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December 21, 2018

OPINION NO. 2018-07

OFFICE OF THE GOVERNOR; TITLE
54 BOARDS AND COMMISSIONS;
STATUTORY INTERPRETATION:

Employees of fee-funded boards and commissions are persons employed by the State of Nevada for purposes of NRS 281.123, and unless exempted by another statute, any such board or commission must set the salaries of its staff in compliance with the salary limitation set forth in NRS 281.123.

The Honorable Brian Sandoval
Governor, State of Nevada
State Capitol Building
101 N. Carson Street
Carson City, NV 89701

Dear Governor Sandoval:

By letter dated June 29, 2018, you have requested an opinion from the Office of the Attorney General, pursuant to Nevada Revised Statute (NRS) 228.150, regarding the applicability of NRS 281.123 to fee-funded boards and commissions of the State of Nevada. Additionally, you inquire as to the Governor's authority to require the members of such a board or commission to comply with NRS 281.123.

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INTRODUCTION

A fee-funded board or commission is any board or commission whose members are appointed by the Governor to serve a specific term of office as defined by statute, and whose regulatory activities are funded primarily or exclusively by fees or assessments paid by persons working within a regulated occupation or industry. The vast majority of fee-funded boards and commissions are governed by the provisions of NRS Title 54, which encompasses NRS Chapters 622 through 656A under the general heading “Professions, Occupations and Businesses.”

NRS Title 54 extends regulatory authority to myriad licensing boards and commissions, giving them the power to license and discipline architects, accountants, construction contractors, medical professionals, cosmetologists, private investigators, court reporters, and many other businesses, occupations and professions. As a legislatively created “regulatory body” with “the authority to regulate an occupation or profession” within its purview, a fee-funded board or commission derives its authority from, and owes its existence to, the State of Nevada. *See* NRS 622.060; NRS 622.080. Accordingly, the regulatory activities of fee-funded boards and commissions are inextricably tied to State government both financially and administratively.

It has been argued that certain fee-funded boards and commissions are exempted from NRS 281.123 because their staffers do not participate in the Public Employees’ Retirement System, *see* NRS 286.290 to NRS 286.297, inclusive, and because they are neither in the “classified” nor the “unclassified” service of the State, *see* NRS 284.139 to NRS 284.172, inclusive. As discussed below, those individuals are nonetheless “persons employed by the State” within the meaning of NRS 281.123.

To determine whether the staffers to any given board or commission are possibly exempted from the provisions of NRS 281.123, it would be necessary to analyze the specific statutes that govern that board or commission. A specific analysis of the laws governing any particular board or commission is beyond the scope of your opinion request. Accordingly, this opinion addresses only the more general question of whether a fee-funded board or commission is subject to NRS 281.123 in the absence of an express or implied legislative grant of authority to set the salary for any position on its staff at a level which exceeds 95 percent of the salary for the office of Governor.

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QUESTION ONE

Whether the fee-funded boards and commissions of the State of Nevada are required to comply with the provisions of NRS 281.123?

SUMMARY CONCLUSION

NRS 281.123 limits the maximum salary payable to persons employed by the State or an agency of the State. The staffers to a fee-funded board or commission of the State are employees of the State for purposes of NRS 281.123. Unless exempted by a separate provision of law governing the compensation or employment qualifications for a specific position, a fee-funded board or commission must comply with the salary limitation set forth in NRS 281.123.

ANALYSIS

NRS 281.123(1) provides that “the salary of a person employed by the State or any agency of the State must not exceed 95 percent of the salary for the office of Governor during the same period.” Unless otherwise provided by another statute referring to a specific position, this salary limitation applies to persons who fall within either of two employment categories: (1) persons employed by the State; and (2) persons employed by any agency of the State. Because the statute draws a distinction between agency employees and other kinds of employees, the threshold question is whether employees of fee-funded boards and commissions are persons employed by the State, persons employed by an agency of the State, or persons employed by some entity or organization other than the State or an agency of the State.

When a statute is clear on its face, a court is required to apply its plain meaning. *Pub. Employees’ Benefits Program v. Las Vegas Metro. Police Dep’t*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008). Alternatively, if a statute adopts a “term of art”—such as a word with a well-established legal or technical meaning when it appears in a particular context—that meaning should prevail over other interpretations. *Beazer Homes Nevada, Inc., v. Eighth Judicial District Court*, 120 Nev. 575, 587, 97 P.3d 1132, 1140 (2004). Likewise, when a term is specifically defined by statute, the statutory definition prevails over the ordinary meaning of the term if there is a conflict between the statutory definition and the ordinary meaning. *Boulder Oaks*

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Community Ass'n v. B & J Andrews Enterprises, LLC, 125 Nev. 397, 406, 215 P.3d 27, 32 (2009).

NRS 281.123 adopts neither a term of art nor a statutorily defined term to narrow the scope of its application to specified employment classes or categories. The statute applies in general terms to any person who is “employed” by the State or an agency of the State. And since the meaning of “employed” is well-settled and commonly understood, its dictionary definition supplies the appropriate standard for interpreting the salary limitation in NRS 281.123. *See State v. Hughes*, 127 Nev. 626, 628-29, 261 P.3d 1067, 1069 (2011). To employ is “to give work (to someone) and pay them for it.” NEW OXFORD AMERICAN DICTIONARY 569 (3d. ed. 2010). As a past participle, the word refers to “the state or fact of being employed for wages or salary.” *Id.* Accordingly, a person is employed by the State if that person performs works and provides labor in exchange for a salary or wages paid by the State.

Furthermore, the text of NRS 281.123 contains no suggestion or indication that a person’s status as a “classified” or “unclassified” employee is relevant for determining whether that person is employed by the State. Nor does the statute suggest that a person’s non-participation in the Public Employees Retirement System (PERS) negates what would otherwise be an employment relationship between the person and the State. Although related to one another, the question of whether a person is employed by the State is distinct from the question of whether a person enjoys specific terms, conditions or benefits of employment with the State. Even though certain terms, conditions and benefits of employment may not be uniformly available or applicable to all persons employed by the State, such a lack of uniformity does not bear directly upon the existence or non-existence of an employment relationship. This is perhaps best exemplified by the distinction between classified and unclassified employment, discussed below, whereby persons within the former category generally enjoy greater job security, while persons within the latter category generally enjoy greater flexibility to deviate from scheduled working hours. Despite these differences, it is beyond dispute that both sets of employees have an employment relationship with the State.

NRS Chapter 284, which establishes the State Personnel System, sets forth the terms and conditions of employment for persons deemed by statute to be in the “classified” or “unclassified” service of the State. *See* NRS 284.139 to NRS 284.172, inclusive. But these categories are not comprehensive of all State employees. NRS 284.022 recognizes as much by granting to the

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Division of Human Resource Management the authority to include other types of employees within the State Personnel System. *See also* NAC 284.070 (defining the term “nonclassified employee”). Although the persons who staff fee-funded boards and commissions are not subject to the same terms and conditions of employment as are persons within the State Personnel System, *see* NRS 284.013(1)(b), they are compensated from the funds that the Nevada Legislature, a branch of State government, has empowered them to collect in furtherance of their regulatory activities, *see, e.g.*, NRS 624.140. In short, they receive a salary or wages from the State in exchange for work performed on the State’s behalf. This is indicative of an employment relationship with the State.

With respect to retirement benefits, NRS Chapter 286 requires certain “public employers” to enroll their employees in PERS, *see* NRS 286.290 and NRS 286.293, while excluding others from that requirement, *see* NRS 286.297. Fee-funded boards and commissions are “public employers” as defined by NRS 286.070, and are thus required to enroll their staffers in PERS in accordance with NRS 286.293. However, at least two fee-funded boards do not participate in PERS because of a historical anomaly. These boards were originally covered by the Old Age and Survivors Insurance (OASI) program authorized by the Federal Social Security Act. *See, e.g.*, Op. Nev. Att’y Gen. No. 63-72 (September 23, 1963); Op. Nev. Att’y Gen. Op. No. 64-148 (June 15, 1964). Because a person may not simultaneously participate in PERS and OASI, the Nevada Legislature enacted legislation in 1955 authorizing the boards’ continuing participation in OASI. *See id.*; *see also* NRS 287.050 to NRS 287.240, inclusive (appearing under the heading “Participation of State and its Political Subdivisions in Federal Old-Age and Survivors’ Insurance”). That the staffers to these boards participate in OASI rather than PERS is not relevant to the inquiry here. It would only be relevant if some Nevada statute prohibited OASI participants from working in the employ of the State, but the applicable statutes are to the contrary. NRS 287.050 states that the very purpose of the 1955 enactment was “to extend to employees of the State and its political subdivisions ... the basic protection accorded to others by the Old-Age and Survivors Insurance Act embodied in the Social Security Act.” Consequently, a person’s participation in PERS is no more indicative of an employment relationship with the State than is a person’s participation in OASI.

In addition to the above points regarding terms, conditions and benefits of employment, it has been argued that a companion statute to NRS

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281.123, specifically NRS 281.1233, provides support for the proposition that the salary limitation in NRS 281.123 is limited in its application to persons who are employed by State agencies receiving distributions from the State General Fund. NRS 281.1233 states, in pertinent part, that “[t]he Interim Finance Committee may approve applications from *agencies of the State* for exceptions to limitations on salaries which are expressed as percentages of salaries paid to another person or authorized for another position.” NRS 281.1233(1) (emphasis added).

In fact, the text of NRS 281.1233 supports the conclusion that fee-funded boards and commissions are indeed subject to the salary limitation in NRS 281.123. More specifically, NRS 281.1233 establishes a procedure for a person employed by an “agency” receiving distributions from the State General Fund to apply to the Interim Finance Committee of the Nevada Legislature for an exemption from the salary limitation. But the statute in no way purports to exempt from that limitation persons who are employed by governmental bodies that receive their funding from sources other than the State General Fund.

As noted above, NRS 281.123 and NRS 281.1233 indicate that “a person employed by any *agency* of the State” is distinguishable from “a person employed by the State”—such that the latter is governed only by NRS 281.123 and not by NRS 281.1233. *See* NRS 281.123(1) (emphasis added). This distinction finds additional support in the well-established canon of statutory construction which holds that a statute should not be construed in a way that renders words or phrases superfluous. *In re Estate of Melton*, 128 Nev. 34, 43, 272 P.3d 668, 674 (2012). To construe the salary limitation as having limited application to certain “agency” employees would render superfluous the language that makes it broadly applicable to “*a person employed by the State or any agency of the State.*” NRS 281.123(1) (emphasis added).

According to NRS 281.1233, a person employed by an “agency” of the State, specifically one that receives funding from the State General Fund, is permitted to apply to the Interim Finance Committee for an exemption from the salary limitation, while a person employed by any other body or entity of the State has no such avenue for obtaining an exemption. In other words, any employee of the State who is not paid from the State General Fund must seek a legislative amendment if the person wishes to be exempted from the salary limitation in NRS 281.123.

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Despite the textual clarity of NRS 281.123 and NRS 281.1233, NRS Chapter 281 does not directly address whether staff to fee-funded boards and commissions are persons employed by the State of Nevada because its provisions do not specifically define, enumerate, or otherwise describe the components and/or attributes of State government. Thus, the necessary inquiry requires a broader analysis of the attributes of fee-funded boards and commissions compared with the attributes of State government generally.

Though fee-funded boards and commissions receive no distributions from the State General Fund, they generate revenue for their regulatory and licensing activities by levying fees and assessments against persons who are made subject to their jurisdiction by way of legislative enactments. In this regard, the source of their revenue is analogous to the tax revenue that the State collects for deposit to the State General Fund.

In light of their power to levy fees and assessments, independent boards and commissions must submit quarterly reports to the State via the Legislative Counsel Bureau. NRS 622.100; *see also* NRS 353.005 (excluding independent boards and commissions from the State Budget Act and participation in the State General Fund). Furthermore, the Department of Administration is responsible for establishing “standards for [their] financial operation and administration.” NRS 622.235. Fee-funded boards and commissions receive no distributions from the State General Fund, but they are subject to financial and administrative oversight by both the legislative and executive departments of the State.

Additionally, fee-funded boards and commissions are mandated to “contribute to the Fund for Insurance Premiums as required by NRS 331.187.” NRS 622.215; *see also* NRS 331.187. This indicates that they bear the same risks and are subject to the same potential liabilities as is the State generally. The Fund for Insurance Premiums, which is commonly referred to as the “State Tort Claims Fund”, is the mechanism by which the State self-insures against potential losses from lawsuits and administrative claims for monetary damages resulting from tortious conduct by employees of the State. Insofar as the State requires fee-funded boards and commissions to pay into the State Tort Claims Fund, it is reasonable to infer that their staffers are employees of the State whose employment-related conduct may be attributed to the State.

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In the context of tort liability and risk management, the provisions of NRS Chapter 41 further establish a nexus between fee-funded boards and commissions and the State. As it relates to the State's obligation to defend and indemnify its employees against claims arising in tort, NRS 41.0307(1)(a) defines "employee" broadly to include "an employee of a ... [p]art-time or full-time board, commission or similar body of the State or a political subdivision of the State which is created by law." Therefore, the persons who staff fee-funded boards and commissions are entitled to be defended and indemnified by the State according to the same terms as all other employees of the State. *See* NRS 41.03375 to NRS 41.035, inclusive.

With respect to their regulatory and licensing activities, fee-funded boards and commissions are required to adhere to the provisions of NRS Chapter 233B, the Nevada Administrative Procedure Act, which is applicable to "all agencies of the Executive Department of the State Government." NRS 233B.020; *see also* NRS 233B.039. In the area of financial administration and debt collection, fee-funded boards and commissions are required to utilize the State Controller, NRS 353C.195 (*see also* NRS 353C.020); they are subject to the provisions of NRS Chapter 333, the State Purchasing Act, NRS 333.020 (*see also, e.g.,* NRS 333.700); and they must conform their administrative processes and procedures to the requirements of the State Administrative Manual (SAM).¹ And like other bodies of State government, including those that receive no distributions from the State General Fund, fee-funded boards and commissions are entitled to use the Office of the Attorney General for legal services. *See* NRS 228.113.

Finally, it should be noted that the Nevada Legislature has, through enabling legislation, empowered fee-funded boards and commissions to fix the salaries of their staffers. *See e.g.* NRS 639.040(2) (the State Board of Pharmacy granted authority to determine the salary of the Executive Secretary); NRS 630.103(2) (enabling the State Board of Medical Examiners to determine the Executive Director's level of compensation); NRS 634.043(1) (the State Chiropractic Physicians' Board provided with the authority to fix the salary of the Executive Director); NRS 640C.200(2) (the salary of the

¹ "The Governor instructs all State executive agencies to comply with the provisions of [the SAM] to promote economy and efficiency in the government of the State of Nevada." NEVADA STATE ADMINISTRATIVE MANUAL (2018), <http://budget.nv.gov/uploadedFiles/budgetnvgov/content/Governance/SAM.pdf> at p. 3, Chapter 0002.

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Executive Director is to be fixed by the State Board of Massage Therapy); NRS 637B.130(3) (granting the State Speech-Language Pathology, Audiology, and Hearing Aid Dispensing Board with authority to determine the Executive Director's compensation). While this means that they have discretion to compensate their staffers at a level they deem to be appropriate, it does not mean that they may disregard the salary limitation in NRS 281.123. Certain other statutes are instructive in this regard.

For example, NRS 286.160 gives PERS Board members the discretion to set the annual salaries of certain PERS employees, but it contains the additional proviso that "[t]he salaries of these employees are *exempt* from the limitations of NRS 281.123". NRS 286.160(2) (emphasis added). As it pertains to the salary of the Executive Officer of the Public Employees' Benefits Program, NRS 287.0424 contains an identical proviso. Unlike NRS 286.160 and NRS 287.0424, the provisions of NRS Title 54 do not explicitly exempt any of the fee-funded boards and commissions from the salary limitation in NRS 281.123. This omission gives rise to a presumption that the Legislature intended to include fee-funded boards and commissions within the scope of salary limitation in NRS 281.123. See *Dept. of Taxation v. DaimlerChrysler Services North America, LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("[O]missions of subject matters from statutory provisions are presumed to have been intentional."). This presumption could conceivably be overcome by contextual clues or legislative history demonstrating a clear legislative intent to give a particular board or commission unfettered discretion to exceed the salary limitation in order to hire a director or management specialist with specified professional or occupational qualifications. In other words, an exemption could be either express or implied in the enabling legislation of a specific board or commission. In the absence of such an exemption, however, a fee-funded board or commission must comply with the salary limitation in NRS 281.123.

QUESTION TWO

Whether the Governor has authority to direct fee-funded boards and commissions to comply with the provisions of NRS 281.123?

SUMMARY CONCLUSION

The Governor has authority to direct fee-funded boards and commissions of the State to comply with the provisions of NRS 281.123.

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ANALYSIS

The Governor has a constitutional duty to see that the laws enacted by the Legislature “are faithfully executed.” NEV. CONST. art. 5, §7; *see also Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967) (executive power extends to carrying out and enforcing laws enacted by the legislature). The nature of the Governor’s duty is mandatory. NEV. CONST. art. 5, § 7 (The Governor “*shall* see that the laws are faithfully executed.”) (emphasis added); *see also State of Nev. Employees Ass’n, Inc. v. Daines*, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992) (“in statutes, ‘may’ is permissive and ‘shall’ is mandatory . . .”) (citation omitted). The Governor has no discretion to ignore legislation that is enacted in accordance with the laws of Nevada, including NRS 281.123. Therefore, the Governor has the requisite authority to direct fee-funded boards and commissions of the State to comply with the provisions of NRS 281.123.

CONCLUSION

The fee-funded boards and commissions of the State employ personnel as necessary to discharge duties and regulate occupations and professions pursuant to NRS Title 54. Such personnel are considered employees of the State for the purposes of NRS 281.123. The Governor has the constitutional duty to ensure that NRS 281.123 is properly executed and State employee salaries fall within the statutory limitation.

Sincerely,

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Attorney General

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TEB/klr