



STATE OF NEVADA
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CATHERINE CORTEZ MASTO
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April 8, 2010

OPINION NO. 2010-01

LEGISLATIVE COUNSEL BUREAU; SEX
OFFENDERS; STATUTES: The sex
offender registration laws that were in
effect prior to the passage of A.B. 579 and
S.B. 471 remain in effect during the
pendency of the litigation.

Jearld Hafen, Director
State of Nevada
Department of Public Safety
555 Wright Way
Carson City, Nevada 89711-0525

Dear Mr. Hafen:

You asked for an opinion from this office regarding whether or not the sex offender registration and notification laws that existed in Nevada on June 30, 2008, are still in effect or whether the Nevada Department of Public Safety (DPS) should be following the laws enacted by Assembly Bill 579 (A.B. 579), even though there is a permanent injunction.

QUESTION

This letter is in response to the request for an opinion from the Nevada Attorney General's Office regarding the status of Nevada's sex offender registration laws.

ANALYSIS

In 2006, the United States Congress authored new registration requirements for convicted sex offenders; the common name of those enactments is the Adam Walsh Act (AWA). 42 U.S.C.A. § 16901 et. seq. The Sex Offender Registration Notification Act

(SORNA), which is Title I of the AWA, calls for each jurisdiction to adopt SORNA and provides that failure to comply within three years of the passing of the SORNA will lead to a 10 percent deduction in funds from the Edward Byrne Memorial Justice Assistance Grant. 42 U.S.C.A. § 16925.

In response to the federal government passing the AWA, the Attorney General's Office drafted what came to be known as A.B. 579. A.B. 579 was passed unanimously by the Legislature, and was then signed into law by the Nevada Governor and was subsequently codified in NRS 179D. These new sex offender registry requirements were to go into effect on July 1, 2008. Additionally, the Legislature enacted Senate Bill 471 (2007) (S.B. 471), which imposed on certain sex offenders additional conditions of probation, parole, suspended sentence or lifetime supervision.

On October 7, 2008, the United States District Court District of Nevada permanently enjoined the State of Nevada from enforcing the requirements of A.B. 579 and S.B. 471 in *ACLU of Nevada v. Masto et al.*, Case No. 2:08-cv-00822-JCM-PAL. The permanent injunction has been appealed to the Ninth Circuit Court of Appeals and a decision has not been rendered.

The Attorney General's Office does not issue written opinions on matters in which there is pending litigation. Op. Nev. Att'y Gen. 195 (March 27, 1945); Op. Nev. Att'y Gen. 123 (March 27, 1924). However, your request seeks the status of the law and not a legal opinion.

On March 30, 2009, the Legislative Counsel Bureau rendered a decision regarding the status of sex offender registration laws, using the reasoning under *Finger v. State*, 117 Nev. 548 (2001) and *Johnson v. Goldman*, 94 Nev. 6 (1978). The Legislative Counsel Bureau determined that:

[T]he new provisions enacted by A.B. 579 (2007) and S.B. 471 (2007) have been rendered null and void by the federal district court's order, and the statutory provisions pertaining to sex offenders that existed before the enactment of the provisions of A.B. 579 (2007) and S.B. 471 (2007) remain in effect as if those provisions were never enacted by the Legislature.

The Legislative Counsel Bureau's March 30, 2009 Opinion sets forth the current status of Nevada's sex offender laws.

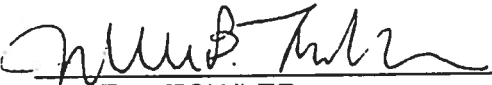
Jearld Hafen
April 8, 2010
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CONCLUSION

Therefore, the sex offender registration laws that were in effect prior to the passage of A.B. 579 and S.B. 471 remain in effect during the pendency of the litigation.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 
JULIE B. TOWLER
Bureau of Public Affairs
Deputy Attorney General
775-684-4605

JBT:JMR



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January 14, 2010

OPINION NO. 2010-02

FIDUCIARY DUTY; FIRST
AMENDMENT; PERS: The First Amendment cannot be used as a justification for failing to exercise the fiduciary duty of loyalty to the PERS trust fund at all times. Therefore, § 7 of the Retirement Board's Legislative Policy does not violate the First Amendment.

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

Dear Ms. Bilyeu:

The Retirement Board of the Public Employees' Retirement System of Nevada (Board) seeks guidance from the Office of the Attorney General (Office) on the following questions of law:

1. Whether a Board member can set aside fiduciary obligations to the trust when acting in a different capacity.
2. Whether section 7 of the Board Legislative Policy is unconstitutional as a violation of the first amendment of the United States Constitution, as it potentially compels disclosure of information obtained while the Board member is acting in other than a trust capacity.

ANALYSIS

The Public Employees' Retirement System of Nevada (PERS or the System) is a constitutionally created trust fund administered by a board of trustees for the

exclusive benefit of the members and beneficiaries of the fund. Specifically, NEV. CONST. art. 9, § 2 and § 4 states:

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

....
4. The public employees' retirement system must be governed by a public employees' retirement board. The board shall employ an executive officer who serves at the pleasure of the board. . . . [Emphasis added.]

NEV. CONST. art. 9, § 2(2) and § (4).

The Board is comprised of seven members, each of whom is appointed by the Governor. See NRS 286.120(1). The Board unanimously adopted a "Legislative Policy" to "define clearly the obligations of the Board and Staff related to the conduct of a Board-approved legislative program responsive to the majority interest of members, benefit recipients and public employers, while protecting PERS' financial integrity." Public Employees' Retirement System, § 1. The Board's Legislative Policy at issue states:

The Board shall require reports from the Board members regarding benefit, funding or administrative issues related to PERS pending at the legislative session, regardless of the status of the issue. These reports are not restricted to pending bills, but may include studies, amendments, information requests, informal discussions and meetings in which facets of PERS administration, funding or benefit structure are discussed.

Public Employees' Retirement System Legislative Policy, § 7.

PERS Board members have clear fiduciary obligations and responsibilities to the System's trust fund. "Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties." *Nat'l Labor Relations Bd. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981), citing Restatement (Second) of Trust § 170(1) (1957); 2 A. Scott, *The Law of Trusts* § 170 (1967). Administering the trust solely in the interest of the beneficiaries has been described as "[t]he most fundamental duty owed . . . the duty of a trustee to administer the trust solely in the interest of the beneficiaries." *In re Baylis*, 313 F.3d 9, 20 (1st Cir. 2002), citing 2A A. Scott, *The Law of Trusts* §170 (W.F. Fratcher ed., 4th ed. 2001).

Moreover, a trustee should not act in his or her own interests. See *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3rd Cir. 1987), decision affirmed in part, reversed in part on other grounds, 489 U.S. 101 (1989). The court in *Bruch* stated:

The principles of trust law instruct that when a trustee is thought to have acted in his own interest and contrary to the interest of the beneficiaries, his decisions are to be scrutinized with the greatest possible care. "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty" which governs a trustee in the execution of his fiduciary duty." *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

Bruch, 828 F.2d at 145.

More recently, the United States Supreme Court, in *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993) stated:

Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.'

Concrete Pipe, 508 U.S. at 616 (citation omitted).

The *Nat'l Labor Relations Bd. v. Amax Coal Co.* case addresses facts that are pertinent to the legal question raised about § 7 of the Board's Legislative Policy,

concerning a Board member's right to "free speech" versus their fiduciary duty to the trust fund. In *Nat'l Labor Relations Bd.*, the Supreme Court held that employer-selected trustees of employee benefit trust funds established under the Labor Management Relations Act were not "representatives" of the employer for the purposes of collective bargaining or the adjustment of grievances within the meaning of the National Labor Relations Act (the LMRA or Act) making it an unfair labor practice for the union to restrain or coerce an employer in the selection of his representative. The Act mandates that the trust funds are administered by three trustees, one selected by the union, one by members of the employer and third selected by the first two. See *Nat'l Labor Relations Bd.*, 453 U.S. at 322.

The Supreme Court reviewed the legislative history and considered the strict fiduciary standards that the trustee must meet. *Id.* at 332. The Supreme Court stated that:

The language and legislative history of [the Act] and ERISA therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him. Thus, the statutes defining the duties of a management-appointed trustee make it virtually self-evident that welfare fund trustees are not "representatives for the purposes of collective bargaining or the adjustment of grievances"

Id. at 334.

Therefore, pursuant to the holding of the *Nat'l Labor Relations Bd.* case, a PERS Board member is precluded from setting aside his fiduciary duties and must be loyal to the interest of the trust fund, without exception. The duty of loyalty to the trust fund is paramount and no other interest or concern trumps this duty. As the *Nat'l Labor Relations Bd.* case makes clear, a Board member of a trust fund cannot set aside or curtail his fiduciary obligations to the trust fund even when acting in a capacity unrelated to the trust fund.

With respect to a Board member's assertion of First Amendment rights, the United States Supreme Court has held that public employees may not be compelled to abandon all of their constitutional rights as a prerequisite to obtaining or continuing their employment. See *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605–06 (1967). Among the rights retained by public employees is that of freedom of expression as guaranteed by the First Amendment to the Constitution. *Id.*; *U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465 (1995). Moreover, the First

Amendment protects the right to refrain from speaking just as surely as it protects the right to speak. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

In determining whether a public employer has violated the First Amendment by restricting or compelling speech, courts have traditionally used a “balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

However, there is ample case law that distinguishes the First Amendment rights of an “employee” from the “free speech” rights of a high level employee, a “policy making” employee, or a member of a board of trustees. In *Phelan v. Laramie County Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243 (10th Cir. 2000), a member of the county community college’s board of trustees sued the board alleging that the board abridged her First Amendment rights when it censured her for violating the board’s ethics policy. *Id.* at 1245. The court stated:

Based on the facts of this case, the Board’s censure is clearly not a penalty that infringes Ms. Phelan’s free speech rights. In censuring Ms. Phelan, Board members sought only to voice their opinion that she violated the ethics policy and to ask that she not engage in similar conduct in the future. Their statement carried no penalties; it did not prevent her from performing her official duties or restrict her opportunities to speak, such as her right to vote as a Board member, her ability to speak before the Board, or her ability to speak to the public. . . . In short, the Board’s actions have not injured Ms. Phelan’s free speech rights.

Id. at 1248.

As a board member, Ms. Phelan took a general public service oath by which the Board members pledge to “faithfully honestly and impartially discharge the duties of trustee.” *Id.* The court noted that “because the oath signed by Ms. Phelan does not contain a penalty, such as perjury, for failure to follow the ethics policy, it also does not restrict her free speech rights.” *Id.* at 1249.

Similarly, in the case of the Board’s Legislative Policy in general and § 7, there is no “penalty.” The Board member must report to the Board any issues relating to PERS or the legislative program for the System, which is an act consistent with the

fiduciary duties required of all Board members. As in the *Phelan* case, the Legislative Policy does not prevent the Board member from performing his official duties, restrict his right to vote, or impair his right to speak before the Board or to the public. Section 7 of the Legislative Policy is designed to promote the duty of loyalty of each Board member. It does not impair or restrict any First Amendment or "freedom of speech" rights.

Another relevant First Amendment case involving a senior policymaking employee is *Lewis v. Cowen*, 165 F.3d 154 (2nd Cir. 1999). In *Lewis*, the terminated chief of the state lottery unit brought an action against state officials alleging violations of the First Amendment and state law. The Court found that the state's interest in effective and efficient operation of the lottery division outweighed Mr. Lewis's First Amendment interest in refusing to present changes to the board. *Id.* at 166. The court stated:

The dilemma faced by a public employee who privately disagrees with his superiors on matters of public policy is not an uncommon one. A well-respected senior policymaking employee with public speaking responsibilities who objects to a position held by his superior frequently may be forced to choose between speaking in favor of his supervisor's program and keeping his job, or voicing his personal opinion and perhaps losing his job. That is what has happened here.

Id.

The court in *Lewis* further stated "after weighing Lewis's significant interest in speaking (or not speaking) on a matter of public concern against the defendants' interest in the efficient and effective fulfillment of the Division's mission, we conclude that the latter outweighs the former." *Id.* Additionally, the court noted that, "[a] highranking policy-making employee does not have, and never has had, a First Amendment right to refuse his employer's directive to promote agency policy." *Id.* at 167. Similarly, a PERS Board member, who has chosen to accept an appointment and serve as a high level policy-making member of the Board, cannot assert a First Amendment right to refuse to comply with a Board-approved Legislative Policy which promotes the interests of the PERS System and trust fund.

CONCLUSION

The fiduciary duty of the Board members to the PERS trust fund is absolute and unwavering. A Board member is precluded from setting aside his fiduciary duties to the PERS trust fund for any reason. Balancing the Board member's duty of complete loyalty to the PERS trust fund and the First Amendment, the balance completely weighs in favor of the Board's interest in encouraging Board members to inform the Board and PERS staff about possible legislative issues that may affect the System. A Board member must never set aside his fiduciary obligations to the PERS trust fund when acting in a different capacity.

The reports that must be submitted by Board members, pursuant to Legislative Policy § 7, do not contain a penalty for failing to follow the Board's legislative program. Moreover, the First Amendment cannot be used as a justification for failing to exercise the fiduciary duty of loyalty to the PERS trust fund at all times. Therefore, § 7 of the Retirement Board's Legislative Policy does not violate the First Amendment.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: /s/
CHRISTINE S. MUNRO
Senior Deputy Attorney General
Government & Natural Resources
Division
(775) 850-4101

CSM/kls



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January 14, 2010

OPINION NO. 2010-03

GOVERNOR; LEGISLATIVE COUNSEL
BUREAU; LEGISLATURE: The
Legislative Counsel is not legally
mandated to draft bill draft requests on
legislation proposed by the Governor for
consideration at a special session of the
legislature.

Adriana Fralick, Esq.
General Counsel
Office of the Governor
101 N. Carson Street
Carson City, Nevada 89701

Dear Ms. Fralick:

On behalf of the Governor, you have requested an opinion on the following question.

QUESTION

Must Legislative Counsel prepare bill draft requests on legislation proposed by the Governor for consideration at a special session of the legislature?

ANALYSIS

NEV. CONST. art. 3, § 1 assigns separate and distinct functions to each of the three branches of government, providing in relevant part:

The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons

charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Generally, legislative power "is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them *Galloway v. Truesdell*, 83 Nev. 13, 20 (1967). The power to originate or introduce legislation is a legislative power. 1 Thomas M. Cooley, *Constitutional Limitations* 325 (8th ed. 1927.) The executive power "extends to the carrying out and enforcing the laws enacted by the Legislature." *Galloway* at 20.

The division of powers between the legislature and the executive have been described in *Litchfield Elementary School Distr. No. 79 v. Babbitt*, 608 P.2d 792, 797 (Ariz. Ct. App. 1980):

It is a basic tenet of our system of government that the governor, or executive, has only such powers as are conferred upon him by our constitution or by validly enacted statute. The law-making power is vested in the legislature. None of the branches of government may exercise powers which are granted to another branch. While the governor is charged with the duty of faithfully executing the laws and must be accorded powers reasonably commensurate with such broad responsibility, this is not a source from which the power to make legislative decisions can be created. (Citations omitted.)

NEV. CONST. art. 5, § 9 empowers the Governor to declare a special session of the legislature under certain circumstances:

The Governor may on extraordinary occasions, convene the Legislature by Proclamation and shall state to both houses when organized, the purpose for which they have been convened, and the Legislature shall transact no legislative business, except that for which they were specially convened, or such other legislative business as the Governor may call to the attention of the Legislature while in Session.

This provision does not address the drafting of legislation and only provides that the Governor may, by proclamation, state "the purpose for which" the legislature has been convened into special session. Further, a grant of authority to issue a

proclamation does not convey additional powers upon the Governor to direct the activities of legislative staff: "The proclamation may suggest means of accomplishing the business, but it cannot prescribe or limit the manner in which the Legislature may act." *State ex. rel. Marockie v. Wagoner*, 446 S.E.2d 680, 690 (W. Va. 1994). The response to the Governor's proclamation is strictly within the province of the legislature. *Gilbert Cent. Corp. v. State*, 716 P.2d 654 (Okla. 1986.)

When exigencies of the times require it, the Legislature may be called in extraordinary session by the Governor to consider particular subjects of legislation. Those subjects must be enumerated in the proclamation or in the Governor's message to the Assembly, and the power of the Legislature is limited to enacting laws affecting those subjects only. In other words, the Governor may submit the subjects with reference to which legislation is desired, but the lawmaking body then has absolute power to construct such laws respecting those subjects as it shall see fit (unless restrained by constitutional inhibition), or to disregard the subjects altogether and not enact any measures respecting them...any recommendation respecting a particular measure would not be binding upon the legislature assembly. (Citations omitted.)

State ex rel. Anaconda Copper Mining Co. v. Clancy, 77 P. 312, 314 (Mont. 1904).

Having established that only the legislature has power over the constructing of laws and decisions as to whether those laws are to be considered or disregarded, we do note that the Legislature has provided the Governor with authority in regard to requesting the drafting of legislation under certain circumstances.

NRS 218.240(1) provides in relevant part: "The Legislative Counsel...shall prepare and assist in the preparation and amendment of legislative measures when requested or upon suggestion as provided in NRS 218.240 to 218.255, inclusive." There is one statutory provision that specifically allows the Governor to request legislative bill drafts under certain conditions. NRS 218.2455 provides in relevant part:

1. The Governor or his designated representative may transmit to the Legislative Counsel on or before September 1 preceding a *regular legislative* session not more than 100 requests for the drafting of legislative measures approved on behalf of state agencies...

....

3. The following constitutional officers may request the drafting of not more than the following numbers of legislative measures on or before September 1 preceding a regular legislative session:

Lieutenant Governor 1
Secretary of State 5
State Treasurer 2
State Controller 2
Attorney General 15

4. Each request made pursuant to this section must be on a form prescribed by the Legislative Counsel. The measures requested pursuant to subsection 1...must be prefiled on or before December 15 preceding the *regular session*. A measure that is not prefiled on or before that date shall be deemed withdrawn. (Emphasis added.)

Therefore, it appears the only specific authority granted to the Governor to submit bill drafts is for drafts to be considered during a regular session of the legislature. No similar authority exists to allow submission of bill drafts during a special session of the legislature.

You have called our attention to other statutory provisions relating to the Legislative Counsel's duty to draft legislation. These provisions contain requirements that lead us to believe that they were intended to apply only to regular, and not special, sessions of the legislature. NRS 218.2405(1) provides:

Except as otherwise provided by specific statute, joint rule or concurrent resolution of the Legislature, the Legislative Counsel shall honor:

(a) The *number of requests* for the drafting of a bill or resolution for a *regular session* of the Legislature *only as provided in NRS 218.240 to 218.255, inclusive*.

(b) A request for the drafting of a bill or resolution for any session of the Legislature which is submitted by a state agency, board or department, a local government, the judiciary or another authorized nonlegislative requester *only if the request is in a subject related to the function of the requester*. (Emphasis added.)

We read paragraph (a) to allow the Legislative Counsel to reject a bill draft request which would exceed the number of requests authorized for that requester in the relevant

section found in NRS 218.240 to 218.255. Paragraph (b) adds the requirement that any request from a non-legislative requester must relate to the official function of the requester. Your request overlooks paragraph (a) and focuses on the fact that paragraph (b) uses the term "any session of the Legislature," which you suggest includes both special and regular sessions.

The provisions of NRS 218.240–.255 frequently refer to "regular session" of the legislature but do not specifically reference "special session" at all in any of those provisions. We therefore believe the term "any" is an ambiguous term. This is reinforced by the fact that the legislature has in other provisions of chapter 218 of NRS specifically used the term "regular or special session of the Legislature" when it intended a provision to apply to both types of sessions. See NRS 218.2381(2), requiring that a legislator must designate a retirement benefits beneficiary within 5 days after the commencement of either a "regular or special session of the Legislature" and NRS 218.5353(2), which allows members of the Legislative Committee on Education to earn certain compensation for meetings, "[e]xcept during a regular or special session of the Legislature."

Since the term "any session of the Legislature" could be interpreted to mean regular sessions of the legislature or it could be interpreted to mean both special and regular sessions of the legislature, the term is ambiguous and a resort to principles of statutory construction is appropriate. *Advanced Sports Information, Inc. v. Novotnak*, 114 Nev. 336, 956 P.2d 806 (1998). Our goal in such an inquiry is to ascertain legislative intent. *State, Dep't of Ins. V. Humana Health*, 112 Nev. 356, 914 P.2d 627 (1996). The legislative history of a bill can shed light on legislative intent in enacting the bill. *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 956 P.2d 117 (1998).

NRS 218.2405 was first enacted in 1999 as part of Assembly Bill 631. Act of June 8, 1999, ch. 463, § 2, 1999 Nev. Stat. 2184. During a meeting of the Assembly Committee on Elections, Procedures, and Ethics on March 31, 1999, Legislative Counsel Lorne Malkiewich addressed the requirements of Assembly Bill 631:

Mr. Malkiewich distributed a handout (Exhibit L) explaining the amendments. He stated that if the committee did not like some of the proposed amendments to take them out of the section...Those amendments suggested were:

1. Specified all limits on *interim bill draft requests* (BDR's) in statute and dates by which *interim BDRs* must be submitted, sections 2 through 6 and sections 14 through 17. (Emphasis added.)

Section 2(1) of Assembly Bill 631 is today codified as NRS 218.2405 and the language of the statute has not been changed since its enactment. Accordingly, the

fact that the legislature acted on the assertion that certain sections of Assembly Bill 631, including Section 2(1), were intended to only operate on *interim bill draft requests* is entitled to weight in resolving the ambiguity of the term “any session” in the statute. The legislative history supports the interpretation that “any session” as used in the statute can only mean any *regular* session of the legislature following an interim between regular sessions when bills are drafted within the number and time limits set forth in NRS 218.240 to 218.255, inclusive.¹

This construction is further bolstered by a review of how the Legislative Counsel has interpreted the statutes it is charged with interpreting and following. We are advised by Legislative Counsel that for at least the last two decades, the Legislative Counsel has never interpreted chapter 218 of NRS as requiring him to draft bills for a special session of the legislature. We are advised that previous special sessions have resulted in discussions between the Governor and the legislature, following the issuance of the Governor’s proclamation declaring the session, and that the Legislative Counsel would craft legislative language for that special session based on those discussions. The Legislative Counsel’s long term and consistent interpretation of the requirements of chapter 218 of NRS is entitled to some deference. *Oliver v. Spitz*, 76 Nev. 5, 348 P.2d 158 (1960)(An administrative construction which is within the language of a statute and the rules promulgated thereunder should not be lightly disturbed by the courts, particularly a construction by the agency charged with its administration when such construction is intended to advance the purposes of a statute).

Based on the above, we conclude that the Legislative Counsel is not mandated by law to prepare bill draft bill draft requests on legislation proposed by the Governor for consideration at a special session of the legislature. Further, we reiterate that once the Governor delivers his proclamation declaring a special session to the legislature, the process from that point on is legislative in nature and therefore within the power and discretion of the legislature under the separation of powers doctrine of NEV. CONST. art. 3, § 1.

¹ You point out that NRS 218.241 also uses the term “any session,” also for the proposition that the term must include special sessions. That statute was also part of Assembly Bill 631 as the bill’s Section 15. Act of June 8, 1999, ch. 463, § 2, 1999 Nev. Stat. 2193. Section 15 of Assembly Bill 631 is one of the sections of the bill which were presented to the Assembly Committee as being applicable only to interim bill draft requests. Accordingly, the analysis made for NRS 218.2405 also applies to NRS 218.241 and NRS 218.241 is applicable only to regular sessions of the legislature.

Adriana Fralick, Esq.
January 14, 2010
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CONCLUSION

The Legislative Counsel is not legally mandated to draft bill draft requests on legislation proposed by the Governor for consideration at a special session of the legislature.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: /s/
JAMES T. SPENCER
Chief of Staff

JTS/MAS



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March 5, 2010

OPINION NO. 2010-04

EMPLOYMENT: HOSPITALS:
PHYSICIANS/SURGEONS: It has been the longstanding practice in Nevada that physicians only work as contractors for private hospitals, and not as employees. To depart from this practice would mark a significant change that would be tantamount to a change in state public policy, best accomplished by either statutory or regulatory revision.

Richard Whitley, Administrator
Department of Health and Human Services
Health Division
4150 Technology Way, #300
Carson City, Nevada 89706

Dear Mr. Whitley:

You have requested an opinion regarding whether a hospital can employ, rather than contract with, a physician to provide medical services. The legal advice you have requested requires a review of the statutes governing licensure of physicians and hospitals.

NRS Chapter 630 sets forth the State of Nevada's Medical Practice Act, which governs physician licensing. In this chapter, the legislature has delegated the responsibility for licensing and monitoring physician competence to the State Board of Medical Examiners. While Chapter 630 confers numerous rights, duties, and limitations upon licensed physicians, neither this chapter nor the related regulations in Chapter 630 of the Nevada Administrative Code expressly prohibit a physician from accepting employment from a hospital; however, a physician licensed under Chapter 630 may not accept compensation which "is intended or tends to influence the physician's objective evaluation or treatment of a patient." See NRS 630.305(1)(a). Hence, a physician may

not accept employment, where the payment of his salary is intended to (or tends to) influence his professional judgment.

Hospitals must obtain a license before operating in this State. NRS 449.030. The Legislature has delegated the licensing and regulation of hospitals to the State Board of Health. NRS 449.037. The State Board of Health has adopted detailed regulations concerning such licensure and the operations of hospitals in Nevada. See NAC 449.279–394.

Hospitals in Nevada are both private and public entities. County hospitals and county hospital districts can be established pursuant to NRS Chapter 450. In contrast, private hospitals, pursuant to NRS Chapter 449, are business entities that can be either for-profit or non-profit.

A county hospital created pursuant to NRS Chapter 450 has no legal standing apart from the county. *King v. Baskin*, 89 Nev. 290, 291, 511 P.2d 115 (1937); *Hughey v. Washoe County*, 73 Nev. 22, 23, 306 P.2d 1115 (1957). Counties are political subdivisions of the State, and as such, possess only those powers which the Legislature has expressly granted to them. *County of Pershing v. Sixth Judicial District Court*, 43 Nev. 78, 181 P. 960 (1914). The authority of a county is limited to the exercise of “only such powers . . . as are specially provided for by law.” *Hoyt v. Paysee*, 51 Nev. 114, 122, 269 P.2d 607 (1928).

NRS 450.180(2) expressly provides that the board of hospital trustees for a county hospital may “[e]mploy physicians and interns, either full-time or part-time, as the board determines necessary, and fix their compensations.” Further, the board of trustees for a county hospital district may also “employ physicians, surgeons and interns, as the board determines necessary, and fix their compensation.” NRS 450.640(2). The law with respect to public hospitals is therefore clear: the state legislature has expressly granted county hospitals and county hospital districts the authority to employ physicians to provide medical services.

Private hospitals may conduct their businesses as they see fit provided that the conduct is not inconsistent with the law. See, e.g., NRS 78.060 and NRS 82.121. The request prompting this opinion arises because the law in Nevada might recognize the “corporate practice of medicine doctrine,” which may limit or prohibit employment of physicians by private hospitals.

This Office has issued two prior opinions¹ that address the "corporate practice of medicine doctrine" in Nevada, but neither of those opinions addressed the issue as it relates to hospitals. Likewise, while the State Board of Health mandates that hospitals provide physician services to their patients, it has neither prohibited nor expressly authorized employment of physicians by hospitals.

In the two prior Attorney General opinions, the corporate practice of medicine doctrine was described to prohibit a corporation from employing physicians because, as its employees, the acts of the physicians are attributable to the corporation, which itself cannot be licensed. *See also Berlin v. Sarah Bush Lincoln Health Center*, 688 N.E.2d 106, 110 (Ill. 1997). The justifications for the doctrine center on three public policy concerns: (1) the possibility of lay control over the physician's judgment; (2) the division of the physician's loyalties between his patient and his employer; and (3) the commercialization of the medical profession. *Id.*

The corporate practice of medicine doctrine was developed by the American Medical Association (AMA) in 1847 as a way of both protecting the public from unqualified practitioners, and protecting the medical profession. Nicole Huberfeld, *Be Not Afraid of Change: Time to Eliminate the Corporate Practice of Medicine Doctrine*, 14 Health Matrix 243, 245—246 (2004). Many states have adopted the doctrine, but the states vary dramatically in this area of the law. *See generally* Sabra K. Engelbrecht, *The Importance of Clarifying North Carolina's Corporate Practice of Medicine Doctrine*, 33 Wake Forest L. Rev. 1093, 1097—99 (1998) (surveying different states' approaches). States such as Texas have expressly established the doctrine in statute. Engelbrecht, 33 Wake Forest L. Rev. at 1098 n. 45. In others, such as California and Idaho, the doctrine has been inferred from the controlling statutes. *Id.* at n. 39. In yet other states, such as Nevada, neither the court nor the legislature has expressly addressed the existence of the doctrine.

The doctrine was significantly challenged in 1975 when the AMA was ordered by the Federal Trade Commission (FTC) to change its restrictions on physicians' contractual arrangements. *See* Jeffrey Chase-Lubitz, *The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry*, 40 Vanderbilt Law Review 445, 475 (1987). The FTC order centered on Section 6 of the 1957 version of the AMA's *Principles of Medical Ethics* which read as follows:

A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care.

¹ Op. Nev. Att'y Gen. No. 77-219 (Oct. 3, 1977); Op. Nev. Att'y Gen. No. 2002-10 (Feb. 26, 2002).

Id.; see also *American Medical Association v. Federal Trade Commission*, 638 F.2d 443 (2nd Cir. 1980). Section 6 had been interpreted by the Judicial Counsel of the AMA to prohibit the employment of physicians by hospitals where the physicians would be rendering medical services to patients. The FTC found that the prohibitions on the physicians' contractual abilities, including employment by a hospital, had three anti-competitive effects.

First, the provisions sought to limit price competition among doctors by fixing the adequacy of compensation and by prohibiting competitive bidding. Second, the provisions inhibited competition by limiting hospitals, prepaid health plans, and lay entities to the traditional fee-for-service method of compensation and by proscribing their use of salaries and other more cost-efficient payment methods. Last, the provisions restricted arrangements between physicians and non-physicians and, therefore, prevented the creation of more economical business structures.

Chase-Lubitz at 476 (citing *In re American Medical Association*, 94 F.T.C. 701, 1011–1016 (1979)). Consequently, the FTC concluded that section 6 and its interpretations constituted an unreasonable restraint of trade and required the AMA to eliminate those restrictions. *Id.*

In the law involving the corporate practice of medicine doctrine, hospitals represent a special class of corporations. In some cases, courts reviewing the issue of physician employment by hospitals have found hospital employment to be an exception to the doctrine. "As far back as the year 1908, the Court of Appeals held the statutory prohibitions against the practice of medicine without lawful registration . . . were not intended to apply and could not reasonably be held to apply to hospitals. . . ." *Albany Medical College v. McShane*, 481 N.Y.S.2d 917, 918 (N.Y.App.Div. 1984) (citing *People v. Woodbury Dermatological Inst.*, 192 N.Y. 454 (N.Y. 1908)). See also *Republic Reciprocal Ins. Assn. v. Colgin Hospital & Clinic*, 65 S.W.2d 286, 287 (Tex. Comm'n App. 1933) (hospital was invested with implied authority to employ licensed physician in order to perform its function to provide medical services).

The willingness of courts to find an exception for hospitals has become more pronounced since the FTC's 1975 order. See e.g. *St. Francis Regional Medical Center v. Weiss*, 869 P.2d 606, 618 (Kan. 1994) ("[w]ithout physicians, nurses and medical technicians, a hospital cannot achieve that for which it is created and licensed – to treat the sick and injured. To conclude that a hospital must do so without employing physicians is not only illogical but ignores reality"); *Estate of Harper v. Denver Health and Hospital Authority*, 140 P.3d 273, 276 (Colo. Ct. App. 2006) (state legislature has made it clear that physicians may be employed by hospitals); *Selective Insurance*

Company of America v. Medical Alliances, LLC, 827 A.2d 1188, 1190 (N.J. Super. Ct. Law Div. 2003) (legislature has carved exceptions from common law corporate ban and permits hospitals to employ physicians).

The Supreme Court of Illinois in *Berlin v. Sarah Bush Lincoln Health Center*, 688 N.E.2d 106, specifically addressed whether hospitals may employ licensed physicians. It noted that the Illinois Medical Practice Act (like the Nevada statutes) contained no express prohibition on the corporate employment of physicians, but that the lower Illinois courts had inferred such a prohibition from the inability of a corporation to receive a license. 688 N.E.2d at 111, 112. However, the *Berlin* court reasoned that where a corporation had been sanctioned by the state to operate a hospital, the prohibition on the employment of physicians was inapplicable. *Id.* at 113. The court observed that Illinois state statutes “clearly authorize and at times mandate, licensed hospital corporations to provide medical services” and that the “authority to employ duly licensed physicians for that purpose is reasonably implied from these legislative enactments.” *Id.* at 113. Based on this reasoning, the Illinois court determined that the corporate practice of medicine doctrine did not prevent hospitals from employing doctors.

Subsequent to the court’s ruling in *Berlin*, the Illinois General Assembly exercised its legislative authority and clarified the issue regarding hospital employment of doctors and the corporate practice of medicine doctrine. See *Carter-Shields v. Alton Health Institute*, 777 N.E.2d 948 (Ill. 2002). In adding a new subsection to Illinois’ Hospital Licensing Act, the Illinois General Assembly both expressly allowed the employment of licensed physicians by Illinois hospitals but also “enumerated requirements designed to safeguard the public health and maintain quality patient care.” *Id.* at 960.

Chapter 210 Ill. Comp. Stat. 85/10.8 requires that a hospital not “unreasonably interfere” with its employee physician’s professional judgment.² Professional judgment

² Other states have also placed protections in their laws to protect the professional judgment of a physician employed by a hospital. See for example:

- Tennessee – [N]othing shall prohibit a hospital licensed under title 68, chapter 11, or title 33, chapter 2 . . . from employing licensed physicians . . . subject to the following conditions: Employing entities shall not restrict or interfere with medically appropriate diagnostic or treatment decisions. Tenn. Code. Am. § 63-6-204.
- Colorado - A health care facility may employ physicians, subject to the limitations set forth in subsections (3) to (6) of this section . . . Nothing in this section shall be construed to allow any health care facility that employs a physician to limit or otherwise exercise control over the physician's independent professional judgment concerning the practice of medicine or diagnosis or treatment or to require physicians to refer exclusively to the health care facility or to the health care facility's employed physicians. Colo. Rev. Stat. § 25-3-103.7.
- Indiana - An employment or other contractual relationship between an entity described in subsection (a)(21) through (a)(22) and a licensed physician does not constitute the unlawful practice of medicine under this article if the entity does not direct or control independent medical acts, decisions, or judgment of the licensed physician. Ind. Code §. 25-22.5-1-2.

is further defined to mean “the exercise of a physician's independent clinical judgment in providing medically appropriate diagnoses, care, and treatment to a particular patient at a particular time.” 210 Ill. Comp. Stat. 85/10.8. Physicians who are not employed by the hospital must review the quality of medical services provided by the employee physician. *Id.* Further, this section gives the employee physician a private right of action for violations, but also maintains the ability of the hospital to discipline its employee physician as well as require compliance with protocols established by its medical staff. *Id.*

In sum, by passing this legislation, the General Assembly has taken steps to eliminate the concept of lay control from the practice of medicine, to require licensed providers to meet certain qualifications, and to assure the monitoring of the quality of health care provided to the public.

Carter-Shields 777 N.E.2d at 960.

Here in Nevada, neither our Supreme Court nor our State Legislature has expressly determined whether the corporate practice of medicine doctrine exists in the State. Nor, consequently, has either body determined whether the doctrine pertains to hospitals.

On this point, the Illinois decision in *Berlin v. Sarah Bush Lincoln Health Center* is not controlling precedent in Nevada, but it is persuasive in its reasoning.³ A hospital in Nevada is an “establishment for the diagnosis, care and treatment of human illness.” NRS 449.012. The Legislature has required that any licensed hospital in this state form a committee to ensure the quality of care provided by that hospital. NRS 449.476. This committee must have doctors, among others, as members of this committee. *Id.* Further, Nevada hospitals must provide the services of licensed physicians to their patients in accordance with numerous regulations.⁴ Moreover, the legislature in defining

³ It is also consistent with the opinion of the Nevada Legislative Counsel Bureau (LCB) issued on December 4, 2006 which addresses the same question asked in this Opinion; namely whether a hospital may employ a physician.

⁴ See for example:

- NAC 449.313 – The governing body of a hospital must ensure that a physician is on duty or on call at all times and that a physician is responsible for the care of each patient with respect to any medical or psychiatric problem.
- NAC 449.314 – A hospital shall ensure that it is staffed by a sufficient number of personnel, whose qualifications are consistent with their job responsibilities, to provide care to the patients of the hospital.
- NAC 449.349 – A hospital shall have sufficient medical and nursing personnel who are qualified in emergency medical care to carry out the written emergency procedures of, and to meet the emergency needs anticipated by, the hospital.

“provider of health care” in NRS 629.031 appears to include a licensed hospital when it employs a physician, among other persons:

“Provider of health care” means a *physician* licensed pursuant to chapter 630, 630A or 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician, optometrist, practitioner of respiratory care, registered physical therapist, podiatric physician, licensed psychologist, licensed marriage and family therapist, licensed clinical professional counselor, chiropractor, athletic trainer, doctor of Oriental medicine in any form, medical laboratory director or technician, pharmacist *or a licensed hospital as the employer of any such person.*

Id. (emphasis added).

The authority to employ physicians by hospitals can be found as a corollary to these legal requirements and definitions. However, physician employees are subject to their own legal and ethical obligations and the conditions of their employment must not unreasonably interfere with the exercise of their professional judgment.

CONCLUSION

In Nevada, the State Supreme Court and the State Legislature have never expressly determined that private hospitals licensed under NRS Chapter 449 cannot employ a physician. And there has never been an express indication that the corporate practice of medicine doctrine pertains to the employment of physicians by private hospitals. Yet, it has been the longstanding practice in Nevada that physicians only work as contractors for private hospitals, and not as employees. To depart from this practice would mark a significant change that would be tantamount to a change in state public policy. Ideally such change should occur through the legislative process in order to ensure full deliberation of the affected policies and interests of the public, physicians and hospitals. In the absence of such legislative change, the State Board of Health might address this through the regulatory process which affords some of the same

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- NAC 449.358 - A hospital shall have a well-organized medical staff . . . and be composed of doctors of medicine or osteopathy.
 - NAC 449.364 - The obstetric department must be under the direction and supervision of a qualified member of the medical staff.
 - NAC 449.371 - An intensive care unit must be under the direction of a qualified member of the medical staff.
 - NAC 449.374 - The nuclear medicine services must be under the supervision of a doctor of medicine or osteopathy who is qualified in nuclear medicine.
 - NAC 449.377 - A radiological therapeutic department must be under the direction of a physician.

Richard Whitley
March 5, 2010
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aspects and benefits of public participation and open deliberation as in the legislative forum.

Sincerely,

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Attorney General

By: /s/
JAMES T. SPENCER
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March 9, 2010

OPINION NO. 2010-05

LOCAL GOVERNMENT; TERM
LIMITATIONS: NEV. CONST. art. 15, § 3
prevents a person from being re-elected
to a different seat of the same local
governing body on which he has already
served 12 or more years.

Jim C. Shirley, District Attorney
Pershing County
Post Office Box 299
400 Main Street
Lovelock, Nevada 89419

Dear Mr. Shirley:

I am in receipt of your letter wherein you request guidance from this Office on two questions related to term limits: (1) Whether the constitutional term limits impose a "life time ban," or merely prohibit more than 12 years of *consecutive* service; (2) Whether the term limits provisions prohibit re-election of a person to a different seat on a legislative body if he has already served 12 or more years in another seat of that same body.

QUESTION ONE

Does NEV. CONST. art. 15, § 3 impose a "life time ban," or only a ban on consecutive terms?

ANALYSIS

With regard to your first question, the Legislative Counsel Bureau issued an opinion on August 6, 1996, finding that the term limits impose a life time ban. We

agree with this conclusion.¹ A copy of the opinion is attached hereto for your convenience. The relevant analysis can be found on pages 25–28.

To summarize, NEV. CONST. art. 15, § 3(2) provides:

No person may be elected to any state office or local governing body who has served in that office, or at the expiration of his current term if he is so serving will have served, 12 years or more, unless the permissible number of terms or duration of service is otherwise specified in this Constitution. [Emphasis added.]

The plain language of the provision states that no one may be elected who has served 12 or more years in that office. It is not limited to situations where the years of service are consecutive or successive. Accordingly, it imposes a life time ban on service.

CONCLUSION TO QUESTION ONE

NEV. CONST. art. 15, § 3 imposes a life time ban on re-election when a person has served, or will have served at the end of his current term, 12 years or more.

QUESTION TWO

Does NEV. CONST. art. 15, § 3 prevent a person from being re-elected to a different seat of the same local governing body on which he has already served 12 or more years?

Your next question involves an analysis of whether each seat on a legislative body constitutes a separate office. The term limits provision states that no person may be elected “to any *state office or local governing body*” if he has served or will have served 12 years or more “in that office.” NEV. CONST. art. 15, § 3(2).

The constitution does not define “office” for purposes of term limits. However, words in a constitution must be construed in harmony whenever possible, and construed in such a way as to carry out the intent of the enacting authority. See *We the People Nevada ex rel. Angle v. Miller*, 124 Nev. ___, 192 P.3d 1166, 1170 (Adv. Op. 75, Sept. 25, 2008) (rules of statutory interpretation apply to interpreting constitutional provisions); *Nevadans for Nevada v. Beers*, 122 Nev. 930, 944, 142 P.3d 339, 348

¹ Although that opinion dealt specifically with state legislators, we believe the analysis is equally applicable to local legislative bodies, as the language is virtually identical.

(2006) (constitutional provisions should be read as a whole and harmonized whenever possible).

Once more, the relevant provision states:

No person may be elected to any *state office* or *local governing body* who has served *in that office*, or at the expiration of his current term if he is so serving will have served, 12 years or more, unless the permissible number of terms or duration of service is otherwise specified in this Constitution.

NEV. CONST. art. 15, § 3(2) (emphasis added).

The term “that office” must be read in context with the first clause, which refers to either a state office *or* a local governing body. The term “local governing body” does not identify a particular “office” or “seat.” It instead refers to an *institution*. Accordingly, it appears that the plain language of the constitution prohibits a person from being re-elected to the body as a whole, regardless of which seat the person would serve in.

This is consistent with the apparent intent behind the term limits amendment. With regard to assemblymen and senators, the constitution explicitly states that no one is eligible to serve more than 12 years, regardless of which district he represents. See, e.g., NEV. CONST. art. 4, § 3 (“No person may be elected or appointed as a member of the Assembly who has served in that Office, or at the expiration of his current term if he is so serving will have served, 12 years or more, *from any district of this State.*”). See Op. Nev. Legis. Counsel, p. 24 (August 6, 1996).

The explanation to Question 9 on the 1996 ballot (the term limits amendment) states that assemblymen and senators would each be limited to 12 years, as would “other state officers and local governing body members.” In Op. Nev. Att’y. Gen. No. 96-23 (August 9, 1996), this Office opined that a “local governing body” is one that “performs legislative functions, makes policy for the jurisdiction it governs, and makes decisions as opposed to making recommendations.” This is similar to the function performed by the Legislature on a statewide level.

Additionally, one of the stated purposes of the term limits amendment was to “stop career politicians since no one will be able to hold one office for several terms.” Another was to reduce the power of lobbyists and special interests “since state officials and local governing body members will only be in office for a limited amount of time.” See Argument in favor of passage of Question 9, 1996. Permitting a person to be

Jim C. Shirley, District Attorney
March 9, 2010
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elected to different seats on the same body, even after serving 12 years or more, would defeat these stated purposes. See Op. Colo. Att'y. Gen. No. 00-5, p. 5 (July 10, 2000).

Accordingly, we conclude that the term limits provisions for local governing bodies was intended to prohibit re-election to the body as a whole, just as the term limits provisions prohibit re-election of legislators, regardless of which districts they represented.

CONCLUSION TO QUESTION TWO

NEV. CONST. art. 15, § 3 prevents a person from being re-elected to a different seat of the same local governing body on which he has already served 12 or more years.

Sincerely,

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By: 
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March 23, 2010

OPINION NO. 2010-06

ADA; COSMETOLOGY; PUBLIC
ACCOMMODATIONS: The Americans
with Disabilities Act does not require that
the State Board of Cosmetology allow
licensees to provide "outcall" or "room
service" cosmetological services to
individuals confined to hospitals or residing
in assisted living facilities.

Vincent D. Jimno, Executive Director
State Board of Cosmetology, State of Nevada
1785 E. Sahara Avenue, Suite 255
Las Vegas, Nevada 89104

Dear Mr. Jimno:

In your June 15, 2009 letter, you have requested that the Office of the Attorney General (Office) opine as to whether the State Board of Cosmetology must allow licensees to provide "outcall" or "room service" cosmetological services to individuals confined to hospitals or residing in assisted living facilities pursuant to the Americans with Disabilities Act.

QUESTION ONE

Does the Americans with Disabilities Act (ADA) require that the State Board of Cosmetology (Board) allow licensees to provide "outcall" or "room service" cosmetological services to individuals confined to hospitals or residing in assisted living facilities?

ANALYSIS

Title III of the ADA¹ “prohibits discrimination or the denial of ‘full and equal enjoyment’ of goods, services, and other benefits provided by ‘places of public accommodation’ operated by private entities.” *Klingler v. Dir., Dep’t. of Revenue, State of Mo.*, 433 F.3d 1078, 1080 (8th Cir. 2006). Specifically, entities that affect commerce are deemed places of public accommodation and include services establishments such as “a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, [or] hospital, . . . ;” 42 U.S.C. § 12181 (7)(F). Under this definition, a cosmetological establishment would be deemed a place of public accommodation and cosmetological establishments would be required to be accessible to persons with disabilities. See 42 U.S.C. § 12182(b)(2)(A)(iv) (stating that architectural barriers in existing facilities should be removed where such removal is readily achievable).

However, requiring that a cosmetological establishment be accessible to persons with disabilities does not mean that the Board must allow its licensees to perform services outside of licensed establishments. “The ADA does not require an entity or place of public accommodation to accommodate a person's disability by ignoring other duties imposed by law.” *Rose v. Springfield-Greene County Health Dep’t*, 668 F. Supp 2d 1206 (W.D. Mo. 2009) (citing *Brickers v. Cleveland Bd. of Educ.*, 145 F.3d 846, 850 (6th Cir. 1998)). In this case, NAC 644.380(1) limits the place of practice of an individual licensed by the Board to licensed cosmetological establishments.² The Board does not authorize or license “outcall” or “room services.” See NRS 644.340–644.375; NAC 644.375. The ADA does not contemplate or require that the Board allow licensees to perform “outcall” or “room service” cosmetological services.

The purpose of the ADA is to eliminate “the discrimination qualified individuals with disabilities face in their day to day lives.” *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 851 (8th Cir. 2002) (citing 42 U.S.C. § 12101). Specifically, in the ADA, Congress cites concerns regarding the discrimination experienced by individuals with disabilities including “outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser

¹ 42 U.S.C. § 12101–12213.

² It should be noted that the Board does allow licensees to provide cosmetological services outside a licensed establishment in limited situations. For example, in an emergency situation, upon approval by the Board, a licensee may provide cosmetological services outside a licensed establishment. NAC 644.380(2)–(4). In addition, if a licensee is donating his/her services to a charitable organization, the licensee may also provide cosmetological services outside of a licensed cosmetological establishment, upon approval by the Board. NAC 644.385.

Vince D. Jimno, Executive Director
March 23, 2010
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services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5). This discrimination is such that it keeps individuals with disabilities from full participation in day-to-day activities regularly experienced by their non-disabled counterparts. Indeed, the ADA was enacted as part of Congress' goal "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" of individuals with disabilities. 42 U.S.C. § 12101 (a)(7).

As cited above, the ADA does not require that those who operate places of public accommodation go to persons with disabilities to provide services. Instead, the requirement is that places of public accommodation be open and accessible to all individuals, including those with disabilities. Therefore, requiring that the Board allow licensees to bring cosmetological services to individuals with disabilities through "outcall" or "room service" is beyond the scope and requirements of the ADA.

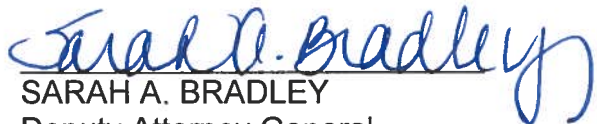
CONCLUSION

Based on the foregoing analysis, the Americans with Disabilities Act does not require that the State Board of Cosmetology allow licensees to provide "outcall" or "room service" cosmetological services to individuals confined to hospitals or residing in assisted living facilities.

Sincerely,

CATHERINE CORTEZ MASTO
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By:



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March 29, 2010

OPINION NO. 2010-07

EMPLOYERS; HEALTH; INSURANCE:

Pursuant to S.B. 283, insurers for the lines of insurance that are subject to Commissioner's approval must apply uniform underwriting and rating rules and practices to domestic partnerships and married couples.

Scott Kipper, Commissioner of Insurance
Department of Business & Industry
Division of Insurance
1818 East College Parkway, Suite 103
Carson City, Nevada 89706

Dear Commissioner Kipper:

You have requested an opinion from the Attorney General's Office. Question One in your request is a two part question. The first part shall be answered as Question One. The second part shall be answered as Question Two. Question Two of your request is a duplicate of the latter question and shall not, therefore, require a separate answer.

QUESTION ONE

Whether the provisions of the Act of June 1, 2009, ch. 393 § 1-13, 2009 Nev. Stat. 2183 (S.B. 283) apply only to employer sponsored group health policies, excluding employer sponsored health plans exempt from State regulation under Employee Retirement Security Act (ERISA), or, whether S.B. 283 applies to all lines of insurance, including individual health and property and casualty?¹

¹ Because of the compound form of this first question and the use of the coordinating conjunction "or," this opinion will address the latter part thereby providing an indirect response to the first part of the question. Your request does not ask this office to opine on the validity of the underlying assumptions regarding employer sponsored group health policies or the application of ERISA contained in the first part of the question.

ANALYSIS

Senate Bill 283 became effective on October 1, 2009. As enunciated in the Legislative Counsel's Digest, S.B. 283 was designed to establish "a domestic partnership as a new type of civil contract recognized in the State of Nevada." *Legislative Counsel's Digest, S.B. 283.*

Section 7(1)(a) of S.B. 283, provides in pertinent part:

1. Except as otherwise provided in section 8 of this act:
 - (a) Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses. . . .

Act of June 1, 2009, ch. 393, § 7(1)(a), 2009 Nev. Stat. 2183.

The plain meaning of the language used by the Legislature is the essential factor in statutory construction. It is well settled that, when a statute's language is plain and unambiguous, and the statute's meaning clear and unmistakable, the courts are not permitted to look beyond the statute for a different or expansive meaning or construction. *See DeStefano v. Berkus*, 121 Nev. 627, 629, 119 P.3d 1238, 1239-1240 (2005).

The language of Section 7(1)(a) of S.B. 283 is plain and unambiguous. Any right, protection, or benefit granted to *spouses* by "statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law," are afforded to *domestic partners*. There are no exceptions to this, other than as provided in Section 8 of S.B. 283.²

² Section 8 of SB 283 provides:

1. The provisions of this chapter do not require a public or private employer in this State to provide health care benefits to or for the domestic partner of an officer or employee.
2. Subsection 1 does not prohibit any public or private employer from voluntarily providing health care benefits for the domestic partner of an officer or employee upon such terms and conditions as the affected parties may deem appropriate.

S.B. 283 is clear on its face and should be given its plain meaning, namely if any “provision or source of law”, as defined in S.B. 283 applies to a married couple, it applies to a domestic partnership. There is nothing in S.B. 283 that limits its application to any specific line of insurance.

CONCLUSION ONE

The application of S.B. 283 is not limited to any specific line of insurance. Except as provided in section 8 of S.B. 283, it applies to any “provision or source of law,” as defined in S.B. 283, applicable to a married couple.³

QUESTION TWO

Does SB 283 require carriers, across all lines of insurance, to apply underwriting and rating rules and practices to domestic partnerships in the same manner as underwriting and rating rules and practices are applied to married couples?

ANALYSIS

The language of S.B. 283 section 7(1)(a) states plainly that “[d]omestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law . . . as are granted to or imposed upon spouses.” Act of June 1, 2009, ch. 303, § 7(1)(a), 2009 Nev. Stat. 2183. The Legislature’s intent to eliminate unequal treatment as between married couples and domestic partnerships is clearly expressed in sections 7 and 13 of S.B. 283 and dictates a uniform treatment of those two types of civil contracts.⁴

³ As requested, this opinion is limited to the applicability of S.B. 283 on provisions contained in Title 57 of the Nevada Revised Statutes.

⁴ Section 13 of SB 283 provides:

The provisions of this chapter must be construed liberally to the effect of resolving any doubt or question in favor of finding that a domestic partnership is a valid civil contract entitled to be treated in all respects under the laws of this State as any other civil contract created pursuant to title 11 of NRS would be treated.

Act of June 1, 2009, ch. 393, § 13, 2009 Nev. Stat. 2183.

To determine whether the underwriting and rating rules practices of insurers are subject to the requirement for uniform treatment, it must be determined whether these rules and practices satisfy the “under law” requirement contained in section 7(1)(a) of S.B. 283.

The underwriting practices of insurers for some lines of insurance are subject to regulation and approval by the Commissioner of Insurance (Commissioner) in Nevada, primarily in the approval of rates. The Nevada Insurance Code provides limited guidelines and general parameters for the premium rates that insurers for those lines of insurance can charge.⁵ The rates of those insurers must be submitted and approved by the Commissioner. Rates approved by the Commissioner become legally effective rates. See NRS 686B.110.

The underwriting rating standards and rules for those lines of insurance whose rates are subject to the approval by the Commissioner are thus “derived from law” as provided in section 7(1)(a) of S.B. 283 and any benefits, including discounts afforded to married couples by virtue of their marital status must be applied to domestic partnerships if contained in an approved rate of the Commissioner. If the methodology in calculations of risk and underwriting decisions as applied to married couples, however, includes risk assessment of each individual within the marriage, such as classifications based on gender or age, the same factors must be taken into consideration when calculating the rate for a domestic partnership if contained in an approved rate of the Commissioner. As a result, when the methodology of risk assessment of married couples includes individual risk assessment using such factors as gender, the rates for a married couple and a domestic partnership may differ.

CONCLUSION

Pursuant to S.B. 283 insurers for the lines of insurance that are subject to Commissioner’s approval must apply uniform underwriting and rating rules and practices to domestic partnerships and married couples. Any benefits, including discounts afforded to married couples by virtue of their marital status must be applied to domestic partnerships. If the methodology in calculations of risk and underwriting decisions by an insurer used for married couples includes risk assessment of each individual within the marriage, such as classifications based on gender or age, the same

⁵ See chapter 686B of the NRS. It should be noted, that there are lines of insurance whose rating practices are not subject to the Commissioner’s review and approval. See NRS 686B.030.

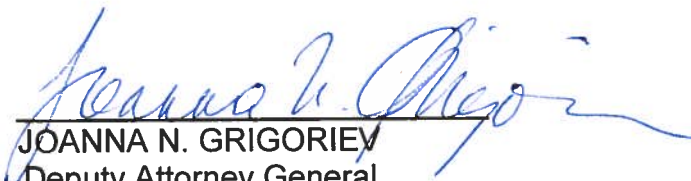
Scott Kipper
March 29, 2010
Page 5

factors must be taken into consideration when calculating the rate for a domestic partnership.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:


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April 6, 2010

OPINION NO. 2010-08

CONTRACTS; HIPAA; BOARD OF
PHARMACY: The Board of Pharmacy is
not a covered entity under the HIPAA
privacy rule.

Adriana Fralick, Esq.
General Counsel
Office of the Governor
101 N. Carson Street
Carson City, Nevada 89701

Dear Ms. Fralick:

On behalf of the Governor, you have requested an opinion on the following question.

QUESTION

Does the Board of Pharmacy's prescription monitoring contract comply with the Health Insurance Portability and Accountability Act of 1996 (HIPAA)?

ANALYSIS

The Board of Pharmacy (Board) is a health care oversight agency within the meaning of 45 C.F.R. § 164.501 (2009) because the Board is charged by statute (NRS 639.070(1)(e)) to oversee the health care system, specifically, to regulate the practice of pharmacy. The Board is required to develop and use a computer system to "track each prescription for a controlled substance" by NRS 453.1545. The computer system must provide information regarding "inappropriate use by a patient of controlled substances" NRS 453.1545(1)(a)(1).

The Board of Pharmacy is not subject to the restrictions on use or disclosure of protected health information imposed by the HIPAA privacy rule because the Board is not a covered entity or business associate as defined by HIPAA. HIPAA privacy rules apply to health plans, health care clearing houses, and health care providers who transmit health information in electronic form. These entities are referred to as "covered entities," 45 C.F.R. § 164.104(a) (2009). Such covered entities may only use or disclose protected health information within the Privacy Rule found at 45 C.F.R. § 164 Subpart E (2009). Because the Board of Pharmacy is not a health plan, health care clearing house, or health care provider, the Board is not directly subject to the limitations on use or disclosure of protected health information set forth in the privacy rule.

Other entities known as "business associates" perform claims processing, billing or other activities on behalf of covered entities as explained at 45 C.F.R. § 160.103 (2009). Business associates are made subject to the HIPAA privacy rule by 42 U.S.C. § 17934 (2009). Even though the Board of Pharmacy acquires prescription information for purposes of the prescription monitoring contract, in order to identify cases of inappropriate use of controlled substances, the Board does not utilize the prescription information to perform work activities on behalf of pharmacies. Thus, the Board is not a business associate subject to the HIPAA privacy rule by application of 42 U.S.C. § 17934 (2009).

Pharmacies are often covered entities subject to HIPAA rules because they are health care providers who transmit health information in electronic form. Covered entities, including pharmacies, are permitted to disclose protected health care information for health oversight activities by 45 C.F.R. § 164.512(d) (2009). The rule provides a list of circumstances in which the covered entity may disclose protected health information to a health oversight agency. Those circumstances include audits; civil, administrative or criminal investigations; or other activities necessary for oversight of the health care system as authorized by law. The rule specifically explains that disclosure is permitted where necessary to determine compliance with program standards of a government regulatory program. The prescription monitoring program is an example where protected health information is needed to determine legal compliance. Without access to protected health information, the Board will be unable to identify fraudulent or illegal activity related to the dispensing of controlled substances.

CONCLUSION

The Board of Pharmacy is not a covered entity under the HIPAA privacy rule. Pharmacies who may be covered entities under the HIPAA privacy rule may disclose protected health information to the Board because the Board is a health oversight agency specifically allowed to receive such information. Because HIPAA does not

Adriana Fralick, Esq.
April 6, 2010
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apply to the Board of Pharmacy and the reporting by the pharmacies falls within a HIPAA exception for the disclosure of the information, the Board of Pharmacy's prescription monitoring contract is not in violation of the HIPAA.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 
DARRELL FAIRCLOTH
Senior Deputy Attorney General
Bureau of Public Affairs

DWF:lw



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April 6, 2010

OPINION NO. 2010-09

ASSEMBLY BILL 97 - TRANSFER OF
ELDER PROTECTIVE SERVICES
PROGRAM TO THE STATE; CLARK
COUNTY; ELDER PROTECTIVE
SERVICES: Transfer of elder protective
services from Clark County to State of
Nevada must comply with A.B. 97.

Carol Sala, Administrator
Department of Health and Human Services
Division for Aging Services
3416 Goni Road, D-132
Carson City, NV 89706

Dear Ms. Sala:

Your inquiry concerns the transfer of elder protective services from the Clark County Social Service Senior Citizens Protective Service Program to the State of Nevada, Department of Health and Human Services, Aging and Disability Services Division. In a letter dated June 22, 2007, Clark County Manager, Virginia Valentine, advised the Director of Nevada's Department of Health and Human Services of Clark County's intention to transfer its senior protection program back to the State and that the final date of service for the program would be June 30, 2009. However, due to the budget crisis, the transfer did not take place on July 1, 2009, and no agreement was reached between the agencies to set a new date for the transfer.

QUESTION

Whether a new notification is required from Clark County informing the State of the County's intent to transfer its elder protective services program back to the State, as outlined in the Act of May 19, 2009, ch. 117, 2009 Nev. Stat. 430 (A.B. 97), or whether the letter from Virginia Valentine referencing a transfer date of July 1, 2009, constitutes adequate notification, even though that date has passed.

ANALYSIS

Clark County is required by law to provide elder protective services. A summary of the duties of the Clark County Social Service Senior Citizens Protective Service Program is set forth in the Clark County Code at 2.48.085 as follows:

Social work intervention shall be provided to senior citizens who are in jeopardy of abuse, neglect, or exploitation through self-neglect or through acts of omission/commission by others. The department shall also provide counseling and referral services to senior citizens and to the families of senior citizens as it relates to the needs of the senior citizen as such services are available in the department.

Section 2.48.025 of the Clark County Code provides for the adoption of the Social Service Policy Manual, 2006 Edition, as amended. Section 13 of that manual sets forth the duties of the Senior Citizens Protective Service Program in greater detail. These duties include, but are not limited to, receiving and investigating reports of abuse, neglect, isolation, or exploitation of persons aged sixty (60) years or older.

NRS 200.5092(6) defines protective services as, "services the purpose of which is to prevent and remedy the abuse, neglect, exploitation and isolation of older persons. The services may include investigation, evaluation, counseling, arrangement and referral for other services and assistance." Since the Clark County Code requires it to provide these services, the Clark County Social Service Senior Citizens Protective Service Program meets the definition of a county office for protective services. NRS 200.5093 requires such offices to receive reports of abuse, neglect, isolation and/or exploitation and also to provide protective services to the older person if he or she is able and willing to accept them.

Thus both the Clark County Code and Nevada Revised Statutes require Clark County to provide elder protective services. "Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained." *Colello v. Adm'r of Real Estate Div. of Nev.*, 100 Nev. 344, 347, 683 P.2d 15, 17 (1984).

To avoid the statutory duties imposed by NRS 200.5093, Clark County would need to amend its Code so that its elder protective services program no longer met the definition of a county office for protective services. Accordingly, in order for Clark County to transfer its elder protective services program to the State, the County would need to repeal or amend section 2.48.085 of the Clark County Code and delete or amend section 13 of the Social Service Policy Manual. While the June 22, 2007 letter from Ms. Valentine implied that the County Code would be repealed, no such action was ever taken.

Clark County recently amended section 2.48.025 of the Clark County Code.¹ It made changes to the Social Service Policy Manual effective August 18, 2009. But it made no changes to section 13 of the manual. Thus, pursuant to the Clark County Code, elder protective services functions are still required to be performed by the county program. If Clark County intended to transfer these functions to the State on July 1, 2009, its code should have been amended to reflect that these functions would no longer be performed by Clark County after this date. Its failure to amend the code necessitates Clark County retaining these obligations.

You indicated in your letter, dated September 4, 2009, that the State and Clark County had been working together to transition these services and that the transition did not occur in 2009 due to budgetary constraints. Both the State and Clark County recognize that a smooth transition is critical to protecting vulnerable senior citizens in Clark County and designating a specific date for the transfer is part of that process. However, neither Clark County nor the State set a new date for the transfer prior to July 1, 2009.

During the 2009 session, the Nevada Legislature passed A.B. 97. In relevant part that statute provides,

1. The Committee on Local Government Finance created pursuant to NRS 354.105 shall, in consultation with the Director of the Department of Administration, adopt regulations to establish procedures for transferring a function from a state agency to a local government or from a local government to a state agency.

2. The regulations adopted by the Committee on Local Government Finance pursuant to subsection 1 must:

(a) Be adopted in the manner prescribed for state agencies in chapter 233B of NRS.

(b) Include provisions requiring:

(1) That, except as otherwise provided in subsection 3, notice to the affected state agency and local government of the intent to transfer a function from a state agency to a local government or from a local government to a state agency be given not less than 30 days before September 1 of an even-numbered year, unless a different period of notification is required by a statute or by contractual agreement.

(2) That, except as otherwise provided in subsection 3, the

¹ Bill No. 7-21-09-1 Ordinance No. 3799.

effective date of the transfer of a function from a state agency to a local government or from a local government to a state agency not be any earlier than July 1 of the year after the year in which notice is given, as described in subparagraph (1).

(3) The exchange of such information between the affected state agency and local government as is necessary to complete the transfer, including, without limitation, such matters as a complete description of the function to be transferred and the mechanism to be used to pay for the performance of that function.

3. An affected state agency and local government may, by mutual agreement, waive the requirements set forth in subparagraphs (1) and (2) of paragraph (b) of subsection 2.

These new notice requirements were passed on May 19, 2009, prior to the anticipated transfer date of July 1, 2009. The legislature was aware that this law could impact the transfer of elder protective services from Clark County to the State because the transfer was brought up in testimony prior to the passage of A.B. 97.² The purpose of the notice requirements was to provide a process for the transfer of government functions so the transfers would occur smoothly and with transparency. The Legislature also recognized that funding would need to be addressed within the State's budgetary processes. *Id.* As of this writing the Committee on Local Government Finance had not yet implemented regulations pursuant to A.B. 97 for the transfer of functions between governments.

Clark County must now comply with the notice requirements of A.B. 97 because the County did not repeal the ordinance requiring it to provide elder protective services and the transition did not occur prior to the passage of A.B. 97. The County's compliance with A.B. 97 will help to ensure a smooth transition of services and also enable the State to request funding, through the legislative process, so the State can provide these services. The State and Clark County have been working together to ensure that services are provided to Clark County's senior citizens. Under A.B. 97 it is possible and also quite probable that the State and County may reach an agreement to use a different period of notification. Recognizing the fiscal constraints that apply to both the State and Clark County, it is in both entities' best interest to continue to work together to ensure services are provided to this vulnerable population.

² *Hearing on A.B. 97 Before the Assembly Judiciary Committee on Government Affairs 2009 Leg., 75th Sess.* (March 6, 2009) and *Hearing on A.B. 97 Before the Senate Committee on Government Affairs, 2009 Leg., 75th Sess.* (April 27, 2009).

Carol Sala
April 6, 2010
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CONCLUSION

Clark County Code requires Clark County Social Service Senior Citizens Protective Service Program to provide elder protective services. Although the County notified the State that it intended to transfer this function to the State, Clark County did not amend its Code and the transfer did not occur. Should Clark County desire to transfer these functions to the State at some future date, the County must comply with the notice requirements of A.B. 97 unless the State and Clark County reach an agreement to use a different period of notification, to ensure a smooth transition of government services and also to allow the State to request adequate funding.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:



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April 12, 2010

OPINION NO. 2010-10

DOMESTIC PARTNERS, EMPLOYEES, PERSONNEL: S.B. 283 requires the interpretation of the term "employee's immediate family" or the word "spouse" as used in NRS and NAC 284, to include domestic partners.

Teresa J. Thienhaus, Director
Department of Personnel
209 East Musser Street, Room 101
Carson City, Nevada 89701

Dear Ms. Thienhaus:

You have requested an opinion from the Office of the Attorney General regarding the application and interpretation of the Act of June 1, 2009, ch. 393, §§ 1-13, 2009 Nev. Stat. 2183 (S.B. 283) of the 2009 Legislative Session as it relates to Chapter 284 of the Nevada Revised Statutes, the Nevada Administrative Code, and the Family and Medical Leave Act.

BACKGROUND

S.B. 283, otherwise known as the Nevada Domestic Partnership Act, was passed by the 2009 Legislature and became effective on October 1, 2009. The bill establishes a domestic partnership as a new type of civil contract recognized in the State of Nevada. Under the provisions of the bill, domestic partners have the same rights, protections, and benefits, with the exception of mandated employer health care benefits, as do parties to any other civil contract created pursuant to Title 11 of the Nevada Revised Statutes, and are subject to the same responsibilities, obligations, and duties under the law as are granted to spouses if registered as domestic partners with the Secretary of State. The bill further clarifies that a domestic partnership is not a marriage for purposes of NEV. CONST. art. 1, § 22.

QUESTION

Does S.B. 283 require the interpretation of the term "employee's immediate family" or the word "spouse" as used in NRS and NAC 284, to include domestic partners? For example, is a domestic partner considered an immediate family member for purposes of family sick leave pursuant to NAC 284.558?

ANALYSIS

In 1996, Congress enacted the federal Defense of Marriage Act (DOMA). Pub. L. No. 104-199, 100 Stat. 2419 (September 21, 1996). DOMA has two sections, one defining "marriage" for purposes of federal law, and the other affirming federalism principles under the authority granted by U.S. CONST. art. IV, § 1, the Full Faith and Credit Clause. The first section states that for purposes of federal law, marriage means a legal union between a man and a woman, and spouse means a person of the opposite sex who is husband or wife. Specifically:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

Pub. L. No. 104-199, § 1, 100 Stat. 2419 (Sep. 21, 1996), codified at 1 U.S.C. § 7 (1997).

The Family Medical Leave Act (FMLA), 29 U.S.C. § 2601-2654, is a federal law that entitles a qualified employee to a total of twelve workweeks of leave under certain enumerated conditions, such as to care for the employee's spouse, parent, or child with a serious health condition. The FMLA defines spouse as an individual who is a husband or wife pursuant to a marriage that is a legal union between one man and one woman, including common law marriage between one man and one woman in States where it is recognized. 29 C.F.R. § 825.122(a). Currently, the FMLA does not grant domestic partners the same rights as spouses.

While the FMLA does not grant benefits to domestic partners, states can be more generous and elect to grant such leave to domestic partners. Federal law in certain cases preempts state law by operation of the Supremacy Clause. Under Article VI of the Constitution, laws of the federal government "shall be the supreme

Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Art. VI, cl. 2. However, preemption only occurs in three circumstances: (1) where preemption is explicit in the federal law, (2) where the intent of Congress is that the federal government occupy the entire field, and (3) where there is an actual conflict between state and federal law. *Oxygenated Fuels Ass’n Inc. v. Davis*, 331 F.3d 665, 667 (9th Cir. 2003). Actual conflict occurs “where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (internal quotation marks omitted).

None of these three circumstances exist in this case. There is first of all a presumption against preemption of traditional state powers unless Congressional intent to preempt is “clear and manifest.” *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994). “[C]ourts generally presume that Congress has not intended to preempt state law, starting with the assumption that the historic police powers of the States are not to be superseded by federal legislation unless that is the clear and manifest purpose of Congress.” *American Bankers Ass’n. v. Gould*, 412 F.3d 1081 (9th Cir. 2005).

In this instance, there is no explicit preemption of state law contained in the federal statutes. In fact, the FMLA expressly reserves state laws that are not in conflict: “Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.” 29 U.S.C. §2651(b).

Likewise, there is no Congressional intention expressed or implied in the DOMA or FMLA that the federal government occupy the field of domestic relations, leaving nothing for the States to regulate. Preemption has been found absent in much closer cases. See *e.g. Rose v. Rose*, 481 U.S. 619 (1987) (state court has jurisdiction to hold a disabled veteran in contempt for failure to pay child support, even if benefits must come from benefits paid for a service-connected disability).

Finally, there is no actual conflict between state and federal law in this instance. “A mere conflict in words is not sufficient. State family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden.” *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (internal quotations omitted). No such conflict—i.e. “major damage” to federal interest—exists here. Instead, the state law merely accords greater rights than federal law does, a common circumstance. See *e.g. Marshall v. Lauriault*, 372 F.3d 175, 187 (3rd Cir. 2004) (New Jersey constitution provides greater rights than the federal constitution), *Smith v. Brough*, 248 F.Supp. 435, 442 (D. Md. 1965) (state may

accord defendant greater rights than it is required to accord him by federal constitution).

"It is axiomatic . . . that a state may grant greater rights than required by the federal minimum." Todd F. Simon, *Independent But Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. Kan. L. Rev. 305, 313 (1985). That is what the legislature has done in this case.

Although the DOMA and FMLA do not recognize domestic partners, with the enactment of S.B. 283, the 2009 Nevada Legislature elected to be more generous than federal law by granting registered domestic partners the same rights, benefits, duties, and responsibilities that spouses have under Nevada law. Specifically, Section 7(e) of S.B. 283 provides:

To the extent that provisions of Nevada law adopt, refer to or rely upon provisions of federal law in a way that otherwise would cause domestic partners to be treated differently from spouses, domestic partners must be treated by Nevada law as if federal law recognized a domestic partnership in the same manner as Nevada law.

Thus, under S.B. 283, domestic partners must be treated as the legal equivalent of a spouse.

An employee's spouse, children (son or daughter), and parents are immediate family members for purposes of FMLA. 29 C.F.R. § 825.112(a)(3). FMLA's definition of immediate family member does not extend to domestic partners. Although NAC 284.5235, as currently written, extends the term "immediate family member" beyond that of the FMLA, it also does not include the term domestic partners.¹ However, because S.B. 283 requires domestic partners to have the same legal status

¹ NAC 284.5235 defines immediate family as:

1. The employee's parents, spouse, children, regardless of age, brothers, sisters, grandparents, great-grandparents, uncles, aunts, nephews, grandchildren, nieces, great-grandchildren and stepparents; and
2. If they are living in the employee's household, the employee's father-in-law, mother-in-law, son-in-law, daughter-in-law, grandfather-in-law, grandmother-in-law, great-grandfather-in-law, great-grandmother-in-law, uncle-in-law, aunt-in-law, brother-in-law, sister-in-law, grandson-in-law, granddaughter-in-law, nephew-in-law, niece-in-law, great-grandson-in-law and great-granddaughter-in-law.

Teresa J. Thienhaus
April 12, 2010
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as a spouse, and the definition of immediate family in NAC 284.5235 includes a spouse, the term spouse infers that these rights are given to domestic partners under S.B. 283. Thus, S.B. 283 requires the interpretation of the term "immediate family member" in NAC 284.5235, as well as in NAC 284.558,² to include domestic partners. S.B. 283 requires the State to afford the same rights to an employee with a domestic partner as are provided for a spouse under the FMLA.


CONCLUSION

S.B. 283 requires the interpretation of the term "employee's immediate family" or the word "spouse" as used in NRS and NAC 284, to include domestic partners. Although NAC 284.5235, as currently written, does not expressly include the term domestic partners, the Department of Personnel may wish to add the term to the Nevada Administrative Code for clarification.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:


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KSALSD

² NAC 284.558 provides for sick leave if there is an illness in an employee's immediate family.



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April 14, 2010

OPINION NO. 2010-11

ENERGY; TAXATION; USE TAX:
Provided the Energy Commissioner issues the partial abatement or sales and use taxes provided in A.B. 522, the facility and those authorized to make purchases for and on behalf of the facility are entitled to the abatement. All tangible personal property purchased by or on behalf of the facility is eligible for the partial abatement because A.B. 522 § 28(6)(b)(1) contains no restrictions on the types of tangible personal property that may be purchased under the partial abatement.

Dino DiCianno, Executive Director
Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-2000

Dear Mr. DiCianno:

You have requested an opinion from this Office regarding certain aspects of the renewable energy sales and use tax partial abatement contained in Act of May 30, 2009, ch. 377, §§ 1-110, 2009 Nev. Stat. 2001 (A.B. 522). First, you have asked who is eligible to use the certificate of abatement for the sales and use tax abatement designated in A.B. 522. Second, you have asked what types of tangible personal property are eligible purchases subject to the abatement.

QUESTION ONE

Provided that the Commissioner approves an application for the sales and use tax abatement as provided in A.B. 522, to whom shall the Department of Taxation issue the certification of abatement and who is eligible to use such abatement certificate?

ANALYSIS

Initially, it is important to note that tax abatements exempt entities from certain tax provisions to which they would otherwise be subject. Accordingly, like exemptions, tax abatements should be narrowly construed. *Dep't of Taxation v. DaimlerChrysler Servs. North America, LLC*, 121 Nev. 541, 545, 119 P.3d 135, 137 (2005). The Supreme Court of Connecticut first stated that: "[t]he general rule of construction in taxation cases is that provisions granting a tax exemption are to be construed strictly against the party claiming the exemption.... Exemptions, no matter how meritorious, are of grace, and must be strictly construed. They embrace only what is strictly within their terms." *Id.* (footnote omitted; quoting *DaimlerChrysler Services v. CIR*, 875 A.2d 28, 32 (Conn. 2005)).

Nevertheless, "[w]hen construing an exemption, the court must always . . . avoid reading the exemption so narrowly [that] its application is defeated in cases rightly falling within its ambit." *Sparks Nugget, Inc. v. State ex rel. Dep't of Taxation*, 124 Nev. ___, 179 P.3d 570–574 (Adv. Op. 15, March 27, 2008) (footnotes omitted; quoting *Dawley, Inc. v. Indiana Dep't of State Revenue*, 605 N.E.2d 1222, 1225 (Ind. T.C.1992).

A.B. 522, *inter alia*, provides for partial abatement of sales and use taxes payable by certain renewable energy facilities. In order to receive the partial abatement, the facility must submit an application to the Director of the Nevada State Office of Energy. Thereafter, the Energy Commissioner (Commissioner) reviews the application and determines whether the facility is approved for the abatement. A.B. 522 § 28.

Part of the Department's responsibility with respect to the abatement is found in A.B. 522 § 28(6)(b)(2) which provides that if the Commissioner approves the partial abatement:

The Department of Taxation shall issue to the facility a document certifying the abatement which can be presented to retailers at the time of sale. The document must clearly state that the purchaser is only required to pay sales and use taxes imposed in this State at the rate of 2.6 percent.

Initially, the language in the first sentence in A.B. 522 § 28(6)(b)(2) seems clear. The plain language of the provision requires that the abatement certification document be *issued to the facility* which applied for the abatement. *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006) ("When a statute is clear on its face, we will not look beyond the statute's plain language") (footnote omitted). However, the first sentence must be read in conjunction with the second sentence, which mandates the language to be included in the abatement certificate and provides that, "the document must clearly state *that the purchaser* is only required to pay sales

and use taxes imposed in this State at the rate of 2.6 percent.” A.B. 522 § 28(6)(b)(2) (emphasis added). The term “facility” could have been used in both the first and second sentences but was not. Although it may be plausible that the legislature intended no distinction, “when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

Accordingly, to read the first sentence in context of the second sentence, facility and purchaser must be given their own meanings. While the various facilities to which the abatement applies are defined in A.B. 522, the term purchaser is not defined nor is it used in any other context in the text of A.B. 522. If the terms facility and purchaser were used in both the first and second sentences, then it would be clear that the abatement would apply to only purchases made specifically by the facility. However, because purchaser is used in the second sentence, it could be interpreted to apply to all purchases made on behalf of the facility, including contractors.

A review of the legislative history of A.B. 522 will assist to resolve the question whether the abatement can be used only when the facility makes a purchase or if it should be interpreted to apply to all purchases made on behalf of the facility. The legislative history of A.B. 522 shows concern by several members of the Legislature that the abatement maintain revenue streams while still providing the incentives for green energy facility development and operation. This could indicate that the abatement should have a narrow application and only apply to purchases made specifically by the facility. See *Hearing on A.B. 522 Before the Assembly Committee on Commerce and Labor Subcommittee on Energy*, 2009 Leg., 75th Sess. 18–20 (April 1, 2009).

However, A.B. 522 contains language directing a cost benefit analysis prior to approval by the Energy Commissioner. A.B. 522 § 28(3)(f) provides that the Commissioner shall only approve the abatement application if he determines that, “[t]he financial benefits that will result to this State from the employment by the facility of the residents of this State and from capital investments by the facility in this State will exceed the loss of tax revenue that will result from the abatement.” Additionally, A.B. 522 requires fiscal notes prepared by both the Department of Taxation and the Budget Division to determine the impact of the partial abatement on revenue. A.B. 522 § 28(8)(a). Because those revenue protection measures were actually placed in the bill it does not appear that there was any intent by the legislature to limit the term purchaser to only include the facility.

Finally, it is clear from the Legislative history of A.B. 522 and the language of the bill itself that the partial abatement of sales tax is intended to apply to the construction of the green energy facility.¹ NAC 372.200 makes construction contractors the consumers of all the tangible personal property purchased for use pursuant to a construction contract and the tax applies to the total sales price of the property to the contractor. Accordingly, to only allow the abatement for purchases made specifically by the facility, especially during the construction of the facility, and not allow the abatement for purchases made on behalf of the facility, would so narrow the abatement that its application would be defeated in cases where it is clear that it was intended to apply.

CONCLUSION

The certification document issued by the Department pursuant to A.B. 522 must be issued in the name of the facility whose application is approved by the Commissioner and applies to all purchases made specifically by the facility and to purchases made by those authorized to make purchases on behalf of the facility.

QUESTION TWO

What types of tangible personal property are eligible purchases subject to the abatement?

ANALYSIS

A.B. 522 contains no restrictions on types of tangible personal property. Specifically, with respect to what the partial abatement must or must not include, it provides as follows:

6. If the Commissioner approves an application for a partial abatement pursuant to this section of:
 - (b) Local sales and use taxes:
 - (1) The partial abatement must:
 - (I) Be for the 3 years beginning on the date of approval of the application;

¹ For instance, as part of the application to receive the abatement, the facility must make assurances with respect to the wages and benefits offered to employees working on the construction of the facility. See, e.g., A.B. 522, § 28(3)(d)(3). Additionally, there is discussion on the record of the direct construction jobs that would be created by providing the abatement and comparing the benefit of creating those construction jobs with the cost of the partial abatement. See *Hearing on A.B. 522 Before the Assembly Committee on Commerce and Labor Subcommittee on Energy*, 2009 Leg., 75th Sess. 19 (April 6, 2009).

Dino DiCianno
April 14, 2010
Page 5

(II) Be equal to that portion of the combined rate of all the local sales and use taxes payable by the facility each year which exceeds 0.6 percent; and

(III) Not apply during any period in which the facility is receiving another abatement or exemption from local sales and use taxes.

A.B. 522 § 28(6)(b)(1).

Omitted from the partial abatement provision is any reference to any type of tangible personal property that would be excluded. That omission is presumed to have been intentional. *DaimlerChrysler*, 121 Nev. at 548, 119 P.3d at 139 ("Nevada law also provides that omissions of subject matters from statutory provisions are presumed to have been intentional") (footnote omitted).

CONCLUSION

What must or must not be included in the partial abatement is provided in A.B. 522 § 28(6)(b)(1) which contains no restrictions on the types of tangible personal property that may be purchased under the partial abatement. Accordingly, all tangible personal property purchased by or on behalf of the facility is eligible for the partial abatement.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 

DEONNE E. CONTINE
Deputy Attorney General
Bureau of Public Affairs
(775) 684-1218

DEC/JMK



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

April 30, 2010

OPINION NO. 2010-12

EMPLOYMENT; ETHICS COMM'N:

Neither the executive director nor the commission counsel of the Nevada Commission on Ethics may pursue an outside business, occupation, or office of profit while employed by the Commission.

George Keele, Chairman
State of Nevada Commission on Ethics
3476 Executive Point Way, Suite 10
Carson City, Nevada 89706

Dear Chairman Keele:

On behalf of the Commission on Ethics, Commission Counsel Yvonne M. Nevarez-Goodson has asked for an opinion of this Office on the following question.

QUESTION

May the executive director and commission counsel for the State Commission on Ethics (Commission) pursue an outside business, occupation, or office of profit while employed by the Commission?

ANALYSIS

NRS 228.150(1) provides, in relevant part, "[w]hen requested, the Attorney General shall give his opinion, in writing . . . to the head of any state . . . agency, board or commission . . . upon any question of law relating to their respective . . . agencies, boards or commissions." This opinion is issued pursuant to NRS 228.150(1).

During the 1999 Legislative Session, the Legislature passed Senate Bill 478. Act of June 9, 1999, ch. 535, 1999 Nev. Stat. 2728 (Act). The Act required the Commission to appoint an executive director and a commission counsel. Act, § 5 and 5.5. The Act also placed certain constraints on each of those positions with regard to an incumbent's ability to engage in outside activities. Section 5(4) of the Act restricts the activities of the executive director: "The Executive Director shall devote his entire time and attention to the business of the Commission and shall not pursue any other business or occupation or hold any other office of profit that detracts from the full and timely performance of his duties." Section 5(4) of the Act is today codified as NRS 281A.230(4).

The Act placed the same constraints on the commission counsel. Section 5.5(4) of the Act provided, "The commission counsel shall devote his entire time and attention to the business of the commission and shall not pursue any other business or occupation or hold any other office of profit that detracts from the full and timely performance of his duties." Section 5.5(4) of the Act is today codified as NRS 281A.250(4).

The two statutes are each written in the conjunctive, containing two separate, but related, requirements. The incumbent of each position must: 1) "devote his entire time and attention to the business of the Commission *and*"; 2) must not "pursue any other business or occupation or hold any other office of profit that detracts from the full and timely performance of his duties." (Emphasis added.)

Where a statute imposes conjunctive, mandatory requirements, all must be met to satisfy the statute. See *State, Dep't of Employment Sec. v. Reliable Health Care Serv. of S. Nev., Inc.*, 115 Nev. 253, 258, 983 P.2d 414, 417 (1999) ("[t]he aforementioned statute is conjunctive in nature, and thus the putative employer has the burden of proving all three criteria.") Accordingly, the incumbents of the executive director and commission counsel positions must comply with both restrictions set forth in the statutes delimiting their respective positions.

While we believe that the language of the two subject statutes is clear and that resort to aids of statutory construction is therefore not necessary, *Worldcorp v. State, Dep't of Taxation*, 113 Nev. 1032, 944 P.2d 824 (1997), the legislative record leading to the enactment of the Act does confirm our conclusion.

The First Reprint of the Act included the following language:

5. *Except as otherwise provided in NRS 284.143*, the executive director and commission counsel shall devote their entire time and attention to the business of the commission and shall not pursue any other business or occupation or

hold any other office of profit that detracts from the full and timely performance of their duties. [Emphasis added.]

NRS 284.143 is a statute that allows certain unclassified employees to engage in outside employment under certain conditions, providing in relevant part:

[A] person in the unclassified service of the State who has been appointed or employed for service in a department, division, agency or institution, other than a director of a department, may pursue any other business or occupation or hold any other office for profit if:

1. The other employment does not conflict with the duties he is required to perform in his unclassified service;
2. The other employment does not conflict with the hours during which he is required to perform those duties; and
3. He has obtained the approval of his supervisor.

Accordingly, under the language of the First Reprint of the Act, the Commission's executive director and commission counsel would have been able to engage in outside employment if that employment did not conflict with either the duties or hours of their Commission duties and if the employment had been approved by the Commission as their supervisor.

However, in the Third Reprint of the Act, and in its final, enacted version, the reference to NRS 284.143 is removed. The reason for the deletion of the NRS 284.143 reference is explained during a legislative hearing on the Act:

Chairwoman Giunchigliani stated the next proposed amendment was to section 5. The proposed amendment:

Deleted on page 5, line 11, "Except as otherwise provided in Nevada Revised Statute 284.143, pertaining to outside employment by the executive director and commission counsel."

The proposed amendment to the section stipulated a person in the unclassified service could, in certain circumstances, have other employment. The amendment ensured the executive director and legal counsel to the Ethics Commission devoted their entire time to the business of the commission.

Hearing on S.B. 478 Before the Assembly Committee on Elections, Procedures, and Ethics, 1999 Leg., 70th Sess. (May 12, 1999) (emphasis added). Therefore, the legislative testimony confirms that the deletion of the outside employment authority

George Keele, Chairman
April 30, 2010
Page 4

provided in NRS 284.143 was intended to ensure that the executive director and commission counsel each “devoted their entire time to the business of the commission” and that neither is allowed to pursue any other business or occupation.

CONCLUSION

Neither the executive director nor the commission counsel of the Nevada Commission on Ethics may pursue an outside business, occupation, or office of profit while employed by the Commission.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: /s/
JAMES T. SPENCER
Chief of Staff

JTS/MAS



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
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QUESTION

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ANALYSIS

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George Keele, Chairman
April 30, 2010
Page 4

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CONCLUSION

Neither the executive director nor the commission counsel of the Nevada Commission on Ethics may pursue an outside business, occupation, or office of profit while employed by the Commission.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: /s/
JAMES T. SPENCER
Chief of Staff

JTS/MAS



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

May 10, 2010

OPINION NO. 2010-13

COUNTIES; DISTRICT ATTORNEYS;
NYE COUNTY: The District Attorney must be disqualified to act in the instant matter. Accordingly, it falls to the district court to appoint an attorney to prosecute the criminal case. And since the NRS 283.440 action can be filed by "any complainant," this Office would have no role in the potential civil proceeding.

Gary Hollis, Chairman
Nye County Board of County Commissioners
2101 E. Calvada Blvd. #200
Pahrump, NV 89048

Dear Chairman Hollis:

On your behalf, the Nye County Manager, Richard Osborne Sr., has posed several questions to this Office and has requested an expedited reply.

FACTUAL BACKGROUND

The Nye County District Attorney was arrested and charged with various crimes relating to expenditures from a particular fund held within his Office. You have been advised that the District Attorney is proceeding to hire his own "special prosecutor" to investigate other county employees to see if there was collusion and improper motive to have the charges brought against him. Your questions flow from this background.

ANALYSIS AND CONCLUSIONS

Several of your questions can be answered by reference to NRS 283.440, which addresses the procedure for removing certain public officers for malfeasance:

1. *Any person now holding or who shall hereafter hold any office in this State, except a justice or judge of the court system, who refuses or neglects to perform any official act in the manner and form prescribed by law, or who is guilty of any malpractice or malfeasance in office, may be removed therefrom as hereinafter prescribed in this section.*

2. *Whenever a complaint in writing, duly verified by the oath of any complainant, is presented to the district court alleging that any officer within the jurisdiction of the court:*

(a) *Has been guilty of charging and collecting any illegal fees for services rendered or to be rendered in his office;*

(b) *Has refused or neglected to perform the official duties pertaining to his office as prescribed by law; or*

(c) *Has been guilty of any malpractice or malfeasance in office, the court shall cite the party charged to appear before it on a certain day, not more than 10 days or less than 5 days from the day when the complaint was presented. On that day, or some subsequent day not more than 20 days from that on which the complaint was presented, the court, in a summary manner, shall proceed to hear the complaint and evidence offered by the party complained of. If, on the hearing, it appears that the charge or charges of the complaint are sustained, the court shall enter a decree that the party complained of shall be deprived of his office.*

3. *The clerk of the court in which the proceedings are had, shall, within 3 days thereafter, transmit to the Governor or the board of county commissioners of the proper county, as the case may be, a copy of any decree or judgment declaring any officer deprived of any office under this section. The Governor or the board of county commissioners, as the case may be, shall appoint some person to fill the office until a successor shall be elected or appointed and qualified. The person so appointed shall give such bond as security as is prescribed by law and pertaining to the office.*

4. *If the judgment of the district court is against the officer complained of and an appeal is taken from the judgment so rendered, the officer so appealing shall not hold the office during the pendency of the appeal, but the office shall be filled as in case of a vacancy.*

(Emphasis added.)

Applying the above statute to your questions, there must be a "formal charge of...Malfeasance." (Question 1.) The NRS 283.440 procedure is in the nature of a civil proceeding. (Question 6.) Your Question 7 was, "who actually files" the civil charges, and that is answered in NRS 283.440(2), a written, verified complaint filed by "any complainant." This includes a private citizen.

Question 2: May the District Attorney be placed on administrative leave during the pendency of the criminal, and possibly civil, actions. We find no authority to place the office on administrative leave, and answer this question "no." And, we point out that during the pendency of the criminal charges, an accused is presumed innocent.

Question 3: What is the status of the Deputy District Attorneys while the criminal, and possibly civil, proceedings are being resolved? The District Attorney retains the statutory authority of his Office and as such maintains authority over the daily activities of the Office, including staff assignments. We note that the individual deputies are licensed Nevada attorneys and are therefore subject to the rules of professional conduct that all Nevada attorneys are bound to follow.

Questions 4 and 5: What role will the Attorney General's Office play during the resolution of the criminal, and possibly civil, proceedings? Will the Attorney General prosecute the criminal charges? NRS 252.100 sets for the process to be followed where a District Attorney is disqualified from prosecuting a case:

1. *If the district attorney fails to attend any session of the district court, or for any reason is disqualified from acting in any matter coming before the court, the court may appoint some other person to perform the duties of the district attorney, who is entitled to receive the same compensation and expenses from the county as provided in NRS 7.125 and 7.135 for an attorney who is appointed to represent a person charged with a crime.*

2. If the district attorney willfully neglects to attend any session of the district court the amount so paid must be deducted by the board of county commissioners from the salary allowed to the district attorney.

(Emphasis added.)

We believe it to be beyond argument that the District Attorney must be disqualified to act in the instant matter. Accordingly, we believe that it falls to the district court to appoint an attorney to prosecute the criminal case. And since the NRS 283.440 action can be filed by "any complainant," this Office would have no role in the potential civil proceeding.

Question 8: May the District Attorney hire a special prosecutor as described above? This question brings up at least two issues. First, NRS 245.070 provides:

No county officer in any county in this State, except the board of county commissioners, shall contract for the payment or expenditure of any county moneys for any purpose whatever, or shall purchase any stores or materials, goods, wares or merchandise, or contract for any labor or service whatever, except the board of county commissioners, or a majority of it, shall order such officer to do the same.

Accordingly, if the special prosecutor was purportedly hired with county money and without Board approval, the legality of the employment would be challengeable as contrary to NRS 245.070.

Second, if the special prosecutor was hired with personal money by the District Attorney, he would not be acting as a county employee but would be acting in a private capacity only. While there is nothing per se illegal about that arrangement, problems could arise if the private attorney's activities interfered with the official criminal investigation and could result in charges being filed against the private attorney. See, for instance, NRS 199.305, providing criminal penalties for threatening or intimidating a witness.

Gary Hollis, Chairman
May 10, 2010
Page 5

Question 9. The Governor's Office does not have authority to appoint a special prosecutor to assume control of the District Attorney's Office.

We hope that this satisfactorily answers your concerns.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: /s/
JAMES T. SPENCER
Chief of Staff

JTS/MAS



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

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Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

May 13, 2010

OPINION NO. 2010-14

AGRICULTURE; FEES; LIVESTOCK:
Pursuant to NAC 565.230(6), the Department of Agriculture may charge brand inspection fees for a special sale of cattle, not just horses and bulls.

Tony Lesperance, Director
Department of Agriculture
405 South 21st Street
Sparks, Nevada 89431

Dear Mr. Lesperance:

You have requested an opinion on the proper interpretation of a regulation concerning whether "special sale" fees may be charged by the Department of Agriculture for cattle sales.

QUESTION

Under NAC 565.230(5) and NAC 565.230, may the Department of Agriculture charge for a special sale for cattle, not just horses and bulls, when the sale does not occur on a weekly basis or on the regular sale day?

ANALYSIS

NRS 565.070 gives the Department of Agriculture (Department) the authority to charge a fee for brand inspections. "The Department may levy and collect a reasonable fee for brand inspection as required under the provisions of this chapter. Any fee so levied must be collected in the manner prescribed by the Director." *Id.*

Nevada Administrative Code section 565.230 outlines the fees that the Department is permitted to charge for inspection of livestock at sales conducted within Nevada. NAC 565.230(5) and (6) state:

5. If a brand inspector has been assigned to inspect the brands of livestock at a sale conducted by a livestock commission company and the sale is conducted on a weekly basis, the amount of the brand inspection fee is:

(a) For cattle, \$1 per head of livestock consigned.

(b) For horses:

(1) Ten dollars for the first horse consigned by the owner; and

(2) Three dollars for each additional horse consigned by the same owner.

6. If a brand inspector has been assigned to a special sale of horses or bulls, the amount of the brand inspection fee is, in addition to the fees set forth in paragraphs (a) and (b) of subsection 5:

(a) For the travel time of the brand inspector from his duty station to the place of inspection and from the place of inspection to his duty station, \$16 per hour.

(b) For the time necessary for the brand inspector to conduct the inspection, \$16 per hour.

(c) For the mileage of the brand inspector to reach the place of inspection from his duty station and to reach his duty station from the place of inspection, the amount of mileage reimbursement that the brand inspector is entitled to receive from this State.

The fees set forth in this subsection must be paid on all consigned cattle and horses regardless of whether the cattle or horses are actually sold at the special sale.

Id.

The "[r]ules of statutory construction apply to administrative regulations." *Meridian Gold Co. v. State ex. rel. Department of Taxation*, 119 Nev. 630, 633, 81 P.3d 516, 518 (2003); see also *UMC Physicians Bargaining Unit of Nevada Serv. Employees Union v. Nevada Serv. Employees Union*, 124 Nev. ___, 178 P.3d 709, 712 (Adv. Op. 9, March 6, 2008) ("[r]egulations are subject to these same rules of interpretation"). Therefore, the Department's regulations must be construed and interpreted just as a statutory provision would be, using the rules of statutory construction as a guide.

As an initial matter, NAC 565.230(6) is patently ambiguous. The first sentence delimits application of the regulation to "a special sale of horses or bulls". The last sentence requires fees on sale of "cattle or horses". It is therefore appropriate to resort to rules of construction in order to ascertain the meaning of the regulation.

Applying the rules of statutory construction to the Department's administrative regulations, such as NAC 565.230, must be done in a way that avoids "absurd or unreasonable results." See *Pelligrini v. State of Nevada*, 117 Nev. 860, 874, 34 P.3d 519, 528 (2001). However, "when determining the validity of an administrative regulation, courts generally give 'great deference' to an agency's interpretation of a statute that the agency is charged with enforcing." *State, Division of Insurance v. State Farm Mut. Auto Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000); see also *Nevada Tax Comm'n v. Nevada Cement Co.*, 117 Nev. 960, 968-969, 36 P.3d 418, 423 (2001) ("the interpretation by the agency charged with administering a statute is persuasive, and great deference should be given to that interpretation if it is within the language of the statute").

The Nevada Supreme Court has stated that it "will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary or capricious." *Meridian Gold Co.*, 119 Nev. at 635, 81 P.3d at 519 (2003). Furthermore, the Court has held that it must "also consider the effect or consequences of proposed interpretations." *Alper v. State*, 96 Nev. 925, 930, 621 P.2d 492, 495 (1980). Thus, "[a]n unreasonable result produced by one interpretation is reason for rejecting it in favor of another interpretation which would produce a reasonable result." *Id.*, citing, *Sheriff v. Smith*, 91 Nev. 729, 542 P.2d 440 (1975).

In your letter dated January 26, 2010, you indicated that it has been the customary practice of the Department for a number of years to offer one free day of brand inspection service weekly to scheduled yard sales in regard to time and a per diem for the inspectors. "Special sales" of horses, bulls and cattle have customarily paid all additional time and a per diem charge by the Brands Division, based upon the language found in NAC 565.230(6).

NAC 565.230(5) provides for brand inspection fees for cattle and horses that are sold on a regular weekly basis. NAC 565.230(6) provides for fees for a special sale of horses and bulls in addition to those fees set forth in NAC 565.230(5). Reading NAC 565.230(5) and (6) together is required by statutory construction. "It is a well-recognized tenet of statutory construction that multiple legislative provisions be construed as a whole, and where possible, a statute should be read to give plain meaning to all its parts." *Gilman v. Nevada State Bd. of Veterinary Med. Examiners*, 120 Nev. 263, 271, 89 P.3d 1000, 1006 (2004).

More importantly, NAC 565.230(6)(c) states that "[t]he fees set forth in this subsection must be paid on all consigned cattle and horses regardless of whether the cattle or horses are actually sold at the special sale." This portion of the regulation explicitly contemplates and allows fees on cattle at a special sale. When all of the provisions of NAC 565.230(5) and (6) are read together, the intent of the regulation is to provide additional fees for brand inspections when there is a special sale held for cattle, horses and bulls. See *Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001) (courts must construe statutes to give meaning to all of their parts and language, and the court will read each sentence, phrase and word to render it meaningful within the context of the purpose of the legislation). Therefore, although the provisions of NAC 565.230(6), NAC 565.230(6)(a) and NAC 565.230(6)(b) refer only to horses and bulls, NAC 565.230(6)(c) specifically references and allows fees that must be paid "on all consigned cattle and horses" at a special sale.

The Nevada Supreme Court has also noted that "[w]here, as here, the legislature has had ample time to amend an administrative agency's reasonable interpretation of a statute, but fails to do so, such acquiescence indicates the interpretation is consistent with legislative intent." *Hughes Properties, Inc. v. State*, 100 Nev. 295, 298, 680 P.2d 970, 972 (1984), citing, *Summa Corporation v. State Gaming Control Board*, 98 Nev. 390, 392, 649 P.2d 1363 (1982). NAC 565.230 was originally adopted by the Department in 1972, and most recently amended in 2006. See NAC 565.230. As in the *Hughes* and *Summa* cases, the Legislature has had ample time to amend the Department's interpretation of NAC 565.230 concerning fees that are charged for special sales of cattle and has declined to do so. This acquiescence indicates the Department's interpretation of NAC 565.230 regarding the fees charged for special sales is consistent with legislative intent.

Finally, the Nevada Supreme Court has stated that "we must construe statutory language to avoid absurd or unreasonable results." *Meridian Gold Co.*, 119 Nev. at 633, 81 P.3d at 518. In this instance, allowing the fees only for horses and bulls and not for cattle would be an absurd and unreasonable result since cattle are also sold at special sales, not just horses and bulls and NAC 565.230(6)(c) states that fees for cattle at a special sale must be paid.

Tony Lesperance
May 13, 2010
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CONCLUSION

Pursuant to NAC 565.230(6), the Department of Agriculture may charge brand inspection fees for a special sale of cattle, not just horses and bulls.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: /s/
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June 16, 2010

OPINION NO. 2010-15

ENGINEERS; LICENSING; LAND
SURVEYORS: The Board may, but is not
required to deny licensure to applicants for
reciprocal licensing if the Board
determines the applicant lacks the
necessary qualifications, including failure
to meet the standards of licensure that are
equivalent to those required of Nevada
residents.

Noni Johnson, Executive Director
State of Nevada
Board of Professional Engineers
and Land Surveyors
1755 East Plumb Lane, #135
Reno, Nevada 89502

Dear Ms. Johnson:

You have requested an opinion of this Office concerning the effect of changes to
licensing requirements for professional engineers and land surveyors which go into
effect on July 1, 2010.

GENERAL BACKGROUND INFORMATION

In 2005, S.B. 59 was passed which, *inter alia*, made changes to the licensing
requirements for professional engineers and land surveyors effective July 1, 2010. The
primary change effected by S.B. 59 was the elimination of a potential licensee's ability
to acquire 10 years or more of active experience pursuant to NRS 625.183(3)(b) or
NRS 625.270(3)(b) in order to qualify for licensure under the respective statutes.

You have posed four questions related to licensing requirements which may be affected by the passage of S.B. 59.

QUESTION ONE

May the State Board of Professional Engineering and Land Surveying (Board) license an applicant pursuant to the provisions of NRS 625.183 who passed the examination on the principles and practices of engineering even if the applicant must obtain some of the required ten years of active experience after July 1, 2010?

ANALYSIS

The Board is established by statute. See NRS 625.100. Among its duties, the Board "[i]ssue[s] licenses to qualified and competent persons as professional engineers and professional land surveyors and certifi[ies] qualified and competent persons as engineer interns and land surveyor interns." NRS 625.152(1). Nevada law defines a "license" as the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law, and "licensing" refers to the agency procedure whereby the license is granted, denied, revoked, suspended, annulled, withdrawn or amended. NRS 233B.034. To that end, "[a] 'license' is frequently defined as permission to do some act without which the act would be illegal." *Shady Acres Nursing Home, Inc. v. Canary*, 316 N.E.2d 481 (Ohio.App.10.Dist.Franklin.Co. 1973)

1. The Vested Rights Theory

Stated otherwise, Question One asks whether an applicant who intended to become licensed pursuant to NRS 625.183(3)(b) by acquiring 10 years or more of active experience, has a vested right to continue seeking licensure under this provision once commenced, even though qualification for licensure by this method is repealed as of July 1, 2010.

It is well established that a board's power to license occupations and privileges is derived from its police power. *Clark County v. City of Los Angeles*, 70 Nev. 219, 221, 265 P.2d 216, 217 (1954). "[T]o the extent [a] license is subject to the state's police power, it is not vested." *In re the Application of Herrick*, 922 P.2d 942, 951 (Haw. 1996) (citing *Stroh v. Midway Restaurant Systems, Inc.*, 226 Cal.Rptr. 153, 160 (Cal.App.3d 1986)). A license is not a contract nor does it constitute property in a constitutional sense or confer an absolute right, and a governmental authority can impose new burdens, create additional burdens, or revoke the license. *Shady Acres*, 316 N.E.2d 481 (Ohio Ct. App. 1973); see also *In re Herrick, supra*, at 922 P.2d 952 ("A state's issuance of professional, business, or trade license does not give a licensee an absolute right to continue in that particular profession, business, or trade forever.").

In *Bourgeois v. State of Utah, Dept. of Commerce*, 41 P.3d 461 (Utah 2002), a similar question was presented after the educational requirements for professional engineers changed during the period the applicant was completing the requirements for licensure. The board denied the application after concluding the applicant's educational qualifications as a professional engineer were no longer valid under the current licensing criteria in effect at the time his application was filed. 41 P.3d at 462.

The court, citing *Riggins v. Dist. Ct. of Salt Lake County*, 51 P.2d 645, 658 (Utah 1935) held that:

[A] license is not a contract, it is clear that it does not in itself create any vested right, or permanent right, and that free latitude is reserved by the legislature to impose new or additional burdens on the licensee, or to alter the license, or to revoke or annul it. And this is the general rule notwithstanding the expenditure of money by the licensee in reliance thereon, and regardless of whether the term for which the license was given has expired.

41 P.3d at 465 (quoting *Riggins*, 51 P.2d at 658 (additional citation and quotations omitted)). Further, the *Riggins* court stated that because the legislature cannot pass irrepealable legislation, the legislature is free to change licensing requirements to serve the public good. *Id.* Accordingly, the *Bourgeois* court held that the applicant's completion of the educational requirements under a prior version of Utah statutes did not create a vested right in attaining licensure prior to a change in the licensing statutes. *Id.*

A similar question was also presented in *In re the Application of Herrick, supra*, where an applicant for a court reporting license challenged changes to the state's court reporting licensing statutes, which lead to the applicant's temporary certification being repealed, and ultimately resulted in the applicant's ability to attain permanent licensure as a court reporter. *Id.* at 922 P.2d 942. In denying the applicant's claim that she had a vested right in retaining the temporary certification pending permanent licensure, the court observed that "[a] license may be changed or even annulled by the supreme legislative power of the state whenever the public welfare demands it. There is no vested right in a public law which is not in the nature of a private grant, and, however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it." *Id.* at 951 (internal citations omitted).

Thus, as evidenced above, a state may change the requirements for the issuance or retention of occupational licenses, so long as the licensing requirement bears some reasonable relationship to the legitimate interest of securing public health,

safety, and welfare. See *Raymond W. Wineblad, P.A. v. Department of Registration & Educ.*, 515 N.E.2d 705 (Ill.App.Ct. 1987). NRS 625.005 plainly states that the purpose of NRS Chapter 625 "is to safeguard life, health and property and to promote the public welfare by providing for the licensure of qualified and competent professional engineers and professional land surveyors." Accordingly, the Nevada Legislature could have concluded that completion of an approved four-year curriculum was a preferred method of attaining licensure for professional surveyors and engineers over the acquisition of 10 years active experience pursuant to NRS 625.183(3)(b).

The Nevada Legislature remains free to change the licensing requirements for the public good, and an applicant does not have a vested right to attain licensure by completing some of the 10 years active experience requirement after July 1, 2010, where NRS 625.183(3)(b) is repealed on that date.

2. The Plain Language of the Licensing Statutes

"When the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it." *Cirac v. Lander County*, 95 Nev. 723, 729, 602 P.2d 1012, 1015 (1979) (quoting *State ex rel. Hess v. Washoe County*, 6 Nev. 104, 107 (1870)). The plain language of NRS 625.183(3) is also instructive as to whether an applicant can attain some of the 10 years active experience requirement after July 1, 2010.

Specifically, NRS 625.183(3) states "[a]n applicant for licensure as a professional engineer *is not qualified for licensure unless* the applicant meets the requirements of one of the following paragraphs. . ." (Emphasis added). The "is not qualified, unless" paradigm indicates that the applicant must meet *all* the requirements set forth in NRS 625.183(3)(b), including demonstrating he has 10 years active experience, *prior to* being considered qualified to apply for a professional engineering license.

The plain language of NRS 625.183(3) indicates that an applicant must be able to demonstrate 10 years active experience *prior to* being considered a qualified applicant for licensure.

CONCLUSION TO QUESTION ONE

The Board may not license an applicant who passed the examination on the principles and practices of engineering but did not acquire ten years active experience prior to July 1, 2010. The Nevada Legislature remains free to change the licensing requirements for the public good, and an applicant does not have a vested right to attain licensure by completing some of the 10 years active experience requirement after July 1, 2010.

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QUESTION TWO

May a qualified applicant who failed the relevant exam before July 1, 2010, retake the examination after July 1, 2010, even though the applicant is not a graduate of an engineering or land surveying curriculum of four years or more that is approved by the Board?

ANALYSIS

Based upon the analysis provided in Question One, an applicant has no vested right to continue seeking licensure by having completed 10 years active experience prior to July 1, 2010, without also having passed the relevant exam prior to that date.

The plain language of NRS 625.183 effective July 1, 2010, provides that the applicant for licensure as a professional engineer must have passed the relevant exam pursuant to NRS 625.183(2), and that the applicant is not qualified for licensure unless he is a graduate of a four-year engineering curriculum pursuant to NRS 625.183(3).

Similarly, the plain language of NRS 625.270 effective July 1, 2010, provides that the applicant for licensure as a professional land surveyor must have passed the relevant exam pursuant to NRS 625.270(2). Notwithstanding, the applicant is not qualified to take the relevant exam unless he is a graduate of an approved four-year land surveying curriculum pursuant to NRS 625.270(3).

CONCLUSION TO QUESTION TWO

Where an applicant has no vested right in attaining some, but not all of the required licensure qualifications prior to July 1, 2010, an applicant who is not a graduate of an engineering or land surveying curriculum of four years or more after July 1, 2010, is not qualified for licensure pursuant to NRS 625.183(3). In addition, he cannot take the relevant exam without being a graduate of an approved four-year curriculum pursuant to NRS 625.270(3).

QUESTION THREE

May an individual who was previously licensed by the Board apply for relicensure after July 1, 2010, even though the applicant is not a graduate of an engineering curriculum or land surveying curriculum of four years or more that is approved by the Board?

ANALYSIS

There are four scenarios by which a licensee may be required to seek relicensure according to the Nevada Revised Statutes and the Nevada Administrative Code:

1. Expiration

NRS 625.395 requires that each licensee renew his license and pay the fee for renewal according to the schedule set forth in NAC 625.410(2). The license of a licensee who does not renew his licensure by the appropriate date set forth in

NAC.410(2) expires, and he is not licensed to continue to practice. NAC 625.410(4). Notwithstanding, a licensee who fails to renew his license, may do so within 6 months after the date of its expiration, upon application to and with the approval of the Board and payment of all required fees and penalties, and submission of all information required to complete the renewal. NRS 625.395. As well, the Board may extend the time for renewal of the expired license. *Id.* To that end, NAC 625.410(5) states that:

A licensee whose license has been expired for more than 6 months:

- (a) Must reapply for licensure and pay the appropriate application fee.
- (b) May be required to appear before the Board.
- (c) May be required to pass a written or oral examination.¹
- (d) May be required to submit proof to the Board of the completion of 30 professional development hours.

The use of the words "shall" or "must" is generally regarded as mandatory. See *People ex rel. Larson v. Rosewell*, 410 N.E.2d 404, 408, (Ill.App. 1980); and see *State v. American Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990) (citing *Givens v. State*, 99 Nev. 50, 54, 657 P.2d 97, 233 (1983)); *Thomas v. State*, 88 Nev. 382, 384, 498 P.2d 1314, 1315 (1972)) (use of "shall" in statute is presumptively mandatory, and "may" in statute is construed as permissive unless the legislative intent demands another construction). Further, it is a fundamental rule of statutory construction that the mention of one thing implies the exclusion of another. *In re Estate of Prestie*, 122 Nev. 807, 138 P.3d 520 (2006); see also *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967) (the maxim "expressio unius

¹ This assumes that the oral or written exam is something other than the examination on the principles and practices of land surveying. For, if the Board required the licensee to pass the examination on the principles and practices of land surveying, the licensee whose license is revoked would not be qualified to sit for the exam if he is not a graduate of an approved four-year curriculum in land-surveying. See NRS 625.270(3).

est exclusio alterius”, the expression of one thing is the exclusion of another, is applied in Nevada).

Read together, NRS 625.395 and NAC 625.410(4) require, at a minimum, a licensee whose license is expired for more than 6 months, and who fails to obtain an extension of time to renew an expired license, to reapply for licensure and pay the appropriate application fee. There is no indication, however, that an applicant need comply with the requirements for the issuance of an original license, as in reinstatement from a retired license, discussed *infra*. Accordingly, the Board may, but is not required to, also request that the licensee appear before the Board, pass a written or oral examination, and/or submit proof to the Board of the completion of 30 professional development hours, in addition to reapplying and making payment of the appropriate fees.

2. Revocation

NRS 625.490 provides that “[t]he Board may reissue a license to any person whose license has been revoked if a majority of the members of the Board vote in favor of reissuance.” Further, NRS 625.397(2) provides that if the revocation came about as a result of a disciplinary proceeding before the Board, the Board may require the person to pass a written or oral examination as a condition of reinstating his or her license.²

Nevada law is silent as to whether licensure anew is required to reinstate a revoked license. Indeed, the only requirements for the reinstatement of a revoked license is a majority vote by the Board for reinstatement, and possibly the administration of a written or oral exam, determined at the discretion of the Board. Thus, where the Board has required licensees to reapply for licensure under other scenarios discussed herein, the Board’s silence as to revocation can be interpreted to mean that an applicant is not required to reapply for licensure to reinstate a revoked license.

3. Retired status

NAC 625.420(1)(a) provides that “[i]n lieu of the renewal of his license, a licensee may apply to the Board to change his status to retired status by filing a notice to the Board in writing stating his intention to retire from practice. The Board will issue an identification card indicating that the licensee is retired and showing the period of his active professional licensure in this State. If an identification card is issued to a licensee pursuant to this section, his license expires and he is not licensed to continue to practice. NAC 625.420(2). A licensee who has changed his status to retired pursuant to this section may reinstate his license to active status by complying with the requirements for the issuance of an original license and submitting proof that he has

² See footnote 1, *supra*.

completed at least 30 professional development hours within the 2 years immediately preceding the date of his request to reinstate his license to active status. NAC 625.420(3).

The language under the retired license scenario is clear. Reinstatement of a license from retired status after July 1, 2010, must "comply [] with the requirements for the issuance of an original license," which includes graduation from an approved four-year curriculum in professional engineering or land surveying.

4. Inactive status

NAC 625.420(1) provides that "[i]n lieu of the renewal of his license, a licensee may apply to the Board to change his status "to inactive status, by" filing with the Board a notice in writing that states his intention to change his status to inactive and paying a fee that is equal to the fee required for a licensee who wishes to renew his

license. The Board will issue an identification card indicating that the licensee is inactive." NRS 625.420(1)(b). If an identification card is issued to a licensee pursuant to this section, his license expires and he is not licensed to continue to practice. NAC 625.420(2). A licensee who has changed his status to inactive pursuant to this section may reinstate his license to active status by submitting proof that he has completed at least 30 professional development hours within the 2 years immediately preceding the date of his request to reinstate his license to active status. NAC 625.420(4).

Accordingly, there is no requirement that a licensee reinstating an inactive license to an active license be a graduate of a four-year curriculum in order to reinstate the license. The only requirement is that the licensee demonstrates completion of at least 30 professional development hours within the 2 years immediately preceding the date of his request.

CONCLUSION TO QUESTION THREE

1. A licensee whose license is expired for more than 6 months, and who fails to obtain an extension of time to renew an expired license, is required to reapply for licensure and pay the appropriate application fee. There is no indication that an applicant need comply with the requirements for the issuance of an original license; therefore, the Board may, but is not required to also request that the licensee appear before the Board, pass a written or oral examination, and/or submit proof to the Board of the completion of 30 professional development hours, in addition to reapplying and making payment of the appropriate fees.

2. The only requirements for reinstatement of a revoked license is a majority vote by the Board for reinstatement, and possibly the administration of a written or oral exam, administered at the discretion of the Board.

3. Reinstatement from retired license requires an applicant to meet the requirements for the issuance of an original license. If the applicant is not a graduate of an engineering curriculum or land surveying curriculum of four years or more that is approved by the State Board, the applicant cannot meet the requirements for licensure.

4. Reinstatement from inactive status only requires that the licensee demonstrate completion of at least 30 professional development hours within the 2 years immediately preceding the date of his request for reinstatement.

QUESTION FOUR

May the State Board decline to license an applicant who is licensed in another jurisdiction if that applicant is not a graduate of four years or more that is approved by the State Board?

ANALYSIS

With respect to reciprocal licensing, the Board may, pursuant to NRS 625.382(1),

issue a license to practice professional engineering or land surveying to an applicant, upon presentation of evidence that he is licensed to practice professional engineering or land surveying, respectively, and in good standing in a state, territory, possession of the United States or country that maintains standards of engineering or land-surveying licensure, equivalent to those in this state, if the applicant, in the judgment of the Board, has the necessary qualifications pursuant to the provisions of this chapter.

You have indicated the Board's concern regarding NRS 625.382 is that Nevada applicants may be unfairly disadvantaged by being denied licensure if not graduates of an approved four-year curriculum in their respective field, while out-of-state applicants who are not graduates of a four-year curriculum may become licensed in Nevada.

States are under no obligation to recognize licenses for professions issued by other states, as such licenses issued by one state are not extraterritorial and no rule of comity requires a state to grant a license merely because a person has been admitted to practice in another state. *Fales v. Comm'n on Licensure to Practice Healing Art*, 275 A.2d 238 (D.C. 1971). Accordingly, reciprocity provisions in professional licensing

Ms. Noni Johnson
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schemes do not require a state to recognize a license issued by another state, but rather, the principle of comity affirms that citizens of another state who are professionally licensed in that state should, in certain circumstances, be granted licensing advantages in another state. *Arizona State Bd. of Accountancy v. Cole*, 581 P.2d 1139 (Ariz.1978).

As discussed above in Question Three, use of the word "may" is construed as permissive, unless the legislative intent demands another construction. Here, use of the word "may" in NRS 625.382(1) is consistent with the intent of the Legislature to allow the Board to exercise discretion in granting a reciprocal license to an out-of-state applicant. To that end, NRS 625.382(1) allows the Board discretion to grant a license to an applicant who has the necessary qualifications, including, *inter alia*, having a license in good standing from another jurisdiction "that maintains standards of engineering or land-surveying licensure, equivalent to those in this state. . ." Thus, if the Board determines that the out-of-state applicant's standards for licensure are not equivalent to those required of Nevada residents, *i.e.*, graduation from an approved four-year curriculum, the Board may decline to issue a reciprocal license pursuant to NRS 625.382(1).

CONCLUSION TO QUESTION FOUR

The Board may, but is not required to deny licensure to applicants for reciprocal licensing if the Board determines the applicant lacks the necessary qualifications, including failure to meet the standards of licensure that are equivalent to those required of Nevada residents.

CATHERINE CORTEZ MASTO
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By:



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August 13, 2010

OPINION NO. 2010-16

FIREARMS; LOCAL GOVERNMENT;
POLITICAL SUBDIVISIONS: County
government is prohibited from adopting
and enacting new legislation relating to the
possession of firearms.

David Roger, District Attorney
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Dear Mr. Roger:

This letter is in response to your request for an opinion from the Nevada Attorney General's Office.

QUESTION

Does NRS 244.364 give Clark County the authority to adopt and enact a local ordinance or regulation which prohibits the carrying, possessing, or discharging of firearms in Clark County parks and park facilities?

ANALYSIS

Counties are political subdivisions of the State and enjoy only the powers which the State Legislature grants to them. *Falcke v. Douglas County*, 116 Nev. 583, 588, 3 P.3d 661, 664 (2000). The answer to your first question requires an analysis of the authority granted to the county governments concerning the regulation of firearms. We will first look to the language of NRS 244.364.

NRS 244.364 reads in relevant part:

1. Except as otherwise provided by specific statute, the Legislature reserves for itself such rights and powers as are necessary to regulate the transfer, sale, purchase, possession, ownership, transportation, registration and licensing of firearms and ammunition in Nevada, and no county may infringe upon those rights and powers. As used in this subsection, "firearm" means any weapon from which a projectile is discharged by means of an explosive, spring, gas, air or other force.
2. A board of county commissioners may proscribe by ordinance or regulation the unsafe discharge of firearms.

If the language of a statute is plain and unambiguous, the words must be given their ordinary meaning. *McGrath v. State Dept. of Public Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007). "If, however, a statute is subject to more than one reasonable interpretation, it is ambiguous, and the plain meaning rule does not apply." *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697 (2007). "When a statute is ambiguous, legislative intent is the controlling factor, and reason and public policy may be considered in determining what the legislature intended." *Id.* However, statutory construction should always avoid an absurd result. *Sheriff, Clark County v. Burcham*, 124 Nev. ___, 198 P.3d 326, 329 (Adv. Op. 101, Dec. 24, 2008).

Your office asserts two main arguments in support of the position that NRS 244.364 does not prevent the county from adopting and enacting local ordinances that regulate firearms. First, your office suggests that NRS 244.364 is ambiguous as to its intent to preempt regulation of the *possession* of firearms. Second, your office suggests that Clark County Code 19.060.04, and the regulations adopted pursuant to its authority, were grandfathered by the Legislature when the Act of June 13, 1989, ch. 308, § 1, 1989 Nev. Stat. 652 (A.B. 147) was codified in NRS 244.364.

As an initial matter, NRS 244.364(2) explicitly authorizes county government to regulate the unsafe discharge of firearms. Therefore, any new or existing ordinance or regulation that prohibits the unsafe discharge of firearms in Clark County parks and facilities is within Clark County's authority.

A review of the language contained in NRS 244.364(1) indicates that the Nevada Legislature intended to preempt the entire field of firearm regulation, absent its one exception for the unsafe discharge of firearms. NRS 244.364(2). When the Legislature adopts a general scheme for the regulation of a particular subject, local control over the

same subject ceases. *Lamb v. Mirin*, 90 Nev. 329, 332, 526 P.2d 80, 82 (1974). Therefore, a county may not enforce regulations which are in conflict with the Legislature's mandate. *Id.* at 333.

Your office suggests that the word 'possession' in NRS 244.364(1) is ambiguous since it is subject to more than one meaning in BLACK'S LAW DICTIONARY. BLACK'S LAW DICTIONARY describes that in law there are two forms of possession; actual and constructive possession. BLACK LAW DICTIONARY 1047 (5th ed. 1979). However, an ambiguous word should receive the meaning which is generally recognized within the community. *State v. Webster*, 102 Nev. 450, 453, 726 P.2d 831, 833 (1986). Use of a more narrow definition is contrary to this rule of statutory construction. *Id.* at 454. MIRIAM WEBSTER'S DICTIONARY defines possession as "the act of having or taking into control." MIRIAM WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 918 (9th ed. 1985). This definition clearly reflects a meaning most akin to actual, physical possession.

In order for the word possession to mean constructive possession, it would be necessary to conclude that the Legislature intended the word to have its less ordinary meaning. Instead, it is the opinion of this office that the ordinary and plain meaning of possession must be given its more common meaning, which is actual possession. Further, actual possession is consistent with preemption principles and with the spirit of the Act.

Your office also suggests that the legislative history discloses that the Legislature did not intend to preempt local ordinances concerning the carrying, possessing, and discharging of firearms. A review of the legislative history shows otherwise. In a letter dated February 17, 1989, Attorney General McKay responds to the following questions posed by Assemblyman Dini:

1. Would A.B. 147 repeal or make ineffectual local discharge ordinances?

Answer:

This statute [A.B. 147] would preempt for state regulation all forms of governmental regulation involving firearms and ammunition in Nevada, with one exception. That exception allows cities, counties, and towns to proscribe by ordinance or regulation the unsafe discharge of firearms. We understand this to mean that cities, counties and towns could continue to enact ordinances and regulation which

would prohibit discharging firearms on the public street or other public places, in urbanized area, or into structures, vehicles, aircraft or watercraft. *Such unlawful discharge ordinances would be the only type of local ordinance or regulation permitted if A.B. 147 becomes law.*

. . . .

4. Would A.B. 147 repeal or make ineffective laws governing the carrying of concealed weapons?"

Answer:

A.B. 147 would not repeal or make ineffective any state statutes, but *would invalidate any local ordinances or regulations on this subject since all aspects of the possession of firearms and ammunition in Nevada would be preempted for state regulation if A.B. 147 becomes law* (emphasis added).

Discharge ordinances are explicitly permitted by NRS 244.364(2); however, regulations concerning possession are not. The Office of the Attorney General has also interpreted NRS 244.364 in a 1995 Opinion and has stated, "regarding control of firearms, NRS 244.364 clearly states that counties may regulate only the unsafe discharge of firearms, and that "no county may infringe upon" the power of the legislature to regulate, inter alia, the sale and possession of firearms." Op. Nev. Att'y Gen. No. 95-03 (March 13, 1995). It is therefore the opinion of this office that the legislative history supports preemption.

It has been also been offered that Clark County Code 19.060.04, and the regulations adopted pursuant to its authority, were grandfathered by Section 5 of A.B. 147. Section 5 reads: "The provisions of this act apply only to ordinances or regulations adopted on or after the effective date of this act."¹ As the legislative history suggests, Section 5 was added to grandfather existing firearms ordinances statewide. Assembly Bill 147 became effective on June 13, 1989 and was codified as NRS 244.364. The regulations adopted by the Clark County Board of County Commissioners, which prohibited the carrying, possessing or discharging of firearms in Clark County parks, were adopted on January 5, 1981, well before the effective date of A.B. 147. Therefore, Clark County Code 19.060.04, and the regulations adopted pursuant to its authority, were grandfathered by the Legislature in 1989. As a result, the

¹ The previously cited Attorney General Opinion was drafted prior to Section 5 being added to A.B. 147.

continued enforcement of the previously adopted regulation prohibiting the carrying, possessing, and discharging of firearms in Clark County parks continued in effect despite the preemption language contained in A.B. 147.

The grandfather provision was not altered in this regard by subsequent amendment. In 2007, Act of June 4, 2007, ch. 320, §1, 2007 Nev. Stat. 1288 (S.B.92) amended NRS 244.364 to require that county governments impose uniform laws concerning the registration of handguns in the State of Nevada. Rather than grandfather local ordinances and regulations concerning registration, S.B. 92 explicitly required all local ordinances or regulations relating to the registration of handguns to be consistent throughout the state. Unlike A.B. 147, S.B. 92 did not grandfather previously adopted ordinances or regulations related to firearms registration. However, S.B. 92 also did not materially amend the "grandfather clause" from A.B. 147 in the 1989 legislative session.² Therefore, the "grandfather clause" remained unaffected by S.B. 92.³

² Senate Bill 92 did clarify the language of the grandfather clause by replacing "after the effective date of this act" with "after June 13, 1989."

³ At the conclusion of NRS 244.364, the Reviser's Notes contain Section 4 of S.B. 92:

Ch. 308, Stats. 1989, the source of this section, as amended by ch. 320 Stats. 2007, contains the following provision not included in the NRS:

1. Except as otherwise provided in subsection 2, the provisions of this act apply to ordinances or regulations adopted on or after June 13, 1989.
2. The provisions of this act, *as amended on October 1, 2007*, apply to ordinances or regulations adopted before, on or after June 13, 1989 [emphasis added].

The sections of A.B. 147 and S.B. 92 which dictated whether NRS 244.364 was to be applied retroactively do not appear in the body of the current statute. Instead, the Legislative Counsel placed those sections of A.B. 147 and S.B. 92 in the Reviser's Notes at the conclusion of NRS 244.364. Pursuant to NRS 220.120(6); the Legislative Counsel is authorized to reorganize and reorder the Nevada Revised Statutes without changing their force and effect.


Section one of the Reviser's Notes means that ordinances or regulations adopted prior to June 13, 1989, were not preempted by language of A.B. 147, codified as NRS 244.364 (1) and (2). Section two of the Reviser's Notes addresses the 2007 amendments from S.B.92. Section two states that provisions amended by S.B. 92 apply to all ordinances and regulations, even those adopted prior to June 13, 1989. Therefore, since S.B. 92 only substantively amended NRS 244.364 (3) and (4) and it did not substantively amend NRS 244.364 (1) and (2), section two of the Reviser's Notes is not applicable to Clark County Code 19.060.04 and the regulations adopted pursuant to its authority.

CONCLUSION

The Legislature has preempted the entire field of firearm regulation, with the exception of unlawful discharge ordinances and regulations which the Legislature has explicitly authorized county government to regulate. Therefore, county government is prohibited from adopting and enacting new legislation relating to the possession of firearms. However, through the legislative process, certain ordinances and regulations concerning firearm regulation were grandfathered by A.B. 147, including Clark County Code 19.060.04 and the regulations adopted pursuant to its authority. Although Clark County does not have the authority to adopt or enact new local ordinances or regulations that are preempted by NRS 244.364(1), the ordinances or regulations grandfathered by A.B. 147 still remain in effect today.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 
SAMANTHA T. LADICH
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September 22, 2010

OPINION NO. 2010-17

DRUG TESTING; PERSONNEL; PUBLIC SAFETY: If an applicant applies for a public safety position, he is required to submit to a screening test. If the applicant tests positive for the use of a controlled substance, he *must* not be considered for that public safety position by the relevant appointing authority. NAC 284.894(1).

Teresa J. Thienhaus, Director
Department of Personnel
209 Musser Street, Room 101
Carson City, Nevada 89701-4204

Dear Ms. Thienhaus:

You have requested an opinion from the Office of the Attorney General on the question, should an applicant for employment who tests positive on a pre-employment controlled substance test be removed from all recruiting lists for one year, not just the lists for positions that require pre-employment testing?

BACKGROUND

NRS 284.4066(1) and NAC 284.886(1) require an applicant for a position that is designated by the Personnel Commission as affecting public safety to submit to a screening test to detect the general presence of a controlled substance.

NRS 284.4066 further provides that:

2. An appointing authority may consider the results of a screening test in determining whether to employ an applicant. If those results indicate the presence of a controlled substance, the appointing authority shall not hire the applicant unless the applicant provides, within 72 hours

after being requested by the appointing authority, proof that the applicant had taken the controlled substance as directed pursuant to a current and lawful prescription issued in the applicant's name.

NRS 284.4066(2).

Additionally, NAC 284.894 states that:

1. An applicant who tests positive for the use of a controlled substance must not be considered by an appointing authority for employment in any position which requires such testing until:

(a) One year has passed from the time of the positive test;
or

(b) The applicant provides evidence that he has successfully completed a rehabilitation program for substance abuse.

NAC 284.894(1)(a) and (b).

An "appointing authority" is defined in NAC 284.022 as "an official, board or commission having the legal authority to make appointments to positions in the state service, or a person to whom the authority has been delegated by the official, board or commission."

QUESTION

May an applicant who tests positive for the use of a controlled substance be removed from *all* state recruiting lists for one year from the time of a test administered pursuant to NAC 284.886(1)?

ANALYSIS

While Chapter 284 of NRS and NAC mandate pre-employment screening tests of applicants for public safety positions only, "[i]t is the policy of this state to ensure that its employees do not: 1. Report for work in an impaired condition resulting from the use of alcohol or drugs; ..." NRS 284.406. In accordance with this policy, NRS 284.240 states that:

The Director may refuse to examine an applicant or, after examination, may refuse to certify an eligible person who:

....

2. Submitted to a screening test administered pursuant to NRS 284.4066, the results of which indicated the presence of a controlled substance, and the person did not provide the proof required by NRS 284.4066.

NRS. 284.240(2).

This statute, read alone, appears to allow for removal of an applicant who tests positive for the use of a controlled substance from any state recruiting lists managed by the Director of Personnel for one year from the time of a test administered pursuant to NAC 284.886(1). However, while this statute does not appear to apply only to applicants for public safety positions, it is unclear how the Director would have access to the results of a test administered by an appointing authority pursuant to NAC 284.886(1).

NRS 284.4068 states:

Except as otherwise provided in NRS 239.0115, the results of a screening test taken pursuant to NRS 284.4061 to 284.407, inclusive, are confidential and:

. . . .

2. Must be securely maintained by the appointing authority or his designated representative separately from other files concerning personnel; and
3. Must not be disclosed to any person, except:
 - (a) Upon the written consent of the person tested;
 - (b) As required by medical personnel for the diagnosis or treatment of the person tested, if he is physically unable to give his consent to the disclosure;
 - (c) As required pursuant to a properly issued subpoena;
 - (d) When relevant in a formal dispute between the appointing authority and the person tested; or
 - (e) As required for the administration of a plan of benefits for employees.

NRS 284.4068.

Teresa J. Thienhaus, Director
September 22, 2010
Page 4


NRS 284.4068 does not provide for the release of screening test results by an appointing authority to the Director of the Department of Personnel.

CONCLUSION

If an applicant applies for a public safety position, he is required to submit to a screening test. If the applicant tests positive for the use of a controlled substance, he *must* not be considered for that public safety position by the relevant appointing authority. NAC 284.894(1). For an applicant to be removed by the Director from *all* recruiting lists for other positions within the State, the Director must first have lawful possession of the screening test results. This may require an amendment to NRS 284.4068.

Sincerely,

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November 3, 2010

OPINION NO. 2010-18

MILITARY; NATIONAL GUARD;
OFFICERS: A general officer appointed as a Commander and not an Assistant Adjutant General is not required to have six years service in the Nevada National Guard, three of which must be immediately before his appointment pursuant to NRS 412.054. Rather, only an officer appointed to one of the two Assistant Adjutant General positions is subject to the eligibility requirements set forth in NRS 412.054.

Brigadier General William R. Burks
The Adjutant General
Nevada Office of the Military
2460 Fairview Drive
Carson City, NV 89701

Dear General Burks:

You have requested an opinion of this Office concerning the application of NRS 412.054 as it applies to a general officer position within the Nevada Office of the Military. You offered the following background information relevant to the question presented.

The Assistant Adjutant General position is a Brigadier General position (1-star position), immediately below the Adjutant General (a 2-star position). Initially, both the Army Guard and the Air Guard authorized one such officer position. Approximately 15 years ago, the Air Guard was authorized an additional general officer position giving

the Air Guard both an Assistant Adjutant General–Air Guard, and a Commander-Nevada Air Guard¹, both of which are 1–star positions.

The Army Guard continued to be authorized for one, 1-star position, so the individual occupying that position has served as both the Assistant Adjutant General–Army Guard and the Commander-Nevada Army Guard. It now appears as though the Army will authorize an additional 1-star position which will allow the Adjutant General to have both an Assistant Adjutant General–Army and a Commander–Army Guard. In the event the additional 1-star position of Commander–Army Guard is authorized, the Office of the Military seeks clarification on whether the eligibility requirements contained in NRS 412.054 apply to that position.

QUESTION

Does NRS 412.054 require that a general officer appointed as the Commander of the Army Guard, but not appointed as an Assistant Adjutant General, have six years service in the Nevada National Guard, three of which immediately precede his appointment?

ANALYSIS

NRS 412.054 entitled “Assistant Adjutants General” states in relevant part:

1. The Adjutant General may appoint two Assistant Adjutants General, one each from the Nevada Army National Guard and the Nevada Air National Guard, who may serve as Chief of Staff for Army and Chief of Staff for Air, respectively, at the pleasure of the Adjutant General or until relieved by reason of resignation, withdrawal of federal recognition or for cause to be determined by a court-martial.

2. To be eligible for appointment to the office of Assistant Adjutant General, a person must be an officer of the Nevada National Guard, federally recognized in the grade of lieutenant colonel or higher, and must have completed at least 6 years’ service in the Nevada National Guard as a federally recognized officer, 3 years of which must be immediately before the appointment.

3. An Assistant Adjutant General may be appointed in the grade of lieutenant colonel or higher, but not exceeding that of brigadier general. He may be promoted by the Governor to any grade not exceeding that of brigadier general.

¹ Commander positions are authorized by National Guard Manning Documents, rather than by state statute.

4. The Assistant Adjutants General shall perform such duties as may be assigned by the Adjutant General. . . .

NRS 412.054(1)–(4).

Statutes must be reviewed in light of certain rules that guide in interpreting the intent of the Legislature: “when the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it.” *Cirac v. Lander County*, 95 Nev. 723, 729, 602 P.2d 1012, 1015 (1979) (quoting *State ex rel. Hess v. Washoe County*, 6 Nev. 104, 107 (1870)). “It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act.” *Del Papa v. Bd. of Regents of U. and Community College Sys. of Nev.*, 114 Nev. 388, 392, 956 P.2d 770, 774 (1998) (citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)). Thus, words within a statute must not be read in isolation, and statutes must be construed to give meaning to all of their parts and language within the context of the purpose of the legislation. See *Bd. of County Comm’rs of the County of Clark v. CMC of Nev., Inc.*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. *Id.* In addition, the title, subject matter, and the policy to be effectuated may be used in statutory construction. *Banegas v. State Indus. Ins. System*, 117 Nev. 222, 230, 19 P.3d 245, 250 (2001); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 366, 989 P.2d 870, 878 (1999). When the entire subject matter and the policy of the law are considered, the interpretation should always be construed so as to avoid an absurd result. *Banegas*, 117 Nev. at 231, (quoting *Welfare Div. of State Dep’t of Health v. Washoe Cty. Welfare Dept.*, 88 Nev. at 637-38, 503 P.2d at 458–59) (additional citations omitted)).

Nevada law is clear that the military staff of the Governor may consist of not more than two Assistant Adjutants General. NRS 412.042(1). To that end, the Adjutant General is only statutorily authorized to appoint two Assistant Adjutants General, one each from the Nevada Army National Guard and the Nevada Air National Guard. NRS 412.054(1).

The plain language of NRS 412.054(2) effectively sets forth two requirements for an individual to be eligible for appointment as an Assistant Adjutant General. First, an individual must be an officer of the Nevada National Guard, federally recognized in the grade of lieutenant colonel or higher. Nevada law defines an “Officer” as a commissioned or warrant officer. NRS 412.018.² Second, the individual must have completed at least six years’ service in the Nevada National Guard as a federally

² Commissioned and warrant officers are addressed further in NRS 412.156–412.186; however, there is no years of service requirement found in these statutes similar to that contained in NRS 412.054.

recognized officer, three years of which must be immediately before the appointment. Here, both eligibility requirements are preceded by the introductory phrase "[t]o be eligible for appointment to the office of Assistant Adjutant General . . .", which indicates that only an individual appointed to the position of Assistant Adjutant General need meet the years of service requirement found in NRS 412.054(2). See *Webb v. Smart Document Solutions, LLC.*, 499 F.3d 1078, 1084 (9th Cir. 2007) ("The canon of statutory construction *expressio unius est exclusio alterius* . . . creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions . . ."). Thus, an officer not being appointed as an Assistant Adjutant General, including a Commander of the Army Guard, is not subject to the eligibility requirements found in the statute.

Further, the title of NRS 412.054, "Assistant Adjutants General," confirms that the statute is intended to apply to that position. Similarly, the subject matter of the statute addresses Assistant Adjutants General, including the number of appointments that can be made, eligibility requirements and duties. The complete absence of any reference to Commander or a general officer who is not appointed as an Assistant Adjutant General reinforces the conclusion that the statute only applies to Assistant Adjutants General.


The plain language, title and subject matter of NRS 412.054 confirm that only an officer appointed to the position of Assistant Adjutant General is subject to the eligibility requirements set forth in the statute. Thus, a general officer who may be appointed to serve as the Commander of the Army Guard is not subject to the eligibility requirements, including the years of service requirement in NRS 412.054.

CONCLUSION

A general officer appointed as a Commander and not an Assistant Adjutant General is not required to have six years service in the Nevada National Guard, three of which must be immediately before his appointment pursuant to NRS 412.054. Rather, only an officer appointed to one of the two Assistant Adjutant General positions is subject to the eligibility requirements set forth in NRS 412.054.

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November 18, 2010

OPINION NO. 2010-19

PUBLIC WORKS BOARD, CONFLICT OF INTEREST, CONTACTS: If the sources of supply are limited, the general contractor may contract with SPWB on low bid projects without a member violating NRS 281.230.

Robert Thorniley, Chairman
State Public Works Board
1830 East Sahara, Suite 204
Las Vegas, Nevada 89104

Dear Mr. Thorniley:

You have requested an opinion from this Office regarding whether the State Public Works Board (SPWB) or one of its members would be in violation of any provision of NRS Chapter 281 if the construction company employing that member was awarded a contract by the SPWB for a capital improvement project.

BACKGROUND

According to the information provided to this Office, a member of the State Public Works Board (Member) is currently employed by a company engaged in the business of a general contractor (Company). The Company wishes to contract with the State of Nevada to construct public works projects. You requested an opinion concerning whether the Member would be in violation of any of the provisions of NRS Chapter 281, should the Company contract with the SPWB.

The Member was appointed to the SPWB on December 2, 2007. Both at that time and currently, the Member is employed by the Company as Vice President in charge of the Building Division. The Member reports directly to the president of the Company. There are two other individuals who are employed as vice presidents who report directly to the president. The Member does not serve on the board of directors.

The Member receives compensation in the form of an annual salary plus an annual bonus. Prior to January 1, 2009, he had no ownership interest in the Company, but at that time obtained a one percent interest. If a project involves a vertical building, the Member would potentially be involved in the oversight of the project.

The SPWB has received funding from the Legislature for its 2009 Capital Improvement Program (CIP). The 2009 CIP includes both maintenance and new construction projects. The Company intends to submit bids on one or more projects.

Your request for an opinion is best addressed by answering the following questions: (1) Whether the SPWB members are subject to the conflict of interest statutes in NRS Chapter 281; (2) Whether Member is a "principal" of the Company who is prohibited from being interested in contracts with the SPWB pursuant to NRS 281.221; and (3) Whether Member would be in violation of NRS 281.230 if Company entered into a contract with SPWB.

QUESTION ONE

Whether SPWB members are public or state officers who are subject to the conflict of interest statutes in NRS Chapter 281?

ANALYSIS

NRS Chapter 281 places various prohibitions on state and public officers regarding conflicts of interest, employment of relatives, and other ethics matters. NRS 281.005(1) defines "public officer" as:

[A] person elected or appointed to a position which:

(a) Is established by the Constitution or a statute of this State, 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.

NRS 281.005(1).

In this case, it is clear that Member is a public officer. The SPWB was created by statute in NRS Chapter 341. NRS 341.020 provides that the Board consist of seven members who are appointed by either the Governor, the Speaker of the Assembly, or the Majority Leader of the Senate. Accordingly, Member holds an appointive position established by statute, meeting the first part of the definition of "public officer" in NRS 281.005.

Concerning the second half the definition in NRS 281.005, this Office has previously discussed the term: "Involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty." In 1973, Opinion No. 143, the Attorney General explained:

The exercise of these powers is of a continuous nature for the boards have the authority to exercise their enumerated powers until such time as the boards are discontinued under the provisions of the various chapters of the Nevada Revised Statutes. Until that time their existence and powers are of an uninterrupted nature.

Op. Nev. Att'y Gen. No. 143 (September 18, 1973).

The SPWB's statutes give it certain powers and authority to oversee construction on State land, and this authority is continuous and of indefinite duration. The Board is therefore part of the regular and permanent administration of government. Accordingly, the Board's members are "public officers" as defined in NRS 281.005.

"State officers" are further defined as those public officers who receive their commissions from the Governor pursuant to NRS 281.020 or are entitled to receive expenses allowed for State employees or are compensated from the State Treasury. See Op. Nev. Att'y Gen. No. 218 (September 20, 1977). SPWB members may receive a salary of up to \$80 per day, and are also entitled to per diem expenses as allowed for State employees. NRS 341.050. Member is therefore a "state officer" as well as a public officer.

CONCLUSION TO QUESTION ONE

Members of the SPWB are both "public officers" and "state officers" for purposes of NRS Chapter 281, and therefore are subject to the statutes prohibiting conflicts of interest in contracting with the State.

QUESTION TWO

Whether Member is a "principal" of the Company who is prohibited from being interested in contracts with the SPWB pursuant to NRS 281.221?

ANALYSIS

NRS 281.221(1) provides:

1. Except as otherwise provided in this section, it is unlawful for any state officer who is not a member of the Legislature to:

a. *Become a contractor* under any contract or order for supplies or other kind of contract authorized by or for the State or any of its departments, or the Legislature or either of its houses, *or to be interested*, directly or indirectly, *as principal*, in any kind of contract so authorized.

b. Be interested in any contract made by him or to be a purchaser or interested in any purchase under a sale made by him in the discharge of his official duties.

NRS 281.221(1) (emphasis added).

In this case, it is plain that Member would not become a contractor; the Company would be the contractor. However, the statute also prohibits a State officer from being interested, directly or indirectly, "as principal" in a contract. Because Member is employed by the Company, a court could hold that he would be at least indirectly interested in any contract made between the State and the Company. However, the statute only prohibits such contracts if Member is interested "as principal." Therefore it is necessary to determine whether, based on the facts presented in this case, Member's relationship to the Company is that of a principal.

In Nev. Op. Att'y Gen. No. 71-16 (March 2, 1971), this Office opined that a State officer who was also a director, shareholder, and vice president of a private company was not a "principal" for purposes of NRS 281.221. The Attorney General noted that "principal is defined in the law as being 'the source of authority or right.'" *Id.* (citing BLACK'S LAW DICTIONARY, 4th ed. 1968). Further, the opinion states: "The relationship of a person to a corporation is determined by the incidents of the relationship as they actually exist." *Id.*

Opinion No. 71-16 dealt with a former Lt. Governor who was a director, vice president, and shareholder of a private company. He was elected to the board of directors and made a vice president in 1960. Through stock purchases in 1959, 1963, 1965, and 1967, the Lt. Governor owned a .016 percent share of the total issue. In December 1966, the Lt. Governor submitted his resignation, but the company did not act on it. The company contracted with the Colorado River Commission (CRC) to purchase certain land along the river for development. Serious negotiations between the CRC and the company occurred in 1966, the contract was drafted in early 1967, and it was finalized on May 4, 1967. The Lt. Governor did not become Lt. Governor until January 1967. In October 1967, he attended a board meeting to insist on his resignation. That was the only board meeting he attended since 1965.

Additionally, the facts in Opinion No. 71-16 state:

The Lt. Governor did not participate in the negotiations with the CRC in any manner or form, directly or indirectly, nor was he present at any of the meetings with the CRC. He did not exert any influence or participate either directly or indirectly in any of the policy decisions by the Corporation or CRC concerning the transactions in questions; nor did he contact any state official or agent or member of the CRC concerning any aspect of the transaction, nor has he received any compensation or profit in any form for any services to the Corporation.

Op. Nev. Att'y Gen. No. 71-16 (March 2, 1971).

Based on these facts, the Attorney General concluded that "the Lt. Governor occupied his corporate position in name only," did not negotiate or execute the contract, and therefore was not interested "as principal" in the contract. *Id.*

Like the Lt. Governor in that opinion, Member owns only a very small percentage of the company's equity. The Lt. Governor was on the board of directors, but he resigned that position and did not participate in that capacity for two years prior to the contract being made. In this case, Member is not a member of the board of directors of the Company.

However, there are also distinctions that must be noted. First, unlike the Lt. Governor, Member does receive compensation for his services to the Company. Second, he could possibly have some personal involvement in managing projects that include vertical buildings. Finally, Member is listed as an "employee qualified individual" on the Company's contractor's license.

Regarding this latter point, some clarification is necessary, as this issue is likely to arise only where contractors licensed pursuant to NRS Chapter 624 are concerned. According to NRS 624.260, for a business organization to be licensed as a contractor, it must be represented by a "qualified individual;" that is, a natural person who is a bona fide member or employee of the firm who qualifies in terms of the necessary experience and skills to be a contractor.

Prime contractors must be prequalified to bid on public works projects. NRS 338.1375. In order to prequalify, a potential bidder must submit an application detailing, *inter alia*, the experience, skills, and qualifications of the firm's principal personnel. NAC 338.240(b). "Principal personnel" is defined in NAC 338.220 as "the owner, partner and any corporate officer *and any qualified employee* listed on the contractor's license of the prime contractor." NAC 338.220 (emphasis added).

Of course, the term "principal personnel" is defined in NAC Chapter 338 for the purpose of prequalifying bidders, not for the purpose of determining who would be interested in a contract "as principal" under the ethics laws, NRS Chapter 281. However, the reason for inquiring about principal personnel is to ensure that the people who are actually involved in the work possess sufficient skill to deliver the project. See Hearing on A.B. 298 Before the Senate Committee on Government Affairs, 1999 Leg., 70th Sess. 6 (May 14, 1999) (testimony on A.B. 298 relating to ensuring that contractors have qualified personnel, in addition to sufficient licenses and financial capacity).

The fact that Member meets the definition of "principal personnel" for prequalification of bidders is one of several factors to be considered; it is not determinative by itself, since that term is used in a different chapter, for a different purpose. But it is indicative of Member's relationship to the Company. As stated in Op. Nev. Att'y Gen. No. 71-16, "The relationship of a person to a corporation is determined by the incidents of the relationship as they actually exist." Op. Nev. Att'y Gen. No. 71-16 (March 2, 1971).

To summarize, in some respects, Member's situation is similar to that of the Lt. Governor in Nev. Op. Att'y Gen. No 71-16, where this Office concluded that the Lt. Governor held his corporate position "in name only." Member owns only a very small percentage of the company's equity, and he is not a member of board of directors.

However, unlike the Lt. Governor in Opinion 71-16, Member is an active employee of the Company and receives compensation for his services. He could possibly have some personal involvement in managing projects that include vertical buildings. Although not a member of the board of directors, as a senior vice president,

he is a member of upper management. Finally, Member is listed as an employee qualified individual on the Company's contractor's license.

Nevertheless, the prohibition in NRS 281.221 only applies when a state officer is interested "as principal." "Words in a statute should be given their plain meaning unless this violates the spirit of the act."¹ *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. ___, ___, 215 P.3d 705, 708 (2009) (internal citations omitted). Typically, a principal is more than just an employee, even a high-ranking employee. As stated in Opinion No. 71-16, a principal is the source of authority. Op Nev. Att'y Gen. No. 71-16 (March 2, 1971). A principal is defined also as: "a person who has controlling authority or is in a leading position: as [] a chief or head man or woman." MERRIAM-WEBSTER ONLINE DICTIONARY (2010).

Although Member is an active, high-ranking employee of the Company, since he is not a member of the board of directors and his ownership interest in the company is very small, it is not apparent that he "has controlling authority" of the Company. It is therefore our opinion that he would not be interested "as principal" in any contract made between the Company and the SPWB. Therefore a contract between the Company and the State would not place Member in violation of NRS 281.221.

CONCLUSION TO QUESTION TWO

Member is not a principal of the Company because he is not a director and his ownership interest is very small; therefore, he is not prohibited by NRS 281.221 from being interested in a contract made between the Company and SPWB.

QUESTION THREE

Whether Member would be in violation of NRS 281.230 if Company entered into a contract with SPWB?

ANALYSIS

Another statute, NRS 281.230, also controls contracting activities by public officers and employees. It provides that State officers (among others) "shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind resulting from any contract or other significant transaction in

¹ It is not apparent that the spirit of NRS 281.221 is to prohibit *all* employees' interests in public contracts, including the interests of employees who do not have any controlling ownership interest in the company, especially considering the existence of additional conflict of interest provisions in NRS 281.230, discussed *infra*.

which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way directly interested or affected." NRS 281.230(1). Violation of the statute is a criminal offense. NRS 281.230(5).

NRS 281.230(1) is broader than NRS 281.221 because it does not limit the public officer's interest to that of a principal. Instead, it prohibits a public officer from receiving "any commission, personal profit or compensation of any kind resulting from" a contract in which the employing public agency is interested or affected.

In this case, it is possible that Member, as a management-level employee of the Company, would receive compensation or personal profit as a result of a contract made between the Company and SPWB. However, NRS 281.230 does contain some exceptions to its general prohibition on such contracts. Specifically, NRS 281.230(4) provides:

A public officer or employee . . . may bid on or enter into a contract with a governmental agency if the contracting process is controlled by rules of open competitive bidding, the sources of supply are limited, he has not taken part in developing the contract plans or specifications and he will not be personally involved in opening, considering or accepting offers. . . .

NRS 281.230(4).

Accordingly, when all these conditions are met, it is permissible for a public officer to receive a commission, personal profit or compensation resulting from a contract with a public body. It should be noted that the public officer must still disclose his interest and must abstain from advocating for or voting on approval of the contract. NRS 281.230(4); *see also* NRS 281A.420.

You have inquired about two projects specifically: the High Desert Erosion Control Project (project number 07-M37(A)) and the Readiness Center Project (09-C14). The former is a traditional low-bid project, while the latter project is expected to be performed using a Construction Manager at Risk (CMAR). Since the method for letting these kinds of contracts differ, they will each be analyzed in turn to determine whether they meet the following criteria:

1. The contracting process is controlled by rules of open competitive bidding;
2. The sources of supply are limited;

3. The public officer has not taken part in developing the contract plans or specifications; and,
4. He will not be personally involved in opening, considering or accepting offers.

NRS 281.230(4).

A. LOW BID PROJECTS

1. Open and Competitive Bidding

In a traditional or low bid project, the bidding procedures are governed by NRS Chapter 338. This chapter requires open and competitive bidding for projects over \$100,000. See NRS 341.148; NRS 338.1385(1). The project must be advertised, and the plans and specifications made available to bidders and other interested persons. NRS 338.1385(4). The project must be awarded to the lowest responsive and responsible bidder. NRS 338.1385(5). Additionally, NRS 338.140 generally prohibits governing bodies from drafting plans and specifications in such a way as to limit the bidding to one specific concern. Accordingly, contracts for low bid projects like the High Desert Erosion Control Project are "controlled by rules of open competitive bidding," and therefore satisfy that requirement of NRS 281.230(4).

2. The Sources of Supply are Limited

NRS 281.230(4) requires that the sources of supply must be limited. The Legislature has not defined when sources of supply are limited. Obviously, where there is only one source of supply, this requirement will be met. Conversely, where there are several qualified bidders, the sources of supply are not limited. *Compare*, Abstract Of Advisory Opinion No. 99-27, Nevada Commission on Ethics (May 8, 2000) (stating that: "local competition for type B widget manufacturing exists and therefore the sources of supply are not limited"); Opinion No. 91-12, Nevada Commission on Ethics (August 7, 1992) (sources of supply are not limited where 13-14 firms responded to the solicitation, and four were competitively "short-listed");² *with*, Opinion No. 02-08, Nevada Commission on Ethics (August 15, 2002) (where there are only two businesses that provide the needed service, the sources of supply are limited).

Whether the sources of supply are limited will depend on the facts of each case. If there are several qualified bidders for a project, this indicates that the sources of supply are not limited. We recognize that this case-by-case determination will make it

² Opinion 91-12 dealt with NRS 281.481, not NRS 281.230. However, at the time of that opinion, NRS 281.481 contained an exception similar to that in NRS 281.230(4).

difficult, if not impossible, to determine whether the sources of supply are limited until after a bid opening, since that is the earliest time that it can be ascertained how many qualified and responsive bidders there are. However, NRS 281.230(4) states that a public officer "may bid on or enter into a contract" if all four of the criteria are met.

As explained in a previous opinion, a conviction for violation of NRS 281.230 would require some type of criminal or corrupt intent. Op. Nev. Att'y Gen. No. 71-16 (March 2, 1971). Assuming that the other requirements of the statute are satisfied, it is the opinion of this Office that a public officer generally will not violate NRS 281.230 by bidding on a low-bid public works project, since it is unlikely that the officer will be able to know at the time of bidding whether the sources of supply are limited.

3. Developing Contract Plans and Specifications

To apply the exception in NRS 281.230, the public officer must not have been involved in developing the contract plans and specifications. NRS 281.230(4). The plans and specifications are prepared by SPWB staff in cooperation with members of the using agency. The Manager of SPWB, not the Board, has final authority to accept the architecture of all buildings, plans, designs, and types of construction. NRS 341.100(8)(h). Therefore a SPWB member would not be personally involved in developing the plans and specifications.

4. Opening, Considering, and Accepting Offers

Finally, the public officer must not be personally involved in the opening, considering, or accepting of offers. NRS 281.230(4). The SPWB staff handles bid openings as part of the day-to-day business of the SPWB. See NRS 341.100(8)(b) (Manager is responsible for the daily business of the Board). For low bid projects, contracts are awarded by staff, not by the Board. NAC 341.030(2)(g). In the unusual situation that a contract came before the board for approval, Member could comply with NRS 281.230(4) by disclosing any interest he may have and abstaining from voting.

5. Conclusion Regarding Low Bid Contracts

This Office concludes that low bid public works contracts are controlled by the rules of open, competitive bidding, and that SPWB members generally will not be personally involved in developing the project plans or specifications, nor in opening, considering or accepting offers. If the sources of supply are limited, Member would not violate NRS 281.230 if Company is awarded a low bid contract by SPWB.

B. CONSTRUCTION MANAGER AT RISK PROJECTS (CMAR)

Generally, the role and purpose of the construction manager at risk is to assist in both construction and preconstruction of the project. This includes design of the project, giving cost estimates, coordinating construction, and contracting with trade contractors. See Bruner & O'Conner on Construction Law, § 6:13 (2009). Usually pricing is on the basis of a guaranteed maximum price. *Id.*

As discussed above, it appears that Member would be in violation of NRS 281.230 if the Company formed a contract with SPWB, unless the exception contained in NRS 281.230 applies. Since CMAR contracts differ from low bid contracts, they must be separately analyzed to determine if the exception applies.

1. Open and Competitive Bidding

The process for selecting a CMAR is described in NRS 338.169 to 338.1696, inclusive.³ NRS 338.169 authorizes public bodies to use a CMAR for a public work. A CMAR must be a licensed contractor and, for state projects, must be prequalified to bid pursuant to NRS 338.1379. NRS 338.1691. The statutes require separate contracts for preconstruction services and construction. NRS 338.169. Preconstruction services include:

1. Assisting the public body in determining whether scheduling or design problems exist that would delay the construction of the public work;
2. Estimating the cost of the labor and material for the public work; and

³ The State Public Works Board has independent authority to contract with CMARs pursuant to NRS 341.161. The CMAR method provided in NRS 338.169–338.1696 was added in 2007 by S.B. 201. It applies to “public bodies,” including the SPWB. During the 2009 legislative session, A.B. 174 temporarily exempted the SPWB from the CMAR process described in NRS Chapter 338. This allowed the SPWB to use its “old” CMAR selection process under Chapter 341 for capital improvement projects in the 2009-2010 biennium. This was necessary to comply with federal requirements in anticipation of receiving economic stimulus funds through the American Recovery and Reinvestment Act of 2009. The exemption will sunset on June 30, 2011. This Office is informed that almost all CMAR projects have already been awarded for the 2009-2010 capital improvement program, and none of them were awarded to the Company. The one remaining project is not one about which you have inquired. Since the exemption from NRS 338.169–338.1696 for SPWB expires in 2011, this opinion will analyze the CMAR selection process under those statutes.

3. Assisting the public body in determining whether the public work can be constructed within the public body's budget.

Id.

Under the CMAR selection process in NRS Chapter 338, CMARs are selected first according to qualifications, skills, and experience. NRS 338.1692–1693. A panel appointed by the public body ranks applicant's statements of qualifications, and then ranks their final proposals. NRS 338.1693–1694. Only after that process does the top candidate enter into negotiations with the public body concerning price. NRS 338.1695. This process closely resembles the process for selecting an architect, engineer, or other consultant. See NAC 341.136 (describing process of ranking and short-listing consultants, including architects, engineers, and construction managers at risk). Obtaining the services of an architect or engineer is a process that is generally regarded as not suited to open competitive bidding, and is therefore exempt from the usual competitive selection process for state purchasing. NAC 333.150(2).

Since the process of selecting a construction manager at risk so closely resembles the process for selecting an architect or engineer, and is based primarily on the CMAR's qualifications and experience, rather than on a fee or price, it appears that the selection process is not controlled by the rules of open competitive bidding.

2. Conclusion Regarding CMAR Contracts

A project delivered using a CMAR does not meet the first requirement of NRS 281.230(4), that the selection process be controlled by the rules of open, competitive bidding. Therefore a public officer would be prohibited from bidding on or entering into such a contract if he would receive any kind of compensation, commission, or personal profit as a result of the contract. Since this first requirement is not satisfied, it is unnecessary to address the remaining requirements of NRS 281.230(4).

Robert Thorniley
November 18, 2010
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CONCLUSION TO QUESTION THREE

If the sources of supply are limited, the Company may contract with SPWB on low bid projects without Member violating NRS 281.230. However, Member would violate NRS 281.230 if Company contracted with SPWB as a construction manager at risk, because the CMAR selection process is not controlled by the rules of open competitive bidding.

Sincerely,

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December 9, 2010

OPINION NO. 2010-20

LABOR COMMISSIONER; WAGES:
A.B. 522 does not create a claim for back wages that can be enforced by the Labor Commissioner.

Michael Tanchek
Labor Commissioner
675 Fairview Drive, Suite 226
Carson City, NV 89701

Dear Mr. Tanchek:

You have asked for an opinion regarding the Labor Commissioner's ability to undertake legal action to recover underpaid wages pursuant to Act of May 30, 2009, ch. 377, §§ 1-110, 2009 Nev. Stat. 2001 (A.B. 522).

QUESTION

Whether certain provisions of A.B. 522 create a claim for back wages that can be enforced by the Labor Commissioner?

BACKGROUND

A.B. 522 Sec. 28 authorizes the Nevada Energy Commissioner to grant partial abatements of property taxes and local sales and use taxes to certain facilities for the generation of heat from solar renewable energy, wholesale facilities for the generation of electricity from renewable energy, facilities for the generation of electricity from geothermal resources, and facilities for the transmission of electricity produced from renewable energy under certain circumstances pursuant to changes to NRS 701A.

ANALYSIS

The statutory language of A.B. 522 Sec. 28 in question is as follows:

3. Except as otherwise provided in subsection 4, the Commissioner shall approve an application for a partial abatement pursuant to this section if the Commissioner makes the following determinations:

....
(d) If the facility will be located in a county whose population is 100,000 or more or a city whose population is 60,000 or more, the facility meets the following requirements:

....
(3) The average hourly wage that will be paid by the facility to its employees in this State is at least 110 percent of the average statewide hourly wage, excluding management and administrative employees, as established by the Employment Security Division of the Department of Employment, Training and Rehabilitation on July 1 of each fiscal year; and

(4) The average hourly wage of the employees working on the construction of the facility will be at least 150 percent of the average statewide hourly wage, excluding management and administrative employees, as established by the Employment Security Division of the Department of Employment, Training and Rehabilitation on July 1 of each fiscal year and:

....
(e) If the facility will be located in a county whose population is less than 100,000 or a city whose population is less than 60,000, the facility meets the following requirements:

....

(3) The average hourly wage that will be paid by the facility to its employees in this State is at least 110 percent of the average statewide hourly wage, excluding management and administrative employees, as established by the Employment Security Division of the Department of Employment, Training and Rehabilitation on July 1 of each fiscal year; and

(4) The average hourly wage of the employees working on the construction of the facility will be at least 150 percent of the average statewide hourly wage, excluding management and administrative employees, as established by the Employment Security Division of the Department of Employment, Training and Rehabilitation on July 1 of each fiscal year and:

....

Act of May 30, 2009, ch. 377, §28(3)(d), 2009 Nev. Stat. 2004.

The above referenced section sets forth the wage requirements necessary for eligibility for the abatement. The wage requirements are in addition to other requirements necessary to be set forth in an executed agreement between the applicant and the Nevada Energy Commissioner.

A.B. 522 Sec. 28(9) sets forth the procedure to be followed in the event of a determination that the subject facility has ceased to meet the eligibility requirements.

9. A partial abatement approved by the [Nevada Energy] Commissioner pursuant to this section terminates upon any determination by the Commissioner that the facility has ceased to meet any eligibility requirements for the abatement. The Commissioner shall provide notice and a reasonable opportunity to cure any noncompliance issues before making a determination that the facility has ceased to meet those requirements. The Commissioner shall immediately provide notice of each determination of termination to the Director, and the Director shall immediately provide a copy of the notice to:

- (a) The Commissioner, who shall immediately notify each affected local government of the determination;
- (b) The board of county commissioners;

- (c) The county assessor;
- (d) The county treasurer; and
- (e) The Commission on Economic Development.

Act of May 30, 2009, ch. 377, §28(a), 2009 Nev. Stat. 2007.

The first rule of statutory construction is that “[w]here a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature’s intent.” *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). Here, the statute is clear on its face. If the facility/employer fails to meet the eligibility requirements, including minimum wage requirements, then the partial abatement terminates after notice and a reasonable opportunity to cure the noncompliance. Termination of the partial abatements is the only result of non-compliance listed in the statute.

The goal of statutory interpretation is to effectuate the Legislature’s intent. *Savage v. Third Jud. Dist. Ct.*, 125 Nev. ____, ____, 200 P.3d 77, 82 (2009). If a statute’s language is clear and unambiguous, the court will apply its plain language. *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007). Plain meaning may be ascertained by examining the context and language of the statute as a whole. *Redl v. Sec’y of State*, 120 Nev. 75, 78, 85 P.3d 797, 799 (2004); *see also McKay*, 102 Nev. at 650-51, 730 P.2d at 443. Since the language of A.B. 522 is to be included in NRS Chapter 701A, the existing language of the Chapter must be examined.

NRS Chapter 701A is the Green Buildings statute that authorizes partial property tax abatements for buildings or structures that meet certain standards under the Green Building Rating System. This statute contains termination language similar to that contained in A.B. 522.

NRS 701A.110 states in part:

4. The partial abatement:

....

- (c) Terminates upon any determination by the Director that the building or other structure has ceased to meet the equivalent of the silver level or higher. The Director shall provide notice and a reasonable opportunity to cure any noncompliance issues before making a determination that the building or other structure has ceased to meet that standard.

The Director shall immediately provide notice of each determination of termination to the:

- (1) Department of Taxation, who shall immediately notify each affected local government of the determination;
- (2) County assessor;
- (3) County treasurer; and
- (4) Commission on Economic Development.

NRS 701A.110(4)(c). Again, termination of the partial abatement is the only statutorily specified result of non-compliance. There is no statutory language creating a claim for back wages that can be enforced by the Labor Commissioner.

CONCLUSION

A.B. 522 does not create a claim for back wages that can be enforced by the Labor Commissioner. Pursuant to the statutory language of A.B. 522 and NRS Chapter 701A, failure to meet the statutory requirements results in the termination of the partial abatement after notice and a reasonable opportunity to cure the non-compliance.

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