

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1960

OPINION NO. 60-168 COUNTY COMMISSIONER; VACANCY IN OFFICE—Appointment by Governor to fill vacancy on board does not “extend beyond 12 p.m. of the day preceding the 1st Monday of January next following the next general (biennial) election.”

Carson City, July 12, 1960

Honorable Fred Nelson, District Attorney, County of Esmeralda,
Goldfield, Nevada

STATEMENT OF FACTS

Dear Mr. Nelson:

In the general election conducted in Nevada on November 4, 1958, there was elected in the County of Esmeralda, under the provisions of Section 244.025, subsection 3, NRS, a long term County Commissioner. The term of office is four years and the term would normally expire the first Monday of January 1963. Death intervened and on January 20, 1960, under the provisions of 244.040 NRS, the Governor appointed Jewell Parsons, to the office of County Commissioner, County of Esmeralda, “for the balance of the unexpired term ending the first Monday of January 1961.” At the date hereof Mrs. Parsons still holds said office.

QUESTION

Does the term of office of Mrs. Parsons, by virtue of the appointment of Governor Sawyer of January 20, 1960, terminate at 12 p.m. of the day preceding the first Monday of January 1961?

CONCLUSION

Yes; said office terminates on that date and at that hour.

ANALYSIS

Section 26 of Article IV of the Constitution provides:

Sec. 26. The legislature shall provide by law for the election of a board of county commissioners in each county, and such county commissioners shall, jointly and individually, perform such duties as may be prescribed by law.

Section 244.025, subsection 3 of NRS, provides:

3. At the general election in 1870, and at every general election held every 2 years thereafter, there shall be elected in each county one commissioner to serve upon the board of county commissioners for the term of 4 years; and a term of 4 years shall be known, both in this chapter and for the purpose of the election of county commissioners, as the long term; and the other commissioner or commissioners, as the case may be, necessary to fill the board, shall, at the election, be elected to serve upon the board for the term of 2 years.

Section 244.030 NRS provides:

244.030 County commissioners shall enter upon their duties on the 1st Monday of January succeeding their election, and shall hold their offices for 2 or 4 years, as the case may be, as provided in this chapter; and the term of office of 2 years or 4 years, as the case may be, shall expire at 12 p.m. of the day preceding the first Monday of January following a general election.

Section 244.040 NRS provides:

244.040 1. Any vacancy occurring in any board of county commissioners shall be filled by appointment of the governor.

2. The term of office of a person appointed to the office of county commissioner shall not, by virtue of the appointment, extend beyond 12 p.m. of the day preceding the 1st Monday of January next following the next general election.

We take it to be axiomatic that in no case may the appointive authority appoint an officer to an elective office, by reason of vacancy therein, for a term to extend beyond the term for which the predecessor had been elected. We are here concerned with whether or not the Governor had the authority to appoint to the first Monday of January 1963, or whether the appointment in the language aforesaid was correct.

Apart from other provisions affecting only the larger counties, boards of county commissioners are composed of three members (subsection 2 of 244.025 NRS), and except for death or resignation, there are elected in each county at each biennial general election two commissioners, one for the short and one for the long term, for two and four years respectively.

If a vacancy occurred on a board by the death of a short term county commissioner, an appointment by the Governor, as authorized by [NRS 244.040](#), subsection 1, would, under the provisions of [NRS 244.030](#), terminate at 12 p.m. of the day preceding the first Monday of January following the next general election. The office could not be held beyond that time and date since it is only a two-year term.

It follows that [NRS 244.040](#), subsection 2, has application only to vacancies in office of county commissioners elected to the long term, and then only if death or resignation occurs during the first two years of the term. If the vacancy occurred during the last two years of the term, the appointment would run its course to the same date that the term of the elected officer would have expired.

Subsection 2 of [NRS 244.040](#), would be rendered meaningless if we construed the statute to authorize the Governor to make the appointment for the term to expire on the same date as that of the elected long term county commissioner, had he survived. The appointment cannot “extend beyond 12 p.m. of the day preceding the 1st Monday of January next following the next general election.” The Governor was powerless to make an appointment for term to extend beyond said date. It follows that the appointment was in accordance with the law and that the office is open for election for the unexpired term of a long term county commissioner.

We are mindful of the fact that “general election” has been variously defined by our Supreme Court, and has been held to be the election at which the officer would ordinarily be elected. *Bridges v. Jepsen* (County Clerk), [48 Nev. 64](#), 227 P.588, and *Grand and McNamee v. Payne* (State Senator), [60 Nev. 250](#), 107 P.2d 307. However, for the reasons stated, such could not have been the legislative intent in enactment of the provisions of [NRS 244.040](#), subsection 2. *See also Brown v. Georgetta* (United States Senator), [70 Nev. 500](#), 275 P.2d 376, and Attorney General Opinion No. 166 of June 21, 1960. These decisions are under differing constitutional provisions and statutes and are clearly distinguishable.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-169 INSURANCE DEPARTMENT; STATE BOARD OF HEALTH—With reference to the administration of trust funds, mausoleums and endowment care cemeteries are under the exclusive supervisory jurisdiction of the State Board of Health and the Department of Insurance, respectively.

Carson City, July 18, 1960

Honorable Paul A. Hammel, Insurance Commissioner, Carson City,
Nevada

STATEMENT OF FACTS

Dear Mr. Hammel:

Memory Gardens of Las Vegas, Inc., is a Nevada corporation, with its principal office located at 223 Fremont Street, Las Vegas, Nevada. It operates an endowment care cemetery approximately four miles from the City of Las Vegas, as regulated by the provisions of [NRS 452.050-452.180](#). The corporation also operates a mausoleum on the same grounds under the regulations contained in [NRS 452.210-452.270](#).

Under the provisions of [NRS 452.180](#), the Commissioner of Insurance is vested with the power and duty of examination of the fiscal affairs of the

corporation, insofar as its operation pertains to an endowment care cemetery. Under such authority, the said Commissioner obtained an examination and report of the corporation's affairs to December 31, 1959, prepared by an accountant. We have been furnished with a copy of this report, filed with the Commissioner in June, 1960, to assist with this study.

In an official opinion of this office (Attorney General Opinion No. 408, dated September 24, 1958), rendered prior to the construction of the mausoleum here involved, it was indicated that upon licensing of the mausoleum the corporation would have to set apart a trust fund equal to 15 percent of the cost of the structure, to be invested in accordance with applicable statutory requirements, from which the earnings only might be used for maintenance of the mausoleum. As stated, the said trust fund consists of 15 percent of the cost of the mausoleum, and in no way is determined by the number of interments therein. In this connection, the corporation (as indicated in the accountant's report) did set apart a deposit of \$11,743 in trust. Under [NRS 452.250](#), supervisory authority of the mausoleum and said trust fund, so established, is vested in the State Board of Health.

Parenthetically, we note, analysis of the accountant's computations would appear to show that the sum which should have been set apart for the mausoleum trust fund as of December 31, 1959 should have been substantially more than said sum of \$11,743. We have also been informed that the trust fund required to be set apart under the provisions of [NRS 452.120](#) (endowment care cemetery) did not include any proceeds or income from services contracted or sold for vaults, crypts or catacombs *within* the mortuary building, but only the sum computed on the basis of graves, niches and crypts sold *outside* of the mausoleum building.

QUESTIONS

1. In setting up the trust fund required by the provisions of [NRS 452.120](#) and [452.130](#), may the sum fixed by the accountant as of December 31, 1959 be reduced by the sum (\$11,743) deposited in trust under the provisions of [NRS 452.250](#)?

2. Does the State Department of Health have any jurisdiction respecting the deposit and administration of the trust funds to be set apart and maintained under the provisions of [NRS 452.250](#)?

3. Does the Department of Insurance have any jurisdiction respecting the deposit and administration of the trust funds that have heretofore been set apart under the provisions of [NRS 452.120](#)?

4. Are both said funds to be augmented from time to time by further additions thereto?

5. In computing the sums that are to be added from time to time to the trust fund to be maintained under the provisions of [NRS 452.120](#), should the trustees or accountant for the Commission compute for niches or crypts within the *mausoleum* building?

CONCLUSION

Question No. 1: No.

Question No. 2: No.

Question No. 3: No.

Question No. 4: Trust funds set apart to provide earnings which shall be used for the maintenance of the mausoleum are not required to be

increased from time to time by reason of the sale of vaults, crypts or catacombs therein. However, the sum set apart in a cemetery endowment care fund under the provisions of [NRS 452.120](#) is required to be augmented from time to time as graves, niches and crypts are sold.

Question No. 5: No. Under the mausoleum statutes ([NRS 452.210-452.270](#)), it is contemplated that bodies be stored above ground, and, therefore, jurisdiction is vested in the State Board of Health to supervise and regulate mausoleums in such manner that the stored bodies shall not become a health hazard. The sum required to be set apart in trust is set in such amount as is deemed to be sufficient to maintain the mausoleum building. Additional bodies placed in a mausoleum would not require any addition to the trust fund.

ANALYSIS

[NRS 452.120](#) provides:

452.120 “Endowment care cemetery” defined: Deposits required. An “endowment care cemetery” is one which shall hereafter have deposited in its endowment care fund, at the time of or not later than completion of the initial sale, not less than the following amounts for plots sold or disposed of:

1. \$1 a square foot for each grave.
2. A sum equal to 15 percent of the sale price of each niche.
3. A sum equal to 15 percent of the sale price of each crypt.

[NRS 452.250](#) provides:

452.250 Maintenance fund: Deposit; use of income limited.

1. There shall be deposited with the board of trustees or board of directors of any cemetery corporation or association where the mausoleum, vault or crypt is to be erected a maintenance fund in such sum as shall be determined and fixed by the state board of health.

In reliance upon [NRS 452.250](#) the State Board of Health has promulgated the following resolution:

Maintenance Fund. The sum of money that must be deposited with the board of trustees or the board of directors of the cemetery association authorized to receive the same in the building of a mausoleum must be not less than 15 percent of the cost of such structure.

In Attorney General Opinion No. 408 of September 24, 1958, we concluded that:

1. The Mausoleum Act of 1931 was not repealed by the Endowment Care Cemetery Act of 1953.
2. That health dangers and the cost of upkeep is greater in the case of a crypt than a grave.

3. That the legal burdens placed upon a company maintaining a mausoleum are not variable depending upon whether or not it is maintained in connection with a cemetery.

4. That the cost of upkeep of a cemetery is more or less proportional to the number of bodies interred therein.

5. That it is more costly to maintain a crypt within a cemetery than to maintain a grave.

6. That the cost of maintaining a mausoleum (maintenance of the building) is determined largely by the size of the structure and not by the number of bodies interred therein.

7. That the sums to be collected for the trust fund for the maintenance of a mausoleum are determined by the provisions of [NRS 452.250](#) and not by 452.120, and that contributions under both statutes are not required in any case.

8. That the two funds should be kept separate and apart, for they are under the regulatory supervision of different administrative bodies of government.

It must be remembered that the governing provisions for administration of an endowment care cemetery are contained in Sections [NRS 452.050](#) to [452.180](#), and that the provisions respecting the administration of mausoleums are contained in Sections [NRS 452.210](#) to [452.270](#); that in the former case the supervisory administrative authority is lodged with the Insurance Commissioner and, in the latter case, with the State Board of Health. It is clear that the fact that one corporation owns and administers both an endowment care cemetery and a mausoleum upon the same grounds does not change this supervisory authority nor the duty to account to the proper supervisory authority within its delegated powers. Since the computation of the sum of \$11,743 was under the provisions of [NRS 452.250](#), computed as a percentage of the cost of the mausoleum, such sum is under the exclusive administrative supervision of the State Board of Health. Earnings only from this irreducible sum may be expended by the corporation for maintenance of the mausoleum. Accountings thereon are to be made to the State Board of Health.

On the other hand, to obtain or retain a license as an “endowment care cemetery” there must be compliance with the provisions of [NRS 452.120](#) and [452.130](#), as to the creation and maintenance of a trust fund, from which the earnings only may be used for the “general care, maintenance and embellishment of its cemetery.” This fund, under the provisions of [NRS 452.120](#), will be a constantly increasing fund, under the supervision of the Commissioner of Insurance.

The computation of the amount of this latter fund did not reflect the number of crypts, catacombs or vaults contracted in the mausoleum, and, indeed, such need not be considered or included. Such computed sum, therefore, need not be reduced since the method used in determining the sum appears to have been upon the proper legal basis.

In conclusion, there are no conflicts of jurisdiction. The Board of Health has exclusive supervisory jurisdiction over one fund and the Insurance Department has exclusive supervisory jurisdiction over the other fund. The fact that both operations are conducted by one corporation is without significance. The rents, issues and profits only from the funds may be used, each for its respective purpose. One fund does not change in

principal amount while the other fund is subject to augmentation. Reports should be rendered on both funds, as required, but not less frequently than annually.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-170 NEVADA GAMING COMMISSION—A member of said Commission who furnishes an armored car service to state gaming licensees is not in violation of [NRS 463.023](#), subsection 3, and thereby disqualified from sitting on the Commission.

Carson City, July 26, 1960

Honorable Grant Sawyer, Governor of Nevada, Carson City, Nevada

STATEMENT OF FACTS

Dear Governor Sawyer:

A member of the Nevada Gaming Commission owns the only armored car service in Las Vegas, Nevada. A portion of the business of this service consists of picking up and transporting money for various gaming establishments licensed by the State and located in Clark County.

QUESTION

Is this member in violation of the law which provides that no person who is actively engaged or has a direct pecuniary interest in gaming activities shall be a member of the Commission?

CONCLUSION

The member of the Commission is neither actively engaged in gaming activities nor does he hold a direct pecuniary interest in gaming activities.

ANALYSIS

[NRS 463.023](#), subsection 3, relating to qualifications of members of the Nevada Gaming Commission provides as follows:

It is the intention of the legislature that the commission shall be composed of the most qualified persons available, preferably persons familiar with gaming operations; but no person actively engaged or having a direct pecuniary interest in gaming activities shall be a member of the commission.

To answer the question presented we must define what conduct on the part of a Commission member amounts to being actively engaged in gaming activities and what constitutes a direct pecuniary interest in gaming activities.

The word “actively” is the opposite of passively or *inactively* (*Golden State Theatre Corp. v. Johnson* (Cal.), 133 P.2d 295). In our opinion a person is not actively engaged in gaming activities unless he actually participates in the management or conduct of the gaming operation.

The owner of an armored car service could perform his services without any knowledge, information or participation in any manner in the actual conduct of the gaming operation in those establishments for whom the service is furnished. We think it apparent from the facts stated that the member in question is not actively engaged in gaming activities.

The answer as to what constitutes a direct pecuniary interest in gaming activities is less clear. In our opinion a direct pecuniary interest in gaming activities means an immediate or proximate financial participation in the actual conduct of the gaming operation. It is in no sense remote or contingent upon other factors.

Our Legislature has made a definite distinction between Board members and Commission members insofar as their respective outside activities are concerned. It will, therefore, be necessary to compare and analyze the distinctions respecting the qualifications that the Legislature has imposed on Board and Commission members respectively in order to determine the legislative intent relative to each.

Under [NRS 463.060](#), subsection 3, relative to qualifications of Gaming Control Board members, it is provided as follows:

No member shall be pecuniarily interested in any business or organization holding a gaming license under this chapter or doing business with any person or organization licensed under this chapter.

It is apparent that the Legislature, by inserting the word “direct” before the term “pecuniary interest” in relation to the qualifications of members of the Gaming Commission ([NRS 463.023](#) (3)) and omitting the word “direct” or a word of similar import before the language “pecuniarily interested” in relation to the qualifications of Board members ([NRS 463.060](#) (3)), intended to place a greater restriction on Board members than Commission members. Furthermore, under subsection 3 of [NRS 463.060](#), members of the Board are expressly prohibited from doing business with a state gaming licensee or licensees, or from being interested in any such business. [NRS 463.023](#), subsection 3, does not bar a Commission member from doing business with a state gaming licensee or licensees, or from being interested in any such business. However, the Legislature saw fit to make this language applicable only to Board members and not Commission members. If the Legislature had intended that members of the Commission should be prohibited from doing business with a state gaming licensee or licensees, or from being interested in any such business, it could have so provided by simply employing the language of [NRS 463.060](#), subsection 3, and making it applicable to Commission members. This it did not do.

One reason that occurs to us for these distinctions lies in the fact that Board members are employed on a full-time basis for which they are

adequately compensated. Members of the Commission meet, generally, once a month for which they are paid \$25.

Obviously, Commission members must earn a livelihood from a source other than state compensation.

The most likely persons to serve on the Commission are those who are self-employed for the reason that an employer would not, generally, be receptive to the idea of his employee being absent from his job in order to devote many hours and sometimes days each month to the Nevada Gaming Commission.

For a self-employed person to earn a living in Nevada, it is not uncommon for that person to have business transactions with gaming establishments. To place the same restriction on members of the Commissions as have been placed by the Legislature on Board members would result in narrowing considerably the field of competent persons to serve on the Commission.

From the facts stated and reasons given, we must conclude that the member of the Commission who is engaged in the armored car service is not actively engaged in gaming activities, nor does he hold a direct pecuniary interest in gaming activities.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

BY: Michael J. Wendell
Special Deputy Attorney
General

OPINION NO. 60-171 INITIATIVE; ARTICLE 19, SECTION 3, NEVADA CONSTITUTION. [NRS 302.060](#)—Secretary of State is not required to place a proposed initiative measure on ballot if it would be invalid if adopted and made law. Initiative; Article 19, Section 3, Nevada Constitution. Construed—Legislature, when acting in good faith, may repeal an act which a proposed initiative measure seeks to amend and enact legislation dealing with same subject matter as proposed initiative measure. Initiative; Statutes—Where proposed amendment to statute which had been repealed would not be independent and complete in itself and stand like an independent enactment it would be void if enacted, and need not be placed on ballot.

Carson City, July 27, 1960

Honorable John Koontz, Secretary of State, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Koontz:

An initiative petition seeking to amend [NRS 674.320](#) by reducing the rate of interest on small loans from 3 percent per month to 1 1/2 percent per month was filed with the Secretary of State on November 25, 1958.

The petition was submitted to the 1959 Legislature which failed to take any action on the petition. The Legislature did, however, repeal Chapter 674 NRS in its entirety (Chapter 420, Statutes of Nevada 1959) and enact the “Nevada Installment Loan and Finance Act” (Chapter 208, Statutes of Nevada 1959, Chapter 675 NRS) which governs the same subject matter as Chapter 674.

Article 19, Section 3 of the Nevada Constitution, and [NRS 302.060](#) provide that if no action is taken by the Legislature within 40 days after submission of an initiative measure the Secretary of State must place it on the ballot at the next general election.

QUESTION

Should the initiative measure seeking to amend [NRS 674.320](#) be placed on the ballot where Chapter 674 has been repealed in its entirety?

CONCLUSION

The proposed initiative measure may be omitted from the ballot.

ANALYSIS

It is the rule in Nevada that mandamus will not issue to compel public officers to place a proposed initiative measure before the electorate, if, for some reason, it would be invalid if adopted and made law. This rule was announced in the case of *State v. Reno City Council*, [36 Nev. 334](#), 136 P. 110, where the petitioner sought to compel the City Council of Reno to submit to the electors a proposed ordinance directing the issuance of a liquor and restaurant license. The Court held that such an ordinance would be void because it constituted special legislation and stated:

The proposition that a writ of mandate will not issue to compel respondents to submit to the electors of the city a proposed ordinance that would be void even if approved by a majority of the electors, is too clear for discussion or the citation of authorities.

See also Caine v. Robbins, [61 Nev. 416](#), 131 P.2d 516, where it was held the submission of a proposed initiative measure to the electors may be enjoined if the measure would be unconstitutional.

The ultimate inquiry must therefore be, would the proposed initiative measure, if adopted, be a valid act?

The answer to this question turns upon two preliminary questions: Did the Legislature have power to repeal Chapter 674 NRS and enact the “Installment Loan and Finance Act” while an initiative measure seeking to amend a portion of Chapter 674 was before it, and if it had such power, what is the effect of the repeal?

In *Tesoriere v. District Court*, [50 Nev. 302](#), 258 P. 291, one of the arguments raised by the petitioner was that an amendment enacted by the Legislature shortening the residence requirement in divorce actions was invalid because it sought to repeal a portion of a statute originally enacted

as an initiative measure. Such a statute, it was argued, could not be repealed except by a vote of the people. The Court held that the Legislature could repeal a portion of an enacted initiative measure without the approval of the people and in so holding stated:

* * * by the adoption of the initiative it was not the intention of the people to curtail the power of the legislature over initiative measures except in such manner and to such extent as is expressly stated in section 3.

Justice Ducker wrote a concurring opinion wherein he stated in part:

* * * it was within the power of the legislature to amend it at any time; for except where the right to legislate is withheld from the legislature by article 19, it has full authority therein by reason of section 1, art. 4, of the constitution, which provides: "The legislative authority of this state shall be vested in a senate and assembly, which shall be designated 'The legislature of the State of Nevada.' * * *."

In *Morton v. Howard*, [49 Nev. 405](#), 248 P.44, the County Clerk of Churchill County refused to file petitioner's declaration of candidacy for the office of County Assessor on the grounds that an act of the Legislature consolidated the office of County Assessor with the office of County Sheriff. Petitioner alleged that since a petition demanding a referendum on the statute the Clerk relied upon had been filed, the operation of the statute was suspended and the Clerk's refusal to file his candidacy was improper. The Court held that the mere filing of a referendum petition does not suspend the operation of the statute. The Court said:

The people make their own Constitution, and, when they have not seen fit to provide that the filing of a referendum petition shall suspend the operation of a law, we are not authorized to read such provision into the Constitution.

The following general statement appears at 28 Am.Jur. 469:

Under a general constitutional provision vesting the legislative power of the state in a legislature but reserving to the people the right of initiative and referendum, there is no superiority of power between the two. The legislature on the one hand and the electorate on the other are co-ordinate legislative bodies.

See also 33 A.L.R.2d 1120.

While the facts of the Tesoriere and Morton cases differ from those here presented, the quoted language clearly implies that the power of the Legislature to act is not curtailed by the initiative and referendum provisions of the Constitution except as expressly stated therein. There is nothing in Article 19 which prohibits the Legislature, when acting in good faith, from repealing an act which an initiative measure seeks to amend or from enacting legislation dealing with the same subject matter as a proposed initiative measure.

It is a well-known rule that the legislature has plenary power to legislate upon every subject, unless there is a denial of that right by the constitution.

Moore v. Humboldt County, [48 Nev. 397](#), 232 P. 1078.

It appearing, therefore, that the Legislature was not prohibited from repealing Chapter 674 NRS, it is necessary to decide whether or not the proposed initiative measure which seeks to amend that chapter is valid.

The authorities are divided on the question of whether a statute which has been repealed in its entirety can be amended. Those jurisdictions which hold such amendments valid do so when “the provisions of the new statute are independent and complete in themselves and stand like independent enactments.” 82 C.J.S. 414. The measure here involved obviously cannot satisfy this test. It would govern “Every licensee under this chapter,” but there is no longer a Chapter 674.

The measure, if adopted, would be void, such being the case, the Secretary of State is not required to place it on the ballot at the next ensuing general election.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-172 LAS VEGAS, CITY OF; CITY ATTORNEY; LICENSING AND REGULATION OF FOSTER HOMES UNDER COUNTY OR CITY ORDINANCES—Applicable statutes reviewed and found to exempt foster homes approved and licensed by State Welfare Department from application of any regulatory ordinance enacted by a county or city. A county or city may, however, by requirement of an occupational or business license, impose a tax for revenue purposes only upon foster homes operating within their jurisdictions, in reasonable amount and consistent with that imposed upon other or similar activities.

Carson City, August 3, 1960

Honorable Sidney R. Whitmore, City Attorney, City Hall, Las Vegas,
Nevada

STATEMENT OF FACTS

Dear Mr. Whitmore:

It has been indicated that the City of Las Vegas, Nevada, is presently engaged in a revision of its ordinances relative to the licensing and regulation of child-care facilities.

Under Chapter 424, Nevada Revised Statutes, the State Welfare Department exercises certain powers relative to establishment of standards for, and the licensing and inspection of, “foster homes.”

Other cities and counties may have, or contemplate enactment of, ordinances providing for licensing and regulation of group-care facilities, inclusive of “foster homes.”

There is involved, therefore, a situation or activity, subject to possible licensing requirement by State, county, and city, in compliance with probably varying standards or regulations of said three governmental authorities.

The problem is general in nature, and has already been brought to the attention of this office on the basis of conflicting standards, regulations and inspections, when more than one governmental unit exercises jurisdiction.

QUESTION

Is a “foster home,” approved and licensed by the State Welfare Department under the provisions of Chapter 424, Nevada Revised Statutes, exempt from licensing and regulatory ordinances enacted by a county or city?

CONCLUSION

As herein qualified: Yes.

ANALYSIS

[NRS 424.020](#), entitled “Minimum standards; regulation of foster homes,” provides as follows:

1. The state welfare department, in cooperation with the state board of health, shall:
 - (a) Establish reasonable minimum standards for foster homes.
 - (b) Prescribe rules for the regulation of foster homes.
2. All licensed foster homes must conform to the standards established and the rules prescribed in subsection 1.

[NRS 424.030](#), entitled “Licensing of foster homes,” provides as follows:

1. No person shall conduct a foster home as defined in [NRS 424.010](#) without receiving an annual license to do so from the state welfare department.
2. No license shall be issued to a foster home until an investigation of the home and its standards of care has been made by the state welfare department.
3. Any foster home that conforms to the established standards of care and prescribed rules shall receive a license from the state welfare department, which shall be in force for 1 year from the date of issuance. On reconsideration of the standards maintained, the license may be renewed annually.

4. The license shall show:
 - (a) The name of the persons licensed to conduct the foster home.
 - (b) The exact location of the foster home.
 - (c) The number of children that may be received and cared for at one time.
5. No foster home can receive for care more children than are specified in the license.

NRS 424.040, entitled “Inspection of foster homes,” provides as follows:

The division of child welfare services of the state welfare department, or its authorized agent, shall visit every licensed foster home as often as is necessary to assure that proper care is given to the children.

NRS 424.050, entitled “Investigation of unlicensed foster homes,” provides as follows:

Whenever the state welfare department shall be advised or shall have reason to believe that any person is conducting or maintaining a foster home for children without a license, as required by this chapter, the state welfare department shall have an investigation made. If the person is conducting a foster home, the state welfare department shall either issue a license or take action to prevent continued operation of the foster home.

NRS 424.060 vests authority and power in the State Welfare Department for the removal of children from undesirable foster homes.

NRS 424.010, defining “foster home,” makes all of the foregoing provisions applicable to:

Any family home in which one or more children under 16 years of age not related by blood, adoption or marriage to the person or persons maintaining the home are received, cared for, and maintained for compensation or otherwise shall be deemed to be a foster home for children.

Preliminarily, it is to be noted that a municipality has no inherent power to require a license or to impose a license fee or tax relative to any business, activity or matter, unless that power is delegated by the State expressly or by necessary implication, and that such power will not be inferred from terms of uncertain import. However, generally speaking, licensing power is delegated to municipalities by the State, though the extent of the power and the businesses, activities and matters, to which the power relates will vary considerably. (McQuillin, *Municipal Corporations*, 3d Ed., Vol. 9, Sec. 26.22, p. 38.) In this connection, it is undoubtedly true that the existence of concurrent and overlapping jurisdiction in this field, based upon the fact that the involved license is both an exercise of the tax or revenue power and the exercise of governmental regulatory police power, creates and results in some very serious difficulties and problems. (McQuillin, *supra*, p. 56 et seq.)

Any consideration of the matter here involved suggests four possible alternative conclusions, namely:

1. That municipal (or county) governments have *exclusive* jurisdiction in the licensing and regulation of foster homes.
2. That the state and municipal (or county) governments have *concurrent* jurisdiction in the licensing and regulation of foster homes.
3. That the state has *exclusive* jurisdiction in the licensing and regulation of foster homes.
4. That to the extent that the State actually exercises it, the State must be deemed to have preempted jurisdiction and power, and additional or further municipal (or county) jurisdiction and regulation is prohibited.

The provisions from applicable statutes above quoted clearly deny any exclusive jurisdiction in municipalities (or counties) in the licensing and regulation of foster homes. (Alternative No. 1, above.)

It must also be assumed that if municipal (or county) licensing and regulatory legislation is in conflict with state law, it would be void unless by force of *state law itself* it prevails within the municipality (or county). (McQuillin, *supra*, Sec. 26.23, p. 44.) However, where there is no actual conflict, state licensing does not necessarily always preclude municipal (county) licensing of certain businesses, activities or matters; in other words, state and municipal licensing may be concurrent as to some subjects. In some instances, it has even been held that the power of a municipality to license is definitely limited to those things for which the State exacts a license. (McQuillin, *supra*, pp. 44-45, et seq.)

However, there are situations or matters where the effect of state licensing is to preclude municipal (or county) licensing therein. That is, the power to license and impose license fees or taxes, and/or to regulate certain businesses or activities, may only be exercised by the State; municipal (or county) licenses are unauthorized when state law covers these subjects. (McQuillin, *supra*, Sec. 26.23 et seq., p. 44 et seq.)

Apart from any limitation imposed by reason of the exercise of state jurisdiction in the field, municipalities (or counties) have the delegated legislative authority to license foster homes, either on the basis of their exercise of the taxing power, or governmental regulatory police power. Certainly, if the State had no need for any foster homes, it would not necessarily follow that a municipality (or county) also had no need for them. In other words, to the extent that a local need for foster homes existed, a municipality (or county) would properly have a legitimate concern with their supervision and regulation in exercise of their regulatory police powers for the general welfare, or as a taxable activity to raise revenue. We must therefore conclude that the State does not have exclusive jurisdiction in the field, but that, *generally*, concurrent jurisdiction in the licensing and regulation of foster homes by both the State and municipalities or counties exists.

Existence and exercise of concurrent jurisdiction by both the State and municipalities (or counties) would present no legal (or administrative) problem, if both said governmental authorities established and maintained similar standards and requirements. Such is not the case, however. Municipalities may consider their established standards both necessary and better than those of the State, or vice versa. The question then is which standards or regulations shall apply and be controlling?

In addition to differences in standards or requirements for eligibility or qualification for foster home licenses, there is also duplication in investigations and inspections. The necessity for such duplicate

investigations and inspections is lost upon those subjected thereto, and generally resented by them. So far as they are concerned, if they and their homes qualify for licensing by one governmental unit, they should be considered as qualifying for any and all governmental authorities. This aspect of the problem is not unimportant. It bears directly on the program for recruitment of foster homes, and experience has shown that the requirement for licenses by more than one governmental authority has affected the success of such recruitment programs.

While the foregoing general considerations are practical rather than legal in nature, they are relevant to the evaluation or construction of applicable statutory provisions. Chapter 424 of Nevada Revised Statutes establishes a comprehensive legal base for the licensing and inspection of foster homes, and vests the authority therefor in the State Welfare Department, with the cooperation of the State Board of Health. The standards that shall govern the licensing of a foster home shall be "reasonable minimum standards" as established by said State Welfare Department ([NRS 424.020](#)). Moreover, it is expressly provided that no person shall conduct a foster home as therein defined without receiving an annual license to do so from the State Welfare Department, after investigation by said Department and a finding of compliance with said Department's established standards ([NRS 424.030](#)). Finally, [NRS 424.040](#) and [424.050](#), relating to the inspection of foster homes and the investigation of unlicensed foster homes, respectively, further confirm the authority and power of the State Welfare Department to exercise plenary jurisdiction over the establishment and conduct of foster homes throughout the State.

Applicable statutes, therefore, make a license from the State Welfare Department *mandatory* in connection with the establishment and conduct of a foster home anywhere in the State; in other words, a foster home cannot be legally established and operated solely on the basis of a municipal (or county) license.

It further follows from the above that a municipality (or county) may not impose any standards, requirements, conditions or terms which would in any way interfere with or encroach upon the licensing power and exercise of jurisdiction over foster homes by the State Welfare Department, since said Department is specifically and expressly charged with the duty and responsibility not only of licensing foster homes but also of inspecting licensed homes and investigating unlicensed foster homes. Such legislatively imposed duties and responsibilities cannot be legally delegated nor can they be validly assumed by another governmental unit (municipal or county). (Attorney General Opinion No. 632, dated June 15, 1948.)

In legal substance, the assertion by a municipality (or county) of a right to exercise of concurrent jurisdiction herein amounts to an assumption of power and authority to regulate an activity in derogation of State jurisdiction and authority. This becomes self-evident if consideration be given to the possible situation where a foster home would comply with state requirements but did not comply with municipal (or county) requirements. The State would license the operation. The ultimate and specific question would then be: Could the municipality (or county) prohibit the operation of the state-licensed foster home? In our considered opinion, and predicated upon the above cited statutory provisions, any such prohibition on the part of a municipality (or county) would be invalid.

We may finally indicate that federal matching funds are involved in connection with the administration of some welfare programs entailing the use of foster homes. To such extent, the State Welfare Department is, exclusively, the only agency authorized by the Legislature to formulate and establish standards of service. (See [NRS 422.210](#), [422.230](#), [422.270](#), [422.220](#) and [422.260](#).)

It has been submitted that the licensing and regulation of foster homes by exercise of concurrent jurisdiction on the part of the State and a municipality (or county) is supported by existing concurrent jurisdiction in the gaming industry and in contracting, engineering, architecture, and even the professions, such as lawyers, doctors, dentists, etc. In our opinion, the analogy is not a valid one.

In the case of the gaming industry, county and municipal regulations are consistent with state regulations, and can in no wise be contrary to, nor more liberal than, state regulations. Further, in respect to gaming, counties and cities are directly and primarily concerned with their proper operation under both state delegated police and taxing powers. In other cases cited, the counties and municipalities are without power to prescribe the qualifications of those engaged in such activities or professions, but may only prescribe payment of an occupation or business license fee, for the privilege of doing business in the county or city.

In the case of the licensing and regulation of foster homes, however, the State, through its State Welfare Department, is the governmental authority primarily and most directly concerned with proper standards for, and the licensing and regulation of, foster homes, essentially involved in the proper administration of state welfare programs, which are supported, at least partially, by federal matching funds. Here proper discharge of state obligations excludes municipal (or county) interference of any kind, either by more liberal or more restrictive regulatory measures than those established by the State itself. Any licensing power in a city (or county) must, therefore, be strictly limited to the purpose of raising revenue only, and the amount of such occupational or business license tax would have to be reasonable and consistent with that imposed upon and exacted of other or similar activities. (Attorney General Opinion No. 671, dated September 9, 1948.)

The foregoing limitation on exercise of concurrent jurisdiction with respect to foster homes should not be construed to apply to day nurseries or semi-institutional child-caring agencies which are deemed to be excluded from the definition of "foster homes." (Attorney General Opinion No. 749, dated May 7, 1949.)

It is our advice and opinion, therefore, that a "foster home" approved and licensed by the State Welfare Department under the provisions of Chapter 424, Nevada Revised Statutes, is and should be exempt from licensing and regulatory ordinances enacted by a county or municipality, although it may be subjected to payment of an occupational or business license for revenue purposes only, if reasonable, and similarly imposed upon other or like activities.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter

OPINION NO. 60-173 PUBLIC EMPLOYEES RETIREMENT

BOARD—In determining credit for employment service rendered, as required for eligibility for and participation in benefits provided by Public Employees Retirement System, statutes and rules or regulations in effect at time of any application for said benefits are held to be controlling and determinative.

Carson City, August 4, 1960

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Buck:

It is indicated that public school teachers became affiliated with the Public Employees Retirement System as of July 1, 1949. At that time the Retirement Act provided: "No employee whose position normally requires less than 600 hours of service per year may become a member of the system." (Chapter 124, Section 8, subsection 4, 1949 Statutes of Nevada.)

By Chapter 183, Section 2, 1951 Statutes of Nevada, the above was amended to provide that: "No employee whose position normally requires less than 1,200 hours of service per year may become or remain a member of the system." Nevada Revised Statutes 286.320, adopted in 1959, substantially predicates eligibility in the system and participation in any benefits thereunder on "* * * 1,200 or more hours of service per year."

We are also informed that for the period 1944-1949 "A" was a full-time teacher in the Reno School System. Prior to 1944, "A" had been an Americanization and Naturalization teacher for adults in evening classes from 1932, and had continued such service even after commencement of full-time service in 1944. "A" applied for service credit for the period from 1932-1944. The Retirement Board subsequently granted service credit for the period 1932-1944, presumably finding that the services performed and rendered during such period satisfied the "600 hour" requirement then in effect.

The duties of an Americanization and Naturalization teacher did not during the period 1932-1944, and do not presently, entail "1,200 or more hours" as required since 1951. "A" has requested advice as to her retirement status.

The Public Employees Retirement System was established by Chapter 181, 1947 Statutes of Nevada.

QUESTION

1. In determining credit for employment service rendered, as required for eligibility for and participation in benefits provided by the Public Employees Retirement System, which statutes shall be deemed applicable and controlling:

A. Statutes in effect at the time of original membership in system? or

B. Statutes in effect at the time of application for benefits under the system?

CONCLUSION

Question No. A: No.

Question No. B: Yes.

ANALYSIS

It is well-established general law that a pension granted by a public authority is not a contractual obligation, but a gratuitous allowance, in the continuance of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor. By the great weight of authority, it is also true that the fact that a pensioner makes compulsory contributions does not give him a vested right in the pension, and that he has no rights therein *except such as are conferred by the statutes creating and governing the pension fund*. (See Note, 98 A.L.R. 505-506 et seq., and cases cited therein.)

Generally, pension funds created by tax levies and assessments from the salaries of prospective beneficiaries are public funds (40 Am.Jur. 988, Sec. 34 and footnote citations), and it has been held that a Legislature has the unquestionable authority and power to order the liquidation of a state retirement system (see *Hansen v. Public Employees Retirement System Board of Administration*, 246 P.2d 591).

The right that any member of a public retirement system has in any benefits thereunder is an inchoate right only, until the conditions of eligibility thereto are satisfied. As enunciated by the United States Supreme Court, and applied under varying circumstances, the rule is:

Pensions, compensation allowances, and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress.

(Note, 98 A.L.R. 505 citing *Lynch v. United States* (1934) 292 U.S. 571, 78 L.Ed. 1434, 54 S.Ct. 840.)

So a *Legislature* is not bound to continue in force rules and regulations previously adopted by a pension board, but may provide that new rules and regulations shall be adopted or be effective. And a statute, with retroactive effect, requiring a member to be of a certain age in order to be entitled to a pension, has been held not to impair any vested right. (See Note, 98 A.L.R. 506 and cases therein cited.)

The foregoing statements briefly summarize the majority view of the law. The following somewhat different opinion has been expressed in the case of *State ex rel. Gorezyea v. Minneapolis*, 174 Minn. 594, 219 N.W. 924:

A pension or retirement allowance is a gratuity where it is granted for services previously rendered, and which, at the time they were rendered, were fully paid for and gave rise to no legal obligations for further compensation * * *. It is not a gratuity when the services are rendered while the pension or

retirement relief statute becomes a part of the contract of employment and contemplates such pension or allowance as part of the compensation for the services rendered.

Under this *minority* view, the rule may be stated to be that when it has been determined that an officer is entitled to a pension and the pension has been officially allowed, or when the event happens upon which the granting of the pension is dependent, the pension thereupon becomes vested and cannot afterwards be revoked or impaired. However, the vested right thus acquired by a pensioner is held to be merely a right to be included among those entitled to share in the pension fund, and not a right to have the pension continued in the same amount as was originally allowed.

Under this view the pensioner is protected against abolition of his pension, but not against a reduction in the amount. And *see McCann v. Retirement Bd.* (1928) 331 Ill. 193, 162 N.E. 859, in which a policeman was held to have no vested right in a pension so as to preclude the correction of the allowance of the pension, *by reducing it so as to conform to a statute fixing the maximum salary to be considered for pension purposes, which statute was applied retroactively to include pensions previously allowed.* (Emphasis supplied.)
(See Note, 98 A.L.R. 506-507, and cases therein cited.)

We find, therefore, that, under any view, the law is quite clear that until the conditions of eligibility for pension benefits are actually fulfilled or satisfied, a claimant has no vested rights thereto; and that eligibility requirements may be validly changed either by statute or rules and regulations duly adopted, *even with retroactive effect.*

Services to be included in computing the period of service for purpose of retirement benefits are undoubtedly an eligibility factor and, as such, governed by the same rule. We have carefully reviewed the Public Employees Retirement Act, particularly the provisions of [NRS 286.030](#), [286.320](#), and 286.450, and find no basis therein for any exception to the rule in this particular case.

A member in the Public Employees Retirement System is, therefore, either eligible or not eligible for retirement benefits solely on the basis of applicable statutes or rules and regulations currently in effect at the time of application therefor, and with service credit as determined at the time of such application. (See Notes, 133 A.L.R. 1437 and 2 A.L.R.2d 1033; Attorney General Opinion No. 860, January 30, 1950; Attorney General Opinion No. 322, November 7, 1957; Attorney General Opinion No. 45, May 4, 1959.)

In the particular case here involved, it appears that the matter of service credit relates to the period 1932-1944, *which was prior to the establishment of the Public Employees Retirement System* (1947). Certainly, in such case there can be no claim that the employee contemplated any retirement rights or benefits in seeking and remaining in such employment. Consequently, even the minority rule of law is inapplicable. Such person is not being denied any service credit to which she might be entitled on the basis of services rendered *after* the retirement system was established, *but only with respect to wholly gratuitous allowance of credit for services rendered prior to the establishment of the*

retirement system. In our view, the State, acting through the Legislature, has the unquestionable authority and power to grant allowance of credit for such prior service, either wholly, in part, *or not at all*, as it might determine. In other words, it is within the authority and power of the Legislature to condition eligibility for participation in retirement benefits on the basis of a requirement of a minimum of “1,200 or more hours of service per year”, and such service classification is not unreasonable as a matter of law and may be presumed to be actuarially justified on an overall basis to assure financial soundness of the system.

In any event, conditions currently effective at the time of any application for retirement benefits must be deemed controlling and determinative of eligibility for, and the amount thereof; and such conditions, especially when prescribed in express statute, have precedence over prior statutes or administrative action, if any, had thereon.

We trust that the foregoing sufficiently clarifies the matter and proves helpful.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 60-174 GAMING—A member of the Nevada Gaming Commission engaged in the armored car service is precluded by law from contracting with a department of the State for said service.

Carson City, August 5, 1960

Mr. Louis Spitz, Director, Motor Vehicle Department, Carson City,
Nevada

STATEMENT OF FACTS

Dear Mr. Spitz:

The office of the Department of Motor Vehicles located in Las Vegas, Nevada is interested in contracting with a Las Vegas armored car service whereby the service will pick up the day's proceeds of that Department and transport the same to the bank for deposit. Mr. James Hotchkiss, a member of the Nevada Gaming Commission, is the owner of the armored car service in question and would receive compensation for performance under said contract.

QUESTION

Is Mr. Hotchkiss by virtue of his position as a member of the Nevada Gaming Commission, precluded from entering into a contract with the Nevada Department of Motor Vehicles as outlined above?

CONCLUSION

It would be unlawful for Mr. Hotchkiss to enter into the proposed contract.

ANALYSIS

It is essential that we first establish that the Director of the Motor Vehicle Department has the authority under the law to enter into such a contract that we have described.

The 50th Session of the Nevada Legislature amended Chapter 284 NRS to provide that the heads of departments, boards and commissions may contract for the services of persons as independent contractors (Statutes of Nevada 1960, Chapter 267, Section 3).

An independent contractor is defined in said chapter as a person who agrees to perform services for a fixed price according to his own methods and without subjection to the supervision or control of the other contracting party, except as to the results of the work. From the foregoing language of the statute cited, it appears the Director of the Motor Vehicle Department may contract for the services of an independent contractor. Our concept of the manner in which an armored car service operates leads us to conclude that such a service is within the definition of an independent contractor as that term is defined in the statute.

In the absence of any further restriction, we conclude that the Director of the Motor Vehicle Department is empowered to contract for armored car services to pick up the day's receipts of the Department and transport the same to the bank.

We now consider the specific question presented, namely, does the fact Mr. Hotchkiss, a member of the Gaming Commission, owns the armored car service in question alter the general conclusion we have reached?

Under [NRS 281.220](#), subsection 1, it is provided as follows:

It is unlawful for any officer of this state to become a contractor under any contract or order for supplies, or any other kind of contract authorized by or for the state, or any department thereof, or the legislature or either branch thereof, or to be in any manner interested, directly or indirectly, as principal, in any kind of contract so authorized.

The question then arises is a member of the Nevada Gaming Commission a state officer? A state officer or public officer is one whose functions and duties concern the public and who exercises some portion of the sovereign power of the State. Generally such officers are required to take an oath of office (42 Am.Jur. pages 884 and 888). The Nevada Gaming Commission is charged with the responsibility of administering Chapter 463 NRS pertaining to gaming licenses and control ([NRS 463.140](#)). Before entering upon the duties of his office, each member appointed by the Governor must subscribe to the constitutional oath of office ([NRS 463.025](#)), and, in addition, swear that he is not actively engaged in nor does he hold a direct pecuniary interest in gaming activities.

We conclude that by virtue of the duties and responsibilities imposed upon the members of the Nevada Gaming Commission by Chapter 463

NRS said members are public officers of the State of Nevada and are therefore within the purview of [NRS 281.220](#), subsection 1. Therefore, in our opinion it would be unlawful for Mr. Hotchkiss to contract with the Motor Vehicle Department under the facts heretofore stated.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Michael J. Wendell
Special Deputy Attorney
General

**OPINION NO. 60-175 BOARD OF STOCK COMMISSIONERS;
ANIMALS; [NRS 569.010](#), [NRS 705.150](#)**—Under the provisions of [NRS 569.010](#) and [NRS 705.150](#), railroads are liable to Board of Stock Commissioners for negligently killing or injuring livestock whose ownership cannot be determined by diligent search and inquiries.

Carson City, August 10, 1960

Mr. W. F. Fisher, Executive Officer, Nevada State Department of Agriculture, 118 West Second Street, Reno, Nevada

Dear Mr. Fisher:

You have requested the opinion of this office on the following question.

QUESTION

Are railroads in Nevada liable to the State Board of Stock Commissioners for negligently killing or injuring livestock whose ownership is unknown?

CONCLUSION

Yes.

ANALYSIS

The pertinent statutes are herein set forth:

569.010 Certain animals deemed property of state board of stock commissioners; disposition of moneys collected for sales, injuries or killing.

1. Except as otherwise provided by law, all horses, mules, burros, hogs and cattle within the State of Nevada, the ownership of which cannot be determined by a diligent search through the recorded brands of the state and by inquiries among reputable stockmen and ranchers in the

vicinity where such animals are found, shall be deemed for the purpose of this section to be the property of the state board of stock commissioners.

2. The state board of stock commissioners shall have all rights accruing under the laws of this state to owners of such animals, and may dispose of any such animals by sale through an agent appointed by the board.

3. Except as otherwise provided by law, all moneys collected for the sale or for the injury or killing of any such animals shall be held for a period of 1 year, subject to the claim of any person who can establish legal title to any animal concerned. All moneys remaining unclaimed shall be deposited in the stock inspection fund after the period of 1 year. The state board of stock commissioners has the right to disallow all claims if the board deems the claims illegal or not showing satisfactory evidence of title.

4. The board shall not be held liable for any trespass or other damage caused by any of such animals.

705.150 Liability of railroad for negligent killing, injuring livestock; prima facie evidence of negligence. Every railroad corporation or company, operating any railroad or branch thereof within the limits of this state, which negligently injures or kills any animal of the equine, bovine, ovine or porcine species, or the goat kind, by running any engine or engines, car or cars, over or against any such animal shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof, unless it be shown on the trial of any action instituted for the recovery of such damages as provided in [NRS 705.160](#) that the owner of such animal or animals immediately contributed to such killing or injury; provided:

1. That the mere straying of such animal or animals upon or along the railroad track or tracks concerned shall not be held upon such trial to be any evidence of contributory negligence on the part of the owner of such animal or animals, nor shall the grazing of the same unattended by a herder be so considered; and

2. That the killing or injury in such actions shall be prima facie evidence of negligence on the part of such railroad corporation or company.

705.160 Settlement of claims within 90 days; actions for recovery; assignment of claims.

1. If any railway company or corporation, or owner or operator of a railroad in this state, fails, within 90 days after receipt of the same, to effect settlement of claims received for damages arising from the injury or killing of livestock upon its track or right-of-way by the running of engines or cars over or against such animals in this state as provided in [NRS 705.150](#) to [705.200](#), inclusive, then the owner of such injured or killed animals may sue and recover damages for such injury or killing from any such railway company or corporation or the owner or operator of such railroad in any court of competent jurisdiction in the county in which such animal or animals was or were killed or injured, together

with 7 percent interest per annum on the value of the animal or animals so injured or killed as established in such action, from the date such animal or animals was or were killed or injured until paid.

2. Any person having a claim arising under the provisions of [NRS 705.150](#) to [705.200](#), inclusive, may assign the same in writing to any other claimant or person for value, or for the purpose of suit, who shall thereupon have all the rights and remedies of the assignor.

3. In case it becomes necessary on the part of the owner or owners to establish a claim for any animal or animals so killed or injured in any such action, he shall have the right to establish the actual and market value of such animal or animals or the actual damage so sustained.

The cited legislation nowhere expressly authorizes an action by the Board of Stock Commissioners to recover for death or injuries inflicted by railroads upon animals whose ownership is unknown, but the language of [NRS 569.010](#) implies such authority. Paragraph 2 states the “board * * * shall have *all rights accruing under the laws of this state* to owners of such animals * * *.” In this connection it is significant to note that at the time of the enactment of [NRS 569.010](#) (Chapter 200, Statutes of Nevada 1925), [NRS 705.150](#) (Chapter 88, Statutes of Nevada 1923) had been in effect for two years. Presumably the Legislature was aware of its existence and intended the right of action created thereby to inure to the Board.

Paragraph 3 of [NRS 569.010](#) provides that all money “collected for the sale *or for the injury* * * * of * * * such animals” is to be held for a year subject to the claim of the rightful owner, clearly implying that the Board is vested with power to recover for injuries inflicted upon strays whose ownership is unknown at the time of injury.

[NRS 569.010](#) vesting ownership of stray animals in the Board of Stock Commissioners, and [NRS 705.150](#) et seq., creating a cause of action in favor of owners of livestock negligently killed or injured by railroads, are perfectly harmonious and no reason exists why the Board cannot avail itself of the remedy provided. Of course, in an action instituted under the provisions of [NRS 705.150](#) the Board would have to establish that it was the “owner” of the affected animal. This could only be accomplished by showing that it had made “diligent search through the recorded brands of the state” and “inquiries among reputable stockmen and ranchers” to determine ownership.

An examination of the statutes of several western states discloses that the terminology employed in [NRS 569.010](#), paragraph 1, is unique; however, the notion that the State has title to estrays is apparently an old one. “Blackstone said that by the early common law estrays were forfeited to the King as the general owner and lord paramount of the soil, in recompense for the damage they may have done therein, * * *.” 2 Am.Jur. 794. The Utah Code defines estrays and expressly declares them forfeited to the state. 4-12-2 U.C.A. 1953.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

**OPINION NO. 60-176 STATE PLANNING BOARD; GOVERNOR;
BUDGET DIRECTOR**—State Planning Board held to be lacking in legal authority to augment its regular professional staff and employ a Contract Administrator thereon whose salary would be funded out of, and assessed against, legislatively appropriated construction project funds.

Carson City, August 12, 1960

State Planning Board, 205 East Second Street, Carson City, Nevada

STATEMENT OF FACTS

Gentlemen:

At a meeting of the State Planning Board, held in Carson City, Nevada, on Friday, August 5, 1960, and attended by Governor Grant Sawyer, there was some discussion concerning what could be done to eliminate alleged delays in connection with the various construction projects legislatively authorized and charged to the State Planning Board for execution.

The Manager of the State Planning Board attributed such delays to insufficient staff personnel which had been requested but which had not been approved or authorized. Among such requested additional staff personnel there was a Mechanical-Electrical Engineer, whose professional capabilities could have been utilized in connection with the performance of all required preliminary planning work up to and including award of the construction contracts. In the expressed opinion of the Manager of the State Planning Board, such a "Contract Administrator" was imperatively needed, in view of the ever-increasing work load imposed upon the State Planning Board. It was further indicated that such a "Contract Administrator," if immediately available, might (after a reasonable period of training) be able to eliminate the apparent "bottleneck" and some part of the delay in the planning, preparation, and actual award of construction contracts.

In explanation for not approving and recommending such requested additional staff personnel to the State Legislature, Governor Sawyer indicated that, in his view (apparently concurred in by the Legislature), it was deemed desirable to restrict the number of permanent staff personnel to the indispensable minimum. However, such view was predicated on the assumption that legal authority presently actually existed to augment staff professional personnel as required by the State Planning Board's current work load, and to fund the salaries of such required additional professional personnel, on an apportioned basis, out of the legislative project appropriations. Such view was stated to be based upon [NRS 341.090](#), which provides as follows:

Authorized expenditures. The board may make expenditures necessary to carry into effect the purposes of its acts. However, all expenditures made by the board shall be

within the limits of the appropriation provided for the use of the board, or provided from funds appropriated by the legislature for construction work or major repairs.
(Emphasis supplied.)

Admittedly, neither the foregoing statutory provision, nor the usual statutory powers conferred upon the State Planning Board in the specific legislative enactments relating to the execution of construction projects, have hitherto been construed by the State Planning Board to authorize increase in regular staff personnel, and to assess the salaries of such additional employees, as an apportioned item of cost, against the various and specific construction project appropriations made by the Legislature.

Because of its importance in connection with possible elimination of delays in the execution of authorized projects, both present and future, determination of the legal question outlined herein has been referred to this office.

QUESTION

Is the State Planning Board legally authorized and empowered to augment its regular professional staff, as may be required by construction projects with which the Legislature has charged it, and assess the amount of entailed additional salaries, as an item of cost, on an apportioned basis, against legislative appropriations made for various construction projects?

CONCLUSION

No.

ANALYSIS

[NRS 341.150](#), relating to "Engineering and architectural services; costs; powers of board," provides as follows:

1. The state planning board shall furnish engineering and architectural services to all state departments, boards or commissions charged with the construction of any state building, the money for which is appropriated by the legislature. All such departments, boards or commissions are required and authorized to use such services.

2. The services shall consist of:

- (a) Preliminary planning.
- (2) Designing.
- (c) Estimating of costs.
- (d) Preparation of detailed plans and specifications.

The board may submit preliminary plans and designs to qualified architects or engineers for preparation of detailed plans and specifications if the board deems such action desirable. The cost of preparation of preliminary plans or designs, the cost of detailed plans and specifications, and the cost of all architectural and engineering services shall be charges against the appropriations made by the legislature for any and all state buildings or projects, or buildings or projects planned or contemplated by any state agency for

which the legislature has appropriated or may appropriate funds. *The costs shall not exceed the limitations that are or may be provided by the legislature.* (Emphasis supplied.)

3. The board shall:

(a) Have final authority for approval as to architecture of all buildings, plans, designs, types of construction, major repairs and designs of landscaping.

(b) Solicit bids for and let all contracts for new construction or major repairs to the lowest qualified bidder.

(c) After the contract is let, have supervision and inspection of construction or major repairs. The cost of supervision and inspection shall be a charge against the appropriation or appropriations made by the legislature for the building or buildings.

The foregoing detailed provisions of [NRS 341.150](#) may reasonably be considered as amplification and clarification of the more general provisions contained in [NRS 341.090](#), set forth in our Statement of Facts.

Typical of the provisions contained in specific enactments by the Legislature authorizing and appropriating funds for construction projects entrusted to execution by the State Planning Board, are the following excerpts from Chapter 261, 1960 Statutes of Nevada:

Section 1. For the support of the state planning board in carrying out the program of capital improvements, physical plant design, construction, rehabilitation, repairs, additions, equipment and furnishings, land acquisitions, surveys, preparation of plans, specifications and contract documents, and other thinGs set forth in sections 2 and 3 there is hereby appropriated from the general fund in the state treasury the sum of \$2,063,877.

(Sections 2, 3 and 4 then list and describe specific projects and set forth definite sums of money authorized and allocable to each project.)

Sec. 5 The state planning board is hereby charged with the duty of carrying out the provisions of this act as provided in chapter 341 of NRS. *The state planning board shall insure that competent architects, engineers and other qualified persons are employed to prepare the plans and specifications required to accomplish the authorized work.* All work set forth in sections 3 and 4 shall be approved by the state planning board *and each contract pertaining to such work shall be approved by the attorney general * * *.*

Sec. 6. *The state planning board is charged with the duty of carrying out the provisions of this act relating to the preparation of the plans, specifications and contract documents necessary to the construction of the capital improvements set forth in section 2.* The state planning board shall insure that competent architects and engineers and other qualified persons are employed for the preparation of such plans and specifications and to assist in the preparation of the contract documents necessary to the construction of such facilities, *and each contract document pertaining to such work shall be approved by the attorney general.* The state

planning board is authorized to advertise in a newspaper of general circulation in the State of Nevada for separate sealed bids for the construction of each project set forth in section 2 of this act. (Emphasis supplied.)

The provisions of [NRS 341.160](#), relating to “Reports, recommendations of board: Priority of construction,” are also deemed relevant in connection with the present problem:

The board shall submit reports and make recommendations relative to its findings to the governor and to the legislature. *The board shall particularly recommend to the governor and to the legislature the priority of construction of any kind and all buildings or other construction work now authorized or that may hereafter be authorized or proposed.* (Emphasis supplied.)

From available information, it appears to be established practice for the State Planning Board *and its regular staff personnel* generally to do a considerable amount of advance planning in connection with any construction project *before* legislative authorization and funding of actual construction. This is understandable, when it is realized that in general there will be involved the selection and acquisition of a land site, design of building to fit the needs of the using agency, adaptation of the designed building to the land site, surveys of soil and other topographical features as they may affect adaptation and construction of the building, laboratory tests, and many other matters.

All such preliminary and advance planning is handled by *regular staff employees of the State Planning Board even before submission and recommendation for legislative approval and fund appropriation to effectuate actual construction.* Necessarily, *before* seeking legislative authorization and appropriation of construction funds, the State Planning Board must also, through regular staff members, have worked out the estimated cost of any construction project for submission and approval of the Legislature.

Manifestly, since all of these preliminary services have been rendered by regular staff employees of the State Planning Board *before* legislative authorization and funding of the construction project, the salaries of said employees could not properly be charged to the appropriated funds for the project as subsequently authorized by the Legislature.

We next consider the situation *after* the Legislature has authorized and funded a construction project. As indicated, there is need for a Contract Administrator at this point, who would be able to handle a reasonable number of projects. The logic of the situation would indicate that contract administration could probably be most efficiently handled by professional staff members who were responsible for most of the preliminary or advance planning, effected prior to legislative authorization and funding of the project, since they would be the persons most familiar with the scope of work entailed, the problems involved, costs, and other matters.

It is submitted that such would be preferable to employment of new part-time professionals. In any event, such Contract Administrator, even if not the same person who had performed all the preliminary or advance planning on the project (prior to its legislative authorization), would necessarily have to perform services which could only be properly

expected of a regular staff *employee* of the State Planning Board. Such services, directed to the actual award of the construction contract, in accordance with the policy determinations of the State Planning Board, necessarily entail direct supervisory control of a type *that can only be imposed upon a regular staff employee*. The point is, that such Contract Administration services cannot properly be effectuated by an independent contractor, through contractual agreement therefor, very simply, because the required degree of supervision and control which the State Planning Board must statutorily retain and exercise would not be possible under such circumstances.

The foregoing conclusion, reached on the basis of practical considerations, is reflected and confirmed in express legislative intent and the limitations imposed upon the character of services which the State Planning Board is authorized to engage and properly charge against funds appropriated for construction projects.

It will be noted from the statutory excerpts set forth herein that there is express and specific reference to services by “competent architects, engineers and other qualified persons”; in short, *independent contractors*, engaged to perform professional work pursuant to contract, to “be approved by the attorney general,” and not *employees*, who, as such, would be subject to the direct supervisory control of the Board without necessity of any contract, as here indicated. Certainly, if the Legislature had intended to confer authority and power on the Board to augment or reduce regular *employee* staff in proportion to work load entrusted, and to assess salaries against appropriated construction funds, it could have done so simply enough, and quite explicitly. It did not, however, do so. Moreover, it is a rule of statutory construction, that enumeration and classification by the Legislature serves to characterize or typify, and justifies exclusion of enlargement or additions not characteristic of the express typical classification. (“Expressio unius, exclusio alterius.”) Since the statutes uniformly authorize the engagement of independent contractors, under contracts to be approved by the Attorney General, the Legislature must be deemed as having excluded hiring of additional *employees* for augmentation of regular staff to cope with increased work load in projects. (See Attorney General Opinion No. 161 dated April 10, 1952 and No. 186 dated July 15, 1952.)

We cannot ignore the serious implications and consequences which would result from statutory construction other than such as we have outlined. It is of the utmost importance that the cost of government be readily and definitely ascertainable at all times. If proper discharge of governmental functions entails larger staff and more employees, payment of their salaries is a justified item of cost and expenditure. Their compensation should be predicated on the establishment of authorized positions, rather than charged to *construction funds* appropriated for specific projects. At the very least, such assessment of *salaries* of public employees against construction funds tends to obscure the cost of government and results in a loss of proper legislative and public controls. Serious abuses and irregularities are possible where relatively substantial funds, *indefinitely controlled*, are available and can be improperly used.

There is another aspect of the matter which also deserves consideration. Assuming that augmentation and reduction of State Planning Board’s regular *employee* staff in ratio to varying work load, is legislatively authorized, then, even as employees in the unclassified service, certain rights and benefits (vacation, sick leave, insurance, retirement, subsistence

and travel allowances, etc.) are entailed and would accrue. The administrative and funding difficulties involved in connection with such fringe-benefit *employee* rights should be obvious, where (as has here been suggested) the costs are to be assessed against various construction appropriations, necessarily exhausted or reverting, with completion of projects.

Finally, and also determinative of the matter on a practical basis, it is admitted by both the State Planning Board and the Budget Director's Office that the respective construction funds appropriated by the Legislature contain no allowance or contingent sum which could be applied to payment of the salary of an *employee* Contract Administrator. In such case, the salary, assessed against such appropriations, would *pro tanto*, constitute a diversion from *construction* purposes, as legislatively intended.

We have already indicated our conclusion that neither the specific project enactments nor Chapter 341 of Nevada Revised Statutes provide any sufficient legal authority for the *employment* of a Contract Administrator, the nature of whose duties would require direct supervisory control by the State Planning Board, hence precluding any rendition of such services on the basis of contract, as with an independent contractor. Since the Legislature did not see fit to authorize such position (or any equivalent thereof) in approving the Board's budgetary requests, the present employment of a contract Administrator would be improper without the approval of a change in the work program, justifying application of appropriated funds of the agency to accommodate employment of a person in such established position. Although [NRS 284.145](#)(8) would not authorize such employment, [NRS 341.100](#) provides sufficient authority therefor, *if otherwise feasible and properly authorized in accordance with statutory budget controls*.

In conclusion, our negative answer to the question herein stated is specifically predicated on the fact (1) that the functions and duties of a Contract Administrator (indicated as the solution to the existing "bottleneck") can only be performed and rendered by an *employee* subject to the direct supervisory control of the State Planning Board, and that such services cannot be assured on the basis of contract with an *independent contractor*; (2) that statutory provisions and express legislative intent are not so broadly worded as to authorize the State Planning Board to augment and reduce the number of regular staff *employees* in ratio to its changing work load; (3) that the appropriations approved by the Legislature for the construction of the various projects do not contain any allowance or contingency sum for payment of the *salary* of an *employee* Contract Administrator; and (4) that the assessment of any such *employee's* salary out of authorized construction funds would be violative of express legislative intent and contrary to law.

For the future, it is, of course, entirely within the competency and prerogative of the Legislature expressly to authorize either (1) sufficient regular *employee* staff to assure efficient and expeditious completion of construction projects entrusted to the State Planning Board; or (2) expansion or contraction of employee staff dependent upon varying work load, with specific power to assess the salaries of additional *employees*, if any, against appropriated *construction* funds, on an apportioned basis.

With respect to the immediate situation, it has been indicated that there is available in the operating fund of the State Planning Board the sum of

\$5,000 which could be applied to payment of the salary of a Contract Administrator (Mechanical-Electrical Engineer), if such position were authorized and established on the basis of a change in work program. This sum would not, presumably, be sufficient to meet the salary which such a position warrants, so that subsequent application to the Legislature would have to be made for any involved deficiency. However, such application for a change in work program, and use of such presently available funds for interim payment of a Contract Administrator's salary would constitute *immediate* effort and action in the right direction, namely: to get authorized projects into actual construction as soon as possible.

While finding a qualified person and training him for the performance of a Contract Administrator's duties may involve some delay, it is to be hoped that the period of time so involved would not be unduly long, and that he could soon be productively effective in processing projects to the point of actual award of construction contracts.

We trust that the foregoing sufficiently clarifies the problem here involved, and proves helpful, at least in some measure, in its solution.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Deputy Attorney General

**OPINION NO. 60-177 FISH AND GAME COMMISSION; COUNTY
GAME MANAGEMENT BOARDS; HUNTING SEASONS—**
State Board has power to open season closed by County Board.

CARSON CITY, August 29, 1960

Honorable William J. Raggio, District Attorney, Washoe County, Reno,
Nevada

Attention: Mr. Drake DeLanoy

STATEMENT OF FACTS

Dear Mr. Raggio:

On August 14, 1960, the Nevada Fish and Game Commission set an open season on chukar partridge in Washoe County, Nevada, for the fall of 1960, although the Washoe County Game Management Board had previously voted to close the season on this particular bird for the year 1960.

QUESTION

May the Nevada Fish and Game Commission reverse the action of a County Game Management Board when the said Board has closed a hunting season?

CONCLUSION

Your question is answered in the affirmative.

ANALYSIS

Initially, in determining this question we should look at [NRS 501.345](#), which section was last amended in 1947 and reads as follows:

1. The commission is authorized to divide the State of Nevada into such districts as it shall find expedient with reference to hunting or fishing, and fix the dates for hunting or fishing in each of such districts within the limits provided in this Title; but the county board of any county may shorten or close the season entirely, except as to migratory birds. It shall be unlawful for any person to hunt in any such district or county on any day or days other than may be designated by the commission or the county board.

2. The county board of each county shall fix the open season in such county within the limits provided in this Title not less than 60 days before the dates specified in this Title for the opening of such season; but in the event an unforeseen emergency shall arise after any season shall have been declared open, and the county board shall determine that the interests of conservation so require, the board may declare such season closed, giving reasonable notice of such action, which notice shall be not less than 1 day.

3. The commission or any county board within its county may, in the interest of conservation, close to hunting or fishing designated areas in each county, in which event the county board shall post notice of such closing in the closed area, and give further notice thereof by publication.

Standing alone this section would indicate that there is little doubt as to the county Board's authority to close the season as to any game animal, game bird or fish, with the exception of migratory birds. However, we feel this question should also be considered in the light of [NRS 501.330](#), subsection 2, paragraph (f), which reads as follows:

* * * 2. Such enumeration and classification and the specification of the first and last day of the open or of the closed season found in [NRS 501.335](#), [501.090](#) and 503.130, inclusive, shall not prohibit the commission or the respective county boards from taking any of the following steps by general rules and regulations, or in specific instances, and giving public notice thereof as is elsewhere provided in this chapter:

* * * (f) Providing supervision and control throughout this state over all orders closing the open season temporarily or permanently because of emergency imperiling the preservation and conservation of fish, or otherwise, and requiring the approval of all such orders by the commission before they become effective.

It should be noted that paragraph (f) was added by amendment in 1949.

In Opinion No. 849, Report of the Attorney General 1948-1950, this office held that the aforementioned paragraph (f) vested the ultimate authority to close a fishing season in the State Board on the theory that since paragraph (f) was enacted after [NRS 501.345](#) and the two provisions of the statute were not reconcilable, the latest expression of the legislative will controlled. However, in Opinion No. B 949, Report of the Attorney General 1950-1952, this office held that paragraph (f) applied only to fishing seasons. With due respect to our predecessor, we feel that we cannot concur in this interpretation of paragraph (f) as the opinion ignores the relevance of the words “or otherwise” in this paragraph. Had the Legislature intended to have this paragraph apply solely to fish, these two words would not have been necessary. The only logical meaning which can be attributed to this wording is that the Legislature intended to have the paragraph apply to seasons on game birds, game animals and fur bearing animals as well as fish.

This construction of the State Board’s powers is further supported by [NRS 501.350](#) which reads as follows:

The commission shall have the power to compile the seasons for hunting, fishing and trapping and the limits for hunting and fishing as set by several county boards and to publish them as official regulations in the manner provided in this chapter and by printed form bearing the imprint of the commission, after first examining such seasons and limits to determine that there exists a desirable degree of uniformity and after a proper consideration of the biological balances necessary for good management, the populations existing, the available harvests, and the probable hunting and fishing pressure, and making such changes as are necessary.

The pertinent portions of this section were added in the year 1951. Again applying the rule that the latest expression of the Legislature controls, we construe this provision to mean that the State Board is to compile the seasons set by the County Boards, but may make necessary changes to insure that the county seasons have a degree of uniformity and are set in accordance with good fish and game management. In our opinion this section allows the State Board to open a season closed by the County Game Management Board in instances where they feel that an open season is warranted under good game management practices.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: William N. Forman
Special Deputy Attorney
General, for Nevada Fish and
Game Commission

**OPINION NO. 60-178 NEPOTISM; [NRS 281.210](#) CONSTRUED;
PUBLIC OFFICERS—[NRS 281.210](#)** prohibits only the act of
employing relatives within the class defined by the statute.
Continued employment of a public employee following the election
of his relative to the appointing board does not contravene the
provisions of that statute. Public officers, tenure. Where
appointments at pleasure are to be made by a board, the tenure of the
incumbent is not terminated by a change in the personnel of the
board.

Carson City, August 31, 1960

Honorable Jack C. Cherry, District Attorney, Clark County, Las Vegas,
Nevada

STATEMENT OF FACTS

Dear Mr. Cherry:

Your letter of August 24, 1960 relates that one of the candidates for the
office of County Commissioner of Clark County is the nephew of the
Clark County Road Superintendent. Although the office held by the
candidate's uncle is denominated "County Road Superintendent" and he is
an appointee of the Board of County Commissioners, we are unable to find
any statutory authority authorizing such a position. [NRS 403.110](#), et seq.,
provides for a "County Road Supervisor" who is appointed at the pleasure
of the Board of County Highway Commissioners, which is a Board
composed of the County Commissioners, the County Assessor, and the
District Attorney ([NRS 403.020](#)). The candidate's uncle has held his
present position for several years. You have asked this office if the
antinepotism statute would have any application in the event the nephew
of the present "County Road Superintendent" is elected.

QUESTION

Would the continued employment of a "County Road Superintendent"
following the election of his nephew to the office of County
Commissioner contravene the provisions of [NRS 281.210](#)?

CONCLUSION

No.

ANALYSIS

The relevant portions of the applicable statute read as follows:

281.210 Officers of state and political subdivisions
prohibited from employing relatives; exceptions; penalties.

1. Except as provided in this section, it shall be unlawful
for any individual acting as a * * * county official, or for any
board, elected or appointed, to employ in any capacity on
behalf of * * * any county * * * any relative of such

individual or of any member of such board, within the third degree of consanguinity or affinity. * * *

4. No person employed contrary to the provisions of this section shall be entitled to or allowed compensation for such employment.

5. Any person violating any provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than \$100 nor more than \$1,000, or by imprisonment in the county jail for not less than 30 days nor more than 6 months, or by both fine and imprisonment.

The phrase “to employ” in the context used in [NRS 281.210](#), supra, is susceptible of both a narrow and broad construction. The statute might be construed to prohibit only the act of hiring relatives within the class described or it might in addition make retaining such relatives in public employment unlawful. Webster’s New International Dictionary furnishes us with definitions of the verb “employ” which would suit either construction: “to make use of the services of”; “to give employment to * * *.”

Our court has never had occasion to construe [NRS 281.210](#), but the Supreme Court of the State of Utah, in the case of *Backman v. Batemen*, 1 Utah 2d 153, 263 P.2d 561, was confronted with an antinepotism statute which expressly prohibited the continued employment of certain relatives of appointing officers.

It is unlawful for any person holding any position the compensation for which is paid out of public funds to *retain in employment* or to employ * * *. Utah Code Ann., Sec. 52-3-1 (1953 Supp.) (Emphasis added.)

The Court in a divided opinion held the statute unconstitutional when it was invoked in an attempt to terminate the employment of the plaintiff, a high school principal who had served for 27 years and whose brother became a member of the Board of Education after the plaintiff was hired.

The adoption of a broad construction of our antinepotism statute would in many instances deprive a public servant of long standing of his job merely because his relative assumes a position on the appointing board years after his appointment. It would work a hardship not only on the government employee but upon the agency or political subdivision employing him. The difficulty involved in replacing tested, experienced public employees is common knowledge. The majority opinion in the *Backman* case, supra, suggests that the denial of employment under such circumstances constitutes a deprivation of the employee’s constitutional rights. Construction of an ambiguous statute in such a manner as to cause hardship or unconstitutionality should be avoided. *Smith v. Southern Pacific Co.*, [50 Nev. 377](#), 262 P. 935; *V. & T.R.R. Co. v. Henry*, [8 Nev. 165](#).

It bears pointing out that subsection 5 of [NRS 281.210](#) makes a violation of that section a misdemeanor. In *State ex rel. Robinson v. Keefe*, 111 Fla. 701, 149 So. 638, it was held that an antinepotism statute, highly penal in character, should be strictly construed. See also *Ex parte Todd*, [46 Nev. 214](#), 210 P. 131.

Construing the cited statute in a manner to prohibit only the act of hiring relatives within the proscribed class does not do violence to the general purpose of antinepotism legislation as expressed in the decided cases, which is to prevent the evil of selecting public employees on the basis of kinship rather than merit. *See* 88 A.L.R. 1103. If it had been the purpose of the Legislature to prohibit employment following the assumption of an appointing office by a relative, it could have expressly included such a provision in the act.

Based on the reasons above stated we are of the opinion that [NRS 281.210](#) prohibits only the act of employing relatives within the class defined by the statute and that continued employment of the present "County Road Superintendent," should his nephew be elected to the appointing board, would not contravene the provisions of that statute.

An appointment, or reappointment, to the office of "County Road Superintendent" of an uncle of any of the members of the Board following the coming election would, of course, constitute a violation of the Nepotism Act, but it appears that election of new Commissioners does not create any necessity for such an appointment.

Where appointments at pleasure are to be made by a board, the tenure of the incumbent is not terminated by a change in the personnel of the board * * *. (67 C.J.S. 200.)

The conclusions stated herein are in accord with Attorney General Opinions No. 347, October 3, 1929; No. 196, December 5, 1935; No. 223, September 10, 1952; insofar as they differ from the conclusion stated in Attorney General Opinion No. 430, December 3, 1958, we think the views here expressed ought to control.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-179 DISTRICT ATTORNEYS; COUNTY OFFICERS; ELECTIONS—[NRS 252.060](#) construed. An appointment to the office of District Attorney vacated by resignation occurring prior to biennial election cannot extend beyond the next biennial election, at which time the electorate is to determine who shall fill the unexpired term of that office. [NRS 294.300](#) construed. Resignation of District Attorney prior to the holding of a primary election but subsequent to the last day permitted for filing for such election creates a vacancy in party nomination after the holding of a primary, and [NRS 294.300](#) applies, authorizing and requiring County Central Committees to nominate.

Carson City, September 20, 1960

Honorable Jack C. Cherry, District Attorney, Clark County, Las Vegas,
Nevada

STATEMENT OF FACTS

Dear Mr. Cherry:

Mr. George Foley was duly elected to the office of District Attorney of Clark County to serve a four-year term commencing January 1959 and ending January 1963. On August 22, 1960 he resigned from that office and the County Commissioners of Clark County appointed Jack C. Cherry to replace him. The vacancy in office occurred prior to the holding of the primary election of September 6, 1960, but subsequent to the last day for filing a declaration of candidacy for that election, which is declared to be not less than 50 days prior to the primary. ([NRS 294.120](#).) A general election is to be held November 8, 1960; however, the office of District Attorney would not ordinarily appear on the ballot at that election ([NRS 296.015](#), [NRS 252.020](#)). The District Attorney of Clark county has, in his letter of September 9, 1960, presented the questions appearing below for our consideration.

QUESTIONS

1. Is the office of District Attorney of Clark County to be filled by election on November 8, 1960, or does the appointment of the present District Attorney extend until the completion of the unexpired term of his predecessor?
2. If the office of District Attorney is to be filled by the coming election, in what manner are the candidates of the respective political parties to be chosen?

CONCLUSIONS

1. The office of District Attorney of Clark County is to be filled by election on November 8, 1960.
2. The County Central Committees of the respective political parties are authorized and required to nominate candidates for the office of District Attorney.

ANALYSIS

[NRS 252.060](#) provides:

252.060 Vacancy in office. In case a vacancy should occur in the office of district attorney, by death, removal, or otherwise, the board of county commissioners shall appoint some suitable person to fill vacancy until the *next ensuing biennial election*. (Emphasis added.)

[NRS 245.170](#) provides:

245.170 County commissioners to fill vacancies. When any vacancy shall exist or occur in any county or township office, except the office of district judge and county

commissioner, the board of county commissioners shall appoint some suitable person, an elector of the county, to fill such vacancy until the *next ensuing biennial election*. (Emphasis added.)

The cited statutes can best be understood in the light of a brief review of pertinent judicial decisions.

In the case of *Bridges v. Jepsen*, [48 Nev. 64](#), 227 P. 588 (1924), the County Clerk and Treasurer of Douglas County who was elected for a four-year term commencing in January of 1923, died during the first week of his administration. The County Commissioners thereupon appointed Jepsen to fill the vacant office. Bridges sought mandamus to compel the County Clerk to include the office of County Clerk and Treasurer in the notice proclaiming offices to which candidates were to be nominated in the primary election of 1924. The controlling statute provided that when vacancies occurred in the office of County Clerk, the Board of County Commissioners was to appoint to fill the vacancy “until the next general election.” The Court denied the writ, holding that the office of Clerk was not open for election, since it was filled by appointment until the next election at which a County Clerk would regularly be elected. The Court stated:

* * * Now that county officers hold for a term of four years, a vacancy occurring in such offices is to be filled by appointment by the board of county commissioners until the next general election prescribed by law for the election of county officers. It may be that the legislature, having changed the term of county officers from two to four years, should have been provided that an election to fill a vacancy be held at any biennial election; but they did not do so, * * *.

The rule stated in the *Jepsen* case, *supra*, was followed in *Grant and McNamee v. Payne*, [60 Nev. 250](#), 107 P.2d 307 (1940), where it was held that an election for the office of State Senator of Clark County, vacated by the resignation of the incumbent in 1940 could not be held at the biennial election of 1940, but could only be held at the general election of 1942, when that office would ordinarily be filled by election. As to county offices as opposed to state offices, however, the Court said that the 1939 amendment to Section 4813 NCL (presently [NRS 245.170](#), *supra*) was “for the purpose of changing the rule declared by this court in *State ex rel. Bridges v. Jepsen* * * *.” The 1939 amendment referred to appears at page 146, Statutes of Nevada 1939, and that amendment together with the amendment appearing at page 165, Statutes of Nevada 1933, had the effect of changing the term of appointment to a vacated county office from the next ensuing general election to the next ensuing biennial election.

[NRS 252.060](#), *supra*, relates specifically to the office of District Attorney and provides that the appointee of the Board of County Commissioners shall fill a vacancy “until the next ensuing biennial election.” The legislative history beneath this statute does not indicate that it was ever amended; however, the comparable statute in NCL, Section 2085, provided that the appointee would “remain in office during the balance of the unexpired term.” The reviser’s note to [NRS 252.060](#) notes the change in language and makes reference to Section 4813 NCL 1931 (*supra*). He has adopted the view that the 1939 amendment to that section,

which governed all county officers, amended the specific section governing District Attorneys. The Nevada Revised Statutes were enacted as the law of this State and all prior laws were repealed by virtue of Chapter 2, Statutes of Nevada 1957, page 2.

It can readily be observed from the foregoing that the existing statutes result from a clear legislative attempt to overcome the rule stated in the *Jepsen* case and furnish the electorate with an opportunity to fill a vacated county office at the earliest convenient time. It follows that the appointment of the present District Attorney of Clark County cannot extend beyond the next biennial election to be held on the 8th day of November, 1960, at which time the voters shall determine who shall fill the unexpired term of that office.

Having decided that the District Attorney must be elected at the coming biennial election, it is necessary to determine in what manner the political parties are to choose the nominees to that office. [NRS 294.300](#) provides:

294.300 Vacancy in party nomination after primary: How filled. Vacancies occurring after the holding of any primary election shall be filled by the central committee of the political party of the county, district or state, as the case may be. Such action shall be taken not less than 30 days prior to the November election.

In the case of *Brown v. Georgetta*, [70 Nev. 500](#), 275 P.2d 376 (1954), it was contended the cited statute applied only in cases where the nominee at the primary election died or resigned, but the Court held the statute was not so limited. In that case it was applied to a vacancy in nomination created by a vacancy in office occasioned by the death of Senator McCarran following the primary election. The Court cited from *Penrose v. Greathouse*, [48 Nev. 419](#), 233 P. 527, 529:

But, as said in *State v. Hostetter*, supra, where, by reason of death, as in this case, a vacancy in an office occurs shortly before a general election at which someone to fill the office for the unexpired term should be chosen, and no one has been nominated to said office (as in this case), there is a vacancy in the nominations within the meaning of the election law, and such a vacancy may be supplied, at any time prior to the election, by a nomination authenticated in the mode pointed out by the ballot law.

In the case at hand the resignation of George Foley occurred prior to the actual holding of the primary election but following the last day permitted for filing. This resulted in the creation of a vacancy in party nomination after the holding of a primary, and we are, therefore, of the opinion that [NRS 294.300](#) applies and the respective County Central Committees should nominate.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey

OPINION NO. 60-180 HEALTH, STATE DEPARTMENT OF—

Foodstuffs manufactured or packaged in Nevada must bear the name (not license number) of the manufacturer or packer. [NRS 585.350, 5\(a\)](#) construed. If processed and packaged in Utah for shipment to and consumption in Nevada, the same rule applies, for the effect upon interstate commerce would be only indirect.

Carson City, October 3, 1960

Mr. W. W. White, Director, Division of Public Health Engineering, State Department of Health, 755 Ryland Street, Reno, Nevada

STATEMENT OF FACTS

Dear Mr. White:

The Lucerne plant of Salt Lake City has undertaken the processing of milk for Cream o'Weber and Hi-Land Dairies in cartons containing the name and all of the advertising of Cream o'Weber and Hi-Land Dairy Companies. The Division of Public Health Engineering of the Nevada State Department of Health has informed the interested companies that the cartons shall also contain the following printed material, "Processed and Bottled, Lucerne, Salt Lake City," insofar as the cartons for export to Nevada for consumption in Nevada are concerned. The Cream o'Weber and Hi-Land Companies desire, in addition to their individual advertising, the following printed material on the carton: "Processed and Bottled, Salt Lake City, Plant No. 10." The Lucerne plant is licensed under the laws of Utah as Plant Number 10. The difference in views of proper content of the material to be printed on the carton is one of occupation and trade name competition, for Lucerne is a competitor of the two dairy companies designated.

QUESTION

Would the imprinting upon the carton for milk to be exported to Nevada for consumption in Nevada, in the form urged by the Cream o'Weber and Hi-Land Companies, satisfy the requirements of the Nevada law?

CONCLUSION

We have concluded that the question must be answered in the negative.

ANALYSIS

Under Chapter 585 of the Nevada Revised Statutes, entitled, "Food, Drugs and Cosmetics: Adulteration; Labels; Brands," Section [NRS 585.350](#), in part provides:

585.350 A food shall be deemed to be misbranded:

5. If in package form, unless it bears a label containing:
(a) The name and place of business of the manufacturer, packer or distributor.

In harmony with this statute, under its rule-making power, your department has promulgated a rule, together with other rules on July 12, 1960, which in part provides the following:

Section 4. Labeling. All bottles, cans, packages, and other containers enclosing milk or any milk product defined in these regulations shall be plainly labeled or marked with * * * (5) the name of the producer of raw milk for pasteurization or processing, and the name of the plant and location at which the contents were pasteurized; * * *.

Under [NRS 585.350](#), subsection 5, (a) if a carton of milk is in "package" form, and it appears to us that it clearly is in such form, the carton will be misbranded unless it bears a label containing "the name and place of business of the manufacturer, packer, or distributor."

By liberal construction of the statute, under the police powers of the State, in the interest of the health and welfare of the people, we believe that a plant which pasteurizes and packages milk is a "manufacturer or packer" within the provisions of the statute. This leads to the conclusion that the name of "Lucerne" as distinguished from the number assigned to this plant must be used in those milk products prepared for shipment and consumption in Nevada.

To this point we have disregarded the question of interstate commerce and have dealt with the statute as if all of the three interested companies were domiciled in Nevada.

Indirect effects upon interstate commerce, when imposed by the states, are not under the commerce clause of the United States Constitution rendered unconstitutional. This imposition is no more than that imposed upon persons similarly situated in Nevada. In *Schechter v. United States*, 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837, 97 A.L.R. 947, the Court said:

* * * where the effect of interstate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power.

If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control.

See also Highland Farms Dairy v. Agnew, (1936 D.C.) 16 F.Supp. 575, and Attorney General Opinion No. 241 of February 12, 1957.

It follows, we think, without stating that as to milk products placed in cartons in Salt Lake City, Utah, not to be exported to Nevada for consumption here, that the Nevada State Department of Health has no control or jurisdiction.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

**OPINION NO. 60-181 WATER AND WATER COURSES; STATE
ENGINEER'S ORDER DECLARING ARTESIAN BASIN—**

State Engineer can administer artesian basin notwithstanding appeal of Order to District Court where no stay bond has been filed by appealing party.

Carson City, October 11, 1960

Honorable Hugh A. Shamberger, Director, Department of Conservation
and Natural Resources, State Office Building, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Shamberger:

On June 27, 1960, the State Engineer declared a portion of Smith Valley, Nevada, as an artesian basin, pursuant to [NRS 534.030](#), subsection 2. Thereafter, within the statutory period, a group of landowners in the declared basin filed an appeal with the District Court asking for a judicial review of the State Engineer's Order. Thereafter, a different group of landowners in the declared basin, being in favor of the Order of the State Engineer, petitioned the Court for leave to intervene in the judicial review proceedings and asked the State Engineer to proceed to regulate the basin in accordance with his Order and pending the judicial review. The State Engineer has taken the position that during the judicial review litigation that he would be exceeding his authority if he proceeded to regulate the basin. The petitioners in intervention, the group of landowners who favor the Order of the State Engineer, take the position that the State Engineer is duty bound to so regulate the basin in accordance with the Order.

QUESTION

Can the State Engineer proceed with the regulation of an artesian basin according to his Order designating said basin where an appeal from such Order has been filed with the appropriate District Court and where no stay bond has been filed by appellants or must he obtain a Court order for that purpose.

ANALYSIS

[NRS 534.030](#) provides:

534.030 Supervision of ground water basins by state engineer; petition of well owners; review of orders; extent of supervision; advisory services of governing bodies of water districts, water conservation boards.

1. Upon receipt by the state engineer of a petition requesting him to administer the provisions of [NRS 534.010](#) to [534.190](#), inclusive, as relating to designated areas, signed by not less than 15 percent of the owners of wells, in any particular basin or portion therein, having a legal right to appropriate underground water therefrom, he shall:

(a) Cause to be made the necessary investigations to determine if such administration would be justified.

(b) If his findings are affirmative, designate such area by basin, or portion therein, and shall make an official order describing the boundaries by legal subdivision as nearly as possible.

(c) Proceed with the administration of [NRS 534.010](#) to [534.190](#), inclusive, as provided for herein.

2. In the absence of such a petition from the owners of wells in a ground water basin which the state engineer has found, after due investigation, to be in need of administration as relating to designated areas, the state engineer may upon his own motion enter an order in the same manner as if a petition, as described in subsection 1, had been received.

3. Such order of the state engineer may be reviewed by the district court of the county pursuant to [NRS 533.450](#).

There follows subdivisions 4 and 5 but they are not pertinent to the discussion here.

The Order designating a portion of Smith Valley as an artesian basin was made by the State Engineer upon his own motion pursuant to [NRS 534.030](#), subsection 2 as quoted above.

As noted in subsection 3 quoted above, the Order of the State Engineer may be reviewed by the District Court, pursuant to [NRS 533.450](#). In [NRS 533.450](#), subsection 1, it is stated in part, "Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order or decision in question and notice thereof is given to the state engineer as provided in subsection 3." Taken alone it would seem that the moment an appeal from the Order of the State Engineer is taken, such appeal would operate as a stay. However, [NRS 533.450](#), subsection 5 states: "No bond shall be required except when a stay is desired, and the proceedings herein provided for shall not be a stay unless, within 5 days following the service of notice thereof, a bond shall be filed in an amount to be fixed by the court, with sureties satisfactory to such court, conditioned to perform the judgment rendered in such proceedings."

We think that subsection 5 quoted above is controlling and where no stay bond has been filed the State Engineer can administer a basin pursuant to his Order even though an appeal to the District Court is pending. It should be noted that the judicial review proceedings above referred to pertain to adjudication and appropriation proceedings. The underground water law came later and had no specific or special provisions for appeal or judicial review other than referring to [NRS](#)

[533.450](#). Whether the judicial review proceedings as pertaining to underground waters are adequate or appropriate is a matter for the Legislature.

[NRS 534.120](#) provides:

1. Within an area that has been designated by the state engineer, as provided for in [NRS 534.010](#) to [534.190](#), inclusive, where, in his judgment, the ground water basin is being depleted, the state engineer in his administrative capacity is herewith empowered to make such rules, regulations and orders as are deemed essential for the welfare of the area involved.

2. In the interest of public welfare, the state engineer is authorized and directed to designate preferred uses of water within the respective areas so designated by him and from which the ground water is being depleted, and in acting on application to appropriate ground water he *may* designate such preferred uses in different categories with respect to the particular areas involved within the following limits: Domestic, municipal, quasi-municipal, industrial, irrigation, mining and stock-watering uses. (Emphasis supplied.)

The above two sections of [NRS 534.120](#) are quoted only to point out the latitude and discretion lodged in the State Engineer in the performance of his administrative duties.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: William Paul
Special Deputy Attorney
General for
Department of Conservation

OPINION NO. 60-182 PRIVATE DETECTIVES—A nonresident private detective or firm, even if licensed in another state, and there represent the public generally, may be employed by one Nevada employer, without the requirement of Nevada licensing. [NRS 648.190](#) construed.

Carson City, October 14, 1960

Mr. Robert F. Stenovich, Superintendent, Nevada Highway Patrol, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Stenovich:

Recently a private detective, not licensed in Nevada, was employed by the Clark County Grand Jury, and by the office of District Attorney of Washoe County. Presumably in both cases the individuals are duly licensed in another state, and presumably these individuals have not accepted private detective employment in Nevada, except with the one employer as aforesaid.

QUESTION

Are such employments authorized by law?

CONCLUSION

We are of the opinion that the employment by the County Grand Jury is clearly authorized.

Unless the private investigator or firm is employed by the District Attorney, for and in aid of the Grand Jury of his county, under the provisions of [NRS 172.320](#), subsection 4, we are of the opinion that such employment by a District Attorney is not authorized.

ANALYSIS

We are principally concerned with the question of whether or not a private detective (or firm) employed by a single employer in Nevada, must be licensed in Nevada, under the provisions of [NRS chapter 648](#). Before exploring this question however, we observe that there is no question but that the Grand Jury of a county is authorized, with the consent of the Board of County Commissioners, to obtain the professional assistance of a private detective (or firm) in the performance of its inquisitorial powers and duties. This authority is contained in [NRS 172.320](#), subsection 4, which provides the following:

4. The grand jury shall have the power, with the consent of the board of county commissioners, to engage the services of an attorney other than and in addition to the district attorney, certified public accountants, and such other skilled persons as may be necessary in the performance of its inquisitorial powers.

However, in our search we have not found a comparable section authorizing a District Attorney, as such, to employ a private investigator. [NRS 648.010](#), subsection 4, provides:

“Private detective” means and includes any of the following:

(a) Any person who engages in business or who accepts employment for hire, reward or fee to furnish or supply information as to the personal character or actions or identity of any person, or as to the character or kind of business or occupation of any person.

[NRS 648.060](#) provides:

648.060 No person, unless he is licensed under this chapter, shall:

1. Engage in the business of private detective for hire or reward; or
2. Advertise his business to be that of private detective irrespective of the name or title actually used.

[NRS 648.190](#), in part, provides:

648.190 This chapter shall not apply: * * *

5. To any person employed as special agent, detective or private investigator for one employer exclusively in connection with the affairs of that employer.

We are of the opinion that the fact that these persons are domiciled and licensed in another state as private detectives, and there offer their services to the public generally, is of no consequence in the determination of this problem, and that so long as their employment in Nevada is for one employer only and is upon an assignment “exclusively in connection with the affairs of that employer,” such private detective falls within the quoted exception and is not required to be licensed in this State. Of course, if either private detective should advertise for or accept an appointment for private detective service, in this State, in addition to the one permitted contract, he would be required to be licensed by the Board, under the provisions quoted.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

**OPINION NO. 60-183 TAXES; EMINENT DOMAIN; [NRS 37.160](#);
[NRS 37.100](#)**—Where a tax-exempt public agency condemns real property, the tax liability of the owner ends on the effective date of the order permitting immediate occupancy if such is obtained, and not upon entry of the Final Order of Condemnation. Real property taxes which become a lien prior to condemnation are to be deducted from the condemnation award.

Carson City, October 17, 1960

Honorable William J. Raggio, District Attorney, Washoe County, Reno, Nevada

Attention: Mr. Eric L. Richards, Assistant District Attorney

STATEMENT OF FACTS

Dear Mr. Raggio:

On the 27th day of December, 1957, the State of Nevada, on relation of its Department of Highways, instituted proceedings to condemn for highway purposes a parcel of real property situate in Washoe County, owned by Ruth Garfinkle Olsen. Pursuant to the provisions of [NRS 37.100](#) the State obtained an "Order for Immediate Possession," effective June 19, 1958. A Final Order of Condemnation was entered on August 3, 1960. Mrs. Olsen was assessed and paid real property taxes on the condemned parcel for the fiscal year commencing July 1, 1958 and ending June 30, 1959. She now seeks a refund of the amount paid.

QUESTION

Is a condemnee liable for payment of property taxes which accrued prior to the Final Order of Condemnation but following the entry of an order authorizing immediate occupancy of the parcel sought by the State?

CONCLUSION

No.

ANALYSIS

The problem of ascertaining at what stage in eminent domain proceedings rights in respect of real estate taxes are to be determined is discussed at 45 A.L.R.2d 536, et seq. The annotator there points out that the courts have reached varying solutions, depending upon the applicable statutes. [NRS 37.160](#) provides:

When payments have been made * * *, the court must make a final order of condemnation, which must describe the property condemned and the purpose of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the title to the property described therein shall vest in the plaintiff for the purpose therein specified.

Under the provisions of [NRS 37.100](#), the plaintiff in an eminent domain proceeding "any time after the commencement of suit" may, upon a proper showing, obtain an order permitting occupancy of the premises sought and authorizing work to be done thereon. In cases where the condemnor has entered the property of the defendant pursuant to such an order, the transfer of title contemplated by [NRS 37.160](#), supra, amounts to little more than a legal formality. The defendant property owner has been deprived of all the beneficial use and enjoyment of his land and he should not be required to pay taxes upon it.

Section 1253 of the California Code of Civil Procedure is, in substance, identical to [NRS 37.160](#). Notwithstanding this provision, it was held in *City of Long Beach v. Aistrup*, 164 Cal.App.2d 41, 330 P.2d 282, that where a tax exempt condemnor obtains an order for possession of property prior to judgment and actually takes possession of the property, evicting the owners therefrom, the owners are not thereafter obligated to pay real property taxes.

It is clear that in California the date marking the termination of the landowner's tax liability is the date upon which the condemning authority actually takes possession of the property and makes substantial changes upon it. It has been held that such acts constitute a "taking" within the meaning of the California eminent domain provisions. *See People v. Joerger*, 12 Cal.App.2d 655, 55 P.2d 1269. However, we are of the opinion that where a tax exempt public agency condemns real property, the tax liability of the owner should end on the effective date of the order for immediate entry if such is obtained, even though the mere issuance of such an order does not constitute a "taking." *See People v. Watkins*, ____ Cal.App.____, 345 P.2d 960. Convenience commends this view. The County Assessor is not equipped to make inquiries as to the time when the condemnor has actually entered upon the defendant's property; but it is a simple matter to file a court order in the office of the County Recorder. As a practical matter, the effective date of the order and the date of physical entry should not vary to any great extent. Subparagraph 2, [NRS 37.100](#) requires the court to take proof "of the reasons for requiring a speedy occupation" and presumably, the plaintiff would not be granted the order allowing occupancy unless he displayed an immediate need.

While Mrs. Olsen has not requested a refund of any taxes paid by her on the condemned parcel for the fiscal year 1957-1958, it is clear that such claim could not be allowed. By virtue of the provisions of [NRS 361.450](#), a lien attaches on all property assessed on the first Monday in September "prior to the date on which the taxes are levied." Taxes for the fiscal year 1957-1958, therefore, became a lien on Mrs. Olsen's property in September of 1957, two months prior to the commencement of the action. It is the general rule that taxes which become a lien prior to condemnation are to be deducted from the condemnation award. 45 A.L.R.2d 529, *City of Long Beach v. Aistrup*, supra.

In view of the above, Mrs. Olsen's claim for refund of taxes paid on real property for the fiscal year 1958-1959 should be allowed, since immediate entry upon the parcel sought by the State of Nevada was authorized prior to the accrual of the property taxes.

Your attention is invited to [NRS 354.220](#), et seq., authorizing refunds of moneys paid into the County Treasury where just cause exists, upon resolution of the Board of County Commissioners.

The views expressed herein are in accord with the conclusions stated in Attorney General Opinion No. 300, dated August 23, 1957.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-184 COUNTY COMMISSIONERS—County Commissioners have no authority to enact an ordinance establishing a standard of time for Clark County.

Carson City, October 24, 1960

Honorable Jack C. Cherry, District Attorney, Clark County, Las Vegas, Nevada

Dear Mr. Cherry:

Your letter of October 7, 1960 requests the opinion of this office on the following question:

QUESTION

Is the Board of County Commissioners of Clark County, Nevada empowered to govern the standard of time applicable to Clark County?

CONCLUSION

No.

ANALYSIS

In 1918 the Federal Government established five “standard” time zones in the United States. The zones are designated Eastern, Central, Mountain, Pacific and Alaska. The Interstate Commerce Commission is authorized to define the limits of each zone. 15 U.S.C.A. Secs. 261 et seq. The statute provides that the time zones created shall govern all common carriers engaged in interstate commerce, all statutes, orders, rules and regulations relating to the time of performance of any act by an officer of the United States, or relating to the time within which rights shall accrue to persons under federal laws. The federal legislation, however, is not exclusive of state action on the same subject matter. *State v. Benton*, 10 Fed.2d 515, *aff’d* 47 S.Ct. 189, 272 U.S. 525, 71 L.Ed. 387.

The only Nevada legislation pertinent to the instant matter is [NRS 237.010](#) which reads as follows:

1. The governor of the State of Nevada may establish daylight saving time for the State of Nevada. Such time shall be established by proclamation, and, if proclaimed, shall be the official time for the State of Nevada.
2. Daylight saving time, if proclaimed, shall be 1 hour in advance of the standard time applicable to any portion of the state.

It was held in *Smith v. City of Pittsburgh, et al.*, 30 Penn. Dist. Reps. 454, that the Council of the City of Pittsburgh had no power to enact a city ordinance establishing daylight saving time in view of the existence of a state statute approving Eastern Standard Time. The cited Nevada provision does not expressly declare “Standard Time” as defined in Title 15, U.S.C.A., to be the official time of the State of Nevada. However, it is arguable that [NRS 237.010](#) is at least a legislative recognition of the federally declared standard time zones, since such was the “standard time applicable” to most of Nevada at the time of the enactment of the statute. The phrase “standard time” has been held to mean the standard time provided for in Section 261, 15 U.S.C.A., *McFarlane v. Whitney*, 134 Texas 394, 134 S.W.2d 1047.

Regardless of whether or not [NRS 237.010](#) impliedly makes the federally declared “Standard Time” the official time for the State of Nevada, we are of the opinion that the County Commissioners have no authority to enact an ordinance establishing a standard of time for Clark County. It was stated in *King v. Lothrop*, [55 Nev. 405](#), 36 P.2d 355, that “It is well settled that county commissioners have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect.” (Citing *Sadler v. Board of Commissioners of Eureka County*, [15 Nev. 539](#).) We find no statute expressly or incidentally authorizing County Commissioners to enact an ordinance regulating time.

It occurs to us in passing that perhaps the Legislature ought to consider the enactment of legislation clearly defining what is “standard time” in the State of Nevada and who is authorized to declare it or Nevadans may some day be faced with the confusion extant in Kentucky, where a Commissioner of the Court of Appeals of that state in a recent decision prefaced the Court’s holding by the following remarks:

We are again faced with the tribulations of time. This suit is an attack on the validity of our 1952 statute undertaking to regulate its official measurement in Kentucky.

It was anciently observed, “Our time is a very shadow that passeth away”. In Kentucky this is only a half truth. Our time is a fleeting shadow, but unfortunately, as a chronic problem in calculation, it will not pass away.

It cannot be said with certainty what time it is in Kentucky. Watches show one hour and the courthouse clock another. It is five o’clock in Frankfort, but it is four o’clock in Louisville. This is rather convincing evidence that the hour was not a divine creation, but is wholly man made and arbitrary. What time it is, is what a person thinks it is, and practically nobody in Kentucky today is quite sure. *Hamilton v. City of Louisville (Ky.)*, (1960), 332 S.W.2d 539.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsay
Deputy Attorney General

**OPINION NO. 60-185 EDUCATION, STATE DEPARTMENT OF;
USE OF PUBLIC SCHOOL FUNDS FOR EDUCATIONAL
PROGRAMS IN COUNTY JUVENILE DETENTION
FACILITIES**—Relevant statutes reviewed and found not to authorize apportionment and use of state distributive school funds for establishment and support of instructional programs restricted to benefit inmates of Detention and Rehabilitation Facilities recently established in Washoe and Clark Counties. [NRS 388.440-388.540](#), pertaining to education of physically and mentally handicapped, and [NRS 388.050](#), relating to establishment of “school attendance areas”

held inapplicable to authorize such educational program. Pending legislative authorization therefor, such educational programs would have to be assumed and paid for with county funds, if available therefor.

Carson City, October 26, 1960

Mr. Byron F. Stetler, Superintendent of Public Instruction. Department of Education, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Stetler:

It is indicated that the Washoe County School District has requested approval of the State Department of Education for the instruction of children who are detained at Wittenberg Hall (the newly established Washoe County Children's Detention Home) by School District teachers employed for the teaching of physically or mentally handicapped children who are unable to attend school.

It is also indicated that Clark County School District has requested approval for the establishment of a new "school attendance area" which shall include the Spring Mountain Youth Camp, the recently instituted Clark County Youth Detention and Rehabilitation Center, designed and intended to accommodate juveniles adjudged and held subject to the jurisdiction, custody and control of the District Court. Such new "school attendance area" (indicated as admittedly for the exclusive benefit of juveniles in said Youth Center), if authorized and approved by the State Department of Education, would permit the employment of a teacher or teachers to give academic instruction at the Youth Camp, with Clark County School District, rather than Clark County, assuming and paying the costs involved from apportioned distributive school funds.

QUESTIONS

I. In respect to apportionment and use of state distributive school funds therefor ([NRS 387.125](#)), would an instructional program for children, detained in a County Detention Facility, be authorized under statutory provisions ([NRS 388.440-388.540](#)) pertaining to the education of "physically or mentally handicapped minors"?

II. A. Would the instructional program contemplated for the Clark County Spring Mountain Youth Camp (as outlined in the letter of Honorable David Zenoff, District Court Judge, Clark County, Nevada, dated September 13, 1960) come within the purview and scope of "public school," as statutorily defined ([NRS 388.010](#), [388.020](#)), and the use of "public school" moneys, as regulated and governed by [NRS 387.040-387.045](#)?

B. If our answer to Question IIA is in the affirmative, would use of apportioned state distributive school funds be legally authorized for support and maintenance of a school in Clark County's Spring Mountain Youth Camp, a Juvenile Detention and Rehabilitation Facility?

CONCLUSIONS

Question No. I: No.
Question No. II, A: No.
Question No. II, B: No.

ANALYSIS

[NRS 388.440](#), entitled “Physically or mentally handicapped minor” defined, provides as follows:

As used in [NRS 388.440](#) to [388.540](#), inclusive, “physically or mentally handicapped minor” means a physically or mentally defective or handicapped person under the age of 21 years who is in need of education. Any minor who, by reason of physical or mental impairment, cannot receive the full benefit of ordinary education facilities shall be considered a physically or mentally handicapped person for the purposes of [NRS 388.440](#) to [388.540](#), inclusive. Minors with vision, hearing, speech, orthopedic, mental and neurological disorders or defects, or with rheumatic or congenital heart disease, or any disabling condition caused by accident, injury or disease, shall be considered as being physically or mentally handicapped.

The above statutory definition of “physically or mentally handicapped minor” must be deemed to exclude any but a *medical* handicap condition, insofar as special educational provisions are concerned, if they are to be paid out of State distributive school funds. Certainly, said definition does not contemplate that a child physically prevented from attending school because confined in a Youth Detention Facility, is necessarily “physically or mentally” handicapped, in the *medical* sense legally provided.

We would certainly agree that an adequate instructional program for such unfortunate children or youths as may be adjudged to require detention for social rehabilitative purposes is a most laudable objective. We are, however, concerned herein only with the legal question as to whether, under existing law, authority exists for use of public school funds for the indicated desired instructional programs.

In our considered opinion, sections [NRS 388.440](#) through 388.540 do not provide any legal basis or authority for instructional programs to inmates, judicially committed to, and detained in, County Detention Facilities. Existing statutes which authorize special provision of education to the “physically and mentally handicapped” cannot be construed to include special educational provisions for children or youths, *not mentally handicapped*.

We have carefully examined other relevant Nevada statutes for such authority without success. In the case of the Nevada School Of Industry (the State Youth Detention Facility), express statutory authority is given to organize an instruction department, establish programs of study, or arrange for the attendance of inmates of the School at the Elko County High School ([NRS 210.090](#)). And [NRS 210.100](#) directs that the Superintendent of the School of Industry make due arrangements for carrying out the statutory requirements relative to education of the inmates therein.

In the case of dependent children committed to the Nevada State Children’s Home in Carson City, Nevada, [NRS 423.220](#) expressly authorizes the attendance of such children in the public schools of the

Ormsby County School District on the same basis as is afforded any other resident children of said school district.

However, respecting County Detention Facilities (such as those established by both Washoe and Clark Counties), we find no statutory provision which clearly and explicitly applies. This is not surprising, since these facilities have only recently been established as an answer to the juvenile problem existing in these two most populous counties in the State. It must also be noted that school district boards are restricted to exercise of express powers conferred upon them or reasonably intended by the Legislature and no others.

Obviously, because attendance would admittedly be restricted to the inmates of such Detention Facilities only, the proposed and desired educational programs for such facilities cannot reasonably be said to be embraced in *public* schools, as statutorily defined. However, it has been suggested that the problem of providing education to the inmates of both such County Detention Facilities might be resolved by establishment of "school attendance areas" which would respectively include each of them in both Washoe and Clark Counties. In view of such suggestion, it is necessary, therefore, carefully to examine the provisions of [NRS 388.050](#), entitled "School attendance areas: Creation; abolishment; 'resident child' defined," which, as here relevant, provides:

1. The board of trustees of a school district, with the approval of the superintendent of public instruction, may create a new school attendance area in the school district and define its boundaries when:

- (a) A school attendance area is not in existence.

- (b) Transportation to an existing school is not feasible or practical.

2. Whenever the attendance of any school child or school children is the determining factor in the creation of a school attendance area, such child must be a "resident child", or such children must be "resident children" within the meaning of subsection 3 *before any such school district shall be entitled to receive any apportionment of public school money.*

3. As used in this Title of NRS, the terms "resident child" and "resident children" mean all normal children between the ages of 6 and 17 years *who have actually resided in the proposed school attendance area within the school district with a parent or parents, or a guardian or guardians, for a period of at least 3 months, but do not include:*

- (a) Children residing in the proposed school attendance area within the school district who have already completed the grades proposed to be taught in the school.

- (b) *Children whose parents or guardians reside or have their home outside the state or in any other school district within the state.* (Emphasis supplied.), See Attorney General Opinion No. 177, June 24, 1935; Attorney General Opinion No. 270, December 3, 1938.

The italicized portions of the foregoing statutory provisions, it is submitted, impose restriction or limitations upon the establishment of new "school attendance areas" by use of public school moneys, which would

not be satisfied in the circumstances obtaining in the County Detention Facilities established by Washoe and Clark Counties. The inmate group in both such facilities would be a fluctuating one, in many cases lacking the required 3 months' residence therein. Also, the parents or guardians of the inmates would, at least in most instances, be resident outside the proposed "school attendance area." In short, these particular statutory provisions were never legislatively intended to include or resolve the particular educational problem here involved.

Admittedly, a satisfactory solution must be provided, in view of the importance of education in the rehabilitation of children and juveniles judicially committed to such County Detention Facilities. In the present state of the law, apportioned public school moneys are, however, not authorized therefor.

Pending possible legislative action providing such specific power and authorization, we are compelled to the conclusion that any expense or cost of educational programs, as outlined for the above-mentioned Washoe County and Clark County Detention Centers or Facilities, must be borne by each said county respectively, and be paid out of *county* funds.

We trust that the foregoing sufficiently answers your inquiries, and proves helpful in effecting a satisfactory and definitive solution to the problems herein reviewed.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 60-186 TAXATION; LEASEHOLD; LEASEHOLD IMPROVEMENTS—Where lease provides that possessory interest in real property and improvements made by lessee, to be removed upon termination of lease, are to be assessed and taxed to lessee, Assessor must assess possessory interest and improvements to lessee and not to lessor during term of lease.

Carson City, October 28, 1960

Honorable Jack C. Cherry, District Attorney, Clark County, Las Vegas, Nevada

STATEMENT OF FACTS

Dear Mr. Cherry:

The Union Pacific Railroad Company, as owner of lands within Clark County, from time to time has leased certain of its lands to individuals and other entities. The form of lease executed by the lessor and lessees, *inter alia*, provides:

It is agreed that *no* improvements placed upon the leased premises by the Lessee shall become a part of the realty, and the Lessee further agrees to pay before the same shall become delinquent all taxes levied or assessed during the life of this lease upon the leased premises and upon any buildings and improvements thereon, or to reimburse the Lessor for sums paid by the Lessor for such taxes, except taxes levied upon the leased premises as a component part of the railroad property of the Lessor in the state as a whole. (Section 2)

The Lessee covenants and agrees to vacate and surrender the quiet and peaceable possession of the leased premises upon the termination of this lease howsoever. Within thirty days after such termination the Lessee shall (a) remove from the premises, at the expense of the Lessee, all structures and other property not belonging to the Lessor; and (b) restore the surface of the ground to as good condition as the same was in before such structures were erected, including, without limiting the generality of the foregoing, the removal of foundations of such structures, the filling of all excavations and pits and the removal of all debris and rubbish, all at the Lessee's expense, failing in which the Lessor may perform the work and the Lessee shall reimburse the Lessor for the cost thereof within thirty days after bill rendered.

In the case of the Lessee's failure to remove said structures and other property the same shall, upon the expiration of said thirty days after the termination of this lease, become and thereafter remain the property of the Lessor; and if within ninety days after the expiration of such thirty-day period the Lessor elects to and does remove, or cause to be removed, said structures and other property from the leased premises and the market value thereof on removal or of the material therefrom does not equal the cost of such removal plus the cost of restoring the surface of the ground as aforesaid, then the Lessee shall reimburse the Lessor for the deficit within thirty days after bill rendered. (Section 17)

The Assessor had heretofore assessed the leased land and improvements to the lessor railroad, which assessment was premised upon the interpretation of [NRS 361.035](#) defining "real estate" and [NRS 361.030](#) defining "personal property." The interpretation of such sections being that the improvements in the nature of fixtures placed upon the leased land by the lessees did not constitute personal property, but constituted real property and by reason thereof were subject to assessment to the lessor as *owner* of the land and became a lien against such land until such taxes shall have been paid.

QUESTIONS

1. Does Nevada law mandatorily require the assessment of improvements under a leasehold interest to be made against the owner of the land irrespective of the ownership of the improvements thereon?

2. Should such improvements be assessed against the owner of the improvements where the lease provides for the dismantling and removal of such improvements by the lessee?

CONCLUSIONS

1. That the law does not mandatorily, or at all, require the assessment of improvements under a leasehold interest, as set forth hereinbefore, to be made to the lessor owner of the land.

2. That the said assessment should be made to the lessee tenant.

ANALYSIS

Statutes imposing taxes are subject to strict interpretation. 51 Am.Jur. 616, Sec. 650.

It is well settled and familiar law that statutes imposing taxes are to be construed most strongly against the government, and in favor of the citizen, and are not be extended beyond the clear import of the language used. (*Portland Terminal Co. v. Hinds*, 154 A.L.R. at p. 1306.)

The lessor and lessee herein mutually agreed that no improvements placed upon the leased land by the lessee shall become a part of the realty, and also that upon the expiration of the term of the lease the lessee shall remove from the premises, at the expense of the lessee, all structures and other property not belonging to the lessor. Thus the lessor expressly disclaims any right of ownership and control of the lessee's improvements, save and except, in the event of the failure of the lessee to remove its property at the end of the term as provided in section 17 of the lease agreement.

At common law, a building or other structure erected by one person on the land of another is, as a general proposition, considered as a part of the realty, nevertheless, where the intention of the parties is shown, it may be owned by and taxed to a person other than the owner of the land. (22 Am.Jur. 778, Secs. 63, 64. Anno. 154 A.L.R. 1309 et seq. *See also* 51 Am.Jur. 451, Sec. 435 as amended at p. 26, pocket part, Cumulative Supplement, 1960.)

A leading case in point with the instant question is *Portland Terminal Company v. Hinds*, hereinabove cited.

Briefly, the facts were that the land was owned by the Terminal Company, a railroad corporation, but leased by the owners of buildings erected upon said land. In 1942 taxes upon some 41 buildings were assessed to the Terminal Company. The company paid the taxes to assessed and filed with the assessors application for abatement thereof upon the ground that it was not the owner of the buildings. The assessors denied the applications. The company sought judicial relief.

The Court analyzed the facts, the statutory law of Maine, and many cases of other states and thereupon held as follows:

1. Where the interest of a lessee in a building erected by him on leased land is not merely a contractual right operative only between himself and the landowner, but has the status

of a separate and distinct estate, a building which he has a right to remove upon the termination of the lease, or which is not to become the property of the lessor until the termination of the lease, is taxable during the term of the lease to the lessee rather than the lessor under a taxing statute which provides that buildings on leased land or on land not owned by the owner of the buildings shall, when situated in any city, town, or plantation, be considered real estate for purposes of taxation, but when located in unorganized territory shall be taxed as personal property.

In the course of the opinion the Court said:

The exact issue presented has not been previously before this court. The question has been passed upon, however, in other jurisdictions and although the tax statutes of the different states are not the same, we believe that the principle upon which the decisions have been based is applicable to the case before us.

Opposite results have been reached in the adjudicated cases, but the courts of those jurisdictions have been, for the most part, in agreement that the conclusion reached depends upon the view taken as to the nature of the interests of the building owner. In those jurisdictions where the interest of the building owner is considered a mere contractual right operative only between the parties thereto, it has been generally held that the building is taxable to the lessor as the owner of the entire property while in those jurisdictions where the interest of the building owner attains to the status of a separable and distinct estate, the building is taxable to the building owner. This reasoning would seem to be a logical application of the rule that property is taxable to its owner.

Adverting to the Nevada statutes governing the taxation of property, it may well be that [NRS 361.035](#) defines the improvement property of the lessee herein as “real estate”. But this, we think, is a classification for property tax valuation purposes and not necessarily fixing and determining that such property is to be at all times and under all circumstances assessable to the owner of the land upon which such property is located.

[NRS 361.035](#)(b) and (c) also defines possessory rights to land as real estate, but the language thereof does not import actual ownership of the land in all cases. Such definition also relates to the use of any land by a lessee, tenant or any other person to whom the right of use is granted by the owner. The power to tax possessory rights even to land of the United States was long ago sanctioned by the Court in *State v. Central Pacific R.R. Co.*, [21 Nev. 241](#); *Forbes v. Gracy*, 94 U.S. 762; Opinion No. 366, Attorney General Report 1946-1948. This latter right is now limited to possessory rights on federal lands upon which the government is not paying sums of money in lieu of taxes to the State. [NRS 361.035](#)(4).

The Nevada Supreme Court, in the case of *Nellis Housing Corporation v. State of Nevada*, No. 4120 dated May 22, 1959, [75 Nev. 267](#), dealt with a tax on possessory interests and leasehold improvements on land owned by the United States, but leased to a private corporation. The Court stated,

“It is conceded that the interests of the lessees are subject to taxation.” Here both the lessees’ possessory interest in the federal land and the improvements placed on the same were assessed and taxed.

Notwithstanding “possessory rights” to land are defined as “real estate”, nevertheless such rights also constitute property belonging to a lessee tenant, which the assessor in the performance of his duty to ascertain all real and personal property, and the owner thereof subject to taxation, should evaluate and assess to the owner thereof. ([NRS 361.260](#), [361.265](#)) In this connection it is to be noted that the Court in the *Portland Terminal Co. v. Hinds* case applied the rule of taxation of the property in question there to the lessee owner on the principle that it applied to both real and personal property of the lessee.

The lessor owner of the land in question here has expressly contracted with the lessee that no improvement placed on the leased land by the lessee shall become a part of the land. Thus the lease in this respect places such improvements, defined in the statute as “real estate,” squarely within [NRS 361.035](#)(3) reading:

3. When an agreement has been entered into, whether in writing or not, or when there is sufficient reason to believe that an agreement has been entered into, for the dismantling, moving or carrying away or wrecking of the property described in subsection 1, or where such property shall undergo any change whereby it shall be depreciated in value or entirely lost to the county, such property shall be classified as personal property, and not real estate.

We think it is clear that by reason of the terms of the lease agreement herein there are two classes of property owned by the lessee that, under the law, are assessable to him, i.e., possessory right to the use of the land classified as real estate and improvements placed upon the land classified as personal property.

It is the statutory duty of the Assessor to require any person, firm, etc., within the county owned by such person, etc. ([NRS 361.265](#)) The assessment of the tax is required to be made to the owner of the listed property. ([NRS 361.260](#))

Every tax levied under the provisions of the law shall be a perpetual lien against the property assessed. ([NRS 361.450](#)) Also the Assessor, assessing property of any person etc., who does not own real estate within the county of sufficient value in the Assessor’s judgment to pay the taxes on both real or personal property so assessed, shall proceed immediately to collect the taxes on the personal property. ([NRS 361.505](#)) Following the procedure set forth in [NRS 361.535](#), [361.540](#), [361.560](#).

Entertaining the views hereinabove expressed, it is our considered opinion:

1. That the law does not mandatorily, or at all, require the assessment of improvements under a leasehold interest, as set forth hereinbefore, to be made to the lessor owner of the land.

2. That the said assessment should be made to the lessee tenant.

The Court in the *Portland Terminal Co. v. Hinds* case ended its opinion by saying:

If there are difficulties to enforcing taxation of a building upon leased land as real estate, as suggested by counsel for

the appellees, resort must be had for correction by legislative action.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: W. T. Mathews
Special Deputy Attorney
General

OPINION NO. 60-187 PUBLIC ACCOUNTANTS—One’s “principal occupation” is that occupation to which he devotes his principal attention, in time, and effort in gaining livelihood. Chapter 131, 1960 Statutes, construed.

Carson City, November 2, 1960

Mr. J. W. McMullen, C.P.A., Secretary-Treasurer, State Board of Accountancy, P.O. Box 30, 320 South Virginia Street, Reno, Nevada

STATEMENT OF FACTS

Dear Mr. McMullen:

The Legislature of 1960 enacted Chapter 131, in which it created the Nevada State Board of Public Accountants, provided for the licensing, registration and regulation of Certified Public Accountants, and Public Accountants, and partnerships thereof and provided for the suspension, and revocation of certificates, licenses, etc. The statute is a complete regulatory statute within itself, and repeals [NRS 682.010](#) to [682.080](#), but protected rights, proceedings, acquired or instituted thereunder prior to April 1, 1960, which was provided as the effective date of the said Chapter 131.

Section 36 of the Act, in part, provides:

Sec. 36. 1. Any person who:

(a) Is a resident of this state, or has a place of business therein; and

(b) Has attained the age of 21 years; and

(c) Is of good moral character; and

(d) Meets the requirements of subparagraphs (1) or (2) of this paragraph (d), may register with the board as a public accountant on or before September 1, 1960:

(1) Persons who held themselves out to the public as public accountants and who were engaged as principals (as distinguished from employees) within this state on April 1, 1960, in the practice of public accounting as their *principal occupation*. (Emphasis supplied)

This section also in subsection 3 thereof provides:

3. The board shall in each case determine whether the applicant is eligible for registration. Any individual who is so registered and who holds a permit issued under section 39 shall be styled and known as a public accountant.

Pursuant to the statute quoted, some 190 persons have made application to the Board for registration and the issuance of a permit to designate each of such persons as a "Public Accountant." Such applications were filed prior to September 1, 1960. The Board will conduct its next meeting on November 11, 1960, and desires in the meantime to be advised as to the manner of construing and interpreting the language "principal occupation," for the purposes of granting or denying individual applications.

QUESTION

What tests are valid, under the statute, to be applied by the Nevada State Board of Public Accountants, in the granting or denying of individual registration of applicants as Public Accountants?

CONCLUSIONS AND ANALYSIS

We shall glean from the statute and the ruling cases, certain principles that may safely be declared as guides.

1. On April 1, 1960, the applicant for registration must have been "holding out" to the public that he was a Public Accountant.

If on April 1, 1960, an applicant for registration was employed in accounting work by a sole employer, and had held out to the public the information that he was available to do public accounting work, for hire, this requirement would not be met. Neither would this requirement be met by one who on that date, although doing accounting work exclusively, was a mere employee of a firm of accountants, or working exclusively for one firm or on one account.

2. On April 1, 1960, the applicant must have been engaged in the practice of public accounting as his "principal occupation."

One's "principal occupation" is that "occupation or business on which the party chiefly relies for a livelihood, and which engrosses the most of his time and attention, not for a day or week, or month, but through the year." *Smalley v. Masten*, 8 Mich. 529. In this case it was held that it was error for the Court to permit testimony in regard to which of two occupations brought in the most money.

We are clearly of the opinion that no precise length of time of being so employed may be specified or required to make it the "principal occupation." Circumstances will vary in individual cases. One might break over very gradually in one instance from one occupation to another and thus be engaged in the occupation for a long time before it became his "principal occupation." Or, in another case the changeover might be very rapid.

In *State v. Eischen*, (Minn. 1957) 86 N.W.2d 652, the appointment of Eischen was challenged as a member of the State Board of Barber Examiners, on the ground that he had not, as required by statute, engaged in the barber trade for five years prior to his appointment. The Court held the appointment good and held that the statute did not require the five years of barber service be at the exclusion of all other activities, and that statutes prescribing qualifications for appointees to public office must be liberally construed in favor of the appointees. *Johnson v. Starkey*, 52 N.W. 24.

In *Evans v. Woodman Accident Association*, 171 P. 643, Evans, a school teacher, was killed while cutting down a tree on his father's farm. It was contended in an effort to defeat the insurance claim that he had changed his occupation to farmer from that of school teacher. The Court rejected this and said:

The word "occupation" must be held to have reference to the vocation, profession, trade or calling which the assured is engaged in for hire or for profit, and not precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations, or from engaging in mere acts of exercise, diversion or recreation.

In *Dorrell v. Norida Land and Timber Company*, (Idaho 1933) 27 P.2d 960, involving liability under the Workmen's Compensation Law, the Court defined "occupation" as "That which principally takes up one's time, thought and energies; especially one's regular business or employment; also whatever one follows as a means of making a livelihood."

In *Harris v. Southern Carbon Company, Inc.*, (La. 1935) 162 So. 430, the Court said:

"Occupation" has been defined by the courts of this (Ohio) and other states to be "that particular business, profession, trade, or calling, which engages the time and efforts of an individual". In other words, the employment in which one regularly engages, or the vocation of one's life. *

* *

See also: *Industrial Commission of Ohio v. Roth*, (Ohio 1918) 120 N.E. 172, in which the above definition is adopted.

See also *Sovereign Camp v. Craft*, (Alabama 1922) 94 So. 831, in which virtually the same definition has been employed.

3. One's "principal occupation" is not determined by the relative amount of money derived therefrom, but is determined by a factual analysis of which work, in gaining a livelihood, engages the bulk of his time, concentration and effort.

An individual shows which industry he regards as most desirable for him, as to income, health, satisfaction in the performance and long term dependability, (and perhaps other values important to him) principally by the time and concentration that he devotes to it.

4. One's "principal occupation," need not be his sole occupation.

One may have two or more occupations which he follows for profit to earn his livelihood. One of the several occupations may be classified as the "principal occupation", if he devotes to it more of his active concentration, time and attention than he devotes to the combined other occupations.

5. April 1, 1960, is the date which fixes the "principal occupation" of the applicant.

The evidence which will determine the "principal occupation" of the applicant on April 1, 1960, will include that date, and a number of weeks or months prior to that date, but will reject all evidence of occupation and employment subsequent to that date.

6. This statute prescribing regulations and qualifications for registration as Public Accountants must be liberally construed in favor of the applicant.

In those cases in which it is not clear that under the law and the evidence presented to the Board, the registration should be denied, the applicant is entitled to a liberal construction and as a result of such liberal construction is entitled to be registered.

Borderline cases may arise, in which the Board feels that additional information is available to the applicant, which, if supplied, would show clearly whether the application should be approved or rejected by the Board. In such cases it is suggested that the matter be continued and that the applicant be requested to supply documentary evidence or relevant testimony upon the specific matter to be designated in the communication.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-188 ELECTION LAW; CHANGE OF PARTY AFFILIATION—[NRS Chapter 294](#) construed relative to change of party affiliation. An elector may not change party affiliation between General Elections of this State and become candidate for office at the Primary Election of political party newly chosen by him. Election Law; Refund of Filing Fees; County Commissioners—[NRS Chapter 294](#) and [NRS 354.220](#) construed. Elector disqualified from becoming candidate for office on primary ballot of political party not entitled to refund of filing fees as matter of legal right. Board of County Commissioners has power to consider application for refund of filing fees, and allow or reject claim for same.

Carson City, November 4, 1960

Honorable L. E. Blaisdell, District Attorney, Mineral County, County
Court House, Hawthorne, Nevada

Dear Mr. Blaisdell:

Requests have been made for an opinion interpreting [NRS Chapter 294](#) relating to certain phases of the primary election law and of the right of a party filing a declaration of candidacy to obtain the return of the filing fee for office when it has been determined that the name of that party could not legally appear on the ballot. We answered your telegram of August 16, 1960 by telegram of August 17, 1960. The answers to the questions posed in your telegram were accurate but it is deemed advisable, because of numerous inquiries, both written and oral, received by this office since that time, to issue a formal opinion clarifying the answers given, together with the reasons therefor as well as other related matters not previously specifically covered.

STATEMENT OF FACTS

A party who had been registered as a Democrat in 1958, and for some time prior thereto, reregistered as a Republican in June 1960 and filed for office in the primary elections of 1960 as a Republican. A party registered as an Independent in 1958, and prior thereto, reregistered as a Democrat in February 1960 and filed for office in the primary elections of 1960 as a Democrat. In both cases the applications and declarations of candidacy were accepted by the County Clerk of your county, together with payment of the filing fees required by law. There is some suggestion that in at least one instance the candidate inquired about the clause in the form of declaration of candidacy regarding reregistration and change of designation of political party affiliation since the last general election of this State and that the County Clerk informed the prospective candidate that the clause "was almost obsolete" and would not affect the candidacy of the party involved. Apparently the clause regarding reregistration and party affiliation were thereupon stricken from the declaration of candidacy in at least one instance before same was completed, signed, verified and filed. Thereafter, and as a result of the telegraphic opinion issued by this office, the names of the two candidates were stricken from the primary ballots of the respective political parties (or were never printed thereon) so that those names were not presented to the electorate to be voted upon at the primary elections held in 1960.

On the above state of facts questions are presented by your office and by several other District Attorneys in this State, as well as by many candidates and other interested parties.

QUESTIONS

1. May a qualified elector of the State of Nevada registered as an adherent of one political party and affiliated with such party at the last general election (1958) reregister, change the designation of his political party affiliation between general elections of this State and become a candidate at the primary elections of 1960 on the ballot of the other political party?

2. May a qualified elector of the State of Nevada registered as an Independent, with no party affiliation at the general election of 1958, (the last general election of this State) reregister in 1960 and claim affiliation with either of the political parties and become a candidate at the primary election on the ballot of the political party selected by him as a proposed candidate?

3. In the event the name of a proposed candidate in either of the situations described in the foregoing questions cannot legally appear on the primary ballot of either of the political parties, has such proposed candidate the right to demand and receive, from the County Clerk or the County Treasurer, the return of the fee paid pursuant to law for the filing of the declaration of candidacy?

4. If the answer to Question No. 3 is in the negative, has the Board of County Commissioners the power to make refund of the filing fee of such proposed candidate?

CONCLUSIONS

Question No. 1: No.

Question No. 2: No.

Question No. 3: No.

Question No. 4: Yes, as herein qualified.

ANALYSIS

[NRS 294.125](#) reads as follows:

Declaration of candidacy, acceptance of nomination:
Form.

1. A declaration of candidacy or an acceptance of a nomination shall be in substantially the following form:

Nomination _____ Paper _____ of _____
_____ for the Office of _____.

State of Nevada

County of _____ ss.

For the purpose of having my name placed on the official primary ballot as a candidate for nomination by the

_____ Party as its candidate for the office of _____, I, the undersigned _____ do solemnly

swear (or affirm) that I reside at No. _____, _____ Street, in the City (or Town) of _____, County of _____,

State of Nevada, and that I am a qualified elector of the election precinct in which I reside; that I am a member of the

_____ Party; *that I have not reregistered and changed the designation of my political party affiliation on an official affidavit of registration since the last general election;* that I believe in and intend to support the principles and policies of such political party in the coming election; *that I affiliated with such party at the last general election of this state;* that if nominated as a candidate of the _____ Party at the ensuing election I will

accept such nomination and not withdraw; that I will not knowingly violate any election law or any law defining and prohibiting corrupt and fraudulent practice in campaigns and elections in this state; and that I will qualify for the office if elected thereto.

(Signature of candidate for office)

Subscribed and sworn to
before me this)_____
day of _____,
19____.

Notary Public (or other
officer authorized to
administer an oath).
(Emphasis supplied)

The above statute, particularly the emphasized portions, which are not in any way obscure or ambiguous, amply sustain our conclusions to Questions Nos. 1 and 2. We feel that any elector or official is put on notice and informed of exactly what is required in the matter of becoming a candidate on the primary ballot of a political party at a primary election. While it is our opinion that the statute, standing alone, furnished the complete answer to the first two questions propounded, official and judicial opinion interpreting the law is not lacking.

The matter of change of party affiliation and its effect on a declaration of candidacy for office (or acceptance of nomination) on the ballot of political party is treated fully in the case of *State v. Brodigan* (1914) [37 Nev. 458](#). In that case the Nevada Supreme Court held that compliance with the statute (now [NRS 294.125](#)) was essential in order to enable an elector to become a candidate for office on the primary ballot of a political party. The Court went to great lengths to list the elements of the declaration of candidacy or acceptance of nomination required of prospective candidates under the statute. One of these is the declaration of having affiliated with the same party at the last general election held in this State, in order to run for office on a party ticket in the primary elections.

After listing the elements required in the form of nomination paper ([37 Nev. 465](#)) the Court went on to say:

By these declarations under oath, *made prerequisites for one seeking nomination*, it was undoubtedly intended to require the applicant to declare the parth of which he was a member *and with which he affiliated at the last general election, and this must be the same party under whose party designation he seeks the nomination at the ensuing primary*. Every substantial element of the nomination paper and the oath therein prescribed precludes the idea of an applicant for nomination seeking the nomination of two distinct parties at the same primary.

The object of the primary law, generally speaking ,was to avoid those things which under the old convention system were believed to be corrupt. The spirit of the law was to get a popular expression as to choice of candidates from the membership of the respective political parties within the

state. The various changes, amendments, and modifications of our primary laws that have been enacted by recent legislatures have had for their purpose and aim the elimination of one political party from the primary election of another, the object being to prevent one political party from interfering with another as to the selection of party nominees for the various offices. (Emphasis supplied.)

The office seeker in such cases *must* file a declaration of candidacy in the prescribed form or his name simply cannot appear on the official ballot to be used at a primary election.

[NRS 294.115](#) reads as follows:

Conditions for printing name on ballot. A candidate's name *shall not be printed* on an official ballot to be used at a primary election unless he qualifies by filing a declaration of candidacy or by filing an acceptance of nomination, and by paying a fee as provided in this chapter. (Emphasis supplied.)

The mandatory “shall not” negatives the possibility of departing from the requirements of the statutory provision fixing the essentials of the nomination paper, to wit, the declaration of candidacy or acceptance of nomination. These clauses may not be stricken from the nomination paper by the County Clerk, the candidate or any other party.

At this point it might be well to note that the direct primary law in substantially the form in which it is now found on the statute books of this State was subjected to and withstood a full-scale, broadside attack on its validity and constitutionality and was upheld by the Supreme Court of the State of Nevada. (*See Riter v. Douglass* (1910) [32 Nev. 400](#).)

The provisions of Chapter 294 NRS adverted to apply equally to those affiliated with one of the political parties desiring to become a candidate for office and those registered as Independent and seeking for the first time to become the candidate of a recognized political party in a primary election. This was definitely settled and established by the Nevada Supreme Court in the case of *Reed v. Stewart* (No. 4349, filed August 9, 1960) [76 Nev. 361](#), 354 P.2d 858.

The right of an elector to become the candidate of a political party at primary elections and to have his name printed on the official ballot must conform with the requirements of the direct primary law. However, what has been stated above refers only to a declaration of candidacy or acceptance of nomination as the proposed nominee of one of the political parties. Anyone desiring to become a candidate for office may be nominated as an Independent by complying with the procedure outlined in [NRS 294.155](#). The provisions of the direct primary law deal only with present candidacy on the ballot of a political party at a primary election. Neither the qualifications of an elector nor the right of a duly qualified elector to become a candidate for office as an independent candidate can be abridged, amended, modified or restricted by statutory enactment for reasons other than those stated in the Constitution of the State of Nevada itself (Constitution Article 2, Section 1; Article 15, Section 3).

Parus v. District Court (1918) [42 Nev. 229](#), 241; *State ex rel. Boyle v. Board of Examiners* (1890) [21 Nev. 67](#), 69; *State v. Findlay* (1888) [20 Nev. 198](#).

Parenthetically, it might be well to note that the clauses with which this opinion deals and to which it applies will not be effective after January 16, 1961, under the new election law (Statutes of Nevada, 1960, Chapter 157, Page 235). Section 57 of the new law has eliminated the clauses in the nomination paper relating to change of designation of political party and affiliation with that same party at the last general election held in this State. Our opinions must deal with the law as it exists and the statutory provisions now found; but it is not improper to direct attention to relevant future changes enacted by the Legislature. Moreover, since amendments, changes and modifications of our statute law, entirely within the province and sound discretion of the Legislature, are constantly found necessary or advisable, the deleted portions of the statute relating to primary elections and eligibility to become the candidate of a political party may well be restored.

We next consider Question No. 3, dealing with the *legal right* of a duly qualified elector to demand the return of the filing fee paid with his declaration of candidacy or acceptance of nomination when it has been ascertained that his name cannot appear or be printed on the official ballot of the political party whose candidate he seeks to become in the primary election.

As above pointed out the name of a candidate may not be printed on the official ballot to be used at a primary election unless he qualifies by filing his declaration of candidacy or acceptance of nomination and by paying the fee provided by law ([NRS 294.115](#)). The amount of the fee is specifically fixed in [NRS 294.145](#), and is in the sum of \$40 for any county office. The fees received by the County Clerk are required immediately to be turned over to the County Treasurer:

294.150 Disposition of filing fees.

1. The county clerk shall immediately pay to the county treasurer all fees received by him from candidates.

The Supreme Court of the State of Nevada has ruled that fees paid by electors with their declarations of candidacy or acceptance of nomination need not be returned by the official receiving same for filing the nomination paper (*State v. Brodigan* (1914) [37 Nev. 458](#), 466). In that case the Court expressed itself as follows:

By the provisions of the statute set forth above the money paid by a candidate filing a nomination paper is paid to the secretary of state in this instance as a "fee for such filing". In the case at bar the services of the secretary of state were performed in the way of filing the nomination paper for which it appears from the record that the nomination paper of Raymond A. Gott was filed with the secretary of state and all the services required of the secretary of state in the way of filing were duly performed. The ministerial officer of the state, to wit, the secretary of state, having performed the services required of him under the law, was entitled to the fee designated by section 9 of chapter 3 of the act, and the fact that this fee so paid was thereafter to be turned over to the state treasurer, as other moneys collected by the secretary of state are turned over to the state treasurer for ministerial services performed, did not change the nature of the fee, and

the same, having been paid to the secretary of state for filing services performed, cannot, in our judgment, be returned to the party seeking to have his name withdrawn. This might properly be considered in the nature of a forfeiture, but that is unnecessary for us to determine in this instance.

The fact that the officer receiving the filing fee in the cases under consideration was a county officer, namely, the County Clerk, rather than a State officer, to wit, the Secretary of State, does not, in our opinion, furnish any reason for a different conclusion. Nor does the fact that the candidate in the Brodigan case, *supra*, sought to have his name voluntarily withdrawn, while the candidates in the matters under review could not have their names on the ballots at the primary elections, in spite of their earnest desire to run for office, dictate any different conclusion. [NRS 294.145](#) speaks of payment to the “filing officer” without any distinction drawn between the Secretary of State and the County Clerk. [NRS 294.150](#) provides for the disposition of filing fees in either case and [NRS 294.135](#) designates the appropriate officer, State or county, with whom nomination papers for various offices are to be filed. The foregoing judicial and statutory authorities conclusively deny to any candidate or proposed candidate a *legal right* to demand return of the filing fee paid with his declaration of candidacy or acceptance of nomination.

Does the conclusion reached above prevent the Board of County Commissioners, in a proper case, from ordering a refund of the filing fee to a candidate whose name could not legally appear on the official printed ballot at the primary election? We think not.

[NRS 354.220](#) makes express provision for applications for refunds of money paid into the county treasuries in certain cases. The relevant portions of the statute read as follows:

354.220 Cases in which applications for refunds may be made.

[NRS 354.220](#) to [354.250](#), inclusive, shall apply in making applications for refund of moneys which have been paid into the county treasuries in cases where: * * *

4. In the opinion of the board of county commissioners, the applicant for refund has a just cause for making the application and the granting of such a refund would be equitable.

The form of the application and the manner of presenting same are not set forth in the statute. The time for presenting the claim is fixed at a maximum of 3 years from the time such claim was incurred ([NRS 354.230](#)).

Thus, the Board of County Commissioners has the *power, in its discretion*, to entertain and allow such claim. As to whether refusal to allow the claim would form the basis of suit against the county pursuant to [NRS 354.250](#) we do not deem it necessary or proper now to decide. Nor should anything in this opinion influence the action of the Board in its ultimate decision. This opinion is intended only to indicate our conclusion that the Board of County Commissioners has the statutory authority and power to receive, pass upon and allow or reject any such claims for refund, if and when presented for its consideration and determination.

Respectfully submitted,
ROGER D. FOLEY
Attorney General

By: Norman H. Samuelson
Deputy Attorney General

**OPINION NO. 60-189 TAXATION; FREEPORT LAW; TAX
EXEMPTION OF PERSONAL PROPERTY**—Warehouse
defined to include open storage. Exemption limited to inanimate
personal property.

Carson City, November 9, 1960

Honorable William J. Raggio, District Attorney, Washoe County, Reno,
Nevada

Dear Mr. Raggio:

You seek our opinion whether or not under four factual situations certain personal property is tax exempt under the Nevada Freeport Act, [NRS 361.160](#)-361.185. We will set forth these problems using, in part, the same language that you have employed:

1. An aircraft company, a New Jersey corporation, stores earth moving construction machinery and spare parts on the property of an equipment company in Washoe County (not affiliated with the aircraft company). Part of the machinery is under cover and part is in the open air. The equipment company is not in the warehousing business, but carries instead a general merchandise license granted by the City of Reno. The aircraft company has filed a claim for exemption under the provisions of the Freeport Law.
2. A California resident ships five hundred head of sheep into Washoe County and puts them on the range or under fence for six months, and then ships them back to California for sale or other disposition.
3. A California resident who owns property in northern Nevada winters two thousand head of cattle in California and then ships them to his property in northern Nevada for six months, then returns them to California.
4. A meat packer who is a Nevada resident and owns a meat packing plant in California purchases cattle in Colorado and Wyoming and ships them to his California plant. While passing through Nevada the cattle are put in feed lots for periods of three to six months, or more, and then shipped on to the packing plant in California. These cattle are in transit through Nevada and are never sold in this State.

QUESTION

Is the personal property described in the four above problems tax exempt under the Nevada Freeport Act?

CONCLUSION

No. 1: Yes.
Nos. 2, 3 and 4: No.

ANALYSIS

Reference is made to our Opinion No. 138 of March 1, 1960, particularly where we took the position that the storage of aircraft with a bailee on an airport comes within the meaning of the word warehouse as that term is used in the Freeport Law.

Your attention is also directed to the language of the preamble to the 1955 amendment to the Freeport Law quoted at page 3 of said opinion (Chapter 362, 1955 Statutes, page 600). In the preamble the Legislature refers to "*storage in Nevada of goods and merchandise*" as being beneficial; makes mention that the "*warehouse industry of the State of Nevada*" has benefited the people of this State by the "*construction of warehouse facilities * * * increasing taxable valuations * * * and has provided employment for Nevada citizens;*" and "*that such tax-exempt warehousing be sponsored and encouraged.*"

The preamble concluded, "Whereas, It is deemed necessary that this act should be augmented by additional provisions which would indicate the wide-spread approval of this act by the people of the State of Nevada and the desire of the people of the state that the *provisions thereof be interpreted broadly and liberally*, to achieve the purposes of the legislation, such additional provisions being designed to further encourage resident and nonresident persons and corporations to warehouse goods and merchandise from outside the State of Nevada, intended for out-of-state destination, in the State of Nevada and to assemble and disassemble the same while in storage in Nevada, including the doing of all necessary acts to prepare such stored goods for shipment to their destination, including the separation of the same into portions of the whole, or into broken, mixed or odd lots; now, therefore... (Emphasis supplied.)

We are grateful to Springmeyer, Thompson & Dixon, Attorneys at Law, of Reno, Nevada, for their letter to you of October 17, 1960, and for the copy supplied to us. The authorities cited and quoted from support the position taken by this Department in Opinion 138 of March 1, 1960, that personal property otherwise exempt under the Freeport Law is nonetheless so because it is stored in the open on an airport ramp. We quote from Springmeyer, Thompson & Dixon's letter, in part:

* * * we believe that the primary question is whether the term "warehouse" as used in the Freeport Law is restricted in its meaning to the term "building". We think not, and we thin Opinion No. 138 leaves no question about this. In Opinion No. 138, airplanes owned by Douglas in the possession of the bailee Alamo Airways at McCarran Field were held to be within the exemption provided by the Freeport Law.

In 93 C.J.S. 395 it is said: "In a broad sense and as used in common parlance, a 'warehouse' is the building or place used for storing goods, wares and merchandise * * * It has, and has not, been held to be a mere inclosure."

Case after case recognizes the principle of warehousing in open storage. For example, coal piled on open ground under

warehouse receipt has been held to be properly warehoused. *In re Wyoming Valley Collieries Co.*, Pa., 29 F.Supp. 106.

The case of *In re C.A. Taylor Log & Lumber Co.*, Wash., 41 R.2d 249, involved the storage of piles of lumber under warehouse receipt. The court recognized the validity of such open storage methods, saying at page 252: "The storage receipts being negotiable in form, duly indorsed and delivered, for value, to the bank, without notice of any fact impeaching the title evidenced by them, vested the bank with a lien prior to any right of the trustee to such of the lumber in the original placarded piles as can, by a fair preponderance of the evidence, be identified."

In connection with the Taylor case, it is to be noted that Section 3588 Remington Compiled Statutes contains the provision of the Uniform Warehouse Receipts Act to the effect that every such receipt must embody "the location of the *warehouse* where the goods are stored." This same provision is found in the Nevada Act, [NRS 95.070](#).

The case of *In re Cincinnati Iron Store Co.*, Ohio, 167 F. 486, likewise recognized the principle of open storage of iron beams. The beams were placed in different piles in the yard under a warehouse receipt. The validity of the warehouse receipt was sustained.

A leading case is *Love v. Export Storage Co.*, 131 F.1. There, a lumber company occupied four acres of leased ground. The yard was surrounded on three sides by a fence composed of four wires and a string of plank with gates in it. The fourth side next to the railroad was open. Lumber was in piles in the yard. The lumber company leased the yard to a storage company and entered into a warehousing agreement, receiving warehouse receipts for the lumber piled in the yard. In answer to the contention that the property was not warehoused, the court, at page 12, held: "One of the grounds upon which the position is urged is that the lumber in question was not warehoused by those proceedings. *Of course, an actual warehouse is not essential to the warehousing of goods.* They may be warehoused upon a parcel of ground inclosed or open, or partly so. And they may be warehoused upon what are the owner's premises at the time of the warehousing, and that, though they may then be on those premises and without changing their location thereon. The only thing essential to the warehousing of goods is that their possession changed from that of their owner to that of the warehouseman."

Considering the direction of our Legislature that the Freeport Law be interpreted *broadly and liberally*, and there being no language, either in the preamble or the act itself, limiting the meaning of warehousing to the complete inclosure under roof and between four walls and the cases cited by Springmeyer, Thompson & Dixon, we conclude that the open storage of goods constitutes warehousing within the meaning of the Freeport Law. We are of the opinion, therefore, that as to problem No. 1 above set forth the open storage of machinery and parts is warehousing within the meaning of the law and the said property is tax exempt, provided there is

full compliance with all sections of the Freeport Act, including record keeping, the filing of claims, monthly reports, etc., by the warehouse company.

We are not impressed with your conclusion that the bailee warehousing company is not in the warehouse business because it has only a general merchandise license. Licensing of warehousing companies, or of a person or persons engaged in such business, is, in this case, a problem that concerns the City of Reno. The Freeport Law requires no such licensing. So long as the said company is actually engaged in the storage of goods in compliance with the Freeport Act, such goods are tax exempt.

We do not believe that the personal property described in problems 2, 3 and 4 above is tax exempt.

From the preamble, as well as from the Freeport Act itself, it appears very clear that the Legislature never had in mind animate chattels such as cattle and sheep, but only inanimate personal property. Consider the language of [NRS 361.160](#): “* * * the property is assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled or repackaged.” Consider the language of the preamble: “* * * and to assemble and disassemble * * * including the doing of all necessary acts to prepare such stored goods for shipment to their destination, including the separation of the same into portions of the whole, or into broken, mixed or odd lots.”

Although it is not applicable to problems Nos. 2, 3 and 4, your attention is called to the language of [NRS 361.160](#), subsection 1(a):

1. Personal property in transit through this state is personal property, goods, wares and merchandise:

(a) Which is moving in interstate commerce through or over the territory of the State of Nevada;

I am sure that the Washoe County Assessor is aware of the above language and does not attempt to tax personal property moving in interstate commerce, if stopped in transit for appreciable periods of time, such as in the above set forth problems, probably acquires a situs in Nevada for taxation unless otherwise exempt under the Freeport Law or other applicable statute.

Although we did not say so in Opinion 138, we were aware of the doubtful constitutionality of the Freeport Law, but in view of the approval of the voters on November 8, 1960, of Question No. 1, adding to Article X, Section 1, of the Nevada Constitution, language exempting property from taxation as spelled out in the Freeport statute, any doubt as to constitutionality has been removed.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

OPINION NO. 60-190 INSURANCE—The State Government and its political subdivisions may purchase insurance from a mutual company if the policies are nonassessable and clearly marked “without contingent liability.” Federal stamp tax on such policies

(26-4371 U.S.C.A.) not collectible if policies countersigned by Nevada agent or broker.

Carson City, November 14, 1960

Mr. J. E. Springmeyer, Legislative Counsel, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Springmeyera:

Senate Resolution Number 9 of the legislative session of 1960 memorialized the Legislative Counsel Bureau to make a study and report the conclusions thereof to the legislative session to convene in 1961, in respect to the cost of public liability, fire and other insurance (not life insurance) procured by the State and its political subdivisions.

Pursuant to such request, preliminary studies have been conducted and it has been learned that some cities, counties and school districts have purchased policies of insurance and have become members of mutual companies, and also that as a condition precedent to receiving policies in such companies such entities have advanced member ship fees and premiums to such mutual insurance companies.

Revenue stamps issued pursuant to the internal revenue laws of the United States are, in certain cases, attached to such policies, and it is doubted if the State of Government or any political subdivision thereof is properly required to pay such tax.

QUESTIONS

Question No. 1. May the State or any of its political subdivisions become members of, and pay membership or advance premium fees to a mutual company as a condition precedent to obtaining insurance from such company?

Question No. 2 If the above question is answered in the affirmative, is the State, or a political subdivision thereof, required to pay a federal stamp tax upon stamps to be affixed to such policies?

CONCLUSIONS

No. 1: Yes, upon condition that the policies so issued are nonassessable, and are clearly marked thereon to be "without contingent liability."

No. 2: We are of the opinion that the federal law does not require revenue stamps to be affixed to such policies, with the exception of "surplus line" insurance policies issued by a nonadmitted company. The duty to affix and cancel the stamps is not that of the state officer however. (See Section 4384 of Title 26, United States Code.) The cost of such stamps is probably passed on indirectly and paid by the insured.

ANALYSIS

Section 10 of article VIII of the Nevada Constitution provides:

Sec. 10. No county, city, town, or other municipal corporation shall become a stockholder in any joint-stock company, corporation or association whatever, or loan its credit in aid of such company, corporation, or association, except railroad corporations, companies or associations.

On June 29, 1955, Attorney General Opinion No. 78 held that:

Contracts of Inter-Insurance may not be entered into by political subdivisions, being violative of Section 10 of Article VIII, Constitution, and of the budgetary law.

Respecting this opinion the inquiry was about reciprocal or inter-insurance only, which differs from mutual insurance, as we shall presently show briefly. This opinion was based upon the belief (from documents then made available) that reciprocal or inter-insurance contracts, binding the insured thereunder, were subject to assessment, and that for the political subdivisions to subscribe for and purchase something of indefinite cost, with contingency of assessment, was a "loan of credit," not capable of exact budgetary estimation, and therefore violative of the constitutional and statutory provisions. (See [NRS 354.010](#) et seq., respecting cash operations upon a budgetary system.)

Subsequently, the conclusions were challenged by counsel for reciprocal exchanges, and thoroughly briefed with a request that the matter be reviewed. Upon review and upon a clear showing that with respect to the exchange under consideration the power of Attorney and the policies issued thereunder carried a definite provision and recitation that there was no contingent liability and that the policies were "nonassessable," the previous conclusion was modified and it was held that when nonassessable, "political subdivisions in Nevada may subscribe for reciprocal insurance."

In the present study we are concerned with the constitutional provision heretofore quoted and also the budgetary law under which the counties ([NRS 354.010](#) et seq.) are required to operate.

For a detailed and authoritative discussion of the legal distinctions in composition of a "reciprocal or inter-insurance" entity and "mutual" insurance company, with resulting distinctions of operation and obligations, see Attorney General Opinion No. 163, April 24, 1956, p. 398, as taken from 94 A.L.R. p. 826.

That mutual companies may issue insurance policies in Nevada "without contingent liability," is provided by statute. (See [NRS 682.210](#).) The danger of this provision is that the right to continue to issue such policies depends upon the continued maintenance of "a surplus equal to the capital of a stock company doing the same kind of kinds of business, but no company shall issue such policies except during such time as it shall continue to have such a surplus."

Having shown that under certain circumstances a mutual insurance company may issue upon Nevada risks, policies "without contingent liability," we are next confronted with the question of whether or not, assuming the issuance of such policies by such companies, the purchase thereof by a county, city or other municipal corporation, would offend Section 10 of Article VIII of the Constitution or the statutes requiring the operation of such governmental entities upon a cash and budgetary system.

The latest authority upon this proposition that we have found, reviews the earlier decisions, and passes upon a state constitutional provision almost identical to our own, is *State v. Northwestern Mutual Insurance Company* (Ariz. 1959), 340 P.2d 200. This case holds:

The statute providing that any government or agency, state or political subdivision may be a member of a domestic foreign mutual insurer is not violative of the constitutional provision that neither the state, nor any subdivision thereof shall ever give or loan its credit, and hence a contract by a school district for a fire policy with a mutual company was not invalid.

In this case it is pointed out (p. 202) that the highest courts of eleven states have ruled that such nearly identical constitutional provisions do not prevent the purchase, by the state and its political subdivisions, of nonassessable policies, nor the prepayment of membership fees of premiums in such mutual companies. (See authorities cited 340 P.2d 202.) The State of Texas alone has ruled to the contrary. *Lewis v. Independent School District of Austin*, 161 S.W.2d 450.

We are clearly of the opinion, however, that policies issued by such mutual companies which do not contain provisions disclaiming or negating assessment liability, would offend both Section 10 of Article VIII of the Constitution and the statutory budgetary provisions of the specific political subdivisions. The purchase of such policies from mutual companies by the State or its political subdivisions would be illegal and unauthorized.

We turn now to a consideration of the question of the liability of the State and its political subdivisions for payment of United States revenue stamps to be affixed to policies of insurance in which the State or its political subdivision is the insured.

Title 26, Section 4371 U.S.C.A. makes provision for a stamp tax upon insurance contracts, indemnity bonds, and annuity contracts. Section 4373 thereof provides the exemptions to the liability for the tax. This section in part provides:

The tax imposed by section 4371 shall not apply to (1) Domestic agent. Any policy, indemnity bond, or annuity contract signed or countersigned by an officer or agent of the insurer in a State, Territory, or District of the United States within which such insurer is authorized to do business; * *

*.”

Insurance of the type here under consideration (casualty, fidelity and surety; fire and marine) written by foreign and alien companies, upon Nevada risks, except surplus line, must be written by companies licensed to business in Nevada, and, under [NRS 684.350](#), all such policies must be countersigned by a local agent.

When countersigned by a local agent under the provisions of [NRS 684.350](#), policies issued by a company authorized to do business in Nevada are exempt from the stamp tax liability under Section 4373, Title 26, U.S.C.A.

“Surplus line” insurance, however, upon Nevada risks, presents a somewhat different picture. Surplus line insurance may be placed with a

company not licensed to do business in this State, through a duly licensed surplus line broker. ([NRS 686.280](#), subsection 2.) Although under [NRS 686.300](#), surplus line insurance is required to be initialed, by the surplus line broker in this State who clears the same, since it is by a company not licensed to do business in this State, such policies so initialed would not fall within the exception stated in Section 4371, Title 26 of U.S.C.A.

However, the liability for the tax (Section 4384, Title 26, United States Code, 1958 Edition) and duty to affix the stamps is upon “any person who makes, signs, issues, or sells any of the documents and instruments subject to the taxes imposed, * * *.”

There are no exemptions from the liability for the tax, affecting the State Government or subdivisions, other than those above enumerated. The duty is not upon the insured to affix the stamps. If stamps are affixed to a policy, the cost is not doubt passed on to the insured. If the State Government or a political subdivision thereof is the insured, and stamps are affixed, as they should be for “surplus line” insurance, and the cost thereof is passed on to the insured, the resulting requirement to pay the cost is unavoidable, even as against the State.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-191 GAMING—Nevada Gaming Commission has authority to require administrative, supervisory and policymaking personnel of licensed gaming establishment to be qualified **for licensing provided established procedure is followed.**

Carson City, November 23, 1960

Nevada Gaming Commission, Carson City, Nevada

STATEMENT OF FACTS

Gentlemen:

At the regular monthly meeting of the Nevada Gaming Commission held in Carson City, Nevada, October 18, 1960, the question of the legal authority of the Board and Commission to control the employment of key personnel in casino operation was discussed.

The facts giving rise to this question concerns the recent denial by the Commission of an application by certain licensees in the Stardust and Desert Inn to acquire an interest in the Hotel Riviera operation.

We have been informed by the Administrative Secretary of the Commission that, after that denial, three of the key personnel of the casino operations of the Desert Inn and Stardust were employed as shift bosses on each of the three shifts at the Hotel Riviera Casino. We assume that such employees have no financial interest in the Riviera. With that as a

background, it was requested that the Department of the Attorney General research the law in this regard and that an opinion be given in order that the Board and Commission may have legal guidance on the question hereinafter stated.

QUESTION

What, if any, is the authority of the Board and Commission to control the employment of key casino personnel having administrative, supervisory or policymaking interest in the licensed operation?

CONCLUSION

The Board and Commission, by law, may require a state gaming licensee to qualify for licensing certain key personnel having supervisory, administrative or policymaking interest in the licensed operation, providing the procedure established by law is followed.

ANALYSIS

[NRS 463.170](#), subsection 2, provides as follows:

No corporation, limited partnership, business trust or organization or other association of a quasi-corporate character shall be eligible to receive or hold any license under this chapter unless all persons having any direct or indirect interest therein of any nature whatsoever, whether financial, administrative, policymaking or supervisory, are individually qualified to be licensed under the provisions of this chapter.

The Hotel Riviera is a Nevada corporation under the corporate name of Hotel Riviera, Inc.

In our opinion the foregoing subsection is authority for the Board and Commission to require those persons having administrative, policymaking or supervisory interest in the operation to qualify for licensing.

In order to make a determination that an individual is qualified to be licensed in a presently licensed operation, it is necessary that the Board obtain requisite information about that individual. There is ample authority to permit the Board to secure this information. Said subsection 2 of [NRS 463.170](#) implies this authority. Regulation 5.070 expressly permits the Board or its agents to summon any licensee, his agents or employees, to appear and testify regarding the conduct of any licensee, or the agents or employees of any licensee.

In order for the Board and Commission to exercise the foregoing authority against a currently licensed establishment, it is essential that a definite procedure be adhered to. That procedure is set forth in [NRS 463.310](#) and [463.312](#).

Under [NRS 463.310](#), subsection 1, the Board investigates apparent violations of Chapters 463 and 464 of NRS, or any regulations adopted thereunder. If disciplinary action or other action is to be taken against a licensee, the Board may conduct investigative hearings as may be necessary.

Under subsection 2, if the Board is satisfied that a license should be “*limited, conditioned, suspended or revoked,*” it initiates a hearing by filing a complaint with the Commission together with a summary of evidence. If the Commission then determines that probable grounds exist for disciplinary or other action, it then proceeds to serve the licensee with a copy of the complaint in the manner set forth in [NRS 463.312](#). (Emphasis supplied.)

Thereafter the Commission, under subsection 4 of [NRS 463.310](#), has full power and authority to *limit, condition*, revoke or suspend any license for any cause deemed reasonable by the Commission.

Let us now examine how the procedure would work in practice. If the Board feels there is an apparent violation of [NRS 463.170](#), subsection 2, because administrative, policymaking or supervisory employees in the licensed operation are not qualified to be licensed, a complaint may be filed with the Commission together with a summary of the evidence. This action is not to discipline the licensee at this time, but rather falls within the classification of “other action” as that term is used in [NRS 463.310](#). The purpose of the proposed hearing is to determine before the Commission if the facts warrant a finding that the individual in question is not qualified to be licensed. If that is the finding and decision of the Commission, the license may then be *limited* or *conditioned* that the individual not be employed in such capacity.

Thereafter the licensee has his right to judicial review as provided by [NRS 463.315](#).

If ultimately the imposition of the *limitation* or *condition* is affirmed on judicial review, and the licensee fails to comply with the condition, the Board may then institute proceedings to take disciplinary action against the licensee by filing a complaint as set forth in [NRS 463.310](#).

The Board has no authority to *limit, condition*, suspend or revoke a license, but is limited to recommending such action to the Commission ([NRS 463.310](#)(2)). For the Commission, which sits as a quasi-judicial body, to take the initiative and direct a licensee to dismiss a particular employee under threat of revocation of his license would mean that the Commission has reached its conclusion that such employee is not qualified to be licensed based upon the evidence of the Board alone and without affording the licensee an opportunity to present his case to the Commission, as is provided by law.

We must also keep in mind that in order to afford gaming licensees the right of judicial review of orders and decisions of the Gaming Commission, [NRS 463.315](#) became a part of the 1959 Gaming Act.

Although it is inapplicable in this case, your attention is directed to the Commission’s emergency powers under [NRS 463.312](#), subsection 9. Said section reads in part as follows:

9. Notwithstanding any other provisions of this section, the Commission may issue an emergency order for suspension, *limitation* or *conditioning* of a license in the following manner:

(a) An emergency order for the suspension, *limitation* or *conditioning* of a license shall be issued only when the commission believes that: * * *

(3) Such action is necessary for the immediate preservation of the public peace, health, safety, morals, good order or general welfare.

(b) The emergency order shall set forth the grounds upon which it is issued, including a statement of facts constituting the alleged emergency necessitating such action. (Emphasis supplied.)

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Michael J. Wendell
Deputy Attorney General

OPINION NO. 60-192 ARCHITECTURE, NEVADA STATE BOARD OF—Applicable statutes held not to confer any legal right to a refund or credit of fees paid with applications for examinations for Certificates of Registration. Rule-making power of the Board considered with respect to such holding where request is made for withdrawal of such applications, or failure for any reason, to take required examination or submit to required interview.

Carson City, November 28, 1960

Mr. Raymond Hellmann, A.I.A., Secretary-Treasurer, State Board of Architecture of Nevada, 421 Hill Street, Reno, Nevada

STATEMENT OF FACTS

Dear Mr. Hellman:

It appears that two out-of-state architects filed applications for examinations for Certificates of Registration from the State Board of Architecture of Nevada to practice as architects in the State of Nevada. In connection with such applications, they paid a required fee of \$35.

Apparently, said filings for Nevada Certificates of Registration were motivated by the expectation in each case of being engaged to render and perform professional work and services as architects in connection with certain projects in the State of Nevada. These expectations did not materialize, and said two out-of-state architects desire to withdraw their applications.

QUESTION

Is the Board of Architecture required to return the filing fee statutorily prescribed for qualifying examinations for Certificates of Registration authorizing the practice of the profession of architecture in the State of Nevada in circumstances where an applicant fails to appear for such examination or an interview?

CONCLUSION

No.

ANALYSIS

[NRS 623.310](#) sets forth the schedule of fees in connection with examinations for, and the issuance and maintenance, or renewal or restoration of, Certificates of Registration, and makes the payment and receipt of such fees mandatory. [NRS 623.160](#) provides that such fees shall be paid to, and receipted by, the Secretary of the Board, and shall be paid by him monthly into the State Treasury to the credit of a separate fund to be known as the architectural fund. Except as expressly or specifically authorized, there shall be no withdrawal from said fund. We find no express provision for any refund or credit of such fees in Chapter 623 of NRS, which regulates and governs architects and the practice of the profession of architecture in the State of Nevada.

[NRS 623.140](#) confers upon the State Board of Architecture of Nevada the power to adopt rules and regulations for its government in the examination of applicants for certificates to practice architecture in the State of Nevada, and for any other purpose enumerated in the chapter, provided the same is not inconsistent with express provisions therein. Presumably, the Board has not adopted any rule or regulation relative to the question here involved.

We conclude, therefore, that said applicants have no *legal right* to refund or credit of the fee paid by them in connection with their application for the qualifying examination required for grant or issuance of a Certificate of Registration, authorizing the practice of architecture in the State of Nevada. Evident additional support for such conclusion is the fact that payment of said fee is presumably justified and authorized to defray the costs of processing such applications as may be submitted to the Board and the administering the examinations to applicants.

Undoubtedly, in certain instances, there may be good reason and cause to justify or excuse the absence of an applicant from a scheduled examination or interview, e.g., accident, illness, failure of available and necessary transportation, etc. It might seem that some consideration and allowance might be accorded such applicants, such as affording them an opportunity to take the examination or have an interview on a later date, without payment of any additional fee. On the other hand, the Board certainly is generally not responsible for the intervening cause or circumstance which prevented attendance at the examination or interview. And the fact is that, regardless of the cause or circumstances, administrative costs have been or are incurred in connection with the processing of applications, and for the holding of such examinations and interviews. Such being the general situation, it is not unfair to impose such entailed costs upon those responsible therefor, namely, those seeking the privilege and license authorizing the practice of the profession of architecture.

We, therefore, further conclude as follows:

A. By exercise of its rule-making power, the State Board of Architecture, in specified circumstances, may authorize refund or allow credit of fees paid by applicants in connection with qualifying examinations for Certificates of Registration.

B. The State Board of Architecture of Nevada, in exercise of its statutory powers, as a matter of sound administrative

policy and practice, may properly deny any refund or credit of fees prescribed of applicants desirous of taking qualifying examinations for Certificates of Registration.

See generally, Attorney General Opinion No. 188, November 4, 1960.

On the basis of the particular facts herein submitted, and in the absence of any applicable rule or regulation adopted by the Board, there is no legal or sufficiently good cause or reason shown to make any refund of the fees paid by the applicants here involved. Such persons were not prevented from taking the examination for which they had applied, but merely concluded that it would no longer serve their personal or financial interests to take such examination. While their change of mind was within their prerogative and may not be open to question, there was, presumptively, some change of position caused by the Board by reason of their applications, and the fees paid may be deemed to provide compensation therefor.

We trust that the foregoing review of the matter sufficiently answers your inquiry.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 60-193 PARK COMMISSION, STATE—State Park Commission is authorized to expend moneys appropriated to acquire title to described lands from the United States, in preparing plans and specifications to be submitted to the Bureau of Land Management as part of the application for the grant. Chapters 252 and 97, Statutes of Nevada 1960 and Section 869, Title 43, U.S.C.A., construed.

Carson City, November 28, 1960

Mr. William J. Hart, Director, State Park Commission, Carson City,
Nevada

STATEMENT OF FACTS

Dear Mr. Hart:

The Legislature of 1960 enacted Chapter 97, p. 113, under the provisions of which it provided that when the State or a political subdivision thereof desires to purchase or lease public lands through the Bureau of Land Management, the application therefor shall be with the assistance of the State Land Register, who shall (1) examine the application to determine that the same is in proper form, with proper information and fee, and (2) determine from the records of the Bureau that the lands applied for are subject to disposition under the federal act.

The Legislature of 1960 also enacted Chapter 252, p. 451, under the provisions of which it appropriated \$32,000 for the acquisition of certain lands, describing the lands desired, from the Bureau of Land Management, pursuant to the provisions of Title 43, Section 869, U.S.C.A. Section 6 of this act provides that the moneys appropriated shall be used only for the specific purposes described, and that any funds so appropriated remaining unexpended on July 1, 1962, shall revert to the general fund.

Sections 869 to 869-4 of Title 43, U.S.C.A., is a Congressional act of 1954, effective June 4, 1954, being amendatory of an act entitled "Public and Recreational Purposes Act of 1926." Under the provisions of Section 869 it is provided that before lands of the United States may be leased or conveyed to the State, or a political subdivision thereof, he must be satisfied that the land is to be used "for an established or definitely proposed project." Under the provisions of 869-1, it is provided that the Secretary of the Interior may classify the public lands and may sell or lease federal land to the State, or a political subdivision thereof, and that if so classified and conveyed for "historic monument purposes under this section shall be made without monetary consideration," otherwise to be made at a price fixed by the Secretary.

An application by the State Park Commission, made recently to the Bureau of Land Management, through the offices of the State Land Register, pursuant to Chapter 97, Statutes 1960, for the acquisition of certain lands designated in Chapter 252, Statutes 1960, to be acquired as provided in Section 869, Title 43, U.S.C.A., and the subsequent sections, has been rejected by the Bureau, pending receipt of engineering data pertaining to design, specifications, cost, and projected schedule of completion of improvements.

QUESTION

Is the State Park Commission authorized to make expenditures or the preparation of engineering data, design, specification and cost estimates in respect to the lands designated in Chapter 252, Statutes of 1960, prior to the acquisition of title to such lands from the United States?

ANALYSIS

Section 1 of Chapter 252 appropriates \$32,000 to the Commission to purchase federal lands described in the act, pursuant to the provisions of Section 869 et seq., Title 43, U.S.C.A.

The federal statute has not been modified or amended subsequent to the effective date of the Nevada statute. It then provided for conveyance or lease to the State or certain designated political subdivisions by the Secretary of the Interior for "an established or definitely proposed project." That the agency of the Secretary of the Interior, namely the Bureau of Land Management, would require some evidence of the definitely proposed project, as a condition precedent to making the grant to the State's Commission, was or must have been anticipated by the Legislature prior to the enactment of Chapter 252, Statutes 1960. Further evidence of the fact that the Legislature anticipated that the Bureau would make such requirements prior to making the conveyance is shown by the enactment of Chapter 97, Statutes 1960, under the provisions of which the Legislature provided that the State Land Register should assist the said Commission

and determine, among other things, that the application for the land is in proper form.

Finally, it is likely under the provisions of the federal statute (Section 869-1, Title 43, U.S.C.A.) that upon submission to the Bureau of Land Management of the materials and data required by that Bureau, in application for the conveyance for state park purposes, that the conveyance or conveyances will be made “without monetary consideration” as is authorized in the federal act. It is also quite likely that this requirement of the Bureau will not add any costs to the Commission, for once the precise plans and specifications are made (before or after the acquisition of the title) it will not be necessary that the costs thereof be incurred again.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

**OPINION NO. 60-194 DIVISION OF HOSPITAL SERVICES,
STATE DEPARTMENT OF HEALTH**—Names, appellations, or advertisements which connote or imply that unauthorized and unlicensed establishments are medical facilities or “hospitals,” as defined by statute and rules and regulations, constitute false advertising and are violative of law. Penalties provided by law held to be applicable to any such violations.

Carson City, November 29, 1960

STATEMENT OF FACTS

Mr. Donald A. Baker, Director, Division of Hospital Services, Nevada State Department of Health, Carson City, Nevada

Dear Mr. Baker:

It appears that a complaint has been registered with your office by the Nevada State Association of Nursing Homes and Allied Institutions relative to certain alleged misleading advertisements on the part of boarding homes, represented to be “Rest Homes.”

The complaint presumably quotes from “Rules and Regulations for Hospitals and Related Facilities in Nevada,” Part 1—Definitions, Section 1.1, paragraph (c), as follows:

Rest Home, Nursing Home, or Convalescent Home—
Shall be defined as any place or institution which makes provisions for bed care, or chronic or convalescent care, for one or more nonrelated patients who by reason of illness or physical infirmity, are unable to properly care for themselves.

Submitted examples of alleged false advertisements either contain the word “Rest” in the name of the establishment; or the establishment is advertised in the newspapers under the caption of “Rest Homes”; or the advertisement states that the establishment is a “Licensed home for aged, infirm and handicapped persons”; or that a nurse and/or physicians are always in attendance or available.

It is indicated that rules and regulations heretofore adopted by the Nevada State Department of Health do not specifically cover the subject. Further, there appears to be some question as to said Department’s authority and responsibility concerning the regulation of advertising of such nature, inclusive of the name which an owner or operator may assign to an establishment or institution irrespective of compliance with licensing requirements under applicable law.

Has the Nevada State Department of Health any legal jurisdiction over group-care facilities or boarding homes falsely represented or advertised as a “sanitarium,” “rest home,” “nursing home,” “maternity home,” of “lying-in asylum,” if actually unlicensed as such?

CONCLUSION

Yes.

ANALYSIS

Group-care facilities, or boarding homes, of the type here involved, are apparently subject to the provisions of Chapter 431 of Nevada Revised Statutes.

[NRS 431.010](#), paragraph 2, provides:

Group care facility means an establishment maintained for the purpose of:

- (a) Furnishing food and shelter, in single or multiple facilities, to four or more aged, infirm or handicapped adult persons unrelated to the proprietor; and
- (b) Providing personal care or services which meet some need beyond basic needs of food, shelter and laundry.

[NRS 431.020](#) provides that the State Welfare Department shall adopt, amend, promulgate and enforce reasonable rules, regulations and standards with respect to group care facilities licensed under the provisions of that particular chapter.

[NRS 431.030](#) (“Standards for licensing, operation, maintenance of group care facilities”), as here relevant, provides as follows:

1. The (state welfare) department, with the advice of the state board of health in matters pertaining to health, shall formulate standards for the operation and maintenance of group care facilities, and standards of care conducive to the health and general welfare of persons residing in such facilities.
2. Standards for the licensing, operation and maintenance of group care facilities shall require that:
 - (a) Practices and policies of the facility must provide adequately for the protection of the health, safety, physical,

moral and mental well-being of the persons accommodated in the facility.

[NRS 431.040](#) (“License for operation of group care facility required”) provides as follows:

No person shall operate a group care facility, as defined in this chapter, without a license from the (state welfare) department. No fee shall be charged for such license.

On the other hand, Chapter 449 of Nevada Revised Statutes relates to the regulation of “Hospitals and Maternity Homes.”

[NRS 449.020](#) (“Hospital defined”) provides as follows:

As used in [NRS 449.020](#) to [449.240](#), inclusive, “hospital”:

1. Means any institution, place, building or agency which maintains and operates facilities for the diagnosis, care and treatment of human illness, including convalescence, and including care during and after pregnancy, to which a person may be admitted for over-night stay or longer.

2. *Includes any sanitarium, rest home, nursing home, maternity home and lying-in asylum.* (Emphasis supplied.)

[NRS 449.030](#) (“License required to establish, maintain hospital”) provides as follows:

No person, partnership, corporation or association, nor any state or local government unit or any agency thereof, shall establish, conduct or maintain in this state any hospital without first obtaining a license therefor as provided in [NRS 449.020](#) to [449.240](#), inclusive.

[NRS 449.040](#) (“Application for license: Filing; contents.”) substantially provides that there be a showing of evidence satisfactory to the State Department of Health that the applicant is of reputable and responsible character, and able to make compliance with applicable statutes and rules and regulations adopted pursuant thereto, relative to the establishment, and maintenance and operation of “a hospital.”

Admittedly, the particular licensing requirement contained in Chapter 449 of Nevada Revised Statutes is primarily and substantively applicable to facilities “* * * for the diagnosis, care and treatment of human illness, including convalescence, and including care during and after pregnancy * * *.” However, the statutory definition of “hospital” does expressly include, among other designated types of establishment, “rest homes,” which name itself connotes convalescence or care (after some presumed disability, infirmity, or illness) within the apparent meaning and intent of the statutory definition of “hospital.” Obviously, such implied meaning or connotation is even more emphasized by inclusion in any advertisement of statements informing the public generally and unequivocally that a “Nurse (is) in attendance at all times,” and that there are “Two physicians always available.” The reasonable import of such types of advertising is that the establishments therein referred to are in the nature of medical facilities or “hospitals,” within the scope of the statutory definition, and presumable

subject to the control, supervision and licensing jurisdiction and authority of the Nevada State Department of Health, Division of Hospital Services.

Such conclusion is further confirmed by the definition of “Rest Home,” provided in the rule and regulation which has been promulgated and which, presumably, is presently effective. By both statute and rule, therefore, a “Rest Home” is a “hospital,” subject to regulation, supervision and control of the State Department of Health under its licensing jurisdiction, authority and powers. In the absence of a “hospital” license, use by an unlicensed establishment of the name, or its characterization as a “Rest Home” is deceptive and misleading and, therefore, unauthorized.

Further support for the foregoing conclusion is to be found in [NRS 207.170](#) (“False advertising prohibited”), which provides as follows:

1. It shall be unlawful for any person, firm, corporation or association, with intent to sell, let, lease, rent or in anywise offer or dispose of merchandise, products, securities, service, lodging, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for rent, lease sale of distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto * * * to make, publish, post, disseminate, display, circulate or place before the public, or cause, directly or indirectly, to be made, published, posted, disseminated, displayed, circulated or placed before the public in this state, in a newspaper or other publication or in a form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign or billboard, or in any other way, an advertisement of any sort regarding such lodgings, meals, merchandise, products, securities, service or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

2. Any person, firm, or any officer or managing agent of any corporation or association, who shall violate the provisions of subsection 1 shall be guilty of a misdemeanor, and shall be punished by a fine of not less than \$50 nor more than \$200, or by imprisonment in the county jail for not less than 30 days nor more than 90 days, or by both fine and imprisonment.

In our considered opinion, therefore, the type of advertising complained of is violative of both statute and rule defining a “Rest Home,” when the establishments involved are not properly licensed by the State Department of Health as “hospitals.” Moreover, such advertisements are also misleading and deceptive, and clearly violative of the prohibition against “false advertising.”

Such unlicensed establishments should be served with appropriate notice to cease and desist from the use of unauthorized names and from advertisements in any manner inferring that they are “hospitals” as defined in statute and rules and regulations, and they should further be advised that noncompliance with such notice will subject them to the penalties provided in law.

We trust that the foregoing sufficiently answers your inquiry.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 60-195 ELECTIONS; DISTRICT ATTORNEYS;
[NRS 252.060](#)-NRS 282.010—A District Attorney who is elected at
a biennial election at which District Attorneys are not ordinarily
elected may assume office immediately following election upon
qualification for office.

Carson City, December 2, 1960

Honorable James L. Wadsworth, District Attorney-elect, Esmeralda
County, 1852 Las Vegas Boulevard North, North Las Vegas, Nevada

STATEMENT OF FACTS

Dear Mr. Wadsworth:

Ralph Denton was duly elected District Attorney for Esmeralda County
at the general election of 1958. In September of 1959, Mr. Denton
resigned that office and the County Commissioners appointed Fred Nelson
to fill the vacancy created by the resignation. The office of District
Attorney was placed on the ballot at the last biennial election, which
occurred November 8, 1960, and, the votes having been canvassed, a
certificate of election was issued to James L. Wadsworth.

QUESTION

When may the District Attorney-elect assume the duties of the office of
District Attorney of Esmeralda County?

CONCLUSION

The District Attorney-elect may assume office immediately upon
satisfying the required statutory qualifications.

ANALYSIS

The question posed above may be phrased in another way, ie., when
does the term of the appointee, Fred Nelson, expire?
[NRS 252.060](#) provides:

In case a vacancy should occur in the office of district
attorney, by death, removal, or otherwise, the board of
county commissioners shall appoint some suitable person to
fill such vacancy *until the next ensuing biennial* election.
(Election supplied.)

[NRS 245.170](#) relates to vacancies occurring in any county or township office and, similarly, provides that such vacancies shall be filled by appointment of the county commissioners “until the next ensuing biennial election.”

If the election of James L. Wadsworth had been the result of a general election at which District Attorneys are regularly elected, he would enter office on the “first Monday of January subsequent to” the election. (*See* [NRS 252.020](#).) But the office of District Attorney appeared on the November ballot by operation of the provisions cited above, which limit the term of an appointee to fill a vacancy created in that office until the next ensuing biennial election. *See* Attorney General’s Opinion No. 179, dated September 20, 1960.

[NRS 282.010](#), subparagraph 4, provides:

The term of office of all officers, elected or appointed, shall begin from the time of their qualification, unless some other express provision is made by law.

It is our opinion, therefore, that Mr. Wadsworth may assume the office of District Attorney of Esmeralda County immediately upon satisfying the qualifications prescribed in [NRS 252.030](#) (bond), and [NRS 282.010](#) (oath). The incumbent appointee, Mr. Nelson, has occupied the office of District Attorney in “de facto” status only since the election of November 8, 1960. *See State v. Wells*, [8 Nev. 105](#).

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-196 EMERGENCY LOANS; COUNTY COMMISSIONS—County Commissioners of Washoe County have no authority to appropriate funds to aid in the reconstruction of a baseball park owned by the City of Reno, a municipal corporation. State Board of Finance may not approve an application for a temporary emergency loan to Washoe County where the County Commissioners have no authority to expend sums for the purpose contemplated.

Carson City, December 20, 1960

Honorable Grant L. Robison, Secretary, State Board of Finance, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Robison:

Pursuant to the provisions of [NRS 354.070](#), et seq., the Board of County Commissioners of the County of Washoe, adopted a resolution authorizing a temporary emergency loan in the sum of \$25,000. The resolution recites that “sufficient sums are not presently available for the reconstruction of recreational facilities at the Moana Ball Park” which were recently destroyed by fire. The notice published pursuant to subsection 2, [NRS 354.070](#), states that the loan is “to be used to help reconstruct the bleachers” at the ball park. Moana Ball Park is owned by the City of Reno, a municipal corporation, located within Washoe County.

The resolution of the Washoe County Commissioners is presently being considered by the State Board of Finance, and that Board seeks the opinion of this office on the following question:

QUESTION

May the State Board of Finance approve a resolution of the Washoe County Commissioners authorizing a temporary emergency loan for the purpose of assisting in the reconstruction of bleachers in a ball park owned by the City of Reno?

CONCLUSION

The State Board of Finance may not approve such a resolution.

ANALYSIS

[NRS 354.070](#) through [NRS 354.110](#) outline the method by which a Board of County Commissioners may in cases of “great necessity or emergency” authorize temporary loans. The State Board of Finance is charged with the responsibility of examining and approving such resolutions. ([NRS 354.080](#)). It is required that a copy of the county resolution be forwarded to the Secretary of the Nevada Tax Commission. The Secretary of the Commission then submits to the Board of Finance, the resolution, “together with a factual report of the tax structure” of the county concerned and the ability of the county to repay the loan. ([NRS 354.080](#).) The information this office has received to date does not disclose whether or not such a report has been submitted.

We are in accord with the opinion of our predecessor who, in construing [NRS 354.070](#) et seq., stated:

To us, no doubt exists but that the purposes for which emergency loans may be obtained * * * are confined to such as are strictly applicable or necessarily for county needs or operation. (Attorney General Opinion No. 392, July 8, 1958.)

Our first inquiry then must be whether or not the Washoe County Commissioners are empowered to expend county funds for the purpose of aiding the reconstruction of a ball park owned by the City of Reno.

It is well established that “county commissioners have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect.” *State ex rel. King v. Lothrop*, [55 Nev. 405](#), 36 P.2d 355. See also *Sadler v. Board of Com’rs. Of Eureka County*, [15 Nev. 39](#); *State ex rel. Wood v. Haeger*, [55 Nev. 331](#), 33 P.2d 753.

Our search fails to reveal any statute expressly or impliedly authorizing County Commissioners to appropriate funds to aid in construction or reconstruction of a recreational facility owned by a municipal corporation located within the county. Such statutes as appear to be relevant to the instant question, on the contrary, clearly imply that the Legislature intended that such expenditures be prohibited.

[NRS 244.300](#) reads as follows:

The county commissioners of the several counties having a population of 7,000 or more, in addition to the powers now conferred upon them by law, are authorized and empowered to operate, manage, improve and maintain all public parks, golf courses and other public recreational centers and areas, the construction of which has either been initiated or completed, *and the title to which is held by the county.* (Emphasis added.)

[NRS 244.445](#) provides:

The county commissioners of the counties of the state having a population in excess of 15,000, * * * shall have power and jurisdiction within their respective counties, and outside of the limits of incorporated cities located in such counties: * * *.

2. To provide for the construction, improvement, maintenance, vacation and preservation of *county* parks, playgrounds, and recreational facilities, * * *.

3. To provide for the maintenance, repair, alteration, improvement and preservation of any other *county property* not herein mentioned, * * *. (Emphasis added.)

The emphasized portions of the cited statutes clearly limit expenditures by counties for the purpose of construction and maintenance of parks and recreational facilities to property owned by the county. We therefore conclude that the County Commissioners are without authority to appropriate funds for the purpose contemplated by the resolution, which is to assist in the reconstruction of a recreational facility, title to which does not lie in the county but in the City of Reno.

Article VIII, Sec. 10 of the Nevada Constitution prohibits a county from loaning its credit in aid of “any joint stock company, corporation or association whatever, * * * except, railroad corporations, companies or associations.”

In *Conservation District v. Beemer*, [56 Nev. 104](#), 45 P.2d 779, the respondent argued that since the only express exemption contained in the constitutional provision related to railroads, a loan of the credit of Washoe County to a conservation district was unconstitutional, even though it was quasi-public corporation. However, the Nevada Supreme found it unnecessary to decide this point. Similarly, the question of the constitutionality of a loan of the credit of the County of Washoe to the municipal corporation of Reno might be raised here.

Regardless of the constitutionality of an expenditure of county funds to aid in the reconstruction of a city-owned ball park, for the reasons stated above it is our view that the Commission is without authority to

appropriate funds for such a purpose. It follows that the Board of Finance should not approve a loan sought for a purpose which is ultra vires.

The City of Reno may have sufficient funds available for recreational purposes to provide for the required reconstruction. In the event such funds are not available, your attention is invited to the provisions of [NRS 354.420](#) which prescribe the means by which cities may make applications for emergency loans. A properly framed resolution submitted on behalf of the City would not be subject to the defects here pointed out relating to the Washoe County resolution, and could in our opinion be considered by the State Board of Finance.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-197 CORPORATIONS; FOREIGN—Fees payable to Secretary of State. The fees to be exacted of foreign corporations for the privilege of entering the State to do an intrastate business therein, computed upon authorized capital stock, shall not exceed \$25,000. [NRS 80.050](#), as amended by Chapter 132, 1960 Statutes, construed.

Carson City, December 21, 1960

Honorable John Koontz, Secretary of State, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Koontz:

The El Paso Natural Gas Company, a Delaware corporation, qualified to do business in Nevada on February 15, 1954. At that time it paid to the Secretary of State a filing fee of \$12,675. Having amended its charter increasing its authorized capital stock, it filed with the Secretary of State its amendment to Articles of Incorporation on August 8, 1956 and paid the further fee of \$6,000. Having again amended its charter authorizing a further increase in its capital stock, it paid the Secretary of State, on January 17, 1957, a further sum of \$6,225. On May 18, 1959, by charter amendment, the corporation increased its authorized capital to \$179,775,000 and paid the further fee to the Secretary of State of \$2,550. Upon this one item of fees computed upon authorized capital stock it has, therefore, paid the total of \$27,450 to the Secretary of State of the State of Nevada. It has also paid other fees, not material here, for incidental services in the amount of \$365. Such incidental fees cover such items as charges for certifying copies of Articles of Incorporation, the filing of lists of officers and directors annually and like services.

The Legislature of 1960, by Chapter 132, Statutes of 1960, page 177, effective March 9, 1960, amended NRS Section 80.050, which in part, as amended, provides as follows:

80.050 Foreign corporations shall pay the same fees to the Secretary of State as are required to be paid by corporations organized under the laws of this state, *but in no case shall the amount of fees to be paid exceed the sum of \$25,000.*

(The emphasis has been supplied. This represents the new material added by Chapter 132, Statutes 1960).

On August 30, 1960, the corporation caused to be filed with the Secretary of State a certificate of reduction of authorized capital to the then total of \$174,925,000.

Recently the corporation has increased its authorized capital stock (it has a number of varieties and designations of preference, not material here) and has tendered to the Secretary of State, for filing, the amendment to its Articles of Incorporation. The Office of the Secretary of State desires an interpretation of the statute, as amended, with reference to the fee to be charged.

QUESTION

In computing fees to be paid to the Office of the Secretary of State by a foreign corporation on account of changes from time to time of its capital structure, may that officer add all fees paid on account of this one item, from time to time, and upon the total reaching \$25,000, refrain from making further charges, upon further filings of changes in capital structure?

CONCLUSION

Yes, we construe such to be the meaning of the statute as presently amended.

ANALYSIS

Under [NRS 80.050](#), prior to the 1960 amendment, it was the duty of the Secretary of State to collect of each foreign corporation upon changes in authorized capital stock, the same fees that would be collected from a domestic corporation upon making such changes. The fees to be collected of a domestic corporation upon its incorporation are provided in [NRS 78.760](#). Under the provisions of [NRS 78.765](#), it is provided that upon the filing of a certificate of amendment to the Articles of Incorporation, of a domestic corporation, increasing the authorized capital stock, a fee is to be collected in amount representing the difference between the charge that would have been made upon the filing of original Articles of Incorporation of that capital structure and the amount previously paid.

We have no doubt that the statutes mentioned would be regulative of the situation as to the fees to be charged in this case if it were not for the amendment of 1960, and that since the amendment to articles now offered for filing would bring the total authorized capital stock above, in amount, the total authorized by the amendment of May 18, 1959, of \$179,775,000

that there would now be an additional charge, to be computed under [NRS 78.760](#) and [78.765](#). Section [NRS 80.030](#), subsection 2, requires a foreign corporation, qualified in Nevada, upon filing amendatory Articles of Incorporation in the place of its domicile, to file forthwith such amendatory articles in Nevada. Such was the law of Nevada from March 1949, and was a condition under which El Paso entered the State in February 1954. To require additional fees for such filings, as provided in [NRS 78.765](#), would not render the act unconstitutional under the commerce clause or the due process clause of the Fourteenth Amendment. *State v. Koontz*, [69 Nev. 25, at 34](#); *Atlantic Refining Company v. Virginia*, 302 U.S. 22, 58 S.Ct. 75, 82 L.Ed. 24. Such an entrance fee is not a tax but compensation for the privilege applied for, namely, the privilege of doing a local business. *Atlantic Refining Company v. Virginia*, *supra*.

But we have the amendment of 1960, and we have a corporation that heretofore has paid above \$25,000 to the Secretary of State, computed entirely upon its authorized capital stock.

Under the authority of *General Motors Acceptance Corporation v. McCullem* (Texas 1928) 10 S.W.2d 687, this question well near on “all fours” was determined. There the statute provided for additional fees to be paid upon the filing of amendments to the Articles of Incorporation, and concluded with this provision: “* * * provided that in no event shall such fee exceed twenty-five hundred dollars.” There it was held that the corporation having previously paid the full sum of \$2,500 was entitled to have its certificate of amendment of Articles of Incorporation authorizing an increase in capital stock filed, without further charge. Upon such payment or payments the license was granted, as a ministerial act, for ten years, and held that increases in authorized capital stock, during such period, should be filed without further fees. In Nevada the authority is not granted for ten years, but upon a much higher scale of fees is granted for perpetuity.

The computation of the \$25,000, however, is not to include all items and sums paid by a corporation, but only those sums paid under [NRS 78.760](#) and [78.765](#). It is our opinion that other fees to be paid to the Secretary of State in behalf of a corporation, under the laws of Nevada, may not be added into the computation designated and intended by [NRS 80.050](#), as amended by Chapter 132, Statutes 1960. This rule should prevail for the reason that other fees are for specific services and each of such other fees is more or less commensurate to the service, whereas the fees or charges here under consideration are exacted as compensation for the privilege of doing an intrastate business therein. The \$25,000 is maximum that may be charged for this privilege, and not the maximum that may be charged of the corporation.

For the reasons given, it follows that El Paso Natural Gas Company is entitled to have filed by the Secretary of State its amended Articles of Incorporation, or amendment thereto, authorizing the sale of Capital stock of value in excess of the former maximum of \$179,775,000, without the payment of further fees insofar as fee computation depends upon authorized capital stock.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-198 STOCK COMMISSIONERS, STATE BOARD OF—When uniform brand inspection has been dispensed with by a majority of the stockmen of a district, it cannot be reinstated by less than a majority vote of such stockmen. [NRS 565.040](#), subsections 2 and 4 construed.

Carson City, December 21, 1960

Dr. W. F. Fisher, Executive Officer, State Department of Agriculture, Post Office Box 1209, Reno, Nevada

STATEMENT OF FACTS

Dear Mr. Fisher:

Section 565.010 Nevada Revised Statutes provides:

565.010 As used in this chapter “board” means the state board of stock commissioners.

[NRS 565.040](#) in part provides:

565.040 1. The board is authorized and empowered to declare any part or parts of the State of Nevada a brand inspection district or districts.

2. After the creation of any brand inspection district as authorized by this chapter all neat cattle, horses or mules within any such district shall be subject to brand inspection in accord with the terms of this chapter before:

- (a) Consignment for slaughter within any district; or
- (b) Any transfer of ownership for sale or otherwise; or
- (c) Removal from such district when such removal is not authorized pursuant to a livestock movement permit issued by the board.

4. When a petition *signed by a majority* or the owners of neat cattle, horses or mules within a brand inspection district is filed with the board praying that the board inspection district be excluded from the operation of the provisions of paragraphs (a) and (b) of subsection 2 of this section, the board forthwith shall cause the brand inspection district to be so excluded by the issuance of a regulation in the manner prescribed in this chapter. (Emphasis supplied.)

Under the provisions of subsection 1 of [NRS 565.040](#), the Board issued and published a regulation declaring Lyon County a brand inspection district.

Subsequent to the issuance and publication of the regulation declaring Lyon County a brand inspection district, a petition signed by a majority of the owners of neat cattle, horses and mules within said brand inspection

district, prepared pursuant to the provisions of subsection 4 of [NRS 586.040](#), was filed with the said Board, praying that the brand inspection district so established, be relieved of brand inspection, under the provisions of (a) and (b) of subsection 2, of [NRS 565.040](#). by said petition it was shown to the Board that it was the desire of a majority of the stock owners entitled to vote thereon that in said brand inspection district brand inspection be not required in transactions involving (a) consignment for slaughter within the district and (b) transfers of ownership within the district.

Thereafter, inquiry having been made to the Attorney General as to the mandatory effect of such petition upon the Board, it was officially ruled in Attorney General Opinion No. 309, dated September 19, 1957, that the provisions of subsection 4 of [NRS 565.040](#), having been met by the signing and filing by a majority of the eligible stockmen of the county, praying to be relieved of inspection in situations designated by the statute, it became and was incumbent upon the Board to immediately honor the petition, and exclude the district so established from the operation of the provisions of (a) and (b) of subsection 2 of [NRS 565.040](#).

Hereafter we shall refer to the full inspection authorized by the statute as “uniform brand inspection,” and the inspection petitioned by the eligible stockmen of the district as “limited brand inspection.”

It appears that thereafter, the Board of its own motion mailed ballots to all eligible stockmen of the Lyon County Brand Inspection District, according to its records, one hundred eighty-nine (189) in number, upon which ballots the stockmen were asked to vote upon the acceptance or rejection of uniform brand inspection. Of the 189 eligible stockmen, qualified to vote upon this question, ninety-eight (98) stockmen voted. Sixty-three (63) of their number voted for uniform brand inspection, i.e., 35 voted for the continuation of the present method of limited brand inspection.

QUESTION

May uniform brand inspection as provided by subsection 2 of [NRS 565.040](#) be returned to the brand inspection district, upon the authority of the plurality vote mentioned, in light of the fact that limited brand inspection has been required by a majority of the eligible stockmen of the district?

CONCLUSION

We conclude that an affirmative vote of a majority of the eligible stockmen of the district will be required to return the district to uniform brand inspection.

ANALYSIS

After the lawful creation of the brand inspection district, comprising Lyon County, the district was, by affirmative action of a majority of its eligible stockmen, relieved of a portion of the restrictions placed upon it. It was relieved of uniform brand inspection and adopted limited brand inspection, in the manner provided in subsection 4 of [NRS 565.040](#). Apparently more than one-half of the eligible stockmen of the county district, at that time (1957) desired to operate with limited brand

inspection. Apparently this same viewpoint still obtains for substantially less than one-half of their number (exactly one-third) have voted to return to uniform brand inspection.

It clearly appears to be the legislative intent that a majority of the eligible stockmen of the district might, by affirmative action, dispense with uniform brand inspection and avail themselves of a less restrictive procedure, and likewise the intention that thereafter a majority of the eligible stockmen of the district might, by affirmative action, reverse their former decision and reinstate uniform brand inspection.

If the ruling were otherwise, the conclusion might well be ridiculous. Suppose that upon the 189 ballots sent out, 15 stockmen vote. Suppose that 8 of the stockmen vote to return to uniform brand inspection and 7 vote to retain limited brand inspection. The 8 being a plurality would reverse the wishes of approximately 95 or more (a majority of 189 eligible voters) and would reinstate uniform brand inspection. The Legislature did not intend that in a case such as this silence (failure to vote) would constitute consent.

It is therefore our opinion that a proper statutory construction would require a vote a majority of all eligible stockmen of the district, so evidencing their desires, before the district could be returned to uniform brand inspection, and that the plurality vote obtained in this case is ineffectual.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

While it is true that our Legislature has enacted NRS 41.430, whereby the State of Nevada, pursuant to the provisions of a federal act, assumed jurisdiction over public offenses committed by or against Indians in the areas of Indian country in Nevada, except in areas specifically excluded by the Governor, the Pyramid Lake Indian Reservation has been excluded from the operations of this section by proclamation of Governor Charles H. Russell, issued on the 27th day of June, 1955.

However, in the case of non-Indians our Supreme Court has held that the State, having the right to utilize its police power for the preservation and protection of fish in its public waters, has the right to regulate the taking of fish from the public waters within the boundary of the Pyramid Lake Reservation by all parties not Indian wards of the government. This decision is based on the general principle of law that state courts have jurisdiction on Indian reservations over offenses not committed by or against an Indian. Ex Parte Crosby, 38 Nev. 389.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General.*

By WILLIAM N. FORMAN, *Special Deputy Attorney General
for Nevada Fish and Game Commission.*

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121. State Planning Board. University of Nevada. Federal Grants in Aid. The State Planning Board is legally authorized and empowered to fulfill the requirements of, and to enter into necessary contracts with, the Federal Government, which would qualify the Board as an applicant for Federal aid under Section 702 of the 1954 Federal Housing Act.

CARSON CITY, January 5, 1960.

MR. M. GEORGE BISSELL, *Executive Secretary, State Planning Board,
Carson City, Nevada.*

STATEMENT OF FACTS

DEAR MR. BISSELL: Reference is made to conference held on October 6, 1959 in this office in which you, on behalf of the State Planning Board, and Mr. Lutz, Administrator, and Mr. Davis, Attorney, on behalf of Housing and Home Finance Agency (U. S.), spoke with D. W. Priest, Chief Deputy Attorney General, concerning a grant of federal funds in connection with advance planning of the proposed History Building for the University of Nevada in the city of Reno.

Some question seems to have arisen concerning the authority of the Nevada State Planning Board to apply for a grant of such advance planning federal funds on behalf of the University of Nevada and the State of Nevada. Such objection, if we have been correctly informed, is predicated on the provisions of Section 702 of the 1954 Housing Act (Public Law 560, 83rd Congress—Second Session, Vol. 1, U. S. Code Congressional and Administrative News, P. 675, at p. 737 et seq.).

Chapter 274, 1956-1957 Statutes of Nevada, authorized and directed the State Planning Board to proceed with preplanning of certain projects, including said History Building for the University of Nevada in Reno, Nevada. (Section 1, Project No. 6.) *It also appears that needed federal funds for advance planning have heretofore been granted for Projects Nos. 3, 4 and 7, stated in said Nevada Act, presumably on the basis of the authority therein contained.* In passing said Act, the Nevada Legislature had as a basis therefor the recommendations of the State Planning Board for the biennium 1957-1959, which expressly included provisions for the advanced planning and required federal funds therefor in connection with the indicated History Building for the University of Nevada. (See State of Nevada Planning Board Recommended Program, Biennium 1957-1959, pp. 142-143, 155.)

Chapter 400, Statutes of Nevada, 1958-1959, authorizes the appropriations of state funds for the purpose of the design, construction and furnishing of certain additional physical facilities required by the University of Nevada. *The Nevada State Planning Board is charged in said Act with the duty of carrying out its provisions relating to the design, contract administration, construction, equipment and minimum furnishings therefor.*

Chapter 458, Statutes of Nevada, 1958-1959, provides for state appropriation of funds for the Nevada State Planning Board to carry out said Board's program of capital improvements, physical plant design, construction, rehabilitation, remodeling, repairs, additions, equipment and furnishings, land acquisitions, safety survey, landscaping, *preparation of plans, specifications, and contract documents*, and other matters therein provided. Included in the many items enumerated for authorized expenditures from said appropriated funds, are various projects on behalf of the University of Nevada. *Said Act also charges the State Planning Board with the duty of carrying out the provisions of the Act, specifically including the preparation of required plans and specifications by qualified professional and technical personnel in the varied and many phases connected with the execution of the projects enumerated therein.*

A similar question was previously raised by the Housing and Home Finance Agency (U. S.) concerning the authority of the Nevada State Board to represent the University of Nevada and the State of Nevada in connection with applications for, and receipt of federal grants for such advance planning. This office, on submission of said question to it for official opinion, exhaustively reviewed applicable state law and the same Federal Act now involved, and conclusively sustained the legal authority of the Nevada State Planning Board to act on behalf of the University of Nevada and the State of Nevada in applying for and receiving federal grants for identically the same purposes presently under consideration. (See A.G.O. No. 143, dated January 31, 1956; A.G.O. No. 396, dated July 18, 1958, both of which were addressed to the Nevada State Planning Board.)

If we correctly understand the specific factual basis for the present objections of the Federal Agency to any grant of advance planning funds for the History Building to be constructed by the University of Nevada, the claim is made that the Nevada State Planning Board

has not, expressly and specifically, been authorized to enter into a contract for such moneys, as required by Section 702 of the 1954 Federal Housing Act (See *supra*). Such contention is based upon the omission in Chapter 274, Statutes of Nevada, 1957-1958, of an express provision authorizing the State Planning Board to enter into a contractual agreement (in the name of the State of Nevada) with the United States, to receive and expend, by grant, loan or otherwise, funds which may be made available for planning purposes by the United States.

QUESTION

Is the Nevada State Planning Board empowered under state law to fulfill requirements of the Federal Government which would qualify said Board as an applicant for, and recipient of, federal aid under Section 702 of the Federal Housing Act of 1954?

CONCLUSION

Yes.

ANALYSIS

In the interest of brevity, and because the requirements of Section 702 of the Federal Housing Act of 1954 are essentially the same as those contained in Section 701 of said Act, which were reviewed and analyzed in detail by this office in A.G.O. No. 143 (*supra*), we will merely list the requirements numerically, and indicate under each the basis for the legal authority and power of the State Planning Board for satisfaction of, or compliance with, each said requirement.

I. An applicant for a federal grant must be an official state planning agency. (Sec. 702(a), 1954 Fed. Housing Act.)

The State Planning Board was officially created by an Act of the Nevada Legislature in 1937, since which date it has been, and still is, in existence, notwithstanding subsequent amendments of said Act. (See Chapter 341, Nevada Revised Statutes.) NRS 341.010 expressly provides that "board" means the State Planning Board.

II. The state planning agency must be empowered, under its state laws, to provide planning assistance in connection with the construction of public works. (Sec. 702(a), 1954 Fed. Housing Act.)

NRS 341.150, relating to "Engineering and architectural services: Costs; powers of board," insofar as here pertinent, provides as follows:

1. *The state planning board shall furnish engineering and architectural services to all state departments, boards or commissions charged with the construction of any state building. * * ** All such departments, boards or commissions are *required* and authorized to use such services. (Emphasis supplied.)

2. The services shall consist of:

- (a) Preliminary planning
- (b) Designing
- (c) Estimating of costs
- (d) Preparation of detailed plans and specifications.

The board may submit preliminary plans or designs to qualified architects or engineers for preparation of detailed plans and specifications if the board deems such action desirable. The cost of preparation of preliminary plans or designs, the cost of detailed plans and specifications, and the cost of all architectural and engineering services shall be charges against the appropriations made by the legislature for any and all state buildings or projects, or buildings or projects planned or contemplated by any state agency for which the legislature has appropriated or may appropriate funds

* * *

3. The board shall:

(a) Have final authority for approval as to architecture of all buildings, plans, designs, types of construction, major repairs and designs of landscaping.

(b) Solicit bids for and let all contracts for new construction or major repairs to the lowest qualified bidder.

(c) After the contract is let, have supervision, and inspection of construction or major repairs. The cost of supervision and inspection shall be a charge against the appropriations made by the legislature for the building or buildings.

NRS 341.160, relating to "Reports, recommendations of board; priority of construction," provides:

The board shall submit reports and make recommendations relative to its findings to the governor and to the legislature. The board shall particularly recommend to the governor and to the legislature the priority of construction of any and all buildings or other construction work now authorized or that may hereafter be authorized or proposed.

NRS 341.170 relates to "State plan for economic, social development," and provides:

The board shall make a comprehensive state plan for the economic and social development of the State of Nevada. To this end, the board shall conduct research and studies relating to the natural resources and other factors in the progress of the state.

NRS 341.180 relates to "Cooperation with state agencies, local planning commissions," and provides:

The board *shall*:

1. Cooperate with other departments and agencies of the state in their planning efforts.

2. Advise and cooperate with municipal, county and other local planning commissions within the state for the purpose of promoting coordination between the state and the local plans and developments. (Emphasis supplied.)

NRS 341.110 relates to "General powers of board," and provides:

In general, the board shall have such powers as may be necessary to enable it to fulfill its functions and to carry out the purposes of this chapter.

NRS 341.120 relates to "Board may accept grants, services," and provides:

The board is empowered to receive and accept, in the name of the state, grants of money or services to enable the board to carry on its work under this chapter. (Emphasis supplied.)

Certainly, the proposed History Building for the University of Nevada, a state institution, is a public work, as required by Section 702(a) of the 1954 Federal Housing Act. The preplanning for said building was authorized by Chapter 274, 1956-1957 Statutes of Nevada. Chapters 400 and 458, 1958-1959 Statutes of Nevada, appropriation Acts, make provision for planning and construction of many University and other projects, and expressly charge the State Planning Board with the *duty* of effecting the execution of the provisions therein, including the preparation of required plans and specifications.

We conclude, therefore, that the State Planning Board is fully authorized and empowered, as a state agency, to provide planning assistance in connection with the construction of public works, including the proposed History Building for the University of Nevada.

III. The State Planning Board must be legally empowered to receive and expend federal funds for the purposes stated in requirement No. II above, and to contract with the United States with respect thereto. (Section 702 (b) (c), 1954 Fed. Housing Act.)

Since any advance of federal funds for construction planning has to be repaid, there is necessarily involved some kind of loan agreement or contract. We have already quoted above the provisions of NRS 341.110 and 341.120, conferring upon the State Planning Board both broad general powers to carry out its functions, and specific power to accept grants and services in connection with the performance of its statutory responsibilities and duties. These provisions sufficiently authorize the State Planning Board to contract with a grantor, including the United States or any of its agencies, for the acceptance and expenditure of a grant, so long as it is consistent with the provisions of the Act generally governing the Board, or with specific legislative enactment and authority. Specific contractual power is *necessarily* implied, in order that the Board may properly perform and discharge the responsibilities and duties statutorily imposed upon it. (See 42 A.J. 316, Section 26, "Public Administrative Law.")

In this connection, mention may also be properly made of the provisions of NRS 341.130, relating to "Participation in interstate, regional, national planning projects" by the Board for the purpose of promoting the general welfare of the people. This provision, we also submit, reasonably implies the existence and exercise of contractual power by the Board, whenever necessary for any authorized transaction involving the general welfare of the people.

IV. The State Planning Board, or the State of Nevada, must obligate itself to make repayment of any federal funds advanced for planning of construction of public works. (Section 702 (b) (c), 1954 Fed. Housing Act.)

The State Planning Board is a state agency supported by direct legislative appropriation. (See Chapter 458, 1958-1959 Statutes of Nevada.) The good faith of the State of Nevada is pledged to performance of all valid contractual obligations entered into and assumed by the State, or on its behalf, by its respective agencies and officials. This would include the State Planning Board and the University of Nevada. (Article IX, Section 3, Article I, Section 15, Nevada Constitution; NRS 41.010.) NRS 341.090, relating to "Authorized expenditures" by the Board, authorizes application of appropriated funds, as necessary, "to carry into effect the purposes of its acts."

The grant of federal funds for advance planning purposes would (as we understand the practice) provide a proper basis for estimating costs of construction and legislative appropriations therefor, as well as future planning. Such procedure and results are also necessary to determine requirements and essential data in connection with applications for further federal assistance and participation, as authorized by the 1954 Federal Housing Act.

V. The State Planning Board must be ready and able to assume full responsibility for the proper execution and completion of the planning work, and of carrying out the terms of the federal grant contract. (Section 702(b), 1954 Fed. Housing Act.)

Either by use of its own staff, or through authorized employment of qualified professional or technical assistance, the State Planning Board is certainly in a position to complete the planning work as required by the 1954 Federal Housing Act. It is also, by the express terms of the State Act governing it and by the provisions of Chapter 458, 1958-1959 Statutes of Nevada, charged with the statutory duty and required to assume full responsibility for the execution and proper performance of the planning work here involved in connection with the proposed University of Nevada History Building. Further, in connection with this specific point, the State Planning Board has, on other occasions involving the use of federal funds made available to it for advance planning under the 1954 Federal Housing Act, *demonstrated and proved* that it is quite able and qualified to make proper use of federal funds for such purposes, in the regular performance of its official state duties and responsibilities.

VI. The State Planning Board shall, subsequent to approval and prior to disbursement of any federal and state funds for planning purposes, establish a separate account therefor, into which all such moneys shall be deposited. (Section 702(b), 1954 Fed. Housing Act.)

Certainly, this requirement of the Federal Act can, as heretofore, be readily complied with.

VII. The State Planning Board has been legislatively authorized and charged with the responsibility and duty of representing the University of Nevada, the using state agency, in connection with the advance planning work, and requirements therefor, for the proposed History Building. (See Chapter 274, 1957-1958 Statutes of Nevada; Chapter 458, 1958-1959 Statutes of Nevada.)

This point is addressed to the requirement that: "No advance shall be made hereunder with respect to any individual project unless it conforms to an over-all state * * * plan approved by a competent state * * * authority, and unless the public agency formally contracts with the Federal Government to complete the plan preparation promptly and to repay such advance when due." (Section 702(b), 1954 Fed. Housing Act.)

That the University of Nevada may, as required under state law, designate the State Planning Board to represent it in connection with the advance planning work for the proposed History Building, can hardly be disputed on any legal basis. In any event, this requirement, in legal substance, merely means that the individual project be in conformity with state planning; be approved by a competent state authority; be the subject of valid contract between the State and Federal Governments, or their authorized agencies; that the plans therefor be completed promptly; and, that the federal advance moneys be repaid when due.

Manifestly, the State Planning Board, acting directly under its statutory powers and authority, or acting in a representative capacity for the University of Nevada and the State of Nevada, is ready, willing, and able to do.

We thus conclude that the State Planning Board, as a prospective applicant for federal funds under the 1954 Federal Housing Act, is legally authorized and qualified to meet all the federal requirements set forth in Section 702 thereof, namely:

1. It is authorized to contract in its own name.
2. It is empowered to enter into contracts with the Federal Government for planning grants under Section 702, 1954 Federal Housing Act.
3. It is authorized to receive and expend donations and grants as well as funds legislatively appropriated to discharge and perform all of its official and public responsibilities and functions, both express and those reasonably necessary and implied.
4. The State Planning Board's jurisdiction or area for exercise of its authority and power have been sufficiently defined in both general and specific statutes, which also provide adequate standards or tests delineating its proper functions, responsibilities and duties.
5. It can obligate the State of Nevada for the safeguarding and proper use of any federal funds advanced for public construction planning purposes, and for the repayment of any such advance federal funds when due.
6. It can, and, in fact, is legislatively required to, perform all the necessary preliminary planning work on behalf of the University of Nevada, as well as other state, regional or local agencies; in a representative capacity, acting for and on behalf of the University of Nevada, it can enter into contractual agreement with the Housing and Home Finance Agency (U. S.) for a federal grant to be used in connection with advance planning of the proposed History Building, a public construction work.

We trust that the foregoing sufficiently answers the specific question

and objection raised by the federal agency at this time in connection with the application by the State Planning Board for a federal grant under the 1954 Federal Housing Act.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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122. Health—State Health Officer. University of Nevada. Present law requiring State Health Officer to devote full time to official duties and not to engage in any other business or occupation held to prohibit employment as lecturer in Public Health Administration by the University of Nevada.

CARSON CITY, January 6, 1960.

DANIEL J. HURLEY, M.D., *State Health Officer, Nevada State Department of Health, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR DR. HURLEY: It is indicated that the University of Nevada has asked you to accept an appointment as lecturer in Public Health Administration, involving your teaching a course in such subject from 9:00 a.m. to 12 noon on Saturday mornings during the Spring Semester, for which you would be paid the sum of \$375.

It is further indicated that the State Board of Health has adopted the policy that full-time professional employees should not accept outside employment, but that exceptions to this rule have been made to grant permission to such professional personnel of the Department to teach courses at the University of Nevada both in Reno and in Las Vegas. Such exceptions have been allowed when such teaching engagements would not interfere with the regular duties or work of the employee, and also when other qualified persons were not readily available for such teaching engagements.

Our attention is invited to NRS 439.110, regarding your acceptance of the proffered appointment.

QUESTION

May the State Health Officer, under present law, accept an appointment to lecture for compensation in a Public Health Administration course at the University of Nevada?

CONCLUSION

The State Health Officer may not accept an appointment at the University of Nevada, since such occupation would prevent him from devoting full time to his official duties as required by present law.

and objection raised by the federal agency at this time in connection with the application by the State Planning Board for a federal grant under the 1954 Federal Housing Act.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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Our attention is invited to NRS 439.110, regarding your acceptance of the proffered appointment.

QUESTION

May the State Health Officer, under present law, accept an appointment to lecture for compensation in a Public Health Administration course at the University of Nevada?

CONCLUSION

The State Health Officer may not accept an appointment at the University of Nevada, since such occupation would prevent him from devoting full time to his official duties as required by present law.

ANALYSIS

NRS 439.120 as amended by Chapter 484, 1958-1959 Statutes of Nevada, provides as follows:

The state health officer shall:

1. Receive an annual salary of \$14,676, payable in the manner provided in NRS 281.120.
2. Be allowed the per diem expense allowance and travel expenses as provided by law.

NRS 281.120 relates to "Semimonthly paydays for state officers, employees," and establishes the time and manner of payment for such state personnel.

NRS 439.110, relating to "State health officer: Devotion of entire time to official duties," provides:

The state health officer *shall* devote his *full* time to his official duties *and shall not engage in any other business or occupation.* (Emphasis supplied.)

The State Board of Health was first established in 1911. At that time there was no provision for a State Health Officer, the Act providing that the Board should consist of a president, secretary, and one other member to be appointed by the Governor. The president and secretary of the Board were to be qualified medical doctors with at least five years of medical practice in Nevada. (Chapter 199, 1911 Statutes of Nevada, p. 392.) Compensation was fixed in the amount of \$20 per day for attendance at sessions of the Board, together with necessary traveling expenses.

Chapter 117, 1919 Statutes of Nevada, p. 221, increased the Board's membership to five, established the Secretary thereof as the State Health Officer and Executive Officer of the Board, and authorized payment to him of a salary of \$2,500 per year and his necessary expenses, actually incurred in the performance of his duties.

Chapter 184, 1939 Statutes of Nevada, p. 297 et seq., authorized a salary of \$3,600 per year together with necessary traveling expenses, and for the first time expressly imposed the requirement that the State Health Officer should devote his *full* time to his official duties and not engage in any other business or occupation.

All subsequent amendments to the law have contained the foregoing express limitation regarding devotion of full time to official duties and prohibition of other employment and occupation. Chapter 151, 1943 Statutes of Nevada, p. 215 et seq., increased the salary to \$4,250 per year and necessary travel expenses; Chapter 235, 1947 Statutes of Nevada, p. 752, authorized an increased salary of \$7,000 per year together with necessary travel expenses; and, as above noted, the 1959 legislative amendment further increased the salary of the State Health Officer to \$14,676 per year together with per diem allowances and travel expenses in accordance with law. Application of full time to official duties and prohibition of any other employment was continued in the law by express provision.

Regrettable though it may be that the University of Nevada, and the

State generally, will be deprived of the benefit of the actual experience which the present State Health Officer possesses and could impart through a lecture course in Public Health Administration, we deem present law to be expressly prohibitory of his rendering any such services. This is so not as a matter of policy, but because the State Legislature, in exercise of its judgment and wisdom, has seen fit to impose such prohibitory limitation on the State Health Officer as a matter of express law.

The legislative history of the office herein outlined, shows progressive increases in the authorized salary connected with the office, presumably to make adequate compensation for the State Health Officer's full and entire services to the public health and safety. It may properly be noted that in the event of any serious epidemic, the general public interest might well demand services on the part of the State Health Officer which could be in conflict with other commitments, including the one here under consideration. In any event, the seriousness and importance of the public health responsibilities with which said officer is charged, in its many and varied aspects, undoubtedly and properly, motivated the Legislature in providing the express prohibition against other employment and encroachment upon the full time and services due the general public. (See Attorney General Opinion No. 298, April 29, 1946.)

It is our considered opinion, therefore, that present law prohibits acceptance of the appointment as lecturer proffered by the University of Nevada, as herein indicated. It may well be that the Legislature might authorize an exception for utilization of the professional experience in certain appropriate circumstances, such as here involved, but this can only result from legislative amendment of present law.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

123. Education, State Department of—School Board Trustees—Change of residence (domicile) as rendering ineligible and creating vacancy in office. Applicable statutory provisions construed and held to render an incumbent school trustee ineligible for continuance, and creating a vacancy, in office held by him, upon removal of residence from definite area from which elected or appointed, where such residence is a necessary condition and qualification for said office in the first instance. A sufficient legal basis and determination of such ineligibility and "vacancy" in office held necessary. Such legal determination is authorized on basis of School Board or State Department of Education rules, if duly adopted and promulgated by School Boards, or through *quo warranto* proceedings.

CARSON CITY, January 6, 1960.

MR. BYRON F. STETLER, *Superintendent of Public Instruction, Department of Education, Carson City, Nevada.*

STATEMENT OF FACTS

DEAR MR. STETLER: A person was elected or appointed to serve as a member of the Board of Trustees of a school district pursuant to the provisions of NRS 366.170, paragraph 1(e). Thereafter, he moved his residence outside the county, actually establishing a residence in an adjoining county.

QUESTIONS

1. If a School District Trustee changes his residence after election or appointment to the particular office as provided in NRS 386.170, does said change of residence render him ineligible to continue, and create a vacancy, in said office?

2. If our answer to the foregoing question is in the affirmative, would it follow that where a School District Trustee ceased to reside in the designated area from which he was elected or appointed but still had residence within the county embracing the school district, he would be ineligible to retain his office as School District Trustee?

CONCLUSIONS

To question No. 1 (As qualified herein): Yes.

To question No. 2 (As qualified herein): Yes.

ANALYSIS

The following prefatory observations are deemed proper:

We think the questions submitted to us for opinion are primarily of local concern since they relate to the eligibility of an incumbent, or "vacancy," in a School District Trustee office, and might, perhaps more properly, be resolved by opinion and advice of the District Attorney of the county wherein the particular school district is located.

Determination of whether a Trustee is eligible for the office held by him, or whether a "vacancy" exists in a particular Trustee's office, can, if necessary, be legally determined through *quo warranto* proceedings, which a District Attorney can institute in the name of the Attorney

General of the State of Nevada, upon approval or permission first obtained therefor.

The interest of the State Superintendent of Public Instruction would appear to be an indirect one, arising from the fact that, under NRS 386.270, he is authorized to fill any "vacancy" in a Board of Trustees by appointment for the unexpired term. Until a vacancy in the office of a School District Trustee is actually, legally held to exist, the State Superintendent of Public Instruction is without apparent sufficient interest to take any action or otherwise intervene in the matter.

Because the questions embody considerations of statewide and general public interest however, we feel it to be both proper and desirable to express our official views on the subject.

We assume for purposes of our opinion that there is involved, in connection with the questions submitted, a County School District as distinguished from a Joint School District, comprising more than one School District.

NRS 366.170, relating to "Election of trustees in county school districts having a pupil enrollment of 1,000 or more," specifically sets forth the qualifications, insofar as residence is concerned, which a School District Trustee shall have, to be elected to and hold office, commencing with the general election of 1956.

NRS 386.360, relating to "Rules of board of trustees," provides:

Each board of trustees have the power to prescribe and enforce rules, not inconsistent with law, *or rules prescribed by the state board of education, for its government* and the government of public schools under its charge. (Emphasis supplied.)

NRS 386.350, relating to "General powers of board of trustees," further provides:

Each board of trustees is hereby given such reasonable and necessary powers, not conflicting with the constitution and the laws of the State of Nevada, as may be requisite to attain the ends for which the public schools are established *and to promote the welfare of school children.* (Emphasis supplied.)

NRS 283.040, insofar as here pertinent, provides as follows:

1. Every office shall become vacant upon the occurring of either of the following events before the expiration of the term:
 - (f) The ceasing of the incumbent to be a resident of the state, *district, county, city or precinct in which the duties of his office are to be exercised, or for which he shall have been elected or appointed.* (Emphasis supplied.)

As used in the Nevada State Constitution or in statutes relating to political rights and eligibility for public office, the term "resident" is, generally, synonymous with "domicile." (State v. Moodie, 65 N.D. 340, 258 N.W. 558.) A person may have more than one residence, but can have only one domicile at any particular time. Domicile is retained until abandoned; and, in order to abandon a domicile there must be

both an intention to establish a new domicile accompanied by physical presence in the place of new domicile.

To be a qualified elector in a county, residence in that county is required. (NRS 292.070, 292.080, 281.050.) In other words, legal residence is that place where a person is actually present within the State or county, whichever the case, during all the period of time for which he claims residence. So long as an incumbent of public office is in a position to show that he had the intention of returning to, and continuing, his residence, he remains eligible to hold office in said place. (*State v. Van Patten*, 26 Nev. 273.) But if an incumbent of public office has *actually* removed his residence *and* is unable to show an intention to return to such residence, then he has abandoned same, and the provisions of NRS 283.040, cited above, and applicable without exception, would govern. This, presumptively, is the situation herein.

On the basis of the foregoing, therefore, the following conclusions appear to be proper:

1. That if a School District Trustee was elected or appointed to his particular office on the basis of having residence in a definite area, then an *actual* change of residence (domicile) and removal from said definite area would render him ineligible to continue in, or hold, the particular office to which he was so conditionally elected or appointed.

2. That a Board of School District Trustees, by adoption of rules on its own part, or such rules as may be prescribed by the State Board of Education, may determine that removal of residence (domicile) from the area entitled to representation on the board by a School District Trustee, shall automatically render an incumbent trustee ineligible for continuance in office, and be deemed to create a vacancy in such office.

Justification for these conclusions is predicated on express legislative provision and intent requiring as a qualification for the office of School Board Trustee residence in the area which such official will represent on said board. Evidently, this requisite was legislatively designed as essential to secure the best interests of the public in the field of education and the welfare of school children. (See Attorney General Opinions No. 10, dated January 31, 1917, No. 110, dated November 1, 1917, No. 56, dated May 19, 1919, No. 181, dated September 29, 1920. But see: Attorney General Opinion No. 364M, dated December 10, 1942, dealing with the eligibility of a nonresident of a School District to the office of Trustee in a *Joint School District election*.)

Both under its general powers, as well as under the powers vested in school boards for their own government and the promotion of the public and school interests, therefore, School Boards by appropriate rule, could, and would be authorized in taking action as we have indicated. We also believe that the State Board of Education could prescribe adoption of such a rule by School District Boards, if the latter refused or neglected to do so on their own initiative.

We must emphasize again, however, that until such a legal basis has been established to support a determination that a particular incumbent school trustee is ineligible for such position and that a vacancy therefore exists in said office, the only other manner in which eligibility

can be placed in issue is through *quo warranto* proceedings, as already indicated herein.

The answer to the second question submitted to us is included within the scope of our above analysis.

In other words, removal of a residence (domicile) from a definite area to a location outside such area, even if within the county wherein the School District is situated, renders an incumbent trustee ineligible for continuance in office as trustee, when actual residence (domicile) in a definite area is a condition and qualification for his election or appointment to said office in the first instance.

We trust that the foregoing sufficiently answers your questions and proves helpful to you.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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124. Education, State Department of. University of Nevada. State Department of Education held authorized to hold in-service training sessions for teachers and administrators; to hire and compensate necessary consultants therefor, and pay consultants, teachers and administrators per diem and other necessary expenses for attendance at such sessions from Federal and State funds made available to carry out approved program for improvement of education in the fields of science, mathematics and modern foreign languages, as provided in National Defense Education Act (Public Law 85-864). Professors of the University of Nevada may be engaged to render consultative services in connection with such program, be compensated therefor, and receive other allowances for necessary expenses entailed in connection therewith, if such services do not interfere with their academic duties and University authorities approve.

CARSON CITY, January 7, 1960.

MR. BYRON F. STETLER, *Superintendent of Public Instruction, Department of Education, Carson City, Nevada*.

Attention: Mr. Dwight F. Dilts, Assistant Superintendent.

STATEMENT OF FACTS

DEAR MR. STETLER: By letter dated November 18, 1958, this office advised the State Department of Education that NRS 385.100 authorized the preparation and submission of such State Plan as might be feasible in compliance with the requirements of the National Defense Education Act, Title III (Public Law 85-864, U. S. Code Congressional and Administrative News, Vol. 1, pp. 1894, 1903 et seq; 72 Statutes at Large, 1580), so as to qualify the State of Nevada for the federal aid provided therein.

Presumably, "Nevada State Plan—Title III" was accordingly prepared, submitted and approved.

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Presumably, "Nevada State Plan—Title III" was accordingly prepared, submitted and approved.

Pursuant to said State Plan, the State Department of Education has planned a program scheduling a number of conferences or in-service training sessions for teachers and administrators in the public school system of Nevada. These conferences are felt to be necessary to accomplish the general purposes of the approved State Plan. They are planned for various locations within the State. It is intended to call in consultants in the subject areas of science, mathematics and the modern foreign languages, who would be engaged by contract and be compensated out of both federal and state funds made available therefor by said governments on a matching basis.

The in-service training sessions are invitational and voluntary in nature, as distinguished from authorized institutes that may be called by the Superintendent of Public Instruction, at which attendance is required. The sessions would be devoted to the study of the indicated subject areas, the development of study courses in such subject areas, the presentation and discussion of new ideas and materials available for teaching of the mentioned subjects, and related pedagogical matters. The sessions would each be from one to two days in duration; and, it is indicated, approximately 10 such sessions, in various locations of the State, have been planned for the current year.

Finally, we understand that state implementation of the State Plan was provided for in the budget of the State Department of Education and approved by the State Legislature. (Chapter 433, 1958-1959 Statutes of Nevada.)

QUESTIONS

1. Is the State Department of Education authorized to conduct the activities provided for in said "Nevada State Plan—Title III," namely: schedule and hold such in-service training sessions for teachers and administrators; engage by contract, desired consultants; and compensate and also make payment to such consultants and teachers of necessary expenses incurred in connection with such training sessions or conferences?

2. If our answer to the foregoing question should be in the negative, is the State Department of Education authorized to use "Title III" funds:

A. To pay travel and per diem allowances to University of Nevada professors for consultative services in connection with said in-service training conferences, under the provisions of Chapter 485, 1958-1959 Statutes of Nevada?

B. To supplement University of Nevada funds for travel and per diem allowances for said University professors who may be requested to render their services or otherwise participate in such in-service training conferences, if University of Nevada funds therefor are insufficient?

C. To pay certain University of Nevada professors a consultant's fee, if the time and services rendered by them in connection with said in-service training conferences is above and beyond the requirements of their normal duties and responsibilities to the University of Nevada?

D. To pay the travel and per diem allowances of public school teachers within the State, entailed in their attending said in-service training conferences?

CONCLUSIONS

To question No. 1: Yes.
To question No. 2A: Yes.
No. 2B: Yes.
No. 2C: Yes.
No. 2D: Yes.

ANALYSIS

Insofar as here pertinent, NRS 385.100 provides as follows:

1. The state board of education shall prescribe regulations under which contracts, agreements or arrangements may be made with agencies of the Federal Government for funds, services, commodities or equipment to be made available to the public schools and school systems under the supervision or control of the state department of education.

2. All contracts, agreements or arrangements made by schools and school systems in the State of Nevada involving funds, services, commodities or equipment which may be provided by agencies of the Federal Government shall be entered into in accordance with the regulations prescribed by the state board of education and in no other manner.

We assume that the State Board of Education has adopted and promulgated such regulations, and that "Nevada State Plan—Title III" conforms to, and complies with, such regulations. We further assume that this State Title III Plan was submitted to the Federal Government, as required by the National Defense Education Act (Public Law 85-864), and approved, so as to qualify the State of Nevada for federal funds as provided in said Act. The receipt of federal funds by the State of Nevada under the Federal Act must be presumed to have been based upon the representation, express or implied, that the State of Nevada was ready, willing and able to render performance in accordance with provisions of its Title III Plan, as submitted and approved. The question is, therefore, whether the Title III Plan contains any provision for the in-service training sessions or conferences here involved.

Section 3.31(b) of Nevada State Plan—Title III provides as follows:

Supervisors for the fields of science, mathematics and modern foreign languages will be responsible for coordinating programs of the schools operating approved projects, conducting in-service training of teachers and supervisors, organizing and conducting state-wide conferences, and gathering, preparing and distributing aids and materials to the schools of Nevada.

On the basis of the foregoing, it is quite clear that scheduled conferences of teachers and supervisors for in-service training was represented to the Federal Government in partial qualification of Nevada's right to federal funds and assistance under the title: "3.3 *Description of Program for Improvement of Supervisory and Related Services.*" In other words, additional personnel consisting of a "Coordinator" and "Supervisors" were to be engaged by the State Department of Education, and provision therefor included in the budget of the Department,

in order to carry out the proposed “* * * expanded supervisory program under the intent of Title III, relating to the improvement of education in the fields of science, mathematics and foreign languages.”

In the legislative appropriation for the State Department of Education, provision of the sum of \$20,000 is specifically included for “Science, mathematics and foreign languages.” (See Chapter 433, Section 32, 1958–1959 Statutes of Nevada, p. 704.) This sum presumably represents Nevada’s share of the moneys made available by both Federal and State Governments to carry out in Nevada the program and objectives contained in the National Defense Education Act, *supra*. Such state legislative appropriation, moreover, constitutes specific authorization to the State Department of Education to implement, execute, and give effect to Nevada State Plan—Title III, including the scheduling of sessions or conferences of teachers and supervisors for in-service training in the State of Nevada. Necessarily included in such specific authorization is the reasonably implied authorization to do any and all things required in connection with such proposed and scheduled in-service training sessions or conferences.

In our considered opinion, such requirements would include the contractual hiring of professional or technical consultants or experts in the indicated subjects, their compensation, and payment or allowance of per diem and travel expenses to both such consultants and teachers and administrators attending such in-service training conferences. Anything less would render the program ineffectual, or seriously impair or defeat legislative intent and purpose, of both the Federal and State Governments.

The authorization for such in-service training conferences must be deemed exempt of the limitations or restrictions contained in NRS 385.190, being of an additional and special or specific nature, and subsequent in time thereto.

The foregoing analysis must suffice in support of our affirmative answer to question No. 1.

Notwithstanding the fact that the other questions submitted to us for opinion presuppose our negative conclusion to question No. 1, some discussion relative thereto is deemed necessary and proper herein for purposes of clarification. Since all such additional questions are of a related nature, the following observations will be generally applicable. Fundamentally, we intend to analyze the relation of professors of the University of Nevada to such in-service training conferences, and their right to any compensation, fee, or other allowance for any services rendered by them in connection therewith. The problem here involved may be outlined by reference to certain applicable statutory provisions which might, apparently, be construed as legally prohibiting any such compensation or allowances to University of Nevada professors in the indicated circumstances.

NRS 281.170, as amended by Chapter 485, 1958–1959 Statutes of Nevada, insofar as here pertinent, provides as follows:

1. When any * * * state employee of any * * * agency or institution operating by authority of law and supported in whole or in part by any public funds, whether the public funds are funds received from the Federal Government of the United States

or any branch or agency thereof, or from * * * any other sources, shall be entitled to receive his necessary expenses in the transaction of public business within the state, such person shall be paid a per diem allowance not exceeding \$15 per day, and also an allowance for transportation, but the amount allowed for traveling by a private conveyance shall not exceed the amount charged by public conveyance. As used in this subsection "necessary expenses" shall not include the costs of personal laundry, recreation or entertainment.

Chapter 178, 1958-1959 Statutes of Nevada, provides as follows:

Section 1. Chapter 281 of NRS is hereby amended by adding thereto a new section which shall read as follows:

Unless otherwise provided by law, *no public officer or employee whose salary is set by law, whether or not he serves the state in more than one capacity, may be paid more than one salary for all services rendered to the state, except for salaries for any ex officio duties he may be required by law to perform.* (Emphasis supplied.)

NRS 281.220 prohibits "State officers * * * from having interest in state contracts * * *."

NRS 281.230 provides: "No state * * * officer * * * or employee shall in any manner, directly or indirectly, receive any commission, personal profit, or compensation of any kind or nature, inconsistent with loyal service to the people, resulting from any contract or other transaction in which the state * * * is in any way interested or affected."

NRS 281.100, relating to "Hours of service, employment of employees of state * * *," provides as follows, as here pertinent:

1. Except as otherwise provided in this section, the services and employment of all persons who are now, or may hereafter be, employed by the State of Nevada * * * is hereby limited and restricted to not more than 8 hours in any 1 calendar day and not more than 56 hours in any one week.

2. The period of 8 hours employment mentioned in this section shall commence from the time the employee takes charge of any equipment of the employer or acts as an assistant or helper to a person who is in charge of any equipment of the employer, or enters upon or into any conveyance of or operated by or for the employer at any camp or living quarters provided by the employer for the transportation of employees to the place of work.

3. Nothing in this section shall apply to:

(a) Officials of the State of Nevada or of any county, city, town, township or other political subdivision thereof * * *.

NRS 281.110 provides: "State offices to maintain 40-hour work-week," and prescribes that the transaction of business shall be "at least from 8 a.m. until 12 m. and from 1 p.m. until 5 p.m. every day of the year, with the exception of Saturdays, Sundays and public holidays."

NRS 284.140, relating to the "Unclassified service" of the State of Nevada, includes:

6. Officers and members of the teaching staff * * * of the University of Nevada * * *.

The foregoing will suffice to show that there is some apparent basis to consider professors of the University of Nevada, whether regarded as officers or employees of the University, or, derivatively, of the State of Nevada, subject, at least to some extent, to the foregoing statutory provisions. As stated, we are here concerned with the limited question as to whether compensation and other allowances to them would be legally authorized for their consultative or other services rendered in connection with the planned in-service training conferences herein indicated. Are the foregoing provisions restrictive or prohibitory of such additional compensation and allowances?

The term "compensation" when employed in reference to the remuneration of public *officers* means pay for doing all that may be required of the official, whether it is in the form of a fixed salary, or fees, or commissions, or perquisites of whatsoever character. (43 A.J. 134, Section 340; emphasis supplied.)

While judicial authorities are divided on the matter, the majority view is that University professors are "employees" rather than "public officers." Their contractual relationship to the University is deemed to be that of "employer-employee" or "master-servant" in legal substance and character. (See 55 A.J. 9, Section 13, citing *Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163, 140 A.L.R. 1063; *Butler v. Regents of the University*, 32 Wis. 124; 75 A.L.R. 1355 et seq.)

NRS 396.280, relating to "Salaries of academic staff," provides:

The board of regents shall have the power to fix the salaries of the academic staff of the university.

This statutory provision is authority for the conclusion, therefore, that the salaries of professors of the University of Nevada are not fixed by law. Such being the case, the above-quoted provisions of Chapter 178, 1958-1959 Statutes of Nevada must be deemed inapplicable to the matter here under consideration.

A further element of the problem is, however, whether university professors rendering consultative or other services in connection with the indicated in-service training conferences would, in any legal respect, be acting contrary to, or in violation of, their contractual obligation and responsibilities to the University of Nevada. For answer to this question, we must first legally define "salary."

Words and Phrases, Permanent Edition, Volume 38, p. 37 et seq. cites many cases, variously defining "salary." Among such definitions we find:

* * * fixed compensation * * * paid at stated times. (Citing *Dane v. Smith*, 54 Ala. 47, 50.)

* * * a reward or recompense for services performed. The word is usually applied to the reward paid to a public officer for

the performance of his official duties. (Citing *People v. Adams*, 65 Ill.App. 283.)

* * * a periodical allowance made as compensation to a person for his official or professional services, or for his regular work. (Citing *Board of Com'rs of Teller County v. Trowbridge*, 95 P. 554, 555, 42 Colo. 449.)

* * * a fixed compensation, decreed by authority and for permanence, * * * paid at stated intervals, and depends upon time, and not the amount of the services rendered; "allowance" being a variable quantity. (Citing *Blaine County v. Pyrah*, 178 P. 702, 703, 32 Idaho 111.)

"Fees" or "commissions" are defined as compensation for the rendition of services which may or may not be required or performed. (See *Brandon v. Askew*, 54 So. 605, 608, 172 Ala. 160.)

We find, therefore, that the main characteristic distinguishing "salary" from other forms of compensation or allowances is "fixed compensation by time" (43 A.J. 147, Section 357), or "fixed compensation for continuous services over a period of time." (*McNair v. Alleghany County*, 195 A. 118, 121, 328 Pa. 3.)

A wide discretionary power is vested in the administrative authorities of the University of Nevada to grant members of its academic staff leave of absence for legitimate purposes, within reasonable limits, so long as *there is no undue interference with their rendition and performance of duties or responsibilities for which they were hired*. The professors of the University of Nevada in connection with the indicated pro-service training conferences may not, necessarily, or unduly interfere with their primary obligations to the University under their contracts.

Also, such services would not be connected with their required academic duties or employment. In the absence of express constitutional or statutory prohibition, therefore, it is our considered opinion that, if it did not interfere with their academic duties, professors of the University of Nevada, rendering consultative or other services in connection with such conferences would be legally authorized to be compensated therefor and to receive per diem and other allowances as might properly be required or entailed. (43 A.J. 134, 148-149, 151 et seq.) Such compensation and allowances, it further follows, could properly be made out of Title III funds, both federal and state.

Additional support for the foregoing conclusion may be found in customary general practice, as well as the substantial public interest involved.

It is the general practice as regards university professors that they may supplement their usually inadequate salaries by earnings from writings, lecturing, consultation, or other employment or means, so long as such activities do not interfere with their academic duties. Outstanding educators or specialists could not be induced to teach in any university which denied them the right to supplement their salaries by such additional remunerative endeavors or employment.

The State Department of Education will require such consultative

services in connection with its scheduled in-service training conferences, whether it is able to secure same from professors on the faculty of the University of Nevada or without the State. Certainly, if qualified professors at the University of Nevada are available therefor, it may be more economical to engage such persons than to secure the services of nonresidents of the State of Nevada.

Moreover, it would be promotive of better relations between the University of Nevada and the public school system of the State to cooperate as fully as possible in a program of such great importance, educationally and in terms of national defense, from the standpoint of the general public interest, both state and federal. The pupils of the state public school system are, generally, the future students enrolling at the University of Nevada for completion of their higher education in preparation for adult life and activities. The achievement of optimum results through joint efforts of University and State Department of Education in the contemplated program would appear to be of interest and concern to both agencies. Such challenge should be appreciated, exploited, and, insofar as possible, fully realized in the interests of the educational welfare of the youth of the State, and the greater prestige of Nevada's educational institutions, authorities, educators and teachers.

Apart from our affirmative answer to question No. 1, therefore, it is our considered opinion that questions 2A, B, C, and D may also be answered in the affirmative, even if separately considered.

We trust that the foregoing sufficiently answers your inquiry and proves helpful in effectuating the in-service training program through the planned conferences provided in the Nevada State Plan—Title III.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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125. The Nevada Gaming Commission cannot deny, revoke, suspend, condition or limit a gaming license at the time of quarterly or annual renewal thereof without according the licensee notice and the opportunity to be heard as prescribed by statute.

CARSON CITY, January 7, 1960.

NEVADA GAMING COMMISSION, *Carson City, Nevada*.

STATEMENT OF FACTS

GENTLEMEN: At a meeting of the Nevada Gaming Commission the following question arose concerning the power and authority of the Commission under NRS 463.270:

QUESTION

What is the extent of the Commission's authority to deny, revoke, suspend, condition or limit gaming licenses when they come up for quarterly or annual renewal?

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QUESTION

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CONCLUSION

Before the Nevada Gaming Commission can deny, revoke, suspend, condition or limit a state gaming license at the time of quarterly or annual renewal of the same, it is necessary that the licensee or licensees be given notice and an opportunity to be heard in accordance with NRS 463.310 and 463.312.

ANALYSIS

NRS 463.270 provides, in part, as follows:

1. Subject to the power of the Commission to deny, revoke, suspend, condition or limit licenses, any state license in force may be renewed by the Commission for the next succeeding calendar quarter upon proper application for renewal and payment of state license fees as required by law and the regulations of the Commission.
2. All state gaming licenses shall become subject to renewal on the 1st day of each January and the 1st day of each calendar quarter thereafter.

From the language of paragraph 1 above, the question arises what is the power of the Commission to "deny, revoke, suspend, condition or limit" a gaming license?

NRS 463.310 provides, in part:

4. After the provisions of subsections 1, 2 and 3 above have been complied with, the Commission shall have full and absolute power and authority to limit, condition, revoke or suspend any license for any cause deemed reasonable by the Commission.

Subsections 1, 2 and 3 referred to in subsection 4 above quoted provide for the procedure to be followed in taking disciplinary action against a licensee, namely, the investigation, filing the complaint, and the opportunity for a hearing by the licensee. In our opinion the power of the Commission to revoke, suspend, condition or limit a license is expressly made subject to NRS 463.310, subsections 1, 2 and 3 and for that reason the Commission cannot revoke, suspend, condition or limit a license without according to the licensee notice and the opportunity to be heard and to make a record for judicial review (see NRS 463.310, 463.312 and 463.315). Any other conclusion would make a mockery of NRS 463.310 and 463.312 in that the Commission, instead of following the procedure established by law for conducting hearings of disciplinary matters, could wait until the end of the calendar quarter at which time, it could arbitrarily refuse to renew the license.

We now turn to the question of the power of the Commission to "deny" a gaming license.

NRS 463.220 empowers the Commission to grant or deny an application for a license and prescribes the procedure in regard to the exercise of such power. That statute indicates that the denial pertains to the application for the original license. Again in NRS 463.140, subsection 2, it is provided that the Commission shall have absolute power to "deny any application for a license or to limit, condition, restrict, revoke, or suspend any license, for any cause deemed reasonable by the Commission."

We conclude that the power of the Commission to "deny" a license applies to the original application for a license. To hold that the Commission may deny an application for the quarterly or annual renewal of a license would permit the Commission to do indirectly what it could not, by law, do directly, namely, revoke a license without according to the licensee the opportunity of a hearing.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By MICHAEL J. WENDELL, *Deputy Attorney General*.

126. **Weights and Measures—Agriculture, State Department of.** Present law construed to prohibit approval and use of temperature compensating device or meter in connection with sale of liquefied petroleum gas in this State.

CARSON CITY, January 11, 1960.

MR. LEE M. BURGE, *Director, Division of Plant Industry, Department of Agriculture, P. O. Box 1209, Reno, Nevada*.

STATEMENT OF FACTS

DEAR MR. BURGE: It is indicated that request has been made by the Liquefied Petroleum Gas Industry for approval by your Department of the use of a temperature compensator device or meter which would take account of variations in the cubic content of liquefied petroleum gas resulting from temperature differences in locations of distributors and consumers. The problem arises from the fact that such gas product has a very high expansion coefficient in relation to temperature; that is, the warmer the temperature, the greater the expansion, while the colder the temperature, the greater the contraction or shrinkage.

It is also indicated that the practice is for the manufacturer to sell the product to distributors corrected to 60° Fahrenheit. The distributors would like to do the same on sale of the product to the ultimate consumers, thus effectuating standardization and eliminating discrepancies and both advantages or disadvantages due to variable temperatures.

The device or meter in question appears to have been thoroughly tested under varying climatic conditions in California and, you indicate, has been approved in 15 other states, having been found to perform satisfactorily under all tests and accurately making the involved temperature corrections.

While appreciative of the industry's problem, the Department entertains serious doubt as to whether the device or meter can be legally approved in this State. This concern is based on the fact that the Department, in further compliance with law, by regulation has adopted the standard federal gallon, containing 231 cubic inches in liquid measure, as the unit of measure. In consequence of this fact, it is felt that a consumer buying a *gallon* of liquefied petroleum gas should have

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DEAR MR. BURGE: It is indicated that request has been made by the Liquefied Petroleum Gas Industry for approval by your Department of the use of a temperature compensator device or meter which would take account of variations in the cubic content of liquefied petroleum gas resulting from temperature differences in locations of distributors and consumers. The problem arises from the fact that such gas product has a very high expansion coefficient in relation to temperature; that is, the warmer the temperature, the greater the expansion, while the colder the temperature, the greater the contraction or shrinkage.

It is also indicated that the practice is for the manufacturer to sell the product to distributors corrected to 60° Fahrenheit. The distributors would like to do the same on sale of the product to the ultimate consumers, thus effectuating standardization and eliminating discrepancies and both advantages or disadvantages due to variable temperatures.

The device or meter in question appears to have been thoroughly tested under varying climatic conditions in California and, you indicate, has been approved in 15 other states, having been found to perform satisfactorily under all tests and accurately making the involved temperature corrections.

While appreciative of the industry's problem, the Department entertains serious doubt as to whether the device or meter can be legally approved in this State. This concern is based on the fact that the Department, in further compliance with law, by regulation has adopted the standard federal gallon, containing 231 cubic inches in liquid measure, as the unit of measure. In consequence of this fact, it is felt that a consumer buying a *gallon* of liquefied petroleum gas should have

the assurance that he is, in fact, receiving just that, and not a different measure, varying on the basis of compensation for temperature.

In this connection, it is stated that about 65 percent of the liquefied petroleum gas is sold during the winter months while only 35 percent is sold during the summer or warmer months, so that consumers, on such over-all basis, might reasonably conclude that they were paying for a cubic content which they would not actually be receiving, if such device or compensating meter were approved for use in this State.

Of course, in actual fact, it is the heating effectiveness, or thermal units produced by any given amount of gas, which the consumer would be interested in in making a purchase of such product, rather than mere cubic content. Cubic content, as already noted, will differ with varying temperature, expanding when warm and contracting when cold. Mere cubic content, in other words, does not necessarily equate to thermal efficiency, and the industry, in proposing approval of the temperature compensating meter or device, does not seek legal approval of something which would defraud the public in any manner whatsoever. The device would merely provide a means of effecting proper compensation for differences in temperature, and standardize the relationship between manufacturer-distributor-consumer. At the present time this cycle is incomplete, in that transactions between manufacturer and distributor are on one basis, and the transaction between distributor and consumer are on another and different basis.

The Department concedes that the device is thoroughly accurate, and probably desirable for use in areas of relatively uniform mean temperature. There appears to be some reservation on the part of the Department, however, as to the merits for adoption in this State, in view of the considerable variations in temperature here experienced. Specifically, however, the question is whether the device would comply with state law and Department regulation prescribing the use of the standard federal gallon containing 231 cubic inches.

QUESTION

Is the Department of Agriculture legally authorized and justified in disapproving the temperature compensating device or meter proposed by the Liquefied Petroleum Gas Industry for adoption and use in the State of Nevada on the basis of present law?

CONCLUSION

Yes.

ANALYSIS

NRS 581.110, entitled "United States standards as state standards," provides that the weights and measures received from the United States as standard weights and measures and such weights and measures in conformity therewith as shall be supplied by the State, *shall, when certified by the National Bureau of Standards, be the State standards of weights and measures.*

NRS 581.200, entitled "Liquid measure: Standard gallon and divisions," insofar as here pertinent, provides: "The standard gallon and its parts are the units of capacity for liquids * * *."

We are informed, as set forth in our Statement of Facts, that the Department, by regulation, has further implemented the foregoing statutory provisions by adoption of the standard federal gallon containing 231 cubic inches, through regulation.

NRS 481.410, entitled "False or short weights, measures unlawful," provides:

It shall be unlawful for any person, in buying or selling any commodity or article of merchandise, to make or give false or short weight or measure, or to sell or offer for sale any commodity or article of merchandise less in weight or measure than he represents, or to use a weight, measure, balance or measuring device that is false and does not conform to the authorized standard for determining the quantity of any commodity or article of merchandise, or to have a weight, measure, balance or measuring device adjusted for the purpose of giving false or short weight or measure, or to use in the buying or selling of any commodity or article of merchandise a computing scale or device indicating the weight and price of such commodity or article of merchandise upon which scale or device the graduations or indications are falsely or inaccurately placed, either as to weight or price.

NRS 581.420 relates to "Misrepresentation of merchandise," and further supplements NRS 581.410.

There are other statutory provisions pertaining to labeling and false advertising that are also involved and relevant to the problem under consideration, but it is unnecessary to extend the citation of authorities and our opinion herein.

We are constrained by the foregoing excerpts and references to applicable law to hold that present law not only authorizes and justifies the Department of Agriculture to disapprove the proposed temperature compensating device or meter, but actually makes it mandatory upon the Department to reject same. Any relief from such a result must come through legislative amendment of present law.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

127. Health, State Department of. Purchase of professional (malpractice) liability insurance by Department with public funds to afford staff members personal protection against tort liability claims connected with discharge of governmental functions and performance of official duties held unauthorized in the absence of express or reasonably-implied necessary statutory power or requirement therefor. Doctrine of "sovereign immunity" would apply to exempt the State from any such claim for tort liability.

CARSON CITY, January 12, 1960.

DANIEL J. HURLEY, M.D., *State Health Officer, Nevada State Department of Health, Carson City, Nevada.*

STATEMENT OF FACTS

DEAR DR. HURLEY: It is indicated that the Nevada State Health Department has in its employ two full-time physicians, four dentists, fourteen public health nurses, five psychologists, and four psychiatric social workers, and also plans to recruit a full-time psychiatrist.

While a few among such personnel are primarily charged with duties of an administrative nature, it is nevertheless a fact that clinics are held, immunizing injections are given, and other medical, dental or psychiatric treatment administered in the normal discharge or performance of official and professional duties.

"No matter how careful a professional person can be," you properly indicate, "there is always the danger of an accident." It is your feeling that the professional personnel employed by the State Department of Health, if not all employees administering to the public should be covered by professional liability insurance. We further understand that funds for purchase of such insurance are available.

QUESTION

Is the Nevada State Department of Health legally authorized to purchase professional liability insurance covering staff personnel administering to the public, against suit based upon negligence, resulting from the performance of official duties?

CONCLUSION

No.

ANALYSIS

The Nevada State Department of Health is governed by Chapter 439 of Nevada Revised Statutes. There is no express statutory requirement for any of the personnel connected with the Department to furnish any official bond for the faithful performance of office, or for the benefit of any person who may be injured or aggrieved by the wrongful act or default of such officer or other employee in their official capacity. (NRS 282.060.)

Both the State Board of Health and the State Department of Health have only such powers as have been expressly conferred upon them by the Legislature, or such powers as may reasonably be necessary to give effect to conferred express powers. We find no provision in applicable

law, either express, necessary or reasonably implied, which can be deemed to authorize purchase of the professional liability insurance coverage and protection here desired.

The State and its political subdivisions, in the absence of waiver thereof, under the doctrine of "sovereign immunity," are protected against liability based upon negligent or wrongful acts connected with, or arising from, the discharge of *governmental* functions and the performance of public or official duties by their employees. (*Gurley v. Brown*, 65 Nev. 245, 193 P.2d 693 (1948); *Hill v. Thomas*, 70 Nev. 389, 270 P.2d 179; *Taylor v. State and University of Nevada*, 73 Nev. 151, 311 P.2d 733 (1957).)

The ministrative services performed and discharged by the professional and other personnel of the State Department of Health, hereinbefore outlined, are undoubtedly public, official, and *governmental in nature*. As such the doctrine of sovereign immunity would apply to exempt the State, in any event, from any liability in tort from the negligent or wrongful acts of its officers or employees.

The question here involved is whether such immunity to liability in tort would extend to and protect the state officers or employees, *in their individual capacity*, for negligently or wrongfully inflicting injury upon third persons in the performance of their official duties.

The liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty to which the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task—in other words, is simply ministerial—he is liable in damages to any one specially injured, either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority. (*Shear. & R. Neg.*, 3d Ed., sec. 156, cited in *Gurley v. Brown*, supra, 65 Nev. at p. 252.)

Because the various professional ministrations herein outlined generally involve the exercise of discretion or judgment, we are of the considered opinion that the immunity of the State from suit would extend to the professional personnel of the State Department of Health, *in their individual capacity*, acting without malice within the scope of their official authority. (*Gurley v. Brown*, supra.)

Where the ministrations do not involve the exercise of judgment and discretion and are purely ministerial in nature (e.g., injections, dosages of medicine, etc.), injury resulting from negligent or wrongful acts may possibly give rise to *personal* liability of state officers or employees. In this narrow area, professional or malpractice liability insurance coverage would appear to be desirable for *personal* protection of Department officers or employees. Since the services involved are *governmental* in nature, the use of public funds for purchase of

such insurance coverage would be proper. However, express, necessary, or reasonably implied authority to make such expenditure out of public funds is lacking in present law.

Unless and until the Legislature sees fit to remedy such deficiency, therefore, it is our considered opinion that the question herein stated must be answered in the negative. Unauthorized expenditure of public funds would constitute misconduct on the part of the officers of the State Department of Health under NRS 197.110, subparagraph 3.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

128. Sales and Use Tax Law (Ch. 372 NRS). When tangible personal property is sold and delivered to purchaser in Nevada, not otherwise exempt from taxation, the tax attaches notwithstanding the fact that purchaser (a) resides in another state, or (b) intends to use and consume the property in another state. Constitutional Law. Under Section 2 of Article XIX of the Constitution, Ch. 372 NRS may not be amended by the Legislature. Attorney General Opinion No. 228 of December 10, 1956.

CARSON CITY, January 18, 1960.

HONORABLE PETER ECHEVERRIA, *State Senator, County of Washoe, Reno, Nevada.*

STATEMENT OF FACTS

DEAR SENATOR ECHEVERRIA: Mr. J. W. Williams, Administrator of the Sales and Use Tax Division of the Nevada Tax Commission, under date of January 4, 1960, has issued an administrative determination to automobile dealers of Nevada, respecting the exemption from taxation, the conditions and limitations thereof, that may properly be granted to nonresidents of Nevada. This administrative determination concludes:

Sales of a kind where delivery is taken anywhere in Nevada are to be deemed sales in Nevada, and therefore subject to the Nevada sales tax, it being immaterial to this taxing jurisdiction what the intent of the purchaser is relative to subsequent place of use of the automobile.

It is urged that this "results in the inequitable situation whereby a California purchaser of an automobile in the State of Nevada would have to pay a sales tax in the State of Nevada and then also be assessed a use tax in the State of California."

QUESTION

Is the administrative determination heretofore quoted a correct statement of the law?

such insurance coverage would be proper. However, express, necessary, or reasonably implied authority to make such expenditure out of public funds is lacking in present law.

Unless and until the Legislature sees fit to remedy such deficiency, therefore, it is our considered opinion that the question herein stated must be answered in the negative. Unauthorized expenditure of public funds would constitute misconduct on the part of the officers of the State Department of Health under NRS 197.110, subparagraph 3.

Respectfully submitted,

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It is urged that this "results in the inequitable situation whereby a California purchaser of an automobile in the State of Nevada would have to pay a sales tax in the State of Nevada and then also be assessed a use tax in the State of California."

QUESTION

Is the administrative determination heretofore quoted a correct statement of the law?

CONCLUSION

We conclude that the administrative determination is a correct statement of the law.

ANALYSIS

Section 372.335 NRS provides as follows:

372.335 There are exempted from the computations of the amount of the sales tax the gross receipts from any sale of tangible personal property which is shipped to a point outside this state pursuant to the contract of sale *by delivery by the vendor* to such point by means of:

1. Facilities operated by the vendor;
2. Delivery by the vendor to a carrier for shipment to a consignee at such point; or
3. Delivery by the vendor to a customs broker or forwarding agent for shipment outside this state. (Italics supplied.)

Section 372.255 NRS provides:

372.255 1. On and after July 1, 1955, it shall be further presumed that tangible personal property delivered outside this state to a purchaser known by the retailer to be a resident of this state was purchased from a retailer for storage, use or other consumption in this state and stored, used or otherwise consumed in this state.

2. This presumption may be controverted by:

(a) A statement in writing, signed by the purchaser or his authorized representative, and retained by the vendor, that the property was purchased for use at a designated point or points outside of this state.

(b) Other evidence satisfactory to the tax commission that the property was not purchased for storage, use or other consumption in this state.

From the two statutes quoted we draw certain conclusions, viz: Under 372.335 NRS, the general rule is expressed that when tangible personal property is sold for shipment to a point outside of the State of Nevada, in accordance with the strict provisions of the statute, such sale is not subject to the provisions of the Sales and Use Tax Law of Nevada, i.e., such sale is tax exempt. An exception to this general rule is expressed in 372.255 NRS, wherein it is recited that if the retailer knows that the purchaser is a resident of this State, the sale is taxable, notwithstanding the fact that shipment or delivery is to a point outside this State, unless the buyer shows under the provisions of (a) or (b) that the property is not to be used or consumed in this State.

Tax exemption statutes are to be strictly construed. Sutherland Statutory Construction—Third Ed. Vol. 3, Sec. 6702.

The general rule is that a grant of exemption is never presumed; on the contrary the presumption is against exemption from taxation. 84 C.J.S. p. 431, Sec. 225.

If the ruling of this office were to the effect that a Nevada retailer

might deliver a chattel to a purchaser in Nevada, and upon the purchaser's self-serving declaration that he resides in another State to which it is intended to take the chattel and there consume or use it, and upon such showing the Nevada retailer be accorded the privilege of collecting no tax thereon, the State would encourage the evasion of the tax, by means of falsification of the true facts.

An official opinion of this department, written by our immediate predecessor in office, the Honorable Harvey Dickerson, Attorney General, dated December 10, 1956, numbered 228, held that the Nevada Sales and Use Tax Law (Chapter 372 NRS), being an enactment of the people by referendum measure (question No. 8, November 1956), could not by reason of the provisions of Section 2 of Article XIX of the Constitution of Nevada, be amended by the Legislature. We concur with that well reasoned and well documented opinion.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General.*

By D. W. PRIEST, *Chief Deputy Attorney General.*

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129. University of Nevada. Board of Regents members, attending meetings required for performance of official, public duties or obligations, held entitled to authorized travel expenses and subsistence allowance under applicable law.

CARSON CITY, January 20, 1960.

DR. CHARLES J. ARMSTRONG, *President, University of Nevada, Reno, Nevada.*

STATEMENT OF FACTS

DEAR DR. ARMSTRONG: It is indicated that during the past year several committees of the Board of Regents have been quite active, in particular the Building and Investment Committees, necessitating a number of meetings of such committees. In several cases, members of the Board of Regents serving on such committees, and residing at some distance from the University of Nevada, have incurred considerable travel expenses in connection with their attendance at such committee meetings and their performance of official duties. In some cases, at least, such committee meetings have imposed a financial hardship on some members of the Board of Regents who have, to date, assumed the cost of required travel necessarily involved as a personal expense under present interpretation of applicable law.

Our advice is, therefore, requested on the proper construction of NRS 396.070, the specific statute involved, in clarification of the problem as above outlined.

QUESTION

Are members of the Board of Regents of the University of Nevada legally entitled to established allowances for travel expenses and subsistence connected with their performance of official duties as members of committees of the Board of Regents?

might deliver a chattel to a purchaser in Nevada, and upon the purchaser's self-serving declaration that he resides in another State to which it is intended to take the chattel and there consume or use it, and upon such showing the Nevada retailer be accorded the privilege of collecting no tax thereon, the State would encourage the evasion of the tax, by means of falsification of the true facts.

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QUESTION

Are members of the Board of Regents of the University of Nevada legally entitled to established allowances for travel expenses and subsistence connected with their performance of official duties as members of committees of the Board of Regents?

CONCLUSION

Yes.

ANALYSIS

NRS 396.070 relates to "Compensation and expenses of regents," and provides as follows:

1. No member of the board of regents shall receive any compensation for his services.
2. Each member of the board of regents shall receive traveling expenses and subsistence allowances as provided by law in attending meetings of the board.

The problem and question here involved falls within the purview of paragraph 2, above. Apparently, as heretofore construed by University of Nevada officials, the indicated allowances therein have only been authorized in connection with official meetings of the Board of Regents, sitting as a whole.

In our view, such an interpretation or construction is too narrow and was not legislatively intended.

The test is not that the entire Board of Regents shall be in session, but that members of the Board of Regents shall be meeting officially and for the conduct of public business.

Manifestly, the many, varied and complex affairs of the University of Nevada, entrusted to the Board of Regents, can be more satisfactorily and efficiently handled and managed on the basis of delegation of specific matters to committees comprised of members of the Board. Such committees have official status, and are an integral and essential part of the Board of Regents for performance and discharge of the Board's public and official business.

While the statute expressly prohibits payment of any compensation to members of the Board of Regents, paragraph 2 of NRS 396.070 manifestly supports the conclusion that the Legislature did not intend that members of the Board of Regents should sustain definite monetary loss or be "out-of-pocket" for travel and subsistence expenses necessarily incurred in connection with their performance of public services, for both the University of Nevada and the State of Nevada.

The proper test or criterion is not the number of members of the Board involved, but that public funds shall not be expended except for authorized public purposes. This criterion or test is sufficiently supported by the following:

Public officers are very often allowed statutory compensation for expenses incurred by them in the performance of their official duties. Such allowances for expenses are something different from salary, emoluments, or perquisites, and prohibitions against changing these do not ordinarily apply to an allowance for expenses. Where, by constitutional provision, the compensation of a designated officer or class of officers for the performance of official duties is fixed, official expenses may be allowed the officer, but not personal expenses, or expenses unnecessarily incurred. *Thus, expenses incurred in attending conventions or meetings not for a public purpose may not be allowed.* These rules are applicable to

members of a state legislature * * *. (Italics supplied; § 368, 43 A.J. 154.)

In addition to their fixed compensation, public officers may be allowed mileage where they are required to travel in discharge of their official duties. But mileage allowed public officials involves the idea that the travel is performed in the public service or in an official capacity * * *. In defining the travel for which such mileage is allowed, the terms "necessary travel" or "necessarily traveled" are sometimes used, thus restricting the recovery for mileage to the distance actually covered by the officer by the shortest available and practicable route * * *. (Sec. 369, 43 A.J. 154-155.) See also: Annotations, 81 A.L.R. 493; L.R.A. 1918 E, 675; 106 A.L.R. 779; and 22 R.C.L. 524-548.

NRS 396.070 expressly authorizes travel expenses and subsistence allowances to members of the Board of Regents, not for their personal benefit, but for the benefit of the public. Fundamentally, it is to enable the incumbents in such public offices to give due attention to their official duties and to perform them better. "The public service is protected by protecting those engaged in performing public duties, not upon the ground of their private interest, but upon that of necessity of securing the efficiency of the public service * * *. (42 A.J. 156.)

The Board of Regents could not efficiently discharge their public obligations without delegation of some of the various University problems which concern them to committees from their membership. The meetings of such committees for such official purposes are as much meetings for public purposes and in the public interest as are meetings of the Board of Regents as a whole. Travel and subsistence expenses incurred in connection with such official committee meetings are no less "necessary" or "necessarily incurred" than similar expenses when the entire Board of Regents meets officially, for the conduct of public business in the public interest.

In our opinion, therefore, and based upon the foregoing considerations and principles of law, Board of Regents members serving on Board committees performing official and public duties are legally entitled to travel and subsistence allowances as established under NRS 396.070. We are unaware of any constitutional or statutory inhibition or prohibition to grant of such allowances.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

130. Nevada Gaming Commission. A State gaming licensee, operating in the first month of the calendar quarter and prior to the time he makes application for renewal and pays his license fees, is not operating without a license.

CARSON CITY, January 20, 1960.

NEVADA GAMING COMMISSION, *Carson City, Nevada.*

STATEMENT OF FACTS

GENTLEMEN: The Nevada Gaming Commission has presented the following question to this office:

QUESTION

Is a state gaming licensee, who has not renewed his license and paid the fees required by law, operating without a license during the first 25 days of the first month of each calendar quarter at which time the fee based upon gross revenue is due, and, likewise, during the first 10 days of January of each year when annual fees (table taxes) are due?

CONCLUSION

A licensee, who has not renewed his license and paid the fees required by law, is not operating without a license during the 25-day and 10-day periods referred to in the above-stated question.

ANALYSIS

All state gaming licenses are subject to renewal on the 1st of January of each year and on the 1st day of each calendar quarter thereafter. The application for renewal of a license, which is *in force*, shall be filed with the Commission on or before the 25th day of January and on or before the 25th day of the first month of each calendar quarter thereafter (NRS 463.270).

In the case of quarterly renewal the application must be filed and fees based upon gross revenue paid on or before the 25th of the month (NRS 463.370). Annual license fees based upon the number of games in operation must be paid to the Commission before the 10th of January of each year before the license is renewed (NRS 463.380). We therefore have a situation where a licensee must pay his annual fees (table taxes) prior to the 10th of January and make quarterly application for renewal and pay his fees based upon gross revenue on or before the 25th day of the first month of each calendar quarter. No license may be renewed by the Commission until all state license fees have been paid.

Under NRS 463.160 it is unlawful for anyone to conduct gaming in the State without first obtaining and "thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses * * *."

NRS 463.270 provides the Commission may renew for the succeeding calendar quarter any state license *in force* upon proper application and payment of license fees required by law.

If a state gaming license expired on the last day of each calendar

quarter then any operation by that licensee during the following month, which would be the first month of the quarter, and prior to the time of making application for renewal and paying all license fees would be (1) an unlawful operation because he does not have a license in full force (NRS 463.160) and (2) he could not renew the license because there is no license *in force* capable of being renewed (NRS 463.270, subsection 1).

To avoid the absurdities stated above we must conclude that a state gaming license, once issued, is of a continuing nature. It may be voluntarily surrendered by the licensee (Regulation 9.010) or it may terminate by the Board and Commission proceeding in the manner outlined in NRS 463.310 and 463.312, or by a court of competent jurisdiction proceeding under NRS 463.360.

The purpose for renewal of a state license is twofold. Firstly, it is the means whereby the State collects the license fees. Secondly, from the information stated on the application for renewal, the Commission is apprised of the particulars concerning each gaming establishment and thereby is in a better position to carry out its duties.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By MICHAEL J. WENDELL, *Deputy Attorney General*.

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131. Nevada Gaming Commission. Nevada Gaming Control Board. Until such time as the Commission may adopt a procedure governing the manner of acting upon an application of a current licensee to enlarge his operations by adding games, gaming devices or slot machines, the provisions of NRS 463.200, 463.210 and 463.220 apply.

CARSON CITY, January 28, 1960.

NEVADA GAMING COMMISSION AND NEVADA GAMING CONTROL BOARD,
Carson City, Nevada.

STATEMENT OF FACTS

GENTLEMEN: This office has received separate requests from the Nevada Gaming Commission and Gaming Control Board asking for our opinion on similar questions. Because of this similarity we will answer both questions in one opinion. The questions are stated as follows:

1. What procedure should be followed by the Gaming Control Board and Nevada Gaming Commission in acting upon an application of a state gaming licensee to enlarge his operation by adding games or slot machines to his present licensed operations?
2. May the Commission adopt a regulation prescribing the procedure to be followed in such a situation or is this a matter to be accomplished by legislative enactment?

quarter then any operation by that licensee during the following month, which would be the first month of the quarter, and prior to the time of making application for renewal and paying all license fees would be (1) an unlawful operation because he does not have a license in full force (NRS 463.160) and (2) he could not renew the license because there is no license *in force* capable of being renewed (NRS 463.270, subsection 1).

To avoid the absurdities stated above we must conclude that a state gaming license, once issued, is of a continuing nature. It may be voluntarily surrendered by the licensee (Regulation 9.010) or it may terminate by the Board and Commission proceeding in the manner outlined in NRS 463.310 and 463.312, or by a court of competent jurisdiction proceeding under NRS 463.360.

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2. May the Commission adopt a regulation prescribing the procedure to be followed in such a situation or is this a matter to be accomplished by legislative enactment?

CONCLUSION

1. In the absence of specific statutory or regulatory procedure being provided, the Board and Commission should follow the same procedure in acting upon an application to increase the number of games or slot machines in a currently licensed operation as they do in acting upon a new application.

2. The Commission may adopt a regulation governing the procedure to be followed by a licensee in making application to enlarge his operations by adding games or slot machines.

ANALYSIS

NRS 463.380, subsection 3, provides that if any licensee during the calendar year wishes to enlarge his operations he shall, after his application is approved, be charged the full annual fees. Fees paid quarterly would reflect any increase in gross revenue because of the games or slot machines added to the operation. No reference is expressly made as to what procedure shall be followed in approving the application. The only procedure provided under the statutes or regulations is the procedure for the initial application outlined in NRS 463.200, 463.210 and 463.220.

An examination of that procedure reveals that the Board shall recommend approval or denial of the application for a state gaming license to the Commission. Thereafter the Commission may approve or deny the application and if the former action is taken, issue the state gaming license. In our opinion it would be inconsistent with the very concept of gaming control and the Nevada Gaming Control Act of 1959 to permit any state gaming licensee, irrespective of the nature of his license and the type of operation conducted thereunder, to increase the number of games, gaming devices or slot machines in his operation without first securing the approval of the Commission and the recommendations of the Board prior thereto. This conclusion finds support in the language found in NRS 463.130 wherein the State's policy concerning gambling is set forth. Said statute provides that it is the State's policy concerning gambling that all places where gambling is conducted in the State shall be "*licensed and controlled*" (italics supplied) so as to protect the public health, safety, morals, good order and general welfare of our inhabitants.

Every state gaming license issued carries with it a limitation which the applicant himself has requested to be imposed. That limitation applies to the number and type of the games, gaming devices and slot machines as set forth in his application. If any licensee increases the number of games or slot machines over and above the number specified in his approved application without first securing the Commission's approval made after considering the Board's recommendations relating thereto, that licensee is in violation of that limitation and subject to disciplinary proceedings.

The act of authorizing an enlargement of a licensed operation by increasing the number of slot machines, gaming devices or games is a matter to be undertaken and concluded through the exercise of the judgment and discretion of the members of the Board and Commission. It is not a ministerial act which may be delegated by the Board or Commission.

For the reasons expressed above, we conclude that an application for enlarging gaming operations of a currently licensed establishment must be submitted and acted upon in the manner of a new application.

We now consider the second question presented.

NRS 463.150 empowers the Commission to adopt regulations prescribing the method and form of application which any applicant for a gaming license shall follow before the application is considered by the Board. We construe this to empower the Commission to prescribe regulations to govern the procedure for a licensee applying for approval to increase the size of his operation by adding games or slot machines. Any regulation so adopted should provide for the Commission to take final action only after receiving the recommendations of the Board because the Board is charged with the duty of observing the conduct of all licensees (NRS 463.140, subsection 2) and for that reason will have current information on each licensee which should be imparted to the Commission prior to the Commission's action. Until such time as a regulation is adopted by the Commission which will govern the procedure to be followed for acting on an application of a restricted or nonrestricted licensee to enlarge his operations by adding games or slot machines, the procedure set forth in NRS 463.200, 463.210 and 463.220 applies.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By MICHAEL J. WENDELL, *Deputy Attorney General*.

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132. District Attorney, Clark County. County Public Assistance for Maintenance and Education of Feeble-minded Children. Attorney General Opinion No. 409, dated September 25, 1958, reviewed and found presently valid and effective under applicable laws granting educational benefits to physically and mentally handicapped children. NRS 435.010 through 435.030 construed as adequately providing for county public assistance for care, maintenance and education of feeble-minded children, when parents cannot afford same and are otherwise eligible therefor.

CARSON CITY, February 3, 1960.

HONORABLE GEORGE FOLEY, *District Attorney, Clark County, Las Vegas, Nevada*.

STATEMENT OF FACTS

DEAR MR. FOLEY: It is indicated that a mentally handicapped child, about seven years of age, having an I.Q. of 20 (approximately equivalent to the mental age of a one-year old) and requiring constant supervision, was placed in a school designed for training of such children, located in the State of Utah, conducted under the auspices of the Public Welfare Division of the State of Utah.

At the outset of such placement (effected with the assistance of the local welfare agency) said welfare agency made payments of \$150 per

For the reasons expressed above, we conclude that an application for enlarging gaming operations of a currently licensed establishment must be submitted and acted upon in the manner of a new application.

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Respectfully submitted,

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By MICHAEL J. WENDELL, *Deputy Attorney General*.

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132. District Attorney, Clark County. County Public Assistance for Maintenance and Education of Feeble-minded Children. Attorney General Opinion No. 409, dated September 25, 1958, reviewed and found presently valid and effective under applicable laws granting educational benefits to physically and mentally handicapped children. NRS 435.010 through 435.030 construed as adequately providing for county public assistance for care, maintenance and education of feeble-minded children, when parents cannot afford same and are otherwise eligible therefor.

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At the outset of such placement (effected with the assistance of the local welfare agency) said welfare agency made payments of \$150 per

month to the Utah institution for said child in connection with its training and education therein. However, it is stated that approximately since September of 1958 said welfare payments were discontinued on the basis that, said minor child being trainable but noneducable, the financial responsibility for further care, training or education of said child devolved upon, and would have to be paid solely and wholly by, the parents of the child. In effect, therefore, the discontinuance of such payments was based upon the conclusion that welfare assistance for such institutional training or education of said child was legally unauthorized under the provisions of Chapter 435 of Nevada Revised Statutes.

The said child has, nevertheless, been kept at such institution in Utah with the parents making the indicated monthly payments. These payments are, however, an undue burden and hardship at the present time since (it is indicated) the parents are unable to continue therewith and at the same time adequately support and provide for themselves and their several other children.

In connection with this problem, request is made that we review Attorney General Opinion No. 409, dated September 25, 1958, issued by this office, and that we indicate whether the legal conclusion therein reached may be deemed currently valid and effective.

QUESTIONS

1. Is the legal conclusion contained in Attorney General Opinion No. 409, dated September 25, 1958, issued by this office at the request of the State Department of Education, namely:

All handicapped children entitled to benefits of attending classes pursuant to provisions of NRS 388.440-388.540, unless found ineligible by examination provided for under NRS 388.470

presently valid and effective?

2. If otherwise eligible therefor, are the parents of a mentally handicapped child, as herein described, entitled to county public assistance under the provisions of Chapter 435, Nevada Revised Statutes?

CONCLUSIONS

To question No. 1: Yes.

To question No. 2: As herein qualified, Yes.

ANALYSIS

The following excerpts from Attorney General Opinion No. 409, dated September 25, 1958, may well be quoted herein for their relevancy to the present matter:

As used in NRS 388.440 to 388.540, inclusive, "physically or mentally handicapped minor" means a physically or mentally defective or handicapped person under the age of 21 years who is in need of education. Any minor who, by reason of mental impairment, cannot receive the full benefit of ordinary education facilities shall be considered a physically or mentally handicapped person for the purposes of NRS 388.440 to 388.540, inclusive. Minors with

vision, hearing, speech, orthopedic, mental and neurological disorders or defects, or with rheumatic or congenital heart disease, or any disabling condition caused by accident, injury or disease, shall be considered as being physically and mentally handicapped.

Here the definition of a physically or mentally handicapped child is clearly stated and, as we read it, includes all mentally defective children regardless of their degree of intelligence. While a classification of these children into "educable" and "trainable" groups according to their intelligence quotients may constitute both a practical and convenient method for dealing with them, we are unable to find from the statute any direction or authority for using these classifications as a measuring stick in determining a handicapped child's eligibility to participate in an education program. As we interpret the definition above given, if these children are under 21 years of age and in need of education and unable, because of their handicap, to receive the full benefit of ordinary education facilities, they are entitled to receive such education pursuant to the act here under discussion.

It is difficult to draw a clear distinction between the terms "educable" and "trainable." We feel that they are somewhat synonymous, although varying in degree. In a sense, any training received by a mentally handicapped child constitutes a part of his education. However, the Legislature, in enacting the act, made provision in NRS 388.430 for determining the extent of a handicapped child's ability to learn before being admitted to an education program. This section * * * does not prescribe any particular intelligence quotient he must meet. The section is broad in its scope and, in our opinion, was intended to include if possible, rather than exclude those examined as eligible for participating in education programs. The fact that no specific intelligence quotient is prescribed for such eligibility indicated a legislative intent that the mental ability of each child examined is to be considered individually and not in connection with a group norm. While both the State Department of Education and boards of trustees in the various county school districts are delegated the power to make certain rules and regulations and also to provide standards of education for the programs contemplated, none of these may override the mandate of the Legislature as set out in NRS 388.470 for determining eligibility. We can only conclude that if an examination shows that the child can profit from education of any kind and to any extent, he must be considered eligible for the benefits provided in the education programs of this type.

Since the foregoing was written there has been no change in the law in any way affecting the validity or present effectiveness of such conclusion. Question No. 1 herein is, therefore, answered in the affirmative. NRS 435.010, relating to "County commissioners to make provision for maintenance of feeble-minded children," provides as follows:

1. The boards of county commissioners of the various counties shall make provision for the support, education and care of the feeble-minded children of their respective counties.

2. For that purpose they are empowered to make all necessary contracts and agreements to carry out the provisions of this chapter. Any such contract or agreement may be made with any responsible person or institution in or without the State of Nevada.

NRS 435.020, relating to "Children entitled to benefits of chapter," provides as follows:

All children:

1. Who are entitled to relief;
2. Who are free from offensive or contagious diseases;
3. Who are unable to pay for their support, education and instruction in any institution; and
4. Whose parents, relatives, guardians or nearest friends are unable to pay for their support, education and instruction, shall be entitled to the benefits intended by this chapter.

NRS 435.030, relating to "Applications for care; commissioners' certificates; transportation of children," provides as follows:

1. A parent, relative, guardian or nearest friend of any feeble-minded child, resident of this state, may file with the board of county commissioners of the proper county an application under oath stating:

(a) That by reason of deficient mental understanding, the child is disqualified from being taught by the ordinary process of instruction or education; and

(b) That the applicant is unable to pay for the child's support, education and instruction in an institution or by a responsible person.

2. If the board of county commissioners is satisfied that the statements made in the application are true, the board shall issue a certificate to that effect.

3. The board of county commissioners shall make necessary arrangements for the transportation of a feeble-minded child to the institution or responsible person as designated in NRS 435.010 at the expense of the county.

4. A certificate of the board of county commissioners, when produced, shall be authority of any responsible person or institution in or without the State of Nevada under contract with the board of county commissioners to receive any such feeble-minded child.

The situation herein described apparently falls within the purview of the foregoing statutory provisions. If the parents of the specific child herein described are otherwise eligible therefor, *and* there exist no suitable local facilities for the care and education of said child, then the foregoing provisions of law require that public assistance to the extent necessary be granted for the institutional care of said child where it now is, or with another suitable institution of the commissioners' selection through contract arrangement.

As so qualified, and as heretofore indicated, question No. 2 is, therefore, also answered in the affirmative.

We trust that the foregoing sufficiently answers your inquiry and is helpful in clarification of the problem.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

133. Park Commission, State. State Park Commission may expend its funds to lease areas for state park or other recreational purposes.

CARSON CITY, February 3, 1960.

MR. WILLIAM J. HART, *Director, State Park Commission, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR MR. HART: The Nevada State Park Commission formerly initiated an application to the United States Bureau of Reclamation, through its office in Boulder City, to lease two specific areas of land along the lower Colorado River, for recreational purposes. The Bureau of Reclamation has informed the commission that it is willing to enter into such a lease agreement, however, it has not been able to determine with certainty that the State Park Commission is empowered to enter into a lease contract with the United States, and thus obtain possession of land for recreational purposes.

QUESTION

Is the State Park Commission authorized to enter into lease contracts with private individuals or governmental agencies, either with or without consideration flowing from the commission, and thus obtain possession of real property for state park or other recreational purposes?

CONCLUSION

We conclude that the State Park Commission is vested with such authority.

ANALYSIS

Section 407.010, NRS, provides for the creation and composition of the State Park Commission. NRS 407.070 makes provision for the powers and duties of the State Park Commission. This section does not specifically authorize the commission to lease land for state park or other recreational purposes. It does authorize the commission to care for parks and recreational areas then existing or later established.

Section 407.120, NRS, provides:

407.120 Upon the recommendation of the state park commission of the State of Nevada, the governor may, by proclamation, designate any site, place or building located on any publicly owned land, or any land in the state held by the state park commission under lease or permit, as a state park, state monument, historical

We trust that the foregoing sufficiently answers your inquiry and is helpful in clarification of the problem.

Respectfully submitted,

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landmark, historical building, an archeological area or recreation area. (Italics supplied.)

Section 407.130, NRS, authorizes the commission to expend any moneys appropriated to the State Park Commission, or derived by it from any source whatever for the "marking, care, protection, supervision, improvement or development of any such state monument, historical landmark, historical building or recreational area."

Offices of legislative creation have only such powers as are expressly conferred upon them and powers reasonably inferred. *State v. McBride*, 31 Nev. 57, 99 P. 705; *McCulloch v. Bianchini*, 53 Nev. 101, 292 P. 617.

It appears to us that the State Park Commission could not hold land under lease, in the absence of authority to enter into a lease of real property. The authority of the State Park Commission to enter into a lease of real property is therefore inferred from the express provisions of Section 407.120, NRS. That it may expend its moneys for such a lease appears reasonably inferred from the provisions of NRS 407.130.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By D. W. PRIEST, *Chief Deputy Attorney General*.

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134. Nevada State Children's Home. Placement of "Tribal" or "Reservation" Indian Children. Applicable law construed as generally precluding placement of "tribal" or "reservation" Indian children in State Children's Home, even though the U. S. Bureau of Indian Affairs assumed responsibility for full payment of the costs therefor, in the absence of judicial termination of parental custodial rights "by courts of competent jurisdiction."

CARSON CITY, February 4, 1960.

MR. RICHARD LITTLE, *Superintendent, Nevada State Children's Home, Carson City, Nevada.*

STATEMENT OF FACTS

DEAR MR. LITTLE: It is indicated that in certain circumstances it would be desirable for the Bureau of Indian Affairs to place Indian children from Indian reservations or colonies in the State Children's Home, with said Bureau being responsible for payment for their care. It is not anticipated that the number of such placements would be great.

Several types of cases might be involved in connection with any such referrals, namely:

1. Children whose parents had given the Bureau of Indian Affairs permission to place the children, with said parents retaining care, custody and control.
2. Neglected children whose custody had been taken from the parents by either the district or tribal courts.

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1. Children whose parents had given the Bureau of Indian Affairs permission to place the children, with said parents retaining care, custody and control.

2. Neglected children whose custody had been taken from the parents by either the district or tribal courts.

It is indicated that in such instances the children might come from reservations either under state jurisdiction or under Tribal Law and Order jurisdiction.

Referrals, if permitted, would be considered on an individual basis by the State Children's Home upon submission by the Bureau of Indian Affairs of a social history for the specific child. The State Children's Home would thereupon make the determination whether or not an individual child might be likely to benefit from such placement, and whether or not there were adequate room and facilities for any said child.

The Superintendent of the Nevada State Children's Home has referred the Bureau of Indian Affairs to this office with respect to legal authority for placement of Indian children in said Children's Home.

QUESTIONS

I. May Indian children be accepted for placement in the State Children's Home from the United States Bureau of Indian Affairs when said children's parents retain their legal care, custody and control, and said Bureau assumes responsibility for full payment of the costs of any such placement;

A. When said Indian children come from reservations or colonies under state jurisdiction?

B. When said Indian children come from reservations or colonies under Tribal Law and Order jurisdiction?

II. May Indian children be accepted for placement in the State Children's Home from the United States Bureau of Indian Affairs when their care and custody has been divested from their parents either by district or tribal courts because of neglect, if the said Bureau assumes responsibility for full payment of the costs of any such placement;

A. When said Indian children come from reservations or colonies under state jurisdiction?

B. When said Indian children come from reservations or colonies under Tribal Law and Order jurisdiction?

CONCLUSIONS

To question IA: No.

To question IB: No.

To question IIA: As herein qualified, Yes.

To question IIB: Except as herein qualified, No.

ANALYSIS

NRS 423.140, relating to "Limitations on admission of children to home," provides as follows:

No child shall be admitted to, received into or ordered committed to the Nevada state children's home who is insane, idiotic, or so mentally or physically deformed as to be incapable of receiving the elements of an education, or who has any contagious disease.

NRS 423.150, relating to "Limitation on admission of whole orphan," as amended by Chapter 158, 1958-1959 Statutes of Nevada, as here relevant, provides as follows:

1. Upon complying with the provisions of this chapter, all male whole orphans under 16 years of age and all female whole orphans under 18 years of age may be admitted to the Nevada state children's home.

2. For the purposes of this chapter, a whole orphan is a child both of whose parents are deceased.

NRS 423.200, relating to "Admission of dependent children to home," provides as follows:

In addition to the other purposes for which the Nevada state children's home is established, the Nevada state children's home shall receive dependent children as defined by NRS 201.090, other than orphans, *when such children are committed to the care of the Nevada state children's home by a district court in this state.* (Italics supplied.)

NRS 201.090 defines "dependent child" and "delinquent child" as including any person less than 18 years of age. Said statutory definition contemplates, broadly and comprehensively, virtually every conceivable situation which would justify the intervention of the district court for the protection, care, custody, and commitment of a "dependent" or "delinquent" child for said child's best interests. (See also NRS 425.030, as amended by Chapter 306, 1956-1957 Statutes of Nevada defining a "dependent" child for purposes of public assistance.)

NRS 423.210 prescribes the procedure for commitment of a "dependent" or "delinquent" child by the district courts, and the liability of parents or the county for the support and care of any committed child.

Chapter 62 of NRS (Juvenile Court Act), except as otherwise provided by law, vests original jurisdiction of "dependent" or "delinquent" children in the district courts of the State.

NRS 424.070, relating to "Placement of child for care, adoption; approval of placement by state welfare department," provides as follows:

No person other than the parents or guardian of a child and no agency or institution in this state or from any other state may place any child in the control or care of any person, or place such child for adoption, without sending notice of the pending placement and receiving approval of the placement from the state welfare department. (Italics supplied.)

NRS 424.080, relating to "Parental rights and duties: Termination by order of district court," as amended by Chapter 110, 1958-1959 Statutes of Nevada, provides as follows, as here relevant:

Except in proceedings for adoption, no parent may voluntarily assign or otherwise transfer to another his rights and duties with respect to the permanent care, custody and control of a female child under 18 years of age, or a male child under 21 years of age,

unless parental rights and duties have been terminated by order of a court of competent jurisdiction. (Italics supplied.)

NRS 422.260, relating to "Acceptance of Social Security Act and federal funds," provides as follows:

1. The State of Nevada assents to the purposes of the Act of Congress of the United States entitled the "Social Security Act" * * * and assents to such additional federal legislation as is not inconsistent with the purposes of this chapter.

2. The State of Nevada further accepts the appropriations of money by Congress in pursuance of the Social Security Act and authorizes the receipt of such money into the state treasury for the use of the state welfare department in accordance with this chapter and the conditions imposed by the Social Security Act.

(NOTE: An opinion rendered by the Solicitor of the Interior Department in 1936 holds the Social Security Act applicable to Indians with respect to the three types of direct aid by states in cooperation with the federal government, namely: aid to the needy aged, *dependent children, and the blind*, predicated upon the requirement of a state plan, effective throughout the state, which necessarily included Indian reservations. Memo. Sol. I. D., April 22, 1936, cited at p. 286 of "Federal Indian Law," compiled by U. S. Department of the Interior, Office of the Solicitor, published by the U. S. Government Printing Office, Washington, D. C., 1958.)

NRS 41.430, relating to "State jurisdiction over actions, proceedings where Indians are parties: conditions," provides as follows:

1. Pursuant to the provisions of section 7, chapter 505, Public Law 280 of the 83d Congress, approved August 15, 1953, and being 67 Stat. 588, *the State of Nevada does hereby assume jurisdiction over public offenses committed by or against Indians in the areas of Indian country in Nevada, as well as jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country in Nevada, subject only to the conditions of subsection 2 of this section. (Italics supplied.)*

2. This section shall become effective 90 days after July 1, 1955, and shall apply to all the counties in this state except that, prior to the effective date, the board of county commissioners of any county may petition the governor to exclude and except the area of Indian country in that county from the operation of this section and the governor, by proclamation issued before the effective date of this section, may exclude and except such Indian country.

3. In any case where the governor does exclude and except any area of Indian country, as provided in subsection 2 of this section, he may, by subsequent proclamation at the request of the board of county commissioners of any county which has been excluded and excepted, withdraw and remove the exclusion and exception and thereafter the Indian country in that county shall become subject to the provisions of this section.

We have set forth the foregoing statutory provisions because of the anomolous nature and complex character of the status of Indians under both federal and state laws, dependent upon whether they are "non-tribal," or "tribal," Indians. (See Attorney General Opinion No. 13, dated February 23, 1959.)

It may be categorically assumed for consideration of the various questions here involved that state powers and jurisdiction over individual, nontribal Indians, not on or connected with Indian reservations or colonies under federal jurisdiction, is no different than such powers and jurisdiction over other persons within the State. However, as regards Indian tribes, or tribal Indians, on or connected with Indian reservations under federal jurisdiction, federal powers are, even today, generally plenary and conclusive. Hence, if a state concerns itself in any manner with these "wards" of the Federal Government, express legal sanction therefor must be specifically available. (A.G.O. No. 13, *supra*.) Since we are here concerned with such "tribal" Indians or "wards" of the Federal Government, applicability of the foregoing statutory provisions requires careful consideration.

In the first place, we may note that the Nevada State Children's Home is only legally authorized for placement of orphans (NRS 423.150, *supra*), if not insane, idiotic or physically or mentally deformed or incapacitated (NRS 423.140, *supra*) and "dependent" or "delinquent" children *committed by a district court in this State*. (NRS 423.200.)

On the facts submitted to us, it appears that the parents of Indian children, in some instances at least, have merely consented to, and given permission for, the placement of their children, by the Bureau of Indian Affairs, reserving to themselves, however, their legal care, custody and control. Unless and until divested by a district court of this State of such legal care, custody and control, and the entry by said court of an order of commitment thereto, the Nevada State Children's Home would have no legal authority, under any circumstances, to accept any child, Indian or otherwise, for placement in the Home. (See NRS 201.020; Chapter 62, NRS; NRS 424.070; NRS 424.080, *supra*.)

In answer to questions IA and B, therefore, we are compelled to answer that the Nevada State Children's Home may not legally accept such Indian children for placement under any of the circumstances therein indicated, in the absence of the entry of an order of commitment by a court of competent jurisdiction vesting their care, custody and control in said Nevada State Children's Home.

We next consider the situation set forth in questions IIA and B. Of fundamental importance in this connection is the question of the jurisdiction of the State over "tribal" or "reservation" Indians, insofar as placements in the State Children's Home are concerned.

By Congressional Act of June 2, 1924 (43 Stats. 253), citizenship was conferred on all noncitizen Indians born within the territorial limits of the United States. Such citizenship was again confirmed in the Nationality Act of October 14, 1940, and reenacted on June 27, 1952. (See 8 U.S.C. 1401; Federal Indian Law, p. 516 and footnotes, *supra*.) With enactment of NRS 41.430 in 1955 (*supra*), and, except

as expressly provided therein, state jurisdiction was extended over "tribal" or "reservation" Indians who might be parties in any legal proceedings under the criminal or civil laws of this State. Such extension of state jurisdiction was authorized by the express relinquishment of sole and exclusive federal jurisdiction over such Indians, as provided in Chapter 505, Public Law 280, approved August 15, 1953 (67 Stat. 588).

As a result of the foregoing, there would appear to be no question at present that Indians born in the United States and subject to its jurisdiction are, *generally*, citizens not only of the United States but also of the states wherein they reside. As such, they have constitutional rights, liberties and immunities, as well as correlative legal duties and obligations. Insofar as civil proceedings to divest parents of custodial rights over children are concerned, it would clearly appear that "tribal" or "reservation" Indians (unless expressly excepted) are amenable to the jurisdiction of the district courts of this State. (NRS 41.430, *supra*.)

With respect to "dependent" children, NRS 422.260, *supra*, and "Note" thereunder, may properly be considered at this point. Nevada is a recipient of federal funds for the proper care of "dependent" children in this State. The amount of such federal assistance is determined by an approved State Plan which includes "tribal" or "reservation" Indians. The State of Nevada has assented to receipt of federal funds and assistance on the conditions imposed by the Social Security Act, amendments and administrative rules and regulations adopted in conformity with and pursuant thereto. In consequence thereof, such assistance as is available to others should also be available to "tribal" or "reservation" Indians, *especially when such persons are from reservations or colonies under state jurisdiction*.

The fact that the Federal Government may consider such "tribal" Indians as "wards" entitled to further and additional federal financial assistance does not diminish or cancel state responsibility to accord to such Indians the assistance provided and available to all legally eligible persons.

Where the State has jurisdiction over Indian reservations or colonies, there may be some question concerning the efficacy or validity of *tribal law* to divest parents thereon of custodial rights over their children. In other words, would such divestment of parental custody of an Indian child under tribal law be valid under state law as a judicial determination "by a court of competent jurisdiction"? On this specific question, it is our considered opinion that, in the absence of statutory exception, or state treaty or agreement with "tribal" Indians therefor, any such determination under *tribal law* would not be binding or conclusive (under present law) on the district courts of this State. The divestment of parental custody of a "tribal" Indian child would have to be decided *de novo* by a competent state court, since the statute specifically confers such jurisdiction on the district courts of the State, and there is no basis in comity for recognition and acceptance of any such determination under *tribal law*.

Finally, we have for consideration the situation where the Indian children come from reservations or colonies under Tribal Law and

Order jurisdiction. It is not clear from the facts submitted to us whether the Federal Government and/or the particular tribe involved have reserved exclusive concurrent jurisdiction over members of such tribe, as between them only, so that the State is precluded from exercise of any jurisdiction over members of such tribes, except as expressly authorized under Chapter 505, Public Law 280 (1953, 67 Stat. 588) and NRS 41.430, 194.030 and 194.040. Assuming such to be the case, question 1B, then, clearly requires answer in the negative.

If, however, applicable federal statutes do permit exercise of *concurrent* jurisdiction by both the Federal and State Governments, then termination of parental rights or divestment of custodial rights over "tribal" Indians under tribal law in Tribal Law and Order jurisdictions would probably be deemed determinations or orders of "a court of competent jurisdiction." As such, the district courts of this State would probably recognize and give effect to such determinations under the provisions of NRS 424.080, and enter their own orders of commitment of a "dependent" Indian child to the State Children's Home on the basis of comity, thus complying with the state law restrictively governing admission to said State Children's Home. (NRS 423.140, 423.150, 423.200, 201.090, Chapter 62, and 424.080, *supra*.)

We deem it proper to note that the inquiry concerning the matters herein considered makes reference to an existing contract between the Bureau of Indian Affairs and the Nevada State Welfare Department for foster home care of Indian children under certain circumstances. In our opinion, the financial agreement therein provided would not apply to placement of Indian children in the State Children's Home under the circumstances indicated herein. Nor, in our view, would the provisions of NRS 423.210 generally apply.

Under NRS 423.210 commitments by the district courts to the State Children's Home require the parent or parents of the child to pay to the Superintendent \$50 monthly for the care and support of each child so committed. Where the parents are unable to make such payment, they are required to make payment of such lesser amount as may be reasonable and which they can afford, and, if they are unable to make any payment at all, then the county where the child was committed shall be liable for the whole amount of the support of the child.

The budget recommended by the Governor for the Nevada State Children's Home establishes the requirement of \$2,625 per child per year, or about \$219 per child per month adequately to provide for the care, maintenance and support of each child in said Children's Home.

As set forth in the "Statement of Facts" herein, the Bureau of Indian Affairs has indicated that it would assume responsibility for full payment for the care and support of any Indian child placed in the State Children's Home. It is, of course, not known whether the amount of such cost is known to or realized by, the Bureau, even on an estimated basis.

The point is that, unless the actual cost were paid by the Bureau of Indian Affairs, any deficiency would have to be met out of state funds, since under present law, counties would not be responsible or liable for payment of any such costs for "tribal" or "reservation" Indians

under the "wardship" of the Federal Government, as would appear to be the situation here.

We trust that the foregoing sufficiently clarifies the various aspects of the problem involved and proves of some help to you.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

135. Gaming—Regulation of, Under State's Police Powers. Proposed legislation providing that only citizens or wards of the United States shall be employed by any licensee to deal, conduct, carry on or operate any licensed game held not to be violative of guarantees secured by Federal or State Constitutions, but may not be applied so as to discriminate against, or abridge the rights of nationals of other countries, as established by effective treaties between the countries of such nationals and the United States.

CARSON CITY, February 17, 1960.

HONORABLE HOWARD F. MCKISSICK, JR., *Assemblyman from Washoe County, Assembly Chambers, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR MR. MCKISSICK: Assembly Bill No. 98 would amend Chapter 463 of Nevada Revised Statutes so as to prohibit aliens from being employed by any licensee to deal, conduct, carry on or operate any licensed game, and makes violation of such provision a misdemeanor.

As a member of the Public Health and Public Morals Committee, presently considering the bill, you have been asked to ascertain from this office whether such legislation, in restricting aliens from earning a living in such job, business, occupation or profession, would be valid.

QUESTION

Does Assembly Bill No. 98, in providing that only citizens or wards of the United States shall be employed by any licensee to deal, conduct, carry on or operate any licensed game, violate any guarantee of Federal or State Constitutions?

CONCLUSION

No.

ANALYSIS

Article 1, Sections 1 and 8, of the Nevada Constitution contain the guarantees that no person shall be deprived of life, liberty, or property, without due process of law, and, substantially correspond to such guarantees, as provided by the 14th Amendment to the Federal Constitution.

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CONCLUSION

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ANALYSIS

Article 1, Sections 1 and 8, of the Nevada Constitution contain the guarantees that no person shall be deprived of life, liberty, or property, without due process of law, and, substantially correspond to such guarantees, as provided by the 14th Amendment to the Federal Constitution.

The Fourteenth Amendment to the Constitution of the United States provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. By the due process of law clause it was undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid on one than are laid on others in the same calling and condition. While an alien is not entitled to the privileges and immunities of a citizen, strictly as such, under the final clause of this provision, yet he is a "person" whom the state cannot deprive of life, liberty, or property without due process of law, and to whom the state cannot deny the equal protection of the laws. This clause is universal in its application to all persons within the territorial jurisdiction without regard to any differences of race, color, or nationality. It must be observed, however, that this constitutional guaranty of the equal protection of the law applies only to aliens within the jurisdiction of the United States. In the light of these interpretations of the Fourteenth Amendment there is authority to the effect that statutes which forbid peddling without a license, and which provide that only citizens of the United States shall be licensed, constitute a denial of equal protection of the laws, as they absolutely deny to an alien permission to pursue a business occupation and to acquire and enjoy property on equal terms with the citizen, and such a statute is not sustainable as a proper exercise of the police power; though this has been denied * * *. Some statutes, however, which on their face seem to be a denial of equal protection of the law to aliens have been upheld as a valid exercise of the police power of the state, as for example a statute providing that no license for the sale of intoxicating liquors by retail shall be granted except to citizens of the United States of temperate habits and good moral character. An alien is within the protection of the Fifth Amendment to the Federal Constitution . . . (1 R.C.L. 799-801, Section 6, and footnote citations; 2 Am.Jur. 470, Section 13, and footnote citations).

Exceptions to the guarantee of the Fourteenth Amendment to the Constitution of the United States have been classified as follows:

1. Where a foreign corporation is the object of discrimination.
2. Where the statute or ordinance is an exercise of the police power, and the discrimination therein between residents or citizens and non-residents or aliens bears some reasonable relation to the end sought to be attained, as in cases of statutes relating to certain professions and businesses.

3. Where the statute is an exercise of the taxing power in which case it may be proper to make a special exemption of persons otherwise taxed.

4. Where the regulation is of the right to take fish and game.

We are here concerned with the classification set forth in No. "2" above.

It is important to note that a distinction must be made between a right to engage in ordinary occupations or employment and privileged professions, occupations, or pursuits. For example, in exercise of its sovereign and police powers, a state may constitutionally require citizenship of persons who desire to engage in the practice of certain professions or public employment. Thus NRS 281.060 provides as follows:

1. Only citizens or wards of the United States or persons who have been honorably discharged from military service of the United States shall be employed by any officer of the State of Nevada, any political subdivision of the state, or by any person acting under or for such officer in any office or department of the State of Nevada, or political subdivision of the state.

* * *

See, also: Law, NRS 7.490, Sup.Ct. Rule 43; Medicine, NRS 630.160; Pharmacy, NRS 639.120; Compilation of cases, NOTE. 39 A.L.R. 346.

Our review of the cases shows the following:

A statute denying aliens the right to be auctioneers was held to be valid. (*Wright v. May*, 127 Minn. 150, 149 N.W. 9, L.R.A. 1915 B, 151.) The decision in this case was based upon the following ground:

* * * But where the calling or occupation is one which, though lawful, is subject to abuse, and likely to become injurious to the community, there is good authority for holding that the state may limit it to its own citizens and deny the right to all others.

Prohibiting the licensing of aliens for the conduct of a pool or billiard parlor business has also been sustained on the basis of the following considerations:

Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens * * * it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification. (*Ohio ex rel. Clarke v. Deekbaeh*, 274 U.S. 392, 71 L.Ed. 1115, 47 S.Ct. 630.)

Citizens as a class have more settled domicile and are better known to the local police officials, while the sojourn of aliens in this country in theory, and usually in practice, is temporary, and their abode, while here, capricious and uncertain. Citizens by means of taxation bear the expense of the government and police protection, while the alien does not necessarily pay taxes or share any part of the public burden. Native citizens are justly presumed to be imbued with natural allegiance to their government, which unnaturalized aliens do not possess. (Annotation: 24 A.L.R. 1120.)

Pawnbroking licenses have been restricted to citizens. (*Asakura v. Seattle*, 122 Wash. 81, 210 P. 30, reversed, however, in 265 U.S. 322, 68 L.Ed. 1041, 44 S.Ct. 515, on the ground that the ordinance in question violated a treaty between the United States and Japan—an additional matter which will be discussed hereafter.)

Authority is divided concerning the validity of statutes forbidding peddling without a license and providing that only citizens of the United States shall be licensed. (See: *Com. v. Hana*, 195 Mass. 262, 81 N.E. 149, 11 L.R.A. (N.S.) 790, 122 Am.St.Rep. 251, 11 Ann.Cas. 514; *State v. Montgomery*, 94 Me. 192, 47 A. 165, 80 Am.St.Rep. 386; Annotation: 100 Am.St.Rep. 614.)

Finally, a state's denial, to persons not citizens of the United States, of the right to obtain licenses to sell intoxicating liquors has been held not to be an unlawful discrimination against aliens or an abridgement of their rights within the prohibition of the Fourteenth Amendment of the Federal Constitution. (See: *Trageser v. Gray*, 73 Md. 250, 20 A. 905, 9 L.R.A. 780, 25 Am.St.Rep. 587; *Bloomfield v. State*, 86 Ohio St. 253, 99 N.E. 309, 41 L.R.A. (N.S.) 726, Ann.Cas. 1913 D, 629; *Kaname Tokaji v. State Board of Equalization*, 67 P.2d 1082, 20 C.A.2d 612; *Crowley v. Christensen*, 137 U.S. 86, 11 S.Ct. 13, 15, 34 L.Ed. 620; *Kidd v. Pearson*, 128 U.S. 1, 9 S.Ct. 6, 32 L.Ed. 346; *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205; *State Board of Equalization v. Superior Court*, 5 C.A.2d 374, 377, 42 P.2d 1076, 1077; *Hansen v. State Board of Equalization*, 110 P.2d 453, 43 C.A. 176.)

As was declared by the United States Supreme Court in *Crowley v. Christensen*, *supra*:

There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority.

(See: Sec. 23788, Business and Professions Code, West's Annotated California Codes; Sec. 126, McKinney's Consolidated Laws of New York, Vol. 3, Alcoholic Beverage Control Law, p. 135 et seq.)

See generally, Notes, 11 L.R.A. (N.S.) 799; 40 L.R.A. (N.S.) 279, 39 A.L.R. 346.

On the basis of the foregoing authorities deemed to be even more controlling in the tolerated privilege or business of gambling in this State, it is, therefore, our considered opinion that, *apart from any limitation expressly provided in existing treaties between the United States and foreign nations*, Assembly Bill No. 98 is not violative of any guarantee contained either in the Federal Constitution or the Constitution of this State.

Concerning possible limitations on such state power on the basis of treaty provisions, it must be generally noted that no state may enact any statute which conflicts with, or is contrary to, any express treaty provision. Where there is a "most favored nation clause" in a treaty to which the United States is a party, in substance providing that there

shall be no discrimination in treatment of the nationals of another country, such provision is deemed to have the effect of law throughout the United States.

See: 1 R.C.L. 807 et seq.; 2 Am.Jur. 478 et seq.; 4 A.L.R. 1377, 17 A.L.R. 635; *Asakura v. Seattle*, *supra* (Pawnbroking).

Thus, the New York Alcoholic Beverage Control Law has been construed as follows:

Aliens residing in the State, who are nationals of a country having a treaty with the United States containing a most-favored nation clause and guaranteeing equality with citizens in freedom of trade, commerce, etc. may not be excluded by state laws from such trade or occupations by a licensing requirement, limiting the said occupation to citizens. (See: McKinney's Vol. 3, Alcoholic Beverage Control Law, Sec. 126, page 137, citing 1933 Op. Atty. Gen. 94, 1954 Op. Atty. Gen. 113.)

A contrary view, however, was apparently taken in the *Kaname Tokaji Case*, *supra*, also involving liquor licensing:

Under the present state of the law, it may be conceded that it is uncertain whether there is any limitation at all on the treaty-making power of the federal government, even when the police power of the state is involved, for the Supreme Court of the United States has declared that "It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way." (Cases). Although article 6, clause 2, of the Constitution of the United States provides that "* * * all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land," nevertheless it is important to bear in mind the Tenth Amendment to the Constitution of the United States, which holds that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In the case at bar the power of the State to regulate and control the liquor traffic is assailed, a power not delegated to the United States but reserved to the State. No citation of authority is necessary to support the proposition that the liquor traffic is peculiarly the subject of police power regulation. So definitely is this established by a long line of decisions that it is settled beyond all reasonable controversy. *It is true that statutes which have conflicted with treaties have been held to be invalid, but such statutes did not contain police power regulations, at least not as outstanding as the statute involved herein.* (Italics supplied.)

However, it must be noted that the court in this case based its decision on the specific fact that the treaty involved provided that the subjects of each country shall have liberty to carry on trade and "generally" to do anything incident to or necessary for trade upon the same terms as native citizens. Said word "generally" was held to

be a limitation on the rights established by the treaty requiring only approximate application of said treaty terms, as opposed to a definite and unqualified application. On the basis of such construction, the court concluded that the Alcoholic Beverage Control Act was in harmony with the treaty there involved.

On the basis of the foregoing analysis, therefore, we conclude that Assembly Bill No. 98 is constitutionally valid, but should not be applied so as to discriminate against, or abridge the rights of, nationals of other countries, as established by effective treaties between the countries of such nationals and the United States.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General.*

By JOHN A. PORTER, *Deputy Attorney General.*

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136. **State Board of Pharmacy.** Board may not deny a license to a physician for establishment of a drug store to be under direct management and operation of a registered pharmacist, even though possible effect may be to control and channel prescriptions written by physician to his own drug store; such denial would be contrary to express statutory provision, and violative of both state and federal constitutional guarantees. Statutory prohibition of "unlawful sharing of prescription moneys by pharmacists, physicians, and other persons" (NRS 207.240) construed not to be violated by issuance of such license to physician-owner of pharmacy.

CARSON CITY, February 25, 1960.

MR. W. L. MERITHEW, *Secretary, Nevada State Board of Pharmacy,*
135 Elm Street, P. O. Box 1087, Reno, Nevada.

STATEMENT OF FACTS

DEAR MR. MERITHEW: It is indicated that a group of medical doctors have organized and established a hospital in which they have installed X-ray equipment and a pharmacy. The medical doctor representing the group and hospital has made application to the Board of Pharmacy for a license to operate the pharmacy under the direct supervision of a licensed pharmacist, to be employed for that purpose.

The Board of Pharmacy has received a number of requests from members of the Pharmaceutical Association to withhold issuance of any permit for the operation of such pharmacy. In substance, such requests are based upon the fact that, through installation of an intercommunications system in the offices of each of the group physicians and the pharmacy at the hospital, prescriptions virtually will be controlled and channeled directly to the hospital pharmacy by the group of physicians, thus preventing patients from having them filled by druggists of their own choice.

The Board of Pharmacy is also concerned with the possibility that

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issuance of a license for such pharmacy in the particular circumstances indicated, may be contrary to, and violative of, the provisions of NRS 207.240, relating to "Unlawful sharing of prescription moneys by pharmacists, physicians, other persons," which provides as follows:

1. No pharmacist may share or offer to share the money received from a customer for filling a prescription with the physician or other person who wrote the prescription, and no person writing any such prescription may accept any share of such money.
2. Any person violating the provisions of subsection 1 is guilty of a misdemeanor.

QUESTIONS

- I. May physicians be validly precluded from engaging in a pharmacy business under applicable law?
- II. Would issuance of a license to physicians for a pharmacy business, under the circumstances stated, be violative of the provisions of NRS 207.240?

CONCLUSIONS

- To question No. I: No.
To question No. II: No.

ANALYSIS

The State Board of Pharmacy is an administrative agency charged with the duty of administering the laws of Nevada regarding pharmacists and pharmacy. It has authority and general power to promulgate reasonable rules and regulations in conformity with the provisions of Chapter 639, Nevada Revised Statutes, and to prescribe methods and procedure required in connection therewith. (NRS 639.070.)

NRS 639.220, relating to "Registered pharmacist to be in charge of pharmacy, drug store," provides as follows:

1. Except as provided in subsection 2, a registered pharmacist, physically present therein, shall be in charge of every store, dispensary, pharmacy, laboratory or office, except a duly licensed hospital, when it is open for business for:

(a) The sale, dispensing or compounding of drugs, medicines or chemicals; or

(b) The dispensing of prescriptions of medical, dental, chiropody or veterinarian practitioners.

2. The requirement of subsection 1 shall not interfere with the registered pharmacist being absent each day for a total period of not to exceed 2 hours for the purpose of taking meals, but the registered pharmacist shall be on call during such absence.

NRS 639.230, relating to "Annual licensing of pharmacists," insofar as here pertinent, provides as follows:

1. No pharmacy shall operate as such or use the word "drug" or "drugs" or "pharmacy," or similar words or words of similar import, without first having secured a license so to do from the board.

2. Every person, partnership, corporation or association doing business as a proprietor of a place in which drugs, medicines and poisons are retailed or physicians' prescriptions are compounded or dispensed shall:

(a) Satisfy the board that the same is conducted according to law.

(b) Annually, on or before May 2, pay to the secretary of the board the annual fee fixed by the board not to exceed \$25.

3. Upon receipt of the annual fee the secretary of the board shall register the pharmacy, store or dispensary and shall furnish the store manager or proprietor with a license valid for 1 year from July 1 next succeeding such payment * * *.

We fully appreciate the possible problems and evils that could attend the conduct of a pharmacy business in circumstances such as those here present, where an employer-employee relationship exists between the prescribing physician and the pharmacist filling a prescription written by his employer-physician.

It is, of course, well established in law that a pharmacist is held to the exercise of such care as is commensurate with the dangers and risks involved in his calling, and the skill employed by him must correspond with the superior knowledge of his business which the law demands. He must be extremely cautious, prudent, thoughtful, vigilant, and practice exact and reliable safeguards, consistent with reasonable conduct of such business. (See: Note, 31 A.L.R. 1336.) It has also been held that an unusual prescription imposes upon a druggist the special duty of inquiring from the physician who issued it, as to its correctness before filling it; and a druggist was held to have no right to sell a drug containing opium even on a physician's prescription, without having a license permitting him to do so. (See: Note, 80 A.L.R. 452, citing *People's Serv. Drug Stores v. Somerville*, 161 Md. 662, 158 Atl. 12, 80 A.L.R. 449; *Moberg v. Scott*, 42 S.D. 372, 175 N.W. 559; 17A Am.Jur. 536 et seq.)

Necessarily involved in the determinations of such cases as the two above mentioned, was the important question: Under what circumstances should a pharmacist set up his own judgment against that of a licensed physician?

As related to the relationship involved in the matter before us, an additional question suggests itself, namely: Can, or may, a pharmacist reasonably be expected to question the judgment or prescription of a licensed physician, *when the prescribing physician who wrote the prescription which is to be filled, is also the pharmacist's employer?*

Because the pharmacy business is concerned with public health, safety, and life, it should suffice merely to pose the problem in the form of the question as stated to suggest the seriousness of the matter, and justification for concern where, from the nature and circumstances of the operation, direct controls for channeling of prescriptions to a pharmacy owned by prescribing physicians are indicated. The additional check and safeguard of the "independent" judgment of a pharmacist, in no way under the domination of the prescribing physician, is not available under circumstances such as those here involved.

We fully appreciate the fact that a patient places his trust and confidence for recovery and restoration to health primarily in his physician. And this, of course, is as it should be. In other words, the physician's presupposed professional ability and integrity are of fundamental importance. Without such assumed ability and integrity, a patient would obviously be exposing both his health and life to serious consequences or even peril. Especially is such the case, since a physician, generally, not only examines the patient and makes a diagnosis or prognosis of the ailment of the patient, but may also administer, directly, some immediate medication himself to the patient, pending compounding or dispensation of prescribed medication by a pharmacist. These facts, however, we submit, do not completely answer the matter or resolve the problem indicated, in the best interests of the public.

Mention may also be made of the apparent conflict of interest which naturally exists where the prescribing physician is also the owner of the dispensing pharmacy. Manifestly, as owner of the drug store, the physician is definitely and properly concerned with a profitable operation of same. Such concern must, for obviously practical reasons, have some effect both on the prices charged, and the quality of the pharmaceuticals dispensed, by the pharmacy owned by him. Where patients are virtually "captives" both of the prescribing physician and the dispensing pharmacy, the patients may well be victimized both economically and in terms of early restoration to health.

While it is true that professional ethics forbid conduct of the kind indicated, it is also true that we are here not concerned with theoretical or abstract codes of what constitutes proper professional conduct, but rather with practicalities and realistic appreciation of the actual exigencies of life.

It will, however, be noted that the statute imposes no conditions respecting ownership of drug stores or pharmacies for applicants for licenses; the owners are merely required to obtain a license from the Board. The owners of pharmacies are, of course, required to comply with the law, and rules and regulations promulgated by the Board in conformity with the law. This would include the requirement that a registered pharmacist shall be in charge of a pharmacy when open for business.

An administrative agency, such as the State Board of Pharmacy, has no power to impose any limitation in the issuance of a permit or license, except as legislatively authorized. Any limitation on the right of physicians to secure a license for the establishment and conduct of a pharmacy business would not only be contrary to express statutory provision, as set forth above, but would also amount to new legislation beyond the powers of the Board and be invalid as violative of state and federal constitutional guarantees affecting property rights and ownership of property. (See, Opinion of Attorney General 686, dated October 5, 1948.)

As stated in 42 Am.Jur. 358-360, applicable law is as follows:

* * * Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its exercise by issuing a "regulation" which is out of harmony with, or

which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the lawmakers' intent in other statutes. The administrative officer's power must be exercised within the framework of the provision bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the true sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority. Thus, where a right is granted by statute, the officer administering such a statute may not by regulation add to the conditions of that right a condition not stated in the statute, nor may he bar from that right a person included within the terms of the statute, even though such inclusion is not express, but only by judicial construction. (Citing many cases in footnotes.)

For a case closely analogous to the one before us in respect of the facts, see: *Medical Properties v. North Dakota Board of Pharmacy*, 80 N.W.2d 87 (1950).

In such case, the plaintiff was a corporation organized in connection with a clinic. The stockholders of the corporation were the manager and the physicians of the clinic. None of them were pharmacists. The purpose, as here, was to provide a pharmacy for the convenience of the patients of the clinic, especially the handicapped ones, so that they could have their prescriptions filled within the building *if they desired*. The pharmacy was to be operated by a registered pharmacist, under the rules provided by law and the regulations of the Board.

The Board, in that case, denied the application because the corporation was not owned and controlled by pharmacists, *as required by a regulation of the Board*. On appeal, the district court held such regulation invalid, and the Board appealed. The Supreme Court there held that there was no statutory authority for the regulation requiring corporations operating a pharmacy to be owned by pharmacists, and that the regulation was unreasonable and void. (Another regulation pertaining to the site of the pharmacy was also held invalid.)

Of relevance herein, the statute here involved was substantially similar to the one in effect in this State.

We have no information concerning the present principles governing the ethics of the medical profession. However, there has been made available to us for consideration in connection with this matter, a thermofax copy of *The Journal of the American Medical Association*, issued June 7, 1958, entitled "Principles of Medical Ethics, Opinions and Reports to the Judicial Council," which contains an item relating to "Ownership of Pharmacy by Physician," as follows:

The Principles of Medical Ethics were revised in Atlantic City at the June 1955 Session of the House of Delegates to read as follows: "It is not unethical for a physician to prescribe or supply drugs, remedies, or appliances as long as there is no exploitation of the patient."

Under this language, the Judicial Council does not believe it can be considered unethical for a physician to own or operate a pharmacy provided there is no exploitation of his patient. (JAMA, March 30, 1957.)

The foregoing is cited not because such statement is of any *legal* import or effect on the question before us, but rather to indicate that the Medical Association was apparently also mindful of the possible undesirable consequences inherent in ownership of a pharmacy by a physician, conformably with the views stated by us above.

Based upon our analysis to this point, we therefore conclude that a physician may not, under applicable law, be disqualified or barred from issuance of a license for establishment and conduct of a pharmacy business.

Considering question No. II, NRS 207.240, despite the apparently all-inclusive scope of its provisions, is obviously intended to prohibit "fee-splitting" or "unlawful sharing of prescription moneys by pharmacists, physicians, and other persons."

In the situation under consideration the pharmacist is, in fact, merely an employee of the physician. Prescription receipts, if any, would accrue to the physician-owner of the pharmacy, and not to the pharmacist. The fact that the physician-owner pays the pharmacist wages, presumably from proceeds from the pharmacy business does not, from a legal standpoint, involve an "unlawful sharing of prescription moneys" within the reasonable contemplation or purview of the statute.

To construe the additional provision that "* * * no person writing any such prescription may accept any share of such (prescription) money" literally, and apart from its context, so as to apply to a physician-owner of a pharmacy who may have written a prescription for one of his patients, which is subsequently turned over to the physician's pharmacy for filling, would result in an application which would be violative of both state and federal constitutional guarantees of due process and equal protection of the laws, relative to such physician engaging in, and conducting, a pharmacy business on the same basis as anyone else.

There is a presumption of the constitutionality of every statute, and, if a statute is susceptible of a construction and application which will sustain its validity, such interpretation will be presumed as legislatively intended, rather than another which would render it unconstitutional and void.

For the foregoing reasons, we further conclude that question No. II must also be answered in the negative; that is, issuance of a license to a physician-owner of a pharmacy business would not be violative of NRS 207.240.

We trust that our within opinion and advice sufficiently answers your inquiry, and proves helpful to you in clarification of the matter and solution of the immediate problem confronting the Board of Pharmacy.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

137. County Commissioners. Commissioners may contract for purchase of voting machines, upon deferred payments, not to be completed within present terms of office. NRS 244.320, 303.225 construed.

CARSON CITY, March 1, 1960.

HONORABLE GEORGE FOLEY, *District Attorney, County of Clark, Las Vegas, Nevada.*

Attention: Mr. M. Gene Matteucci, Deputy.

STATEMENT OF FACTS

DEAR MR. FOLEY: The Board of County Commissioners of Clark County desires to purchase additional voting machines for use in Clark County, under a contract of deferred payments extending over a period of approximately 10 years. The obligation of the contract would therefore extend beyond the term of office of which the present members have now been elected. By telephone call another question has been resolved and a single question remains.

QUESTION

Is a board of county commissioners authorized to enter into a contract for the purchase of voting machines, which would carry an obligation in payments, not to be discharged within the present terms of the incumbent commissioners?

CONCLUSION

We have concluded that the question should be answered in the affirmative.

ANALYSIS

Section 244.320 NRS provides:

244.320 1. *Except as otherwise authorized by law*, no member of any board of county commissioners shall be allowed to vote on any contract which extends beyond his term of office.

2. Any commissioner violating the provisions of subsection 1 shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than \$100 nor more than \$500, or be imprisoned in the county jail for 3 months, or by both fine and imprisonment. (*Italics supplied.*)

The earliest statute on voting machines is Chapter 136 (p. 179) of 1951, approved March 17, 1951. Section 48 thereof, being Section 303.225 NRS, provides:

303.225 The commissioners or the legislative bodies of incorporated cities may provide for the payment for or rental of a voting machine in such manner and method as they may deem for the best local interest.

The concept that a county commissioner may not vote on any contract, which carries an obligation to be discharged after the end of the term of office for which the commissioner has been elected, is of much

earlier date, namely, Chapter 96 of 1895. This statute is general in application, whereas the statute respecting contracts for payment of purchase of voting machines is specific.

In *Ex parte Smith*, 33 Nev. 466, at 476, the court said:

Under the rules of construction * * * the intention of the legislature is to be ascertained and followed, that a special provision will prevail as against a general one, and that a later provision will control an earlier one, * * *.

We note also that this contemplated action of the Board of County Commissioners is proprietary, as distinguished from governmental, and as such it is usually held that the rule to prevent such action has no application. 14 Am.Jur., Art. 41, p. 210.

It is therefore our opinion that in the purchase of voting machines, the county commissioners may enter into a contract of purchase, which contract will carry an obligation not to be completely discharged during the term for which the individual members have been elected. This is in accord with the conclusion reached in Attorney General Opinion Number 328, of November 27, 1951.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By D. W. PRIEST, *Chief Deputy Attorney General*.

138. **Freeport Law—Essential Requirements.** Property must move from outside Nevada to warehousing point within State—thereafter move to destination outside of Nevada.

CARSON CITY, March 1, 1960.

MR. R. E. CAHILL, *Secretary, Nevada Tax Commission, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR MR. CAHILL: You seek our opinion whether or not, under the assumed factual situations set forth below, the personal property is exempt from taxation under the Nevada Freeport Act.

1. Douglas Aircraft Company, a corporation, acquires title to and possession of airplanes from an airline at a point outside the State of Nevada. Douglas personnel then fly the airplanes into Nevada and deliver possession thereof to a bailee, George Crockett's Alamo Airways, at McCarran Field in Las Vegas, Nevada. Douglas personnel later take possession of the aircraft in Las Vegas, and fly them to a point outside Nevada where they are delivered to a buyer or lessee.

2. The airline flies the airplanes to McCarran Field where title and possession are transferred from the airline to Douglas. Douglas then delivers possession of the aircraft to the bailee in Las Vegas. Douglas later takes possession of the aircraft in Las Vegas, and flies them to a point outside Nevada where they are delivered to a buyer or lessee.

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Respectfully submitted,

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2. The airline flies the airplanes to McCarran Field where title and possession are transferred from the airline to Douglas. Douglas then delivers possession of the aircraft to the bailee in Las Vegas. Douglas later takes possession of the aircraft in Las Vegas, and flies them to a point outside Nevada where they are delivered to a buyer or lessee.

3. The facts are just the same as under (2) except that the airline, at Douglas' direction, delivers the airplanes directly to the bailee in Las Vegas and title passes to Douglas upon such delivery.

4. If the aircraft are exempt from personal property tax in the above situations, would the aircraft be exempt if:

(a) After possession of the aircraft has been delivered to the bailee, Douglas later takes possession of it for the purpose of demonstrating it to a potential buyer or lessee, so demonstrates it, and then returns possession of it to the bailee.

(b) Operations for maintenance and preservation are carried on while the aircraft are in Nevada or because modifications necessary before delivery to a buyer or lessee are made while the aircraft are in Nevada.

QUESTION

Under the assumed factual situations above stated, would the aircraft be deemed not to have acquired situs in Nevada and, therefore, be exempt from personal property taxation?

CONCLUSION

In all of the aforesaid situations the said aircraft would not be deemed to have acquired situs in Nevada and would, therefore, be exempt from taxation.

ANALYSIS

NRS 361.160 reads in part as follows:

1. Personal property in transit through this state is personal property, goods, wares and merchandise:

(a) Which is moving in interstate commerce through or over the territory of the State of Nevada; or

(b) Which was consigned to a warehouse, public or private, within the State of Nevada from outside the State of Nevada for storage in transit to a final destination outside the State of Nevada, whether specified when transportation begins or afterward.

Such property is deemed to have acquired no situs in Nevada for purposes of taxation. Such property shall not be deprived of exemption because while in the warehouse the property is assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled or repackaged. The exemption granted shall be liberally construed to effect the purposes of NRS 361.160 to 361.185, inclusive.

When the Freeport Act was last amended in 1955, the Legislature saw fit to include the following preamble found in Chapter 362, 1955 Statutes, page 600:

Whereas, The so-called "freeport bill" was enacted by the legislature of the State of Nevada in 1949, it being chapter 77, Statutes of Nevada 1949, at page 95; and

Whereas, This act has accomplished the storage in Nevada of goods and merchandise which would not otherwise be stored in the State of Nevada; and

Whereas, This act has been of great benefit to the State of Nevada and the people thereof, has benefited the warehouse industry of the State of Nevada, has promoted the construction of warehousing facilities, thereby increasing taxable valuations in the State of Nevada, and has provided employment for Nevada citizens; and

Whereas, It is the sense of the people of the State of Nevada, as expressed through this legislature, that such tax-exempt warehousing be sponsored and encouraged further; and

Whereas, It is deemed necessary that this act should be augmented by additional provisions which would indicate the widespread approval of this act by the people of the State of Nevada and the desire of the people of the state that the provisions thereof be interpreted broadly and liberally, to achieve the purposes of the legislation, such additional provisions being designed to further encourage resident and nonresident persons and corporations to warehouse goods and merchandise from outside the State of Nevada, intended for out-of-state destination, in the State of Nevada and to assemble and disassemble the same while in storage in Nevada, including the doing of all necessary acts to prepare such stored goods for shipment to their destination, including the separation of the same into portions of the whole, or into broken, mixed or odd lots; now, therefore,

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

Then follows the amendment of the law itself, part of which is above quoted from NRS 361.160.

In view of the declared intention of the Legislature in the preamble and in the Act itself that the law be liberally construed, we conclude that Alamo Airways in the instant case would come within the meaning of the words "warehouse, public or private, within the State of Nevada."

We are also of the belief that in determining whether or not personal property is exempt from taxation under the Freeport Act, the following factors are immaterial: (a) ownership; (b) means of transportation; (c) when and where title passes; (d) whether warehoused by owner or third person; (e) demonstrations; (f) maintenance; (g) when moved to destination outside of Nevada.

The only essential requirements are that the property must move from outside of Nevada to a warehousing point within this State and thereafter be moved to a destination outside of Nevada.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General.*

139. Cemeteries, Endowment Care. The provisions of NRS 452.050-452.180, respecting endowment care cemeteries, have application only to cemeteries established for the interment of deceased human beings.

CARSON CITY, March 2, 1960.

HONORABLE PAUL A. HAMMEL, *Insurance Commissioner, Carson City, Nevada.*

STATEMENT OF FACTS

DEAR MR. HAMMEL: NRS 452.050-452.180 contain provisions of regulation of endowment care cemeteries. Section 452.110 NRS, subsection 2, in part provides: "Endowment care is a provision for the discharge of a duty due *from the persons contributing to the persons interred* and to be interred in the cemetery, and a provision for the benefit and protection of the public by preserving and keeping cemeteries from becoming unkept and places of reproach and desolation in the communities in which they are situated." (Italics supplied.) Section 452.170 NRS, referring to purposes for which trusts may be accepted, subsection 2, in part provides: "Such contributions are a provision for the discharge of a duty from the persons contributing *to the person or persons interred or to be interred in the cemetery * * *.*" (Italics supplied.)

QUESTION

Would the governing board of an endowment care animal or pet cemetery be required to comply with and be governed by the provisions of NRS 452.050-452.180?

CONCLUSION

The question is answered in the negative.

ANALYSIS

No place in the Act is there any reference to, suggestion of or inference that an endowment care cemetery may be used otherwise than for the interment of deceased human beings. We, therefor, conclude that it was the legislative intent that such cemeteries were to be established exclusively for such interment.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General.*

By D. W. PRIEST, *Chief Deputy Attorney General.*

140. Cemeteries, Endowment Care. Endowment Care Cemetery Act (NRS 452.050-452.180) construed. What constitutes "income" within the meaning of NRS 452.160, subsection 1, not clearly defined or limited.

CARSON CITY, March 2, 1960.

HONORABLE PAUL A. HAMMEL, *Insurance Commissioner, State of Nevada, Carson City, Nevada.*

Attention: Mr. Louis T. Mastos, Chief Deputy Insurance Commissioner.

STATEMENT OF FACTS

DEAR MR. HAMMEL: Under the provisions of NRS 452.050-452.180 regulations are provided for the care and administration of endowment care cemeteries. Under NRS 452.050, subsection 1, it is provided that a permit to so operate shall issue from the Department of the Commissioner of Insurance. Under NRS 452.160 provision is made for the investment of endowment care funds, including investments in "corporate bonds or preferred or common stock approved by the state board of finance." Under NRS 452.160, subsection 1, it is provided that "endowment care funds shall not be used for any purpose other than to provide, *through income only*, for the reserves authorized by law and for the endowment care of the cemetery in accordance with the resolutions, bylaws, rules and regulations or other actions or instruments of the cemetery authority." (Italics supplied.) Under NRS 452.180, subsections 2 and 3, it is provided that the Commissioner of Insurance may examine the books, records and documents of a "cemetery authority," to determine therefrom whether or not such authority is complying fully with the provisions of NRS 452.050-452.180.

An examination by a representative of the Department of Insurance of one of the "cemetery authorities," operating under a permit issued by the department, reveals that this governing body contends that profits from the sale of corporate stocks, should be included along with interest on bonds, and dividends on stocks, as "income" from endowment care funds, and as "income" should be available to the governing body for disbursement for current expenditure in beautifying and ornamenting the cemetery. On the other hand the representative of the department contends that such are faulty, erroneous and unwise accounting or administrative practices, in that it encourages speculation with the funds and provides no adequate cushion against the eventuality of declining corporate stock and security prices.

QUESTION

When a cemetery authority, operating under a permit as an endowment care cemetery, liquidates corporate stocks or other securities, and receives therefor a sum in excess of costs, is such profit an "income" within the meaning of NRS 452.160, subsection 1?

CONCLUSION

Although we see a number of reasons which slant to the conclusion that such is an unsound fiscal policy and should not be pursued, yet we find nothing in the law which precludes such practice, or authorizes

the Insurance Commissioner or the Attorney General to prevent the continuance of it. We therefore reluctantly answer the question in the affirmative.

ANALYSIS

The theory of "endowment" is, of course, that the principal will not be diminished but will remain intact as an operative and working fund, from which the earnings may be separated and may be consumed from year to year. But if the practice above described had been followed from 1941 to this date, as to any endowment fund (by reason of inflation and loss of purchasing power), that fund would in terms of purchasing power have been greatly decreased, although holding a nominally fixed number of dollars.

Although stocks and other securities rise in price, they also decline, and this being true, if an endowment fund is allowed to siphon off the "profits" on the upgrade, and spend them as an earned income, how could this sum be replaced when a downgrade puts the quoted value of securities held well below the cost price?

Although we think such practice is not economically sound, and although we think it is dangerous, and not conducive to the security of such endowment funds, we are confronted with the question of whether or not the Insurance Commissioner or this Department is authorized to bring it to a halt.

NRS 452.120 provides for the minimum amount that shall be deposited, as to each grave, niche and crypt, in an endowment care cemetery. NRS 452.130 provides that each endowment care cemetery shall, in addition to the requirements of NRS 452.120, have deposited in its endowment care fund the further sum of \$25,000.

NRS 452.060 provides:

452.060 1. The principal of all funds for endowment care shall be invested and the income only used for the care, maintenance and embellishment of the cemetery, in accordance with the provisions of law and the resolutions, bylaws, rules and regulations or other actions or instruments of the cemetery authority, and for no other purpose. Endowment and special care funds shall be maintained separate and distinct from all other funds and the trustees shall keep separate records thereof.

2. The trustee of the endowment care fund shall create a reserve from which principal losses may be replaced by setting aside a reasonable percentage of the income from the fund.

This statute is ineffectual in that nothing definite is provided as to the portion that shall be set aside from the income of the fund as a reserve, and that no authority is granted thereunder to the Insurance Commissioner to compel compliance.

NRS 452.180 provides:

452.180 1. It shall be unlawful for a cemetery authority, its officers, employees or agents, or a cemetery broker or salesman, to represent that an endowment care fund or any other fund set up for maintaining care is perpetual or permanent, or to sell, offer for sale or advertise any plot under representation that the plot is

under endowment care, before an endowment care fund has been established for the cemetery in which the plot is situated. Any person violating any of the provisions of NRS 452.050 to 452.180, inclusive, shall be personally liable for all damages resulting to any person or persons by reason of such violation, and shall also upon conviction thereof be guilty of a misdemeanor punishable by a fine of not less than \$100 nor more than \$500, or by imprisonment in the county jail for not less than 10 days nor more than 6 months, or by both fine and imprisonment.

2. The commissioner of insurance, for the purpose of ascertaining the assets, conditions, and affairs of any endowment care cemetery, may examine the books, records, documents and assets of any endowment care cemetery operating, or being organized to operate as such, in the State of Nevada, and may make whatever other investigations as may be necessary to determine that such cemeteries are complying fully with the provisions of NRS 452.050 to 452.180, inclusive.

3. If, after an examination or investigation, the commissioner of insurance has just cause to believe that a cemetery, certified by the state as an endowment care cemetery, has failed to comply with the provisions and requirements of NRS 452.050 to 452.180, inclusive, he may, after due notice and hearing, if he finds the cemetery authority has violated the requirements or regulations contained herein revoke or refuse to renew the certificate of such cemetery authority and refer the violation to the attorney general to determine if further action should be taken under subsection 1.

Nowhere in the statute (NRS 452.050-452.180) is the commissioner authorized to make rules and regulations upon the matters covered. And if he were to declare such sums of money derived in the manner heretofore mentioned, as not constituting "income" within the meaning of NRS 452.160, subsection 1, it would constitute statutory amendment, in our opinion, and not within the power of the Legislature to grant or the commissioner to accept. Specifically the statute is ineffectual and cries for amendment in that it sets forth no test or limitations in what constitutes "income."

Officers of legislative creation have such powers only as are conferred upon them, and implied powers reasonably inferred. *McCulloch v. Bianchini*, 53 Nev. 101, 292 P. 617.

It follows that the Insurance Commissioner has no authority to rule that the sums of money received in the manner mentioned are not "income" within the meaning of NRS 452.160, subsection 1.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By D. W. PRIEST, *Chief Deputy Attorney General*.

141. Health. There is no legal prohibition in NRS on adding fluorine to drinking water in the State of Nevada. Water Supply Regulations of State Health Department are applicable.

CARSON CITY, March 3, 1960.

HONORABLE GEORGE FOLEY, *District Attorney, Las Vegas, Nevada.*

STATEMENT OF FACTS

DEAR MR. FOLEY: The Council of Social Agencies, Las Vegas, Nevada, is interested in the project of adding fluorine to the drinking water of Clark County. You have requested an opinion of this office regarding the legality of such action.

QUESTION

What, if any, are the legal prohibitions on adding fluorine to the drinking water of Clark County?

CONCLUSION

We find no provision in the Nevada Revised Statutes whereby the addition of fluorine to the drinking water of a community is prohibited.

ANALYSIS

An examination of the Nevada Revised Statutes reveals no provision prohibiting the addition of fluorine to the drinking water in the State of Nevada. Generally governmental and administrative measures involving fortification of public water supplies by adding fluorides are held to be a valid exercise of the police power and upheld against attack on constitutional and other grounds. (See Annotation 43 A.L.R. 2d 453.)

Under NRS 439.150 the State Board of Health is declared to be supreme in all health matters and in the preservation of the health and lives of the citizens of this State.

Under NRS 439.200 the State Board of Health is empowered to adopt and enforce reasonable rules and regulations to carry out its duties and responsibilities. Pursuant to that authority the Department of Health, State of Nevada, adopted certain regulations entitled "Water Supply Regulations" on January 8, 1952 and currently in effect. Section 10 of said Regulations reads as follows:

Sec. 10. Fluoridation addition.

Item 1. All requests that fluoride be added to the water supply for the reduction of the incidence of dental caries, which is a public health matter, shall be referred to the local health authority, and by them to the State Board of Health.

The water utility is charged with supplying water meeting standards of the State Board of Health, with regard to fluoridation this may be a maximum of 1.5 ppm.

Item 2. Responsibility for fluoridation. The addition of fluoride to a water supply shall be concurred in before there is any commitment by the water utility; by the County Board of Health, and

the State Board of Health, the local dental and medical society or in the absence of such local society by the State society; and the local governing body, board or council.

Item 3. Application of fluoride. The application of fluoride must be made through accurate feeding equipment. Either gravimetric or volumetric dry-feed equipment or positive displacement liquid feed equipment with an accuracy within 5 percent is required.

Special precaution must be taken to protect the operators from inhaling fluoride dust when charging the hoppers of the feeders. It is recommended that dry feeders be equipped with dust collectors consisting of bag filters operating under positive air pressure and vented to the outside. Each operator who handles fluoride shall be provided with his individual toxic dust respirator to be used only when handling this chemical. When liquid-feed equipment is used, at least two solution tanks must be available for the preparation and storage of the fluoride solution.

Item 4. Control. Laboratory analysis shall follow written instructions of the State Health Department.

Samples must be taken from points before and after fluoridation and from one or more points in the distribution system as determined by the State Health Department. The frequency of sampling shall be stated in the written instructions, samples shall be tested by the State Health Department for control purposes.

Tests for purity of fluoride chemical used in water fluoridation shall be determined as necessary, these tests shall be by approved methods.

Particular attention should be given to Item 2 above wherein it is provided that the local governing body, the County and State Boards of Health and the local dental and medical society must concur in such proposed action before there is any commitment by the water utility.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By MICHAEL J. WENDELL, *Deputy Attorney General*.

142. Welfare, State Department of. Applicable statutes construed as imposing the duty exclusively upon the State Welfare Department to make any required adoption investigation. Such duty and responsibility may not be delegated to, or discharged by any investigation made by, any other agency; nor may the State Welfare Department solely depend upon, and adopt as its own, a report of such investigation and recommendations of any other agency, as performance of its statutory duty.

CARSON CITY, March 4, 1960.

MRS. BARBARA C. COUGHLAN, *Director, Nevada State Welfare Department, P. O. Box 1331, Reno, Nevada.*

STATEMENT OF FACTS

DEAR MRS. COUGHLAN: It is indicated that in connection with adoptive placements arranged by the Catholic Welfare Bureau, a copy of the adoptive home study and a copy of the background information on the child to be adopted are submitted to the State Welfare Department for approval prior to the placement, in accordance with law (NRS 424.070).

In such instances, when the petition to adopt is filed (and in the absence of any court order dispensing with the investigation by the State Welfare Department), a problem arises, both with respect to duplication of work involved by the Catholic Welfare Bureau and the State Welfare Department, as well as the effect on adopting parents and others subjected to interviews by representatives of said two social agencies. The indicated problem arises from the fact that the law (NRS 127.120), in part, provides as follows:

* * * The state welfare department shall verify the allegations of the petition and investigate the condition of the antecedents of the child and make proper inquiry to determine whether the proposed adopting parents are suitable for the minor. * * *.

QUESTION

Does applicable law require that the State Welfare Department itself interview natural parents, adopting parents and all other interested parties when the placement has been made by another child-placing agency, such as the Catholic Welfare Bureau, or may the records and reports of such other agency, and the determinations or findings therein contained, be used for purposes of the adoption investigation prescribed by law?

CONCLUSION

The State Welfare Department must, itself, make any required adoption investigation, in performance of the statutory duty imposed upon it, and may not delegate such responsibility and duty to any other child-placing agency under applicable law.

ANALYSIS

There is no question involved herein as to the sufficiency or adequacy of the investigation and report which might be conducted and made by a child-placing agency such as the Catholic Welfare Bureau.

We are solely concerned with the law presently applicable, which imposes the duty and responsibility of making, and reporting on the results of, an adoption investigation exclusively upon the State Welfare Department.

The statute, a portion of which has been quoted, expressly and exclusively designates the State Welfare Department as the agency which is authorized and required to make such investigation and verification. By use of the word "shall," the statutory mandate is made imperative. (Rule of Statutory Construction: "Expressio unius, exclusio alterius.")

It is the general rule that a delegated power may not be further delegated by the person to whom such power is delegated. The only exception to such rule is: "Merely ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature." (42 Am.Jur. 387, Section 73, and footnote citations.)

Certainly, the investigation here involved, and the evaluation of the evidence adduced therefrom, as well as the report and recommendations made to the court in adoption proceedings, involve the exercise of discretion and judgment, and are not purely ministerial in nature.

It has been held that "* * * when the means for the exercise of a granted power are given, no other or different means can be applied as being more effective or convenient." (McCullough v. Scott, 109 S.E. 789, 182 N.C. 865.)

We fully appreciate the fact that there is apparently unnecessary duplication of work, and that the effect of investigations for the same purpose by representatives of two social agencies is unfortunate and productive of undesirable consequences. A proper solution of the matter would appear to be the amendment of NRS 127.120 to authorize such investigations by the State Welfare Department or any proper agency licensed or approved by the State Welfare Department. This, however, is a matter for legislative action and beyond the province of this office.

We trust that the foregoing sufficiently clarifies the matter, and proves helpful.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

143. Gaming. Under Gaming Control Act of 1959, Gaming Commission may not attach condition to state gaming license subjecting licensee to disciplinary action for racial discrimination.

CARSON CITY, March 8, 1960.

NEVADA GAMING COMMISSION, *Carson City, Nevada.*

STATEMENT OF FACTS

GENTLEMEN: Representatives of the National Association for the Advancement of Colored People have requested the Nevada Gaming Commission to attach to each state gaming license a condition subjecting the licensee to disciplinary proceedings in the event the licensee discriminates against members of the Negro race who come on the licensed premises for the purpose of engaging in the gaming conducted thereon.

The NAACP maintains that the Nevada Gaming Commission possesses the power referred to above under NRS 463.130, 463.140, and 463.220.

QUESTION

May the Nevada Gaming Commission attach a condition to all state gaming licenses providing for disciplinary action in the event said licensee discriminates against any patron because of race, color or creed?

CONCLUSION

In the absence of express legislation, the Nevada Gaming Commission may not attach conditions to a state gaming license subjecting a licensee to disciplinary action because of racial discrimination on the premises wherein gaming is conducted.

ANALYSIS

To properly consider the question presented it is necessary to examine the common law and the many cases relevant to this problem.

At common law the general public was regarded as having such an interest in certain classes of businesses conducted by private parties for their own profit as to impose restrictions not applicable to the conduct of private business generally. Certain duties were placed upon common carriers requiring them to accept all passengers and goods offered for transportation and carriers were not permitted to discriminate in favor of or against any class. (10 Am.Jur. 911.) To the same effect it was settled under common law that an innkeeper was absolutely bound to receive and serve persons applying for accommodations unless he had some reasonable grounds for refusal. (52 L.R.A. New Series, p. 740.)

Again at common law the proprietor of a strictly private business was under no implied obligation to serve the public and in the absence of statute was under no duty to admit everyone to the premises where the business was located. The fact that the business was carried on under a license would not necessarily change the character of the business from private to public. (10 Am.Jur. 915.)

Our Nevada Supreme Court in the case of *Stoutmeyer v. Duffy* (1872), 7 Nev. 342, held that Negro children are entitled to equal participation in the benefits of the public schools in the State of Nevada, but that it is within the power of the State to send all blacks to one school and all whites to another.

In 1896 the Supreme Court of the United States held that a public carrier of passengers providing separate but equal facilities for Negroes does not deprive those Negroes of any rights under the Fourteenth Amendment of the Federal Constitution. (*Plessy v. Ferguson*, 163 U.S. 537, 41 L.Ed. 256.) This doctrine of "separate but equal" was followed generally until 1954, at which time the United States Supreme Court rendered its opinion in the case of *Brown v. Board of Education*, 347 U.S. 483, 98 L.Ed. 873, and the four related cases decided thereunder. That court held that the separate but equal doctrine of *Plessy v. Ferguson* has no place in the field of education. The court said that to separate children in grade and high schools solely because of their race generates such a psychological effect on the Negro children that it "may affect their hearts and minds in a way unlikely ever to be undone," and announced that separate but equal facilities in the field of education is a denial of equal protection of the laws guaranteed by the Fourteenth Amendment.

Since then numerous cases have been decided concerning the matter of racial discrimination on both the state and national level. Among those cases, to name a few, are the cases of *South Carolina Electric and Gas Company v. Flemming* (1956), 351 U.S. 901, 100 L.Ed. 1439, holding that common carriers are governed by the same principles that control in public school segregation. The decision of the Supreme Court in *Brown v. Board of Education* leaves no doubt that the separate but equal doctrine, approved in *Plessy v. Ferguson*, has been repudiated. In *Dawson v. Baltimore* (1955), 220 F.2d 386, it was held that enforcement of racial segregation in the enjoyment of public beaches and bath houses maintained by public authority of the State of Maryland and the city of Baltimore was not a proper exercise of police power and was in violation of the Fourteenth Amendment to the Federal Constitution. To the same effect in the field of public housing are the cases of *Housing Authority v. Banks* (1954), 347 U.S. 974, 98 L.Ed. 1114, and *Detroit Housing Commission v. Lewis* (1955), 226 F.2d 180. Denial of the use of a municipal golf course by Negroes was held to be a violation of civil rights in *Holmes v. Atlanta* (1955), 350 U.S. 879, 100 L.Ed. 776. Requiring a Negro candidate for public office to insert "Negro" after his name deprived him of equal protection of the laws in the case of *Key v. McDonald* (1955), 350 U.S. 895, 100 L.Ed. 787. The doctrine announced in the *Brown v. Board of Education* case, *supra*, has been extended to cover situations where a state or subdivision thereof leases property for private purposes to an individual lessee who excludes Negroes from the premises, and such action on the part of the lessee has been held to constitute state action in violation of the Fourteenth Amendment. (See *Muir v. Louisville Park* (1954), 347 U.S. 971; *Denington v. Plummer* (1956), 240 F.2d 922.)

The general import of the cases cited and the numerous cases that

have been decided since the *Brown v. Board of Education* case clearly shows that only discrimination by state action is within the contemplation of the Fourteenth Amendment to the United States Constitution. (*Ross v. Ebert* (1957), Wis., 82 N.W.2d 315; *Reed v. Hollywood Professional School* (1959), Cal., 338 P.2d 633; and *Girard College Trusteeship Cases* (1958), Pa., 353 U.S. 230, 1 L.Ed.2d 792.)

We think the case of *Madden v. Queens County Jockey Club* (1947), N.Y., 72 N.E.2d 697, is in point. There the plaintiff was barred from a New York race track under the mistaken belief that he was a bookmaker for a notorious underworld character. The plaintiff asserted his right as a citizen and taxpayer to enter the race course and engage in the pari-mutuel betting conducted on the premises. The defendant asserted the unlimited power of exclusion. The court pointed out that if the plaintiff had been excluded because of race, creed or color or national origin, it would have been unlawful, inasmuch as it would have been contrary to the civil rights legislation adopted by the State of New York. After a general discussion of the common law distinguishing persons engaged in a public calling such as an innkeeper or common carrier, who were under the duty to serve the public without discrimination, and proprietors of private enterprises, who at common law were under no such obligation, the court concluded that a race track falls within the latter classification and that the common law power of exclusion continues until changed by legislative enactment.

The plaintiff advanced the arguments that the license to conduct pari-mutuel betting constitutes the licensee an administrative agent of the state and that the license to conduct horse racing is a franchise to perform a public purpose. In disposing of those arguments, as to the first, the court said that the 10 percent tax imposed by the state for the privilege of conducting pari-mutuel betting was not imposed on the bettor for the privilege of *betting* but upon the licensee for the privilege of *conducting* the operation. The court said that if the plaintiff's argument were valid, every licensee, e.g., theater manager, cab driver or dog owner would have to be regarded as an administrative agency of the state simply because he pays a tax or fee for his license.

The court devoted a greater discussion to the second argument, namely, that the license is a franchise. The court said that a franchise is a special privilege conferred by a state on an individual, which does not belong, as a matter of common right, to that individual. The primary object is to promote the public welfare, for example, the operation of railroads, waterworks, and gas and power lines.

On the other hand, a license is merely permission to exercise a pre-existing right which has been subjected to regulation in the interest of the public welfare. The granting of a license to promote the public good does not make the purpose a public one, nor the license a franchise, nor does it place the licensee under an obligation to the public.

The court observed that the privilege of conducting horse racing for stakes existed at common law and that it is taken away only by statute. Consequently, the license, instead of creating a privilege, merely permits the exercise of one subject to restrictions and regulations contained in the statute.

Turning to the immediate problem, it should be noted that at common law gambling was not in itself unlawful. (Stat. 9 Ann.Ch. 14; *Ex parte Pierotti*, 43 Nev. 243; *West Indies v. First National Bank*, 67 Nev. 13.) Therefore gambling if not expressly prohibited would be permitted in all states which recognize the application of the common law in matters not specifically governed by statute. (See NRS 1.030.)

Based on the distinctions heretofore made, we conclude that a gaming license in the State of Nevada is a license as distinguished from a franchise.

We realize that we have placed great emphasis on the case of *Madden v. Queens County Jockey Club*, and have done so because it involves legalized gambling. We fully recognize that the *Madden* case was decided prior to the case of *Brown v. Board of Education*, but find no language in the latter case which in our opinion would overrule the decision of the court in the former case. Furthermore, from reading the many cases decided subsequent to *Brown v. Board of Education*, some of which have been cited herein, we do not think the prohibition against "state action" found in the Fourteenth Amendment can be extended to the instant problem.

Both the *Madden* case and the present problem are concerned with the question of exclusion of individuals from premises whereon legalized gambling is conducted. In the former case the exclusion based upon racial discrimination would have been prohibited because of the civil rights legislation adopted by the State of New York. In this case, the State of Nevada has no express legislation prohibiting such exclusions.

It has been urged by representatives of the NAACP that the Commission may attach a condition to a state gaming license for any cause deemed reasonable by the Commission. (NRS 463.130, 463.140 and 463.220.) We interpret this language as empowering the Commission to attach conditions only when those conditions are directly related to *licensing* and *controlling* gaming within the State of Nevada. (NRS 463.130.)

The Nevada Gaming Commission was established to attain important objectives within the sphere of gaming. It is the responsibility of that Commission to carry out the law as enacted by the Legislature and to fill in administrative gaps by the adoption of rules and regulations. For the Commission, as an administrative agency, to pronounce what civil rights must be observed by state gaming licensees is to extend the Commission's authority beyond the sphere of gaming. To go beyond that sphere is to legislate.

It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the leave of administrative officers. This principle ought not to be surrendered for the sake of convenience or expediency. (42 Am.Jur. 342.)

Civil rights legislation is the means whereby the State prohibits persons mentioned therein from doing what the State is prohibited from doing under the Fourteenth Amendment of the United States Constitution. It is inconceivable and legally impossible to conclude that the Legislature of Nevada has delegated to the Nevada Gaming

Commission the responsibility of determining what civil rights are guaranteed and to whom under the statutes of this State, and the further responsibility of enforcing those rights by sitting as a quasi-judicial body on matters only remotely connected with gaming control and licensing.

It should be carefully noted that the question as herein stated is concerned with discrimination on the part of a state gaming licensee. We are not concerned at this time with the matter of the Gaming Control Board or Nevada Gaming Commission discriminating against an applicant for a state gaming license because of race, color or creed. Unquestionably from the authorities cited, such discrimination would be unconstitutional as being state action in violation of the Fourteenth Amendment.

It is our conclusion that it would be an abuse of authority and an unlawful attempt to legislate if the Nevada Gaming Commission, in the absence of express legislation, attached to any state gaming license a condition that the licensee will be subject to disciplinary action should he discriminate because of race, color or creed against any person who comes on the licensed premises.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By MICHAEL J. WENDELL, *Deputy Attorney General*.

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144. Welfare, State Department of. No legal authority exists for requirement that prospective adopting parents pay a fee in such amount as would effect reimbursement of the costs expended for physician's services and hospitalization connected with birth of a child whose adoption is being sought.

CARSON CITY, March 8, 1960.

MRS. BARBARA C. COUGHLAN, *Director, Nevada State Welfare Department, P. O. Box 1331, Reno, Nevada.*

STATEMENT OF FACTS

DEAR MRS. COUGHLAN: It is indicated that the State Welfare Department is considering the adoption of a policy which would exact a charge of adopting parents of infants under one year of age, such charge to be based upon the average cost of delivery, namely, physician's services and hospitalization.

The need for such policy is predicated upon the increasing number of referrals of unmarried mothers to the Department for assistance, resulting in prospective depletion of the insufficient funds appropriated for such purpose.

You advise that an effort is being made to coordinate the policies of the Department in this matter with those of the Catholic Welfare Bureau, the only other child-placing agency in the State, and indicate that this private agency has, for the past few years, charged adopting

Commission the responsibility of determining what civil rights are guaranteed and to whom under the statutes of this State, and the further responsibility of enforcing those rights by sitting as a quasi-judicial body on matters only remotely connected with gaming control and licensing.

It should be carefully noted that the question as herein stated is concerned with discrimination on the part of a state gaming licensee. We are not concerned at this time with the matter of the Gaming Control Board or Nevada Gaming Commission discriminating against an applicant for a state gaming license because of race, color or creed. Unquestionably from the authorities cited, such discrimination would be unconstitutional as being state action in violation of the Fourteenth Amendment.

It is our conclusion that it would be an abuse of authority and an unlawful attempt to legislate if the Nevada Gaming Commission, in the absence of express legislation, attached to any state gaming license a condition that the licensee will be subject to disciplinary action should he discriminate because of race, color or creed against any person who comes on the licensed premises.

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ROGER D. FOLEY, *Attorney General*.

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parents a fee based on the cost of maintenance and delivery of the unmarried mother, including other costs, such as that for foster home care of the child.

Concerning the practice generally and elsewhere, it is indicated that a 1951 study of tax-supported agencies handling adoptions showed that such charges to adopting parents, at that time, were the exception rather than the rule. More recent studies, however, indicate that the contrary may be true. It appears to be the present general opinion that such reimbursement charges of expenses, if based upon the average cost to natural parents of having a child, have certain psychological value for the adopting parents, as well as other advantages. Thus, you invite our attention to the position taken in 1958 by the Child Welfare League of America, an organization representing both public and private agencies providing services to children, namely: "The agencies should expect adoptive applicants, insofar as they are able, to pay a fee for the services which it offers them." (Citing "Standards for Adoption Service," page 49.) We are further informed that while Arizona, by reason of an opinion of that state's Attorney General, prohibits any such charges; California, on the other hand, presently has permissive legislation authorizing the establishment of fees for adopting applicants to a maximum of \$300 for the cost of care of a child from the time of relinquishment until placement.

Moreover, it appears that some eight to ten years past, the State Welfare Department did charge adopting parents for the expenses involved in care of children prior to placement, including maternity costs. The funds thus derived were accepted under the provisions of NRS 422.250 and deposited in the Department's Gift Fund in the State Treasury, and used to pay expenses in connection with other unmarried mother cases. However, the practice, according to your advice, was gradually discontinued as the appropriations were increased to provide sufficiently for such need.

Under the contemplated policy, reimbursement would be expected from adopting parents to cover the average expenses involved in the birth of a child, that is, physician's services and hospitalization. This would amount to the sum of \$300 for an infant, or multiple placement of twins or triplets, and so forth. Payment would be reduced or waived if necessary, depending on the income or financial ability of the adopting parents to make payment.

The proposed requirements and conditions for payment would be as follows:

- a. The adopting parents shall sign an agreement at the time of placement, which agreement will provide for the payment plan.
- b. Should a child be removed before the consummation of the adoption, any and all payments made by the adopting parents shall be refunded.
- c. Full payment must be made before the Department will consent to the adoption.
- d. The payment plan may be amended or waived by the Department after agreement has been signed, if the changed circumstances of the adopting parents renders such payment impossible or unduly burdensome.

Request is made for review of the proposed policy, with our comments and advice on the legal aspects thereof, as well as any suggestions which we might have as to the contents of the agreement to be used in implementation of such policy.

QUESTION

May the State Welfare Department legally exact a charge from prospective adopting parents, which would be determined on the basis of reimbursement of the average amount involved and expended to cover physician's services and hospitalization in connection with the birth of a child?

CONCLUSION

No.

ANALYSIS

We have carefully reviewed the provisions of Chapters 127, 422, 423, and 425 of the Nevada Revised Statutes, and amendments thereto, and must conclude that there is no statutory authority for exacting the charge contemplated in the policy which the State Welfare Department has under consideration.

Notwithstanding the merits of the proposed policy, which are fully appreciated and may readily be conceded, existing applicable law provides no authority or power, either in the State Board of Welfare or the State Welfare Department, to require any payment of a charge by prospective adopting parents, such as that contemplated in the proposed policy.

NRS 422.140, relating to the State Board of Welfare's "Powers and duties in general," insofar as here pertinent, provides as follows:

1. The board shall have only such powers and duties as may be authorized by law.

NRS 422.180, relating to "State welfare director to serve as executive officer of department," insofar as here pertinent, provides as follows:

The state welfare director shall:

* * *

2. Administer all activities and services of the department in accordance with the policies, standards, rules and regulations established by the state welfare board.

NRS 422.240, relating to "State welfare fund: Legislative appropriations," insofar as here pertinent, provides as follows:

1. Funds to carry out the provisions of this chapter shall be provided by appropriation by the legislature from the general fund. The money so appropriated shall be deposited in a fund to be known as the state welfare fund in the state treasury.

NRS 422.250, relating to "State welfare gift fund: Acceptance of gifts, bequests by department," insofar as here pertinent, provides as follows:

1. The state welfare department is authorized to accept *gifts or bequests* of funds or property to the state welfare department or to the State of Nevada for welfare purposes. (Italics supplied.)

NRS 422.270, relating to "Powers and duties of state welfare department," insofar as here pertinent, provides as follows:

The state welfare department shall:

1. Administer all public welfare programs of this state, including * * * aid to dependent children, general assistance, child welfare services, and such other welfare activities and services as now are or hereafter may be authorized or provided for by the laws of this state and vested in the department.

* * *

8. Provide services and care to children, shall receive any child for placement, and shall provide for their care directly or through agents.

NRS 425.050, relating to "Application for assistance" under the Aid To Dependent Children Act, provides as follows:

Application on behalf of a child for assistance under this chapter shall be made to the department. The application shall be in writing or reduced to writing in the manner and upon the form prescribed by the department, and shall contain such information as may be required by the application form.

NRS 425.170, relating to "State funds for assistance: administrative expenses," insofar as here pertinent, provides as follows:

1. Funds for the state's participation in assistance to dependent children under this chapter *shall be provided by direct legislative appropriation from the general fund* * * *. (Italics supplied.)

Chapter 127 of Nevada Revised Statutes, relating to "Adoption," is lacking in any provision which would authorize the State Welfare Department to require prospective adopting parents to pay a fee for the care, maintenance, medical and surgical treatment and hospitalization of expectant mothers who are not financially able to pay for the same and for whom the prospective adopting parents have no legal responsibility. (See Attorney General's Opinion No. 872, dated February 20, 1950.)

The authority and power which both the State Board of Welfare or the State Welfare Department would be exercising under the proposed policy, if adopted, would clearly exceed the express powers conferred and vested upon them. Nor can such power be reasonably deemed to be necessary to carry out the objectives, or responsibilities or duties, statutorily imposed upon them. The charge which would be made can in no manner be construed as a "bequest or gift," and the law expressly indicates that the various programs administered by the State Welfare Department "** * ** shall be provided by appropriation by the legislature from the general fund."

In view of the foregoing, we conclude that the proposed charge to adopting parents under consideration can only be valid on the basis of permissive legislative amendment of present law.

Based upon such conclusion, we deem it to be unnecessary to extend this opinion by consideration and discussion of the additional administrative questions outlined in your inquiry.

We trust that clarification of the matter as herein given sufficiently answers your question and proves helpful.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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145. Welfare, State Department of. The transfer to the State Welfare Department of any funds designated for support of the State Children's Home in order to enable the Department to match and secure federal funds available for "child welfare services" held unauthorized and violative of legislative intent and express limitation on state funds appropriated and available for such program of State Welfare Department.

CARSON CITY, March 9, 1960.

MRS. BARBARA C. COUGHLAN, *Director, Nevada State Welfare Department, P. O. Box 1331, Reno, Nevada.*

STATEMENT OF FACTS

DEAR MRS. COUGHLAN: It is indicated that under the provisions of Title V, Part 3, of the Social Security Act, federal grant-in-aid funds, in the approximate amount of \$10,000 are available to this State for payment of Child Welfare Services, under specified conditions. These federal funds could be had provided there were state funds available on a matching basis in the ratio of \$2 of state money for each \$1 of federal funds, thus involving a requirement of a total of \$20,000 in state funds, which the State Welfare Department does not have.

If available, the combined federal and state funds would be utilized to finance a special project, calling for the review of the background and present circumstances of every child in the State Children's Home for the purpose of developing the best possible plan for each child's care and welfare. The costs of such project would involve salary and travel expenses of a highly-qualified social worker who would study the family relationships of each child, his school adjustment, payment for necessary psychological and psychiatric services, and other related expenses.

Unless matched by the State, the \$10,000 in federal funds will revert to the Federal Government on June 30, 1960, and no longer be available for Child Welfare Services in connection with said project in this State.

In view of the foregoing, we conclude that the proposed charge to adopting parents under consideration can only be valid on the basis of permissive legislative amendment of present law.

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Unless matched by the State, the \$10,000 in federal funds will revert to the Federal Government on June 30, 1960, and no longer be available for Child Welfare Services in connection with said project in this State.

QUESTION

May the required amount of matching state funds be taken from the legislative appropriation authorized for the State Children's Home, and the combined federal and state moneys thus made available, utilized for Child Welfare Services, and the project as outlined?

CONCLUSION

No.

ANALYSIS

NRS 422.270, relating to "Powers and duties of state welfare department," insofar as here pertinent, provides as follows:

The state welfare department shall:

1. Administer all public welfare programs of this state, including * * * aid to dependent children, general assistance, child welfare services, and such other welfare activities and services as now are or hereafter may be authorized or provided for by the laws of this state and vested in the department.
2. Act as the single state agency of the State of Nevada and its political subdivisions in the administration of any federal funds granted to the state to aid in the furtherance of any services and activities as set forth in subsection 1.
4. Conduct research, compile statistics on public welfare, determine welfare needs and make recommendations for meeting such needs.
5. Cooperate with the Federal Government in adopting state plans, and in all matters of mutual concern, including adoption of such methods of administration as may be found by the Federal Government to be necessary for the efficient operation of welfare programs.
8. Provide services and care to children, shall receive any child for placement, and shall provide for their care directly or through agents.
9. Cooperate and advise with the state welfare board and the superintendent of the Nevada state children's home in such matters as may be referred to the state welfare department by the state welfare board or the superintendent of the Nevada state children's home.

NRS 422.060, relating to "State welfare department: Creation; composition," provides as follows:

1. There is hereby created the state welfare department in which shall be vested the administration of the provisions of this chapter.
2. The state welfare department shall consist of:
 - (a) The state welfare board.
 - (b) The state welfare director.
 - (c) Such officers and employees as the director, with the approval of the board, may appoint.

NRS 422.140, relating to "Powers and duties in general," insofar as here pertinent, provides as follows:

1. The board shall have only such powers and duties as may be authorized by law.

3. The board shall:

(b) Formulate policies and establish rules and regulations for administration of the programs for which the department is responsible.

NRS 422.240, relating to "State welfare fund: Legislative appropriations," provides as follows:

1. *Funds to carry out the provisions of this chapter shall be provided by appropriation by the legislature from the general fund * * *.*

2. *Disbursements for the purposes of this chapter shall be made upon claims duly filed, audited and allowed in the same manner as other moneys in the state treasury are disbursed. (Italics supplied.)*

NRS 423.030, pertaining to the Nevada State Children's Home, constitutes a "Declaration of legislative intention" that said Home shall be deemed an agency of the State Welfare Board on an equal basis with the old-age assistance and child welfare divisions; provides that the Superintendent of the Children's Home and the State Welfare Director shall coordinate their work through the State Welfare Board; and is declarative of legislative desire that the cooperative efforts of the two agencies will operate to the benefit of the state's public welfare.

NRS 423.040 provides that the State Welfare Board shall be the policymaking board of the Nevada State Children's Home.

NRS 423.080 establishes the State Children's Home Fund, and provides that all accounts and demands against the Home shall be examined and approved by the Superintendent and submitted by him to the State Board of Examiners for allowance.

Section 35, Chapter 433, 1959 Statutes of Nevada, enumerates the various appropriations for the various activities and programs of the State Welfare Department; the sum of \$10,000 is therein appropriated for "Child welfare services."

Section 36 of said Appropriation Act relates to the Nevada State Children's Home, and shows the sum of \$161,340 authorized "For the support of the Nevada state children's home."

Section 19, Article IV, Nevada Constitution, provides as follows:

No money shall be drawn from the treasury but in consequence of appropriations made by law.

NRS 353.255, relating to "Appropriations to be specifically applied; penalty," insofar as here pertinent, provides as follows:

1. The sums appropriated for the various branches of expenditure in the public service of the state shall be applied solely to the objects for which they are respectively made, and for no others.

The proposed project here under consideration is concededly and clearly one which is concerned with child welfare services, an area for which the Legislature saw fit to provide an appropriation of \$10,000.

While it is undoubtedly true that the State Children's Home also provides child welfare services, these are fundamentally incidental to the maintenance of said Home for children. The legislative appropriation for the Home is for its support and maintenance, and cannot reasonably be construed to authorize the Superintendent to approve a diversion of such funds to the State Welfare Department for the latter's use in matching funds for a federal grant-in-aid.

Nor is the State Board of Welfare, which is the *policymaking* body of both the State Welfare Department and the Nevada State Children's Home, empowered to countermand express legislative appropriations as authorized for the various programs of the two concerned agencies.

In brief, the Legislature saw fit to appropriate the sum of \$10,000 for "child welfare services." The transfer of funds from the appropriation made for the State Children's Home would increase funds for said "child welfare services" to \$30,000. If such increase could not properly be effected by diversion of the required sum from moneys appropriated by the Legislature for another program of the State Welfare Department (e.g., old-age assistance), then it certainly cannot be effected through diversion from the appropriated funds of a *separate*, even if closely-allied, agency.

The additional state funds required to match and secure the available federal grant-in-aid for "child welfare services" were either not budgeted or not legislatively appropriated. State officials, boards, and commissions are absolutely prohibited by state law from paying out funds unless expressly appropriated by the Legislature for the purpose for which they are expended; and a severe penalty is imposed for violation of such law. (NRS 353.255(2); 353.260(5); A.G.O. No. 52, August 31, 1931; A.G.O. No. 137, June 2, 1934.)

In our considered opinion, the desired transfer and use of State Children's Home funds for "child welfare services" would clearly be violative of legislative intent, no matter how well-intentioned the motives. It is settled law that an act which may not legally be done directly may not be legally done indirectly. (*El Claro Oil etc. Co. v. Daugherty*, 11 Cal.App.2d 274, 281.)

We trust that the foregoing sufficiently clarifies and answers your inquiry.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

146. Architecture, State Board of. State Planning Board review and written approval of plans for specified public construction projects, and assessment of charges for Board services necessarily entailed held valid and justified in the public interest, even though such requirement may entail some duplication in services and increased costs. State Planning Board has in effect a limited appeal procedure for review and consideration of differences between architects and engineers originally preparing plans for specified public works and Board consultant structural plan checkers. Constitutional rights of Board of Regents to govern University of Nevada held exclusive of such rights in any other governmental department except as constitutionally authorized.

CARSON CITY, March 21, 1960.

MR. ELMO C. BRUNER, *Chairman, State Board of Architecture of Nevada, 1420 Las Vegas Boulevard South, Las Vegas, Nevada.*

STATEMENT OF FACTS

DEAR MR. BRUNER: Request is made for our opinion concerning the import or legislative intent and application of certain statutory provisions requiring duplication of architectural and/or engineering services, and expenditure of public money.

In consequence of present interpretation of certain statutory provisions, it is indicated that the State Planning Board, through use of licensed consultant architects and engineers, claims the authority and power to exercise control over approval of plans and specifications originally prepared for certain legally-specified public construction projects by licensed architects and engineers, and makes assessment of charges to cover the costs of such consultant services. It is further indicated that in given situations architectural or engineering problems may be susceptible to alternative solutions, all equally correct and consistent with good practice, and in compliance with building code requirements, and that the judgments of the Board's consultants are not necessarily supported by their greater technical qualifications, or in any way superior to those of the architects or engineers who originally prepared the plans and specifications being reviewed, so as to warrant preferential and conclusive acceptance.

It is further noted that the problem of alleged unnecessary duplication of work and increased costs is further accentuated by the additional and similar processing generally also required by building departments, either at county or city levels.

QUESTIONS

1. Has the State Planning Board the legal authority to engage the consultant services of licensed architects and/or engineers for review of plans and specifications originally prepared by licensed architects and/or engineers, whose technical qualifications may, in fact, be at least equal to those of the Board's consultants with respect to certain legally-specified public construction projects?

2. Where differences of opinion arise between the Board's consultants and the architects and/or engineers who originally prepared the

plans and specifications, respecting equally valid and technically proper alternative solutions, is there any appeal from the decision or judgment of the Board's consultants?

3. Does the Act establishing the State Planning Board, its jurisdiction, authority and powers supersede Nevada constitutional provisions relating to the establishment of the University of Nevada, and the jurisdiction and powers of the University's Board of Regents?

4. Inasmuch as a licensed architect or engineer is presumed to be qualified and familiar with the requirements of building codes, does the law intend that taxpayers should be put to the expense necessarily entailed in connection with the duplication and triplication of service costs for the review of plans, specifications, and contract documents?

CONCLUSIONS

- To question No. 1: As qualified herein: yes.
To question No. 2: Yes.
To question No. 3: Except as specifically qualified: no.
To question No. 4: As qualified herein: yes.

ANALYSIS

We deem it proper to note and emphasize that the scope of the problem is confined to certain legally-specified *public* construction projects.

Thus, NRS 341.150, relating to "Engineering and architectural services: Costs; powers of board," provides as follows:

1. The state planning board *shall* furnish engineering and architectural services to all state departments, boards or commissions charged with the construction of any *state building, the money for which is appropriated by the legislature*. All such departments, boards or commissions *are required and authorized to use such services*.

2. The services shall consist of:

- (a) Preliminary planning.
- (b) Designing.
- (c) Estimating of costs.
- (d) Preparation of detailed plans and specifications.

The board *may* submit preliminary plans or designs to qualified architects or engineers for preparation of detailed plans and specifications if the board deems such action desirable. The cost of preparation of preliminary plans or designs, the cost of detailed plans and specifications, and the cost of all architectural and engineering services shall be charges against the *appropriations made by the legislature* for any and all state buildings or projects, or buildings or projects planned or contemplated by any state agency *for which the legislature has appropriated or may appropriate funds*. The costs shall not exceed the limitations that are or may be provided by the legislature.

3. The board *shall*:

- (a) Have final authority for approval as to architecture of all buildings, plans, designs, types of construction, major repairs and designs of landscaping.

(b) Solicit bids for and let all contracts for new construction or major repairs to the lowest qualified bidder.

(c) After the contract is let, have supervision and inspection of construction or major repairs. The cost of supervision and inspection shall be a charge against the appropriation or appropriations made by the legislature for the building or buildings. (*Italics supplied.*)

NRS 341.160, relating to "Reports, recommendations of board: Priority of construction," provides as follows:

The board shall submit reports and make recommendations relative to its findings to the governor and to the legislature. The board shall particularly recommend to the governor and to the legislature the priority of construction of any and all buildings or other construction work now authorized or that may hereafter be authorized or proposed.

NRS 341.180, relating to "Cooperation with state agencies, local planning commissions," provides as follows:

The board *shall*:

1. Cooperate with other departments and agencies of the state in their planning efforts.

2. Advise and cooperate with municipal, county and other local planning commissions within the state for the purpose of promoting coordination between the state and the local plans and developments. (*Italics supplied.*)

NRS 393.110, relating to "Approval of plans for school buildings," provides:

1. Before letting any contract or contracts for the erection of any new school building, the board of trustees of a school district *shall submit plans therefor to and obtain the written approval of the plans by the state planning board. The state planning board is authorized to charge and collect,* and the board of trustees is authorized to pay, *a reasonable fee for the payment of any costs incurred by the state planning board in securing the approval of qualified architects or engineers of the plans submitted by the board of trustees in compliance with the provisions of this subsection.* (*Italics supplied.*)

2. Before letting any contract or contracts totaling more than \$5,000 for any addition to or alteration of an existing school building, the board of trustees of a school district shall submit plans therefor to and obtain the written approval of the plans by the state planning board. The state planning board is authorized to charge and collect, and the board of trustees is authorized to pay, a reasonable fee for the payment of any costs incurred by the state planning board in securing the approval of qualified architects or engineers of the plans submitted by the board of trustees in compliance with the provisions of this subsection.

3. No contract for any of the purposes specified in subsections 1 and 2 made by a board of trustees of a school district contrary

to the provisions of this section is valid, nor shall any public money be paid for erecting, adding to or altering any school building in contravention of this section.

In respect of state buildings and construction projects undertaken by school districts, therefore, the above provisions of law are definite and clear that the State Planning Board shall review and approve the plans and specifications prepared therefor, engaging the services of qualified architects and engineers as deemed necessary for structural plan checking, and making authorized charges for the costs so entailed. Such is the indisputable import and intent of the law, and the legislative policy embodied therein is not violative of any constitutional prohibition of which we have any knowledge. (A.G.O. No. 161, April 10, 1952.)

We understand that the State Planning Board makes no charges in excess of those actually incurred for such consultant technical services.

Fundamentally, the questions raised with respect to this matter are questions relating to legislative policy and the necessity or wisdom of the requirements imposed thereby. While unnecessary duplication of work and expense thereby resulting may be open to question and criticism, it is suggested that it must first be established that the duplication of work and expense are, in fact, "unnecessary," or that such "duplication" and expense cannot be justified, in any event, on other grounds.

The foregoing observation would appear to be warranted in our consideration of the matter here involved, since the Legislature may reasonably be presumed as legitimately concerned with the type of construction effected in connection with public works or buildings, and whether or not legislative appropriations therefor are expended in a manner to secure proper value both in services and materials.

In essence there is involved nothing more than a system of "checks and balances," for the protection of the public interest.

The functions and responsibilities of the State Planning Board, as presumably conceived and intended by the State Legislature make possible the utilization of the specialized experience of said Board in respect of all aspects of construction work so as to secure possible standardization, more effective controls, and, under some circumstances, even savings in costs in connection with public works. Thus, some degree of standardization in connection with the construction of state office buildings, as well as school buildings, would appear not only to be possible but might even be desirable. At least generally, standardization is recognized as rendering more feasible savings and economy.

Another important aspect of the matter is the practical one that the officials of using state agencies or school districts generally are inexperienced and unversed in the highly technical requirements involved in, and connected with, the designing or planning and construction of a building, and therefore unable to evaluate and appraise adequately or properly, the recommendations of architects or engineers retained for such purposes. Nor are they in any position to assess the propriety of the estimated costs established for a construction project. In such circumstances, it certainly would appear to be good sense to utilize the specialized experience of an agency such as the State Planning Board in such matters. That such Board services may somewhat increase the

costs of the project does not mean that such services are "unnecessary" or a "duplication" of services.

After all, the services rendered by a licensed architect or engineer are not exclusively concerned with the protection of the public interest; in some measure at least, and quite properly of course, an architect or engineer will naturally be concerned with the promotion of his own interests, and to such extent conflict in interest must be assumed. Even if some increase in costs is entailed thereby, therefore, the State Legislature cannot be said to have acted unreasonably or unwisely in establishing the State Planning Board and conferring upon it the requisite powers for better protection of the public interest.

Our foregoing observations should not be construed as any reflection on either the professional qualifications or the integrity of licensed architects or engineers who may be concerned with the preparation of plans and specifications for the specified types of public construction projects which are subject to review and approval of the State Planning Board.

We merely desire to indicate that it is presently both general and well-settled public policy not to entrust concern and protection of the public interest *exclusively to any professional group*. As a state public agency, the State Planning Board (subject to legislative supervision, control and regulation) must be deemed a more responsive and proper instrumentality or protector of the general public interest. (See generally, Attorney General Opinion No. 108, dated October 28, 1959, addressed to the State Board of Architecture of Nevada.)

We also desire to note that the law contemplates that the State Planning Board shall render the enumerated services to state agencies and school districts, and not to the architects or engineers engaged by them for the planning and designing of the specified public construction projects. This is true unless otherwise expressly provided in legislative enactments. The architects or engineers are not in privity with said Planning Board, and the Board has no jurisdiction or control over them except as expressly authorized by the Legislature, or a using agency which chooses to rely upon its specialized and greater experience and expressly empowers the Board to act on its behalf with the architect or engineer. In such instances the Board is actually in the legal position of an agent representing the interests of the owner, here the using agency or school district, in negotiations with the architect or engineer. And, the Board's decision, if adopted, is legally the decision of the using agency or school district, countermanding the recommendation of the architect or engineer, engaged for the rendition and performance of other services.

While the submission to, and approval of plans by the State Planning Board may be required, there is no legal requirement that the University of Nevada, a using state agency, or a school district should submit or accede to any unreasonable, arbitrary, or illegal action on the part of the State Planning Board.

Regarding the review of plans and specifications by building departments at county or city levels, it may suffice to note (1) that the respective interests and responsibilities of the State Planning Board and said

building departments are not necessarily identical; (2) that such building departments do not (at least usually) have on their staffs technically qualified and registered structural engineers or licensed architects capable of satisfactorily rendering the services with which the State Planning Board has been charged by the Legislature; and (3) that the building codes adhered to in counties and cities generally provide for waiver of technical review of plans and specifications submitted for public buildings by licensed or registered architects and engineers, if, and when, said plans and specifications have been technically reviewed and approved by the State Planning Board.

Concerning possible appeal from the judgment or decision of the State Planning Board's plan checkers, we are advised that the Planning Board does allow such appeals to it, either by letter or by personal appearance at a hearing before the Board. We have been further advised that, *unless violative of building code requirements and regulations*, variances from the judgment or decision of the Board's plan checkers are generally, and with but few exceptions, granted and approved as a matter of Board policy. Such administrative remedial procedures, as far as they permit, do certainly provide some regulatory measure of control over prejudicial or arbitrary action, judgments or decisions of the Board's consultant structural plan checkers.

That there may be room for improvement in the Board's appeal procedure might be conceded. An advisory committee, comprised of outstanding architects and engineers, and qualified representatives of the construction industry, suggests itself as a possible means of further achieving greater impartiality and objectivity where legitimate differences of opinion do arise. Such an advisory committee, as its name suggests, could only function to assist the Board in arriving at a final decision. The Board, as legislatively-intended, should still have authority, power, and responsibility for final decisions. In the final analysis, in administrative matters requiring the exercise of judgment and discretion, even where legitimate differences of opinion may exist, a decision must be made, and responsibility for such decision should be definitely fixed.

Presumptively, because of the fact that such administrative decisions do involve the exercise of judgment and discretion, there is little likelihood that the courts would disturb any determination of the State Planning Board, unless patently arbitrary or wholly unsupported in fact. However, remedial action or relief by the Legislature does remain available.

As a final and significant observation on this aspect of the matter, we might note that Assembly Bill 99, which would have exempted school districts whose plans to erect or alter school buildings are approved by city or county engineers from obtaining the approval of the State Planning Board, failed of enactment by the Legislature in the session that recently came to a close.

Presumably, such failure implies legislative recognition of the continued need of the services performed by the State Planning Board, and may also be considered evidence of the Legislature's confidence in

the record of performance of the Board in the various matters for which it has been made responsible.

There is left for final consideration the respective rights of the State Planning Board and the Board of Regents of the University of Nevada. It would unduly extend this opinion to include an exhaustive or detailed analysis of the constitutional question involved in connection with the exercise of such rights and powers of these two Boards.

We are, of course, aware of the constitutional provisions relating to the University and the Board of Regents. (Nev. Const., Art. XI, Sections 4-9.) The Nevada Supreme Court has thoroughly analyzed such provisions with respect to legislative encroachment of the jurisdiction and powers of the University and its Board of Regents in the case of *King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221 (1948). The following excerpts, taken from the syllabus of that case, may prove helpful on this particular point:

State constitution is limitation of law-making power and legislature is supreme in its field of making the law so long as it does not contravene some expressed or necessarily implied constitutional limitation.

Matters of policy, convenience, right, justice, hardship, or questions of whether legislation is good or bad are solely matters for consideration of the legislature and not of the courts.

Courts must proceed with the greatest of caution before declaring a statute unconstitutional.

Every presumption is in favor of constitutionality of statute and every doubt must be resolved in its favor.

In construing statute, court must give words such reasonable construction as would carry out intent of the legislature, if possible.

Under constitution authorizing legislature to establish state university to be controlled by board of regents whose duties should be prescribed by law, right of regents to control university, in their constitutional, executive and administrative capacity is exclusive of such right in any other department of the government *save only the right of legislature to prescribe duties and other well-recognized legislative rights.* (Italics supplied.)

Article XI, Section 6 of the Nevada Constitution provides, among other matters, that the Legislature shall make provision for the maintenance and support of the University by direct legislative appropriation from the general fund, upon presentation of a budget in the manner required by law. Certainly, the Legislature, charged with the appropriation and expenditure of public funds, may, short of clear contravention of express constitutional prohibition, regulate and control both the amount of any funds for the University's support, and attach reasonable conditions and safeguards over expenditures by the University, in the public interest. This does not mean that the Legislature may constitutionally enact a law which would effect an encroachment upon, or a usurpation of, the constitutional rights and powers of the Board of Regents, the governing body of the University.

In the question before us there is subsumed a situation involving the balance of the public interest as dependent upon the exercise of functions and powers on the part of the University and the Board of Regents, and the public interest as dependent upon the exercise of functions and powers on the part of the Legislature, as delegated to a state agency. Both functions and powers of the Board of Regents and the Legislature are grounded in the State Constitution, which defines and limits them in general terms.

The optimum situation would, of course, be one where complete agreement obtained when these constitutionally-established jurisdictions overlapped. Concededly, differences and conflicts must inevitably arise. Adjustment and compromise of such differences and conflicts are not only conceivable but compelled by paramount public interest and welfare. Fortunately, only in a few and exceptional instances, do negotiation and compromise fail, necessitating resort to judicial determination of the constitutional question involved.

In such extreme eventuality, however, it is significant to note that the constitutional question is decided not abstractly, but on the basis of the particular facts or circumstances involved, and the conclusiveness of the judicial determination is confined to the particular, or closely-analogous, facts before the court in said case. It is not to be presumed (as here pertinent) that the concern of the Legislature for the public interest is inconsistent with, or in any way less than, similar concern of the University and the Board of Regents for the public interest. The contrary, of course, is equally untrue. In point of actual fact, it must be presumed that both the Legislature and the Board of Regents, in their respective jurisdictions and functions, are equally responsive to public need and equally responsible to the general public for performance of services and action appropriate to the protection and advancement of the public welfare.

We further suggest that *legislative* "checks and balances" on the use and expenditure of public funds by the University of Nevada, *per se*, do not necessarily constitute an exceeding of the Legislature's constitutional powers, nor need they be violative of the University's or the Board of Regent's constitutional guarantees.

Whether the State Planning Board, in exercise of legislatively-conferred powers, violates constitutional provisions affecting the University and its Board of Regents, would have to be determined on the basis of the particular facts in any given situation, and not on the basis of generalities. (See Attorney General Opinion No. 290, dated July 23, 1957.)

We trust that our foregoing observations sufficiently clarify the problem and indicate the basis for the various conclusions given by us to the questions which have been submitted. We further trust that they may be helpful in resolving any differences presently existing to the end that the public interest and welfare may be advanced.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

147. Net Proceeds of Mines—Nevada Tax Commission. Contract between owner and contractor whereby contractor mines and stockpiles ore for a specific amount per ton mined is not a lease. Owner may claim sums paid to contractor as actual cost of extracting ore.

CARSON CITY, March 22, 1960.

MR. RICHARD C. YATES, *Chief Auditor, Nevada Tax Commission, Carson City, Nevada.*

STATEMENT OF FACTS

DEAR MR. YATES: The Nevada Iron Ore, Inc., a Nevada corporation, engaged in the mining of iron ore from its own property and as lessor of properties in Nevada has entered into a contract with a contractor for the mining of its ore by such contractor.

Briefly, the terms of the contract require the contractor to mine the ore of a specified grade and transport the same to a stockpile as directed by the company. The contractor is required to mine the ore, using good and miner-like methods, and shall furnish all equipment, material and labor necessary therefor. The contractor shall also, at his own expense, obtain and carry public liability and property damage insurance on all equipment, and also obtain and carry Nevada Industrial Insurance on himself and all employees. The contractor also covenants that he will comply with all laws of the United States, the State of Nevada or any political subdivision relating to mining or otherwise.

The company agreed to pay the contractor a fixed sum, \$5.40 per short ton of ore mined, weighed and transported to the company stockpile.

The company, in filing its statement of gross yield of the mine under the contract, claimed as a deduction from the gross yield all of the payments made to the contractor. The company claimed no additional deductions over and above expenditures made by the contractor in accordance with the provisions of the contract. The company did claim additional cost to it outside of the contract, i.e., for transportation for, and cost of reduction of the ore.

QUESTION

Do the terms of the above contract constitute, in effect, the contractor a lessee or such operator of the mining property required by law to file with the Tax Commission a statement showing the actual cost of his operations thereafter claimed by the owner as deductions from the gross yield by the mine?

CONCLUSION

No.

ANALYSIS

The terms of the contract do not, in our opinion, create the relationship of lessor and lessee of mining property as usually follows the execution of leasing of such property whereby the remuneration of the lessee flows from royalties from the proceeds of the ore mined, and where the payment of royalties by the lessee to the lessor constitutes a

deductible item from the gross yield of the lessee. The contract herein provides for the work and labor only of the contractor in the mining of the ore and delivery thereof to a certain stockpile of the owner and in so doing incurs the necessary cost of the production of the ore, which expenses and remuneration of the contractor for his work are covered by the price contracted per ton of ore so produced. The execution of and operation under such contract does not of itself require that the contractor render a report to the Tax Commission.

The Tax Commission is vested by law with broad powers relative to the taxation of net proceeds of mines, and particularly so if such proceeds are believed to be escaping taxation. In the exercise of such power, the Commission may examine the books and records of any person necessary for a proper determination of any question relative thereto. NRS 360.230, 362.200. Also, in this connection, the Commission is empowered to not only examine books and records of any person when deemed necessary, but may hold hearings and examine witnesses, all for the purpose of arriving at the true net proceeds (NRS 362.200). In brief, the Commission is the judge of the validity and sufficiency of the statement and report of the mine owner or person returning such statement or report.

It is, therefore, our opinion that the owner (company in above contract) may contract the work and labor of producing the ore, and use the contract terms as the actual cost of extracting the ore in its statement.

The Commission, in its discretion, may accept or reject such statement if it determines it does not comply with the terms of the Net Proceeds of Mines Tax Act, particularly NRS 362.120.

The Commission, in its discretion, may require of the owner (company) further information.

The Commission is empowered, in its discretion, to require the "contractor" to file a statement covering the period of time and the property, the subject of the owner's (company's) statement.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General.*

By W. T. MATHEWS, *Special Deputy Attorney General.*

148. (See Opinion No. 150, March 30, 1960.) Welfare, State Department of. Budget Director. Applicable federal and state laws construed as prohibiting application of federal funds available for child welfare services in supplementation solely of State's share of nonfederal costs thereof, and to exclusion of any rights of counties to specific benefit and share therein. Statutory rules of construction applied to provisions of A. B. 255 (Chapter 173, 1960 Statutes of Nevada), containing apparent conflicts in requirements, to establish legislative intent that counties hereafter shall make payments of 33-1/3 percent of nonfederal share of all maintenance expenses in specified child welfare services.

CARSON CITY, March 23, 1960.

MRS. BARBARA C. COUGHLAN, *Director, Nevada State Welfare Department, P. O. Box 1331, Reno, Nevada.*

STATEMENT OF FACTS

DEAR MRS. COUGHLAN: Certain budgetary questions have arisen concerning the construction of Assembly Bill 255, enacted by the 1960 Nevada Legislature and approved by the Governor on March 14, 1960, with immediate effect. (Chapter 173, 1960 Statutes of Nevada.)

It is indicated that state funds for the Department's program for Foster Home Care for Children are rendered insufficient for the last quarter of 1959-1960 because of the provisions of A. B. 255. A substantial amount of money to supplement state funds for this program might be available from federal sources to the extent of \$10,000, under the Social Security Act, Title 42, Section 721 et seq., as amended, Federal Code Annotated, p. 156 and 1960 Cumulative Supplement, pp. 35-37.

The federal funds indicated would be available between the dates of April 1 to June 30, 1960 only. It is not anticipated that any federal funds (certainly no comparable sum) will be forthcoming or available in future quarters. No federal subventions were budgeted for 1960-1961 at all for the Department's Foster Home Care for Children program. (Executive Budget for 1960-1961, p. 106.)

The Department's caseload estimate for this program for the quarterly period remaining in the 1959-1960 fiscal year, as affected by the provisions of A. B. 255, may be reflected as follows:

TABLE NO. I

	Monthly average per child	Quarterly total
Total	\$76.00	\$20,140
State*	51.00	13,515
County	25.00	6,625

*Includes \$10,000 from federal source, and \$1.00 average per child for special services.

TABLE NO. II

	Monthly average per child	Quarterly total
Total.....	\$76.00	\$11,323
"Federal Share"*.....	37.74	5,623
Nonfederal Share.....	38.26	5,700
State.....	25.51	3,800
County.....	12.75	1,900

*Includes \$1.00 average per child per month for special services, and only \$5,623 of the \$10,000 in federal funds which could be utilized for the indicated program; the remaining \$4,377 would revert to the State General Fund, as "earned" by expenditure of state funds for said program.

Table No. "I" shows that the sum of \$20,140 is the estimated quarterly requirement for the program, and that funds therefor would be sufficient if the \$10,000 available from federal sources were construed under A. B. 255 in supplementation of state funds.

Table No. "II," on the other hand, shows that if said \$10,000 is construed under the provisions of A. B. 255 as "federal share," then instead of being able to provide for an estimated 265 children, the Department could only service 149 children, since the balance of state funds on April 1, 1960, will only be \$3,800 which, through supplementation of \$1,900 on the part of the counties, would aggregate \$5,700. This aggregate sum of \$5,700 would render the State eligible for federal aid or assistance to the extent of \$5,623 more ("federal share"), for the indicated total of \$11,323, or an estimated deficit to June 30, 1960 of \$8,817 in connection with this program.

The foregoing facts sufficiently indicate the basis of the first question, hereinafter stated, submitted for our opinion and advice.

The second question, hereinafter stated, arises from apparent conflicts of language as contained in Sections 5 and 7 of A. B. 255, and our advice and opinion as to legislative intent and construction of said provisions, and the interpretation to be given thereto.

QUESTIONS

1. Is there any prohibition in either federal or state law legally preventing the application of federal funds available under the Social Security Act in supplementation of state funds?
2. Must Section 5, subsection 1 of A. B. 255 be interpreted as referring to a county payment of $33\frac{1}{3}$ percent of the nonfederal share of all expenses for "maintenance" for foster home care for children, as defined in the law?

CONCLUSIONS

- To question No. 1: Yes.
To question No. 2: Yes.

ANALYSIS

Section 5, subsection 1, of A. B. 255 provides as follows:

In the case of placement of a child under the provisions of paragraph (c) of subsection 1 of section 3 of this act, 100 percent of the *nonfederal* share of all expenses for special services, and 66 $\frac{2}{3}$ percent of the *nonfederal* share of all expenses for maintenance, shall be paid from moneys which may be provided to the department by direct legislative appropriation. Thirty-three and one-third percent of *all expenses for maintenance* shall be paid by the county from which the child was placed. (Italics supplied.)

Paragraph (c) of subsection 1 of Section 3 of the Act (A. B. 255), referred to above, provides as follows:

The department is hereby authorized and empowered:

1. To provide maintenance and special services to:

(c) Children who are placed by court order in the custody of the department, and who are placed in foster homes or group care facilities.

Section 7, subsection 2 of the Act (A. B. 255), provides as follows:

The proceeds of such tax so collected shall be placed in the indigent fund in the county treasury, out of which the county treasurer shall transmit to the state treasurer monthly or quarterly, at the time required by the rules and regulations of the department, the full amount necessary to pay *33 $\frac{1}{3}$ percent of the nonfederal share of payments for the expenses provided for in section 5 of this act, incurred by that county*, and as certified to him by the county clerk of that county. (Italics supplied.)

The foregoing provisions of A. B. 255 clearly and definitely fix both state and county responsibility and obligation in terms of the percentages *which each shall contribute to the "nonfederal" share of the costs of the program*, namely, two-thirds for the State, and one-third for the counties. This means that the costs to the State and counties will be such amounts as determined *after* deduction of available "federal" funds from the actual costs of the program, with the State then to pay two-thirds, and the counties one-third, of the *nonfederal* costs.

Since federal aid is only made available on the basis of an acceptable state program, it might reasonably be argued that federal funds, when available, should be considered in supplementation of *state* funds, with the counties also deriving benefit through reduction in the aggregate costs of the welfare program. In other words, more specific apportionment of federal funds as between State and counties for determination of their respective shares of the costs in each county is not *expressly* required by the provisions of A. B. 255, if considered alone and without reference to the Social Security Act, under which federal funds are made available.

However, since A. B. 255 provides for apportionment of costs on the basis of a formula expressly predicated on available "federal" and

"nonfederal" funds, reference to the conditions or limitations regulating apportionment or allocation of "federal" funds, as contained in the Social Security Act, is necessarily required.

As amended in 1958, Section 723 of the Social Security Act, entitled "Payment to States," provides as follows:

(a) From the sums appropriated therefor and the allotments available under this part * * * the Secretary shall from time to time pay to each State with a plan for child-welfare services developed as provided in this part * * * an amount equal to the federal share * * * as determined under section 524 (section 724 of this title) of the total sum expended under such plan (including the cost of administration of the plan) *in meeting the costs of district, county, or other local child-welfare services,* * * * . (Italics supplied.)

(b) The method of computing and paying such amounts shall be as follows:

(1) The Secretary shall, prior to the beginning of each period for which a payment is to be made, estimate the amount to be paid to the State for such period under the provisions of subsection (a).

(2) From the allotment available therefor, the Secretary shall pay the amount estimated, reduced or increased, as the case may be, by any sum (not previously adjusted under this section) by which he finds that his estimate of the amount to be paid the State for any prior period under this section was greater or less than the amount which should have been paid thereunder to the State for such prior period. (Aug. 14, 1935, c. 531, Title V. Sect. 523, as added Aug. 28, 1958, P.L. 85-840, Title VI, Sect. 601, 72 Stat. 1052.)

We consider the foregoing provisions of *federal* law clearly determinative of the question before us.

Manifestly, the costs of the child-welfare program will vary in the different counties. Section 723(a) of the Social Security Act (above) *expressly* stipulates that federal funds, when available and allotted to the states, shall be applied to "** * * meeting the costs of district, county, or other local child-welfare services.*" It is true that payment of federal funds to the states are made in advance on the basis of estimated needs for the period involved, but they are adjusted, either upward or downward, through increase or reduction in the amount granted in subsequent periods, to accord with the amount which a state "earned," or was entitled to, on the basis of actual caseload or child-welfare services rendered, not only by the state as a whole, but also *by each of the counties.*

Such conclusion is inescapable since the above-cited federal provision does not allocate available federal funds to the state share alone of the program costs in any given county, but applies equally to the county's share.

Although we are cognizant of state legislative intent (as reflected in the Executive Budget and A. B. 255) that the benefit contemplated for counties was provided in reduction of their proportionate share of the costs of child-welfare services to one-third from the previous two-thirds share which they were required to pay, in both cases, such ratios were expressly related to the nonfederal costs involved. There was no express waiver by the counties of the benefits to which they were eligible under federal law (Social Security Act), nor would any such waiver (even if it had been made) be effective and valid in view of said federal law.

Notwithstanding the effect upon the statewide program because of insufficient state funds appropriated therefor, and the relative difficulty in accounting thereby entailed, we are compelled to the conclusion that *federal* law (Social Security Act) requires specific apportionment of federal funds available to the costs of child-welfare services in each of the counties of the State and with both State and counties participating in such federal funds.

The foregoing analysis is submitted in support of our affirmative conclusion that there exists a legal prohibition (in federal law) to application of any available federal funds in supplementation of state funds only for the child-welfare services indicated.

The answer to the second question submitted is generally contained in our foregoing analysis.

It is our considered opinion, based upon what we conceive to be legislative intent and reasonable construction of the provisions of A. B. 255, that county payments for "maintenance" for foster home care for children shall consist of *33⅓ percent of the nonfederal share of all expenses for "maintenance" involved in such child-welfare services.* Though undoubtedly somewhat inconsistent with the provisions of the first sentence of paragraph "1" of Section 5 of A. B. 255, the second and last sentence in said paragraph is definitely governed by, and dependent upon, said first sentence, both with respect to context and meaning. This conclusion is confirmed by the provisions of paragraph 2 of Section 7, appearing later in the Act, where the respective shares of the costs for State and counties are unambiguously fixed in relation to the "nonfederal" share of the costs or share of expenses for the indicated child-welfare services.

Any other construction would result in a requirement of more money than the estimated actual costs involved, with the counties contributing more than their proportionate share as legislatively intended. The following hypothetical example will graphically illustrate such result:

Total monthly average	
cost per child	\$100.00
"Federal share"	10.00
"Nonfederal" share	90.00
State share (two-thirds)	60.00
County share	
(one-third of "all expenses") ..	33.33⅓ (one-third of \$100.00)

Adding "federal" share (\$10.00), state share (\$60.00), and "county share" (\$33.33⅓), we secure a sum of \$103.33⅓, or \$3.33⅓ more than the assumed total average cost per child.

Such a result cannot be attributed to the Legislature, either as expressly intended or reasonably implied or inferred, on the basis of all the provisions of the Act, and its apparent objective, as therein expressed.

We trust that our foregoing analysis suffices in clarification and resolution of the budgetary questions and problem posed by A. B. 255, herein considered.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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149. Fire Protection Districts, County. The North Tahoe Fire Protection District is not a "public employer" within the meaning of the Public Employees Retirement Act. Its employees not eligible for membership.

CARSON CITY, March 25, 1960.

HONORABLE KENNETH BUCK, *Executive Secretary, Public Employees Retirement Board, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR MR. BUCK: The North Tahoe Fire Protection District of Crystal Bay, Nevada, was organized under the provisions of Chapter 474 NRS. It obtains its funds for operation as provided by Sections 474.190, 474.200, and 474.210 NRS. The funds of the district are audited and paid through the offices of Auditor and Treasurer of Washoe County.

QUESTION

Does the North Tahoe Fire Protection District of Crystal Bay, Nevada, qualify under the law as a "public employer" within the meaning of the Public Employees Retirement Act?

CONCLUSION

We have reached the conclusion that the question must be answered in the negative.

ANALYSIS

As previously stated the North Tahoe Fire Protection District was organized under the provisions of NRS 474.010-474.120. The district is governed by a Board of Directors, selected and empowered as provided in NRS 474.130-474.180. It obtains its funds to defray the costs of operation as provided in NRS 474.190-474.210. Under the provisions of NRS 474.160, subsection 6, it is provided:

The board of directors shall have the power to and it shall:

* * *

Such a result cannot be attributed to the Legislature, either as expressly intended or reasonably implied or inferred, on the basis of all the provisions of the Act, and its apparent objective, as therein expressed.

We trust that our foregoing analysis suffices in clarification and resolution of the budgetary questions and problem posed by A. B. 255, herein considered.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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HONORABLE KENNETH BUCK, *Executive Secretary, Public Employees Retirement Board, Carson City, Nevada*.

STATEMENT OF FACTS

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QUESTION

Does the North Tahoe Fire Protection District of Crystal Bay, Nevada, qualify under the law as a "public employer" within the meaning of the Public Employees Retirement Act?

CONCLUSION

We have reached the conclusion that the question must be answered in the negative.

ANALYSIS

As previously stated the North Tahoe Fire Protection District was organized under the provisions of NRS 474.010-474.120. The district is governed by a Board of Directors, selected and empowered as provided in NRS 474.130-474.180. It obtains its funds to defray the costs of operation as provided in NRS 474.190-474.210. Under the provisions of NRS 474.160, subsection 6, it is provided:

The board of directors shall have the power to and it shall:

* * *

Employ agents and employees for the district sufficient to maintain and operate the property acquired for the purposes of the district.

Nowhere within the chapter is it provided that the agents and employees of the district shall be employed under the provisions of Chapter 284 NRS (the Personnel Act).

The board of directors of the district are elected by the qualified electors of the district. (NRS 474.070, and NRS 474.140.) Neither the State, nor an agency thereof or political subdivision of the State has any control over such board of directors. Such members are elected, and inducted into office. Thereafter the board controls and regulates the district in accordance with the statutory law.

Section 286.070 NRS provides:

286.070 1. As used in this chapter, "public employer" means the state, one of its agencies or one of its political subdivisions, irrigation districts created under the laws of the State of Nevada, and the Las Vegas Valley Water District, created pursuant to Chapter 167, Statutes of Nevada 1947, as amended.

2. State agencies are those agencies subject to state control and supervision, including those whose employees are governed by chapter 284 of NRS, unless specifically exempted therefrom, and those which deposit funds with the state treasurer.

The North Tahoe Fire Protection District is not a "state agency" as hereinabove defined. Neither is it included within the enumeration of entities contained in subsection 1, above. It is therefore not a "public employer" within the meaning of Chapter 286 NRS.

The fact that the North Tahoe Fire Protection District is not a public employer within the meaning of NRS 286.070, is significant in that NRS 286.290, subsection 1, provides:

286.290 1. No person may become a member of the system unless he is in the service of a public employer.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General.*

By D. W. PRIEST, *Chief Deputy Attorney General.*

150. Welfare, State Department of, Budget Director (Attorney General Opinion No. 148, dated March 23, 1960, supplemented and amended). Applicable federal and state laws construed as legally justifying application of federal funds (available because of state child welfare services rendered) in supplementation solely of state's share of non-federal costs of said services. Counties are not legally entitled to any share or benefit in said federal funds, allocable for administrative expenses.

CARSON CITY, March 30, 1960.

MRS. BARBARA C. COUGHLAN, *Director, Nevada State Welfare Department, P. O. Box 1331, Reno, Nevada.*

DEAR MRS. COUGHLAN: Reference is made to your letter dated March 29, 1960 requesting our review of Attorney General Opinion No. 148, dated March 23, 1960 and our conclusions therein, on the basis of certain additional pertinent facts not previously furnished to us by you and, therefore, not within our contemplation in connection with said released opinion.

The additional pertinent facts contained in your letter, and verified by the Budget Director, may be summarized as follows:

1. That the possibly "available" federal funds involved in connection with the State Welfare Department's Foster Home Care Program have already been "earned" and have accrued to the State.
2. That in accordance with established procedures, said "earned" funds are to be transferred by the State Treasurer from the Federal Deposit Account to the Department's Operating Accounts in reimbursement of state funds previously utilized and actually expended, regularly, in compliance with budget appropriations as approved and authorized by the Legislature.
3. That the combined and intermingled federal and state funds are applied to operating expenses of the Department subsequently incurred, thus accruing additional "earned" federal funds.
4. That for the fiscal year 1959-1960, due to the failure properly to estimate and allow for said federal "earned" funds which would accrue, legislatively-approved allocations or appropriations for the Department's administrative expenses have been increased.
5. That it is such surplus funds which are sought for use by the Department in connection with its administration of the Foster Home Care Program.
6. That if not authorized and so made available, such funds or the balance thereof on June 30, 1960, must revert to the State General Fund.
7. That the respective counties of the State are neither charged with, nor do they bear any part of the Department's administrative expenses; and, that none of the counties are entitled to participate, share, or have any benefit, in said "earned" federal funds, which have accrued and must, budgetarily, be allocated for the Department's administrative expenses.

As stated, these new and additional facts were not originally submitted in your request for our opinion and advice. As we construe them, they definitely put an entirely different aspect on the problem.

Contrary to our expressed views in our released opinion, federal law, namely, the Social Security Act (Title 42, Section 721 et seq., as

amended, Federal Code Annotated, p. 156 and 1960 Cumulative Supplement, pp. 35-37) is neither restrictive nor determinative of the question raised by such facts. State law (particularly as amended by A. B. 255 or Chapter 173, 1960 Statutes of Nevada) is alone applicable and determinative.

We affirm the conclusion, already stated in our released opinion, that state law contains no express requirement for any more specific apportionment of federal funds as between the State and the counties for determination of their respective shares of the costs of the child-welfare services indicated as involved herein. The additional facts now presented for consideration definitely show that the "earned" federal funds must, in fact, be allocated (if at all) to administrative costs of the Department, in which costs the counties have no financial or legal responsibility. Consequently, the counties are ineligible for, and not legally entitled to, any share or benefit in such "earned" federal funds, which have accrued to, and are now vested in, the State alone.

The verified additional facts further indicate that the Legislature approved a specified amount of money for administrative expenses of the Department for certain child-welfare services. No allowance was made in the estimated needs of the Department for any accrual of federal funds as "earned" by the State. In any event, the fact is that such appropriated state funds and "earned" federal funds, accruing and properly allocable to the Department's administrative expenses, are legally available to the Department for authorized purposes as approved by the Legislature, notwithstanding any assumed or actual budgetary mistake.

Based upon the foregoing new and additional facts and review of applicable federal and state law thereto, we herewith supplement and amend the conclusions stated in Attorney General Opinion No. 148, dated March 23, 1960, in respect of question No. 1, therein stated.

Question No. 1 was stated as follows:

"Is there any prohibition in either federal or state law legally preventing the application of federal funds available under the Social Security Act in supplementation of state funds?"

In view of the new and additional facts herein stated, this question must properly be answered in the negative. Such conclusion and answer amends and corrects our said released Attorney General Opinion No. 148, dated March 23, 1960, wherever indicated and appropriate.

The syllabus of said released opinion should, as now pertinent, also be amended to read as follows:

Applicable federal and state laws construed as legally justifying application of federal funds (available because of state child-welfare services rendered) in supplementation solely of State's share of nonfederal costs of said services; counties are not legally entitled to any share or benefit in said federal funds, allocable for administrative expenses.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

151. District Attorney, Clark County. Election of Five County Commissioners in Certain Counties. Chapter 85, 1960 Statutes of Nevada, reviewed and found to constitute reasonable legislative classification and, therefore, not violative of any constitutional prohibition. Legislative intention held sufficiently clear in said Act to constitute carry-over incumbent as County Commissioner-at-large at time of 1960 general election. Any possible question thereon has been conclusively resolved by Chapter 213, 1960 Statutes of Nevada. A legislator who voted on the Act held not rendered ineligible for election to office of County Commissioner created hereby.

CARSON CITY, April 8, 1960.

HONORABLE GEORGE FOLEY, *District Attorney, Clark County Courthouse, Las Vegas, Nevada.*

STATEMENT OF FACTS

DEAR MR. FOLEY: Assembly Bill 170, dated February 9, 1960, as amended, has been enacted into law as Chapter 85, 1960 Statutes of Nevada.

The Act affects county government by providing for the election of five county commissioners in counties having 50,000 or more population, and amends previous law by providing for the number, qualifications and election of county commissioners, commissioner districts, members of boards of county highway commissioners, county boards of hospital trustees, and certain changes necessitated by the increase in the number of county commissioners. Further, the Act establishes the procedure for increasing the number of county commissioners, and makes provision for certain other related matters.

This office is in receipt of various requests for opinion and advice concerning the constitutionality and construction and application of said Act, or provisions thereof. These inquiries are embodied or reflected in the following questions.

QUESTIONS

1. Is Chapter 85, 1960 Statutes of Nevada, violative of any provision of the Constitution of the State of Nevada?
2. What position or status does Paragraph "2," Section 3, of Chapter 85, 1960 Statutes of Nevada, establish for a carry-over county commissioner under the required 1960 general election therein provided?
3. Is a legislator who voted on Chapter 85, 1960 Statutes of Nevada ineligible for election to the office of county commissioner as created by said Act?

CONCLUSIONS

To question No. 1: No.

To question No. 2: The carry-over county commissioner is legislatively intended to be holding the position and status of county commissioner at large in the composition of the board of county commissioners under and subsequent to the 1960 general election prescribed by the Act.

To question No. 3: No.

ANALYSIS

Insofar as here relevant, Article IV, Section 20 of the Nevada Constitution provides as follows:

The legislature shall not pass *local or special* laws * * * regulating the election of county and township officers * * * (Italics supplied.)

Article IV, Section 21, of the Nevada Constitution, provides as follows:

In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state.

Article IV, Section 25, of the Nevada Constitution, provides as follows:

The legislature shall establish a system of county and township government, which shall be uniform throughout the state.

Article IV, Section 26, of the Nevada Constitution, provides as follows:

The legislature shall provide by law for the election of a board of county commissioners in each county, and such county commissioners shall, jointly and individually perform such duties as may be prescribed by law.

As may be noted from the above, the only apparent constitutional inhibition that can be raised against the validity of Chapter 85, 1960 Statutes of Nevada, is that it constitutes "local or special" legislation, and would not have uniform operation throughout the State. (McDonald v. Beemer, 61 Nev. 419, 220 P.2d 217.)

The Act contemplates application of its provisions to every county having a population of 50,000 or more, as determined by the last preceding national census of the Bureau of Census of the United States Department of Commerce, or, in the alternative (until the 1960 decennial census is completed), as determined according to the figures contained in the Bureau of Census document designated Series P25, No. 210, Current Population Estimate. In this respect, said Act differs quite clearly from the law struck down in the above mentioned case of McDonald v. Beemer, *supra*, which was expressly made applicable only to Washoe County. (Chapter 30, Statutes of Nevada, 1933.)

Reasonable classification in a legislative act is not prohibited by a constitution prohibiting passage of local or special laws. State v. Donovan, 20 Nev. 75; Singleton v. Eureka County, 22 Nev. 91, 97 et seq., 35 Pac. 833; State v. Boyd, 19 Nev. 43, 5 Pac. 735.)

* * * Classification is permissible under constitutional provisions forbidding local or special laws, provided not only the law applies uniformly to all persons in its operation who are in the same circumstances, but provided there is a rational basis for putting the persons to whom it applies in a different group from other persons. Therefore, the rule is settled that a statute relating

to persons or things *as a class* is a general law, but a statute relating to particular persons or things *of a class* is special. Under this rule it is apparent that in every case the vice of a law, as a special law, is that it rests upon a false and deficient classification and does not embrace all of the class to which it is naturally related. (Italics supplied; 12 Am.Jur. 238 et seq., Sections 541, 542; see cases, Permanent A.L.R. Digest, Vol. 3, Sec. 256, p. 229 et seq., A.L.R.2d Digest (Vol. 1-50) Sections 150, 151, and cases therein cited.)

* * *

The constitutional inhibition of special legislation affecting counties or municipalities is frequently obviated by certain classification of the subject matter of the legislation, which classification, when it bears a reasonable relation to the object of the legislation, renders unobjectionable laws which otherwise would fall within the constitutional inhibition. With respect to legislation relating to counties and municipalities, classification according to population, although this method amounts to the selection of a particular county or city to which the law shall apply, has long been regarded as a proper basis upon which to predicate what would be considered special or local legislation. Some authorities have taken the view that the population basis is the only reasonable one which may be used in legislation pertaining to political subdivisions of the state. (Note, 50 A.L.R. 1163, citing R.C.L. 819, Sections 67 et seq., and a number of judicial decisions.)

See: Attorney General Opinion No. 80, dated July 15, 1955, and Nevada cases cited therein.

Generally, see: May v. City of Laramie, 131 P.2d 300, 58 Wyo. 240; Bedwell v. Board of Trustees, etc., 166 P.2d 994, 114 Col. 475; Miller v. Jackson, 199 P.2d 513, 116 Kan. 141; County Com'rs. of Oklahoma County, 257 P.2d 802; City of Lawrence v. Robb, 265 P.2d 317, 175 Kan. 495; Thompson v. Dickson, 275 P.2d 749, 202 Or. 394; State ex rel. Fatzer v. Urban Renewal Agency of Kansas City, 296 P.2d 656, 179 Kan. 435; City of Walnut Creek v. Silveira, 306 P.2d 453, 47 Cal.2d 804; Haas v. Holloman, 327 P.2d 655; City of Kansas City v. Robb, 332 P.2d 520, 183 Kan. 834.

The foregoing sufficiently establishes the rule that a legislature may make classification of counties on a population basis if such classification is reasonable and intended to have uniform operation upon all counties which fall within the classification.

In order for a classification of cities (or counties) for purposes of legislation to be valid under a constitutional provision prohibiting special or class legislation, it must be so constituted as not to preclude additions to the numbers (cities or counties) included within the classification. (See: Permanent A.L.R. Digest, Vol. 10, pp. 452, 453, Sections 176, 177, citing Axberg v. Lincoln, 141 A.L.R. 894, 141 Neb. 55, 2 N.W.2d 613; parenthetical words supplied to denote more clearly application herein.)

That the provisions of Chapter 85, 1960 Statutes of Nevada, otherwise constitute proper classification or regulation of the counties to which the Act is made applicable would appear reasonably clear. The increased population involved, and the manifold and complex problems confronting and demanding the consideration of county governing boards, as well as the need for representation on said boards of officials who may be more responsive to the specific needs of the districts from which they are elected to office, are matters that should be patent and readily conceded. In this connection, it is, moreover, proper to note that the test regarding the reasonableness of any legislative classification is not the wisdom thereof, but rather the good faith of the legislature in making the same. Such good faith is presumed, and, in the absence of clear contravention of constitutional law, the courts will not encroach upon legislative prerogatives in such matters.

Article II, Section 1, of the Nevada Constitution grants the franchise to all United States citizens, 21 years of age or older, with actual state and *district or county* residence of six months and thirty days respectively.

NRS 244.020, as amended, provides that county commissioners shall be qualified electors of their respective counties, except as further requiring residence under the new Act in counties of 50,000 or more population; and NRS 244.025 is now amended so as to be applicable to counties of 50,000 or more population, regarding which there is presently required election from among the qualified residents of the designated districts or areas, *by the qualified electors in such districts or areas*, of county commissioners, conformably with the new provisions in the Act.

We find no conflict of the new requirements with constitutional or statutory provisions respecting districting, residence requirements and eligibility to office of qualified persons to the offices of county commissioners, or the persons who shall be deemed qualified electors in any election for any of the several offices of the board of county commissioners.

The distribution of representation on the boards of county commissioners of the affected counties on the basis of county seats, unincorporated area, incorporated cities, and at large, is reasonably designed to attain more responsive government and representation by officials who may be elected from the specified areas. The requirement of residence within the area from which any aspirant to office desires election to the board of county commissioners must also be deemed reasonable as designed to the same end, or results. Both districting and the procedure for elections are specifically and plainly spelled out in the Act; and, finally, there is no interference with, or any divestment of, office of any present incumbent, appointed or elected.

We conclude, therefore, that the Act in question is not a local or special law, as prohibited by the State Constitution, but a general law which, in respect of counties of the specified population, will have general application and operate uniformly throughout the State. Based upon said analysis and conclusions, said Act, in our considered opinion, is not violative of any constitutional provision.

Addressing ourselves to the second question herein, it will be noted that Section 3 of the Act makes mandatory the election at the 1960 general election of one board member who is resident at the county seat and one board member, resident in the unincorporated area of the county, each for a term of two years, and one board member, resident at the county seat, and one board member, resident in an incorporated city which is not the county seat, each for a term of four years.

As a result of such 1960 election, therefore, four of the five designated commissioners authorized and required by the Act, and three of the four specified areas or districts designated to have board representation, will be accounted for. This leaves the carry-over incumbent commissioner as the fifth member of the county board after the 1960 general election, and both arithmetically or logically, the member legislatively intended to be the at large representative on the board of county commissioners, since he was elected at large and holds such office on a county-wide basis. Thus, districting or area representation, as called for by the Act, is made complete with the 1960 general election.

If confirmation of such legislative intention were needed, it is to be found in the requirements established for the 1962 general election, when three vacancies in commissioner offices are deemed to exist, namely, the two two-year terms filled by the 1960 election, to provide representation to the county seat and to the unincorporated area, and election of the board member to provide representation at large, obviously intended to fill the office held by the carry-over commissioner which was not vacant at the time of the 1960 general election, but which office is actually vacant for the 1962 election. Finally, A. B. 268, submitted subsequent to enactment of A. B. 170 into law (Chapter 85, 1960 Statutes of Nevada), and also approved and signed into law as Chapter 213, 1960 Statutes of Nevada, expressly confirms such legislative intent.

We conclude, therefore, that the Act is sufficiently clear to establish the fact that the Legislature intended to constitute the carry-over commissioner as the at large member of the board of county commissioners at the time of the 1960 general election. Any question thereon has, in any event, been entirely dispelled by enactment of A. B. 268 into law as Chapter 213, 1960 Statutes of Nevada.

The third and last question included within the scope of this opinion requires a negative answer on the basis of the provisions of Article IV, Section 8, of the Nevada Constitution, namely:

No senator or member of assembly shall, during the term for which he shall have been elected, nor for one year thereafter, be *appointed* to any civil office of profit under this state which shall have been created, or the emoluments of which shall have been increased during such term, *except such office as may be filled by elections by the people.* (Italics supplied.)

We do not find any statutory provision imposing any greater restriction on the right of legislators to seek public office, and we therefore conclude that a legislator who voted on Chapter 85, 1960 Statutes of

Nevada, is not rendered ineligible for *election* to the office of county commissioner as created by said Act.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

152. Stabilization and marketing of fluid milk and fluid cream. State Dairy Commission's authority to prescribe certain mandatory provisions to be included in all producer-distributor contracts within the dairy industry in Nevada.

CARSON CITY, March 31, 1960.

MR. CLARENCE J. CASSADY, *Administrator-Secretary, Nevada State Dairy Commission, 830 Ryland Street, Reno, Nevada.*

STATEMENT OF FACTS

DEAR MR. CASSADY: The Legislature in 1955 in its initial Act setting up a State Dairy Commission, and by amendment in 1957 and 1959, has enacted and amended NRS 584.568 and 584.570 providing certain mandatory provisions which are directed by that body to be included in all stabilization and marketing plans.

In compliance with the provisions of NRS 584.590, certain hearings were conducted by the State Dairy Commission in the months of November and December, 1959. After due deliberation and consideration of testimony presented by witnesses representing all interests of the dairy industry in Nevada within the various marketing and stabilization areas, the members of the Commission in a meeting duly and properly called, adopted and enacted marketing and stabilization plans, which became effective for enforcement purposes on January 1, 1960.

In all of these plans, there is contained the following provisions:

"ARTICLE IV

USAGE AND QUANTITY DETERMINATIONS

Section A. Usage Determinations:

1. Milk fat or skim milk, or any combination of milk fat and skim milk, sold or transferred by a distributor to another distributor shall be presumed to have a Class I usage, unless such selling or transferring distributor shall furnish satisfactory proof to the Commission that the usage was other than Class I. Such proof shall specify the class usage if other than Class I.

2. A distributor who purchases milk fat or skim milk or any combination thereof from a Grade A producer, including any association of producers, will keep complete and accurate records of the usage of such product, since it shall be presumed that this purchase will have a Class I usage unless the distributor can furnish satisfactory proof to the Commission that the usage was other than Class I. Such proof shall

Nevada, is not rendered ineligible for *election* to the office of county commissioner as created by said Act.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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In compliance with the provisions of NRS 584.590, certain hearings were conducted by the State Dairy Commission in the months of November and December, 1959. After due deliberation and consideration of testimony presented by witnesses representing all interests of the dairy industry in Nevada within the various marketing and stabilization areas, the members of the Commission in a meeting duly and properly called, adopted and enacted marketing and stabilization plans, which became effective for enforcement purposes on January 1, 1960.

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Section A. Usage Determinations:

1. Milk fat or skim milk, or any combination of milk fat and skim milk, sold or transferred by a distributor to another distributor shall be presumed to have a Class I usage, unless such selling or transferring distributor shall furnish satisfactory proof to the Commission that the usage was other than Class I. Such proof shall specify the class usage if other than Class I.

2. A distributor who purchases milk fat or skim milk or any combination thereof from a Grade A producer, including any association of producers, will keep complete and accurate records of the usage of such product, since it shall be presumed that this purchase will have a Class I usage unless the distributor can furnish satisfactory proof to the Commission that the usage was other than Class I. Such proof shall

specify the class usage if other than Class I, however, plant loss will not exceed one percent (1%) and sales replacements will not exceed one percent (1%)."

"ARTICLE V

MANDATORY PROVISIONS

As required by Chapter 584, Nevada Revised Statutes, as amended, distributors and retailers are prohibited from engaging in the unfair practices hereinafter set forth.

Section D.

The purchase of any fluid milk in excess of two hundred (200) gallons monthly from any producer or association of producers unless a written contract has been entered into with such producer or association of producers stating the amount of fluid milk to be purchased for any period, the quantity of such milk to be paid for as Class I in pounds of milk or pounds of milk fat or gallons of milk, and the price to be paid for all milk received. The contract shall also state the date and method of payment for such fluid milk, which shall be that payment shall be made for approximately one-half of the milk delivered in any calendar month not later than the first day of the next following month and the remainder not later than the 15th day of said month, the charges for transportation if hauled by the distributor, and may contain such other provisions as are not in conflict with this act, and shall contain a proviso to the effect that the producer shall not be obligated to deliver in any calendar month fluid milk to be paid for at the minimum price for fluid milk that is used for Class III, as said Class is defined in Chapter 584.490. A signed copy of such contract shall be filed by the distributor with the Commission within five (5) days from the date of its execution. The provisions of this subdivision relating to dates of payment shall not apply to contracts for the purchase of fluid milk from nonprofit cooperative associations of producers.

1. *The written contract that shall be entered into with a producer or association of producers and a distributor will include the following provisions:*

a. Distributor agrees to purchase from Producer, and Producer agrees to sell to Distributor..... lbs. of milk or..... lbs. of milk fat per month. For..... lbs. of milk or..... lbs. of fat per month, the Distributor agrees to pay the Producer a price not less than the minimum price for Class I milk as established by the Nevada State Dairy Commission for the marketing area in which said milk is purchased. The amount of milk to be paid for as Class I shall not be less than eighty percent (80%) of the total contractual amount.

b. For milk supplied in excess of contractual amount for Class I purposes, the Distributor further agrees to pay according to usage of such milk. The price to be paid the Producer for Class II and III usage shall not be less than the minimum for such Class as established by the State Dairy Commission for the marketing area in which it is purchased."

The above recited provisions are required by State Dairy Commission regulations contained in the stabilization and marketing plans to

be included in all producer-distributor contracts as well as other required conditions.

QUESTION

Do the regulations in question concerning contractual relations of producers and distributors amount to a violation of the guarantee of freedom of contract as safeguarded in the Nevada State Constitution by Article I, Section 8, and also the United States Constitution in the V and XIV Amendments?

CONCLUSION

The regulations in question do not amount to an illegal and unconstitutional infringement upon the contract rights of producers and distributors in the milk industry within the State of Nevada as guaranteed by the Nevada and United States Constitutions.

ANALYSIS

The general rule is well settled that the right to make contracts is not absolute. There is no absolute freedom to contract as one chooses, for the liberty of contract guaranteed by the Constitutions, like the general concept of liberty thus guaranteed, is freedom from arbitrary restraint, not immunity from reasonable regulation imposed in the interest of the community.

The states may regulate and limit liberty of contract provided that the limitations imposed are reasonable. Such state regulation is generally exercised by means of the police power for the promotion of the health, safety, morals and welfare of the inhabitants of the states. (11 American Jurisprudence, Constitutional Law—Sec. 341.)

The production and distribution of fluid milk and fluid cream has been declared by the Nevada Legislature "to be a business affected with a public interest," Nevada Revised Statutes 584.390. Pursuant to this finding of fact by the Legislature, it passed an Act in 1955 entitled "Stabilization and Marketing of Fluid Milk and Cream" being NRS 584.325 to 584.690. In this Act (NRS 584.390) the Legislature declared its intent as follows:

The provisions of NRS 584.325 to 584.690, inclusive, are enacted in the exercise of police powers of this state for the purpose of protecting the health and welfare of the people.

The instant legislative Act then proceeds to provide for the enforcement of the Act, picking of personnel for membership on the Commission and delegates to the Commission certain powers and authority to pass regulations, adopt stabilization and marketing plans, conduct hearings, issue subpoenas, summon witnesses and perform other administrative and quasi-legislative acts. The legislature further stated that the powers conferred upon the Commission shall be liberally construed. (NRS 584.415.)

In American Law Reports annotation cited as 119 A.L.R. 956, the matter of right of contract is set forth as follows in par. 7 at page 961:

Liberty of contract and the right to use one's property as he wills are fundamental constitutional guaranties, but the degree of such guaranties must be determined in the light of social and economic conditions that prevail at the time the guaranty is proposed to be exercised rather than at the time the Constitution was approved securing it; otherwise the power of the legislature becomes static and helpless to regulate and extend them to new conditions that constantly arise.

Constitutional guaranties have never been thought to be immune from regulation or limitation in the interest of the common good. When limited, the process has been evolutionary rather than spontaneous. Regulation might be appropriately denied today that could be just as appropriately granted tomorrow. When the exercise of a constitutional guaranty is limited to such a small sector of the population that the rights of the public will be protected by unrestricted competition, the legislature will not generally attempt to regulate, but when large numbers become involved, many of whom are unequal in the race, and their economic security becomes imperiled through the exercise of what may appear to be the constitutional right of another, then the legislature has not hesitated to step in and regulate.

The factors determining the regulation of a trade, business or profession are for legislative determination but they have generally been actuated by public necessity. If done in the exercise of the police power, the health, morals and welfare must be involved. It has also been said that the business regulated must be affected by or clothed with a public interest, but regardless of the basis on which done, if public necessity requires it would be contrary to every concept of social justice to hold that the legislature could not grant relief. One may "Robinson Crusoe like" isolate himself and thereby enjoy the complete unrestrained exercise of his constitutional guaranties but the moment he becomes a unit in organized society, he surrenders a measure of his freedom and the more thickly that society becomes populated and the more complex its means of making a living become, the more freedom he must make up his mind to surrender.

There is no magic in the phrase, "clothed with or affected with a public interest." Any business is affected by a public interest, when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public and when this point is reached, the liberty of contract must necessarily be restricted. If the regulation involves the question of price limitation, it will be upheld unless clearly shown to be arbitrary, discriminating or beyond the power of the legislature to enforce. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; *Borden's Farm Products Co., Inc. v. Ten Eyck*, 297 U.S. 251, 56 S.Ct. 453, 80 L.Ed. 669; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330; *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835; *Miami Home Milk Producers Association*

v. Milk Control Board, 124 Fla. 797, 169 So. 541. See, also, inferences from Economy Cash & Carry Cleaners, Inc. v. Cleaning, Dyeing & Pressing Board (128 Fla. 408, 174 So. 829), supra; Coleman, Sheriff v. State ex rel. Lichtenstein (128 Fla. 408, 174 So. 829), supra; and Bon Ton Cleaners and Dyers, Inc. v. Cleaning, Dyeing & Pressing Board (128 Fla. 533, 535, 176 So. 55), supra.

The above stated limitations upon the right or freedom of contract was cited verbatim in Robinson v. Florida Dry Cleaning & Laundry Board, 194 So. 269. A review of the many cases involving the test of constitutionality of so-called dairy or milk acts shows that the issue of being deprived of property without due process of law as defined in the United States Constitution in Sec. 1 of the 14th Amendment and various comparable sections of the Constitutions of the several states, has consistently been raised. The earlier cases dealt with the price fixing features of the various milk acts, however, recently the attention of the courts has been directed to the so-called unfair trade practices sections of the acts.

The "Mandatory Provisions" concerning contractual requirements contained in the aforesaid stabilization plans were passed pursuant to NRS 584.570—*Mandatory Provisions—Unfair Practices; Certain Practices of Distributors Prohibited Whether Plan in Effect or Not*.

In two very recent decisions involving a determination of the constitutionality of similar unfair practices provisions, the Supreme Court of Wisconsin in the cases of Borden Co. v. Donald McDowell and State of Wisconsin and Wright & Wagner Dairy Co. v. Donald McDowell and the State of Wisconsin, cited as 8 Wis.2d 246, 99 N.W.2d 146, held the restrictions against the practices to be constitutional. In its opinion, the court stated,

Respondents contend that these statutes deprive them of freedom of contract, a property right. We have often upheld statutes which restrict long continued freedoms to make contracts in the course of their business where the legislature has determined that the public welfare requires restriction.

Governed by such precedents, we conclude that the dairy industry is subject to regulation and has been regulated so by the legislature for the public welfare for many years. The present statutes seem to us to be of the nature of those which we have previously sustained as constitutional.

The monopolistic tendencies in merchandising practices which the legislature perceived and believed to be inconsistent with the public welfare were not mere bogies under the bed but were beliefs based on facts which reasonable and honest men could entertain even if other men equally honest and reasonable might see the facts differently and reach different conclusions. The prohibitory and regulatory methods chosen by the legislature are not inappropriate to the public purpose sought by the legislature to be accomplished.

From the foregoing, it is clear that the provisions in question do not

violate the due process clauses of the United States nor the Nevada State Constitutions.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General.*

By JOSEPH J. KAY, JR., *Special Deputy Attorney General*
For Nevada State Dairy Commission.

153. Welfare, State Department of, Budget Director. Chapter 173, 1960 Statutes of Nevada construed. Administration of public assistance programs listed in said Act, and current and future payments therefor, to the extent of authorized available funds, unless in clear contravention of express provisions therein, not affected by Act. Apparent conditional limitations contained in Section 4 of said Act specifically pertain to Department "employees" rather than Department as such. Contractual arrangements with Bureau of Indian Affairs providing for foster home care of Indian children held not affected by Act.

CARSON CITY, April 15, 1960.

MRS. BARBARA C. COUGHLAN, *Director, Nevada State Welfare Department, P. O. Box 1331, Reno, Nevada.*

STATEMENT OF FACTS

DEAR MRS. COUGHLAN: Request is made for advice as to the construction and application of Sections 3 and 4 of Chapter 173, 1960 Statutes of Nevada, as said sections relate to children currently under care by the State Welfare Department, and also as the provisions therein contained are legislatively intended to affect services to children provided by the Department in the future.

It is indicated that prior to enactment of Chapter 173, 1960 Statutes of Nevada, and for the fiscal year 1959-1960, state funds were appropriated to the State Welfare Department as follows:

Handicapped Children	\$6,500.00
Child Welfare Services (Unmarried mothers and children awaiting adoptive placement)	10,000.00
Foster Home Care	10,000.00

The fund for Handicapped Children has been used for the purpose of enabling children throughout the State to utilize special training and educational facilities which were not available in their local communities. Legal custody of said children in the Department has not been a prerequisite to such assistance. Payments from this fund were for foster family care, special needs, transportation, and similar services. Eleven children are currently receiving such assistance and help.

The Child Welfare Service fund has been used for maintenance and medical care for unmarried mothers and foster home care for children pending placement in adoptive homes. The children receiving such help

violate the due process clauses of the United States nor the Nevada State Constitutions.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

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The Child Welfare Service fund has been used for maintenance and medical care for unmarried mothers and foster home care for children pending placement in adoptive homes. The children receiving such help

and assistance currently number 37, and have either been relinquished by the natural parent(s) to the Department for adoptive placement, or are in the Department's custody as a result of court action prior to, or following, termination of parental rights.

The Foster Home Care fund has been used to pay part of the cost of such care for children who had to be cared for away from their own homes and who could not benefit from group care. Counties paid \$50 per month (the same amount paid by counties for a child in the Nevada Children's Home), and the remaining cost, including medical care, has been met out of this fund. The Department either has custody for each such child or a voluntary agreement with the child's parents. Twenty-nine children are currently receiving assistance from this fund.

Since 1951, under an approved contractual arrangement with the Bureau of Indian Affairs, the Department has also furnished foster home care to Indian children certified to it by the Commissioner of Indian Affairs or his authorized representative. A total of 56 children are currently in foster homes under this program, the expenses for which are borne by the Bureau of Indian Affairs.

Insofar as here pertinent, Section 34, Chapter 250, 1960 Statutes of Nevada, authorized appropriations to the State Welfare Department of the following sums for the ensuing fiscal year:

Handicapped Children.....	\$14,370.00
Child Welfare Services.....	16,872.00
Foster Home Care.....	67,500.00

Insofar as here pertinent, Section 1, Chapter 262, 1960 Statutes of Nevada, authorized appropriations to the State Welfare Department of the following expenditures for the ensuing fiscal year:

Foster Home Care.....	\$31,950.00
Foster Home Care for Indian Children.....	40,000.00

As indicated, both of these last two mentioned laws become effective as of July 1, 1960.

Chapter 173, 1960 Statutes of Nevada (the law containing the sections submitted to us for statutory construction) became effective upon passage and approval, namely, March 14, 1960.

QUESTIONS

1. Can the State Welfare Department legally continue to make payments on behalf of children currently receiving assistance on the basis of the various authorized programs in effect prior to enactment of Chapter 173, 1960 Statutes of Nevada?

2. Do the provisions of Chapter 173, 1960 Statutes of Nevada prospectively prohibit the State Welfare Department from furnishing foster home care to Indian children pursuant to contractual arrangements with the Bureau of Indian Affairs?

3. Is the State Welfare Department prohibited from rendering future services under its various programs as heretofore except in strict compliance with the conditions as to method of initial referral set forth in Section 4, Chapter 173, 1960 Statutes of Nevada?

CONCLUSIONS

- To question No. 1: Yes.
To question No. 2: No.
To question No. 3: No.

ANALYSIS

Section 3, Chapter 173, 1960 Statutes of Nevada, insofar as here pertinent, provides as follows:

The department is hereby authorized and empowered:

1. To provide maintenance and special services to:
 - (a) Unmarried mothers and children awaiting adoptive placement.
 - (b) Handicapped children who are receiving specialized care, training or education.
 - (c) Children who are placed by court order in the custody of the department and who are placed in foster homes or group care facilities.

Section 4, Chapter 173, 1960 Statutes of Nevada, provides as follows:

Nothing in this or any other law shall be construed as authorizing any employee of the department to provide maintenance and special services for any child or youth except:

1. Upon the request of a child or youth whom the department determines to be emancipated; or
2. Pursuant to court order or request; or
3. Upon referral of appropriate law enforcement officials for emergency care.

Our attention has been called to the fact that a more comprehensive bill, intended to provide a sufficient legal base for public child welfare and youth services, namely, Assembly Bill 27, had been submitted to the 1960 legislative session. However, when it appeared unlikely that such measure might be enacted because of its comprehensive scope, it was decided to submit a substitute bill, namely, Assembly Bill 255, now Chapter 173, 1960 Statutes of Nevada, less comprehensive in scope, and for the most part, excerpted from Assembly Bill 27, even to the extent of identical language employed.

Careful review of the provisions of Assembly Bill 27 (which failed of enactment) discloses that in addition to the three methods of initial referral contained in Section 4, Chapter 173, 1960 Statutes of Nevada, *supra*, Section 30 (of Assembly Bill 27) also included the following:

- (a) Upon the request or with the consent of his parent, guardian or custodian, or of the person serving in loco parentis; and where care is to be provided for such child or youth outside of his own home such request shall be in writing and signed by his parent or guardian * * *.

Section 27, subsection 2, of Assembly Bill 27 contained the following prohibition:

No officer or employee of the department may accept appointment as the guardian of a child or youth whose legal custody is

vested in the department, except when parental rights have been terminated and the department has been authorized to place the child or youth for adoption.

The questions submitted to us for determination obviously stem from the failure to include in Chapter 173, 1960 Statutes of Nevada, the above-quoted excerpts from Assembly Bill 27 which failed of enactment.

It is properly indicated that, prior to enactment of Chapter 173, 1960 Statutes of Nevada, it was not legislative intent to limit services of the Department to handicapped children, unmarried mothers, and children awaiting adoptive placement to the three conditions of referral provided in Section 4 of said Act. In point of actual fact, we are informed that the majority of payments currently being made and pending in these three categories involve cases where the initial request did not come from an emancipated child or youth, are not pursuant to court order or request, or were not referred by an appropriate law enforcement official. Nor have the children in such three categories (unmarried mothers under 21 years of age, children awaiting adoptive placement, or handicapped children) been placed in the custody of the Department by court order, except in a few instances.

Specifically, therefore, the basic two-fold question which must first be resolved is whether the Legislature, by approval of Section 4 of Chapter 173, 1960 Statutes of Nevada, intended to effect any change in policy concerning eligibility for public assistance on the part of any or all of the three categories embraced within the provisions of the Act; or, whether the Legislature intended to restrict the jurisdiction of the Department in the granting of such public assistance to the enumerated conditions of initial referral listed in Section 4.

We are of the considered opinion that the foregoing basic two-fold question must be answered in the negative as to both aspects thereof.

Construed strictly and out of context with other provisions of the Act, it would reasonably appear that the conditions set forth in Section 4 thereof would, for example prohibit the Department from placing children in foster care awaiting adoptive placement where the natural parent has relinquished the child to the Department for adoption but no court order has been entered or request made for said placement. (See Section 4, 1960 Statutes of Nevada, *supra*.) Such a construction would obviously be in conflict with other express provisions in the Act authorizing such services on the part of the State Welfare Department, and would very considerably impair the efficacy of the Department's program for such services for which the Legislature saw fit expressly to approve certain appropriations and expenditures. (See Statement of Facts, *supra*.)

It may be noted that administrative boards, agencies, and departments are limited by statutes creating them to those powers conferred upon them expressly or by necessary or fair implication. (42 Am.Jur. 316 et seq.) In the matter under consideration, the Legislature has authorized the State Welfare Department to administer certain programs of public assistance and has specifically appropriated public funds for said programs. (*Supra*) Under such circumstances, any and

all powers reasonably necessary to give effect to such legislative purpose, and intent, must, therefore, be presumed, unless in clear contravention of express legislative prohibition or restriction.

The foregoing conclusion is further predicated on the following rules of statutory construction, deemed too well-established to require any extensive citation of authorities:

The meaning of words used in statute may be sought by examining context and by considering reason or spirit of law or causes which induced legislature to enact it, and entire subject matter and policy of law may be invoked to aid in its interpretation. Statutes should be so construed as to avoid absurd results.

The primary rule for construction of statute is to ascertain intention of legislature in enacting same, and intent, when ascertained, will prevail over literal sense.

When construing statute, purpose of law is to be kept in view and statute given fair and reasonable construction with view to effecting its purpose. (See: *Western Pac. R. R. v. State*, 241 P.2d 846, 69 Nev. 66.)

Moreover, careful reading of Section 4 of Chapter 173, 1960 Statutes of Nevada, *supra*, discloses that the limitations therein contained are not expressly imposed upon the Department as such, but, in fact, specific reference is made to "* * * any employee of the department * * *" in respect of the restrictive conditions under which maintenance and special services may be provided to any child or youth; in other words, such limitation may reasonably be considered as prohibiting, for example, an employee of the Department from serving in the role of a foster parent of a child or youth eligible for and receiving assistance from the Department, in the absence of a court order or request, or referral by an appropriate law enforcement officer for emergency care.

In this connection, the express corresponding prohibition contained in Assembly Bill 27 (which failed of enactment) under Section 27, subsection 2 *supra*, would appear to support our conclusion that the conditional limitations were not legislatively intended to be comprehensively applicable to the Department's jurisdiction and authority to grant assistance to unwed mothers and children placed for foster care and awaiting adoption who have been relinquished to the Department, prior to the entry of any court orders. Otherwise, how could the Department properly and effectively carry out the legislative mandate contained in Section 3(a) of Chapter 173, 1960 Statutes of Nevada? The same argument would appear to be also and equally valid in respect of services to handicapped children. (Section 3(b) of Chapter 173, 1960 Statutes of Nevada.)

We find little merit to the suggested construction that the conditional limitations contained in Section 4 of the Act be viewed as restrictions applicable *only* to Section 3(c) of the Act, that is, to children of whom the Department has custody and requiring placement in foster homes or group care facilities.

Undoubtedly, the referral conditions contained in Section 4, para-

graphs "2" and "3" of the Act are appropriate since the situations involved in such cases generally require coordinate and cooperative action on the part of the Department and the courts. In some cases (generally, in delinquency situations), Section 4 would also have application to emancipated children or youths, for the reasons already mentioned. However, there might be cases of *emancipated* children or youths, who were not delinquent, and over whom, therefore, the courts would have no apparent jurisdiction, but who, nevertheless, required help or assistance which the Department is authorized to provide under the Act. No court order would necessarily be involved or required in such cases for placement of an *emancipated* child or youth in a foster home or group care facility. To such extent, therefore (even though a very limited one), such *emancipated* children or youths would not be embraced in the category established by Section 3(c) of the Act, and the conditional limitations of Section 4 thereof would not be strictly applicable. As provided in Section 4, paragraph "1" of the Act, the Department would, however, have jurisdiction and authority to grant help and assistance in such cases upon the mere "request" of an emancipated child or youth. (Section 4, paragraph "1," of the Act.)

More substantial legal objections against this last suggested construction are the following:

1. There is no *express* language in the Act itself to indicate that the conditional restrictions contained in Section 4 shall *only* be applicable to Section 3(c), and not all of Section 3 of the Act.

2. Such construction (of a limited application of the conditions imposed by Section 4 of the Act) provides no answer whatsoever to the question as to the legal base on which the Department can render assistance and services to unmarried mothers and children awaiting adoptive placement and to handicapped children. (Section 3(a), (b) of the Act, *supra*.)

In our frank view, it is most probable that the Legislature inadvertently omitted to include the following provision when it decided to abandon Assembly Bill 27 for the shorter and less comprehensive Assembly Bill 255 (Chapter 173, 1960 Statutes of Nevada):

Upon the request or with the consent of his parent, guardian or custodian, or of the person serving in loco parentis; and where care is to be provided for such child or youth outside of his own home such request shall be in writing and signed by his parent or guardian. (Section 30(a), Assembly Bill 27 which failed of enactment.)

Except for the omission of the foregoing provision, the conditional limitations contained in said Section 30 of Assembly Bill 27 are identical to those listed in Section 4 of Chapter 173, 1960 Statutes of Nevada.

Further, it is our opinion that the prohibition imposed on "* * * any employee of the department to provide maintenance and special services for any child or youth * * *" (as contained in Section 4 of Chapter 173) was legislatively intended to preserve the prohibition which was previously set forth in Section 27, paragraph "2" of Assembly Bill 27, which was abandoned for the substituted Chapter 173, 1960 Statutes of Nevada.

Our construction results in no violence to the literal language of the Act. It is based upon statutory construction which gives reasonable effect to the prohibition imposed upon Department employees. It reasonably maintains and retains legislative intent and the entire purpose and policy of the Act. And, finally, the Act, as so construed, is susceptible of proper and effective implementation by the State Welfare Department in connection with the various public assistance programs of said Department, both currently being administered and legislatively authorized for the ensuing fiscal year, for which the Legislature has seen fit to provide by appropriation of public funds.

A careful review of Chapter 173, 1960 Statutes of Nevada fails to disclose any provision which in any way affects the foster home program for Indian children on the basis of contractual arrangements with the Bureau of Indian Affairs already authorized and currently in effect. The Act has no effect on said program for the ensuing fiscal year beginning July 1, 1960. In fact, the appropriation of \$40,000 for Department use on behalf of Indian children (authorized by Section 1, Chapter 262, 1960 Statutes of Nevada) must be considered recognition and assumption of state responsibility to provide for Indian children to the extent of such sum, apart from any assistance financed with federal funds, through contractual arrangements with the Bureau of Indian Affairs.

Summarizing from our foregoing analysis, we conclude as follows:

1. The State Welfare Department may legally continue to make payments on behalf of the children currently being serviced on the basis of its programs for unmarried mothers and children awaiting adoptive placement; for handicapped children receiving specialized care, training or education; and for children in its custody pursuant to court order, and receiving foster home or group facility care, and to the extent of authorized available funds therefor.

2. The provisions of Section 4, Chapter 173, 1960 Statutes of Nevada, though applicable to children receiving current care and assistance under the various programs enumerated above, do not prohibit payment by the Department, because the initial referrals of said children were not in accordance with the three methods outlined therein. Said conditional limitations are not restrictions upon the Department as such, but upon Department employees.

3. The Department's future services in the various categories and public assistance programs enumerated in Section 3, Chapter 173, 1960 Statutes of Nevada, are not affected in any material manner, except only as specifically and expressly provided by the conditional limitations contained in Section 4 of said Act. To the extent of authorized and available appropriated public funds, the Department may provide future services to children and youths under the enumerated programs.

Since our advice and opinion have been specifically requested as to the construction and application of Sections 3 and 4 of the Act, we have made no review of the other provisions therein to determine their effect, if any, upon future services under these programs.

4. Contractual arrangements with the Bureau of Indian Affairs providing for foster home care of Indian children are not affected by the Act.

We trust that the foregoing analysis and conclusions sufficiently clarify and answer the various questions submitted to us and prove helpful to you.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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154. Health, State Department of. Chapter 265, Statutes 1960—"Nevada Boat Act", construed. State Department of Health required to promulgate a regulation for treatment of sewage from marine toilets, and may forbid that such sewage be discharged into the lakes and streams of Nevada.

CARSON CITY, April 29, 1960.

MR. W. W. WHITE, *Director, Division of Public Health Engineering, Nevada State Department of Health, 755 Ryland Street, Reno, Nevada.*

STATEMENT OF FACTS

DEAR MR. WHITE: The Legislature of 1960 enacted A. B. No. 10, approved March 17, 1960, which has become Chapter 265, Stats. 1960, to be known as "Nevada Boat Act."

Sections 1 to 26 thereof, not pertinent herein, appertain to the protection of persons and property in the ownership and operation of boats and vessels. Sections 27 to 30 appertain to conserving and retaining the cleanliness and purity of the public waters, as effected by the discharge of human body wastes, through boating upon the public waters.

Sections 27 to 30, inclusive, provide:

Sec. 27. As used in sections 27 to 30, inclusive, of this act:

1. "Boat" means any vessel or watercraft moved by oars, paddles, sails or other power mechanism, inboard or outboard, or any other vessel or structure floating upon the water whether or not capable of self-locomotion, including houseboats, barges and similar floating objects.

2. "Marine toilet" means any toilet on or within any boat.

3. "Sewage" means all human body wastes.

Sec. 28. 1. No marine toilet on any boat operated upon waters of this state shall be so constructed and operated as to discharge any *inadequately treated* sewage into such waters directly or indirectly.

2. No boat shall be so equipped as to permit discharge from or through its marine toilet, or in any other manner of any *inadequately treated* sewage at any time into waters of this state, nor shall any container of *inadequately treated* sewage be placed, left, discharged or caused to be placed, left or discharged in or near any waters of this state by any person at any time whether or not the owner, operator, guest or occupant of a boat.

We trust that the foregoing analysis and conclusions sufficiently clarify and answer the various questions submitted to us and prove helpful to you.

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Sec. 29. Any marine toilet located on or within any boat operated on waters of this state shall have securely affixed to the interior discharge opening of such toilet a suitable treatment device in operating condition, constructed and fastened in accordance with *regulations of the state department of health* or some other treatment facility or method authorized by regulation of the state department of health. All sewage passing into or through such marine toilets shall pass solely through such devices.

Sec. 30. 1. Every sheriff and other peace officer of this state and its political subdivisions shall enforce the provisions of this chapter and may stop and board any vessel subject to the provisions of this chapter.

2. Game wardens of this state may enforce the provisions of this chapter when such enforcement can be conveniently accomplished, and such enforcement shall be incidental to the duties of game wardens to enforce the provisions of Title 45 of NRS.

3. All boats located upon waters of this state shall be subject to inspection by the department or any lawfully designated agent or inspector thereof at any time for the purpose of determining whether such boat is equipped in compliance with the provisions of this chapter.

4. All boats located upon waters of this state shall be subject to *inspection by the state department of health* or any lawfully designated agent or inspector thereof at any time for the purpose of determining whether such boat is equipped in compliance with the provisions of sections 27 to 30, inclusive, of this act.

Sec. 31. The department may carry out the provisions of this chapter by *appropriate regulations*. (Italics supplied.)

Section 445.010 NRS forbids the pollution or defiling of the waters of any streams or lakes of Nevada, in broad terms and makes the violation thereof a misdemeanor.

Section 445.080 NRS, and subsequent sections, delegate broad powers to the State Department of Health in regard to protection of the purity of the water in Lake Tahoe, and generally prohibit the discharge of sewage into the lake. These sections also give broad powers to the department as regards the Nevada watershed to the end that the lake shall not be contaminated from refuse originating in Nevada.

QUESTIONS

1. Does Chapter 265, Statutes 1960, mandatorily require of the State Department of Health that it promulgate a regulation for the treatment of wastes or sewage from marine toilets?
2. If regulation is promulgated by the State Department of Health, as to the treatment of wastes or sewage from a marine toilet will the application of such regulation be restricted to the waters of Lake Tahoe?
3. Is the State Department of Health authorized to require such wastes or sewage to be stored upon the boat and thereafter discharged upon adjoining land?
4. Is the State Department of Health authorized to prohibit the

discharge of treated wastes from a marine toilet into the waters of Lake Tahoe?

5. In what way or manner may the regulations of the Nevada State Department of Health, under questions here propounded, be made effective as to the entire Lake Tahoe area, in light of the fact that a part of Lake Tahoe lies within the State of California?

CONCLUSIONS

Question No. 1: Yes.

Question No. 2: No; the regulation would be applicable to the entire State.

Question No. 3: Yes.

Question No. 4: Yes.

Question No. 5: By persuasion and cooperative effort through an interstate compact and/or by statute of California and/or county ordinances of the adjoining California counties, as more fully discussed in the opinion.

ANALYSIS

We first observe that Chapter 265, Statutes 1960 is valid under the police powers of the State for the protection of the public health and welfare, and as such must be liberally construed to effectuate its purposes. Secondly, we observe that the provisions of Chapter 265, insofar as protection of purity of water is concerned, has application to the regulation of marine toilets for all waters of Nevada and not particularly to the Lake Tahoe area, and that the provisions of this chapter are consonant and in harmony with NRS 445.010 and NRS 445.080 et seq. In all of these statutes the Legislature has manifested concern for the protection of the purity of the water, but in the latter statute (Ch. 265, 1960) the Legislature has shown concern in respect to the ever-increasing hazard of defilement of our waters by the use of boats, some of which are luxurious craft and practically constitute a home afloat.

Section 31 of Chapter 265, Statutes 1960, authorizes the State Department of Health to make appropriate regulations to carry out the provisions of the chapter.

Although the Legislature has provided that "inadequately treated" sewage shall not be discharged into the waters of the lakes and streams of the State, it has not provided that the State Department of Health promulgate a regulation to provide that when sewage is adequately treated it may be discharged from a marine toilet into the lakes and streams of Nevada. The Legislature has thus designated a minimum standard for the protection of purity of waters and nothing more. The Legislature has thus recognized that this question of manner of treatment of sewage and disposal thereof, in the protection of public health and safety, requires periodic review and specialized training and facilities, and after noting the problem, delegating the authority, and setting up minimum standards, it has left the details to the discretion of the State Department of Health.

Under Section 29, and subsection 4 of Section 30, of Chapter 265, Statutes 1960, it is clearly provided that the State Department of

Health shall provide a regulation for the treatment of wastes or sewage from marine toilets.

Chapter 265, Statutes 1960, is not by its terms limited to navigation on Lake Tahoe. Any regulations promulgated by the State Department of Health, respecting the treatment and disposition of sewage from a marine toilet, made pursuant to the statute, will, therefore, apply to the entire State of Nevada, and to that portion of Lake Tahoe which lies within the State of Nevada.

Although the statute authorizes and requires the State Department of Health to promulgate regulations respecting (1) the treatment of wastes from a marine toilet, and provides that (2) no inadequately treated sewage from a marine toilet may be placed, left or discharged in or near the waters of this State, it does not provide or require of the State Department of Health that it promulgate a regulation to permit the disposal of adequately treated sewage and waste into the waters of the State. In short the Department must provide for the treatment of wastes from a marine toilet, and it is permitted to provide for the discharge into the waters of sewage after it is adequately treated, but it may reject the idea of permitting the discharge of adequately treated sewage into the waters of the State and may require that such be deposited upon or within the land. If it elects to follow the latter alternative, the regulation respecting deposit upon or within the land would be required to comply with the provisions of NRS 445.080, et seq., as regards the Lake Tahoe area.

If the State Department of Health should determine to permit adequately treated sewage or waste from a marine toilet to be discharged into Lake Tahoe, it would create for itself and for peace officers generally a very great problem of enforcement, and it would constantly run the risk of violation, intentionally or unintentionally, by reason of imperfection of mechanisms or of knowledge of operation of such marine toilet.

It follows from the foregoing that the State Department of Health is authorized to promulgate a regulation to prohibit the discharge of all sewage or wastes from a marine toilet, including adequately treated wastes, into all of the waters of the State.

One other question remains, and this involves the problem of interstate cooperation, respecting the purity of the waters of Lake Tahoe. A part of the lake lies in the State of Nevada and a part thereof lies in California. Residents of Nevada and residents of California have ownership of land fronting the lake and the temptations and opportunities to defile the purity of the water of the lake are common to residents and guests of both states. Either state could be greatly injured by neglect of recognition of this mutual problem by the residents and guests of the other state.

Your communication to us recognizes that both states are in accord as to the necessity of an interstate compact. Also that the governing bodies of the counties of California with Lake Tahoe frontage have embodied the Nevada law by county ordinances and have manifested a desire of fully cooperating for the attainment of mutually desirable objectives. We entertain no doubts but that California officials and

residents are equally concerned as to the protection of the cleanliness and purity of this water and we doubt not but that they will cooperate with us in every respect. Should statutes of the State of California be required, I have no doubt that the individuals concerned in the area of the lake will urge their enactment.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By D. W. PRIEST, *Chief Deputy Attorney General*.

155. Nevada Tax Commission, Department of Motor Vehicles. NRS Chapter 482 construed relative to collection of personal property taxes on house trailers. Based upon differences in primary function, use and purpose and applicable statutory provisions, Motor Vehicle Department is proper agency to collect such taxes on house trailers moving on public highways; county assessors are proper public officials to collect such taxes when house trailers are not being moved on public highways but are stationary in trailer courts and used for residential purposes.

CARSON CITY, May 12, 1960.

MR. R. E. CAHILL, *Secretary, Nevada Tax Commission*.

MR. LOUIS P. SPITZ, *Director, Department of Motor Vehicles, Carson City, Nevada*.

STATEMENT OF FACTS

GENTLEMEN: Differences of opinion have arisen as to whether the Department of Motor Vehicles or the various county assessors should collect personal property taxes on house trailers.

Requests have been made for an opinion regarding the construction of NRS Chapter 482, particularly NRS 482.135, 482.205, 482.260 and 482.397 with respect to the party charged by law with the duty of collecting taxes:

- (A) On house trailers used or moved on the public highways; and
- (B) On house trailers used and occupied as dwellings in trailer parks.

QUESTIONS

1. Should the Department of Motor Vehicles or county assessors collect the personal property taxes on house trailers used or moved on the public highways?
2. Should the Department of Motor Vehicles or county assessors collect the personal property taxes on house trailers occupied as dwellings in trailer parks or elsewhere?

CONCLUSIONS

- To question No. 1: The Department of Motor Vehicles.
To question No. 2: County assessors.

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QUESTIONS

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2. Should the Department of Motor Vehicles or county assessors collect the personal property taxes on house trailers occupied as dwellings in trailer parks or elsewhere?

CONCLUSIONS

- To question No. 1: The Department of Motor Vehicles.
To question No. 2: County assessors.

ANALYSIS

A

A trailer is a vehicle within the meaning of NRS Chapter 482. NRS 482.135 reads as follows:

482.135 "Vehicle" Defined. "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

NRS 482.125 states in terms that a trailer is a vehicle.

Application must be made to the department for registration before same can be operated upon any public highway in this State. (NRS 482.205.)

The word "Department" means the Department of Motor Vehicles (NRS 482.025). Even though actual collection of the license fee may be made by a county assessor, designated as an agent of the department for that purpose (NRS 482.160). When a county assessor is so designated it is clear that collection of the required license fee is made by the department as such. Further, in that instance, the department is charged with the duty of collecting the personal property tax for the county in which the applicant resides. (NRS 482.260, subsection 1(b).) This provision of the law remains unchanged by Statutes of Nevada 1960, Chapter 88.

This conclusion is strengthened by consideration of NRS 482.180, subsection 3, which provides for certification by the department to the State Board of Examiners of the amount of personal property taxes collected each month by the department for each county and payment thereof in the same manner as other claims against the State are paid.

The answer to question 1 appears to be abundantly plain.

B

The question of collection of personal property taxes on trailers, house trailers and mobile homes occupied as dwellings in trailer parks presents a little more difficulty.

Posited that a trailer, house trailer or mobile home is or may be a "vehicle" under certain conditions (NRS 482.125, 482.135, 482.205) what change, if any, takes place when the wheels are removed and the trailer, house trailer or mobile home is placed upon blocks or a more permanent foundation in a trailer park or elsewhere?

The device is still one in which persons or property may be transported upon a public highway. Very little change would be required to reverse the process of installing the trailer in a trailer park. Wheels could again be placed on the trailer, the blocks or other foundation removed and the device made ready for highway travel.

This, however, does not, in and of itself, solve the problem of tax collection. Reference must be had once more to the statute.

NRS 482.205 reads as follows:

482.205 What vehicles shall be registered. Every owner of a motor vehicle, trailer or semitrailer *intended to be operated upon*

any highway in this state shall, before the same can be operated, apply to the department for and obtain registration thereof. (Emphasis supplied.)

Insofar as intention can be gleaned objectively and from outward manifestations, there would seem to be no indication of contemplated use on a public highway where blocks or some other foundation takes the place of wheels on a house trailer.

Further, the definition of "House Trailer" in NRS Chapter 484 dealing with traffic laws definitely contemplates the possibility of use as a conveyance. Thus, NRS 484.0025 reads in part as follows:

484.0025 "House trailer" defined. "House trailer" means:

1. A trailer or a semitrailer which is designed, constructed and equipped as a dwelling place, living abode or sleeping place, either permanently or temporarily, and is equipped for use as a conveyance on streets and highways; * * *. (Balance of section not involved in this discussion.)

Accordingly, the fact that such trailer may be equipped with wheels is but one factor in determining intention to use same on the highway. This brings us to evaluation of that portion of the statute which is deemed conclusive in resolving the question at hand.

NRS 482.397, so far as relevant, reads as follows:

482.397 Registration of residence trailers not used upon highways; issuance, display of number plates; disposition of fees; penalties.

1. The owner of a trailer not used upon the highways of the state, but used as a residence or dwelling by any person, shall annually, on or before July 1, apply to the department for a trailer registration certificate and number plate.

2. The department shall issue a trailer registration certificate and number plate, and charge and collect a fee therefor in the sum of \$1, *upon proof that all personal property taxes levied against such trailer and its contents have been paid.* (Emphasis supplied.)

* * *

4. All fees collected pursuant to the provisions of this section shall be deposited in the state highway fund.

* * *

This section provides very definite criteria applicable to the situation. If the trailer or house trailer is used as a residence or dwelling but not upon the highways, the registration fee is \$1 rather than the higher fee charged for trailers classed as vehicles even though the latter may also be equipped with household appliances used for living purposes. (See NRS 482.480, subsections 3, 4, 5 and 6.)

The registration fees collected on trailers properly classified as vehicles, are required to be deposited in the state treasury in the motor

vehicle fund (NRS 482.180, subsection 1). Registration fees collected on trailers used as dwellings must be deposited in the state highway fund. (NRS 482.397, subsection 4.)

On trailers used on the public highways the Motor Vehicle Department is expressly directed to collect the personal property tax on the vehicle as agent for the several counties (NRS 482.260, subsection 1(b)) and to certify monthly to the State Board of Examiners the amount collected for each county (NRS 482.180, subsection 3) so that same may be paid in the same manner as other claims against the State.

On trailers used as a residence or dwelling the department is not given any authority express or implied to collect personal property taxes for any county. On the contrary it is expressly enjoined from issuing the registration certificate and number plate required by law until all property taxes levied against the trailer and its contents have been paid. (NRS 482.397, subsection 2.)

By whom must such tax levy be made and collection enforced? Obviously by the county assessor whose official receipt would then constitute the proof of payment without which the department may not issue its trailer (i.e. house trailer) registration certificate and number plate.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By N. H. SAMUELSON, *Deputy Attorney General*.

156. Park Commission, State. "Legislative approval" as regards acquisition of property by commission construed and limited. (Chapter 176, Statutes 1960.)

CARSON CITY, May 17, 1960.

MR. WILLIAM J. HART, *Director, State Park Commission, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR MR. HART: On February 4, 1960, Mr. Fritz L. Kramer, Chairman of the State Park Commission, directed a letter to the Chairman of the Board of Trustees of the Max C. Fleischmann Foundation of Nevada, in which he set forth the need of funds by which to carry on a detailed study of the park potential of the State of Nevada. He supported his letter with his Summary of What is Requested, and a Budget Sheet in which he showed a proposed expenditure of \$24,049 by the use of which it was proposed to survey the park potential of the State of Nevada.

On March 24, 1960, Mr. Julius Bergen, the Vice Chairman of the Foundation, responded to the effect that by unanimous vote the Board of Trustees of the Foundation had allowed the grant of \$24,049 and enclosed a check for that amount. He also enclosed a leaflet containing a report as to how funds granted are to be expended, as well as policy concerning publicity.

vehicle fund (NRS 482.180, subsection 1). Registration fees collected on trailers used as dwellings must be deposited in the state highway fund. (NRS 482.397, subsection 4.)

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Section 407.060 NRS contains provisions for the appointment of a Director of the State Park Commission, provides for the manner of appointment, and regulates the matters of salary, expenses and duties.

Section 407.070 NRS provides the powers and duties of the State Park Commission. This section was amended by Chapter 176, Statutes 1960, effective March 14, 1960, which contains new material in subsection 5, which reads as follows:

5. The state park commission may acquire real or personal property in its own name, by gift, devise or bequest, with the consent of the state board of finance, subject to final approval by the state legislature.

The check heretofore mentioned is in the possession of the said Commission, although as formerly shown it was written and delivered after the effective date of Chapter 176, Statutes 1960.

QUESTION

May the State Park Commission dispense the sum received in accordance with the conditions and provisions of the grant, if the consent of the State Board of Finance is first had and obtained, without the necessity of delaying for and obtaining the approval of the State Legislature?

CONCLUSION

Section 407.060 NRS contains ample authority for the Commission to perform the things outlined in the proposal to the Foundation. Certain limiting factors exist, namely: The consent of the State Board of Finance must be obtained. In the performance Section 407.060 NRS must be complied with. The specifications of the proposal to the Foundation, and the specifications of its leaflet, must be complied with. By compliance with these three factors the program may be executed and the money expended.

ANALYSIS

Among other things, NRS 407.060, subsection 3, provides that the Director's duties shall include:

(c) Making a biennial report regarding the work of the commission and such special reports as he may consider desirable to the commission and the governor.

(d) Hiring employees with the consent of the state park commission whom he considers necessary and as allowed under the provisions of the biennial budget of the commission.

(e) Performing any other lawful acts which he may consider necessary or desirable to carry out the purposes and provisions of this chapter.

Having established that the Director has the authority to employ the help and expend the money for which the gift was made by the Foundation to the Commission, one question remains, viz: Must the time table set out by the Commission in its application for the grant be defeated by the requirement of legislative approval, thus to defeat

the grant and require the Commission to return the check, or may the legislative approval be presumed and inferred, and thus dispensed with?

A careful examination of the leaflet referred to by the Foundation at the time of the grant fails to show that conditions have been provided by the Foundation which are beyond the power of the Commission to meet. As a matter of fact, the few conditions are very liberal. We have concluded from studying the leaflet that if the gift must fail and if the purpose of the gift must be defeated, it would not be from conditions imposed by the Foundation, but from an interpretation of the statute of 1960, heretofore mentioned.

The Commission has, of course, placed restrictions upon the gift by way of the representations to the Foundation as to the manner in which the same would be expended, if granted. These restrictions include a schedule, i.e., time table for the performance of the contemplated survey. Although delayed, that time table can be met if the Commission is now authorized to proceed. It cannot be met if the Commission is delayed until the Legislature reconvenes. Under the facts and conditions heretofore set out there is no possibility of any liability on the part of the State, if the Commission be authorized to proceed with the execution of the original plan in making the park survey.

This brings us to a construction of Chapter 176, Statutes 1960.

What is the meaning of the language "subject to the final approval of the state legislature," respecting the power of the Commission to accept a gift of real or personal property? We believe the meaning to be this: That if any liability, actual or contingent, is involved or if any discretion must be exercised by way of releasing or relinquishing property, privileges, immunities or anything of value, in exchange for the acquisition of the property, real or personal, then final approval by the Legislature must be had, but otherwise not. A contrary construction, if placed upon the language of the statute, renders the statute very harmful and detrimental to the best interests of the people of the State of Nevada. The Legislature will not be presumed to have intended to injure the people. The Legislature intended to protect the State from harm, but did not intend to immunize it from benefits.

In passing, if we had concluded otherwise, the provision under scrutiny would be of doubtful constitutionality, under the provisions of Section 1 of Article III, in that it would violate the division of powers doctrine, by the Legislature assuming and encroaching upon executive powers and functions.

The Commission must receive the consent of the State Board of Finance to its program as submitted to the Foundation, as provided in Chapter 176, Statutes 1960, after which it is authorized to proceed with its program.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By D. W. PRIEST, *Chief Deputy Attorney General*.

157. Health, State Department of, Division of Public Health Engineering. Promulgation of administrative rules and regulations by reference. Constitutional and statutory restrictions construed as requiring specific and explicit adoption of rules and regulations, the violation of which entails fine or imprisonment; especially so, when applicable law requires filing of copies of any such rules and regulations with the Secretary of State, publication thereof, and issuance of same in pamphlet form for distribution to local health officers and citizens of the State.

CARSON CITY, May 27, 1960.

MR. W. W. WHITE, *Director, Division of Public Health Engineering, Nevada State Department of Health, 755 Ryland Street, Reno, Nevada.*

STATEMENT OF FACTS

DEAR MR. WHITE: It is desired to promulgate and make effective for Nevada produced or processed meats certain definitions, standards, requirements and practices embodied in "Regulations Governing Meat Inspection of the United States Department of Agriculture" presently applicable to all meat produced or processed out of state, so as to secure uniformity in such standards and practices.

QUESTIONS

1. May such desired federal regulations governing meat inspection be legally adopted by reference?
2. Must such desired federal regulations governing meat inspection be specifically adopted for each of the items requiring regulation or control?

CONCLUSIONS

1. No.
2. Yes.

ANALYSIS

Administrative rules and regulations which have been duly adopted have the effect of law, unless inconsistent with or contrary to express statutory provision. "The scope and extent of the power of administrative authorities to enact rules and regulations is (however) limited by Federal and State Constitutions and the statutes granting them such power." (42 A.J. 358 et seq.)

Since administrative rules and regulations, when duly adopted, have the effect of law, any constitutional restrictions pertaining to incorporation into a new statute of the provisions of other statutes by reference and adoption must be deemed equally applicable to "reference" rules and regulations. (50 A.J. 57, 195.)

Article IV, Section 17, Nevada Constitution, provides as follows:

Each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only; but in such case, the act as revised, or section as amended, shall be reenacted and published at length. (Emphasis supplied.)

As here pertinent, NRS 439.200, among other matters, provides as follows:

1. The state board of health shall have the power by affirmative vote of a majority of its members to adopt, promulgate, amend and enforce reasonable rules and regulations consistent with law.
* * *

2. Such rules and regulations shall have the force and effect of law and shall supersede all local ordinances and regulations heretofore or hereafter enacted inconsistent therewith.

3. A copy of every regulation adopted by the state board of health, giving the date that it takes effect, shall be filed with the secretary of state, *and copies of the regulations shall be published immediately after adoption and issued in pamphlet form for distribution to local health officers and the citizens of the state.* (Emphasis supplied.)

In the instant case, it is apparently desired to adopt and make applicable to Nevada produced or processed meats various regulatory provisions set forth and contained in approximately 13 pages out of the 242 pages of the Federal Regulations Governing Meat Inspection. It is, of course, not only conceivable but also probable that the specific federal regulations involved may hereafter be modified, amended or repealed. It is always quite difficult to make provision in "reference" statute or rule and regulation against such contingent changes. The consequences of such difficulty can, perhaps be appropriately illustrated by the following quotation:

Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent. (Hassett v. Welch, 303 U.S. 303, 82 L.Ed. 858, 58 S.Ct. 559.)

It may also be presumed that violations of administrative rules and regulations entail certain penalties. In this connection, the requirement of notice, actual or constructive, to satisfy the constitutional guarantee of "due process" assumes increased importance. Required publication of administrative rules and regulations in order to provide them with legal effectiveness, is only questionably fulfilled by publication of "reference" rule or regulation necessitating resort and reference to federal rules and regulations which may be involved, to determine the specific compliance demanded of state (Nevada) residents. (See in general: Attorney General Opinions A-56, March 9, 1940, and No. 216, October 8, 1956.)

We believe that the relatively few observations set forth above sufficiently suggest some of the reasons and justification for the constitutional restriction relative to statutes above cited, and the principle embodied therein which we submit is equally applicable to "reference" administrative rules and regulations.

In our considered opinion, we believe that the desired particular federal rules and regulations proposed for adoption and application to

Nevada producers or processors should be specifically and explicitly promulgated by the State Department of Health in each instance.

We trust that the foregoing sufficiently answers your question and proves helpful in the proper solution of the problem.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

158. School Survey Committee, Nevada State, Budget Director, State Comptroller. Chapter 490, 1959 Statutes of Nevada and Chapter 183, 1960 Statutes of Nevada construed. Any balance in funds appropriated under the 1959 Act, remaining unexpended as of January 15, 1960, held to have reverted to the State's general fund, and not available in supplementation of appropriated funds under the 1960 Act.

CARSON CITY, May 27, 1960.

MR. NEIL D. HUMPHREY, *Budget Director, State of Nevada, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR MR. HUMPHREY: Some question appears to have arisen with respect to the reversion, as of January 15, 1960, of any balance then unexpended, of the \$20,000 appropriated by the Legislature to finance the investigation of financial and administrative problems of Nevada public elementary and high schools, and rendition of report and recommendations based on such investigation and survey. (Chapter 490, 1959 Statutes of Nevada.)

The duly appointed School Survey Committee is desirous of utilizing whatever balance existed as of January 15, 1960 for additional administrative expenses necessarily incurred, and to be incurred, in connection with additional supplementary work as authorized under the provisions of Chapter 183, 1960 Statutes of Nevada.

The problem and question as to whether the use of such balance of the \$20,000 originally appropriated, therefore, necessarily involves the statutory construction of both said Acts by this office pursuant to request submitted therefor.

QUESTIONS

1. In view of the provisions of Chapter 490, 1959 Statutes of Nevada and Chapter 183, 1960 Statutes of Nevada, must any balance remaining from the appropriated funds under the first Act as of January 15, 1960, revert to the State's general fund?

2. May such balance, as above-described, if any, be applied to payment of necessary administrative expenses incident to performance of the objectives authorized under Chapter 183, 1960 Statutes of Nevada?

Nevada producers or processors should be specifically and explicitly promulgated by the State Department of Health in each instance.

We trust that the foregoing sufficiently answers your question and proves helpful in the proper solution of the problem.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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QUESTIONS

1. In view of the provisions of Chapter 490, 1959 Statutes of Nevada and Chapter 183, 1960 Statutes of Nevada, must any balance remaining from the appropriated funds under the first Act as of January 15, 1960, revert to the State's general fund?

2. May such balance, as above-described, if any, be applied to payment of necessary administrative expenses incident to performance of the objectives authorized under Chapter 183, 1960 Statutes of Nevada?

CONCLUSIONS

To question No. 1: Yes.
To question No. 2: No.

ANALYSIS

As herein pertinent, Chapter 490, 1959 Statutes of Nevada, among other matters, provided as follows:

* * *

Whereas, A re-evaluation and reappraisal of Nevada's public school problems is now necessary to inquire into the problems of efficiency and economy of the public school program; now, therefore,

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

Section 1. The governor is hereby authorized to appoint a committee or fact-finding body for the purpose of making surveys, inquiries and investigations into the financial and administrative problems of the public elementary and high schools of the state, and for the purpose of reporting such conditions and making recommendations in connection therewith * * *

Sec. 2. Any committee or fact-finding body appointed by the governor shall report in writing to the governor and the legislature not later than January 15, 1960.

Sec. 3. For the purpose of defraying the expense of such investigations, surveys and reports, there is hereby appropriated from the general fund in the state treasury the sum of \$20,000, out of which the governor is authorized to pay such part of the expense as he may deem proper. *Any moneys hereby appropriated remaining unexpended on January 15, 1960, shall revert to the general fund on that date.* (Emphasis supplied.)

* * *

As herein pertinent, Chapter 183, 1960 Statutes of Nevada, among other matters, provided as follows:

Whereas, Under the provisions of chapter 490, Statutes of Nevada, 1959, the governor was authorized to appoint a fact-finding body to investigate financial and administrative problems of public elementary and high schools of Nevada; and

* * *

Whereas, the sum of \$20,000 appropriated by the 49th session of the Nevada legislature is insufficient to enable the fact-finding body to tabulate and distribute the acquired data, and make recommendations to the state board of education and boards of trustees of school districts; now, therefore,

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

Section 1. For the purpose of supplying to each county school district a report of the statistics and other information applicable to such district acquired by the fact-finding body appointed pursuant to chapter 490, Statutes of Nevada 1959, there is hereby appropriated from the general fund in the state treasury the sum of \$5,000, out of which the governor is authorized to pay such part of the expenses as he may deem proper. Any moneys hereby appropriated remaining unexpended on January 15, 1961, shall revert to the general fund on that date.

* * *

We are appreciative of the fact that the legislative intent and purposes of both Acts relate to maximum utilization of the results of the survey authorized under the 1959 Act, through preparation and rendition of certain reports with recommendations. Involved in the fulfillment and realization of such purposes and objects, are necessary incidental administrative expenses. The 1960 Act definitely shows that the Legislature intended that the appropriation of \$5,000 thereunder was in supplementation of the \$20,000 appropriated under the 1959 Act, which had been determined to be insufficient for accomplishment of all of the related purposes under both Acts. Some argument could, therefore, be made that, to the extent necessary, the 1960 Act be deemed to supersede or repeal the 1959 Act, in order to effect the combined purposes of both Acts.

We are cognizant of the well-settled rules of statutory construction that it is legislative intent which should govern. Also, that the meaning of words used in a statute may be sought by examination of their context, and consideration of the reason or spirit of the law or the causes which induced the Legislature to enact it and that the entire subject matter and policy of the law may be invoked to aid in its interpretation. Moreover, statutes should be construed as to avoid absurd results, and legislative intent, when ascertained, may prevail over the literal sense, to effect legislative purpose. (*State v. Corinbilt*, 72 Nev. 202; *Western Pac. R. R. v. State*, 69 Nev. 66.)

It appears that the \$5,000 appropriated under the 1960 Act will be required to effect the professional aspects of the survey, and that the incidental administrative expenses necessarily involved in such work can only be met out of the unexpended balance remaining from the \$20,000 appropriation under the 1959 Act. County school districts desiring to participate in the results of the authorized projected additional survey are to pay the costs thereof themselves. Viewed as remedial legislation, which it undoubtedly is, the 1960 Act must be liberally construed. The specific question before us is whether said Act may be so construed as to effect repeal of the explicit requirement that "Any moneys * * * unexpended on January 15, 1960, shall revert to the general fund on that date," as contained in the 1959 Act.

The 1960 Act contains no express provision of repeal with reference to the 1959 Act. Any repeal of the reversionary requirement contained in the 1959 Act would, therefore, have to be based on implication, or reasonable intendment. Except where inconsistent or contradictory, so

that legislative intent cannot be maintained and given equal effect, repeals by implication are not favored under the law. In the instant case, the sole legal justification for repeal by implication does not exist: both the 1959 and 1960 Acts are clear, definite, and not mutually contradictory. In actual fact, each can be given full legislative effect within the scope of the express provisions without any conflict whatsoever, even though funds appropriated may fall short of the costs actually entailed in the authorized work. However, such deficiency would be a matter of legislative error in judgment in funds appropriated, which can be remedied by legislative action hereafter, if necessary. Certainly, it does not have any bearing on the legal question addressed to us.

There is an additional weakness in any construction of a repeal by implication. The 1960 Act was actually approved on March 14, 1960, almost two months later than January 15, 1960, the date prescribed for reversion of any unexpended balance to the general fund under the 1959 Act. If the 1960 Act had been approved prior to January 15, 1960, a more cogent legal argument for repeal by implication could undoubtedly be made. However, such argument is not available in the actual circumstances here involved, and the termination date for use of any unexpended balance in funds appropriated under the 1959 Act, is expressly and legally determined as January 15, 1960 by the Legislature, and no later.

It is our considered advice, therefore, that any unexpended balance of the funds appropriated under the 1959 Act must be deemed to have reverted as of January 15, 1960 and that it cannot be used in supplementation of the funds appropriated under the 1960 Act.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

159. Nevada State Hospital. Applicable law held clearly to evidence legislative intent to establish, maintain and operate Hospital facilities primarily for benefit of Nevada residents. Hospital superintendent held authorized to exclude voluntary nonresident applicants and to effect transfer of voluntary or involuntary nonresident patients in proper circumstances. Hospital superintendent held authorized to establish and collect costs for subsistence and care of voluntary, resident and nonresident patients at different per diem rates. Per diem rate charged involuntary, court-committed patients, whether residents or nonresidents of Nevada, held legally required to be the same and uniform.

CARSON CITY, May 27, 1960.

DR. SIDNEY J. TILLIM, *Superintendent, Nevada State Hospital, P. O. Box 2460, Reno, Nevada.*

STATEMENT OF FACTS

DEAR DR. TILLIM: It appears that the Nevada State Hospital has billed the Veterans Administration at the per diem rate of \$8 per day for nonresidents of Nevada, and at the per diem rate of \$4.25 per day for Nevada residents.

The Veterans Administration raises no question concerning the reasonableness of the rate charged for nonresidents of Nevada, but does inquire as to whether legal authority exists for the Nevada State Hospital to require payment of different per diem rates by Nevada residents and nonresidents of the State. In this connection, our attention is specifically invited to NRS 433.410 which, as here pertinent, provides as follows:

1. The daily or monthly rate for the subsistence and care of *committed* persons shall be determined by the superintendent and shall be payable monthly in advance. The optimum rate shall approximate the actual average per diem cost per capita for patients confined in the hospital for the previous year ending on June 30. (*Italics supplied.*)

* * *

Briefly, it is the position of the Veterans Administration that the foregoing Nevada statutory provision directs the establishment of a per diem rate which shall be applicable to resident and nonresident patients alike.

QUESTION

May Nevada State Hospital establish different per diem rates respecting costs for subsistence and care to be paid by resident and nonresident patients at said hospital?

CONCLUSION

As limited and qualified herein: Yes.

ANALYSIS

NRS 433.330, relating to "Admission of voluntary patients," insofar as here pertinent, provides as follows:

1. The superintendent *may* receive in the hospital as a voluntary patient any person in need of care and treatment in such hospital, *and who is a resident of this state* as defined in this chapter, upon receipt of a written application for the admission of the person into the hospital for care and treatment made in accordance with the following requirements * * *. (Italics supplied.)

NRS 433.340, relating to "Payments for support of voluntary patients," as here pertinent, provides as follows:

The daily or monthly rate for the care, support and maintenance of *voluntary* patients *shall be determined by the superintendent*, and shall be payable to the hospital in advance * * *.

As set forth above in the "Statement of Facts," NRS 433.410 relates to *court-committed, or involuntary*, patients of the Nevada State Hospital. NRS 433.370, 433.380, 433.390, 433.400, 433.420, 433.480, and 433.490 provide for the collection of costs of subsistence, care and treatment of such court-committed or *involuntary* patients from legally-responsible relatives, and guardians or administrators of such patients.

NRS 433.580 and 433.590 relate to repatriation of nonresident and resident patients, and for payment of repatriation expenses, of both voluntary and involuntary, or court-committed, patients.

The Act regulating the administration of the Nevada State Hospital generally and substantially evidences legislative intention to differentiate between (1) voluntary, and court-committed or involuntary patients; and (2) to make a distinction between resident and nonresident patients at the Hospital, and to provide for the repatriation of nonresident patients to their states of residence. Such distinctions and classifications in the field of public assistance are entirely proper and valid, and support the view and position of the superintendent, Nevada State Hospital, that such institution is primarily intended for the accommodation and care and treatment of resident patients, and not nonresidents who, because they do not generally pay taxes and support such Hospital, cannot claim, and are not entitled to equal rights to available Hospital facilities. In short, we are of the opinion that if voluntary nonresident patients are charged a higher per diem rate than voluntary, resident patients, such difference in rate charged constitutes classification which is entirely proper and valid, rather than discrimination justifying legal redress.

We are informed that although the differential in per diem rates charged resident and nonresident voluntary patients has been in effect for a substantial period of time, no similar question was previously raised.

Sufficient data has not been made available to determine whether the referrals made by Veterans Administration to the Hospital involve "voluntary" patients. We have assumed such to be the case. If, however, there are involved involuntary, or court-committed, patients, then the daily or monthly rate charged for *their* care and treatment must be the same under the express provisions of NRS 433.410, above quoted. Voluntary patients alone, whether resident or nonresident, come within the provisions of NRS 433.340, and authorized permissible classification by the superintendent of the Nevada State Hospital. Support for our

view is to be found in the fact that there would otherwise be no need for two separate provisions regulating the charges which might be assessed against patients, and the manner of determining the amount of such per diem charge in the case of involuntary, or court-committed patients.

More specifically, if there is involved a veteran, nonresident "involuntary" (court-committed) patient, then the per diem charge must be the same as for "involuntary" (court-committed) resident (whether veteran or nonveteran) patient. However, the superintendent of the Nevada State Hospital, with respect to nonresident (both voluntary or involuntary) patients, may, if a veteran is involved and eligible, effect his transfer to a United States Veterans Administration Hospital or facility (NRS 433.535), or effect his repatriation to his state of residence. (NRS 433.580.)

In conclusion, it is our advice that per diem charges by the Nevada State Hospital be in accordance with the views herein stated.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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160. University of Nevada, Budget Director, Comptroller. Applicable statutes reviewed and construed to authorize retention of any unexpended balance of appropriated moneys in the revolving Western Interstate Commission for Higher Education fund, rather than reversion of any such unexpended balance to the State's general fund. Legislature by 1960 amendment has provided legal authorization for modification of previously executed contracts, so as to require reduced payments by recipients of state financial educational assistance.

CARSON CITY, June 7, 1960.

DR. CHARLES J. ARMSTRONG, *President, University of Nevada, Reno, Nevada*.

STATEMENT OF FACTS

DEAR DR. ARMSTRONG: Chapter 321, 1959 Statutes of Nevada, authorized participation in the Western Regional Higher Education Compact (WICHE), and appropriated the sum of \$25,000 for a special fund to enable the State of Nevada to carry out its obligations thereunder.

Section 2 of said Act provides as follows:

Any moneys remaining in such fund at the end of any fiscal year shall continue as a part of such fund and shall not revert to the general fund in the state treasury.

The general appropriation Act for the fiscal year 1960-1961 (Chapter 250, 1960 Statutes of Nevada), by Section 29 thereof, appropriated the sum of \$15,000 for such state participation in the Compact. Section 60 of this Act provides that:

view is to be found in the fact that there would otherwise be no need for two separate provisions regulating the charges which might be assessed against patients, and the manner of determining the amount of such per diem charge in the case of involuntary, or court-committed patients.

More specifically, if there is involved a veteran, nonresident "involuntary" (court-committed) patient, then the per diem charge must be the same as for "involuntary" (court-committed) resident (whether veteran or nonveteran) patient. However, the superintendent of the Nevada State Hospital, with respect to nonresident (both voluntary or involuntary) patients, may, if a veteran is involved and eligible, effect his transfer to a United States Veterans Administration Hospital or facility (NRS 433.535), or effect his repatriation to his state of residence. (NRS 433.580.)

In conclusion, it is our advice that per diem charges by the Nevada State Hospital be in accordance with the views herein stated.

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Except as otherwise provided by law, on July 1, 1961, any unexpended balances of the appropriations herein made shall revert to the fund from which appropriated.

Chapter 209, 1960 Statutes of Nevada, amended NRS 397.060 relating to contracts between the State and Nevada students for education in out-of-state institutions under the WICHE program, by limiting the amount of money which such students must repay. Such amendment, effective upon passage and approval, has raised some question as to its effect on a number of contracts entered into with Nevada students under the 1959 Act.

QUESTIONS

1. Must any balance remaining unexpended of the \$15,000 appropriated under Chapter 250, 1960 Statutes of Nevada revert to the general fund on July 1, 1961?

2. May Chapter 209, 1960 Statutes of Nevada, limiting the amounts which students must repay under the WICHE program, be construed to have retroactive effect so as to authorize modification of contracts made and executed under the provisions of the 1959 law (NRS 397.060)?

CONCLUSIONS

To question No. 1: No.

To question No. 2: For reasons herein stated: Yes.

ANALYSIS

Chapter 321, 1959 Statutes of Nevada, expressly and specifically established and authorized a revolving fund for state participation in the WICHE program. The continued existence of such a revolving fund is an essential condition to the successful administration of the WICHE program, which involves certification of students to out-of-state institutions more than a year in advance of their admission to professional schools. Under such circumstances, it is manifestly impossible to know the amount of the funds which may be committed at any one period of a fiscal year until students have actually been admitted and enrolled in the professional schools of their choice.

While it may be true that the appropriations Act of 1960 (Chapter 250, 1960 Statutes of Nevada), by Section 60 therein, makes reversion of any balances remaining unexpended on July 1, 1961 generally applicable, so as to appear to include the \$15,000 authorized for the WICHE program, such, in legal effect, is not the case. As expressly stated, "Except as otherwise provided by law * * *" provides the legal basis for exception or exemption of any such reversion of unexpended balance in the case of WICHE funds, on the basis of the provisions of Section 2, Chapter 321, 1959 Statutes of Nevada.

It is our opinion, therefore, that our stated conclusion to the first question is entirely proper and legally valid.

With respect to Chapter 209, 1960 Statutes of Nevada, and its possible application retroactively to contracts previously made, it may be noted that said Act is remedial in nature and should, therefore, be liberally construed. Moreover, it expressly provides for immediate effectiveness upon enactment, so that, performance of repayment by

recipient students furnished state financial educational assistance, shall be regulated and determined as fixed and prescribed by the Legislature, and in effect at the time of performance. While the State could not increase the contractual obligation assumed by such students, the Legislature has authorized waiver by the State of a part of the repayment due from such persons at the time when they would be obligated therefor, under the 1960 Act. In short, the regulatory legal provisions applicable at the time of performance may, therefore, be properly deemed effective and controlling.

We are of the opinion that the University may, therefore, legally enter into modified or new contractual agreement with any student receiving assistance under the WICHE program to provide for repayment and performance as provided in Chapter 209, 1960 Statutes of Nevada.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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161. Education, State Department of, School Districts. Chapter 117, 1960 Statutes of Nevada, amending NRS 386.290 construed and held as limiting payment of travel expenses and per diem allowances to one member-delegate from any school board attending meetings of the State School Board Association and Nevada Association of School Administrators, which organizations meet at the same time and place and hold joint, general sessions.

CARSON CITY, June 7, 1960.

HONORABLE BYRON F. STETLER, *Superintendent of Public Instruction*,
Department of Education, Carson City, Nevada.

STATEMENT OF FACTS

DEAR MR. STETLER: Chapter 117, 1960 Statutes of Nevada, as here pertinent, amended NRS 386.290, relating to "Compensation and traveling expenses of trustees" to read as follows:

* * *

3. *One member of the board of trustees of any school district may be allowed travel expenses and per diem allowances at the same rate authorized by law for state officers when he attends a meeting of the State School Board Association or Nevada Association of School Administrators. (Emphasis supplied.)*

* * *

It is indicated to be the general practice to convene meetings of both of the named groups or associations at the same time and place, though not at one meeting throughout the session. However, the two groups do meet once or twice in a general, or combined, session.

recipient students furnished state financial educational assistance, shall be regulated and determined as fixed and prescribed by the Legislature, and in effect at the time of performance. While the State could not increase the contractual obligation assumed by such students, the Legislature has authorized waiver by the State of a part of the repayment due from such persons at the time when they would be obligated therefor, under the 1960 Act. In short, the regulatory legal provisions applicable at the time of performance may, therefore, be properly deemed effective and controlling.

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* * *

It is indicated to be the general practice to convene meetings of both of the named groups or associations at the same time and place, though not at one meeting throughout the session. However, the two groups do meet once or twice in a general, or combined, session.

QUESTION

Does the language of the statute (specifically, the use of the disjunctive conjunction "or") make it possible to designate one trustee as a representative or delegate to the meeting of the State School Board Association *and* another trustee as a representative or delegate to the meeting of the Nevada Association of School Administrators?

CONCLUSION

No.

ANALYSIS

We consider the purpose of meetings of such organizations named in the above statutory amendment to be the mutual exchange of experiences and joint consideration of problems of common interest. Ultimately, the legislative justification for expenditure of public moneys for payment of expenses necessarily entailed in attendance at such meetings, is the advancement of the public interest.

The statutory authorization for payment of the travel expenses and per diem allowances here involved reasonably infers approval of the specifically-named organizations and encouragement of attendance at their meetings. If the meetings of each of these organizations were held at entirely different times and places, it is reasonable to assume that the statutory provision would authorize the indicated allowances and expenses of one member of a board of trustees attending each said separate meeting of the two organizations. Such, however, is not the situation here.

There is a presumption that the Legislature, when it enacts a law, has knowledge of all of the material facts involved. In the instant case, such presumed knowledge includes the fact that the meetings of both named organizations are held at the same time and place and, at least on one or more occasions, that they combine and hold a joint general session. Under such circumstances, therefore, *one* representative from any school district is not prevented from attending the sessions of *either* group *or* the joint general session(s) of both groups.

As we construe the statutory provision, legislative intent is that, in such circumstances, the travel expenses and per diem allowances are only authorized for *one* member-delegate from any school district. Additional support for such conclusion may be found in the fact that the language of the statute is susceptible of the literal meaning that the expenses and allowances indicated are authorized for *one* school member-delegate attending either the meeting of the State School Board Association *or* the meeting of the Nevada Association of School Administrators; inferentially, *not both*. Such conclusion would, of course, be contrary to legislative intent, on the basis of reasonable construction of the statutory provision. That is, the Legislature obviously intended to authorize the allowances incidental to attendance at meetings of either organization, but restricted such allowances to only *one* member-delegate from any school district.

It is our opinion, therefore, that so long as the two organizations continue to meet at the same time and place, and, in joint session (even in one or a few meetings) that the disjunctive "or" be construed

as "and," and that the indicated allowances be deemed to be authorized for only *one* member-delegate from any school district.

We trust that the foregoing sufficiently clarifies the matter and proves helpful to you.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

162. District Attorney, Washoe County. School Districts—Requirement of Advertisement of Bids for Purchase of Supplies or Equipment in Excess of \$1,000. NRS 393.180 construed and found not to require advertisement for bids for purchase of textbooks previously approved for use by the State Textbook Commission, or of other standard, fair-trade equipment purchased on fairly-apportioned basis from manufacturers or other suppliers, even though expenditure therefor is in excess of \$1,000. Violation of statutory requirement for advertisement for bids held to occur when the need for purchases in excess of \$1,000 is recognized or can be reasonably anticipated and the School Board meets this need through circumvention of the statute by placement of simultaneous or successive orders which in the aggregate exceed the statutory limitation.

CARSON CITY, June 7, 1960.

HONORABLE WILLIAM J. RAGGIO, *District Attorney, Washoe County, Reno, Nevada*.

Attention: Mr. Eric L. Richards, Assistant District Attorney.

STATEMENT OF FACTS

DEAR MR. RAGGIO: Nevada Revised Statutes 393.180 requires Boards of Trustees of School Districts to advertise for bids whenever they decide to purchase supplies or equipment which will cost more than \$1,000.

Some question has been raised concerning application of such requirement in the case of textbooks, purchase of which is limited to such as have been approved by the State Textbook Commission, or to typewriters intended for instructional purposes, which are a fair-trade item, and purchase of which is apportioned among manufacturers or suppliers of all standard machines in order to provide instruction and experience with all types of such machines.

A related question pertains to the conditions under which the statutory requirement will be deemed to apply. That is: whether such requirement relates to a specific purchase on any given date, or whether it applies to successive orders over a period of time, when the aggregate of all such successive orders exceeds the sum of \$1,000.

Because the problem is one of concern and interest to all school districts in the State, and apparently has not previously been specifically

as "and," and that the indicated allowances be deemed to be authorized for only *one* member-delegate from any school district.

We trust that the foregoing sufficiently clarifies the matter and proves helpful to you.

Respectfully submitted,

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A related question pertains to the conditions under which the statutory requirement will be deemed to apply. That is: whether such requirement relates to a specific purchase on any given date, or whether it applies to successive orders over a period of time, when the aggregate of all such successive orders exceeds the sum of \$1,000.

Because the problem is one of concern and interest to all school districts in the State, and apparently has not previously been specifically

submitted to or considered by us, it merits present clarification as to proper construction and application of the indicated statutory requirement.

We desire to note our complete agreement with the facts assumed and conclusions reached in the opinion prepared by your office on the matter in answer to the inquiry by the Washoe School District.

QUESTIONS

1. Is it necessary for boards of school trustees to advertise for bids in connection with the purchase of textbooks when such purchases exceed \$1,000?

2. Is it necessary for boards of school trustees to advertise for bids in connection with the purchase of fair-trade items, such as standard typewriters which are to be used for instructional purposes, and which are normally purchased on a fairly-apportioned basis from all suppliers of such standard equipment?

3. (a) Are purchases of supplies or equipment made over a period of time and aggregating costs in excess of \$1,000 in violation of the statutory requirement contained in NRS 393.180?

(b) Does the statutory requirement contained in NRS 393.180 apply only to the amount of any specific purchase of supplies or equipment on a given date?

CONCLUSIONS

To question No. 1: No.

To question No. 2: No.

To question No. 3(a): As herein qualified: No.

To question No. 3(b): As herein qualified: No.

ANALYSIS

NRS 390.100, relating to "Meetings for adoption of textbooks, etc.," insofar as here pertinent, provides as follows:

1. * * * the state textbook commission may adopt a uniform series of textbooks *for exclusive use* as textbooks in all the elementary public schools of the state. (Emphasis supplied.)

NRS 390.120 relates to "Notice to textbook publishers; sealed proposals," and sets forth the procedure for the submission of sealed proposals for supplying textbooks for use in the State of Nevada, which proposals shall:

2(d) Include a statement of the introductory price, the exchange price for new books in the hands of dealers, the exchange price for secondhand books, and the retail price at which publishers will agree to furnish each textbook to the school children of Nevada at one or more places in the state designated as state textbook depositories by the state textbook commission.

NRS 390.130 relates to "Notices to textbook publishers when purchase contract expires"; NRS 390.140 relates to "Adoption of textbooks by commission; rejection of proposals;" NRS 390.150 relates to "Certification of selected textbooks"; NRS 390.160 relates to "Power

of commission to make contracts, etc."; NRS 390.170 relates to "Contracting publisher to furnish bond, etc."; NRS 390.180 relates to "Contracts effective when bonds filed"; NRS 390.190 relates to "Failure of contracting publisher to comply with conditions; adoption of textbooks void"; NRS 390.200 relates to "Distribution of guaranteed prices of textbooks"; and NRS 390.210 relates to "Penalty for overcharges on textbooks."

The above statutory provisions comprehensively authorize the adoption of textbooks for exclusive use in the State's public elementary school system, and the making of contracts for purchase and supply thereof at agreed and guaranteed prices. The matter is handled entirely on the state level and boards of trustees of school districts are confined to exclusive purchase and use of textbooks approved by the State Textbook Commission, and no others.

The obvious objectives of the statutory requirement contained in NRS 393.180, that boards of school trustees advertise for bids in connection with any purchase of supplies or equipment in excess of \$1,000, are:

1. To permit dealers to compete for school business on a fair and equal basis; and
2. To insure maximum value for public expenditures by requiring school districts to purchase supplies and equipment from the lowest and most satisfactory bidder.

Manifestly, where the selection of textbooks which may be used is determined at state level, and the prices for supply thereof are also established by contracts between publishers and the State, boards of school trustees have no choice or discretion in the premises, and are bound to purchase said textbooks under and pursuant to contracts guaranteeing prices previously executed and controlling. In such circumstances, therefore, there is no legal basis or justification for insistence upon compliance with the statutory requirement for advertisement for bids in connection with any purchase of textbooks. In fact, there would be needless and unjustifiable expenditure of public funds for such advertisements.

The situation is substantially the same at the secondary school level. " * * * the choice of a particular textbook limits selection to the product of a single publisher and no advantage to the school district or to publishers could accrue from publication of a call for bids. Should the price of the textbook be a factor influencing choice, the situation can be resolved by direct negotiation with the publisher." (Opinion, Office of District Attorney, Washoe County, May 9, 1960.)

Typewriters purchased for instructional purposes by schools are fair-trade items and sold to them by suppliers of all standard types at uniform educational discounts. Because a need exists for all types of standard typewriters in connection with proper school instruction in their use, we are informed that it is established policy on the part of boards of school trustees to make fair and equitable allotment of business to each of the suppliers of standard typewriters, so as to make possible maintenance of a proper balance in machines used for instructional purposes. Assuming that such is actually the policy in effect and being adhered to by boards of school trustees, we are of the opinion

that in such instances also, no useful purpose would be served by any advertisement for bids, and the statutory requirement contained in NRS 393.180 is inapplicable.

In respect to question No. 3 herein, it is our considered opinion that the following observations properly reflect valid construction and application of the statutory requirement contained in NRS 393.180:

The language of the statute would seem to indicate that the limitation of \$1,000.00 without bid prohibits purchases in excess of that amount without bid when the board knows or can reasonably anticipate that the contemplated purchase of supplies or equipment will entail the expenditure of more than \$1,000.00.

For example, in the equipment of ten new classrooms, for which 300 pupil desks are required, the board may not purchase, legally, 30 desks on each of ten orders, since the need for 300 desks is apparent at the time that the board decides to open ten new classrooms. On the other hand, a situation may arise, where through repeated unanticipated increases in school enrollment, it may become necessary to provide desks for thirty pupils on each of five or six successive occasions during the year. If an expenditure, not in excess of \$1,000.00 would meet each situation as it arose, successive expenditures to meet each recurring situation would be justified and no call for bids would be required, even though the aggregate amount expended within the year might run to four or five thousand dollars.

Violation of the provision requiring a school district to publish a notice calling for bids occurs when the need for purchasing supplies or equipment of a value exceeding \$1,000.00 is recognized or can be reasonably anticipated and the board meets this need through circumvention of the statute by placing simultaneous or successive orders which in the aggregate exceed the \$1,000.00 limitation. Such procedure would carry the presumption of a wilful evasion of the provisions of the statute." (District Attorney, Washoe County, Opinion dated May 9, 1960.)

We trust that the above will sufficiently clarify legislative intent and construction and application of the law in connection with problems such as those herein considered.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

163. Nevada Tax Commission, Sales and Use Tax Division. State Sales and Use Tax Act reviewed and construed as excepting from collection of the use tax bottles purchased by Nevada bottling firms in other states, and utilized by them as returnable "containers."

CARSON CITY, June 7, 1960.

MR. JACK W. WILLIAMS, *Administrator, Sales and Use Tax Division, Nevada Tax Commission, Carson City, Nevada.*

STATEMENT OF FACTS

DEAR MR. WILLIAMS: It appears that Nevada bottling business enterprises are obliged to purchase the bottles required by them out of state, since such commodity is not manufactured in Nevada. They then fill such bottles with their particular beverages, and sell said bottles with their contents to retail stores, jobbers, or distributors. In the case of jobbers or distributors of such bottles and contents there is, presumably, an additional transaction or sale to retailers. Retailers then sell the bottles with their contents to consumers. The consumers either pay for the bottles as a nonreturnable container, or post a deposit on the bottles as returnable containers, and subsequently either do or do not make actual return of the bottles.

The general question which arises is: How are containers taxed under Sales and Use Tax Acts?

Four situations can be distinguished, namely, the taxation or exemption of empty containers when they are (a) nonreturnable and (b) returnable, and the taxation of filled containers along with the contents when they are (c) returnable and (d) nonreturnable.

QUESTION

Is the use of returnable bottles purchased by Nevada bottlers from out-of-state sources subject to the *use tax* under Nevada Revised Statutes, Chapter 372?

CONCLUSION

No.

ANALYSIS

NRS 372.105 imposes an excise tax on retail sales of tangible personal property, collectible from retailers at the rate of 2 percent of their gross receipts from such sales. NRS 372.185 imposes a corresponding use tax of the same rate on the storage, use or other consumption in this state of tangible personal property.

NRS 372.085 defines "Tangible personal property"; NRS 372.070 defines "Seller"; and NRS 372.055 defines "Retailer."

NRS 372.060, as here pertinent, defines "Sale" as follows:

1. "Sale" means and includes any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

NRS 372.065, as here pertinent, defines "Sales price" as follows:

1. "Sales price" means the total amount for which tangible

property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold.

(b) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses. * * *

2. The total amount for which the property is sold includes all of the following:

(a) Any services that are a part of the sale.

* * *

3. "Sales price" does not include any of the following:

* * *

(c) The amount charged for labor or services rendered in installing or applying the property sold.

* * *

NRS 372.050, as here pertinent, defines "Retail sale" or "sale at retail" as follows:

1. "Retail sale" or "sale at retail" means a sale for any purpose other than resale in the regular course of business of tangible personal property.

NRS 372.100, relating to "Use" provides as follows:

"Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business.

NRS 372.290, relating to "Containers," provides as follows:

1. There are exempted from the taxes imposed by this chapter the gross receipts from *sales of, and the storage, use or other consumption* in this state of:

(a) Nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container.

(b) Containers when sold with the contents if the sales price of the contents is not required to be included in the measure of the taxes imposed by this chapter.

(c) Returnable containers when sold with the contents in connection with a retail sale of the contents or when resold for refilling.

2. As used in this section the term "returnable container" means containers of a kind customarily returned by the buyer of the contents for reuse. All other containers are "nonreturnable containers." (Emphasis supplied.)

Ruling No. 31 of the Nevada Tax Commission relative to "Containers and Labels" (in effect since May, 1955), insofar as here pertinent, further defines "Containers" as follows:

The term "containers" as used herein means the articles in which tangible personal property is placed for shipment and delivery such as wrapping materials, bags, cans, twines, gummed tapes, barrels, boxes, bottles, drums, carboys, cartons, sacks, and materials from which such containers are manufactured.

The term "returnable containers" as used herein means containers of a kind customarily returned by the buyers of the contents for reuse by the packers, bottlers or sellers of the commodities contained therein. A container, title to which is retained by the seller of the contents, or for which a deposit is taken by such seller, is a returnable container. Examples of returnable containers are: registered dairy products containers, steel drums, beer and soft drink bottles, wine barrels, chemical carboys, cement bags, gas cylinders.

All other containers are "nonreturnable containers." Examples of nonreturnable containers are: wrapping and packing materials, paper bags, twine, cartons, cans, medicine and distilled spirits bottles.

* * *

Tax applies to all other sales of containers except sales for the purpose of resale to other sellers of containers who purchase them for resale without the contents.

Deposits as defined herein are not taxable.

Administrative Bulletin No. 1 of the Nevada Tax Commission relative to "Containers and Items Dispensed Together with Meals or Drinks," in substance notes that such items when sold to restaurants and other food and drink dispensing establishments for use of their customers, together with meals, prepared foods and dispensed drinks, are exempted from the sales tax.

The above detailed statement of applicable or relevant statutory and administrative regulatory provisions is essential to proper consideration of the question herein.

In respect to taxes, it is well-settled law that tax exemption provisions must be strictly construed against those claiming any such benefit, although they may not be given a distorted or unreasonable construction. (17 A.L.R. 1027, 1029; 108 A.L.R. 284, 286 and footnote citations.)

On the basis of the foregoing statutory provisions, there can be no reasonable doubt that bottles, as utilized in the circumstances outlined, are tangible personal property and containers, either involved in a *retail sale* transaction or *consumed or used* at some point in their handling, within the *general* purview of the Nevada Sales and Use Tax Act. The problem is, whether the Act exempts or excepts such containers from the *retail sales* or *use* tax, when such container bottles are purchased outside of Nevada and utilized as "returnable containers" under the provisions of the Act and the applicable administrative rules and regulations.

The position of the bottling firms may, perhaps, be briefly summarized as follows:

They are not in the business of selling empty bottles; they use same to package, transport, market and merchandise only the

contents. In this respect, they are in no different position than manufacturers or distributors of canned or bottled products where the bottle containers are not returnable and dispensed by purchasers at retail of the containers with their contents. Finally, that to subject *returnable bottles* to a *use tax* is discriminatory, in that their use of the bottles in the described manner differs in no way from the indicated use of cans or nonreturnable bottles by others, and imposes an undue burden and disadvantage upon them in view of the highly competitive conditions which exist in the beverage field, particularly in view of the increased marketing of canned or bottled beverages, involving no use tax on such containers. (Citing Bulletin 165, March 1958, American Bottlers of Carbonated Beverages, Wash., D. C., relative to Pennsylvania law and practice.)

The Sales Tax agency, on the other hand, contends that the correct test for taxability of returnable containers is based on the answer to the question: "What is the primary purpose for which the containers are bought as evidenced by their use?" Applying such test, it follows that since the containers are *substantially* used by the bottling companies to market and merchandise their products, such subsequent sales to the ultimate consumers of the contents of such *returnable* bottles allegedly do not make the original sales of bottles by the manufacturers to bottling companies sales for resale. The argument made in support of such contention is that bottling companies are primarily not in the business of selling empty bottles; that they buy the bottles to market their particular beverages; that if it were not for the beverages put into the bottles, they would have no use for the bottles; and, therefore, that the use to which the bottles are put is a substantial use as well as the primary purpose for purchase of said bottles. (Citing Owens-Illinois Pacific Coast Co. v. State Board of Equalization, Superior Ct., Sacramento County, June 24, 1942, relative to California law and practice.)

Before considering these respective arguments, it seems proper to dispose of the relationship between the bottling firm and retail stores, and the relationship between the retailers and consumers. Since the transaction between the bottling firms and retail stores, involving filled bottles, is a sale for resale purposes, it is clear that the *sales tax* is inapplicable under the exclusion contained in NRS 372.050. And, NRS 372.290(c) clearly exempts application of the *sales tax* to the transaction between retailers and consumers insofar as "returnable" bottles are concerned.

Though appreciative of the economic argument made by Nevada bottling firms, we must, of course, refrain from any encroachment upon the fields of the legislative and executive branches of government. We are not charged with responsibility for the economic and social effects of taxation. Our task is to ascertain and to give effect to the intention of the Legislature as contained in this State's Sales and Use Tax Act.

It may, however, be noted that examination of Pennsylvania law and practice, relied on by Nevada bottling firms, in no way supports their position; in fact, the exact contrary is the case. (Commonwealth of

Pennsylvania v. The Philadelphia Coca-Cola Bottling Co. 33 Dauph. 421; letter from Pennsylvania Sales Tax Agency, March 21, 1960.)

In connection with our review of the position taken by the Nevada Sales Tax Division, it must be noted that the California statute relative to exemption of containers is substantially identical to the Nevada statute (Section 6364, West's Annotated California Codes, Revenue and Taxation). However, it must further be pointed out that, in both Pennsylvania and California, bottles are either manufactured in said states or are otherwise available for purchase therein, so that the *sales tax* may properly be applied on returnable bottles sold by *bottle manufacturers*. (Owens-Illinois Pacific Coast Co. v. State Board of Equalization, *supra*.) The factual situation in Nevada is otherwise: there is no manufacturing of bottles in this state, and bottling firms must therefore, secure same through purchase from out-of-state manufacturers. There is, therefore, no possible basis for application of a *sales tax*, but only a question of possible application of the *use tax*, insofar as the transaction between bottle *manufacturers* and Nevada *bottling firms* is concerned.

Regarding possible application of the *use tax*, it may parenthetically be noted that the *use tax* was conceived as a necessary supplement to the successful administration of the *sales tax*. Thus, if for some reason a sale at retail of tangible personal property escaped the *sales tax*, the *use*, consumption, distribution, and storage of the property would be taxed after it has come to rest in this state and has become a part of the mass of property in this State. The rationale of *use taxes* is two-fold: (1) to prevent evasion of the *sales tax*, through out-of-state purchases in states where there are no *sales taxes*, where the benefit of an exemption from the *sales tax* can be secured, or where the *sales tax* may be lower than in the state of residence of the purchaser; and (2) to protect local merchants, and the economy of the State. The legislative intent of "use taxes" generally, therefore, is that they shall apply to tangible personal property coming from another state, or another political or geographical area within the same state, whether or not a *sales tax* be in effect there. (See Article, "The Use Tax: Its Relationship to the Sales Tax, Eugene Greener, Jr., Vanderbilt Law Review, Vol. 9, No. 2, p. 349, February, 1956; Morrison-Knudsen Co. v. State Tax Commission, 242 Iowa 33, 44 N.W.2d 449, 41 A.L.R.2d 523 (1950), Union-Portland Cement Co. v. State Tax Commission, 110 Utah 152, 176 P.2d 879 (1947).)

In the situation before us, however, the rationale for application of the *use tax* is totally absent; that is, since bottles are not manufactured in Nevada and not available for purchase therein, purchase of same in another state is in no manner an *evasion* of the Nevada *Sales Tax*, nor (except as the State may be deprived of tax revenues thereon) can local merchants, or the economy of the State, be adversely affected by such out-of-state purchases.

Certainly, some doubt is suggested by the factual distinctions and principles of taxation indicated. And, since it is the generally accepted rule of construction of tax laws that whatever doubt exists in a tax measure must be resolved against the government, further inquiry is well-justified. (Shwab v. Doyle, 258 U.S. 529, 42 S.Ct. 391, 26 A.L.R. 1454.)

We have found no judicial determination of the question herein by the Nevada courts. We have, therefore, been compelled to turn to the court decisions of other states in an effort to find an answer to the problem.

Where "containers" have been essentially determined to be *nonreturnable*, and have been utilized in connection with *resale* purposes, *manufacturers* of such "containers" have been held not to be subject to the *sales* tax. (*N.Y.*, *Sterling Bag Co. v. City of New York*, 256 App.Div. 645, 11 N.Y.S.2d 297.) The *purchaser* of such containers has also been exempted from the *sales* tax, if they were utilized in connection with a *resale*. (*N.Y.*, *American Molasses Co. of New York v. McGoldrick*, 256 App.Div. 649, 11 N.Y.S.2d 289.)

(See also: *Cal.*, *Coca-Cola Co. v. State Board of Equalization*, 156 P.2d 1. However, as previously indicated, *present* law is apparently otherwise.)

Where the sale of containers by manufacturers to users is determined to be *not for resale*, the *sales* tax has been held to apply to *manufacturers*, on the theory that the use of the containers constituted consumption. (*Ala.*, *Birmingham Paper Co. v. Curry*, 238 Ala. 138, 190 So. 86; *Utah*, *E. C. Olsen Co. v. State Tax Commission*, 109 Utah 563, 168 P.2d 324; *Fla.*, *Gay v. Canada Dry Bottling Co. of Florida*, 59 So.2d 788, a case involving *returnable* bottles; *Indiana*, *Department of Treasury v. Fairmount Glass Works*, 49 N.E.2d 1, wherein a wholesale *sales* tax rate was held applicable to *manufacturers* on sales of bottles subsequently utilized on a *returnable* basis.)

(A contrary view is held by *Ohio*, however, where the court, in *Kroger Grocery & Baking Co. v. Glander*, 77 N.E.2d 921, held *exempt* from both the *sales* and *use* tax, containers used in packaging tangible personal property sold in an established business.)

The strongest case we have been able to find in support of the validity of exacting a *use* tax under circumstances similar to those here involved is reported for *Kansas*. Under a statutory provision which the court held as exempting only *nonreturnable* containers, the purchase by a distributor of containers outside the state for use within the state by such distributor who filled same, and later accepted same empty on a *returnable* basis after consumption of their contents by retail customers, was held to constitute a *use* of the containers, subject to the *use* tax under the *Kansas* Act. (*Consumers Co-operative Assn. v. State Comm. of Rev. & Taxation*, 174 Kan. 461, 256 P.2d 850 (1953).)

On the other hand, the *Kroger* Case, *supra*, and the following cases definitely support the contrary view:

(1) Under a statute exempting from the *use* tax "industrial materials not readily obtainable in Iowa," cartons, kegs and bottles used in connection with the sale of beer were held to fall within the exemption in *Zoller Brewing Co. v. State Tax Commission*, 5 N.W.2d 643 (*Iowa*, 1942). (Note: Admittedly, the express statutory exemption justifies this decision.)

(2) Under a statute expressly providing that a "retail sale" did not include the sale of containers when sold to persons for use in packaging or shipping tangible personal property, and also exempting from sales, storage or *use*, any tax on sales of *returnable* containers when sold with the contents in connection with a retail sale of the contents

or when sold for refilling (as provided also in NRS 372.290), it has been *held* that the common *returnable* soft drink bottle, on which a deposit is made on purchase and refunded on return, is a "container" and the purchase thereof by the *bottler* from the *manufacturer* is not taxable under the Sales and Use Tax Act. (Maine, Coca-Cola Bottling Plants v. Johnson, 87 A.2d 667 (1952).)

(3) In the *Tennessee* case of *Evans v. Memphis Dairy Exchange*, 250 S.W.2d 547 (1952), the court reached a similar conclusion where *returnable* milk bottle containers were involved, requiring a three-cent deposit to assure their return. The court, in this case, found that such bottle containers were not included within the definition of a "sale at retail." In this case also, the Tax Commission (as has the Nevada Sales Tax Division) maintained that the transaction did not involve a sale for resale, and that any transaction not a sale for resale must, therefore, under the express statutory provision, be considered a "retail sale." The Tennessee court noted, however, that the same Act which so defined a "sale at retail" also expressly provided (as does NRS 372.290) that there shall be excluded from such term a transaction that is a sale of a container *used* for packaging tangible personal property for sale. In this case also, the Tax Commission further argued (as has the Nevada Tax agency) that the statutory exemption was not intended to apply to all containers but only such as are *nonreturnable* by the consumer. In answer to this additional argument, the Tennessee court further held that even in such case the transaction would be nontaxable, predicated such conclusion on the well-settled principle that "all questions of doubt arising upon construction of taxing statutes are to be resolved against the state." (Citing *Doran v. Crenshaw*, 166 Tenn. 346, 348, 61 S.W.2d 469.)

Our review of the law and relevant decisions, therefore, justifies the following recapitulation:

We find that new bottles are purchased by bottling firms, filled with some beverage, and generally, through a retailer, sold to ultimate consumers. In respect of the bottles, such sale to the ultimate consumer is a "sale or return," and title to the bottles, together with their contents, definitely passes. Nevertheless, in the case of "returnable" bottles, the same may be returned for a refund which the bottling firms are obligated to pay. Consequently, the ultimate sale of the contents of such bottles need not be, and in some cases is not, treated as an ultimate sale of the bottles: the bottles are disregarded for tax purposes, but the first *sale* of the bottles from the manufacturer to the bottling firms *may be taxed as a retail sale*.

Under certain circumstances, and from the standpoint of collecting the tax at least once, such a result is undoubtedly sound and unobjectionable. In such instances, the tax is not collected a second time because the amounts posted by the ultimate consumers of the contents of "returnable" bottles are treated as deposits to assure return of such containers, and the sales tax does not apply to such deposits. Presumably, such deposits are not taxable even though the bottles are never returned by the consumers, or their return is refused (because "unfit" or for no reason), since the tax has been paid on the bottles in said jurisdictions. In such cases, the states derive revenue from bottles not

returned by consumers, or returned and discarded by bottling firms as unfit for further use. And, in such event, the deposits might be regarded as possibly covering the cost of the bottles, including the tax. (See Article: "The Measure of Sales Tax," Arthur H. Northrup, *Vanderbilt Law Review*, Vol. 9, No. 2, February 1956, pp. 251-254.)

It must be presumed that in states where a *sales* tax is imposed on bottle *manufacturers* (e.g., Pennsylvania, California) that bottles are manufactured, or at least available for purchase, therein. Such is admittedly not the case in Nevada; Nevada bottling firms must make purchase thereof in other states. This necessarily means that any liability to any tax in this state would have to be on the basis of the *use*, rather than the *sales*, tax. But, as already noted, the theory and justification of a *use* tax is (1) to prevent evasion of the sales tax, and (2) to protect local merchants and the economy of the State. Both these justifications for imposition of the use tax are, therefore, lacking in the circumstances obtaining in Nevada.

It further appears that although the Nevada Sales and Use Tax Act has been in effect since 1955, the taxing agency only now would so construe the Act as to impose and exact the *use* tax in the described circumstances. This means that if such *use* tax was legal and should have been collected from the outset, then the taxing agency has been derelict in its administrative duties in this respect up to the present time, and bottling firms are not only presently and prospectively liable for such a use tax, but they would also be retroactively liable for such use taxes not heretofore collected by the taxing agency. In this connection, the following observation is deemed pertinent:

Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. (*Coca-Cola Co. v. State Board of Equalization*, 25 Cal.2d 918, 156 P.2d 1, 2.)

Certainly, and at the very least, the taxing agency must have entertained some doubt as to the proper construction and exaction of the *use* tax in the described circumstances ever since the inception of the Act (1955) to justify its omission to collect such taxes up to the present time.

We find no explicit or sufficient legal basis in the Nevada Sales Tax Act indicating that the exemptions authorized in NRS 372.290 are limited to *nonreturnable* containers only. The Kansas case (*Consumers Cooperative Assn. v. State Comm. of Rev. & Taxation*, *supra*) can, therefore, be clearly distinguished, and cannot be regarded as controlling.

Under all of the circumstances indicated and in view of the status of case law on the subject, therefore, it is our considered opinion that the use of *returnable* bottles purchased by Nevada bottlers from out-of-state sources is not subject to the *use* tax under present Nevada law. (*Coca-Cola Bottling Plant v. Johnson*, *supra*; *Evans v. Memphis Dairy*

Exchange, *supra*.) We base our conclusion on the well-settled rule that "all questions of doubt arising upon construction of taxing statutes are to be resolved against the state." (Shwab v. Doyle, *supra*; Evans v. Memphis Dairy Exchange, *supra*, citing Doran v. Crenshaw, 166 Tenn. 346, 348, 61 S.W.2d 469.)

As we have stated, consideration of the economic and social effects of the taxation in question are not properly within the purview of this opinion: our responsibility is to ascertain and to give effect to the intention of the Legislature as expressed. If any change in the law is desired, it must come from the Legislature. It cannot be effected by rule or regulation of the Nevada Sales and Use Tax Division.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

164. **Department of Motor Vehicles. Revocation of License to operate motor vehicle. NRS Chapters 483 and 484 construed relative to mandatory revocation of license to operate motor vehicles. Where a person has been twice convicted of operating a motor vehicle while under the influence of intoxicating liquor, the department has the legal power and is under direct legislative mandate to revoke the driving license of the offender for two years even though the second conviction was in a municipal court under a city ordinance and not under state statute.**

CARSON CITY, June 10, 1960.

MR. LOUIS P. SPITZ, *Director, Department of Motor Vehicles, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR MR. SPITZ: On October 1, 1958, in the Justice Court of Reno Township, State of Nevada, defendant was convicted under NRS 484.050 of having driven a motor vehicle while under the influence of intoxicating liquor on U. S. Highway 395 North on September 14, 1958. He was fined \$150 and his driver's license was suspended for a period of 90 days. On the 19th day of February, 1960, defendant was again charged with driving a motor vehicle while under the influence of intoxicating liquor, this time within the city limits of the city of Las Vegas, State of Nevada, in violation of Chapter 36, Section 42 of the Las Vegas City Code as amended by Section 3 of Ordinance 756 of that city. On the 29th day of February, 1960, defendant appeared with counsel in the Municipal Court of the city of Las Vegas, was convicted of the charge on his plea of guilty and fined \$200. The court then added to its sentence the following: "And his driver's license Revoked for a period of 30 days."

Upon receipt of the record of conviction from the Municipal Court of the city of Las Vegas, the Department of Motor Vehicles revoked the

Exchange, *supra*.) We base our conclusion on the well-settled rule that "all questions of doubt arising upon construction of taxing statutes are to be resolved against the state." (Shwab v. Doyle, *supra*; Evans v. Memphis Dairy Exchange, *supra*, citing Doran v. Crenshaw, 166 Tenn. 346, 348, 61 S.W.2d 469.)

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Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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Upon receipt of the record of conviction from the Municipal Court of the city of Las Vegas, the Department of Motor Vehicles revoked the

driver's license of the defendant for a period of two years. Defendant contends that the revocation of his license to operate motor vehicles in the State of Nevada for a period of two years was unwarranted and that the Department of Motor Vehicles was without legal authority to take such action for the following reasons:

(1) Defendant was charged with and convicted of driving while under the influence of intoxicating liquor on the second offense under a municipal ordinance and not under the state statute; and

(2) The sentence of the Municipal Court of the city of Las Vegas was conclusive so that the Department of Motor Vehicles could not enlarge upon it by imposing a longer period of revocation or suspension of the driver's license than had been indicated by the Municipal Court of the city of Las Vegas.

The Department of Motor Vehicles, on the other hand, claims that its action in revoking the license of defendant for a period of two years upon his second conviction of driving a motor vehicle on any street or highway in this State while under the influence of intoxicating liquor was not only proper under the law applicable to the undisputed facts in this case but also mandatory under the statute. (NRS 483.460, subsection 2.)

QUESTIONS

1. Does the Department of Motor Vehicles acting through its appropriate officers and agents have the legal power to revoke the driver's license of one convicted on a second offense of driving a motor vehicle while under the influence of intoxicating liquor?

2. If the answer to the above is in the affirmative, does the fact that the conviction on the second charge was in a municipal court, pursuant to a municipal ordinance or a section of a municipal code, limit the power of the Department of Motor Vehicles to revoke such license?

3. Does the action, suggestion or recommendation as to revocation or suspension of license by the municipal court in passing sentence limit the power of the Department of Motor Vehicles with reference to revocation of a driver's license in such case?

4. Is the revocation of a driver's license for a period of two years mandatory or optional upon a second conviction of operating a motor vehicle while under the influence of intoxicating liquor?

CONCLUSIONS

To question No. 1: Yes.

To question No. 2: No.

To question No. 3: No.

To question No. 4: Mandatory.

ANALYSIS

A

NRS 484.050 subsection 3 reads as follows:

3. Upon a subsequent conviction for an offense *under the provisions of this section*, the person so convicted shall be punished by a fine of not less than \$100 nor more than \$500 and by imprisonment in the county jail for not less than 10 days nor more than

6 months. *His license to operate a vehicle in this state shall be revoked for 2 years by the department of motor vehicles.* (Italics supplied.)

The first italicized portion of the statute above quoted is the portion upon which defendant bases his contention that conviction must be specifically under the state law in order to justify the sanctions outlined therein. Conviction of the charge of driving while under the influence of intoxicating liquor, second offense, under any municipal ordinance is insufficient, according to his view, to set in motion the machinery available to the Department of Motor Vehicles to revoke his driver's license. This argument is good as far as it goes but it does not go far enough.

NRS 483.460, so far as relevant to this discussion, reads as follows:

483.460 Mandatory revocation of licenses by department. The department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

* * *

2. A second conviction of driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug; *but the revocation provided for in this subsection shall in no event exceed the time fixed as provided in subsection 3 of NRS 484.050.* (Italics supplied.)

This is the statutory provision under which the agents of the Department of Motor Vehicles relied in revoking the driving license of defendant.

Several things should at once be noted. There is no suggestion in that statute with respect to the court in which the conviction for the offense of driving while under the influence of intoxicating liquor must occur in order to invoke the penalties prescribed. This is true both as to the first and any subsequent conviction. However, subsection 2 of NRS 483.460 expressly limits the period of license revocation to the time provided by NRS 484.050, subsection 3, so that no one convicted of a second offense of driving while under the influence of intoxicating liquor may be punished more severely when convicted in a municipal court in a center of population than he could be if tried by jury in a Justice Court of the State under state law and found guilty for an offense committed on the open road.

As appears both from the title of NRS 483.460 and from a reading of the entire section, the only entity vested with the legal power to revoke the driving license of an individual who falls within the provisions of that statute is the Department of Motor Vehicles through its proper officers and agents. Not only is this power to revoke licenses in cases coming within the purview of this statute vested in the Department of Motor Vehicles but that department is directly charged with the mandate of the Legislature to exercise that power in all such cases. Otherwise the words "the department *shall forthwith* revoke the license" of any operator would be meaningless. Furthermore, it is hard

to imagine any language more specific, direct and unequivocal than the words used in the statute to express the undoubted intention of the Legislature to include convictions in all courts of competent jurisdiction in the State and not merely the justices courts. Any other interpretation of the statute in question would render completely meaningless the provisions of NRS 483.460, subsection 2.

We have not overlooked other provisions of NRS 484.050 vesting in the courts of the State the *discretionary* power to direct the Department of Motor Vehicles to suspend the operator's license for a period of time not less than 30 days nor more than a year. (NRS 484.050, subsection 2.) Even here it is the department and not the court which performs the act of suspending the license. In the case of a first offender the department follows the order of the court in suspending the driver's license for the period indicated in the decision of the court. In the case of a second conviction the department is legally bound to revoke the driver's license for the full period of two years pursuant to legislative fiat.

B

On a very broad view of the situation, defendant is hinting at ideas of double jeopardy and multiple punishment for the same offense, without directly advancing these contentions. For the benefit of the public, of the officials of the Department of Motor Vehicles and of law enforcement officers generally, we deem it advisable to interpret the law applicable to such situations.

Where a municipal ordinance prohibits conduct or acts within the town or city limits, which are also regulated and designated as violations of the criminal law by enactments of the State Legislature, an offender may, by his conduct, find himself in violation of both the state law and the municipal ordinance. Conviction under the municipal ordinance in such event would not protect him against prosecution under the state statute. *Ex Parte Sloan* (1923) 47 Nev. 109, 217 Pac. 233; *Ex Parte Siebenhauer* (1879) 14 Nev. 865. The theory is that the same act may constitute a criminal offense against two sovereignties and prosecution by one resulting either in acquittal or conviction affords the defendant no immunity against prosecution by the other. Recognizing that there was a split of authority on this question, the Supreme Court of the State of Nevada settled the question in this State in the case of *Ex Parte Sloan*, *supra*. That case dealt with the manufacture and sale of intoxicating liquors but the principles settled by the decision are obviously of general application.

Dealing with the claims of *res judicata* and double jeopardy the court expressed itself as follows: (47 Nev. 109, at page 115)

There is a conflict of authority upon this question. The decided weight of authority, however, is to the effect that the same act may constitute an offense both against the state and a municipal corporation. "Indeed" says Judge Cooley, in his work on *Constitutional Limitations* (7th ed.) p. 279, "an act may be a penal offense under the laws of the state, and further penalties, under proper legislative authority, be imposed for its commission by municipal bylaws, and the enforcement of the one would not preclude the enforcement of the other." This principle was recognized in *Ex Parte*

Siebenhauer, 14 Nev. 365. The trend of authority in this respect is thus stated in 28 Cyc., pp. 696-698: "The legislature may confer police power upon a municipality over subjects within the provisions of existing state laws. Accordingly, unless it is prohibited by some express constitutional or statutory provision, by the great weight of authority municipal corporations may, by ordinance, prohibit and punish acts which are also prohibited and punishable as misdemeanors under the general statutes of the state, or which may involve a common-law offense." The power may be granted expressly or by implication. Id. 693.

It would be difficult to find any case which disposes more directly and completely of the contentions, express and implied, advanced by the defendant in the matter at hand. Far from limiting the legal power of the Department of Motor Vehicles in pursuing the course followed by it in revoking the driving license of the defendant under the authority conferred by the Legislature in NRS 483.460, the case cited makes it abundantly plain that the defendant might still be subject to prosecution under NRS 484.050 and that the conviction in the Municipal Court of the city of Las Vegas could not be pleaded in bar either as a former judgment of conviction or acquittal (NRS 174.320, subsection 3) or as "once in jeopardy" (NRS 174.320, subsection 4).

To the same general effect as the case of *Ex Parte Sloan*, supra, see: *State v. Reno Brewing Co.* (1919) 42 Nev. 397, 178 Pac. 902; (intoxicating liquors)

Serio v. United States (CCA, 5th Cir., 1953) 203 F.2d 576; certiorari denied (1953) 346 U.S. 887, 98 L.Ed. 391; (narcotics)

United States v. Lanza (1922) 260 U.S. 377, 67 L.Ed. 314; (intoxicating liquors)

Pike v. City of Birmingham (Ala., 1951) 53 So.2d 394, certiorari denied 53 So.2d 396, 255 Ala. 671; (lotteries)

People v. Bartkus (1955) 130 N.E.2d 187, 7 Ill.2d 138; (armed robbery of national bank)

McCann v. State (Okla., 1946) 170 P.2d 562, 82 Okl.Crim. 374; (intoxicating liquor)

State v. Jackson (Wyo., 1955) 291 P.2d 798. (drunk driving)

The law is very well summed up in the case of *Pike v. City of Birmingham*, supra, where the court said (p. 395):

Pretermittting entirely consideration as to whether the plea (autrefois convict, that is prior conviction amounting to a plea of *res adjudicata*) would be valid had the prosecution been by the same sovereign, it is now settled that where an offense constitutes a violation of both a city ordinance and a state law, prosecution by one of the offended sovereigns will not bar a prosecution by the other. (citing cases.)

See also the excellent summary of the subject in published Attorney General Opinion No. 751, May 9, 1949, page 194.

If, as we must assume in view of the decisions cited, prosecution under the municipal ordinance would not bar prosecution under the state law, then it follows with irresistible force that the Department of Motor Vehicles was not only empowered by NRS 483.460 to revoke the driving license in question, but was also under a direct legislative mandate to do so.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By N. H. SAMUELSON, *Deputy Attorney General*.

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165. Public Employees Retirement Board, Budget Director, Personnel Department. NRS 284.147 construed and held applicable to "authorized expenditure" state agencies. Except as restricted by constitutional or statutory limitations, the Legislature has plenary authority over the amount of compensation to be paid all state employees, generally exercised in legislative action taken on detailed departmental budgets submitted for each fiscal year. State agency expenditures held to be strictly limited to, and regulated by, detailed allotments legislatively approved for any given fiscal year, unless variance is regularly effected in accordance with law. Pending specific legislative action, applicable statutes and executive powers, if exercised, held generally sufficient to regulate and control salary payments to state employees in unclassified positions.

CARSON CITY, June 10, 1960.

MR. KENNETH BUCK, *Executive Secretary, Public Employees Retirement Board, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR MR. BUCK: An employee of the Public Employees Retirement Board, in the unclassified service of the State, was granted an increase in salary by official action of the Board on November 6, 1959, said increase to be effective December 1, 1959. We are not here concerned with the salary paid such employee for the fiscal year 1959-1960, but with the validity of such salary increase for the fiscal year 1960-1961.

In accordance with generally established practice and procedure applicable to all state agencies, the Board submitted its detailed budget showing estimated expenditures for the fiscal year 1960-1961 for approval by the 1960 legislative session. The detailed budget, as submitted, provided for the anticipated estimated salary increase as approved by the Board to said employee in the unclassified service. However, as recommended by the Governor and finally approved by the Legislature, a lesser salary was authorized than that which the Board officially approved for said employee.

It further appears that the Governor's recommendation and the Legislature's authorization of this employee's salary for the fiscal year 1960-1961 was consistent with the results of a salary survey of unclassified positions in the state service. The survey, as made, was based

If, as we must assume in view of the decisions cited, prosecution under the municipal ordinance would not bar prosecution under the state law, then it follows with irresistible force that the Department of Motor Vehicles was not only empowered by NRS 483.460 to revoke the driving license in question, but was also under a direct legislative mandate to do so.

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It further appears that the Governor's recommendation and the Legislature's authorization of this employee's salary for the fiscal year 1960-1961 was consistent with the results of a salary survey of unclassified positions in the state service. The survey, as made, was based

upon a comparison of positions in the unclassified service to similar or comparable positions in the classified service, and recommended a five-step salary range for each unclassified position. Where a position was presently being paid more than the top recommended salary, it was decided that no change in salary should be made so long as the present incumbent remained in said position. The Governor, as a matter of policy, adopted and followed such recommendations, as did the Legislature.

At the time of said survey, the Board had not yet approved the salary increase to said employee, who was then receiving \$680 per month, or \$8,160 per year. The survey salary range for the involved position, as recommended and followed by both the Governor and the Legislature, was established at \$6,900 to \$8,220 per year, with increments in such range of \$330. The 1960-1961 budget, as recommended by the Governor and approved by the Legislature, authorizes a yearly salary of \$8,430 per year for said position. (See Executive Budget and Legislative Auditor's Record of Legislative Intent, Account Code 924 (K-1).) *Said authorized yearly salary already exceeds the top salary for the position established by the survey mentioned, and adopted as a matter of policy by both the Governor and the Legislature.* The Board's increase, if legally authorized, would make the yearly salary of the employee presently holding this position \$9,000.

The Budget Director has advised the Board that, in conformity with the Executive Budget as legislatively approved, he would disapprove any payment after July 1, 1960, for more than \$702.50 per month, or \$8,430 per year, for the position in question.

The Board, on the other hand, invites attention to the fact that the Public Employees Retirement System is supported and operated on the basis of administrative charges levied against both employees and employers, and suggests that so long as the Board does not exceed the legislatively-authorized expenditure of \$79,738 for the fiscal year 1960-1961, said Board may legally pay the employee in question a salary of \$9,000 per year. (NRS 286.210 and Chapter 262, 1960 Statutes of Nevada.)

QUESTIONS

I. (A) Has the Public Employees Retirement Board the authority to establish the salary of unclassified employees?

(B) In view of the provisions of NRS 284.147, may an employee in the State's unclassified service be paid a higher salary than that which the Legislature has authorized by approval of the budget containing provision for such an employee?

(C) Do the provisions of NRS 284.147 apply to "authorized expenditure" state agencies, as well as state agencies receiving and maintained by legislative appropriations of public funds?

II. If salaries paid to unclassified personnel, plus other expenditures, by the Public Employees Retirement Board, will not exceed the budgetary appropriation authorized by the Legislature (Chapter 262, 1960 Statutes of Nevada), would the increased salary legally be "within the limits of appropriations made by law," as provided in NRS 284.147?

III. In the absence of express or implied legislative authorization therefor, is there any limitation or control over the amount of salary

that may be paid to a state employee in an unclassified position created in the work program of an agency, either by unclassifying an existing classified position or by establishment of a new position?

CONCLUSIONS

- To question No. I (A): As limited herein: Yes.
(B): Except as herein qualified: No.
(C): Yes.
To question No. II: Except as herein stated: No.
To question No. III: As indicated generally herein: Yes.

ANALYSIS

NRS 286.170, relating to "Employees of board: Appointment; compensation; removal," as here relevant, provides:

1. Subject to the limitations of this chapter and the budget prescribed by the board, the system shall be administered by the executive secretary and by a staff authorized by the board and appointed by the executive secretary with the approval of the board.
2. The board shall:
 - (a) Create such positions as it deems necessary for the sound and economical administration of the system.
 - (b) Fix the salaries of all persons employed for purposes of administering the system *in accordance with the pay plan of the state adopted pursuant to the provisions of chapter 284*, but the salary of the *executive secretary* shall be fixed in the manner provided in subsection 2 of NRS 286.160. (Italics supplied.)

NRS 286.160, relating to "Executive secretary: Appointment; compensation; bond," provides as follows:

1. The board shall employ an executive secretary, who shall hold his position in the discretion of the board.
2. The annual salary of the *executive secretary* shall be fixed by the board, and he shall furnish such bond as may be required by the board. (Italics supplied.)

NRS 286.190, relating to "General powers and duties of board," provides as follows:

1. Have the powers and privileges of a body corporate.
2. Subject to the limitations of this chapter, have the power and duty of managing the system.
3. Arrange for actuarial service for the system.

NRS 286.210, relating to "Administrative expenses of system: Equal payments by employer, employee," as here pertinent, provides:

1. The administrative expenses of the system shall be paid equally by employer and employee members of the system in such manner and at such intervals as may be directed by the board. All sums received by the board for administrative purposes shall be paid into the public employees' retirement administrative fund.

NRS 286.240, relating to "State treasurer to be custodian of funds," provides as follows:

All funds paid into the public employees' retirement fund and the public employees' retirement administrative fund *shall be deposited with the state treasurer, who shall be custodian of the funds and shall pay all warrants drawn thereon by the state controller in compliance with law.* No warrant shall be paid until the claim for which it is drawn has been first certified by the executive secretary and otherwise allowed, audited and drawn as required by law. (Italics supplied.)

NRS 284.147, relating to appointments in the unclassified service, provides as follows:

Unless otherwise provided by law, elective officers and the heads of the several state departments, agencies and institutions are authorized to employ deputies and employees necessary to fill the unclassified positions *authorized by law* for their departments, and *to fix the salaries of such deputies and employees within the limits of appropriations made by law.* (Italics supplied.)

NRS 281.125, relating to "Restrictions upon payment of salary of appointive officer or employee when salary determined by law," provides as follows:

1. In cases where the salary of an appointive officer or employee is determined by law, *such salary shall not be paid unless a specific legislative appropriation of a sum of money or a specific legislative authorization for the expenditure of a sum of money is made or enacted for the department or agency.* (Italics supplied.)

2. None of the provisions of this section shall apply to any officers or employees of the Nevada industrial commission.

NRS 353.210 relates to the preparation and submission of expenditure requirements by state departments and agencies *by September 1 of each year, to show specific needs and intended application of requested funds.*

NRS 353.215, relating to "Work programs for fiscal year: Contests; approval; expenditures made on basis of allotments," among other matters, provides as follows:

1. Not later than *June 1 of each year* the governor shall require the head of each department, institution and agency of the state government to submit to him through the director a work program for the ensuing fiscal year. Such program shall:

(a) Include all appropriations on other funds from any source whatever made available to the department, institution or agency for its operation and maintenance and for the acquisition of property.

(b) *Show the requested allotments of appropriations or other funds by quarters for the entire fiscal year.*

2. The governor, with the assistance of the director, shall review the requested allotments with respect to the work program

of each department * * * and * * * if he deems it necessary, revise, alter or change such allotments before approving the same * * *.

3. *The director shall transmit a copy of the allotments as approved by the governor to the head of the department * * * concerned, to the state treasurer, and to the state controller.*

4. *All expenditures to be made from the appropriations or other funds from any source whatever shall be made on the basis of such allotments and not otherwise, and shall be broken down into such classifications as the director may require. (Italics supplied.)*

NRS 353.220 relates to "Revision of work programs and allotments: Limitations," and provides as follows:

1. *The head of any department, institution or agency of the state government, whenever he shall deem it necessary by reason of changed conditions, may revise the work program of his department, institution or agency at the beginning of any quarter during the fiscal year, and submit such revised program to the governor through the director with a request for revision of the allotments of the remaining quarters of that fiscal year.*

2. *Every such request for revision shall be submitted to the director at least 15 days prior to the commencement of the quarter when such revision, if approved, is to become effective. Within 10 days after submission to him the director of the budget shall transmit the request for revision with his recommendations in writing to the governor. Within 5 days thereafter the governor shall approve or disapprove such request in writing.*

3. *The governor shall promptly transmit a copy of such approval or disapproval to the director, the state controller and to the head of the department, institution or agency making the request. (Italics supplied.)*

Subsequent provisions of Nevada Revised Statutes are concerned with related matters up to approval of budget requests by the Legislature. Sections having some relevancy to the problem here involved are NRS 353.265, relating to "Existence of emergency. Expenditure of unappropriated money by state board of examiners; Limitations," and NRS 353.267, relating to "Expenditure of unappropriated money for payment of salaries of replacement personnel; Limitations."

NRS 353.255, relating to "Appropriations to be specifically applied," provides as follows:

1. *The sums appropriated for the various branches of expenditure in the public service of the state shall be applied solely to the objects for which they are respectively made, and for no others.*

2. *Any person violating the provisions of subsection 1 shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than \$50 nor more than \$300. (Italics supplied.)*

NRS 353.260 relates to "Deficiency spending prohibited: Claims void; penalties," and, among other matters, provides:

2. It is unlawful for any state officer, commissioner, head of any department or employee of this state to bind, or attempt to bind, the State of Nevada or any fund or any department thereof in any amount in excess of the specific amount provided by law, or in any other manner than that provided by law, for any purpose whatever.

3. Every claim allowed in violation of the provisions of this section shall be void.

In addition to the foregoing applicable statutory provisions, certain preliminary observations appear to be in order:

1. Administrative boards, commissions and officers only have such powers as the statutes creating them expressly confer upon them, or which may be reasonably necessary to give effect to such express powers. (42 Am.Jur. 316 et seq.)

2. Administrative boards, commissions and officers owe their existence, jurisdiction and powers to the governing or *legislative* authority which created them, and, except for any limitation imposed by applicable constitutional provision, may be terminated, abolished, regulated and controlled by the governing or *legislative* authority which created them. (42 Am.Jur. 305-309.)

In this connection, it has been held that the Legislature had the unquestionable authority and power to order the liquidation of a state retirement system. (See *Hansen v. Public Employees Retirement System Board of Administration*, 246 P.2d 591.)

3. "Public pension funds are derived from one or all of three sources: tax levies, contributions, either voluntary or compulsory, by prospective beneficiaries of the fund, and gifts and donations. They are usually, if not always, provided for in the legislation creating the pension system, or by legislation in aid thereof. *It is the general rule that pension funds created by tax levies and assessments from the salaries of prospective beneficiaries are public funds.*" (Italics supplied; 40 Am.Jur. 988, Sec. 34 and footnote citations.)

4. The Public Employees Retirement Board is a state agency created for a public purpose *and subject to the regulation and control of the Legislature which created it.* The officials and employees of the Retirement System are state officers and employees. The Legislature has the responsibility and duty of determining the salaries of state officers and employees, and except as restricted by existing guarantees under the Personnel Act or constitutional limitations, *legislative authority and power over the compensation to be paid state officers and employees, is plenary and controlling.* (See *International Brotherhood of Electric Workers Local Union 976 v. Grand River Dam Authority*, 292 P.2d 1018; *Vivian v. Bloom*, 177 P.2d 541, 115 Colo. 579.)

5. *In the absence of contributions by the State* to the Public Employees Retirement Fund, contributions by the members would not be available for payment of expenses of administration or benefits provided under the Act except to members withdrawing from the service and system. The functioning of the administrative machinery of the Retirement System *is entirely dependent on legislative appropriation or authorization.* (See *Eide v. Frohmiller*, 216 P.2d 726, 70 Ariz. 128.)

Study of the problem here involved on the basis of applicable law as above outlined, therefore, results in the following conclusions:

The Retirement System constitutes a public function for realization of a public purpose, legislatively authorized. The Public Employees Retirement Board is a state agency subject to legislative control and regulation. As a state agency, it does not have *carte blanche* to handle the funds entrusted to its management and control, nor can it incur administrative expenditures connected with the System, except in full compliance with laws, regulations, and procedures applicable to all state agencies. Such required compliance extends to and includes expenditures for salaries of administrative personnel.

While the Public Employees Retirement Board undoubtedly has been granted the authority and power to fix the salaries of the executive secretary and other employees in unclassified positions, such salaries are subject to, and may not exceed, legislative limitations or restrictions, either express or reasonably implied. The Legislature, through approval of the Board's budget for the fiscal year 1960-1961, has prescribed the maximum amount in salaries that may be legally paid to administrative personnel of the Retirement System. The authorized expenditures which the Board may make for such salaries must conform to the detailed budget items required and set forth in the Board's budget, *as approved by the Legislature*. The general authorization of expenditures by the Board up to a maximum of \$79,738 for the ensuing fiscal year (see Chapter 262, 1960 Statutes of Nevada) is predicated upon, and is specifically limited, regulated and determined by, the detailed allotments or allocations contained in the budget *as approved by the Legislature*. There is no provision, either express or reasonably implied, in the specific Act governing the Retirement System or Board which exempts said agency and officials from compliance with legislative requirements and controls which apply to all state agencies, boards and departments, as contained in other statutory provisions.

Unlike estimates made for operating or other expenses, salaries are determinable or may be established in maximum amount in advance of the submission of an agency's budget to the Governor and Legislature. For this reason, deviation from salaries which have been legislatively authorized is generally improper and prohibited. Only in *extraordinary* circumstances, and then only if variance and approval is secured in accordance with applicable statutory provisions (see NRS 353.220), are deviations in salary allotments authorized and legal. Here, with presumed contemplation of all the necessary facts, the Legislature established as the *maximum* salary for the position in question the sum of \$8,430 per year. Such legislative determination and action may not properly be ignored and nullified, except as herein indicated. In our considered opinion, it is highly questionable that any "changed conditions" as prescribed in NRS 353.220 can reasonably be shown to have developed *subsequent* to legislative determination and action on the involved budget.

We conclude, therefore, that NRS 284.147 is applicable to "authorized expenditure" state agencies, and that a state employee in an unclassified position may not be paid a higher salary than that which the Legislature has authorized with approval of the detailed budget

which contains the salary provision for such an employee. *Any variance therefrom, in any event, may only be validly effected in accordance with statutory provisions, hereinabove indicated.* Expenditures must otherwise be made for the specific purposes or objects set forth in an agency's detailed budget as legislatively approved and authorized, and are legally limited to the maximum amounts therein stated. In the instant case, the *maximum* salary which may be legally paid to the employee in the unclassified position here in question is \$8,430 per year, unless a variance from legislative determination and action can be legally justified and granted pursuant to applicable statutory provisions and procedures.

Apparently, the Legislature approved the salary classification plan to be applied to positions in the unclassified service by giving such plan general legislative application. It must, therefore, be presumed that the Legislature was satisfied with the conclusions established by the survey that such pay plan was consistent with the pay plan in effect for comparable services and pay in effect for the classified service. The appropriation and authorization of expenditure of public funds, including the fixing and payment of salaries of public employees, is traditionally and legally a matter within the plenary powers of the Legislature. Where, as here, the Legislature has seen fit to exercise such power, an exception or deviation from legislative intent requires specific legislative sanction and approval. Executive action alone may properly be construed as an encroachment on the legislative function and powers, and violative of the constitutional doctrine of the separation of powers.

There remains for final consideration and answer question No. 3.

It is, of course, impossible to make any generalized statement or provide a rule which would be applicable to the particular facts of every possible situation. Moreover, it would serve no useful purpose to extend this opinion by consideration and analysis of situations that could be conceived and assumed. However, there are definite statutory provisions in the Personnel Act, and supplementary rules and regulations thereto, which may be applied in limitation and control of the amount in salary that may be paid to a state employee in an unclassified position, in the absence of legislative authorization, express or implied.

Statutory restrictions on appointments to unclassified positions in the state service are:

1. NRS 284.140, which regulates and prescribes the conditions for appointments in the unclassified service.
2. NRS 284.145, which subjects appointments to unclassified positions in the state service to such persons as are included in a list of eligible persons, established and maintained by the Personnel Department.
3. Requirement of express or reasonably implied statutory power in an appointing authority to employ a person in an unclassified position in the state service in the first instance; in other words, a legal base for any such appointment or employment.

Statutory and other restrictions on the amount of salary that may be paid to an employee in an unclassified position in the state service are:

1. NRS 284.147, restricting salary payments within the limitations

"of appropriations made by law" *for such purposes*. This means that diversion or transfer of funds from one purpose to another is prohibited unless legally authorized and approved. (NRS 284.185, 218.770, 218.780, 218.820, 353.220, 353.255, 353.260, 353.265, 353.267, 284.190, 281.127.)

2. The Personnel Act reasonably discloses legislative intent that salaries paid to employees in the unclassified services shall be consistent with the salary schedule and range of any existing pay plan established or promulgated by the Personnel Department, for any particular and similar or comparable position in the classified service.

3. The recently completed survey of positions in the unclassified service, and development of a pay classification plan therefor, now legislatively approved and given general application, if formally adopted by the Personnel Board by rule and regulation, would be reflective of, and consistent with, legislative intent and policy already evidenced in connection with the 1960-1961 state budget, and confirmatory of the prohibition on any violation of said pay plan to the unclassified service.

While the above limitations may appear to be of a general nature, they do provide a sufficient basis to prevent or correct any abuse or excessive action on the part of any appointing authority in respect of payment of salaries to state employees in unclassified positions, pending expression of legislative intent on the matter.

In our considered opinion, *if and when supported and supplemented by exercise of executive prerogatives and powers*, they are adequate to resolve any problem of the kind indicated, for the interim period before the Legislature can take appropriate action.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.

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166. Constitutional Law, Legislature. Appointment by a board of county commissioners to vacancy in office of State Senate fills office to the day following next biennial election. Section 12, Article IV, construed.

CARSON CITY, June 21, 1960.

HONORABLE JOHN KOONTZ, *Secretary of State, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR MR. KOONTZ: In the general election conducted in Nevada on November 4, 1958, John Murray was elected in the County of Eureka to the State Senate for a term of four years. He served as State Senator throughout the regular legislative session, beginning on the third Monday of January, 1959. Due to ill health Senator Murray resigned his office by written communication to the Governor, under date of December 7, 1959. The Governor accepted the resignation the same date. On January 6, 1960, the Board of County Commissioners of the County

"of appropriations made by law" *for such purposes*. This means that diversion or transfer of funds from one purpose to another is prohibited unless legally authorized and approved. (NRS 284.185, 218.770, 218.780, 218.820, 353.220, 353.255, 353.260, 353.265, 353.267, 284.190, 281.127.)

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166. Constitutional Law, Legislature. Appointment by a board of county commissioners to vacancy in office of State Senate fills office to the day following next biennial election. Section 12, Article IV, construed.

CARSON CITY, June 21, 1960.

HONORABLE JOHN KOONTZ, *Secretary of State, Carson City, Nevada*.

STATEMENT OF FACTS

DEAR MR. KOONTZ: In the general election conducted in Nevada on November 4, 1958, John Murray was elected in the County of Eureka to the State Senate for a term of four years. He served as State Senator throughout the regular legislative session, beginning on the third Monday of January, 1959. Due to ill health Senator Murray resigned his office by written communication to the Governor, under date of December 7, 1959. The Governor accepted the resignation the same date. On January 6, 1960, the Board of County Commissioners of the County

of Eureka appointed William R. Rand to the office of State Senator "until the next ensuing election." Senator Rand served in the legislative session that convened in January, 1960, and continues in office as of the date hereof.

In the general election conducted on November 4, 1958, Edwin T. Lauritzen was elected in the County of Lander to the State Senate for a term of four years. He served as State Senator throughout the regular legislative session, beginning in January, 1959. Senator Lauritzen died after the 1959 session. On January 5, 1960, the Board of County Commissioners of the County of Lander appointed Rene W. Lemaire to the office of State Senator "until the next general election." Senator Lemaire served in the legislative session that convened in January, 1960, and continues in office as of the date hereof.

Section 294.095 NRS provides:

At least 80 days before the time for holding the September primary election in 1956, and biennially thereafter, the secretary of state shall prepare and transmit to each county clerk a notice in writing designating the offices for which candidates are to be nominated at the primary election.

Since time for compliance by the Secretary of State was short, we have already given advice and an oral opinion herein, with the understanding that the same would be confirmed by written opinion.

QUESTION

In complying with the provisions of Section 294.095 NRS, should the Secretary of State inform the county clerks of Eureka and Lander Counties that candidates will be nominated at the primary election of 1960, for the office of State Senator, in each of such counties, and for the remainder of the unexpired term?

CONCLUSION

We have concluded that the question must be answered in the affirmative.

ANALYSIS

The State Senate is a continuing body, by reason of the fact that the regular four-year terms are "staggered," under the provisions of Sections 9 and 10 of Article XVII of the Nevada Constitution. These sections provide:

Sec. 9. The senators to be elected at the first election under this constitution shall draw lots, so that the term of one-half of the number, as nearly as may be, shall expire on the day succeeding the general election in A. D. eighteen hundred sixty-six, and the term of the other half shall expire on the day succeeding the general election in A. D. eighteen hundred sixty-eight; provided, that in drawing lots for all senatorial terms, the senatorial representation shall be allotted so that in the counties having two or more senators, the terms thereof shall be divided as nearly as may be between the long and short terms.

Sec. 10. At the general election in A. D. eighteen hundred and sixty-six and thereafter, the term of senators shall be four years from the day succeeding such general election, and members of assembly for two years from the day succeeding such general election, and the terms of senators shall be allotted by the legislature in long and short terms, as hereinbefore provided, so that one-half of the number, as nearly as may be, shall be elected every two years.

Between 1922 and 1944, Section 12, Article IV, of the Constitution provided:

In case of the death or resignation of any member of the legislature, either senator or assemblyman, the county commissioners of the county from which such member was elected shall appoint a person of the same political party as the party which elected such senator or assemblyman to fill such vacancy; provided, that this section shall apply only in cases where no general election takes place between the time of such death or resignation and the next succeeding session of the legislature.

The Nevada Supreme Court construed Section 12 of Article IV in *Grant and McNamee v. Payne*, 60 Nev. 250, 107 P.2d 307. The facts were as follows:

On November 8, 1938, L. R. Arnold was elected to the office of State Senator of Clark County, for the term of four years commencing on the 9th day of November, 1938. He resigned his office on January 3, 1939, and a few days later Charles Lee Horsey was appointed to fill the vacancy. Senator Horsey served during the regular legislative session beginning January, 1939. On July 29, 1940, he resigned the office.

On July 31, 1940, Archie C. Grant and Frank McNamee, both residents and electors of Clark County, filed with the County Clerk of Clark County declarations of candidacy for the unexpired term of State Senator of Clark County as Democratic and Republican candidates respectively. No others filed. Shortly after the primary election the county clerk informed Grant and McNamee that their names would not be placed on the general election ballot.

Thereafter, Grant and McNamee joined in an original proceeding in mandamus, in the Supreme Court, for a peremptory writ requiring the county clerk to place their names on the general election ballot as nominees of the Democratic and Republican parties respectively, for the office of State Senator.

The Supreme Court entered an order denying the petition and dismissing the proceedings, holding that an election could not be held to fill the unexpired term. This conclusion was reached notwithstanding the fact that no one was in office, and that another appointment by the board of county commissioners would be required to serve during the legislative session beginning in January, 1941.

Relying on *Ex Rel. Bridges v. Jepsen*, 48 Nev. 64, 227 P. 588, the court held that where Section 12 of Article IV provided "that this section shall apply only in cases where *no general election* takes place

between the time of such death or resignation and the next succeeding session of the legislature" (*italics supplied*), the general election referred to was not the next biennial general election, but the next general election at which the office involved would regularly be filled by the voters. The court held that since the term at which Arnold had been elected was for four years from the day succeeding the general election of 1938 to the day succeeding the general election of 1942 (a four-year term), no election could be held in 1940 to fill the unexpired term. Chief Justice Taber wrote a dissenting opinion.

In the legislative session beginning January, 1941 (parenthetically, Archie C. Grant, after losing in his joint petition in mandamus, had been appointed to serve), Assembly Joint Resolution No. 1 was introduced, which had for its purpose the amendment of Section 12 of Article IV of the Constitution. Said resolution succeeding in passage of both houses (Stats. 1941, p. 563), and again succeeded in passage in the Legislature of 1943 (Stats. 1943, p. 311).

Thereafter Assembly Joint Resolution No. 1, heretofore mentioned, was submitted to the people in the general election of November, 1944 (pursuant to the provisions of Section 1 of Article XVI, respecting constitutional amendments), was duly ratified, and became a part of the organic law.

Section 12 of Article IV of the Constitution provides:

In case of the death or resignation of any member of the legislature, either senator or assemblyman, the county commissioners of the county from which such member was elected shall appoint a person of the same political party as the party which elected such senator or assemblyman to fill such vacancy; provided, that this section shall apply only in cases where no biennial election or any regular election at which county officers are to be elected takes place between the time of such death or resignation and the next succeeding session of the legislature.

With the foregoing background, we now proceed with analysis of the present constitutional provision.

Under the present constitutional provision, as amended in 1944, in what cases are boards of county commissioners authorized to make appointments in filling vacancies to office of Assemblyman or Senator? County commissioners are authorized to make such appointments only if a legislative session is scheduled to be conducted prior to (1) a "biennial election" or (2) "any regular election at which county officers are to be elected."

Under the former provision of the Constitution a board of county commissioners was authorized to make an appointment of Assemblyman or Senator, to fill a vacancy, only if a legislative session was scheduled to be conducted prior to a "general election." As previously shown, "general election" was, in 1940, construed to mean only those general elections at which the office would ordinarily be filled by election, *Grant and McNamee v. Payne, supra*.

Would Section 12 of Article IV of the Constitution as now amended warrant the same construction? We think not for several reasons, viz:

(a) In point of time the constitutional amendment indicates an intent to change the Constitution so as to alter the interpretation placed thereon by the Supreme Court.

(b) The term "general election," in the section as amended, has been deleted and other terms used in lieu thereof.

(c) Since the interpretation by the court in the Grant and McNamee v. Payne case limited the right of the people to vote for a State Senator, holding that such right exists only at the end of the four-year term, regardless of intervening vacancies, and so construed "general election," the people, since the 1944 amendment to Section 12 of Article IV, have such right when a biennial election intervenes, or when "any regular election at which county officers are to be elected" intervenes.

The foregoing is deemed sufficient to determine the principal question. However, certain incidental points require some discussion, viz:

(1) If it had not been for the constitutional amendment in 1958 of Section 2 of Article IV, by which the change was made from biennial sessions of the Legislature to annual sessions, there would not have been any legal authority for the appointment of either Senator Rand or Senator Lemaire. The appointments have no more significance than if they had been made under normal circumstances, in order that the Senators might serve in a special session of the Legislature to begin in January, 1960.

(2) When the proposed amendment of Section 2 of Article IV of the Constitution, originated by initiative petition under Article XIX, is referred to the electorate in the general election of 1960, the result of that election will have no bearing upon the conclusion here reached.

(3) The election of State Senators in the general election of 1960, for the counties of both Eureka and Lander, will be only for the unexpired term of two years, ending on the day after the general election of November 1962. This is clear on the basis of the provisions of Sections 9 and 10 of Article XVII, heretofore quoted.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By D. W. PRIEST, *Chief Deputy Attorney General*.

167. Welfare Department, Nevada State. The State Welfare Department, and its Director (in her official capacity) are without legal authority to enter into any arrangement with the Veterans Administration which, in legal effect, entails the assumption and discharge of obligations and responsibilities normally pertaining to the guardianship of a minor's estate. Any condition requiring a state official (or employee) to be accountable to, and subject to the instructions of, a federal agency with respect to any official matter involves a conflict of interest which would be violative of said official's (or employee's) primary obligation to the State.

CARSON CITY, June 29, 1960.

MRS. BARBARA C. COUGHLAN, *Director, Nevada State Welfare Department, 515 East Musser Street, NIC Building, Room 114, Carson City, Nevada.*

STATEMENT OF FACTS

DEAR MRS. COUGHLAN: It is indicated that the State Welfare Department has legal custody of a minor child who has been placed in a foster home under said agency's supervision. Said child is eligible for and the recipient of certain payments from the Veterans Administration, presently amounting to \$27.30 per month and probably due to be increased to \$35 per month under the provisions of Public Law 86-211.

The foregoing monthly payments have been accumulated in a fund for the benefit of said minor and presently amount to approximately \$1,000. The First National Bank of Nevada has been recognized as guardian of said fund. In an attempt to save annual administrative expenses, which are considerable percentage-wise because of the small amount involved, it is desired to terminate the guardianship of said bank, and to deliver said assets and future monthly payments to the Nevada State Welfare Department, providing said State Department can receive and accept such funds, and administer them in a manner acceptable to the Veterans Administration. Such action is, apparently, authorized, insofar as the Veterans Administration is concerned, under the provisions of Title 38, U. S. Code, Section 3202.

The Veterans Administration, in the foregoing circumstances, proposes to make the indicated monthly payments to the Director of the Nevada State Welfare Department, for use and application as received on behalf of the minor involved. The existing accumulated funds (approximately \$1,000) would be placed in a separate savings account in an institution the deposits of which are guaranteed by an agency of the United States, in the name of the Director of the Nevada State Welfare Department, as legal custodian of said minor, for use of or delivery to the minor only after authority is given therefor by the Veterans Administration.

In short, under such proposed arrangement, the Director of Nevada State Welfare Department would be responsible to the Veterans Administration for such funds, and have no responsibility therefor to the State of Nevada.

QUESTION

May the Director of Nevada State Welfare Department enter into an arrangement with the Veterans Administration which, in legal effect, would provide such Director's assumption and performance of duties normally charged of a guardian appointed by, and accountable to, an appointing court for proper guardianship administration?

ANSWER

No.

ANALYSIS

As above stated, it appears that the Nevada State Welfare Department has custody of the minor child involved. However, custody is not equivalent to guardianship which carries with it more general and greater rights and powers, and correlative obligations and duties. Essentially, and as a matter of legal substance, the proposed arrangement involves guardianship of the estate or property of the concerned minor, and such administration warrants certain safeguards in the interests of the child. Such safeguards take the form of posting of a bond and prescribed and scheduled accountings and reports to a court. The proposed arrangement here under consideration, well-intentioned though it undoubtedly is as an effort to save guardianship administration expenses, would eliminate such normal, court-imposed safeguards.

We have carefully examined the provisions of NRS 422.210, 422.230 and 422.270, relating to the powers and duties of the Director and the Nevada State Welfare Department, and none of these sections of statutory law furnishes, either expressly or by any reasonable implication, any sufficient legal basis for the Director of said Department to enter into any arrangement of the kind here proposed. We are of the opinion that the statutes contemplate the appointment of an individual as guardian of the person of a child, and no authority to appoint the State Welfare Department as such guardian is given. (Attorney General's Opinion No. 595, dated March 24, 1948; see also, NRS 159.110, relating to "Petition of state welfare department for appointment of guardian of estate, etc.") The lack of any such statutory authority in the State Welfare Department must be deemed to extend to, and to include the Director of said agency in her *official* capacity, which the proposed arrangement evidently contemplates.

Finally, since the Department is admittedly providing public assistance to said minor child, we are concerned with the possible conflict of interest that could conceivably arise between discharge of the Director's official duties and responsibilities and proper protection of the child's interests and welfare. The Director's primary official obligation is to the State of Nevada and its people in the administration of the public welfare programs with which the Department is charged. Such primary official obligation to the State necessarily compels scrupulous avoidance of participation in any arrangement, no matter how well-intentioned, which might raise any inference that such obligation was not being fully and faithfully discharged. The requirement in the proposed arrangement that the Director be responsible and accountable to the

Veterans Administration and follow such agency's instructions concerning the accumulated funds and future monthly payments made to the child, might well result in a situation where her obligations to the State and to the Veterans Administration would be opposed. She should not expose herself to such a possibility, no matter how contingent.

We have not been furnished with the necessary facts which might enable us to suggest an appropriate alternative. However, it would seem that if a formal guardianship, established by regular court proceedings, is not indicated in the particular circumstances of the case, then the Veterans Administration might itself administer the accumulated funds and further monthly payments to the child, in a trust relationship of the same kind which it is requesting the Director of the State Welfare Department to enter into. We are satisfied that if the object of the proposed arrangement is only to effect a saving in the administrative expenses connected with a formal guardianship, the same can be satisfactorily attained equally well in some other manner, without entailing the complications herein outlined.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*.

By JOHN A. PORTER, *Deputy Attorney General*.
