

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1966

**292 County Auditor; Payroll Records—[NRS 251.030](#) imposes duties on county auditor which cannot be met unless payroll records are maintained in his office. Directive of appointed official to bypass provisions of statute by reassigning auditor's duties to others inoperative.**

Carson City, January 7, 1966

Mr. Paul E. Horn, *Clark County Recorder and Auditor, Clark County Court House, Las Vegas, Nevada*

Dear Mr. Horn: You have stated to this office that the county manager has directed that county payroll records be forwarded to the Personnel Department of Clark County rather than to the county auditor.

You ask whether such procedure is countenanced b law.

In view of the importance of this question on a statewide basis, we are answering it.

ANALYSIS

Under state law ([NRS 251.010](#)) the county recorder of each county in Nevada is ex officio county auditor.

[NRS 251.030](#) provides:

Duties of county auditor. The county auditor shall:

1. Number and keep a record of all demands allowed, showing the number, date, date of approval, amount, and name of the original holder, on what account allowed, and out of what fund payable.
2. Constantly be acquainted with the exact condition of the treasury, and every lawful demand upon it.
3. Report to the board of county commissioners, at each regular meeting thereof, the condition of each fund in the treasury.
4. Keep a complete set of books for the county, which shall be open to the inspection of the public, free of charge, during business hours, in which shall be set forth in a plain and businesslike manner every money transaction of the county, so that he can, at any time, when requested, tell the state of each fund, where the money came from, to what fund it belonged, and how and for what purpose it was expended, and also the collection made, and the money paid into the treasury by every officer.

It will be noted that the county auditor must at all times be acquainted with the exact condition of the treasury, and every lawful demand upon it, and must be able to report to the county commissioners on demand the exact condition of each fund therein.

In addition, the auditor must keep a complete set of books for the county, which shall be open to the public during business hours, and in which shall be set forth *every* money transaction of the county. He must be able to tell the state of each fund, where the money came from, to what fund it belonged, and how and for what purpose it was expended.

Under the provisions of [NRS 244.210](#) the responsibility is placed upon the auditor to handle the vouchers and issue warrants on the county treasurer for demands upon the county treasury, and he must be satisfied that the money is legally due, that it remains unpaid, and that it is authorized by law.

His is the duty of allowing such claims or demands as well as delineating the fund from which it is to be paid.

The law provides for the method of overruling the county auditor when he denies a claim ([NRS 244.215](#)) and it is to be noted that it takes the unanimous vote of the board of county commissioners so to do.

Black, in his law dictionary, defines an auditor as a public officer whose function is to examine and pass upon the accounts and vouchers of officers who have received and expended public moneys by lawful authority (*See Hicks v. Davis*, 163 P. 799).

There can be no doubt that the county payroll is a demand upon the county and a money transaction. The Legislature wisely put the responsibility of accountability for the status of county funds with the county auditor. To divide this responsibility would lead to confusion, and would make it legally impossible for the county auditors to comply with the directives of the Statutes of Nevada.

It is incumbent on all county officials to comply with such requirements of the auditor as will enable him to meet the statutory demands imposed upon him. If each county government were to divide the responsibilities placed upon the shoulders of the county auditor, by assigning part of his duties to appointed officials, it would be impossible for the duly elected and qualified county auditor to fulfill the duties placed upon him by the Legislature and assented to by the electorate.

#### CONCLUSION

It is therefore the opinion of this office that the payroll records of the county are a demand upon the county treasury and involve a money transaction which under the law must be kept by the county auditor. To rule otherwise would make it impossible for such auditor to fulfill the duties imposed upon him by law.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**293 State Legislator; Employment State Service—Member of the Legislature presently in office may accept a position in the service of the State where the salary schedule is established by the Personnel Commission or Department. Also, member of the Legislature presently in office could be appointed to the position of Superintendent of Public Instruction where the salary for such position is set by the State Board of Education. (Modifies AGO 280, 11-24-65.)**

Carson City, January 5, 1966

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

Dear Mr. Stetler: We have reviewed Attorney General's Opinion 280 and are in accord with its conclusion. However, on page 4 in the paragraph preceding the conclusion we stated, "but the Second Assistant Superintendent of Public Instruction for Administration was created by Chapter 427 of the 1965 Statutes, and the prohibition against a Legislator taking this position would lie."

#### ANALYSIS

We now understand that the position of Second Assistant Superintendent of Public Instruction was created by the 1956 Legislature (Chapter 32). We further understand that the duties and responsibilities of the office were further delineated by the amendment of [NRS 385.310](#), and the addition of [NRS 385.315](#) at the 1959 Session of the Legislature.

The enactment of Chapter 427, Statutes of Nevada 1965, did not in any way change the duties of the office of Second Assistant Superintendent of Public Instruction, but merely changed the title to the office to Assistant Superintendent of Public Instruction for Administration.

Under these circumstances the 1965 Legislature did not create the position, but merely renamed it.

#### CONCLUSION

Our conclusion is the same as that set forth in Attorney General's Opinion 280. We modify only to the extent of making the position of Assistant Superintendent of Public Instruction for Administration available to a member of the Legislature presently in office.

Respectfully submitted,

*HARVEY DICKERSON, Attorney General*

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**294 Fish and Game; License—Minors who have attained the age of 16 years must have personally resided in Nevada six months before being eligible for a Nevada Resident License to either hunt or fish.**

Carson City, January 6, 1966

Hon. Roland W. Belanger, *Pershing County District Attorney, Lovelock, Nevada*

Dear Mr. Belanger: You have submitted to this office the following facts: A young man, 17 years of age, arrived in Nevada in May of 1965. He purchased a Nevada Resident Hunter's License in September 1965. His father had been a resident of Nevada since February 1965.

Your question is whether the residence of the father can be attributed to a minor son, so as to waive where the son is concerned, the provisions of NR 502.240.

#### ANALYSIS

[NRS 502.240](#) provides as follows:

License fees. Licenses shall be issued at the following prices:

1. To any citizen of the United States who has been a bona fide resident of the State of Nevada for 6 months, upon the payment of \$5 for a fishing license, \$5 for a hunting license, and \$1 for a trapper's license.

2. To any alien or to any citizen of the United States, not a bona fide resident of the State of Nevada, regardless of age, upon the payment of \$10 for a fishing license (except for a fishing license to fish in the reciprocal waters of the Colorado River and Lake Mead, which license shall cost a sum agreed upon by the commission and the Arizona Game and Fish Commission, but not to exceed \$10) or \$3.50 for a 5-day permit to fish, \$10 for a special hunting license to hunt deer by bow and arrow and no other license shall be required, \$25 for a hunting license, and \$10 for a trapper's license.

[NRS 502.010](#)(1), with exceptions as to ages with which we are not here concerned, provides that every person who hunts or fishes without first having secured a license is guilty of a misdemeanor. This includes a minor who has attained the age of 16 years.

*Every Person* includes minors, and this, taken in connection with [NRS 502.240](#), indicates that a minor who secures a resident license to hunt or fish, must reside in Nevada for a period of six months. Otherwise, a nonresident license is required.

It is therefore the opinion of this office that a minor who has attained the age of 16 years would have to personally reside in Nevada six months in order to get a Nevada Resident License to either hunt or fish.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**295 Nevada State Prison; Fines—Where, in addition to a sentence to be served in the Nevada State Prison, a fine is imposed, the days set to be served in lieu of the fine shall be served in the county jail.**

Carson City, January 11, 1966

Jack Fogliani, *Warden, Nevada State Prison, Carson City, Nevada*

Dear Warden Fogliani: You have advised that a person was committed to the Nevada State Prison to serve a term of two to five years and fined \$100, with the notation that if the fine was not paid, the defendant should serve out the fine in the Nevada State Prison at the rate of four dollars per day.

Your question is whether such sentence contravenes Nevada statutes, especially [NRS 211.070](#), which reads as follows:

Whenever any prisoner, under conviction for any criminal offense, shall be confined in jail for any inability to pay any fine, forfeiture or costs, or to procure sureties, the district court or the justice of the peace, upon satisfactory evidence of such inability, may, in lieu thereof, confine such person in the county jail at the rate of \$4 per day, until the fine, forfeiture or cost so imposed shall have been satisfied.

#### ANALYSIS

Our Supreme Court long ago, in the case of *Ex parte Tani*, [29 Nev. 385](#), discussed this problem, and the decision there reached has not been altered over the years. The court there stated:

It will be perceived that section 2267, Comp. Laws, is the only one which specifies the place of imprisonment in lieu of the payment of a fine, and that it directs that, whenever a prisoner, upon conviction for any criminal offense, fails to pay the fine, the district court may imprison him in the county jail at the rate of \$2 per day until the fine or forfeiture imposed shall have been satisfied. In this connection no distinction is made in regard to the grade of the crime, and there is no limitation to misdemeanors. Under section 4701, the defendant was guilty of a felony, and could have been sentenced directly to the state prison for not less than one nor exceeding two years, or to pay a fine of not less than \$1,000 nor exceeding \$5,000, or to both. But the language of this section does not provide for confinement in the state prison or elsewhere in lieu of the payment of the fine, and there is nothing in this section or the others which authorized the court to commit the defendant to the state prison upon his failure to pay.

And when we turn to section 2267, the one which does provide for imprisonment as an alternative in lieu of nonpayment, the language fixes the place of confinement as such alternative to all cases, and without making any distinction between felonies and misdemeanors, at the county jail. The fine imposed was authorized, being the minimum amount specified in the statute, and the judgment follows the other provisions in ordering that the defendant be imprisoned at the rate of \$2 per day upon his failure to pay the fine. The only error in the sentence was the direction that the defendant work out the fine in the state prison, when the statute specifies the county jail. If he had been fined the maximum of \$5,000, instead of \$1,000, it would take him about seven years to work out the fine at the rate of \$2 per day. Whether it would be better to have a statute, such as exists in some states, providing that where the fine

exceeds \$500, or a specified amount, or the imprisonment may exceed six months or one year, the confinement in lieu of the payment of a fine shall be in the state prison, is a matter for the legislature, and not for the courts, to regulate. It is our duty to enforce these statutes as we find them.

Section 2267 of the Compiled Laws comports with [NRS 211.070](#).

#### CONCLUSION

It is therefore the opinion of this office that if, in addition to a prison sentence a fine is imposed, any days to be served in lieu of the payment of said fine shall be served in the county jail.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**296 State Prison, Prison Labor; [NRS 209.195](#), [209.350](#), and [209.390](#) Interpreted—Moneys received for laundering and dry cleaning within the State Prison must be deposited in State Treasury to account of State Prison Fund, and cannot be deposited to prisoners' store fund.**

Carson City, January 13, 1966

Mr. Jack Fogliani, *Warden, Nevada State Prison, Carson City, Nevada*

Dear Mr. Fogliani: You have made the proposal to the State Board of Prison Commissioners that a work and training program be initiated whereby prisoners would operate a laundry and dry cleaning program at the State Prison.

It is proposed that in addition to the clothing of the inmates, the clothing of personnel located at job corps sites be included at a cost to be determined.

The question asked is whether the revenue derived from the laundering and dry cleaning process may be placed in the prisoners' store fund instead of returned to the State Treasurer.

In order to arrive at a determination, it is necessary to review the laws which touch on the subject or various state prison funds.

#### ANALYSIS

[NRS 209.195](#) reads as follows:

1. The prisoners' store fund is hereby created. All moneys received for the benefit of prisoners through contributions, percentages from sales of goods manufactured by the prisoners, and from other sources not otherwise required to be deposited in another fund, shall be deposited in the prisoners' store fund.

2. The warden shall deposit the prisoners' store fund in one or more banks of reputable standing, shall keep, or cause to be kept, a full and accurate account of such fund, and shall submit reports to the board relative to such funds and valuables as may be required from time to time.

3. Moneys in the prisoners' store fund shall be expended for the welfare and benefit of all prisoners.

It can then be determined that if the funds derived from laundering and dry cleaning do not fall into the categories established by [NRS 209.350](#) or [NRS 209.390](#), that they can be placed in the prisoners' store fund.

[NRS 209.350](#) gives the State Board of Prison Commissioners the exclusive control of the employment of convicts, but places on their judgment certain restrictions which must be observed. The first restriction is that no prisoner may be employed on other than public work of general advantage to the State, which includes any industry adopted by the board for the general employment of the inmates in whole or in part, and then only if it is for the benefit of the State and not the prisoners. However, the board may elect to compensate prisoners for such work.

The foregoing statute must be read in connection with [NRS 209.390](#) which reads as follows:

All sums that are not or may hereafter become due to the state for any manufactured articles sold, or for labor performed either within or without the prison walls or enclosures, shall be certified to under oath by the warden to the board, who shall receive and receipt for the same. All moneys thus received shall be paid into the state treasury, and the state treasurer shall place the same to the credit of the state prison fund. The secretary of the board shall make a report thereof to the state controller on or before the 10th day of each month.

It would appear then that the money received for laundering and dry cleaning would be fore “labor performed within the prison walls or enclosures,” and that all moneys thus received would be paid into the state Treasury to the credit of the State Prison Fund.

It would not therefore fall into the category of moneys received designated in [NRS 209.195](#) for the prisoners’ store fund.

#### CONCLUSION

It is therefore the opinion of this office that moneys received for laundering and dry cleaning at the State Prison would have to be paid into the state Treasury to the credit of the State Prison Fund.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**297 Nevada Real Estate Advisory Commission—The length of term of a member of the Nevada Real Estate Advisory Commission is not affected by the same member having served as a member of the Nevada Real Estate Commission.**

Carson City, January 18, 1966

Mr. Don McNelley, *Administrator, Real Estate Division, Department of Commerce, Carson City, Nevada*

Dear Mr. McNelley: You have asked this office for an opinion as to whether or not a commissioner who has served as a member of the Real Estate Commission would be eligible for appointment for a term as commissioner of the Real Estate Advisory Commission. The answer is yes.

#### ANALYSIS

In 1947 the Nevada State Legislature enacted Chapter 150, Statutes of Nevada 1947, setting up the first Nevada Real Estate Board. The board had general supervisory powers over the licensing of real estate brokers and salesmen. In 1949 the Legislature enacted Chapter 204, Statutes of Nevada 1949, amending the real estate act to substitute the word “commission” for that of “board,” and making minor changes in the duties of the commission. Generally, the function, however, was the same as that of the board.

The act was again amended in 1955 by Chapter 91, Statutes of Nevada 1955. The pertinent part of the 1955 amendment is as follows:

Members may be eligible for reappointment, but shall not serve for a period greater than 6 years consecutively, after which time they shall not again be eligible for appointment or reappointment until 3 years have elapsed from any period of previous service; but when a successor is appointed to fill the balance of any unexpired term of a member, the time served by the successor shall not apply in computing the 6 years' consecutive service herein provided for unless the balance of the unexpired term exceeds 18 months, and no term of any member of the commission in office when this act becomes effective shall be used in computing the 6 years' consecutive service herein provided for.

Again there were further minor amendments as to the duties and power of the commission.

The 1963 Session of the Nevada State Legislature enacted Chapter 339, Statutes of Nevada 1963. This piece of legislation made sweeping changes in the administration of the State of Nevada. A Department of Commerce was created with a director thereof. The department was granted four divisions, a Real Estate Division being one of the divisions. The Director of the Department of Commerce was given the authority, with the consent of the Governor, to appoint a chief of each division. Substantial authority vested with the Real Estate Commission was transferred to the administrator of the Real Estate Division. Section 16, Chapter 339, Statutes of Nevada 1963, amended [NRS 645.050](#) as follows:

645.050 A commission to be known as the Nevada real estate advisory commission is hereby created. The commission shall consist of five members appointed by the governor. The governor shall obtain and consider a list of nominees from the Nevada Association of Realtors. The commission shall act in an advisory capacity for the real estate division, promulgate rules and regulations, approve or disapprove all applications for licenses, and conduct hearings as provided in this chapter.

As set forth, the duties of the commission are advisory to that of the administrator. As noted, many of the powers of the Real Estate Commission were granted to the Administrator, thus leaving a new board in a far less powerful position and in fact, being largely one to act in an advisory capacity only.

Even though [NRS 645.060](#), Section 2 retains the language of the 1955 statutes, this language does not affect membership of the Nevada Real Estate Advisory Commission insofar as referring to July 1, 1955.

#### CONCLUSION

Thus, it is the opinion of this office that the Nevada State Legislature, in the 1963 Session, abolished the Nevada Real Estate Commission and created the Nevada Real Estate Advisory Commission, and that therefore, membership in the old commission would not affect capacity to serve in the new commission.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: John G. Spann, *Deputy Attorney General*

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**298 Savings and Loan Associations—When a savings and loan association's stock, surplus, undivided profits, and reserves are less than the amount specified in [NRS 673.273](#), no new investment certificates may be issued.**

Carson City, January 27, 1966

M.L. Wholey, *Commissioner, Savings and Loan Division, State Department of Commerce, Carson City, Nevada*

Dear Mr. Wholey: You have asked the question whether a savings and loan association may issue new saving certificates in an amount equal to certificate withdrawals, even though at the time of such issuance the savings and loan association's reserves are less than the amount specified in [NRS 673.273](#).

#### ANALYSIS

Your question involves the following statutes:

[NRS 673.273](#):

1. The total permanent stock subscribed and paid plus the total of the surplus, undivided profits and all reserves available for losses shall not at any time be less than 5 percent of the aggregate certificate value of the outstanding investment certificates of the association \* \* \*.

2. No dividends shall be declared on permanent stock until the total of the permanent stock, surplus, undivided profits and all reserves available for losses is equal to the percentage required by subsection 1 of the outstanding investment certificates and if payment of such dividends would reduce the capital structure to an amount below such percentage. \* \* \*

[NRS 673.274\(1\)](#):

1. No association whose stock, surplus, undivided profits and reserves are less than the amount specified in [NRS 673.273](#) may:

(a) Issue investment certificates or withdrawal shares except in lieu of investment certificates or withdrawal shares theretofore issued.

(b) Receive additional funds upon investment certificates or withdrawal shares other than installment investment certificates or installment withdrawal shares.

A reserve of funds is defined as follows: *Long v. City of Fresno*, 36 Cal. 886 (1964):

\* \* \* According to Webster's New International Dictionary (3d ed. Unabridged), "reserve" is defined as "\* \* \* something that is reserved: something kept back or held available (as for future use); \* \* \* something reserved or set aside for a particular purpose, use, or reason \* \* \*; money or its equivalent kept in hand or set apart usually to meet a specified liability or anticipated liabilities \* \* \*."

Webster also defines "reserve account" as "an account that shows an accrued usually estimated liability (reserve account for income taxes) \* \* \*."

*Lubin v. Equitable Life Assur. Soc.*, 61 NE2d 753 (Ill. 1945):

\* \* \* The statutes of the state in which each of the defendants is domiciled require that a reserve equal to the present value on a net premium basis of all outstanding policies must be set aside and maintained. Such reserve is generally called the "legal reserve." The legal reserve is not a surplus but is considered a liability. \* \* \*

*U.S. v. Zions Savings and Loan Association*, 313 F2d 331 (1963):

\* \* \* Although the terms "reserves" has many meanings, \* \* \* it represents "an appropriation or a segregation of surplus."



*Royal Highlanders v. Com’r of Internal Revenue*, 138 F2d 240 (1943):

Reserves, \* \* \* are funds set apart as a liability in the accounts of a company to provide for the payment or reinsurance of specific contingent liabilities. They are held, not only as security for the payment of claims, but also as funds from which payments are to be made.

9 Cal.Jur.2d 350: (Comments on a similar California statute.)

*An association may not pay any dividends or distribute any profits to stockholders or shareholders if its investment certificate and withdrawable share reserve is less than the required amount, or if by such payment or distribution the reserve would be reduced below that amount. Also, if the reserve is less than the amount specified, no association may issue investment certificates except in lieu of investment certificates previously issued, or received additional funds upon investment certificates other than installment certificates.* However, this latter provision does not prevent crediting to investment certificates interest earned thereon. Likewise, if the reserve is less than the amount specified, no association may issue withdrawable shares except in lieu of withdrawable shares previously issued, or in connection with loans, or receive additional funds on withdrawable shares other than installment shares. \* \* \* (Italics added.)

[NRS 673.274](#) must be read as a whole. Subsection (b) clearly prohibits the receipt of additional funds after reserves are less than that set forth in [NRS 673.274](#) must be read as a whole. Subsection (b) clearly prohibits the receipt of additional funds after reserves are less than that set forth in [NRS 673.273](#). Thus, the words “Issue investment certificates or withdrawal shares *except in lieu of investment certificates or withdrawal shares theretofore issued*” of subsection (a) can only mean an *exchange* of certificates already issued, such as replacement of certification lost or where there is a change of names or termination of joint tenancy, etc. (Italics added.)

To argue that subsection (a) means that new certificates could continue to be issued up to the total amount of certificate withdrawals, after the reserve has fallen below the percentages set forth in [NRS 673.273](#), would destroy the meaning and intent of [NRS 673.274](#), subsections (1), (a) and (b), and clearly contravene the entire meaning of the concept of reserves.

#### CONCLUSION

It is the opinion of this office that [NRS 673.274](#) means that if in the event a savings and loan association’s stock, surplus, undivided profits, and reserves are less than the amount specified in [NRS 673.273](#), that savings and loan association may not issue any new investment certificates or withdrawal shares. During such period of time, investment certificates or withdrawal shares may be issued to replace certificates lost, or where there is a change of names or a termination of joint tenancy, etc., but may not be issued in lieu of certificates withdrawn prior to the time of deficiency or the reserve.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: John G. Spann, *Deputy Attorney General*

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**299 County Hospital—The county commission of a county in the State of Nevada may not issue either general obligation or revenue bonds, for the purpose of the construction of a county hospital, unless such proposal is submitted to the qualified electors of that county.**

Carson City, February 9, 1966

Honorable Arthur Olsen, *Member of the Assembly, Carson City, Nevada*

Dear Mr. Olsen: You have asked the following question:

May the County Commissioners of Douglas County cause to be issued revenue bonds, for the purpose of construction of a county hospital, without the proposal for the bond issue to be submitted to the electors of the county?

You have also asked:

May such a county hospital be leased to private individuals?

#### ANALYSIS

It is a well settled principle of law in the State of Nevada that municipal corporations have not powers other than those that are delegated to them by charter or law creating them.

In *Ronnow v. the City of Las Vegas*, [57 Nev. 332](#), the court stated:

In *Tucker v. Virginia City*, [4 Nev. 20, at page 26](#), the court says: "That municipal corporations have no powers but those which are delegated to them by the charter or law creating them; that the powers expressly given and the necessary means of employing those powers constitute the limits of their authority. It is conceded that beyond this they can have no active existence, and can do no act which the law can recognize as valid and obligatory upon them." And in *State ex rel. Rosenstock v. Swift*, [11 Nev. 128, at page 140](#), the court says that "a municipal corporation, in this state, is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication."

See also 2 McQuillin Municipal Corporations 593.

From the foregoing, it is apparent that the power to issue bonds by a county commission must stem from legislative grants or power.

The following statutes are those found to be applicable to the aforementioned question:

[NRS 350.010](#):

As used in [NRS 350.101](#) to [350.200](#), inclusive, "municipal corporation" shall be construed to mean a county, city, town or other municipal corporation, but shall not be construed to mean a school district.

[NRS 350.020](#):

Whenever any municipal corporation in the State of Nevada proposes to issue bonds or provide for loans in any amount within the limit of indebtedness authorized by law, the proposal for the bond issue or loan shall be submitted to the electors of the municipal corporation at a general election or a special election called for that purpose; . . .

The foregoing statutes cover the procedure for the issuance of bonds for public improvements. However, the Legislature enacted special legislation for the issuance of hospital bonds:

[NRS 450.020](#):

Any county or group of counties may establish a public hospital in the manner prescribed in [NRS 450.030](#) and [450.040](#).

[NRS 450.030](#):

1. Whenever the board of county commissioners of any county shall be presented with a petition signed by at least 30 percent of the taxpayers in such county or in each of a group of counties asking that an annual tax be levied for the establishing and maintenance of a public

hospital, at a place in the county or counties named therein, and shall specify in the petition of the maximum amount of money proposed to be expended in purchasing or building the hospital, including the acquisition of a site, each board of county commissioners shall submit the question to issuing bonds therefor to the qualified electors of the county at the next general election to be held in the county.

2. should a majority of all the votes cast upon the question in each county concerned be in favor of establishing such county public hospital, the board or boards of county commissioners shall immediately proceed to appoint the board of hospital trustees and issue and sell the bonds as provided in this chapter.

NRS 450.040:

1. Whenever the board of county commissioners of any county shall be presented with a petition signed by at least 50 percent of the taxpayers in such county . . . for the establishing and maintenance of a public hospital . . . each such board of county commissioners shall call a special election for the purpose of submitting the question of issuing bonds therefor to the qualified electors of the county.

CONCLUSION

From the foregoing, it is the opinion of the undersigned that the county commission of a county in the State of Nevada may not issue either general obligation or revenue bonds for the purpose of the construction of a county hospital, unless such proposal is submitted to the qualified electors of that county.

Inasmuch as the answer to question one is negative, it is unnecessary to consider the second of your questions.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: John G. Spann, *Deputy Attorney General*

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**300 If a vending stand, as defined by the statutes, is operated in a public building of the State of Nevada, or any political subdivision thereof except schools, it is mandatory that a “blind person” be the operator, though through the supervisions of the Bureau of Services to the Blind of the Nevada State Department of Health and Welfare.**

Carson City, February 14, 1966

Mr. Mervin J. Flander, *Department of Health and Welfare, Services to the Blind Division, Carson City, Nevada 89701*

Dear Mr. Flander: You have asked the question: It is mandatory that a public building of the State of Nevada, or any political subdivision thereof, have a “blind person” operating a “vending stand” in said building, when such a facility is operate din such building?

FACTS

Clark County caused to be constructed a County Health Building with public funds, located in Clark County, Nevada. The building is operated by the district health officer and the purpose of the operation is service to the public.

Space has been allocated in the building for a cafeteria-type operation and lunch room facility.

The services to the Blind Division of the Department of Health and Welfare submitted a proposed for a “blind person” to operate the cafeteria facility. The Clark County District Health Board has taken the position that this facility cannot adequately be operated by a “blind person,” and that it is within the discretion of the director of the building as to who shall operate the food dispensing facility.

#### ANALYSIS

The question as outlined is directly governed by [NRS 426.630](#) through [NRS 426.720](#), the statute being entitled: Establishment and Operation of Vending Stands on Public Property.

The applicable sections area s follows:

[NRS 426.630](#) definitions:

\* \* \* \* \*

(c) *Cafeteria* or snack bar facilities for the dispensing of foodstuffs and beverages; (Italics added.)

[NRS 426.640](#):

For the purposes of providing blind persons with remunerative employment . . . *blind persons* licensed under the provisions of [NRS 436.630](#) to [426.720](#), inclusive, by the welfare division *shall operate vending stands in or on any public buildings* where, in the discretion of the head of the department or agency in charge of the maintenance of such buildings or properties, such vending stands may properly and satisfactorily operate. (Italics added.)

[NRS 426.670](#):

The welfare division . . . *shall*:

\* \* \* \* \*

2. With the consent of the head of the department or agency charged with the maintenance of the buildings or properties, establish vending stands in those locations which the welfare division has determined to be suitable, and may enter into leases or licensing agreements therefor.

3. Select, train, license and install qualified blind persons as managers of such vending stands.

4. Execute contracts or agreements with blind persons to manage vending stands, including finances, management, operation and other matters concerning such stands.

5. When the welfare division deems such action appropriate, impose and collect license fees for the privilege of operating such vending stands.

6. Establish and effectuate such rules and regulations as it may from time to time deem necessary to assure the proper and satisfactory operation of such vending stands.

[NRS 426.680](#):

1. If, . . . the head of a department . . . rejects . . . that a vending stand be established or operated for the employment of blind persons, the matter shall be referred to the state welfare administrator for review.

\* \* \* \* \*

3. If the administrator is not satisfied . . . he may refer the mater for final decision to:

\* \* \* \* \*

(b) the board of county commissioners . . .

“Cafeteria” is defined in Webster’s New Collegiate Dictionary as “a restaurant at which patrons serve themselves at a counter, taking the food to tables to eat.”

The foregoing statutes of the State of Nevada specifically spell out that the policy of the State is blind persons shall operate vending stands in any public building, when a vending stand is authorized by the operator of the building ([NRS 426.640](#)). A cafeteria is defined for the purposes of this action as a vending stand ([NRS 426.630\(5\)\(c\)](#)). The Welfare Division shall establish vending stands in public buildings with the consent of the department charged with the operation of the building ([NRS 426.670\(2\)](#)). The Welfare Division shall make rules to assure proper and satisfactory operation of the facility ([NRS 426.670\(6\)](#)). If in the event the department in charge of the building rejects the offer to install a blind person to operate a vending stand in the building, the matter may be referred to the State Welfare Administrator for review. If the operator of the building is dissatisfied with the decision from that department, he may refer the matter for final decision to the board of county commissioners ([NRS 426.680](#)). Commodities and articles sold from the vending stand shall be approved by the Welfare Division and the head or the operator of the building ([NRS 426.690](#)).

#### CONCLUSION

Therefore it is the opinion of this office that if a vending stand, as defined by the statutes, is operated in a public building of the State of Nevada, or any political subdivision thereof except schools, it is mandatory that a “blind person,” if available, be the operator, though through the supervision of the Bureau of Service to the Blind of the Nevada State Department of Health and Welfare.

To operate does not mean to carry out the actual physical duties. If necessary a “blind operator” may employ persons with sight to do the physical work. (An example of this is the food concession at Hoover Dam. The “blind person” is the operator, and he employs persons with sight to act as counter girls.)

It is the further opinion of this office that the Welfare Division shall have exclusive supervisions of the selection of the operator and the method of operation, and that the Welfare Division, and the head of the department in charge of the maintenance of the building, shall approve such commodities and articles that are to be sold from the vending stand.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: John G. Spann, *Deputy Attorney General*

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**301 Las Vegas Valley Water District is not required to comply with the requirements of Chapter 345 of the 1965 Statutes.**

Carson City, February 10, 1966

Mr. W.C. Renshaw, *General Manager, Las Vegas Valley Water District, Las Vegas, Nevada*

Dear Mr. Renshaw: The Las Vegas Valley Water District has propounded to this office the following question:

It the Las Vegas Valley Water District a quasi-municipal corporation organization under Chapter 167, Statutes of Nevada 1947, as amended, properly included within the ambit of Chapter 345, Statutes of Nevada 1965?

The above entitled act is referred to hereafter by its commonly known title, the Local Government Budget Act.

#### ANALYSIS

To begin with, the act creating the Las Vegas Valley Water District is not statutory in the sense that its provisions are contained in the Nevada Revised Statutes. Nor are the provisions regulating this agency in any city charter or ordinance. Therefore, the title to Chapter 345 of the 1965 Statutes, which refers specifically to various sections of the Nevada Revised Statutes, does not include the special act creating the Las Vegas Valley Water District (Chapter 167, Statutes of Nevada 1947).

It is interesting to note in this regard, that Section 19 of Chapter 167, Statutes of Nevada 1947, known as the Las Vegas Valley Water District Act, provides: “\* \* \* this act is complete in itself and shall be controlling. The provisions of any other law, general, special or local, except as provided in this act, shall not apply to a district incorporated under this act.

As we stated in Attorney General’s Opinion No. 8 dated February 7, 1955, the act of 1947 as amended, is so far reaching as to create an autonomy insofar as the Las Vegas Valley Water District is concerned.

In 82 Corpus juris, Section 554, the following rule is laid down:

The government, whether federal or state, and its agencies are not ordinarily to be considered within the purview of a statute, however general and comprehensive the language or act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies, or applies with special force, to statutes by which prerogatives, rights, titles, or interests of government would be divested or diminished.

There are other indications that the Las Vegas Valley Water District was not included in the Local Government Budget Act. Section 3, subparagraph (e) of the act provides for the issuance of emergency loans to local governments. The Water District is prohibited from this type of financing. The Water District Act and its bond covenants have a comprehensive fiscal system with particular restrictions with which the provisions of Chapter 345 of the 1965 Statutes would conflict. Conflicting acts in other chapters and charters are specifically repealed in the act, but these do not include the Las Vegas Valley Water District.

If the State Tax Commission is to require compliance by the Las Vegas Valley Water District with the Local Government Budget Act, the act itself, as well as the act creating the district, must be amended.

#### CONCLUSION

It is therefore the opinion of this office that the Las Vegas Valley Water District is not required to comply with the requirements of Chapter 345 of the 1965 Statutes.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**302 Utilities; Reimbursement Legislation—[NRS 408.943](#) is a partial waiver of state’s police power so as to effectively provide for reimbursement with federal funds of utility relocation.**

Carson City, February 25, 1966

Mr. W.O. Wright, *State Highway Engineer, Carson City, Nevada*

## STATEMENTS OF FACTS

Dear Mr. Wright: Title 23 of the United States Code Annotated, Section 123, states, inter alia, that:

Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.

Subsequently, this provision was interpreted by Policy and Procedure Memorandum 30-4(3)(2), issued by the Bureau of Public Roads, which in part, states:

The rights of an agency or political subdivision of a State under a contract, franchise or other instrument with the utility pertaining to rights of occupancy of publicly owned lands or public rights-of-way shall be considered to be the rights of the State in the absence of State law to the contrary.

On November 7, 1963, this office issued Opinion No. 86 concerning the constitutionality of present [NRS 408.943](#). On July 23, 1964, Opinion No. 154 was issued concerning the application of paragraph 3 of [NRS 408.943](#). We are not requested to issue our opinion concerning the effect of PPM 30-4(3)(2) when compared with the applicable federal and state statutes and federal regulations. In particular, we are asked whether payment to utility companies for relocation which is necessitated by construction of federal-aid highways in the interstate system is lawful when there is an existing franchise between the city or county and the utility company.

## QUESTION

If a city or county, under an existing franchise with a utility company, can compel the utility to remove itself from a city street or county road without cost to the city or county, can the State, acting through its Department of Highways compel the removal of the same utility without compensation, when such is necessitated by construction of a federal-aid highway which enlarges, improves or crosses a city street or county road?

## ANALYSIS

To avail itself of the provisions of Section 123 of Title 23, U.S.C.A., the State of Nevada, acting through its 1963 Legislature, enacted present [NRS 408.943](#). This statute provided that, with the exception contained in paragraph 3, the highway engineer may determine if the utility should be relocated, he may then order the same and the State shall pay the cost thereof provided the proportionate part of such cost is reimbursable from federal funds under a Federal-aid Highway Act or other Act of Congress. The "exception" aforementioned is where a utility is located along a state highway pursuant to [NRS 408.955](#). There is no provisions for a determination except by the highway engineer and the relocation reimbursement is limited to a federally aided highway.

Various state statutes, cited hereafter, confer upon utility companies the right to use publicly owned lands, highways, streets and alleys. These statutes are silent as to who should pay the cost when relocation becomes necessary by reason of improvements initiated by the state or political subdivisions of the state.

[NRS 266.300](#) Franchises: Power of council.

1. The city council shall have the power:

(a) To grant franchises to persons or corporations to lay, maintain and operate in, upon, along, through or across any street, alley, avenue or any part or parts thereof of the city or other public places therein, railroad tracks and connecting and terminal tracts.

(b) To contract with, authorize or grant any person, company or association a franchise to construct, maintain and operate gas, electric or other lighting works in the city, and to give such person, company or association the privilege of furnishing light for the public buildings, streets, sidewalks and alleys of the city. \* \* \*

[NRS 709.010](#) Franchises granted to public utilities operating prior to March 20, 1909: Conditions; payment of percentage of net profits.

1. Any person, company, corporation or association engaged in supplying electric light, heat or power to the inhabitants of any town or city in any county in this state \* \* \* which applied for and received a formal permit or franchise \* \* \* is hereby granted \* \* \* the franchise, rights and privilege to supply electric light, heat and power to the inhabitants of such county, and to the inhabitants of any town or city therein.

2. To carry out such purpose, the right, privilege and franchise is hereby granted to such person, association or corporation to construct and maintain poles and wires on the county roads and highways, and in the streets of such cities and towns, together with all the necessary appurtenances \* \* \*.

3. No person, company, corporation or association shall have the benefits of the provisions of [NRS 709.010](#) to [709.040](#) inclusive, until there has been paid to such town, city or county 2 percent of the net profits made \* \* \*.

[NRS 707.250](#) Construction, maintenance of liens over public, private lands; rates.

The person or persons, company, association or corporation named in the certificate (provided for in [NRS 707.240](#)), and their assigns:

1. May construct, or if constructed, maintain, or if partially constructed, complete and maintain, their line of telegraph, described in their certificate, filed as provided in [NRS 707.240](#), over and through any public or private lands, and along or across any streets, alleys, roads, highways or streams within this state, provided they do not obstruct the same; and

2. May operate the telegraph line between the termini of the same, and have and maintain offices and stations at any city, town, place or point along the line; and \* \* \*.

([NRS 707.300](#) states that all the rights and obligations provided for in [NRS 707.010](#) to [707.290](#) shall be applicable to telephone companies.)

A determination of the particular question herein involved has not been found by a search of decisions among other jurisdictions. However, it is noted that the various state courts, in discussing the relocation reimbursement statutes of their states, relied on what they felt was the intention of Congress in enacting the Federal-aid Highway Act.

In the case of *Minneapolis Gas Company v. Zimmerman* (Minn. 1958), 91 NW2d 642, the gas company was occupying highway rights-of-way under a written permit issued by the State commissioner of Highways. This permit specifically stated that in event improvements were to be made to the highway, the gas company would alter, change, vacate, or move its facilities without any cost whatsoever to the State of Minnesota. This case arose after the issuance of PPM 30-4 which stated, in essence, the State must certify that payment of relocation costs did not violate the law of the state or a legal contract with the utility. Headnote 14 on page 643 stated:

Although permit authorizing public utility to occupy right-of-way for installation of pipeline require utility to relocate its facilities when necessary at its own expense, subsequent statute authorizing reimbursement of utility companies for nonbetterment costs of relocating facilities made necessary by federal road construction program did not impair obligation of contracts within prohibition of state and federal constitution.

The court, in the body of its opinion, on pages 655 and 656, stated:



\* \* \* the pre-existing contract established by plaintiff's applications to occupy the right-of-way and the occupancy permits issued by the state, created a contractual relation between two parties, the state and the plaintiff. No third parties have acquired any rights under or pursuant to the contract. It is elementary that where all parties to a contract mutually agree, by conduct or express words, to amend, rescind, or abrogate a contract, in whole or in part, such mutual action does not impair the obligation of contract within the prohibitory clauses of either the Federal or state constitutions. \* \* \* (T)he Legislature—which is the highest representative authority through which the state can act—had the power by statutory enactment to amend the contract with the other contracting party's consent where no rights of third parties had in the meantime intervened. It is also well recognized that, if an administrative agency has entered into a contract as an agent of the state, the state (as the principal) may consent to release the other party from part or all of its obligations thereunder.

It is to be noted that in the Zimmerman case, the court held that even though there was a pre-existing permit by the Highway Commissioner, the subsequent statute enacted by the legislature, in effect, made the affected utility companies eligible for relocation reimbursement. Nevada, as noted in attorney General's Opinion No. 154, included specifically, in paragraph 3, the exception that utilities covered by permits set forth in [NRS 408.955](#) were not eligible of relocation assistance. To this degree the relocation Statute of Nevada is more restrictive than that of Minnesota.

In the case of *State Highway Dept. v. Delaware Power & Light Co.* (Del.), 167 A2d 27, the Highway Department, on page 29, in contending that their relocation statute was unconstitutional, submitted:

\* \* \* that since defendants under their franchises are obligated to remove and relocate their facilities, the state, in yielding its right under its police power to compel defendants to relocate these facilities at their own expense, is making a gift to the utilities.

The court, in discussing the department's position, stated that the program was gigantic, had crash features attached, and the removal of utilities was all out of proportion to the removal of facilities in the usual program of widening or straightening the road. On pages 30 and 31:

It was apparently for this reason [concern of Congress over expense of the program] and for the purpose of avoiding unnecessary delay in the completion of the program that there was inserted in the Federal Aid Act of 1956 a provision providing for the reimbursement of the state for 90% of their cost in the removal and relocation of such facilities.

\* \* \* we must consider the purpose for which the statute was enacted, the general good which will likely result therefrom, and the difficulties which Congress anticipated would have to be overcome before the construction of this gigantic project shall be completed. To depend upon many of the smaller communities and utilities to provide for the expense of this removal would in many instances not only bankrupt such communities but, foreseeably, would cause considerable delay in the completion of the project. \* \* \* Conceivably to provide for the state to bear this cost would cause a much more equitable distribution of the cost of the relocation of the facilities than would be the case if the owners thereof should themselves be compelled to pay for this relocation, since, otherwise, many people would benefit from the use of the highways who would not be users of the particular facilities involved and would therefore pay nothing toward the cost of the relocation of the facilities.

This office has heretofore considered one aspect of Nevada's relocation reimbursement statute, Attorney General's Opinion 154, July 23, 1964, page 2:

The issuance of this opinion has been delayed for extensive study of the problem involved because of our concern with the possibility that the requirement of Paragraph 3, supra, negatives, to a great extent, the purpose of reimbursement legislation and precludes Nevada utilities from

participating in the Federal program to the same extent as utilities in other states. If our concern is justified, the result of the prohibition against this participation would be that Nevada utilities would bear a cost not assumed by utilities in other states. This cost would be reflected in their rate base and passed on to the consumer. Nevada utility rates would then be proportionately higher than other states because of the requirement in the permit.

That the State may order utilities to relocate at their own expense under the common law is not questioned. See the authorities contained in paragraph 12, page 254, of the case of *Northwestern Bell Telephone Company v. Wentz* (N.D.), 103 NW2d. There the North Dakota Court stated, on page 255:

\* \* \* if the legislature determined, as it has in this instance, that the non-betterment costs should be paid by the state \* \* \* on interstate highways, it is our opinion that to do so will not violate the provisions of section 185 of the Constitution.

Similar expressions are found in *Minneapolis Gas Company v. Zimmerman*, 91 NW2d at 643; *State Highway Dept. v. Delaware Power & Light Co.*, 167 A2d commencing on page 29; and *State v. City of Austin*, 331 SW2d pages 741 and 742.

[NRS 408.943](#) reads, in part:

\* \* \* Whenever the engineer \* \* \* determines \* \* \* [a utility] should be relocated, the utility owning or operating such utility facility shall relocate the same in accordance with the order of the engineer. The cost \* \* \* shall be ascertained and paid by the state \* \* \* provided the proportionate part of such cost shall be reimbursable from federal funds \* \* \*.

3. This section shall not apply where a payment of relocation or removal costs by the state would be inconsistent with the terms of a permit issued by the engineer pursuant to [NRS 408.955](#).

In 50 Am.Jur. Statutes, 386 et seq. page 400, it is stated:

(T)he primary rule of construction of statutes entitled to a liberal interpretation is to ascertain and declare the intention of the legislature, as gathered from the language used.

And on page 404:

A strict construction is a narrow construction confining the operation of the statute to matters affirmatively, definitely, irresistibly, or specifically pointed out by its terms, and to cases which fall fairly within its letter, or the clear, plain, obvious, or natural import of the language used.

And finally the definition of “Ejusdem Generia” found in Ballentine’s Law Dictionary with Pronunciations, 2nd Edition:

Ejusdem generis. Of the same kind. The rule of ejusdem is that where, in a statute, general words follow a designation of particular subjects or classes or persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class of nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose. 50 Am.Jur. 244.

The aforementioned definitions, are, we think, pertinent, when construed with [NRS 408.943](#). It would seem that under any construction of the statute that the legislature intended that utilities be reimbursed for the nonbetterment cost of their relocation when necessary because of the construction of a federal-aid highway *unless they were on the right-of-way of said highway pursuant to a permit granted under [NRS 408.955](#) as mentioned in paragraph 3 of [NRS 408.943](#).*

The greater portion of the expense in relocating utilities under the Federal-aid Highway Program occurs when there must be an adjustment within the limits of towns or cities. This is true whether or not a utility crosses the highway transversely or whether it follows diagonally. Utilities are almost always the subject of a permit or a license or franchise within the limits of the city or town. As can be seen from examination of [NRS 266.300](#), [709.010](#), and [707.250](#), supra, it is seen that these permits, licenses, and franchises are almost solely a revenue measure. We are informed that the Sierra Pacific Power Company alone, pursuant to the three franchises it holds with the City of Reno, will pay in excess of some twenty-five million dollars (\$25,000,000) during the franchises' effective life. This does not include the revenue which is collected by Washoe County or other cities or counties where the company does business.

It must be presumed, pursuant to the authorities contained above in its analysis, that the legislature was cognizant and aware of the effect of the passage of [NRS 408.943](#); that the passage of the statute was to enable the utilities of Nevada to be on ostensibly the same footing as utilities in other states. We see that Nevada's utility relocation statute is, in effect, more restrictive than that of other states, Zimmerman, supra. However, as was stated in Attorney General's Opinion 154, it will take an act by the Legislature affirmatively removing this exception.

Under the common law, states and other political subdivisions can require utilities to relocate at their own expense. This is by force of *Northwestern Bell Telephone Co. v Wentz*, supra. It must be presumed that the Legislature of Nevada had this in mind when they granted the highway engineer the authority to make a determination that the utility should relocate and that the State should pay for the cost of same. By this statute ([NRS 408.943](#)), the Legislature partially waived the police power of the State. If it now can be said that because cities and counties can invoke the police power, therefore, the State must do likewise, then [NRS 408.943](#) is no longer of any effect and any utility which does not have a valid deed or easement within or over the affected area could be required to bear the expense of the relocation. Such a situation would, we have not doubt, cause delay in the completion of the Federal-aid Highway Program together with being prohibitively expensive to some of the smaller communities and utilities. Such a determination would also completely negate the intent and purpose for which [NRS 408.943](#) was passed since every utility in some manner is subject to a franchise or a statute.

#### CONCLUSION

It is our opinion that when the State of Nevada, acting through its highway department, enters into a contract with a utility company, for the relocation of the company's facilities which must be removed because of the construction of a federal-aid highway, the State must bear the cost of the relocation of the same provided the proportionate part of such cost shall be reimbursable from federal funds and provided further that the utilities' facilities are to be on or along the highway engineer under [NRS 408.955](#). We reach this determination because of the following factors, briefly summarized:

1. A state or political subdivision can waive its police powers.
2. Nevada Legislature partially waived the State's police powers when they enacted [NRS 408.943](#).
3. [NRS 408.943](#) was enacted to enable the State to take full advantage of the Federal Highway Act and to place Nevada utilities in a comparable position with utilities of other states.
4. A statute must be looked at to ascertain and determine the intent of the Legislature and when the language specifically points out only one exception to the terms therein, or one class of exceptions, then effect must be given to this language and no other exceptions may be presumed.
5. Congress intended, by passage of Section 123, Title 23, that utilities of a state should be compensated, if not against that state's law or a contract with the state, for the cost of the removal of their facilities. Relocation reimbursement by Nevada to utility affected by a federal-aid highway is not illegal. Relocation reimbursement is not made when a utility occupies a right-of-way pursuant to a permit under [NRS 408.955](#).

Cities and towns or counties are not affected by this partial waiver of [NRS 408.943](#). If a city or county can now require a utility to relocate at its own expense and if it is said that the State

must exercise the same rights, then [NRS 408.943](#) is a futile statute and the intent of the Legislature in passing the same to take advantage of the federal act is negative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**303 City Ordinance; Business Licenses—An ordinance providing for a business license fee based upon (1) business classification; (2) frontage of establishment; (3) average number of employees; (4) average hours per week of operation; (5) number of months of operation per year; and (6) zone in which business is carried on, is valid providing there is no discrimination of any sort between individuals or businesses of the same trade, occupation, or profession.**

Carson City, March 8, 1966

Honorable Gregory J. Chachas, *Ely City Attorney, 448 Aultman Street, Ely, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Chachas: You have submitted to this office a request to review Ordinance No. 247 passed by the city council of the City of Ely. The ordinance provides for the “taxation and regulation of business, trade, professions, and callings within the limits of the City of Ely upon a point basis made up from classification, frontage of establishments, average number of employees, average hours per week of operation, number of months of operation per year, zone in which operation is carried on, and for the assessment of additional points in certain instances; for the calculation and imposition of license fees or taxes in accordance therewith; establishing the method of application for licenses; authorizing the revocation of licenses for cause; fixing penalties for violation thereof; repealing all ordinances and parts of ordinances in conflict herewith; and declaring an emergency.”

In determining the amount each business is required to pay, the following circumstances are considered:

(1) Classification—Various businesses are categorized into 14 different categories and then given points varying from 1,000 down to 175. An example is: Architects—1,000 points; oil exploration companies—475 points; blacksmiths—450; abstractors—425; book shops—400; children’s shops—375; amusement machine shops—350; apartment and rental houses—325; cafes—300; bus and stage lines—275; auto body repair shops—250; bakeries—225; bar and restaurant supplies—200, and fruit peddlers—175.

(2) Frontage—Additional points shall be applied in proportion to the foot frontage of all businesses. A business with less than a 15-foot frontage shall receive 50 points, while a business with over an 100-foot frontage shall receive 3,000 points. There are five other classes, each receiving a different number of points.

(3) Number of Employees—Further points are to be applied according to the average number of employees. Two hundred points are applied for 1 or 2 employees and 5,000 points for 15 or more.

(4) Number of Hours Operated Per Week—For less than 55 hours, 200 points are applied and the scale goes up to 500 points for more than 125 hours.

(5) Number of Months Operated Each Year.

(6) Zones—The city is divided into 3 areas and depending upon the area in which the business is located, from 100 to 300 points are applied.

By the terms of the ordinance the unit of point value is fixed at 1 cent, which is multiplied by the total number of points applicable to the business. The resulting figure is the quarterly license rate.

## QUESTION

You ask of this office an opinion as to the validity of this ordinance.

## ANALYSIS

[NRS 266.105](#) provides:

Power of council to pass and make ordinances, resolutions; limitation of fines; penalties for violations of ordinances.

1. The city council shall have the power to make and pass all ordinances, resolutions and orders, not repugnant to the Constitutions of the United States or of the State of Nevada or to the provisions of this chapter, necessary for the municipal government and the management of the city affairs, for the execution of all powers vested in the city, and for making effective the provisions of this chapter.

2. The city council shall have power to enforce obedience to such ordinances with such fines or penalties as the city council may deem proper, but the punishment of any offense shall be by a fine in any sum less than \$300, or by imprisonment not to exceed 6 months, or by both fine and imprisonment.

McQuillin, in *The Law of Municipal Corporations*, Third Edition Revised, Vol. 9, Section 26.05 announces the following rule:

Requisites pertaining to ordinances generally govern licensing ordinances. Accordingly, licensing ordinances must be definite and certain, reasonable, uniform in operation and not arbitrarily or oppressively discriminatory.

This rule and [NRS 266.105](#) provide the guidelines within which Ordinance No. 247 must fall if it is to be deemed legally acceptable.

Three of the circumstances (classification, number of hours operated per week, and zoning) have been considered by text writers and courts throughout the United States.

Classification: McQuillin, *The Law of Municipal Corporations*, Third Edition Revised, Vol. 9, Section 26.59, provides:

Although a municipal corporation may classify persons, activities, and things, and treat them separately for licensing purposes, the regulations and the fees or charges must in general apply equally to all within the same class, where circumstances and conditions are similar; and any unreasonable discrimination will invalidate the requirement or the exaction. Within a proper class of persons or subjects, an ordinance imposing a license fee or tax must, in order to avoid being discriminatory, bear equally and justly upon all such persons or subjects.

In Section 26.60 of the same work it is stated:

Classifications embodied in municipal licensing legislation must be based upon intrinsic, natural and reasonable distinctions germane to the police or revenue purpose of the law. The difference between the subjects need not be great; and if any reasonable distinction can be found to exist, the classification imposed by the licensing laws will be sustained. The classification may reasonably distinguish between business or trades or between different methods of conducting the same general character of business or trade, but ordinarily not between persons engaged in the same trade or pursuit.

Two cases dealing with this point are: *Fox Bakersfield Theater Corp. v. City of Bakersfield* (Calif. 1950), 222 P.2d 879, 884:

It is well settled that occupations and businesses may be classified and subdivided for purposes of taxation. \* \* \* No constitutional rights are violated if the burden of the license tax

falls equally upon all members of a class, though other classes have lighter burdens or are wholly exempt, provided that the classification is reasonably based on substantial differences between the pursuits separately grouped, and is not arbitrary.

*Thunder Oil Co. v. City of Sunset Hills* (Missouri 1961) 389 SW2d 82, 86:

Even apart from specific authorization for the taxing of gasoline stations, the city has the undoubted power to classify occupations and treat them separately. \* \* \* The imposition of such a license tax has been held not to be a violation of the constitutional requirement of uniformity so long as it operates equally upon all in the same class of subjects.

It is the opinion of this office that the classification of businesses as adopted by Ordinance No. 247 does not render such ordinance invalid, providing each business and individual within each class (that is, each architect, blacksmith, abstractor, etc.) is not discriminated against or distinguished from others in the same trade or profession.

Average hours per week of operation: In *Ard v. Macon*, (Ga. 1938), 200 SE 678, it was held that a licensing ordinance which considered the number of hours the business was open each week in determining the cost of the license violated no constitutional provision and was a valid revenue measure.

It is the opinion of this office that such finding is in conformity with the general rules above set forth and is a reasonable basis upon which to base a business license fee. An underlying and fundamental justification for a business license fee is to provide funds for police protection and other services rendered by the licensing municipality. The longer a business is in operation and offering its services to the public, the greater its demand for such municipal protection, and it follows that such business be required to contribute a greater share to the costs of such municipal services than similar businesses opened for a shorter period of time.

Zoning: An ordinance which merely discriminates between different localities of the municipality according to the advantage they may present for the business for which a license is sought, leaving all persons at equal liberty to apply for a license in whatever locality they think proper, and making no distinction between persons, but only places, is open to no objection. See McQuillin, *The Law of Municipal Corporations*, Third Edition Revised, Vol. 9, Section 26.60.

This, in the opinion of this office, is legally sound and constitutes a proper basis for determination of a business license fee.

The other three considerations which aid in the fixing of the business license fee (frontage, number of employees, and number of months the business is operated) do not contradict the laws of this State.

Frontage: Cases can be found in which the courts upheld the right of a municipality to fix the business license fee in proportion to the size of the building in question or the area used by the licensee. See *Brannen v. Mayor and Council of Statisboro* (Ga. 1954), 80 SE2d 805.

This court has uniformly held that the taxing authorities may levy a license tax upon a certain class or business adjusted to the size of the business carried on.

It was then held that a fee of \$1.50 for each 1,000 square feet of floor space was valid.

In *Chaiet v. City of East Orange* (N.J. 1948), 56 A2d 599, an ordinance imposing a license fee from \$300 to \$500, depending upon the size of the "lot" was held to be valid.

Since the increase in the size of a building and its exposure on the public streets could reasonably be said to demand more municipal protection, control and supervision, the "frontage" of the business may be considered in determining the license fee."

Number of Employees: No case has been found interpreting the right of a municipality to consider the number of employees of the business licensee when fixing the licensee fee. However, in 16 Am.Jur. 2d, *Constitutional Law*, Section 525, it is said:

Classification in various regulations of occupations has often been made and sustained on the basis of the number of persons employed, where such a basis is not arbitrary or unreasonable. Similar classification affecting the financial responsibility of employers in social legislation relating to unemployment has also been sustained.

It is the opinion of this office that the number of employees employed by the licensee may properly be considered when determining the license fee.

Number of Months of Operation Per Year: For the same reasons sustaining the validity of the use of "number of hours per week" it is concluded by this office that Ordinance No. 247 is not rendered unlawful because the "number of months operated per year" is a part of the above described "point system."

#### CONCLUSION

An ordinance providing for a business license fee based upon (1) business classification; (2) frontage of establishment; (3) average number of employees; (4) average hours of operation per week; (5) number of months of operation per year; and (6) zone in which business is carried on, is valid providing there is no discrimination of any sort between individuals or businesses of the same trade, occupation or profession.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**304 Board of Cosmetology; Licenses—A license to operate a school of cosmetology is nontransferable.**

Carson City, March 8, 1966

Mrs. Bernice Randall, *Secretary, Nevada State Board of Cosmetology, P.O. Box 1814, Reno, Nevada 89501*

#### STATEMENT OF FACTS

Dear Mrs. Randall: Two schools of cosmetology, currently licensed by the State Board of Cosmetology, are going to be sold to individuals not licensed by the State Board of Cosmetology.

#### QUESTION

You have presented to this office the following question:

Do the purchasers of the schools have to apply for a new license to operate the schools, or do the licenses currently in effect continue to be valid until their expiration date?

#### ANALYSIS

The applicable statutes are:

[NRS 644.380](#):

1. Any person, firm or corporation desiring to conduct a school of cosmetology in which any one or any combination of the occupations of a hairdresser and cosmetician are taught shall apply to the board for a certificate of registration and license, through the owner, manager or person in charge, in writing, upon forms prepared and furnished by the board. Each application shall contain proof of the particular requisites for registration provided for in this chapter, and shall be verified by the oath of the maker. Such forms shall be accompanied by:

(a) A detailed floor plan of the proposed school.

(b) The name, address and license number of the manager or person in charge and of each instructor.

(c) Evidence of financial ability to provide the facilities and equipment required by rules of the board and to maintain the operation of the proposed school for a period of 1 year.

(d) Proof that the proposed school will commence operation with an enrollment of not less than 25 bona fide students.

2. Upon receipt by the board of the application, the board shall, before issuing a certificate of registration and license, determine whether the proposed school:

(a) Is suitably located.

(b) Contains adequate floor space and equipment.

(c) Meets all requirements established by rules of the board.

3. The annual registration fee for a school of cosmetology is \$200.

[NRS 644.383\(1\)](#):

The owner of each school of cosmetology shall post with the board a good and sufficient surety bond executed by the applicant as principal and by a surety company as surety in the amount of \$5,000.

[NRS 644.385](#):

1. The board may refuse to issue a school of cosmetology license to any applicant who fails to present satisfactory evidence of personal integrity and moral responsibility, and, if the applicant is a corporation, the provisions of this subsection shall apply to all the officers thereof.

2. No school of cosmetology license may be issued until the owner files with the board a statement designating the person authorized to accept service of notice from the board and to transact all business negotiations in behalf of the school.

While the above quoted statutes do not specifically provide an answer to the question, a reasonable interpretation of said statutes leads to the inevitable conclusion that the State Board of Cosmetology is empowered to consider each individual who seeks to be licensed. This interpretation will prevent a qualified licensee from transferring his license to a person not qualified to obtain a license from the board, and thereby thwart the spirit of the statutes.

Such an interpretation of the above statutes is in conformity with the general rule that a license is regarded as a special privilege which cannot be assigned or transferred without the grant of the licensing authorities. See 53 C.J.S., Licenses, Section 45; 33 Am.Jur., Licenses, Section 6; *State v. West Virginia State Board of Examiners* (W.V. 1951), 66 S.E.2d 1; and *Hom Moon Jung v. Soo* (Ariz. 1946), 167 P.2d 929.

#### CONCLUSION

A license to operate a school of cosmetology is a personal privilege and upon sale of such school the license terminates and the purchaser must apply for a new license, according to Chapter 644 NRS.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**305 (1) Notice of the filing of an ordinance 7 days prior to its adoption is in substantial compliance with [NRS 266.115](#). (2) The signing of Ordinance 274 by only two of the three city councilmen does not render it a nullity. (3) The title of an ordinance must embrace but one subject.**



Carson City, March 8, 1966

Gregory J. Chachas, Esq., *City Attorney, 448 Aultman Street, P.O. Box 537, Ely, Nevada 89301*

Dear Mr. Chachas: You have informed this office that you are “having considerable difficulty deciding whether or not City of Ely Ordinance No. 274 was enacted within the mandatory language required by [NRS 266.110](#) and [NRS 266.115](#).” The ordinance is known and referred to as the “Land Use Zoning Ordinance of the City of Ely, Nevada.” By the title of the ordinance, land use districts are established to regulate the height, number of stories, and the size of buildings and structures; the size of yards and other open spaces; the density of population and the intensity of the use of the land; adopt a map defining said land use districts; provide for amendments, variances, conditional use permits, and the enforcement of its provisions; prescribe penalties for violations thereof; and provide for other matters properly related thereto.

[NRS 266.100](#) provides:

1. No ordinance shall be passed except by bill, and when any ordinance is amended, the section or sections thereof shall be reenacted as amended, and no ordinance shall be revised or amended by reference only to its title.
2. Every ordinance, except those revising the city ordinances, shall embrace but one subject and matters necessarily connected therewith and pertaining thereto; and the subject shall be clearly indicated in the title, and in all cases where the subject of the ordinance is not so expressed in the title, the ordinance shall be void as to the matter not expressed in the title.

[NRS 266.115](#) provides:

1. The style of ordinances shall be as follows: “The City Council of the City of ..... do ordain.” All proposed ordinances, when first proposed, shall be read by title to the city council and may be referred to a committee of any number of the members of the council for consideration, after which at least one copy of the ordinance shall be filed with the city clerk for public examination. Notice of such filing shall be published once in a newspaper published in the city, if any there be, otherwise in some newspaper published in the county and having a general circulation in the city, at least 1 week prior to the adoption of the ordinance. The city council shall adopt or reject the ordinance, or the ordinance as amended, within 30 days from the date of such publication, except that in cases of emergency, by unanimous consent of the whole council, final action may be taken immediately or at a special meeting called for that purpose.
2. At the next regular or adjourned meeting of the council following the proposal of an ordinance and its reference to committee, the committee shall report the ordinance back to the council, and thereafter it shall be read in full as first introduced, or if amended, as amended, and thereupon the proposed ordinance shall be finally voted upon or action thereon postponed.
3. After final adoption the ordinance shall be signed by the mayor, and, together with the votes cast thereon, shall be published once in a newspaper published in the city, if any there be, otherwise in some newspaper published in the county and having a general circulation in the city. Twenty days after such publication the same shall go into effect, except as provided in [NRS 266.135](#), and except emergency ordinances which may be effective immediately.
4. In all prosecutions for the violation of any of the provisions of any city ordinance, rule, resolution, or other regulation of the city council, whether in a court of original jurisdiction or in any appellate court, it shall not be necessary to plead the contents of the same, but the court before which the proceedings may be pending shall take judicial notice of such ordinance, rule, resolution, or other regulation, and of the contents thereof. In all civil actions it shall not be necessary to plead the contents of any ordinance, rule, resolution, or other regulation of the city council, but the same may be pleaded by title, and may be proved prima facie by the introduction of the original entry thereof on the records of the city council, or a copy thereof certified by the

city clerk to be a full, true and correct copy of the original entry, or by the introduction of a printed copy published or purported to have been published by authority of the city council.

Notice of the filing of Ordinance No. 274 was published in the “Ely Daily Times” on June 5, 1959. The same ordinance was passed and adopted 7 days later on the 12th day of June, 1959. The vote of the three-man council of the City of Ely was two votes for passage and adoption, the third member was absent.

## QUESTIONS

- (1) Was the filing of notice proper?
- (2) Is the ordinance fatally defective because only two councilmen signed it?
- (3) Is the ordinance fatally defective because it embraces more than one subject matter?

Question No. 1—[NRS 266.115](#) (above set forth) provides that “. . . filing shall be published . . . at least one week prior to the adoption of the ordinance.” The notice of Ordinance 274 was 7 days prior to its approval and adoption on the 12th day of June, 1959. You have raised the question that the 7 days should have lapsed before the council could vote on the ordinance.

Many courts have applied different definitions to the word “week.” One of the latest decision is *City of Olive Hill v. Howard* (Ky. 1954), 273 S.W.2d 387, 389:

But when dealing with publication of notice of a thing to be done, it is commonly understood that the word “week” means seven days.

This office is not going to pass on the question of whether or not the 7 days should have passed before the city council could vote on the proposed ordinance. It is the position of this office that there has been substantial compliance with the terms of [NRS 266.115](#), and considering the fact that the ordinance has been in effect nearly 7 years, such a slight defect, if in fact there is a defect in the publication notice, is not sufficient reason to declare it a nullity.

McQuillin, *Municipal Corporations*, Second Edition, Vol. 2, Sections 734, states the rule as follows:

Provisions respecting publication and sufficient notice are generally held mandatory, and hence failure to publish in *substantially* the manner prescribed renders the ordinance or resolution void. Accordingly where publication is made a prerequisite to the ordinance taking effect, the requirement is clearly mandatory, and to render the ordinance valid and enforceable publication must be in *substantial conformity* with the provisions of the law as to time, place and manner. (Italics supplied.)

Also see *Ninth St. Imp. Co. v. Ocean City* (N.J. 1917) 100 Atl. 568, wherein it was held that a mere informality or irregularity in the procedure in adopting a code of ordinances will not justify a court in setting them aside.

Question No. 2—It is the position of this office that Ordinance No. 274 is not defective because only two councilmen signed it. There is no mandatory language in [NRS 266.115](#) requiring all members of the council to be present and sign each ordinance. By the terms of that statute, the only time the “unanimous consent of the whole council” is required is when the council is voting on whether or not an emergency situation exists, and if final action should be taken “immediately or at a special meeting called for that purpose.” If there is no declaration of an emergency, subsection 2 of [NRS 266.115](#) provides the manner of voting:

. . . and thereupon the proposed ordinance shall be finally voted upon or action thereon postponed.

It must be noted that the particularities of the voting procedure are not set forth. The applicable rule then is:

It is well settled that a majority of a quorum of a municipal council have the right to take any action which is within the power of the entire council, unless the statute, charter, or bylaws governing the council provide otherwise. The acts of such a majority bind not only the minority who are present, but all who are absent.

Question No. 3—[NRS 266.110](#) provides in part:

Every ordinance . . . shall embrace but one subject matter.

The title of Ordinance No. 274 is set forth above. All of the subdivisions of that title directly relate to the regulation of the use of land. It is the considered opinion of this office that the title of Ordinance No. 274 embraces but one subject matter. See McQuillin, *Municipal corporations*, Second Edition, Vol. 2, Section 714.

#### CONCLUSION

(1) Notice of the filing of an ordinance 7 days prior to its adoption is in substantial compliance with [NRS 266.115](#).

(2) The signing of Ordinance 274 by only two of the three city councilmen does not render it a nullity.

(3) The title of an ordinance must embrace but one subject.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**306 A person accepting the benefits of retirement compensation under [NRS Chapter 286](#) may serve as public administrator within the State of Nevada only if his compensation therefor does not exceed \$1,800, as provided by [NRS 286.520\(2\)\(b\)](#), even though such an individual would receive no salary for his employment. If in the event said individual earned fees from the administration of decedents' estates, then said fees would be considered compensation from the State of Nevada or any branch, department, or agency thereof as provided in [NRS 286.520](#).**

Carson City, March 8, 1966

Mr. Kenneth Buck, *Executive Secretary, Public Employees Retirement Board, P.O. Box 637, Carson City, Nevada*

Dear Mr. Buck: You have asked the following question:

May a person receiving retirement benefits under Chapter 286 NRS serve as a public administrator in the State of Nevada, even though said position is without salary?

#### ANALYSIS

The applicable statute, [NRS 286.520](#) reads:

1. Any person accepting or receiving the benefits of retirement compensation under this chapter shall not be employed in any capacity by the State of Nevada, by a political subdivision of the State of Nevada, or any department, branch or agency thereof, except as provided in subsection 2. Any person accepting or enjoying the benefits of retirement compensation under this chapter who accepts employment or receives any other compensation from the State of Nevada, from a political subdivision of the State of Nevada, or any department, branch or agency

thereof for services rendered, except as provided in subsection 2, shall forfeit all the benefits of this chapter so long as he shall retain such employment or receive such compensation. The proper office shall forthwith strike such person's name from the retirement compensation roll and refuse to honor any requisitions for retirement compensation made by such person.

2. \* \* \*

(b) Return to employment for the State of Nevada or a political subdivision thereof during any 1 calendar year without forfeiture of retirement benefits until they have earned a gross amount of \$1,800, at which time the benefits of retirement compensation shall be suspended and shall remain suspended for any month during which such person is employed for any period of time by the State of Nevada or its political subdivisions.

Section 1, [NRS 286.520](#) clearly states:

Any person accepting or enjoying the benefits of retirement compensation under this chapter who accepts employment or receives any other compensation from the State of Nevada, from a political subdivision of the State of Nevada, *or any department, branch or agency thereof for services rendered*, except as provided in subsection 2, shall forfeit all the benefits of this chapter so long as he shall retain such employment or receive such compensation. (Italics supplied.)

It is the opinion of this office there is nothing prohibitive in an individual receiving retirement benefits from accepting a state position if no compensation attaches thereto. However, in the event the individual receives compensation from the state of any department branch, or agency thereof, then the retirement benefits shall terminate except for the exceptions found in paragraph 2 of [NRS 286.520](#).

It is common knowledge a public administrator receives compensation for administration of estates of deceased persons within the State. This compensation comes from courts of competent jurisdiction and such courts can be considered a department, branch, or agency of the State. Fees allowed a public administrator by the courts may be considered compensation inasmuch as they are allowed by the court for services rendered.

If in the event an individual were to become a public administrator in the State of Nevada, that in itself would not cause that individual to lose his retirement benefits. If in the event, however, any fees earned by him in his official capacity which would exceed \$1,800 during any calendar year, then he would be liable of retirements benefits forfeiture.

#### CONCLUSION

From the foregoing, it is the opinion of this office that under [NRS 286.520](#) a person accepting the benefits of retirement compensation under [NRS Chapter 286](#) may serve as public administrator within the State of Nevada only if his compensation therefor does not exceed \$1,800, as provided by [NRS 286.520\(2\)\(b\)](#), even though such an individual would receive no salary for his employment. If in the event said individual earned fees from the administration of decedents' estates, then said fees would be considered compensation from the State of Nevada, or any department, branch, or agency thereof, as provided in [NRS 286.520](#).

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: John G. Spann, *Deputy Attorney General*

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**307 Insurance Companies; Annual Financial Statement—The Insurance Commissioners is not authorized to waive any penalty provision imposed by statute by reason of failure of an insurance company to file its annual financial statement within the time allowed by law.**

Carson City, March 9, 1966

Mr. Louis T. Mastos, *Commissioner of Insurance, Department of Commerce, Carson City, Nevada*

Dear Mr. Mastos: You have asked the question: May the Nevada State Insurance Commissioner waive the statutory provision that provides for the imposition of a penalty if an insurance company fails to file its annual financial statement with the Insurance Division of the Department of Commerce after the time to file such statement has expired?

#### STATEMENT OF FACTS

An insurance company filed with the Insurance Division of the Nevada Department of commerce its 1964 annual financial statement on March 8, 1965. On March 9, 1965, the Insurance Commissioner notified the company it was liable for penalty for reason of its failure to file its statement before March 1, 1965, as provided by [NRS 686.090](#) and [NRS 686.100](#). The company then requested the penalty provision be waived. On March 17, 1965, the commissioner wrote the company a letter indicating the penalty provision would be waived. To date, the penalty for not filing its annual financial statement until March 8, 1965, has not been paid by the insurance company involved.

#### ANALYSIS

Applicable statutes:

[NRS 686.090](#):

1. Every company doing business in this state shall file with the commissioner on or before March 1 of each year a financial statement for the year ending December 31 immediately preceding \* \* \*. The commissioner shall have authority to extend the time for filing such statement by any company for reasons which he shall deem good and sufficient. \* \* \*

[NRS 686.100](#):

1. Any company failing, without just cause, to file its annual statement as required in this Title shall be required to pay a penalty of \$100 for each day's delay, to be recovered in the name of the State of Nevada by the attorney general.

It is the opinion of this office the Insurance Commissioner has no statutory authorization to waive the payment of any penalty by any insurance company wherein a penalty has been incurred. [NRS 686.090](#) provides that the commissioner shall have authority to *extend* the time for filing the financial statement. If the commissioner deems it advisable to extend the time for filing such statement, then, of necessity, he must grant the extension before a penalty is incurred. If the penalty has been incurred by reason of failure to file within the time allowed by law, the commissioner has no authority to waive the payment of such penalty.

In the instant case, no extension was granted the insurance company involved allowing time in which to file its annual financial statement with the commissioner. The statement was filed 8 days after the deadline of March 1, 1965. Seven days penalty, therefore, accrued. The company then requested a waiver of the penalty. The commissioner then indicated the penalty might be waived, although there is nothing in the contents of the letter by the commissioner specifically waiving the penalty. The letter to the insurance company states, in part: "Your letter of March 12 relative to our communication of March 9 is acknowledged. Our law does provide that we may extend the filing date, upon request and the presentation of a "justifiable cause." " From this, apparently the commissioner meant that the filing date might be extended retroactively. This, in the opinion of this office, is a physical impossibility. Any extension of a filing date can only commence from the date of granting the extension. If a penalty has incurred, then the only

possible manner for nonpayment of the penalty can be a waiver of the penalty by its payee. As state, the Nevada statutes do not provide for a waiver of penalty for failure to file a financial statement by the insurance company after March 1 of each year.

It is the universally accepted principle of law that acts of public officers beyond their lawful powers are ineffective to bind the public, and their neglect and laches generally cannot affect public rights. *Hale County v. American Indemnity*, 63 F.2d 275; *Wheeler v. Santa Ana*, 195 P.2d 373 (Cal. 1947); *Ocean Shore Railroad v. Santa Cruz*, 17 Cal. 892 (1961).

It is the opinion of this office that when the Insurance Commissioner granted the waiver as aforesaid he was acting without statutory authority and, therefore, his action was void and of not effect and the State of Nevada is not bound by his action in the waiver of the aforesaid penalty.

#### CONCLUSION

It is the opinion of this office that nothing in the Nevada statutes authorizes the Insurance Commissioner of the Insurance Division, Department of Commerce, State of Nevada, to waive any penalty provisions imposed by statute by reason of failure of an insurance company to file its financial statement with the insurance Commissioner within the time allowed by law. By statute, the commissioner may grant an extension of time in which to file such financial statement but such extension can only be granted for a definite period of time into the future of the time of granting the extension. The granting of an extension of time for filing does not mean that a waiver of penalty already accrued may be made.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: John G. Spann, *Deputy Attorney General*

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**308 Motor Vehicle Registration—A sheriff’s certificate of sale of a motor vehicle is, in itself, insufficient evidence to authorize the issuance of a certificate of ownership of the motor vehicle to the named purchaser in the sheriff’s certificate of sale.**

Carson City, March 10, 1966

Mr. Louis P. Spitz, *Director, Department of Motor Vehicles, Carson City, Nevada*

Dear Mr. Spitz: You have asked the question, “Does a sheriff’s certificate of sale of a motor vehicle convey sufficient title to the purchaser thereof to authorize the Department of Motor Vehicles to issue an unencumbered title for the motor vehicle to the named purchaser in the certificate of sale?”

#### ANALYSIS

Statutes applicable to the above are:

[NRS 21.010](#). The party in whose favor judgment is given may at any time within 6 years after the entry thereof issue a writ of execution for its enforcement.

[NRS 21.080](#)(1). All goods, chattels, moneys, and other property, real and personal, of the judgment debtor . . . shall be liable to execution.

[NRS 21.110](#). The sheriff shall execute the writ against the property of the judgment debtor by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action and selling the other property. . .

[NRS 21.170](#). When the purchaser of any personal property capable of manual delivery shall pay the purchase money the officer making the sale shall deliver to the purchaser the property and if desired shall execute and deliver to him a certificate of sale and payment. *Such certificate*

shall convey to the purchaser all the right, title, and interest which the debtor had in and to such property on the date of execution.

[NRS 482.055](#). “Legal owner” means a person who holds the legal title of a vehicle or a mortgage thereon.

[NRS 482.415](#). Whenever application shall be made to the department for registration of a vehicle previously registered under this chapter and the applicant is unable to present the certificate of registration or ownership previously issued for such vehicle by reason of the same being lost or unlawfully detained by one in possession or the same is otherwise not available, the department is authorized to receive such application and to examine into the circumstances of the case and may require the filing of affidavits or other information. When the department is satisfied that the applicant is entitled thereto, it may register such vehicle and issue new certificates of ownership and registration and new license plate or plates to the person or persons found to be entitled thereto.

A sheriff’s certificate of sale conveys title to property sold by virtue of writ of execution to satisfy a judgment. Such certificate of sale only conveys to the purchaser the title the debtor had to such property on the date of execution ([NRS 21.170](#)).

The interest of a vendee under a contract of conditional sale is that of an equitable owner and such interest may be attached or executed upon. *Nevada Motor Co. v. Bream*, [51 Nev. 89](#), 269 P. 602.

From the foregoing, a sheriff’s certificate of sale does not in itself convey full or “legal” title to property sold. If the sheriff has sold the interest of a judgment debtor to a motor vehicle it may be there exists an unpaid conditional sales contract wherein the legal title still rests with the seller under the contract.

[NRS 482.415](#) provides for the issuance of a certificate of ownership of a motor vehicle when the certificate of ownership or previous registration is unavailable. In such case the statute provides the “department is authorized to receive such application and to examine into the circumstances of the case and may require the filing of affidavits or other information.”

From the foregoing, it is the opinion of this office that in the event an application for a certificate of ownership is made and the evidence of ownership is a sheriff’s certificate of sale, it is incumbent upon the Department of Motor Vehicles to determine whether or not the judgment debtor had a clear and unencumbered title to the motor vehicle subject of the certificate or if legal title remained in the seller of the automobile by virtue of an unpaid conditional sales contract or mortgage.

#### CONCLUSION

A sheriff’s certificate of sale in itself is insufficient evidence for the Department of Motor Vehicles to issue a certificate of ownership of a motor vehicle to the named purchaser in the certificate of sale. It may be the named purchaser in the sheriff’s certificate has purchased the equitable interest only in the motor vehicle, leaving the legal title in a third party.

It is incumbent upon the department, before issuing a certificate of ownership to a motor vehicle to the named purchaser in a sheriff’s certificate of sale, to determine whether or not the named purchaser has purchased the legal as well as equitable rights to the motor vehicle.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: John G. Spann, *Deputy Attorney General*

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**309 [NRS 433.240](#) Construed—Upon the certification by two licensed physicians that an inmate at the Nevada State Prison is mentally ill and likely to injure himself or others, such**

**inmate may immediately be transferred to the Nevada State Hospital, or to another private or public hospital, with the consent of the person in charge.**

Carson City, March 14, 1966

Richard D. Grundy, M.D., *Nevada State Prison Physician, Carson Medical Center, Carson City, Nevada 89701*

Dear Dr. Grundy: You have expressed concern over the proper procedure that you should take in the event an inmate at the Nevada State Prison suddenly suffers such a severe mental illness that for his own safety and protection, as well as that of others, he should be transferred to the Nevada State Hospital. You are more particularly concerned with what course of action would be proper if such commitment is needed during the night or on a weekend when a court proceeding is not possible.

#### ANALYSIS

The answer to your question is found in [NRS 433.240](#), which reads in part as follows:

##### *Emergency temporary commitments.*

1. Emergency temporary commitment to the hospital, or some other public or private hospital, may be made as provided in this section.
2. At such times as the district judge for a particular county is not available, emergency commitment of a person who suddenly becomes acutely ill mentally to the hospital, or to some other public or private hospital with the consent of the person in charge of such other hospital, may be authorized by two physicians licensed to practice medicine in the State of Nevada, who shall certify their belief that the person is mentally ill and, because of his illness, is likely to injure himself or others if not immediately restrained. If the person is committed to the hospital the superintendent shall notify the district judge immediately of such emergency commitment. If the person is committed to some other public or private hospital the person in charge of such hospital shall notify the district judge immediately of such emergency commitment. When the district judge is available, the district judge may authorize two physicians licensed to practice medicine in the State of Nevada to examine the person, and where they certify their belief that he is mentally ill, and, because of his illness, is likely to injure himself or others if not immediately restrained, the district judge may make an order committing the person to the hospital, or to some other public or private hospital with the consent of the person in charge of such other hospital.

By the terms of the above-quoted statute, you and one other physician licensed to practice medicine in the State of Nevada could certify that such inmate is mentally ill and likely to injure himself or others if not immediately restrained. The inmate may then be transferred to either the Nevada State Hospital or some other public or private hospital. The district judge of the judicial district in which the hospital is located should then be immediately notified. That district judge may then require two physicians licensed to practice medicine in the State of Nevada to examine the committed patient. The district judge then may issue a court order committing the patient to the hospital.

#### CONCLUSION

Upon the certification by two licensed physicians that an inmate at the Nevada State Prison is mentally ill and likely to injure himself or others, such inmate may immediately be transferred to the Nevada State Hospital, or to another private or public hospital, with the consent of the person in charge.

Respectfully submitted,

HARVEY DICKERSON, Attorney General



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**310 Fire Protection Districts; Dissolution—To dissolve a fire protection district the following procedure is in conformity with Chapter 474 NRS. Twenty-five percent of the landowners within the district must sign a petition seeking such dissolution. An election must then be held to determine if dissolution is desired by a majority of such landowners voting in the election. A person may vote by proxy in the election but may not assign an affirmative proxy vote as a part of the petition.**

Carson City, March 14, 1966

Mr. John H. Binkley, *Chairman, Silver Springs Fire District, Silver Springs, Nevada*

STATEMENT OF FACTS

Dear Mr. Binkley: The Committee for the Dissolution of the Silver Springs Fire District has been formed, its declared purpose being the dissolution of the Silver springs Fire District, which is currently acting as a fire protection district in Silver Springs, Lyon County, Nevada. A petition has been circulated by the committee addressed to "Dear Taxpayer" which sets forth their position and then requests the following petition to be signed:

The undersigned, landowners of record in Lyon County, Nevada, wish our names signed to the petition to dissolve the Silver Springs Fire District, and hereby request and authorize the committee for the dissolution of said fire district to sign our names to said petition. We also assign said committee our proxy to vote YES to the dissolution of said district at the special election to be called by the Lyon County Commissioners. (Each individual named in deed to sign separately.)

.....  
.....

.....  
.....

QUESTION

Is the attempted assignment of the landowners' proxy vote to the Committee for the Dissolution of the Silver Springs Fire District valid, as set forth in the above quoted petition?

ANALYSIS

The answer to your question may be found in the following applicable statutes:

[NRS 470.100:](#)

1. Holders of title or evidence of title to lands within the district, and no others, shall be qualified and entitled to vote either in person or by proxy at any election held by such district.
2. *No person shall vote by proxy unless his proxy to cast such vote shall be evidenced by an instrument in writing duly acknowledged before a notary public and filed with the board of election.* (Italics supplied.)

[NRS 474.420:](#)

Upon receiving a petition signed by 25 percent of the owners of land within the district, requesting the dissolution thereof, the board of county commissioners shall, by resolution, call an election. The election shall be called, noticed and conducted in all respects in a manner similar to that provided for with reference to the formation of such a district.

The obvious interpretation of these statutes compels the following conclusion.

CONCLUSION

Twenty-five percent of the landowners must sign a petition seeking the dissolution of the Silver Springs Fire District. After this is accomplished, the Board of County Commissioners shall call an election whereby all “holders of title or evidence of title to lands within the district, and no others, shall be qualified and entitled to vote either in person or by proxy.” Nothing can be found in the applicable statutes which would allow an assignment of a proxy vote to be included in the petition. The legitimate place of the use of a proxy is in the election which would follow the circulation and return of the petitions, if in fact 25 percent of the landowners within the district sign. For these reasons, the “petition” above set forth does not result in an effective assignment of proxy votes by the landowner to the Committee for the Dissolution of the Silver Springs Fire District.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**311 Elections; Declaration of Candidacy—When filing a declaration of candidacy the declarant must use his or her given or Christian name and surname, and in the case of a married female, the surname of her husband. A fictitious or assumed name may not be allowed, nor may a title or nickname accompany the signature on a declaration of candidacy, unless the use thereof would better inform the electors as to the person’s identity.**

Carson City, March 15, 1966

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

#### STATEMENT OF FACTS

This office is in receipt of your letter dated March 9, 1966, in which you apprise me of the following circumstances surrounding some prospective candidates for various elective offices. It appears that some candidates desire to declare their candidacy under a name other than their true, real, correct, and present surname, and desire instead to file their declaration of candidacy under either a fictitious, assumed, or in the case of some married female candidates, under their maiden names.

#### QUESTIONS

1. Does a married female candidate have to file her declaration of candidacy under her husbands’ surname?
2. Does a candidate for elective office have a legal right to file a declaration of candidacy under any name other than his or her present surname?
3. When filing a declaration of candidacy, does a person have the right to use a nickname or a title such as “Dr.” “Attorney,” or “Teacher?”

#### ANALYSIS

Question No. 1: Does a married female candidate have to file her declaration of candidacy under her husband’s surname?

It is the considered opinion of this office that a married female filing a declaration of candidacy for an elective office must do so by using the present surname of her husband for the following reasons:

[NRS 293.517](#)(3) and (4) provide:

3. Each female elector who is or has been married shall be registered under her own given or first name, and not under the given or first name or initials of her husband.

4. Any elector who changes his or her name by marriage, or otherwise, shall not be eligible to vote unless he or she reregisters. If any such change of name occurs after the close of registration, the elector may vote at the ensuing election upon satisfactory proof of registration and subsequent change of name.

[NRS 293.177](#) reads:

1. Except as provided in [NRS 293.165](#), no name may be printed on a ballot or a ballot label to be used at a primary election unless the person named has filed a declaration of candidacy, or an acceptance of a candidacy and paid the fee required by [NRS 293.193](#) not later than 5 p.m. on the 3rd Wednesday in July.

2. A declaration of candidacy or an acceptance of a candidacy required to be filed by this section shall be in substantially the following form:

DECLARATION OF CANDIDACY OF .....  
FOR THE OFFICE OF .....

STATE OF NEVADA,            )  
                                  } ss.  
COUNTY OF .....

For the purpose of having my name placed on the official primary ballot as a candidate for the ..... Party nomination for the office of ....., I, the undersigned, ..... do swear (or affirm) that I reside at No. ....., ..... Street, in the City (or Town) of ....., County of ....., State of Nevada; *That I am a registered voter* of the election precinct in which I reside; that I am registered as a member of the ..... Party; that I have not changed the designation of my political party affiliation on an official affidavit of registration in any state since the date of the last primary election; that I believe in and intend to support the principles and policies of such political party in the coming election; 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)  
(Italics supplied)

By the terms of [NRS 293.517](#) a married woman must reregister to be an elector. The statute is silent as to the last name which should be used. However, it must be presumed that the Legislature had some motive and purpose in enacting the statute. The only logical purpose of the legislation would be to have the married person reregister under her new or changed surname (that of her husband). If she then complies with the other statutory and constitutional requirements dealing with residence and mental qualifications, etc., she is a registered voter.

It must be noted that in the "Declaration of Candidacy" ([NRS 293.177](#)) the candidate must ". . . swear (or affirm) . . . that I am a registered voter . . ." and then sign the declaration. To avoid perjury, the married woman would have to sign her "Declaration of Candidacy" by using her own

given or first name and the surname of her husband, just as she must do so when reregistering after her marriage.

This conclusion is supported by both text writers and the courts of other jurisdictions. 38 Am.Jur., Names, Section 10, reads in part:

A married women's name consists, in law, of her own Christian name and her husband's surname, marriage conferring on her the surname of her husband.

65 C.J.S., Names, Section 3(c) reads in part:

At marriage the wife takes the husband's surname which becomes her legal name. Her maiden surname is absolutely lost and she ceased to be known thereby.

Also *see Wilty v. Jefferson, Parish Democratic Executive Com.* (La. 1963), 157 So.2d 718, 724:

We conclude that a married woman's designation or appellation should be that of her Christian name and her husband's surname.

Based upon the above cited authority and reasoning, it is concluded that a married woman must file as a candidate for an elective office by using her own Christian name and the surname of her present husband just as she must when reregistering as an elector after her marriage. This would not prevent a married woman from also using her maiden name for purposes of identification, such as Mary (Smith) Jones.

Question No. 2: Does a candidate for elective office have a legal right to file a declaration of candidacy under any name other than his or her present surname?

[NRS 293.517](#)(1) and (2) provide:

1. Any elector residing within the county may register by appearing before the county clerk or deputy registrar, completing the affidavit of registration, *and giving true and satisfactory answers to all questions relevant to such elector's right to vote.*

2. The affidavit of registration shall be signed and verified by the elector registering. (Italics supplied.)

From the mandatory language in the above quoted subsections, a person must give "true" answers. To register as an elector under any name other than his or her true name would render a person an unqualified elector and hence unqualified to file a "Declaration of Candidacy" ([NRS 293.177](#)). We must now determine what is a "true name."

It was held in *In Re Faith's Application* (N.J., 1944), 39 A.2d 638, that for the purposes of registering to vote ". . . common use of an assumed name will not suffice to make it the true name, required to be stated by a statute, whose purpose is to determine the past, as well as the present, identity of the individual.

The above announced rule is adopted by this office. If a contrary conclusion is reached there would be nothing restraining a person from filing a declaration of candidacy under the assumed name of George Washington or any other which he thought would be attractive to the voters. The attempted registration as an elector under an assumed or fictitious name would not be a "true" answer to the question, "what is your full name?" which appears on the voters' registration form. Since the declaration of candidacy must be signed with the same name, it would also not be a true name, and hence, the declaration of candidacy would be defective.

Question No. 3: When filing a declaration of candidacy, does a person have the right to use a nickname or a title such "Dr.," "Attorney," or "Teacher?"

As has been pointed out above, [NRS 293.517](#) requires a person to register as an elector by using his true name. The use of a nickname or a title is no part of a person's name.

65 C.J.S., Names, Section 1, states the rule:

Nicknames are short names, that is, names which have been nicked or cut off for the sake of brevity. It has been stated that they do not convey any idea of opprobrium, and also that they are names given in contempt, derision, or sportive familiarity, as familiar or opprobrious appellations, and ordinarily have no place in judicial matters.

In 65 C.J.S., Names, Section 5(a), it is pointed out that prefixes such as “Dr.” are not a part of the name. However, the entire purpose of a name is to afford identification and distinguishment of one person from another. If a person is commonly known by a nickname and the electors would better be apprised as to his identity by the use of such nickname, it could be incorporated as a part of the name appearing on the declaration of candidacy. This does not do away with the necessity of using a person’s given or Christian name and the proper surname, however. Hence, the following would be permissible: “John J. (Doc) Smith” if such appellation would better identify the candidate.

#### CONCLUSION

A person filing a declaration of candidacy for an elective office must use the same name that appears on that person’s voter registration form. The name appearing on the voter registration form must be, in the case of a married female, her own Christian name and the surname of her husband.

No person has the right to file a declaration of candidacy by using a false or fictitious name, but a married woman may use her given name, her former name and her married name, in that order, for example, Helen Johnson Jones.

A person may incorporate into his name a nickname when signing a declaration of candidacy if by so doing he could be more positively identified by the electors.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**312 Counties; Emergency Loan Act—An emergency loan, as outlined in [NRS 354.070-354.110](#), cannot be secured without a tax levy to meet the obligations unless the general fund or other fund of the county contains a surplus that will not be needed for the purpose of the general fund, or other fund, in the ordinary course of county government.**

Carson City, March 18, 1966

Mr. Preston E. Tidvall, *Secretary, State Board of Finance, Carson City, Nevada 89701*

Dear Mr. Tidvall: You have stated that the following facts are pertinent to a situation existing in one of Nevada’s counties:

The people have approved a bond issue in the sum of \$1,300,000 for school construction. However, the bond market is at a low ebb, and the board of school trustees wants to withhold sales of the bonds until the market improves. Your question is whether an emergency loan under the provisions of [NRS 354.070-345.110](#) would authorize the borrowing of sufficient money from a private lending agency without a special tax levy.

#### ANALYSIS

To begin with, the Emergency Loan Act contemplates, if possible, a transfer of funds between the financial categories. [NRS 354.100](#) reads as follows:

1. After an emergency loan has been authorized as provided in [NRS 354.080](#), and if, in the judgment of the board of county commissioners, the fiscal affairs of the county can be carried on without impairment and there is sufficient money in the general fund of the county or a surplus in any other fund, with the exception of the bond interest and redemption fund and the general road fund, the board of county commissioners is authorized to transfer from the general fund of the county or any other fund, with the exception of the bond interest and redemption fund and the general road fund, money sufficient to handle the emergency.

2. When such a transfer is made, the board of county commissioners shall comply with the provisions of [NRS 354.110](#), and when the emergency tax is thereafter collected the amount so collected shall be placed immediately to the credit of the fund from which the money was transferred.

3. In cases where the general fund or other fund, at the time of the transfer of funds therefrom, contains a surplus that in the judgment of the state board of finance is or will not be needed for the purposes of the general fund or other fund in the ordinary course of events, then the emergency tax need not be levied, collected and placed in the general fund or other fund, but such transfer shall be deemed refunded for all purposes of this chapter.

If the provisions of Section 3 above cannot be followed, then the levy of an emergency tax is mandatory. [NRS 354.110](#) provides:

1. At the first tax levy following the creation of any emergency indebtedness, the board of county commissioners shall levy a tax sufficient to pay the same. The tax shall be designated as an emergency tax, the proceeds of which shall be placed in the emergency fund in the county treasury to be used solely for the purpose of maturing and redeeming the emergency loan for which the same is levied.

2. When a temporary loan is made for the support of any lawfully organized county farm bureau, the county tax levied therefor shall be deemed the emergency tax within the provisions of this section. The proceeds thereof may be transferred to the state treasury when prescribed in any law providing for the transfer of county farm bureau funds to the state treasury, and the state controller is authorized to draw his warrant against such proceeds for the principal and interest of such temporary loan in favor of the holder of the note issued therefor, and the state treasurer shall pay the same.

It will be noted that any evidence of indebtedness issued as a result of such emergency loan shall mature not later than 3 years from the date of issuance (see [NRS 354.090](#)). There is not guarantee that the bond market will improve within the next 3 years. The people have voted for the issuance and sale of bonds, and this office feels that the mere fact that interest rates will be higher does not authorize the emergency loan requested, and there can be no question that the tax levy provided for in [NRS 354.110](#) must be levied with the exceptions above noted.

#### CONCLUSION

It is therefore the opinion of this office that an emergency loan, as outlined in [NRS 354.070-NRS 354.110](#), cannot be secured without a tax levy to meet the obligations unless the general fund or other fund of the county contains a surplus that will not be needed for the purpose of the general fund, or other fund, in the ordinary course of county government.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

**313 Banks; Branch Banks—In request for location of “satellite” facilities of parent bank, request is actually for branch banks and law governing establishment of branch banks is applicable.**

Carson City, March 18, 1966

Mr. Preston E. Tidvall, *Secretary, State Board of Finance, Carson City, Nevada*

Dear Mr. Tidvall: You have requested of this office an opinion as to whether a banking corporation, duly licensed, may establish satellite facilities in six locations throughout the State. The word “satellite” is used by the requesting bank rather than the word “branch.”

ANALYSIS

The limitation of bank branches was wisely left by the Legislature to the discretion of the Superintendent of Banks. This discretion must, of course, be used on need, for if a bank already established can supply the needs of a community, or locale within a community, the addition of other banking facilities therein would result in a diminution of business which might result in bank failures.

Regardless of the designation of banking facilities as “satellites,” they are in every sense of the word a subsidiary and branch of the parent bank and, therefore, subject to the written consent of the Superintendent of Banks. They are also subject to the capital and surplus provisions of [NRS 660.010](#) and [659.020](#).

There should be no difficulty, therefore, in the Superintendent of Banks arriving at a determination as to whether a branch arm of the parent bank is needed at requested locations. The law does not use the word “satellite” to describe a branch, regardless of the limitation of personnel or functions.

CONCLUSION

It is therefore, the opinion of this office that the request for location of “satellite” arms of a parent bank is a request for a branch bank and subject to the same scrutiny and determination by the superintendent of Banks as provided by law for the establishment of branch banking facilities.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**314 State Agencies; Claims—presented against a state agency must be processed by that agency and forwarded to the State Controller, if found to be valid, no matter what the amount of such claim.**

Carson City, March 25, 1966

Mr. James S. Roberts, *Deputy Budget Administrator, Department of Administration, Carson City, Nevada 89701*

Dear Mr. Roberts: You have apprised this office of the following situation and inquire as to the existence of any legal relief:

The Budget Division of the department of Administration is presented with many claims for an amount less than one dollar. Many of them are for amounts as small as 30 cents. The cost of processing a single claim is approximately \$4. Likewise, the time consumed in processing such a

small claim is, in many cases, longer than in processing claims of a larger amount because the issued check is never cashed by the recipient, thereby causing additional bookkeeping problems.

#### QUESTION

Is there any procedure which could be followed whereby claims against the State of Nevada for an amount less than \$1 could be ignored and not paid?

#### ANALYSIS

The applicable statutes are:

[NRS 227.160\(1\)\(a\)](#):

The state controller shall:

Audit all claims against the state, for the payment of which an appropriation has been made but of which the amount has not been definitely fixed by law, which shall have been examined and passed upon by the state board of examiners, or which shall have been presented to the board and not examined and passed upon by the state board of examiners, such an amount as he shall decree just and legal not exceeding the amount allowed by the board.

[NRS 227.170\(1\)](#):

The state controller shall:

Draw *all warrants* upon the treasury for money, and each warrant shall express, in the body thereof, the particular fund out of which the same is to be paid, the appropriation under which the same is drawn, and the nature of the service to be paid, and no warrant shall be drawn on the treasury except there be an unexhausted specific appropriation, by law, to meet the same. (Italics supplied.)

[NRS 227.200](#) as amended by Chapter 28, Statutes of Nevada 1965:

The state controller shall:

1. Draw a warrant in favor of any person, business firm or payee certified by an agency of state government to receive money from the treasury and deliver or mail such warrant to the responsible state agency for delivery to the payee entitled thereto.
2. Keep a warrant register, in which book he shall enter all warrants drawn by him. The arrangement of this book shall be such as to show the bill and warrant number, the amount, out of which fund the same are payable, and a distribution of the same under the various appropriations.
3. Credit the state treasurer with all warrants paid.

Nowhere in the above applicable statutes is there any reference to a minimum or monetary amount of claims. By the terms of these statutes the Legislature obviously intended the state controller to “audit all claims,” and “draw all warrants.” These statutes are mandatory and since there is no statutory limitation placed on the amount of a claim, all claims presented to an agency must be processed.

#### CONCLUSION

Claims presented to an agency must be processed by that agency and, if found valid, forwarded to the State Controller with a warrantee issuing no matter what the amount of the claim. We suggest remedial legislation.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*



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**315 Prisoners; Concurrent Sentences—If, during the time a prisoner is serving a sentence in the Nevada State Prison, he is sentenced for an additional and separate crime, which he had committed prior to the time he was under sentence of imprisonment, and by the terms of such second sentence, it is to run concurrently with the former, such second sentence does not start to run until the date it was imposed.**

Carson City, March 28, 1966

Mr. Jack Fogliani, *Warden, Nevada State Prison, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Fogliani: You have apprised this office that an inmate incarcerated in the Nevada State Prison has been removed from the prison for the purpose of another trial based upon alleged criminal violation committed by that prisoner prior to the time of his incarceration. After a conviction at the second trial, many times the imposed sentence is ordered by the district court to run concurrently with the sentence which the prisoner is currently serving. The example you presented is: An inmate is received January 2, 1965, under a sentence of from 2 to 14 years. On June 15, 1965, that same inmate is convicted of a separate and distinct crime and sentenced to 2 to 14 years. The sentence is ordered to run concurrently with that imposed January 2, 1965.

#### QUESTION

Should the second sentence, that which is ordered to run concurrently, commence running from the date of the first sentence or from the date it is imposed?

#### ANALYSIS

[NRS 176.150](#) reads as follows:

1. Whenever a person shall be convicted of two or more offenses, and sentence has been pronounced for one offense, the court in imposing any subsequent sentence may, in its discretion, provide that the sentences subsequently pronounced shall run either concurrently or consecutively with the sentence first imposed.

2. If the court shall make no order with reference thereto, all sentences shall run concurrently; but whenever a person under sentence of imprisonment shall commit another crime and be sentenced to another term of imprisonment, such latter term shall not begin until the expiration of the prior terms.

This sentence provides that the sentencing court may impose either a sentence running concurrently or consecutively with the sentence first imposed. However, it is silent as to the date a concurrent sentence should commence.

[NRS 176.410](#), subsection 3, provides:

The term of imprisonment designated in the judgment shall begin on the date of sentence of the prisoner by the court.

Reading the two above statutes together, it is abundantly clear that the second sentence imposed, that which is to run concurrently with the first sentence, commences running on the date it is imposed by the court. This conclusion is in compliance with the general rule announced in 21 Am.Jur. 2d, Criminal Law, Sec. 543:

In the absence of a statute, a sentence that does not specify a beginning date presumably runs from the day it was imposed.

## CONCLUSION

The imposition of a second sentence upon an inmate of the Nevada State Prison may run concurrently with the former sentence, but it does not commence running until the date the sentence was imposed by the court.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**316 State Prisoners; Transfer According to Chapter 215 of NRS—The benefits to be derived from Chapter 215 of NRS and the Contract Between the State of California and the State of Nevada for the Implementation of the Western Interstate Corrections Compact are not to be limited to the mentally ill. The warden of the Nevada State Prison may institute proceedings for the transfer of inmates.**

Carson City, March 29, 1966

Mr. Jack Fogliani, *Warden, Nevada State Prison, P.O. Box 607, Carson City, Nevada*

Dear Mr. Fogliani: Pursuant to Chapter 215 of NRS, the State of Nevada has entered into a Contract with the State of California for the Implementation of the Western Interstate Corrections Compact. Since the inception of this contract, the procedure for transferring inmates from the Nevada State Prison has been to first have the prisoner committed to the Nevada State Hospital and from there transferred to the California Medical Facility at Vacaville, California. To this date, only prisoners determined to be mental defectives have benefited by the compact. There are currently incarcerated in the Nevada State Prison inmates who are not mentally defective and who could benefit from exposure to training and rehabilitation programs offered in California penal institutions. Because of a lack of such programs at the Nevada State Prison, these men are often segregated from other inmates, and in their secluded environment develop additional and more complex problems.

## QUESTION

Having a desire to aid these inmates who are not committable to the Nevada State Hospital as mental defectives, you ask the following question:

Does the warden of the Nevada State Prison have the power and authority to transfer an inmate to a California institution which is a party to the Western Interstate Corrections Compact?

## ANALYSIS

Applicable statutes are:

[NRS 215.020](#), Article I—Purpose and Policy:

The party states, desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement, treatment and rehabilitation of *various types of offenders*, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society. The purpose of this compact is to provide for the development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders. (Italics supplied.)

[NRS 215.020](#), Article II—Definitions:

\* \* \* \* \*

(d) “Inmate” means a male or female offender who is under sentence to or confined in a prison or other correctional institution.

(e) “Institution” means any prison, reformatory or other correctional facility (including but not limited to a facility for the mentally ill or mentally defective) in which inmates may lawfully be confined.

[NRS 215.020](#), Article IV (a)—Procedures and Rights:

(a) Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary in order to provide adequate quarters and care or desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

By the terms of the contract between California and Nevada for the implementation of the Western Interstate Corrections Compact, there is no distinguishment between a mentally ill inmate and any others. The applicable provisions read:

9. Vacancies:

The receiving state hereby undertakes to make available to the sending state such places for inmates as may be vacant from time to time *in any and all institutions of the receiving state* made available for such confinement by the laws of the receiving state. (Italics supplied.)

10. Application:

The sending state will submit a separate application to the receiving state for each individual inmate proposed for commitment.

Said application shall consist of the following: Full information and all necessary documents relating to the case history, physical and clinical record, judicial and administrative rulings and orders relating or pertinent to their mate and the sentence or sentences pursuant to which confinement is to be had or to continue, and reasons for the requested transfer.

From a reading of the above statutes and contractual provisions, it is clear that the intent and purpose of the legislators and the contracting parties in drafting the above had no intention of segregating or treating differently a mentally ill inmate. Nowhere in Chapter 215 of NRS, nor in the Western Interstate Corrections Compact is specific reference made to the mentally ill. Hence, it is concluded by this office that any inmate incarcerated in the Nevada State Prison may be transferred to a penal institution located in the State of California, if such institution has a vacancy and a program designed to house, treat, and rehabilitate the particular prisoner.

Having reached this conclusion, one further question requires answering:

May the warden of the Nevada State Prison, on his own volition, institute proceedings for the transfer of a inmate to a penal institution in California?

[NRS 215.060](#) furnishes the answer:

Any state officer who may be charged with the disposition or care of an inmate, as defined in article II(d) of the Western Interstate Corrections Compact, is hereby empowered to enter into such contracts on behalf of this state as may be appropriate to implement the participation of this state in the Western Interstate Corrections Compact pursuant to article III thereof. No such contract shall be of any force or effect until approved by the state board of examiners.

Since the warden of the Nevada State Prison is charged with the care of inmates, he is authorized to enter into a contract providing for the transfer of an inmate to the appropriate penal institution in California. By the terms of the statute quoted above, such contract must be approved by the State Board of Examiners.

## CONCLUSION

By the terms of Chapter 215 of NRS and the provisions of the Contract Between the State of California and the State of Nevada for the Implementation of the Western Interstate Corrections Compact, all inmates incarcerated at the Nevada State Prison may be transferred to penal institutions in the State of California. Such statutes and contract do not limit the benefits to be derived from such sister state institutions to the mentally ill.

The warden of the Nevada State Prison has the statutory authority to commence the proceedings for the transfer of inmates, such contracts being subject to approval by the State Board of Examiners.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**317 Cabaret Tax—Cabaret tax imposed by Chapter 525, Statutes of Nevada 1965, not applicable to boxing exhibitions, even though held within the confines of a hotel licensed for gaming.**

Carson City, March 30, 1966

Mr. James Deskin, *Secretary, Nevada State Boxing Commission, 4417 Hillcrest Avenue, Las Vegas, Nevada*

Dear Mr. Deskin: You have inquired of this office for an interpretation of Chapter 525, Statutes of Nevada 1965, which provides for the imposition of an additional tax on licensed gaming establishments which provide entertainment. Your specific question is, can this tax be applied to boxing exhibitions held within the confines of a hotel which also has gaming?

## ANALYSIS

Chapter 525, Statutes of Nevada 1965, amended Chapter 463 NRS by adding the provisions set forth as Sections 2 through 7 of the act, which read as follows:

Sec. 2. 1. In addition to any other license fees and taxes imposed by this chapter, a tax, to be known as the casino entertainment tax, is hereby levied upon each licensed gaming establishment in this state where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshments or merchandise. A licensed gaming establishment is not subject to tax under this section if:

- (a) No distilled spirits, wine or beer is served or permitted to be consumed;
  - (b) Only light refreshment is served;
  - (c) Where space is provided for dancing, no charge is made for dancing; and
  - (d) Where music is provided or permitted, such music is:
    - (1) Instrumental or other music which is supplied without any charge to the owner, lessee or operator or such establishment or to any concessionaire; or
    - (2) Mechanical music.
2. The amount of the tax imposed upon each licensed gaming establishment by this section shall be either:
- (a) So long as such tax remains at the rate in effect on January 1, 1965, 50 percent of the federal cabaret taxes imposed under 26 U.S.C. § 4231(6) upon such establishment for the same period; or

(b) If the federal cabaret tax so imposed is reduced after January 1, 1965, an amount equal to the difference between the federal cabaret tax applicable to such establishment at the rate prevailing on January 1, 1965, and the tax actually imposed and collected by the federal government.

3. The tax imposed by this section shall be paid by the licensee of such establishment.

Sec. 3. 1. To administer the collection of the tax imposed by section 2 of this act, the commission:

(a) Shall prescribe and cause to be printed and issued free of charge all forms for reports.

(b) May adopt and enforce any necessary or convenient rules, regulations and standards.

2. Funds for such administration shall be provided in the regular budget of the commission.

Sec. 4. 1. Every person required to pay the tax imposed by section 2 of this act shall file with the commission quarterly, on or before the last day of the month succeeding each calendar quarter, a report showing the amount of federal cabaret taxes paid for such calendar quarter.

2. Each report shall be accompanied by the amount of tax shown to be due for the period covered by the report.

Sec. 5. 1. The tax imposed by section 2 of this act shall be paid in the form of remittances payable to the Nevada gaming commission. The commission shall transmit the payment to the state treasurer to be deposited to the credit of the general fund.

2. Refunds of tax erroneously collected may be made, upon the approval of the commission, as other claims against the state are paid.

Sec. 6. 1. Every person subject to the tax imposed by section 2 of this act shall keep accurate and detailed records of all federal cabaret taxes paid, and shall maintain a copy of any report or return filed with the United States Internal Revenue Service for federal cabaret taxes imposed under 26 U.S.C. § 4231(6) for a period of not less than 3 years from the date of sale or the date of the return.

2. All records and copies of reports or returns required to be maintained by subsection 1 shall be made available at all reasonable times to the commission for the purpose of audit and investigation.

Sec. 7. Any licensee who willfully fails to report, pay or truthfully account for the tax imposed by section 2 of this act shall:

1. Be liable to a penalty in the amount of the tax evaded or not paid, to be assessed and collected in the same manner as other charges, taxes, licenses and penalties under this chapter; and

2. Be subject, in the discretion of the commission to the revocation of his gaming license.

Under Section 2 of the act, it will be noted that a licensed gaming establishment is not subject to the tax if no distilled spirits, wines, or beer are served or permitted to be consumed; if only light refreshment is served; if where space is provided for dancing no charge is made; and where permitted music is instrumental or other music which is supplied without charge to the owner, lessee, or operator; or where the music is mechanical.

This tax is known as the cabaret tax. Webster defines a cabaret as a café or restaurant where patrons are entertained by performers who dance or sing.

It will be noted that the law provides that if the federal cabaret tax is reduced after January 1, 1965, an amount equal to the difference between the federal tax applicable to such establishment and the tax actually imposed and collected by the federal government will be imposed by the State.

This office, on June 21, 1965, interpreted Chapter 525, Statutes of Nevada 1965, for Mr. Edward E. Bowers, Executive Secretary of the Nevada Gaming Commission, Carson City, Nevada, and the analysis found in that opinion is conclusive today as to the collection of the tax. However, there are certain types of gaming establishments which would not be subject to the tax for the reason that they are not cabaret-type enterprises. For example, a gaming establishment which merely had slot machines and other gaming devices therein, but no type of entertainment, would not be subject to the tax under any circumstances. This is true also of boxing exhibitions. Its is not the type of entertainment contemplated by the Legislature in imposing the cabaret tax,

even though refreshments were available for consumption by the patrons of the boxing exhibition.

#### CONCLUSION

It is therefore the opinion of this office that your question as to whether the cabaret tax can be imposed upon the entrepreneur of a boxing exhibition, even though light refreshments are available to the customers, and said exhibition is held within the confines of a hotel licensed for gaming, must be answered in the negative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**318 Parole and Probation—Power of parole and probation officer to order physical and/or mental examination of probation applicant limited to provisions of [NRS 176.310\(1\)](#). Only district courts empowered to order such examinations for probation violators pursuant to [NRS 176.330\(2\)](#). County where conviction occurred must bear expense for such examination in either case.**

Carson City, March 30, 1966

George J. Reed, *Chief Parole and Probation Officer, Department of parole and Probation, Carson City, Nevada*

Dear Mr. Reed: You request the opinion of this office relative to payment of expenses incurred by your office in connection with making investigation for use by district judges in probation cases. Specifically, you inquire as follows:

#### QUESTIONS

1. When this office in preparing a presentence report for the district court of a convicted felon, but prior to sentencing by the court, concludes that a physical and/or mental examination should be given, what agency of the government is financially responsible for paying for such a physical or mental examination?

2. When a probationer allegedly has failed to comply with all laws or probation rules and a probation revocation hearing is to be conducted under the authority of the Nevada Statute ([NRS 176.330\(1\)](#)) and the court or the parole and probation officer orders a physical or mental examination in connection with this probation revocation hearing, what agency or the government is financially responsible to pay for such examinations? In its case it must be borne in mind that probation is a suspension of the execution of the sentence ([NRS 176.330\(1\)](#)).

#### ANALYSIS

The duties of the parole and probation office with regard to investigating persons being considered for probation are set forth in [NRS 176.310\(1\)](#), reading as follows:

1. The parole and probation office shall inquire into the circumstances of the offense, criminal record, social history and present condition of the defendant. Such investigation may include a physical and mental examination of the defendant.

Further duties required of the parole and probation officer in connection with probation violation cases are provided for in [NRS 176.330\(2\)](#). It reads as follows:

2. At any time during probation or suspension of sentence, the court may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the defendant to be arrested. Any parole and probation officer or any peace officer with power to arrest may arrest a probationer without a warrant, or may deputize any other officer with power to arrest to do so by giving him a written statement setting forth that the probationer has, in the judgment of the parole and probation officer, violated the conditions of probation. The parole and probation officer, or the peace officer, after making an arrest shall present to the detaining authorities a statement of the circumstances of violation. The parole and probation officer shall at once notify the court of the arrest and detention of the probationer and shall submit a report in writing showing in what manner the probationer has violated the conditions of probation. Thereupon, or upon an arrest by warrant as herein provided, the court, or such other court to which the case may have been assigned, shall cause the defendant to be brought before it, and may continue or revoke the probation or suspension of sentence, and may cause the sentence imposed to be executed.

Under the first of these sections, it is mandatory that the parole officer make an investigation of the circumstances of the crime for which a probation prospect has been convicted. Such investigation may extend to obtaining a physical examination of the defendant. We believe that the determination as to the necessity for such examination lies within the discretion of the parole officer. In performing that function he is acting for the benefit of the county in which the conviction occurred. Although this officer's salary for performance of his duties in this connection are paid by the State, services or assistance contributed by other persons, such as physicians or psychiatrists, must of necessity, be paid for by the county. This is by reason of the fact that the defendant subject to the investigation, is still a county charge at that stage and the county is liable for all expenses incurred in his behalf not otherwise covered by statute. In authorizing such examinations, it is presumed that the Legislature took cognizance of the fact that the county concerned, in effect, becomes the beneficiary of such examination, and intended that the expense thereof be borne by that particular governmental agency. [NRS 176.330\(2\)](#) has to do only with the procedure to be followed in cases of probation or suspension of sentence violation. The only duties there imposed upon the parole and probation officer are (1) the presentation to the detaining authorities of a statement of the violation, (2) notifying the court having jurisdiction of the detention and, (3) submitting a report to said court as to the manner of violation and the conditions of probation. A close reading of the section fails to reveal any discretionary powers to be exercised by the parole and probation officer. For this reason he would not be authorized to order a physical or mental examination.

Inasmuch as the court itself is empowered to continue the probation or suspension of sentence under this section, it is the opinion of this office that it could order such examination to be made through or under the direction of the parole and probation officer. In such event, the expense thereof would of necessity fall upon the county involved. This type of expense, while for the direct benefit of the violator involved, is also, in effect, a benefit to the county. Again, we deem it to have been the legislative intent that the county pay the expense incurred.

#### CONCLUSION

This office makes the following conclusions:

1. That under the provisions of [NRS 176.310\(1\)](#), the power to order a physical and/or mental examination in making a probation report before sentencing, is within the discretion of the parole and probation officer, and that the expenses thereof must be borne by the county where the probation applicant was convicted.

2. that under [NRS 176.330\(2\)](#), only the district court may order a physical and/or mental examination of a probation violator, and the expenses incurred therefor fall upon the county where the violator was convicted.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: C.B. Tapscott, *Chief Assistant Attorney General*

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**319 Professional Engineers; Licensing—To be licensed and registered as an electrical safety engineer in the State of Nevada, strict compliance with Chapter 625 NRS is needed, and a person certified as such an engineer by an independent association, which is not the licensing board of a sister state, is not entitled to be licensed in this State.**

Carson City, April 1, 1966

Mr. H.B. Blodgett, *Executive Secretary, State Board of Registered Professional Engineers. P.O. Box 5208, Reno, Nevada*

Dear Mr. Blodgett: You have advised this office that you have received information and have reason to believe the following factual situation exists: The International Association of Electrical Inspectors, having its main office in Chicago, Illinois, has advised and continues to advise its members and clients that certification of said members and clients as “Electrical Safety Engineers” by the association will be recognized by several states, one of which is Nevada. The association lists five different technical requirements, any one of which is sufficient for the member or client to obtain the above certification. They are:

1. An E.E. or certification as an E.E. by a state with registration laws plus 5 years’ experience in the electrical inspection field.
2. Four years’ apprenticeship plus 5 years’ experience as a journeyman wireman, plus 5 years’ experience in the electrical inspection field with at least 2 years of the 10 in a supervisory capacity.
3. Ten years’ experience in the electrical inspection field of which 2 years shall be in a supervisory capacity plus specific educational courses. (Exception: Specific training in supervision may be substituted for 2 years of supervisory capacity above.)
4. Thirty-five years of age with 14 years’ experience in the electrical inspection field.
5. The minimum for applicants who do not fall in one of the above items: Five years’ experience in an electrical inspection field in addition to completing education courses consisting of elements of electrical inspection or equivalent schooling; a minimum of four semesters (2 years) through an accredited school. Equivalent course must be approved by Educational Committee of International Association of Electrical Inspectors.

This association operates as a nonprofit technical and educational organization cooperating in the formulation and uniform application of standards for the safe installation and use of electricity and collecting and transmitting information relative thereto.

You have further advised this office that you are of the opinion that the applicable statutes of the State of Nevada forbid the recognition of such certification, and that any person so certified by the International Association of Electrical Inspectors who offers his services as an “Electrical Safety Engineer” within the State of Nevada would be doing so in violation of the applicable statutes. You request from this office an opinion as to whether or not your conclusion is legally sound.

The controlling statutes are:

[NRS 625.180](#) Qualifications of applicant for registration as professional engineer.

1. Any citizen of the United States or any person who has declared his intention of become a citizen of the United States, being over the age of 21 years, may apply to the board for examination, under its rules, for registration as a professional engineer.
2. No person shall be eligible for registration as a professional engineer who is not of good character and reputation.



3. No applicant for registration as a professional engineer shall be entitled to take the examination unless:

(a) He is a graduate from an approved course in engineering of 4 years or more in a school or college approved by the board as of satisfactory standing, and has a specific record of an additional 4 years or more of active experience in engineering work of a character satisfactory to the board, and indicating that the applicant is competent to be placed in responsible charge of such work; or

(b) In lieu of the requirements contained in paragraph (a) of this subsection, he has a specific record of 8 years or more of active experience in engineering work of a character satisfactory to the board, and indicating that the applicant is competent to be placed in responsible charge of such work.

4. The satisfactory completion of each year of approved courses in engineering in a school or college approved by the board as of satisfactory standing, without graduation, shall be considered as equivalent to 1 year of active experience.

5. Graduation in a course other than engineering from a college or university of recognized standing shall be considered as equivalent to 2 years of active experience.

6. No applicant shall receive credit for more than 4 years of active experience because of educational qualifications.

7. The mere execution as a contractor of work designed by a professional engineer or the supervision of the construction of such work as a foreman or superintendent shall not be deemed to be active experience in engineering work.

8. Any person having the necessary qualifications prescribed in this chapter to entitle him to registration shall be eligible for such registration although he may not be practicing his profession at the time of making his application.

[NRS 625.220](#), as amended by Chapter 494, Statutes of Nevada 1965, Section 8:

[NRS 625.220](#) is hereby amended to read as follows:

625.220 1. The board may, upon application therefor, and the payment of an application fee not exceeding \$50, issue a certificate of registration as a professional engineer to any person who holds a certificate of qualification or registration issued to him by proper authority of the National Council of State Boards of Engineering Registration, or by the proper authority of any state, territory or possession of the United States, or of any country, *if the requirements for the registration of professional engineers under which the certificate of qualification or registration was issued do not conflict with the provisions of this chapter and are of a standard not lower than that specified in this chapter.* (Italics supplied.)

Numbers 2, 3 and 5 of the technical requirements listed by the International Association of Electrical Inspectors are clearly insufficient to authorize registration as an electrical safety engineer in Nevada, since they require education and training of a lesser amount than that required by [NRS 625.180](#). Numbers 1 and 4 of the technical requirements listed by the International Association of Electrical Inspectors are insufficient to authorize registration because that association is not an integral part of the National Council of State Boards of Engineering Registration, nor is it the proper registering authority for the State of Illinois. See Smith-Hurd Ann. St., Chapter 48 1/2, Illinois Professional Engineering Act, wherein Department of Registration and Education is the duly appointed licensing agency for the State of Illinois.

#### CONCLUSION

A person certified as an “Electrical Safety Engineer” by the International Association of Electrical Inspectors is not qualified as such engineer in the State of Nevada and must comply with Chapter 625 NRS.

Respectfully submitted,

**320 Counties; Publication of County Bills—All bills allowed and paid by county commissioners must be published once quarterly, and publication must show amount, name of payee, and purpose of each bill.**

Carson City, March 31, 1966

Honorable Roscoe Wilkes, *District Attorney, Lincoln County, Pioche, Nevada*

Dear Mr. Wilkes: You have made inquiry of this office as to the law governing the publication of bills allowed and paid each month by county commissioners. Since a determination of this matter concerns all counties of the State and also because it involves the 1965 Budget Act, we deem it necessary to cover it by formal opinion. You make the following inquiries.

QUESTIONS

1. Does a board of county commissioners of a county within the State of Nevada fulfill the requirements of the law when the “bills allowed” are published in a newspaper, published within the county, semiannually?
2. Does a board of county commissioners of a county within the State of Nevada fulfill the requirements of the law when the “bills allowed” are published in a newspaper, published within the county, quarterly?
3. Is it necessary that the bills allowed by a board of county commissioners in a county within the State of Nevada be published once each month?

ANALYSIS

An act of 1865, relating to such publication, which has never been amended and which now appears as [NRS 244.225](#), provides as follows:

*Publication of financial statement.* The board of county commissioners shall publish quarterly a statement of the receipts and expenditures of the 3 months next preceding, and the accounts allowed. Publications shall be made by making one insertion of the statement in a newspaper published in the county, but if no newspaper be published in the county, then such publication shall be made by posting a copy of the statement at the courthouse door and at two other public places in the county. (Italics supplied.)

In 1893, the Legislature saw fit to require that all publications or postings of bills paid by the county commissioners of a county show (1) the amount, (2) name of the person to whom paid, and (3) the purpose thereof. This act, as amended several times, now appears in [NRS 354.210](#) as follows:

*Publication, posting of amount of bills allowed.*

1. Except as provided in subsection 3, the board of county commissioners shall cause the amount of all bills allowed by it, together with the names of the persons to whom such allowances are made and for what such allowances are made, to be published in some newspaper published in the county.
2. The amount paid for such publications shall not exceed the statutory rate for publication of legal notices, and the publication shall not extend beyond a single insertion.
3. Where no newspaper is published in a county, the board of county commissioners may cause to be published, in some newspaper having a general circulation within the county, the allowances provided for in subsection 1, or shall cause the clerk of the board to post such allowances at the door of the courthouse.

For some reason which we have been unable to ascertain, but which certainly is not required by any law or court decision that this office can find, most counties of the State have long followed the practice of publishing monthly all bills allowed and paid. And some have published after each meeting of their boards of county commissioners even when these bodies have met and allowed bills oftener than once each month. Perhaps it has been the reasoning of county officials that fewer bills published each month better serves the public interest than publication and a greater number quarterly as called for in [NRS 244.225](#).

While monthly publications may appear to be within the spirit of the law in providing frequent notice to the taxpayers of county spending, they are nevertheless not provided for by law. On the other hand, quarterly publications are made mandatory under [NRS 244.225](#), by the words “shall publish quarterly” as used therein. There is overwhelming authority for the rule that if an affirmative statute directs a thing to be done in a certain manner, the mode prescribed by such statute for the exercise of a power, must be adopted. 50 Am.Jur. 40. It is obvious that the above cited statute requiring quarterly publication may not be considered as merely permissive, directory, or discretionary. If that were done, there could be as many different practices followed in the publication of bills as there are counties in the State. Only chaos could result from such interpretation. The Legislature intended the procedure followed by the counties to be uniform, and for that reason wisely made the time of publication mandatory by using the above quoted words.

Some question has been raised as to the effect of Chap. 345, Statutes of Nevada 1965, Sec. 64, on statutes existing prior thereto relating to publication of county bills. The office has already advised that while the 1965 act amends some of the budgetary and auditing duties of county officers, it in no way changes those imposed by [NRS 354.210](#). (A. G. Ltr., 2-4-66 to Co. Clk, Nye Co.) A further reading of this last expression of the Legislature touching on such publication, is equally commencing that it likewise fails to repeal or disturb the provisions of [NRS 244.225](#). In fact, this earlier statute is supplemented in that the 1965 act also requires quarterly publications of reports of receipts and expenditures for local governments.

In the opinion of this office both [NRS 244.225](#) and [NRS 354.210](#) are still in full force and effect and must be read together in determining the manner in which county bills are to be published. It should be noted that since [NRS 354.210](#) requires but one quarterly publication at the statutory rate permitted for publication of legal notices, the overall cost to the county will remain the same as would be required to make three separate publications of a shorter list of bills but which combined would require the same advertising space as a quarterly statement.

#### CONCLUSION

From the foregoing we conclude that all county bills allowed and paid must be published once quarterly, and that such publication must show (1) the amount of each bill, (2) the name of the payee, and (3) the purpose for which the bill was incurred.

For the reasons aforesaid, Questions No. 1 and No. 3 are answered in the negative and Question No. 2 is answered in the affirmative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: C.B. Tapscott, *Chief Assistant Attorney General*

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**321 Insurance; Countersigning Resident Agent to be Paid on Commission Basis—When a contract of insurance covering property or risks or insurable interests within the State of Nevada is negotiated by a direct writing insurer, the countersignature of a resident agent is required. Such resident agent is to be compensated on a commission basis. Only if the agent**

**is to perform additional services during the life of the policy is his compensation subject to contractual agreement with the insurer.**

Carson City, April 5, 1966

Mr. Louis T. Mastos, *Commissioner of Insurance, Department of Commerce, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Mastos: the Government Employees Insurance Company was organized under the laws of the District of Columbia in 1937, and is presently licensed to transact business in several states, one of which is Nevada. The company was licensed by the State of Nevada in 1954 as a "direct writing insurer" and does not utilize the customary agency system. Business is obtained primarily through direct solicitation with the prospective insureds by use of the United States mail. The company has appointed countersigning agents in each of the states in which it is licensed to operate. One of these agents is a resident of Nevada and performs the countersigning functions of the company. The resident agent in Nevada is currently being paid pursuant to a contract between that agent and Government Employees Insurance Company. He is not paid on a commission basis related to the premiums but rather by the number of policies in force in the State of Nevada. By letter dated August 10, 1965, the Nevada Insurance Commissioner notified the government Employees Insurance Company that [NRS 684.350](#) required such resident agent to be compensated on a commission basis. The Insurance Commissioner notified the Government Employees Insurance Company that in the event of continued disagreement the matter would be submitted to the Attorney General and, specifically, you ask:

Does an out-of-state insurance company, which is licensed to do business in the State of Nevada as a direct writing insurer, have the right to compensate its resident countersigning agent pursuant to a contract, or must it comply with [NRS 684.350](#) providing for compensation based upon a commission of at least 5 percent of the premiums?

#### ANALYSIS

It is the considered opinion of this office that the countersigning resident agent is to be paid on a commission basis and, under the above facts, is not eligible to enter into a contract with the employing insurance company for a fixed fee or salary. This conclusion is supported by what we consider to be the only justifiable interpretation of [NRS 684.350](#), which statute reads as follows:

1. *All policies of insurance for or on behalf of any insurance company doing the kind or kinds of insurance business described in classes 3 and 4 ([NRS 681.030](#) and [681.040](#)), on any property or insurable business activities or interests located within or transacted within this state, shall be countersigned by a resident agent licensed under this Title to represent the insurer, but when two or more insurers issue a single policy of insurance the policy may be countersigned on behalf of all insurers appearing therein by a licensed agent, resident in this state, of any one such insurer. This section shall not apply to insurance covering the rolling stock belonging to and used in the operation of railroad corporations or other common carriers or property in transit while in the possession or custody of railroad or other common carriers, not to bid on bonds issued by any admitted surety insurer in connection with any public or private contract.*

Nothing herein contained shall be construed as preventing the free and unlimited right to negotiate contracts of insurance by licensed nonresident agents or brokers outside this state, provided the policies, endorsements or evidence of such contracts covering properties or insurable interests in this state *are countersigned by a resident agent of this state.*

3. *Where a contract of insurance covering property or risks or insurable interests within this state is negotiated by a licensed nonresident agent or broker outside of this state, or by a company which is not represented by a licensed nonresident agent or broker, every such policy of insurance or bond shall be countersigned by a resident agent who is compensated on a commission basis and shall not be countersigned by a salaried company employee, unless such*

*employee is a regular salaries employee of a mutual company and a licensed resident agent. In any case where it is necessary to execute an emergency bond, or a commissioned agent is not present who is authorized to execute such bond, a company manager or other employee having authority under a power of attorney may execute the bond in order to produce a valid contract between the company and the obligee, but such bond shall be subsequently countersigned by a resident commissioned agent, who shall make and retain an office record showing sufficient information regarding the transaction to indicate the essential information to preserve a record.*

4. On such business produced by a licensed nonresident agent or broker, which requires the countersignature of a resident commissioned agent of this state, there shall be a division of the usual customary commission between the licensed nonresident producing agent or broker and the resident countersigning commissioned agent which shall produce for the latter a commission of at least 5 percent of the premium; but the countersigning such casualty insurance policies and fidelity or surety bonds the resident commissioned agent shall not be paid more than \$50 nor less than \$1 for countersigning any such policy or bond. *Where the licensed nonresident agent or broker or the insurer assuming the risk desires the resident commissioned agent to render additional services during the life of a policy, then in such cases the compensation to be paid to such countersigning commissioned resident agent shall be a matter of contract between the parties in interest.*(Italics supplied.)

The underscored portions of the statute clearly indicate the Legislature intended that insurance companies writing casualty, fidelity, and surety, (class 3) and fire, and marine (class 4) insurance, with the risk being located in Nevada, have such policy countersigned by a resident agent (see subsection 1). This is the type coverage offered by Government Employees Insurance Company. Subsection 3 states in unambiguous language that such policy or bond “negotiated by a company which is not represented by a licensed nonresident agent or broker \* \* \* shall be countersigned by a resident agent who is compensated on a commission basis \* \* \*.” Government Employees Insurance Company is not represented by a licensed nonresident agent or broker. Only in subsection 4 of [NRS 684.350](#) is there language allowing an insurance company and a resident agent to enter into a contract providing a fixed compensation for services rendered, and then only if such agent is to render additional services during the life of the policy. Such is not the case here. Even if the resident agent were to render additional services, only those additional services would be subject to contractual compensation. Subsection 4, which provides the agent may be paid pursuant to a contract for additional services rendered during the life of the policy, refers to the agent as a “commissioned agent,” which clearly indicates a commission method of compensation is required for the countersigning functions, and a contractual method of compensation is required for the additional services.

#### CONCLUSIONS

1. The resident agent of a direct writing insurer is to be paid on a commission basis pursuant to [NRS 684.350](#).
2. Only if the commissioned resident agent is to perform additional services during the life of the policy is the agent’s compensation subject to contractual agreement between the insurer and the agent.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**322 Public Employees Retirement—A retired person cannot work for the State of Nevada, or any public subdivision thereof, where his remuneration exceeds \$1,800 per year, and unless his return to employment is immediately preceded by a calendar month’s absence from his previous employment with the State, or any political subdivision thereof.**

Carson City, April 7, 1966

Mr. Kenneth Buck, *Executive Secretary, Public Employees Retirement Board, P.O. Box 637, Carson City, Nevada*

Dear Mr. Buck: You have set forth facts in a letter dated April 6, 1966, which indicate that a public school teacher is contemplating retiring from public service with the State of Nevada on September 1, 1966.

This teacher inquired as to whether he can teach a special course for compensation at the University of Nevada following retirement. The course will cover 3 lecture hours per week and will be continuous throughout the academic year.

Your question is whether he can do so.

#### ANALYSIS

[NRS 286.520](#) reads as follows:

1. Any person accepting or receiving benefits of retirement compensation under this chapter shall not be employed in any capacity by the State of Nevada, by a political subdivision of the State of Nevada, or any department, branch or agency thereof, except as provided in subsection 2. Any person accepting or enjoying the benefits of retirement compensation under this chapter who accepts employment or receives any other compensation from the State of Nevada, from a political subdivision of the State of Nevada, or any department, branch or agency thereof for services rendered, except as provided in subsection 2, shall forfeit all the benefits of this chapter so long as he shall retain such employment or receive such compensation. The proper officer shall forthwith strike such person's name from the retirement compensation roll and refuse to honor any requisitions for retirement compensation made by such person.

2. Persons accepting or receiving the benefits of retirement compensation under this chapter may:

(a) Be employed as members of boards of commissions of the State of Nevada or of its political subdivisions when such boards or commissions are advisory or directive and when membership thereon is noncompensable except for expenses incurred. Receipt of a fee for attendance at official sessions of a particular board or commission shall not be regarded as compensation, provided such fees do not normally exceed a total of \$300 in a calendar year.

(b) Return to employment for the State of Nevada or a political subdivision thereof during any 1 calendar year without forfeiture of retirement benefits until they have earned a gross amount of \$1,800, at which time the benefits of retirement compensation shall be suspended and shall remain suspended for any month during which such person is employed for any period of time by the State of Nevada or its political subdivisions.

3. Within 10 days after return to employment such person shall notify the board of the fact of his employment. Failure to notify shall result in the forfeiture of retirement benefits for the period of employment.

4. A person is not considered to have returned to employment in any calendar year unless he has been absent from employment by the State of Nevada or a political subdivision thereof for not less than 1 calendar month immediately proceeding his return.

5. Notwithstanding any other provisions of this section or chapter any retired person who is elected or appointed as a county commissioner, city councilman or legislator may elect to waive any retirement rights accruing by such service and may thereafter receive his retirement allowance during the entire period of service in such designated offices.

It appears to this office that the language of the statute is unambiguous. Employment by the State after retirement is prohibited except when serving in an advisory or directive capacity without compensation and with only actual expenses compensable, or where employment by the State of any political subdivision does not result in more than \$1,800 in compensation. This

return to employment is further narrowed by the stipulation that “return to employment” does not become fact unless the employed person has been absent from employment for not less than 1 calendar month immediately preceding his return.

Under these provisions the mere fact that an employee worked for certain months without compensation would not fulfill the requirement that he be absent from employment for the 1 calendar month immediately preceding his return. Employment is defined by Webster as “service” without reference to compensation.

#### CONCLUSION

It is therefore the opinion of this office that a retired person cannot work for the State of Nevada, or any political subdivision thereof, where his remuneration exceeds \$1,800 per year, and unless his return to employment is immediately preceded by a calendar month’s absence from his previous employment with the State or any political subdivision thereof.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**323 Education; Private School—Private school, college or university, must fully qualify according to standards established by the State Board of Education before it can be licensed to operate.**

Carson City, April 7, 1966

Mr. Byron F. Stetler, *Superintendent Public Instruction, Carson City, Nevada*

Dear Mr. Stetler: You have advised this office that the Carson College, a private institution, is proceeding with its plan to open for the instruction of students about September, 1966.

You submit the following three questions:

1. Must the college fully qualify for and be in receipt of license before it may commence its operation?
2. If the answer to question 1 is negative, at what point in its organization phase does the need for a license occur?
3. What interpretation shall be placed upon the term “operated” as used in [NRS 394.030](#), paragraph 1?

#### ANALYSIS

[NRS 394.010](#), which concerns private schools, colleges, and universities, defines “school” as used in [NRS 394.010](#) through 395.190 as “any educational institution or class maintained or conducted for the purpose of offering instruction of five or more students at one and the same time or to 25 or more students during any calendar year, the purpose of which is to educate an individual generally or specifically, or to prepare an individual for more advanced study or for an occupation, and includes all schools, colleges, universities and other institutions engaged in such education \* \* \*,” and then follow the exceptions exempting public schools, religious schools, and various other instructions offered privately in trade and business activities.

The Carson College comes within the confines of the definition of “school” under the statute and is not excepted under any of the definitions found in [NRS 394.010](#) and [NRS 394.020](#).

[NRS 394.030](#) reads as follows:

1. No school subject to the provisions of [NRS 394.010](#) to [394.120](#), inclusive, shall be operated in this state unless there is first secured from the state board of education a license issued in accordance with the provisions of [NRS 394.010](#) to [394.120](#), inclusive, and the regulations

thereunder promulgated by the state board of education under authority of [NRS 394.050](#) and [394.070](#).

2. Application for a license shall be filed in the manner prescribed by the state board of education.

It is therefore apparent that the Carson College would have to be licensed before it could commence operation.

The next question arises as to qualifications of a “school,” as defined in [NRS 394.010](#), before it can enroll students and start courses of instruction. [NRS 394.050](#) reads as follows:

No license shall be issued unless the state board of education finds, upon investigation, that the school applying therefor has met the standards set forth by the state board of education. Such standards shall include, but need not be restricted to:

1. Course offerings.
2. Adequate facilities.
3. Financial stability.
4. Competent personnel.
5. Legitimate operating practices.

Therefore, the standards set up by the State Board of Education must be met before a school may be licensed. If a school commences operation without the approval and licensing by the State Board of Education, the Attorney General, under [NRS 394.100](#), has imposed upon him the duty to institute action against the owners or operators of such school.

#### CONCLUSION

It is therefore the opinion of this office that a private school, university or college, must fully qualify according to standards established by the State Board of Education before it can be licensed to operate in the State of Nevada.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**324 Elections; Education, State Board of—Organic, statutory, and case law require that the people of the state be afforded the opportunity to vote on office of Member of State Board of Education in the forthcoming general election.**

Carson City, April 8, 1966

Mr. Byron F. Stetler, *Superintendent Public Instruction, Carson City, Nevada*

Dear Mr. Stetler: You have advised this office that two members of the Board of Education were appointed by the Governor to fill vacancies occasioned by the death of one member and the resignation of another.

Your question involves the terms of office of the two appointed officers as affected by [NRS 385.020](#) and [NRS 283.110](#), which are inconsistent.

Let us first affirm that we feel that members of the State Board of Education are state officers (see Attorney General’s Opinion 28, dated March 28, 1955), being elected from educational supervisions districts which are statewide, and having educational authority over the entire State.

Having made this determination, let us quote the two statutes which are in conflict with each other. [NRS 385.020\(5\)](#) reads as follows:



If a vacancy shall occur on the board from among the elected members, the governor shall appoint a member to fill the vacancy for the remainder of the unexpired term. If a vacancy shall occur in the office of an appointive member, the elected members shall fill the vacancy for the remainder of the unexpired term.

If this procedure were to be followed, an appointment would be carried in many instances through a general election. On the other hand, [NRS 283.110](#) reads as follows:

Whenever any vacancy shall occur in the office of any state officer, the governor shall fill the same by granting a commission, which shall expire at the next general election by the people and upon the qualification of his successor, at which election such officer shall be chosen for the balance of the unexpired term.

The latter provision is supported by Section 22 of Article XVII of the Constitution of Nevada, which reads as follows:

In case the office of any Justice of the Supreme court, District Judge or other State officer shall become vacant before the expiration of the regular term for which he was elected, the vacancy may be filled by appointment by the Governor until it shall be supplied at the next general election, when it shall be filled by election for the residue of the unexpired term.

This office feels that this provision in the Constitution must prevail where a state officer is concerned. In the case of *Penrose v. Greathouse*, [48 Nev. 419](#), the court held that the provisions of organic and statute law indicated that legislative policy was to fill the position of district judge by election as soon as practicable after the vacancy occurred. We feel this policy must then apply to state officers, for they are included in the same constitutional provision and in [NRS 283.110](#).

#### CONCLUSION

In the present situation we conclude that the organic, statutory, and case law require that the people of the state be afforded the opportunity to vote on the office of member of the State Board of Education in the forthcoming general election.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**325 Las Vegas Valley Water District—On all questions coming before the Board of the Las Vegas Valley Water District where a vote is required, the president, if present, must vote.**

Carson City, April 11, 1966

Mr. W. C. Renshaw, *General Manager, Las Vegas Valley Water District, Las Vegas, Nevada*

Dear Mr. Renshaw: You have inquired of this office as to under what circumstances the president of the Las Vegas Valley Water District may vote on matters regularly coming on for consideration by the board of directors of that district.

#### ANALYSIS

The Las Vegas Valley Water District was formed by Chapter 167, Statutes of Nevada 1947. Under that act each elector director must take and subscribe to an official oath and execute an official bond in the sum of \$10,000.

The officers of such district consisted of seven directors, a president and vice president elected from their number, and a secretary and treasurer, the latter two to be appointed by the board.

All meetings of the board are public and a majority shall constitute a quorum for the transaction of business, but on all questions requiring vote there shall be a concurrence of at least a majority of the members of the board.

It can readily be determined that the law intended every director to have a vote, if present. On voting matters at least four members must concur in a vote one way or the other. Thus it stands to reason on a board so constituted, with seven members, so as to prevent, when possible, tie votes, that the president has the same vote as all other members. He can, and must, under the law, vote on all matters coming before the board for consideration where a vote is required.

#### CONCLUSION

It is therefore the opinion of this office that on all questions coming before the board of the Las Vegas Valley Water District, where a vote is required, the president, if present, must vote.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**326 Nevada State Hospital—Statutes regarding care and maintenance of mentally deficient noneducable children in Nevada State Hospital at state expense are not in conflict, but must be read in pari materia, and are interpreted to show legislative intent that such expense be borne by the State.**

Carson City, April 11, 1966

W.W. White, *Director, Health and Welfare Department, State of Nevada, Carson City, Nevada*

Dear Mr. White: The inquiry of Dr. Jules Magnette, Superintendent of the Nevada State Hospital, dated March 25, 1966, which you have forwarded to this office, seeks clarification of certain statutes pertaining to hospitalization of mentally deficient children, these being in part as follows:

433.300 *Mentally deficient, noneducable children.*

1. The superintendent is authorized to receive and care for mentally deficient, noneducable children of the State of Nevada over 2 years of age at state expense when:

(a) Properly committed to the hospital; or

(b) Admission of children not over the age of 21 years is requested by a parent, parents or guardian upon application and proof to the superintendent.

433.410 *Rates for subsistence and care.*

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.

#### QUESTION

Are these statutes in conflict with reference to whether mentally deficient, noneducable children may receive subsistence and care at the Nevada State Hospital at state expense?

#### ANALYSIS

[NRS 433.300](#)(1)(a) above quoted, is a part of Chapter 331, Statutes of Nevada, 1951, being Sec. 38 thereof. In 1953 the Legislature amended this section by adding subsection (2) which

authorizes the superintendent of the State Hospital to receive and examine minor children without commitment under certain conditions. The section was last amended in 1955 by adding subsection 1(b) as above quoted. Standing alone and given their literal meaning the wording in the above quoted subsections would evince a legislative intent to provide for admission and care of the mentally deficient persons therein mentioned, and at state expense, by two methods, viz, (1) court commitment, and (2) upon application by the parents of such persons and proof to the superintendent.

However, [NRS 433.410](#)(1), as above quoted, and enacted by the legislature as a part of Chapter 219, Statutes of Nevada 1955, and which has never been amended in substance, provides for the charging of a monthly subsistence for all committed persons in an amount to be determined by the superintendent of the hospital. Supplementing this is also [NRS 433.370](#)(1)(b)(c), being a part of Chapter 219, Statutes of Nevada 1955, which in substance names relatives who must pay to costs for care and maintenance of any person committed to the hospital under one of the forms of commitment prescribed by law. This has never been amended and reads as follows:

1. *When a person is committed to the hospital under one of the various forms of commitment prescribed by law, the husband, wife, children and parents, the estate of the committed person, and the guardian and administrator of the state of the committed person shall, if of sufficient means and ability: (Italics supplied.)*

(b) Cause the committed person to be cared for and maintained properly and suitably at the hospital.

(c) Pay for services rendered to the committed person at the hospital.

The content of the 1955 sections immediately raises the question as to whether [NRS 433.300](#)(1) enacted in 1951 providing for such care and maintenance, is repealed or superseded. In fixing the responsibility in the 1955 legislation for payment of care and maintenance of persons committed to the State Hospital it would appear that the Legislature intended to make no exceptions. The wording employed in [NRS 433.370](#)(1), “when a person is committed to the hospital under one of the various forms of commitment prescribed by law \* \* \*” seem to be all inclusive since there can be no commitments other than those prescribed by law.

It is clear that the 1955 statutes make no express repeal of the 1951 statute fixing the burden of maintenance of the children mentioned upon the State. In neither the title to the later acts nor at their conclusion did the Legislature express any intent to repeal any earlier act in conflict therewith. In fact, in 1955 when the Legislature enacted [NRS 433.370](#) and [433.310](#), it saw fit to amend [NRS 433.300](#) by adding subsection 1(b) which, in effect, established an additional class of mentally deficient, noneducable children whose care and maintenance at the State Hospital may be at state expense. Failure to repeal an earlier law, but amending it instead so as to extend its general purpose, is strongly indicative of legislative intent that both laws are to be effective.

In arriving at this conclusion we are not unmindful that the rule of *pari materia* applies. When a legislature enacts two or more acts upon the same subject matter at the same session, a presumption arises that they were born of the same legislative mind and actuated by the same policy, and intended to coexist in order to attain the object of the legislation. *Sutherland Statutory Construction*, Vol. 1, P. 483.

Even had the earlier act not been amended, its repeal by implication would still be questionable. Our State Supreme Court has ruled on this aspect of statutory interpretation many times. Repeals by implication are not favored, and if it be not perfectly manifest, either by irreconcilable repugnancy, or by some other means equally indicating the legislative intention to abrogate a former law, both laws must be maintained. *Carson City v. Board of County Commissioners*, [47 Nev. 415](#); *Dotta v. Hesson*, [38 Nev. 1](#); *State v. Boerlin*, [38 Nev. 39](#); *Kondas v. Washoe County Bank*, [50 Nev. 181](#).

It appears clear that the Legislature intended to exclude mentally deficient, noneducable children from the care and maintenance payments charged other persons committed to the State Hospital. Had the intent been otherwise, the earlier act of 1951 providing for such exemption

would not have been amended so as to extend its benefits to more persons hen in 1955 the Legislature enacted other laws which read alone would eliminate the exemption altogether.

#### CONCLUSION

[NRS 433.300](#)(1)(a) is not in conflict with [NRS 433.370](#)(1) or [NRS 433.410](#)(1). From all the circumstances existing and as determined by applicable rules of statutory construction these statutes must be read together or in pari materia, and all must stand. The question propounded is answered in the negative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: C.B. Tapscott, *Chief Assistant Attorney General*

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**327 Department of Health and Welfare; Las Vegas Tuberculosis Control Center—Nevada laws providing for treatment of tuberculosis patients at state facility primarily for benefit of citizens and residents of State. Alien patients not entitled as a matter of right to treatment at state expense, and one signing agreement to pay such expenses assumes contract liability by law.**

Carson City, April 18, 1966

Mr. W.W. White, *Director, Department of Health and Welfare, State of Nevada, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. White: You have submitted for the attention of this office the recent inquiry of Dr. Horace R. Getz, Supervisor, Tuberculosis Control Section at Las Vegas, Nevada, regarding financial responsibility for treatment of an alien Chinese woman at this facility. It is noted from the information furnished us that this woman was found to be afflicted with active tuberculosis shortly after her arrival in Las Vegas from Hong Kong, China, and that she was hospitalized at the above mentioned facility on January 19, 1966. Shortly prior thereto her husband signed a statement for the Public health Service assuming financial responsibility for his wife's care should hospitalization be required. No sworn statement was furnished by the patient in question declaring her inability to pay for medical treatment, as is required under [NRS 443.105](#) in order for those eligible to receive such treatment at state expense.

Due to attendant circumstances and conditions in connection with her ailment and the treatment thereof, it was necessary to order the patient placed under isolation at the Las Vegas Convalescent Center, with the provision that she could, under special permission, enter some other institution of her own choosing instead. The patient's husband paid for her hospitalization for the period from January 9, 1966, to January 15, 1966, and specifically promised to pay for the additional period from January 15, 1966, to January 27, 1966, when she began isolation treatment, but has never done so. Through his attorney, the husband now denies all financial responsibility for any expenses incurred for his wife's care during the isolation period between January 27, 1966, to March 15, 1966, when the patient was released for home treatment, claiming that since the isolation was by official state order, the State of Nevada assumed and designated itself financially responsible for her care during this period.

In accordance with long established practice, the Tuberculosis Control Center has assumed the expenses for furnishing the physician and drugs necessitated in the treatment of this patient, but contends that the per diem charges for her hospitalization are not the State's responsibility.

## QUESTION

Is the State of Nevada responsible for the hospitalization of this particular alien and for all aliens in general?

## ANALYSIS

Rights and privileges of aliens in the United States are in general controlled by the United States Constitution and treaties and the states may not by their laws deny or abridge these rights. The rights and privileges usually included in connection with constitutional and treaty guaranties, are those pertaining to the right to due process of law in criminal cases, and the right to sue and be sued, the right to contract, right to enjoy certain property, and some others in connection with civil matters. Although a state may extend greater rights to an alien than those assured by federal guaranties, it may also confine such rights and privileges under its laws to only those meeting the federal requirement and no more. 3 Am.Jur. 2d. 848 et. Seq.

Citizens and residents of the State enjoy many privileges not available to an alien such as the right to hold office, to vote, to engage in certain professions and callings, and numerous others. The right to claim an exemption from the payment of a tax or fee does not automatically extend to an alien. Neither may an alien readily escape the fees or expenses incurred in protection or caring for him under the police powers of the state. Chapter 443 NRS, provides regulations and procedures in the exercise of the State's police powers and is designed to control and prevent tuberculosis. Laws of this nature are primarily for the benefit of the State's citizens rather than nonresidents and aliens who may come within its jurisdiction. Even citizens of the State are to automatically exempted from paying for their medical or hospital care. Such expenses are borne by the State only if they file an affidavit showing their inability to pay.

Although [NRS 443.105](#) provides that "every person" with tuberculosis and constituting a threat to the health and safety of the public, shall be cared for at public expense upon providing an affidavit of inability to pay, we are constrained nevertheless to interpret the section as being applicable only to citizens and residents of the State. We find nothing in this section or elsewhere in the law that would authorize the waiver of any expenses incurred in the treatment of an alien. While it is realized that in order to assure proper health protection within the State, certain indigent aliens must of necessity be treated at state expense, treatment under such circumstances regardless, is in nowise a right to which such aliens may claim by law. A determination of indigency in all such cases should be made by the officials in charge at the facilities.

We are not unmindful of the contractual obligation of the husband of the alien patient in this case to pay for such hospitalization by reason of signing an agreement wherein he assumed full financial responsibility prior thereto. The fact that isolation of the patient was ordered in the course of the treatment of the patient, fails as we understand the law, to cancel this obligation. Especially is such the case when the husband was privileged to have isolation treatment of his wife administered in some other institution had he elected to have done so.

## CONCLUSION

In the opinion of this office the provisions of Chapter 443, NRS, are for the benefit of citizens of Nevada primarily. Alien patients are not privileged to escape either medical or hospital expenses incurred at or under the direction of the tuberculosis Control Center under the provisions of [NRS 443.105](#). Waiver of any of these expenses may be only after determination of indigency of the alien by proper officials. The husband of the alien patient with whom we are here concerned, in addition to being liable under the above chapter, is also liable by contract obligation for all expenses incurred for treatment at, or under the direction of the Las Vegas Tuberculosis Control Section. The question is answered in the negative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: C.B. Tapscott, *Chief Assistant Attorney General*

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**328 Savings and Loan Institutions; Acceptance of Federal Funds—Savings and loan institutions within the State of Nevada are authorized to accept funds made available by 12 USC 1729(f) of the National Housing Act. Such funds may be considered as “reserves available for losses” within [NRS 673.273](#)(1) as amended by Chapter 523, Statutes of Nevada 1965.**

Carson City, April 20, 1966

Mr. M.L. Wholey, *Commissioner, Savings and Loan Division, Department of Commerce, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Wholey: For the purposes of clarification and future application of [NRS 673.273](#), as amended by Chapter 523, Statutes of Nevada 1965, you have requested from this office an interpretation of this statute. More specifically you ask:

#### QUESTION

In the event savings and loan institutions located in the State of Nevada desire to receive funds made available by the Federal Savings and Loan Insurance Corporation, may the proceeds of such loan be considered in determining if the local institution has the reserves required by [NRS 673.273](#), as amended?

#### ANALYSIS

The available federal funds with which we are concerned are made available pursuant to 12 USC 1729(f), which was added to the National Housing Act in 1935. That section reads:

In order to prevent a default in an insured institution or in order to restore an insured institution in default to normal operation as an insured institution, the Corporation is authorized, in its discretion, to make loans to, purchase the assets of, or make a contribution to, an insured institution or an insured institution in default; but no contribution shall be made to any such institution in an amount in excess of that which the Corporation finds to be reasonably necessary to save the expense of liquidating such institution.

If the local savings and loan institutions may use the proceeds of the loan for the purpose of maintaining minimum reserves, the loan must be considered as being “reserves available for losses” within the meaning of [NRS 673.273](#), since clearly it could not be considered as being “permanent stock,” “surplus,” or “undivided profit.”

[NRS 673.273](#)(1) reads:

The total permanent stock subscribed and paid plus the total of the surplus, undivided profits and *all reserves available for losses* shall not at any time be less than 5 percent of the aggregate certificate value of the outstanding investment certificates of the association. (Italics supplied.)

The term “reserves” or “reserve fund” has many meanings, as was pointed out in *U.S. v. Zions Saving and Loan Association*, 313 F.2d 331 (1963), which was cited with approval in Attorney General’s Opinion No. 298 (1/27/66). In *C.I.R. v. National Reserve Ins. Co.*, 160 F.2d 956, the words “reserve fund” were construed to be a sum of money variously computed or estimated, which with accretions from interest, is set aside to mature or liquidate future unaccrued and contingent claims. This definition is broad enough to encompass “reserves available for losses” which are required to be maintained by [NRS 673.273](#). The proceeds of the loan received by local savings and loan associations would be of an amount equal to any loss incurred and would be of

an amount sufficient to maintain proper reserves. Such use of the money would be in compliance with the underlying purpose of the applicable federal statutes, which is “to prevent a default or to restore the institution to a normal operation.”

The fact that acceptance of the loan will ultimately result in a liability does not prevent it from being considered as an available reserve for losses. The Court in *Royal Highlanders v. Commissioner of Internal Revenue*, 138 F.2d 240 (1943), defined a “reserve” as:

\* \* \* funds set apart as a *liability* in the accounts of a company to provide for the payment or reinsurance of specific contingent liabilities. They are held, not only as security for the payment of claims, but also as funds from which payments are to be made. (Italics supplied.)

The intended use of the money received pursuant to 12 USC 1729(f) is in conformity with this definition.

#### CONCLUSION

It is concluded by this office that such sum may be considered as “reserves available for losses” and may be added to the total permanent stock subscribed and paid plus the surplus and undivided profits. The resulting figure is that which must equal or exceed the minimum requirements of [NRS 673.273](#), as amended.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**329 Health and Welfare; Care of Indigent Tubercular Patients, Chapter 443 of NRS Construed—The State of Nevada is liable for the costs of treating indigent tubercular patients, including transportation, to and from the state tuberculosis centers. The costs of treating the patient after a diagnosis of active tuberculosis has been made, and prior to the time the patient is moved to the state tuberculosis center, is to be assumed by the State if, in fact, the patient is medically indigent. The Health Division of the Department of Health and Welfare may compel examination and isolation of any person having active tuberculosis, and may contract with sister states for the return of patients domiciled in those states.**

Carson City, April 9, 1966

Mr. W.W. White, *Director, Department of Health and Welfare, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. White: The supervisor of the Tuberculosis Care Program, codified as a part of Chapter 443 NRS, has informed this office that the Las Vegas Convalescent Center, located in Clark County, Nevada, may cease operations and terminate the care programs currently in effect. If such is the case, then the patients currently hospitalized in the center, and those who may hereafter be infected with active tuberculosis, will be compelled to seek aid and treatment in either the facilities located in Reno, Nevada, or certain institutions within the State of California. Because of the distance between Clark County and these facilities the cost incurred in the transportation of patients may be substantial and the financial responsibility of the State is questioned. It must be noted that this opinion is limited to indigent persons infected with active tuberculosis. [NRS 443.105](#) defines such person as follows:

1. Every person who, under the regulations of the board, is found to be infected with active tuberculosis, and to constitute a threat to the health and safety of the public, or who is suspected of being so infected, shall be cared for at public expense, if he produces a written statement

subscribed and sworn to or affirmed before a notary public declaring that he is unable to pay for medical or hospital care.

2. The cost of such care shall be paid by the health division from moneys provided by direct legislative appropriation and within the limits of such appropriation.

The current procedure under which the tuberculosis Care Program is administered is:

An informer, who is many times the personal physician of the person infected, will so notify the supervisor of the Tuberculosis Care Program. The supervisor will then make inquiry as to the financial condition of the infected person. If, in the judgment of the infected person, he is not capable of obtaining private medical attention, the supervisor advises that he be transported to one of the state institutions. To date the supervisor has insisted that costs of such transportation be the responsibility of the county in which the patient resides. To date this has not been questioned, but if the Las Vegas Convalescent Center is closed, the cost of transportation from Clark County to the Reno Facility, or to those in California, will be greatly increased.

It has been the policy of the supervisor to assume no financial responsibility for the care and treatment of the patient prior to the time the patient has presented the notarized statement required by [NRS 443.105](#) above set forth.

We are also advised that in many instances the patient, after his illness is diagnosed as active tuberculosis, is too ill to be moved from his present location and many days may pass before he can safely be transported to either state institution. It is the current policy of the supervisor of the tuberculosis Care Program not to assume the costs incurred by the patient prior to his arrival at the state facility.

For purposes of administering chapter 443 NRS in the event the Las Vegas Convalescent Center is closed, you have asked the following questions:

1. Is the Tuberculosis Control Section liable for the cost of moving the patient from the point of diagnosis to the tuberculosis treatment center paid for by the section when the patient has not yet signed and had his medical indigent statement notarized?

2. Is the Tuberculosis Control Section liable for the cost of moving the patient from the point of diagnosis if the informer states the patient has told him he is medically indigent and will sign and have such a statement notarized?

3. Is the tuberculosis Control Section liable for the hospitalization costs of a critically ill patient after a diagnosis of tuberculosis is established and while waiting for the patient to recover sufficiently so he can be moved safely to the tuberculosis treatment center where his care will be paid for by the section? For the hospitalization costs preceding the day of diagnosis?

4. May the tuberculosis Control Section draw up new rules and regulations setting up a 5-day time limit after diagnosis and notification in which the section would select the place of hospitalization and notify the county where to take the patient?

5. Is the county responsible for the continued care, isolation, and supervision of a patient with tuberculosis until the supervisor of the Tuberculosis Control Section admits the patient to a tuberculosis treatment center?

6. Is the Tuberculosis Control Section liable for the transportation costs of the patient when he is discharged to his home?

7. Is the Tuberculosis Control Section liable for the transportation costs of a tuberculous patient who is AWOL from a neighboring state and wishes to return to that state? For the same, but for a more distant state from which he left AWOL?

8. Is the Tuberculosis Control Section liable for the costs of care of an AWOL patient who has an accident and is taken into another hospital? The lapse of time may be days or longer before the patient makes it known that he is an AWOL tuberculous patient. Is there a time limit on this liability? Some patients may be lost for a year or more and be hospitalized for other conditions and not report that he has active tuberculosis.

#### ANALYSIS

Question 1: The entire intent and purpose of the Legislature in enacting Chapter 443 NRS was to provide "care of indigent persons infected with active tuberculosis." To fulfill its intent it is



imperative that the patient be received at either of the two state institutions. Transportation of the patient to the proper facility is incidental to and a part of the required care and treatment to be furnished pursuant to [NRS 443.105](#). The question of whether or not transportation costs are included within the meaning of a statute written in terms of “medical or hospital care” has been passed on by at least two courts in the United States. The court, in *Commissioner of Internal Revenue v. Stringham*, 183 F.2d 579, held:

Expenses incurred by a taxpayer in *transporting* his five year old daughter, who had suffered from respiratory ailments from infancy, to a boarding school in rarefied climate in Arizona, and for her maintenance therein, exclusive of expenses attributable to her education, were deductible as expenses for *medical care*. (Italics supplied.)

In *Boyle-Farrell land Co. v. Haynes*, 256 SW 43 (Ark. 1923) the court held:

An employment contract expressly requiring the employer to furnish *medical treatment* is held to impliedly include free *transportation* on the employer’s logging railroad from their place of work to visit the company doctor, and hence an employee so riding was not a mere licensee. (Italics supplied.)

The opinion that the State should assume the financial responsibility for transporting tubercular patients to the designated state institution is bolstered by Attorney General’s Opinion 118 (March 5, 1964), wherein it was held:

[NRS 443.105](#)(2) provides that the cost of such care shall be paid by the Health Division from moneys provided by direct legislative appropriation, and within the limits of such appropriation. The moneys subject to such appropriation are raised by taxation. The moneys subject to such appropriation are raised by taxation, all counties paying their proportionate share, and in view of the language of the statute, the law is mandatory that the cost of such care shall be paid by the State legislative appropriation.

This office has also held as recently as January 27, 1965 (Attorney General’s Opinion 203, January 27, 1965), that:

Transportation costs between institutions for indigent patients infected with active tuberculosis and admitted to the State Tuberculosis Care Program are the responsibility of the State under [NRS 443.105](#) and [443.115](#).

Because of the above cited authority it is concluded by this office that the costs of transporting the patient from the point of diagnosis to the tuberculosis treatment center should be assumed by the State. The fact that the required notarized statement has not yet been received by the institution affirming the fact that the patient is medically indigent should not prevent the assumption of the transportation costs by the State. When the patient is received at the treatment center a demand for such notarized statement is then to be made. If the patient refuses to comply with the demand, or if the patient is not in fact medically indigent, then admission may be refused.

Question 2. For the reasons and rationale set forth in the answer to question 1, question 2 must be answered in the affirmative. To require the patient to remain at the place of diagnosis until he may transfer his notarized statement to the hospital and have it processed (which may require as much as 2 weeks) would be to allow the patient infected with the contagious disease of active tuberculosis to be exposed to the other patients and staff at his place of confinement. This would be in derogation of the public health, safety, and general welfare, as well as being contrary to the intent of the Legislature in enacting Chapter 443 NRS, which, as has been pointed out, is to provide “care to indigent persons.”

Question 3: [NRS 443.115](#) reads:

1. The health division shall, by contract with hospitals or other institutions having adequate facilities in the State of Nevada, provide for diagnostic examination and in-patient and out-patient care of patients.

2. Whenever adequate facilities are not available in the State of Nevada, the health division may contract with hospitals in other states which have adequate facilities for such care.

It is the considered opinion of this office that the above quoted statute furnishes an answer to this question. Pursuant to the contractual rights and powers conferred upon the health division, an agreement could be entered into between the State Health Division and the hospital wherein the patient is then confined. Such contract should provide for payment by the State to the hospital for the care and treatment rendered the patient during the period of time the patient was unable to be moved from that point to the state institution. By so doing the patient would receive the desired care, would be isolated so as not to expose the general public to a contagious disease, and the State would be assuming the financial burdens incident to the medical care and treatment which is the underlying purpose of Chapter 443 NRS. Only if the above type of contract is entered into would the State be liable for the care and treatment administered by an institution other than to two tuberculosis centers in the State of Nevada.

Question 4: [NRS 439.200](#) provides in part 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:

(a) To define and control dangerous communicable diseases.

\* \* \*

(c) To regulate sanitation and sanitary practices in the interests of the public health.

\* \* \*

(e) To govern and define the powers and duties of local boards of health and health officers.

(f) To protect and promote the public health generally.

(g) To carry out all other purposes of this chapter.

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.

\* \* \*

Pursuant to this statute the board of health has adopted and promulgated rules and regulations relating to the care and treatment of tubercular patients. These rules and regulations do not cover the exact point brought out in question 4. However, if the State Board of Health determines that a period of 5 days is a reasonable amount of time within which to determine where the patient is to be treated, then such may be adopted.

Question 5: As has been pointed out, this office, in Attorney General's Opinion 118 (March 5, 1964), held a county "is not obligated under the law to bear any part of the cost of care for indigent tubercular patients." From the date the supervisor of the tuberculosis Control Section is informed of an indigent person suffering from active tuberculosis and has designated the institution which is to furnish care and treatment, the burden of paying for such care and treatment is upon the State.

Question 6: With question 6 you have requested an answer upon which the statutes of Nevada shed no clear light. Nowhere is there provision made for "round trip transportation" of the indigent from the Tuberculosis Control Section to his home. However, it can hardly be stated that the Legislature would desire to worsen the status of one of the citizens of this State. If it were held the Tuberculosis Control Section were to release an indigent person from the confines of the facility upon his cure and make no provision to return such person to his home, certainly it could be said the patient's status is worsened. While the main function of the tuberculosis Control Section is the treatment and cure of active tuberculosis, it may also be reasonably stated that return of the released patient to his home environment is incidental to his medical care. Had it not

been for the enactment of Chapter 443 into law, the indigent tubercular patient would not have been exposed to medical attention, nor would he have been removed from his home in the first instances. It is concluded by this office that as a part of an indigent's care and treatment the State should assume transportation costs incurred in returning the patient to his home.

Question 7: [NRS 443.105](#) does not differentiate between citizens of this State and citizens of other states who may be suffering from active tuberculosis while temporarily located within this State. No matter who the person is, and no matter where such person is domiciled, if he is suffering from active tuberculosis, he constitutes a threat to the health and safety to the public. As such the State Department of Health and Welfare, acting through the health division, has the duty to take affirmative action to remove the threat. To this end the health department has two choices. First, the supervisor of the Tuberculosis Section could issue either an "examination order" or an "isolation order" requiring the person suspected as being a carrier of active tuberculosis to submit to examination and, if found to be suffering from active tuberculosis, to be isolated as a patient in the appropriate state tuberculosis center. Authority for this procedure is housed in Rules 1 and 3 adopted by the State Board of Health pursuant to [NRS 439.200](#) and [439.210](#), which became effective October 15, 1965. Secondly, the health division could enter into a contract with the appropriate agency of the state from which the patient has absented himself pursuant to [NRS 443.115](#) which would provide terms and conditions for the transformation of persons desiring to return to their home state. It must also be noted that some states have involuntary commitment of tuberculosis patients and the laws of those states may well provide for the return of such patient at that state's expense.

Question 8: It is the opinion of this office that if a person receiving care and treatment in one of the state tuberculosis centers absents himself therefrom and is subsequently hospitalized for other reasons, the State need not assume financial responsibility. The purpose of Chapter 443 was to provide care and treatment for indigent *tubercular patients*. Clearly the Legislature did not intend to furnish complete medical care for any illness or ailment which may affect the citizens of this State. If a person absents himself from the tuberculosis center prior to the time he is released as a cured patient, the State remains liable for the care and treatment given that patient which furthers the cure of active tuberculosis, but if the patient is hospitalized for other purposes, the State is not financially responsible.

#### CONCLUSION

The obvious intent and purpose motivating the Legislature to enact Chapter 443 was the care and treatment of indigent persons suffering from active tuberculosis, and to remove such persons from contact with the general public in an effort to prevent spreading of the contagious disease. Transportation of such persons to the appropriate state medical institution is an integral and incidental part of such treatment, and the costs of such transportation are to be assumed by the State. Likewise, the costs of returning a patient, who has been cured of active tuberculosis, to his home should be borne by the State from money appropriated by the Legislature.

If a person is too ill to be removed from the point of diagnosis to the state tuberculosis center because of active tuberculosis, the costs of care and treatment of such patient rendered prior to the time the patient may be removed to the state tuberculosis center should be absorbed by the State, if in fact the patient would qualify as a medically indigent person.

If a person has absented himself from a sister state while he is suffering from active tuberculosis, the health division may compel the examination and isolation of such person, or enter into a contract with the appropriate agency of the sister state for the return of such patient.

The State of Nevada is not liable for the costs of treatment rendered a patient who is AWOL from the state tuberculosis center unless such treatment was directly related to the cure of tuberculosis.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**330 Savings and Loan Institutions; Investment Certificates—Holders of investment certificates issued by a savings and loan institution or a building and loan institution are creditors of the issuing institution.**

Carson City, April 21, 1966

Mr. M.L. Wholey, *Commissioner, Savings and Loan Division, Department of Commerce, Carson City, Nevada*

Dear Mr. Wholey: You have presented to this office the following question:

Are the holders of investment certificates viewed as being *creditors* of the issuing savings and loan association, or building and loan association, or are they *equity* holders?

ANALYSIS

A “creditor” is generally defined as “a person to whom a debt is owing by another person who is the debtor. See Black’s Law Dictionary, Fourth Edition, page 441.

An “equity holder” on the other hand is a person having an interest in an association such as a shareholder or stockholder and has a claim against the association in proportion to the profits realized.

A determination of whether or not a holder of investment certificates issued by a savings and loan association or a building and loan association is a creditor of equity holder may be made by considering his rights and liabilities of the holder with the issuing associations.

[NRS 673.2755](#) reads:

1. An association may issue investment certificates, with or without passbooks. The holders of investment certificates are not liable for debts or assessments, and are entitled upon liquidation of an association to receive payment in full before any payment or distribution is made to shareholders or stockholders. The holders of investment certificates have not right to participate in the profits of the association.

2. Investment certificates may be issued as full paid investment certificates, accumulative investment certificates, minimum term investment certificates or other types of certificates approved by the commissioner.

We are not favored with a judicial interpretation of this statute. However, the Supreme Court of California has interpreted an identical California statute.

In re Pacific Coast Building-Loan Association, 99 P.2d 251 (Calif. 1940), is in point. Therein it was held:

It is conceded that the investment certificate holders are creditors;

\* \* \*. (Page 252)

The investment certificate holder is without doubt a preferred creditor,

\* \* \*. (Page 255)

The syllabus in *King v. Mortimer*, 233 P.2d 4 (Calif. 1951), reads:

Relationship between holders of investment certificates of building and loan association is that of debtor and creditor.

Other state courts have had the opportunity to pass upon similar statutes and have concluded the relationship with which we are here concerned is that of debtor-creditor. See:

*State v. American Building and Loan Assn.*, 150 SW.2d 1048 (Tenn. 1941).

*In re Commuters Building and Loan Assn.*, 4 A.2d 615 (Pa. 1939).

*White v. Wogaman*, 54 P.2d 793 (Ariz. 1936).

The rationale of the courts is that since the statute provides the holders of investment certificates are to receive preferred treatment in the event of liquidation of the institution, prior to any payment or distribution to shareholders or stockholders, they must be considered as creditors. The supporting authority for this ruling is the fact that the assets of a liquidated firm always are distributed to the creditors of that firm prior to any distribution to stockholders. (Sec. 19 Am.Jur. 2d, Corporations, Section 1686.)

#### CONCLUSION

Since [NRS 673.2755](#) allows the holders of investment certificates preferred treatment in the event of a dissolution they must be considered as being “creditors” and not “equity holders” because of the general rule that creditors always receive such preferential treatment over shareholders and other equity holders.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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### **331 Water Rights—Developed mining water is subject to appropriation under Nevada law.**

Carson City, April 25, 1966

Mr. George W. Hennan, *State Engineer, Division of Water Resources, Nye building, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Hennan: Problems concerning the appropriation of water developed by mining operations have been presented to your office and have been determined through the application of the principles enunciated in *Cardelli v. Comstock Tunnel Co.*, [26 Nev. 284](#) (1901). Since this decision the Nevada Ground Water Act has been enacted. You ask two questions:

#### ISSUES

1. Whether developed mining water is subject to appropriation under Nevada law.
2. Whether the Nevada Ground Water Act supersedes the precedent of *Cardelli v. Comstock T. Co.*

#### ANALYSIS

The *Cardelli* case, *supra*, was decided in 1901, prior to the enactment of the Nevada Water Law of 1905. That case held that developed waters are the property of the persons who develop them and that the waters there involved constituted an artificial and temporary, not a natural stream, and that such waters were not subject to appropriation. The court stated at page 295 that:

Such waters are not like waters running in streams on the public domain of the United States. They are produced by the capital, labor and enterprise of those developing them, and by such developing they become the property of those engaged in the enterprise.

Riparian rights were recognized in Nevada to some extent for several years prior to 1885. However, in that year, in *Jones v. Adams*, [19 Nev. 78](#), the Nevada Supreme Court reversed its stand with respect to riparian rights stating that the riparian doctrine as applied in the Pacific Coast States and Territories did not serve the wants and necessities of the people for either mining or agriculture and that the doctrine of prior appropriation had been universally applied.

Until passage of the Water Appropriation Law of 1913 such nonstatutory appropriations of water were made by actually diverting the water from the source of supply, with the intent to apply the water to a beneficial use, followed by an application to beneficial use within a reasonable time. See: Wells A. Hutchins, *The Nevada Law of Water Rights*, page 12, and cases cited therein.

Notwithstanding the acceptance by the Nevada Supreme Court of nonstatutory appropriations as against riparian rights, the court, nevertheless, in the *Cardelli* case apparently felt that developed water did not fall within that category of waters subject to appropriation. It should be noted, however, that the *Cardelli* case was decided prior to the General Water Law of 1905 and the Water Appropriations Law of 1913. The 1913 water law, now cited as [NRS 533.025](#), recites:

*Water belongs to the public.* The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public.

The same act also provides:

*Appropriation for Beneficial Use.* Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise. [NRS 533.030](#).

In 1939 the Nevada Legislature passed the Underground Water Law. A portion of this law, now cited as [NRS 534.020](#)(1), provides as follows:

All underground waters within the boundaries of the state belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this state relating to the appropriation and use of water and not otherwise.

Nevada has had legislation of one form or another with respect to the appropriation of ground waters during the major part of the last half century, and it has had the comprehensive statute of 1939 in operation since that time. “Although legislation on ground waters has not been before the State Supreme Court, the legislative intent to subject to appropriation all ground water capable of administrative control has been evident for a long time. . . .” *The Nevada Law of Water Rights*, supra, page 62. In a decision rendered after the enactment of the ground-water statute of 1939, but which did not involve a construction of that statute, the Supreme Court stated that it was in agreement with the proposition that the Legislature had declared all water within the State, whether above or beneath the surface of the ground, belongs to the State, and that the doctrine of appropriation was the settled law of the State. In *re Manse Spring and Its Tributaries*, [60 Nev. 280](#), 286-287 (1940). The Court stated:

Water being state property, the state has a right to prescribe how it may be used, and the legislature has stated that the right of use may be obtained in a certain way.

Our Nevada statutory water law is a complete abrogation of the common law doctrine of riparian rights and supersedes the 1901 Supreme Court decision based on that theory, provided, however, that such legislation is not retroactive. Although it might be considered that the *Cardelli* case was not decided on the theory of riparian rights but on the theory of a completely different type of water, i.e., developed water, in view of the Nevada water laws of 1913 and 1939, and the legislative intent as stated in the *Manse Spring* case, supra, we believe that developed water is subject to appropriation.

#### CONCLUSION

It is therefore the opinion of this office that developed water is subject to appropriation and that the precedent of *Cardelli v. Comstock* is superseded by statutory water laws.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: William Paul, *Deputy Attorney General*

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**332 Registration of Agents; Chapter 90 NRS Construed—Neither an employer who is a registered member of the National Association of Security Dealers, Inc., nor his employees, are compelled to register pursuant to Chapter 90 of NRS. The Secretary of State must adopt only those rules and regulations which are sufficient to allow him to perform his functions.**

Carson City, April 26, 1966

Mr. George M. Spradling, *Deputy Secretary of State, Division of Securities, Carson City, Nevada*

Dear Mr. Spradling: You have requested from this office a legal opinion concerned with the interpretation of Chapter 90 NRS. More specifically, you ask the following questions:

Question No. 1: Should the Secretary of State, as administrator of the Securities Act, require the registration as agents of those persons in the employ of an employer who is registered with the United States Securities and Exchange Commission, either under the Securities Exchange Act of 1934, or in the case of broker-dealers who are members of the National Association of Security Dealers, Inc., and therefore not required to register under Chapter 90 NRS?

Question No. 2: Should the Secretary of State differentiate between an agent who is a registered representative of the National Association of Security Dealers, Inc., or a national stock exchange and those who are not?

Question No. 3: Should the Secretary of State as the duly designated administrator of Chapter 90 NRS have prepared a complete set of rules and regulations to be used in the administration of the act in addition to those which are on file pursuant to the Administrative Procedures Act?

Question No. 4: Does the Administrative Procedures Act make mandatory the promulgation of rules and regulations not specifically authorized by Chapter 90 NRS?

#### ANALYSIS

Applicable statutes are as follows:

1. "Agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities.

2. "Agent" does not include an individual who represents an issuer in effecting transactions with existing employees, partners or directors of the issuer, or any of its subsidiaries, if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state.

3. A partner, officer or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions is an agent only if he otherwise comes within this definition.

NRS 90.040 "Broker-dealer" defined. "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Broker-dealer" does not include:

1. An agent.
2. An issuer.
3. A broker or dealer registered pursuant to the provisions of the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.).
4. A person who is a member of the National Association of Securities Dealers, Inc.
5. A bank, savings institution or trust company.

6. A person who has no place of business in this state if:
- (a) He effects transactions exclusively with or through:
    - (1) The issuers of the securities involved in the transactions;
    - (2) Other broker-dealers;
    - (3) Banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940 (15 U.S.C. § 80a-1 et seq.), pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or
  - (b) During any period of 12 consecutive months he does not direct more than 15 offers to sell or buy into this state in any manner to persons other than those specified in paragraph (a) of this subsection 6, whether or not the offeror or any of the offerees is then present in this state.

[NRS 90.120](#) Registration requirements.

1. It is unlawful for any person to transact business in this state as a broker-dealer or agent unless he is registered under this chapter.
2. It is unlawful for any broker-dealer or issuer to employ an agent unless the agent is registered. The registration of an agent is not effective during any period when he is not associated with a particular broker-dealer registered under this chapter or a particular issuer. When an agent begins or terminates a connection with a broker-dealer or issuer, or begins or terminates those activities which make him an agent, the agent as well as the broker-dealer or issuer shall promptly notify the administrator.
3. Every registration expires 1 year from its effective date unless renewed.

Question No. 1: By the clear language of [NRS 90.120](#), it is unlawful for any person to transact business in this State as broker-dealer or as an agent unless he is registered under this chapter. Likewise, it is unlawful for any broker-dealer or issuer to employ an unregistered agent. Hence, all broker-dealers and agents must register unless there is a specific statutory exemption. The only statutes in which such an exemption could be found are [NRS 90.030](#) or [NRS 90.040](#) above set forth. [NRS 90.040](#) excludes from the definition of broker-dealer any person who is registered pursuant to the provisions of the Securities Exchange Act of 1934 or who is a registered member of the National Association of Securities Dealers, Inc. Hence, such a person need not register as a broker-dealer. The statute is silent, however, as to the employees of such person and therefore no statutory authority exempting these employees can be based on [NRS 90.040](#).

[NRS 90.030](#) defines agent as any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases of sales or securities. An employee whose employer is registered pursuant to the Securities Exchange Act of 1934 or who is a member of the National Association of Securities Dealers, Inc., is not employed by a broker-dealer and hence is not an agent within the meaning of [NRS 90.030](#).

Since the only persons required to register pursuant to Chapter 90 NRS are broker-dealers and agents, and since the employees referred to in the above question do not fall into either classification, they need not register.

Question No. 2: Nowhere in the applicable statutes is there any distinction made or referred to between agents who are members of the National Association of Securities Dealers, Inc., and those who are not. The statutory definition of agent in [NRS 90.030](#) is:

1. "Agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities.

The only qualifications of that definition are found in subsections 2 and 3, neither of which makes reference to their membership in the National Association of Securities Dealer, Inc. Hence, it is concluded by this office that all agents should be considered the same and no distinction should be made between those who are members of the National Association of Securities Dealers, Inc., and those who are not. [NRS 90.120](#), supra, requires in mandatory language the registration of all agents.



Questions Nos. 3 and 4: The Nevada Administrative Procedure Act, Chapter 362, 1965 Statutes of Nevada, Section 5, reads:

Unless otherwise provided by law, *each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions.* If adopted and filed in accordance with the provisions of this chapter, such regulations shall have the force of law and be enforced by all peace officers. In every instance, the power to adopt regulations to carry out a particular function is limited by the terms of the grant of authority under which the function was assigned. The courts shall take judicial notice of every regulation duly adopted and filed under the provisions of sections 7 and 8 of this act from the effective date of such regulation. (Italics supplied.)

By the clear language of the above statute, the Secretary of State, as administrator of Chapter 90 of NRS, must adopt only those regulations which are necessary for the proper execution of his duties. At this time, you inform us that the rules and regulations duly adopted and filed governing investigations and hearings by the Secretary of State and the administrator of Chapter 90 of NRS, together with the powers conferred by Chapter 90 of NRS, are sufficient for the execution of your duties. Hence, you have complied with the above statutory provision. If, in your opinion, additional rules and regulations are needed, Chapter 362, Statutes of Nevada 1965, does not make adoption of additional rules and regulations mandatory.

Section 6 of Chapter 362, Statutes of Nevada 1965, reads as follows:

1. In addition to other regulation-making requirements imposed by law, each agency shall:
  - (a) Adopt regulations of practice, setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency.
  - (b) Make available for public inspection all regulations adopted or used by the agency in the discharge of its functions.
  - (c) Make available for public inspection all final orders, decisions and opinions except those expressly made confidential or privileged by statute.
2. No agency regulation, rule, final order or decision shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as required in this section, except that this provision shall not be applicable in favor of any person or party who has actual knowledge thereof.

Subsection (a) above set forth is satisfied by the current rules and regulations. Those rules adequately cover the following areas:

- Procedure Governed
- Deviation from Rules
- Construction
- Severability
- Classification of Parties
- Investigative Hearings
- Notice
- Testimony Under Oath
- Order of Procedure
- Consolidation
- Stipulations
- Issuance of Subpoenas
- Depositions
- Failure to Testify
- Service

It is concluded by this office that additional rules and regulations are not needed.

#### CONCLUSION

Persons in the employ of a person who is registered with the United States Securities and Exchange commission or who is a member of the National Association of Securities Dealers, Inc., need not be registered pursuant to [NRS Chapter 90](#).

No distinction is to be made between “agents” who are registered representatives of the National Association of Securities Dealers, Inc., and those who are not.

The Secretary of State as administrator of Chapter 90 of NRS has discretion in determining the detail of rules and regulations to be adopted pursuant to the Nevada Administrative Procedures Act, Chapter 362, Statutes of Nevada 1965.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**333 Irrigation Districts; Election Resulting in a Tie—In the event of a tie vote resulting from the election held for the purpose of electing a director to the board of directors of an irrigation district which is located in three counties, the Legislature shall elect one of such persons receiving the highest and equal number of votes to fill the office pursuant to Chapter 286, Statutes of Nevada 1965.**

Carson City, April 28, 1966

Honorable Grant Davis, *District Attorney, Churchill County, Fallon, Nevada*

#### STATEMENTS OF FACTS

Dear Mr. Davis: You request from this office an opinion as to the proper course of action that should be taken by the Board of Directors of the Truckee-Carson Irrigation District following a recent election in which two nominees tied for the office of director. The election was held pursuant to [NRS 539.115](#) through [NRS 539.157](#).

#### ANALYSIS

Prior to April 3, 1965, the only laws in the State of Nevada relating to tie votes were found in Article 5, Section 4, of the constitution of the State of Nevada and [NRS 293.400](#). Neither of these provisions, as they then stood, supplied an answer to your question. On the aforementioned date, Chapter 286, Statutes of Nevada 1965, was approved and sheds some light on our present inquiry. It reads:

Section 1. [NRS 293.400](#) is hereby amended to read as follows:

293.400 1. If, after the completion of the canvass of the returns of any election, two or more persons receive an equal and the highest number of votes, the winner shall be determined as follows:

(a) For United States Senator, member of Congress, district or state office, the legislature shall, by joint vote of both houses, elect one of such

(b) For any office of a county, township, incorporated city, city organized under a special charter where such charter is silent as to determination of a tie vote, or district which is wholly located within one county, the county clerk shall summon the candidates who have received the tie votes to appear before him at a time and place designated by him and determine the tie by lot. If the tie vote is for the office of county clerk, the board of county commissioners shall perform the above duties.

2. The summons mentioned in this section shall in every case be mailed to the address of the candidate as it appears upon his affidavit of registration at least 5 days before the day fixed for the determination of the tie vote and shall contain the time and place where such determination will take place.

3. The right to a recount provided in [NRS 293.403](#) shall extend to both candidates in case of a tie.

Sec. 2. This act shall become effective upon passage and approval.

Section 1(b) defines specific procedure to be followed in the event of a tie vote in certain geographic areas. It must be noted, however, that the Truckee-Carson Irrigation District is located in three counties—Churchill, Lyon, and Storey. For this reason, we must resort to an interpretation of this statute. Preceding this, however, we shall see how sister states have resolved similar questions.

There are relatively few cases to be found in point but the rules enunciated by them are:

If there is a statutory remedy governing tie votes in elections, no alternative course may be taken, and if the statutory remedy is by “lot” this is proper. *Heitzman v. Voiers*, 159 S.W. 625 (Ky. 1913); *Omar v. West*, 188 So. 917 (Miss. 1939).

If there are no statutory remedies or if those available do not apply, a tie vote has been held the equivalent to no election and the incumbent of the office holds over until a successor is later elected by a majority. *Thomas v. Wagoner*, 175 P.2d 231 (Okla. 1946).

In *Brower v Gray*, 68 A.2d 553 (N.J. 1949), it was held that the Republican County Committee was free to nominate any person it so desired as a candidate for Township Committeeman after the primary election resulted in a tie.

A similar result was reached in *Nutwell v. Board of Supervisors of Elections*, 108 A.2d 149 (Md. 1954). It was there held that when the statute providing for the primary election made no provision for a runoff election between two candidates, and there was in fact a tie, the Democratic State Central Committee was to designate one candidate as Democratic nominee.

In *Immel v. Longley*, 338 P.2d 385 (Calif. 1959), it was held that if a tie resulted in the primary election, the names of both candidates are to appear on the ballot at the general election. This case was cited with approval and followed in *Kincaid v. Berg*, 339 P.2d 153 (Calif. 1959).

While the question was not clearly answered, the court in *Prather v. Ducker*, 82 So. 2d 897 (Miss. 1955), indicated that in the event of a tie resulting in a primary election, the two candidates receiving the highest popular vote for such office should have their names submitted as candidates in the second primary.

From an examination of these cases, we see that other states have authorized: *first*, the political party designate which of the tying candidates should be nominated; *second*, both candidates to submit to a second primary; *third*, decide the winner by lot; *fourth*, to allow the incumbent to remain in office; and *fifth*, allow the names of both candidates with equal number of votes to appear on the ballot at the general election.

With these rules and cases in mind, we shall now examine Chapter 286, Statutes of Nevada 1965. A preliminary rule with which we are bound is that provisions of statutes governing the conduct of elections, which have the purpose of securing a complete and enlightened vote or preventing fraud, when failure to comply is capable of influencing the outcome of the election, are mandatory. On the other hand, if a deviation from strict compliance cannot affect the result of the election, the statute is generally held to be directory. See: Sutherland, *Statutory Construction*, 3rd Ed., Vol. 3, Sec. 5820.

Clearly, Chapter 286, Statutes of Nevada 1965, affects the outcome of the election and, hence, the language contained therein is mandatory. This being the case, Section 1(a) must be control since we are here concerned with an election in a “district.” Section 1(b) cannot be applied because the “district” with which we are concerned is not “wholly located within one county.”

## CONCLUSION

The tie vote resulting in the election of a director of the Truckee-Carson Irrigation District must be resolved pursuant to Chapter 286, Statutes of Nevada 1965, Section 1(a).

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**334 City Ordinances; Applicability to State—A duly enacted ordinance providing for a mandatory service charge of \$2.50 for services rendered applies to the State, as it is a valid exercise of the municipality's police power.**

Carson City, April 29, 1966

Mr. W.O. Wright, *State Highway Engineer, Department of Highways, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Wright: The City of Wells passed an ordinance requiring, inter alia, that all property owners, tenants, occupants, and residents in the City of Wells pay a mandatory service charge for the collection and removal of garbage, and prohibited any such person from hauling or causing to be hauled garbage from such property. The Department of Highways maintains property known as the Wells Maintenance Yard, and the City of Wells has attempted to collect \$2.50 per month for the collection and removal of garbage pursuant to the ordinance. It has been the policy of the employees of the Wells Maintenance Yard to collect and dispose of their own garbage, depositing it at the Wells city dump.

#### QUESTION

Does the City of Wells have the power, through an ordinance, to collect a mandatory garbage fee from the State?

#### ANALYSIS

It is provided in 39 Am.Jur., Nuisances, Sec. 35, that filth, refuse, and garbage may constitute a nuisance unless disposed of in a suitable manner and that it is within the power of municipal authorities to enact ordinances providing for the collection and disposal of such matter in such a way as to prevent it from becoming a nuisance. It is held that this is a proper exercise of a municipality's police power. This same rule is enunciated in *McQuillin on Municipal Corporations*, 3rd Edition, Volume 7, Sec. 24.242, wherein it is stated:

Municipal collection and disposal of waste products or municipal supervision and regulation of private performance of these functions are within the police power.

The rationale enunciated by *McQuillin* is that such functions are essential to protect against health menaces, danger of fire, and offensive and unwholesome smells. A recent case standing for the same principle is *Matula v. Superior Court*, 3030 P.2d 871 (Calif. 19557). It has been held *Gomez v. City of Las Vegas*, 239 P.2d 984 (N.M. 1956), that a municipality may enact any measures it deems reasonable for the collection and removal of garbage. When enacting ordinances related to the collection of garbage, such ordinance must be reasonable and not oppressive to any class of individuals, Also see *Terenzio v. Devlin*, 65 A.2d 374 (Penn. 1949).

It has long been held that a municipality has the right to regulate the collection and disposal of garbage in many respects. It may designate which receptacles are proper. See *People v. Penas*, 115 N.Y.S.2d 441 (N.Y. 1952). It may prescribe the time and mode of collection and removal. See *Silver v. City of Los Angeles*, 31 Cal.Rptr. 545 (Calif. 1963). A municipal corporation may prohibit the throwing of garbage on public streets. See *Little v. Dist. of Col.*, 62 A.2d 874 (D.C. 1948). It has been held that individuals do not have a right to haul garbage through the public streets. See *Elliot v. City of Eugene*, 294 P. 358 (Ore. 1930). It has been held that garbage wagons

or carts must be water-tight with the word "garbage" written thereon. See *Ex parte Anderson*, 109 SW 193. (Texas 1908). It has been held, in fact, that a municipality not only has the right to collect and remove garbage, but has a public duty to do so in a manner that will best protect the health of the inhabitants. See *City of Grand Rapids v. DeVries*, 82 NW 269 (Mich. 1900); *Paul A. Carting Co. v. City of N.Y.*, 158 N.Y.S.2d 296 (N.Y. 1956); *Leroy Franz, Inc. v. City of Rochelle*, 124 N.Y.S.2d 525 (N.Y. 1953); and *Taylor v. City of Wahpeton*, 62 NW2d 31 (N.D. 1953).

It is the position of this office that the above cases make it abundantly clear that a municipal corporation has broad, if not unlimited, powers to enact ordinances for the collection and removal of garbage as an exercise of its police power.

It has been asserted that the collection of \$2.50 will be a tax imposed by a city upon the State. Such is not the case. Special charges may be made by a municipality commensurate to the cost of removal of garbage. See *City of Glendale v. Trandsen*, 308 P.2d 1 (Calif. 1957); *Cassidy v. City of Bowling Green*, 368 SW2d 318 (Ky. 1963); *City of Lake Charles v. Wallace*, 170 So. 2d 654 (La. 1965); and *Silver v. City of Los Angeles*, 31 Cal.Rptr. (Calif. 1963).

Such a charge is not a revenue measure, but it is a service charge for services rendered and therefore is not a tax.

We must also concern ourselves with the extraterritorial effect of an ordinance; that is: Is the ordinance enforceable on state property? It is a general rule that an ordinance passed as an exercise of police power has no extraterritorial effect. See McQuillin, *Municipal Corporations*, 3rd Edition, Volume 6, Sec. 24.57.

However, it is also held that in the interests of police and fire protection and the preservation of public health, ordinances may apply to the territory outside of the city limits, but within a specified distance. See *Schlientz v. City of North Platte*, 110 NW2d 58 (Nebr. 1961); *Murray v. City of Roanoke*, 64 SE2d 804 (Va. 1951); and 37 Am.Jur., *Municipal Corporations*, Section 122.

It has also been held that if there is no specific authority for extraterritorial effect of ordinances, that such may be implied, as it is necessary for a proper exercise of a municipality's police power and for the protection of the inhabitants. See *City of Pueblo v. Flanders*, 225 P.2d 832 (Colo. 1950) and *Town of Graysville v. Johnson*, 34 So. 2d 708 (Ala. 1948).

#### CONCLUSION

It is the considered opinion of this office that a municipality has complete power as an exercise of its police power to pass ordinances which are reasonable for the collection and disposal of garbage, refuse, and waste. It is also the opinion of this office that all property owners, occupants, and residents of property located within the city must abide by such ordinance, including occupants of state-owned property.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**335 Nevada Tax Commission; Assessment of Net Proceeds of Mines—The Nevada Tax Commission is not authorized to waive assessment on the first \$100 of net proceeds of a mine.**

Carson City, May 10, 1966

Mr. Robert L. Lawless, *Secretary, Nevada Tax Commission, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Lawless: During a meeting of the Nevada Tax Commission the question was presented as to whether or not such commission has the authority to establish a minimum

valuation for the net proceeds of a mine before any assessment upon the proceeds of that mine will be made. The minimum valuation suggested was \$100. The reason for this proposal is the fact that administration and collection costs exceed the amount of revenue collected as the result of an assessment if the net proceeds are less than \$100.

#### ANALYSIS

In determining if the Tax Commission has the authority to proceed as was suggested involves the application and interpretation of Chapter 362 NRS and more particularly [NRS 362.100](#) through and including [NRS 362.140](#). These statutes vest in the Tax Commission the power to investigate and determine the net proceeds of all operating mines and to assess the same, prescribe the form in which each such mine shall submit a statement showing the gross yield and claimed net proceeds, authorize the deduction of specific costs from the gross yield of a mine to arrive at the assessable net proceeds, and determine the rate of taxation within the established rate. It will be noted that these statutes are written in mandatory terms and do not specifically authorize the Tax Commission to exercise discretion in the matter of assessment. Nowhere in the statutes above cited is there any language which could be interpreted as allowing the Tax commission to fix an arbitrary minimum assessment. The rule relating to the construction to be given tax statutes is set forth in Sutherland, Statutory Construction, 3rd Edition, Vol. 3, Sec. 5819:

Statutory directions to taxing officials may frequently be directory for the common reason that they are merely directions to public officers for the purpose of securing prompt and orderly conduct of business and the failure to strictly follow them can be injurious to no one. However, statutes of this kind must be carefully considered for the reason that public or private rights may often be dependent upon them. Thus a grant of authority to a governmental subdivision to levy a tax for a public purpose is mandatory for the reason that the public has an interest in securing the benefit for which the statute provides. *Authority granted to tax certain property is mandatory, because of public interest in having taxes in general reduced.* (Italics supplied.)

The exact question with which we are here concerned has not been judicially determined in this State, but the statute above cited have been discussed by the Nevada Supreme Court in *Goldfield Consolidated Mining Co. v. State*, [60 Nev. 241](#) (1940). In the course of that opinion when the court was discussing taxation of mines it stated:

Further, they (respondents) call attention to the fact that taxation is the rule and tax exemption is the exception.

#### CONCLUSION

Because the statutes relating to the taxation of net proceeds of mines are mandatory, and there is no statute authorizing the Tax commission to waive collection of taxes upon the first \$100 of net proceeds, such a waiver is not authorized. If in fact the tax revenue received form the net proceeds of a mine when they are less than \$100 is insufficient to offset the costs of collecting the tax, then remedial legislation is suggested.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**336 State Board of Education—The State Board of Education may adjust quarterly apportionments at any time it deems such adjustment necessary.**

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

## STATEMENT OF FACTS

Dear Mr. Stetler: In a letter dated May 11, 1966, you call to our attention what may be considered by some as being an inconsistency between [NRS 387.120](#) and [NRS 387.125\(2\)\(d\)](#).  
[NRS 387.120](#) reads:

Quarterly statements of state controller concerning state funds available for apportionment to school district. *On or before August 1, November 1, February 1 and April 1* of each year, the state controller shall render to the superintendent of public instruction a statement of the moneys in the state treasury subject to distribution to the several school districts of the state as provided in [NRS 387.125](#).

[NRS 387.125\(2\)\(d\)](#) reads:

Apportionment shall be paid quarterly at the times provided in [NRS 387.120](#), each quarterly payment to consist of approximately one-fourth of the yearly apportionment as computed in paragraph (c) of this subsection. The first quarterly apportionment based on an estimated number of certified employees and pupils and succeeding quarterly apportionments shall be subject to adjustment *from time to time as the need therefor may appear*. A final adjustment shall be made in the August apportionment of the succeeding year by adding or subtracting the difference between the amount paid in the previous year and the amount computed on the actual average daily attendance of the highest 6 months of the previous year, so that for any school year the adjusted amount paid shall be equal to, but shall not exceed, the sum computed for the highest 6 months of average daily attendance. (Italics supplied.)

## QUESTION

Does a reading of these two statutes mean that adjustments can be made only at the time a quarterly apportionment is calculated for distribution to the school districts, or can the authorization for adjustments to be made also be interpreted to mean that supplementary apportionment may be made after the regular quarterly apportionment is paid?

## ANALYSIS

It is the opinion of this office that adjustments may be made at such times as they are needed and not only on the first day of August, November, February, and April.

The language in both statutes above set forth is directory only and not mandatory. (See the underscored portions.) The phrase, “from time to time” has been judicially interpreted in the past. Black’s Law Dictionary, 4th Edition, page 797: “From time to time” means “Occasionally, at intervals, now and then.”

*Upshur v. Mayor of City of Baltimore*, 51 A. 953, 955 (Md. 1902):

“To detail from time to time”—held not to be technical words but words of common speech and then held that the phrase meant “occasionally” or “at intervals, now and then.”

*Florey v. Meeker*, 240 P.2d 1177, 1190 (Ore. 1951) cited *Upshur v. Mayor*, supra, and then held:

We feel warranted in holding that the phrase, “from time to time” is not restrictive as to any particular period . . .

## CONCLUSION

Based upon the above, it is the conclusion of this office that the adjustments of quarterly apportionments may be made at the times deemed necessary by the State Board of Education.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**337 Education; County Board of School Trustees—The published list of expenditures of the board of trustees of a county school district may be in such form as prescribed by the board so long as such published list fully informs the public, and an item by item list is available for inspection in the office of the clerk of the board.**

Carson City, May 12, 1966

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

Dear Mr. Settler: You have inquired of this office as to the proper construction of [NRS 387.320](#)(1), which reads as follows:

1. During the quarter of the school year beginning January 1, 1956, and in each quarter school year thereafter, the clerk of the board of trustees of a county school district shall cause to be published a list of expenditures of the county school district made during the previous quarter school year. The published list of expediters shall be in the form prescribed by the state board of education.

You then ask the following questions:

1. Does the term “List of expenditures” mean each of the individual expenditures made by the county school district, during the time specified, is to be arranged as a component of the list?

2. Does the statement “The published list of expenditures shall be in the form prescribed by the state board of education” mean that the State Board of Education may determine the detail of the list of expenditures or does it refer merely to the physical form of the publication?

#### ANALYSIS

This office feels that the purpose of the statute is to inform the public and that if the list of expenditures does this, it does not matter if each individual item of expenditure is included, or whether a proper grouping of expenditures reveals the same result. The latitude given the Board of Education to prescribe the form of the list of expenditures was purposeful in that the State may be saved money in the cost of publication. The individual items of expenditure are always available for the inspection of the public in the office of the clerk of the board of trustees of a county school district, and the published list of expenditures gives proper notice which may lead individuals to inquire into such matters of public expense as they deem advisable.

#### CONCLUSION

It is, therefore, the opinion of this office that the published list of expenditures of the board of trustees of a county school district may be in such form as prescribed by the board so long as such published list fully informs the public, and an item by item list is available for inspection in the office of the clerk of the board.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**338 Legislature—Assembly Bill 19 is not within the purview of message of the Governor to Legislature on May 9, 1966, or to any subsequent submission during time they have been convened, and therefore contravenes Article V, Section 9 of the Constitution of Nevada.**

Carson City, May 18, 1966

Honorable B. Mahlon Brown, *Majority Floor Leader, Senate Chamber, Carson City, Nevada*

Dear Mr. Mahlon: You have inquired of this office as to the validity of Assembly Bill 19 introduced on May 17 by Assemblymen Knisley and Bastian. This bill purports to increase gambling taxes and the question therefore arises as to whether this is proper legislature under the message delivered to this special session of the Legislature on May 9, 1966.

#### ANALYSIS

Article V, Section 9, of the Constitution provides:

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

The Governor, in his message to the Legislature, stated:

I have been guided in my recommendations by the need of responsible management of financial resources of our State *under its present tax structure* and the need to limit requests to those which are of an emergency nature.

Nowhere in the Governor's message is there any directive to increase taxes in the field of gaming, or, for that matter, is there any language which would indicate a directive for increased taxes in any field at this special session. It is also to be noted that during this special session of the Legislature the Governor has not submitted to the members thereof any request in the field of taxation. In the case of *Wells v. Missouri Pacific Railroad Company*, 110 Mo. 286, 19 SW 530, it was held:

The constitutional provision that an extra session of the legislature shall have not power to act upon subjects other than those specially designated in the proclamation by which the session is called is mandatory, and a statute passed at such session upon a subject not thus specifically designated is not valid.

The State of Missouri Constitution provides:

The general assembly shall have no power, when convened in extra session by the governor, to act upon subjects other than those specially designated in the proclamation by which the session is called or recommended by special message to its consideration by the governor after it shall have been convened.

This language is approximately the same as that of the Nevada Constitution.

No reasonable interpretation of the language used by the Governor in his message to the special session of the Legislature would suggest any constitutional or executive command for legislation of the kind now under review.

Even should the Governor subsequently approve such a bill, it could not be accepted as a substitute for those earlier steps of the message to the Legislature or presentation to them during the time they were convened, which the fundamental law prescribes.

## CONCLUSION

It is therefore the opinion of this office that Assembly Bill 19 is not within the purview of the message of the Governor to the Legislature on May 9, 1966, or to any subsequent submission to them during the time they have been convened, and therefore contravenes Article V, Section 9 of the Constitution of Nevada.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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### **339 Child Care Establishments—The Welfare Division of the Department of Health and Welfare has the right to regulate child care establishments pursuant to Chapter 424 NRS.**

Carson City, June 3, 1966

Mr. Quentin L. Emery, *State Welfare Administrator, Department of Health and Welfare, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Emery: In a letter dated may 31, 1966, you have asked the following questions:

1. Is a “child care establishment” ([NRS 448.020](#)) included within the definition of a “child care facility” as set forth in [NRS 424.110](#)?
2. Does the Welfare Division of the Department of Health and Welfare have power to license and regulate the operation of “child care establishment”?

#### ANALYSIS

[NRS 448.020](#) defines a “child care establishment” as follows:

“Child care establishment,” as used in its chapter, shall include any children’s home, day nursery, kindergarten, nursery school, or similar establishment or place however designated, maintained or operated for the care of children, for compensation or hire.

The statutory function of such an establishment is to provide “board, laundry, lodging, teaching, necessary articles of apparel or clothing, and necessary medical, nursing or hospital services . . . together with incidental materials and supplies. See [NRS 488.010](#). Nowhere in the five statutes relating to child care establishments are there provisions for the licensing or regulations.

[NRS 424.110](#) defines “child care facilities” as “any home, private institution, or group furnishing care on a temporary or permanent basis during the day or overnight for compensation to five or more children under 16 years of age who are to related to each other.” The statutes immediately following provide for licensing, minimum standards of conduct, and the regulatory powers of the Welfare Division of the Department of health and Welfare. No mention is made in these statutes concerning the regulatory powers of the Welfare Division over child care establishments.

We do not think the mere absence of a statute giving the Welfare Division regulatory powers over child care establishments means no such power exists. The basic function of both the “establishments” and “facilities” above defined is to furnish care and comfort to children. This is a legitimate concern of the Welfare Division. [NRS 422.270](#)(1) vests in the director of the Department of Health and Welfare the power to administer, inter alia, “child welfare services.” Subsection 7 provides the administrator is to “establish reasonable minimum standards and regulations for foster homes . . .” Subsection 8 provides the administrator is to “provide services

and care to children, shall receive any child for placement, and shall provide for their care, directly or through agents.”

While these statutes do not specifically call for the licensing and regulation of “child care establishments” it is clear to this office that the legislature intended them to encompass all institutions furnishing child care, regardless of their names. Because children are incapable of caring for themselves, and considering the harm which is sometimes inflicted upon them, it is imperative that all establishments be licensed, regulated, and supervised according to Chapter 424 NRS.

This does not mean the Welfare Division has the right to regulate or supervise a purely educational function of either a child care facility or a child care establishment. The education of youth is properly vested in the state Department of Education. [NRS 385.010\(3\)](#) reads:

All administrative functions of the state board of education and of the superintendent of public instruction shall be exercised through the state department of education, and the department shall exercise all administrative functions to the state relating to supervisions, management and control of schools not conferred by law on some other agency.

#### CONCLUSION

Both child care facilities and child care establishments are within the regulatory powers of the Welfare Division (Chapter 424 NRS), save and except purely educational activities carried on by such facilities and establishments, which are to be supervised and regulated by the State Department of Education.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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### **340 Education; Chapter 30, Statutes of Nevada 1966—1966 State Aid to Schools Emergency Fund. Interpretation thereof.**

Carson City, June 3, 1966

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

Dear Mr. Stetler: You have pointed out the ambiguities of Chapter 30 NRS as amended by Assembly Bill No. 7 of the 1966 Special Session of the Nevada Legislature. This became Chapter 30, Statutes of Nevada 1966. You request a legal interpretation of this act.

#### ANALYSIS

Because of the brevity of the act, it is quoted here verbatim:

Section 1. 1. There is hereby created in the state treasury the 1966 state aid to schools emergency fund consisting of \$1,500,000, which sum is hereby appropriated to such fund from the general fund in the state treasury.

2. The moneys in the 1966 state aid to schools emergency fund shall be distributed to the school districts of this state by the state board of education during the fiscal year commencing July 1, 1966, and ending June 30, 1967, on the same percentage basis as each school district actually shared in the apportionments of the state distributive school fund made pursuant to law for the fiscal year commencing July 1, 1964, and ending June 30, 1965. Distributions under this subsection shall be payable at the same time as regular apportionments are paid from the state distributive school fund.

3. Except as otherwise provided in this subsection all moneys received by school districts pursuant to the provisions of this section shall be deposited in the respective county school district funds and expended for the uses specified in [NRS 387.205](#). In the Clark County School District the board of trustees shall, from such moneys:

(a) First open, operate and maintain the Southern Nevada Vocational Technical Education Center during the fiscal year ending June 30, 1967; and

(b) Expend any sum remaining of such moneys for the uses specified in [NRS 387.205](#).

4. The state board of education is authorized to make regulations necessary to carry out the provisions of this section.

Sec. 2. Notwithstanding any of the provisions of the Local Government Budget Act or any other law, each school district which receives additional funds pursuant to the provisions of section 1 of this act during the fiscal year ending June 30, 1967, may amend its budget for the fiscal year ending June 30, 1967, and the budget so amended may exceed the total amount of the budget initially filed for that fiscal year by the amount anticipated to be received pursuant to the provisions of section 1 of this act.

Sec. 3. This act shall become effective July 1, 1966.

It will be noted that in all counties except Clark the emergency funds provided for by the act are to be distributed by the State Board of Education in the same percentage basis as each school district actually shared in the State Distributive School Fund for the fiscal year commencing July 1, 1964, and ending June 30, 1965, and that the moneys are to be deposited in the respective county school district funds to be expended for the uses specified in [NRS 387.205](#).

[NRS 387.205](#) reads as follows:

Authorized uses of county school district funds.

1. Moneys on deposit in the county school district fund shall be used for:

(a) Maintenance and operation of public schools.

(b) Payment of premiums for Nevada industrial insurance.

(c) Rent of schoolhouses.

(d) Construction, furnishing or rental of teacherages, when approved by the superintendent of public instruction.

(e) Transportation of pupils, including the purchase of new buses.

(f) School lunch programs, if such expenditures do not curtail the established school program or make it necessary to shorten the school term, and each pupil furnished lunch whose parent or guardian is financially able so to do pays at least the actual cost of such lunch.

2. Money on deposit in the county school district fund, and available, may be used for:

(a) Purchase of sites for school facilities.

(b) Purchase of buildings for school use.

(c) Repair and construction of buildings for school use.

However, under subparagraph 3(a), Section 1 of the act, the Clark County Board of School Trustees must, from money made available to them by the act, first open, operate, and maintain the Southern Nevada Vocational Technical Education Center during the fiscal year ending June 30, 1967, and under 3(b) expend any sum remaining for the uses specified in [NRS 387.205](#), set forth above.

This imposes upon the school trustees of Clark County the duty of using Clark County's share of the moneys provided by the act for the opening, operating, and maintaining of the vocational technical education center during the fiscal year ending June 30, 1967, and not for the purposes provided for in [NRS 387.205](#) until after it has been determined by the Clark County Board of School Trustees, by budget or otherwise, how much will be required to open, operate, and maintain such school. After such determination, any sums remaining may be expended, as needed, for the uses specified in [NRS 387.205](#).

## CONCLUSION

It is therefore the opinion of this office, that moneys deposited in the Clark County School District funds may be used for the purposes set forth in [NRS 387.205](#), once it has been determined the amount of such funds as will be needed to pen, operate, and maintain the Southern Nevada Vocational Technical Education Center.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**341 Taxation—Whenever real or personal property, which for any reason is exempt from taxation, is leased, loaned, or otherwise made available to and used by a private party in connection with a business conducted for profit, the private party is subject to taxation, to the same extent as though he owned such property, even though such property is owned by the United States government or an agency thereof, under the authority of NRS Sections 361.157, 361.159, and 371.100.**

Carson City, June 22, 1966

Honorable William P. Beko, *District Attorney of Nye County, Nye County Courthouse, Tonopah, Nevada 89049*

#### STATEMENT OF FACTS

Dear Mr. Beko: You have asked concerning the taxability of certain real and personal property pursuant to NRS Sections 361.157, 361.159, and 371.100. Those three sections read as follows:

361.157—Exempt real estate subject to taxation when leased to, used in business conducted for profit; exceptions.

1. When any real estate which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association, partnership or corporation in connection with a business conducted for profit, it shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such real estate. This section does not apply to:

(a) Property located upon or within the limits of a public airport, park, market, fairground or upon similar property which is available to the use of the general public; or

(b) Federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed; or

(c) Property of any state-supported educational institution; or

(d) Property leased or otherwise made available to and used by a private individual, association, corporation, municipal corporation, quasi-municipal corporation or a political subdivision under the provisions of the Taylor Grazing Act or by the United States Forest Service, the Bureau of Reclamation of the United States Department of the Interior or other federal agency.

2. Taxes shall be assessed to such lessees or users of real estate and collected in the same manner as taxes assessed to owners of real estate, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the county for which such taxes were assessed and if unpaid shall be recoverable by the county in the proper court of such county.

361.159—Exempt personal property subject to taxation when leased to, used in business conducted for profit.

1. Personal property exempt from taxation which is leased, loaned or otherwise made available to and used by a private individual, association, or corporation in connection with a

business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property.

2. Taxes shall be assessed to such lessees or users of such personal property and collected in the same manner as taxes assessed to owners of personal property, except that such taxes shall not become a lien against such personal property. When due, such taxes constitute a debt due from the lessee or user to the county for which such taxes were assessed and if unpaid shall be recovered by the county in the proper court of such county.

371.100—Vehicles owned by federal, state and local governments exempt from privilege tax; taxation of vehicles leased, loaned to private enterprise.

1. The privilege tax imposed by this chapter does not apply to vehicles owned by the United States, the State of Nevada, any political subdivision of the State of Nevada, or any county, municipal corporation, city, unincorporated town or school district in the State of Nevada.

2. Vehicles exempted from the privilege tax by this section which are leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit are subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such vehicle.

## QUESTIONS

You have submitted the following questions:

1. Does the exemption provided by [NRS 361.157](#)(d) apply to [NRS 361.159](#)?
2. If your answer to the question above is in the negative, is it constitutional?
3. Is the tax imposed by [NRS 361.159](#) considered a personal property tax or a privilege tax?
4. Is the tax imposed by [NRS 371.100](#)(2) a privilege or personal property tax?

It is further requested that the foregoing be clarified with respect to each of the following categories:

1. Construction equipment not used on the public highways of the State.
2. Motor vehicles used solely within the Nevada Test Site, on roads and highways constructed solely by federal funds, access to which is not open to the public except by express permission of the Atomic Energy Commission.
3. Motor vehicles operated both within and without the Nevada Test Site.

Real Property: NRS Sections 361.157 and 361.159, as well as 371.100, were undoubtedly patterned after a Michigan statute enacted in 1950 (6 Mich. Stat. Anno., 1950, [1957 supp.] sections 7.7(5) and (6)).

We will answer the questions in the sequence in which they are asked.

1. [NRS 361.157](#) provides for the taxation of real estate, with some exceptions, when such real estate is for “*any reason* exempt from taxation and is leased, loaned or otherwise made available to and used by a private individual, association, partnership or corporation *in connection with a business for profit . . .*” (Italics supplied.)

There are four separate subparagraphs to Section 1 of said Section 361.157. They are set forth on page 1.

An analysis and study of subparagraphs (a), (b), and (c) demonstrate that we are not concerned with the exemptions therein contained. Subsection (d) presents a little different problem.

That subsection, in substance, provides that [NRS 361.157](#) shall not apply to “property leased or otherwise made available to and used by a private individual, association, corporation or a political subdivision under the provisions of the *Taylor Grazing Act*, or by the *United States Forest Service*, the *Bureau of Reclamation* of the United States Department of the Interior, or *other federal agency*.” (Italics supplied.)

In all legal opinions which interpret statutes and attempt to explain the meaning and legal effect thereof, the cardinal rule which is, or should be, followed is the determination of legislative intent; that is to say, what did the legislature intend to do by the enactment of the statute under consideration; what motivated them in the enactment of the statute or a section thereof. The search is not always successful, for the legislative intent may be obscure; often, so

obscure as to require resort to extrinsic aids. That means that in determining legislative intent, the court or writer will consider sources outside the printed act.

However, we believe resort to extrinsic sources to determine legislative intent which motivated the exemptions found in subsection (d) is not necessary.

It is clear from the wording of said subsection (d) that there are three classes of real property exempt from taxation under the provisions of [NRS 361.157](#). They are:

1. Property that is subject to the provisions of the Taylor Grazing Act;
2. Property under the administration and control of the United States Forest Service; and
3. Property under the control and administration of the Bureau of Reclamation of the United States Department of the Interior.

The sole question remaining as to subsection (d) is the meaning if any, of the last four words of the section, namely: “*or other federal agency.*”

It is an accepted canon of statutory construction that in case the legislative intent is not clear, the meaning of doubtful words may be determined by reference to their association with other words or phrases. This is called the maxim of “*noscitur a sociis*,” which is legal Latin meaning: “It is known by its associates,” or more generally, that the meaning of the doubtful word or words is or may be known from the accompanying words.

One court defined the doctrine as “general and specific words are associated with the take color from each other, restricting general words to a sense analogous to the specific words.”

A variation of the broader doctrine of “*noscitur a sociis*” is that of “*ejusdem generis*,” which means “of the same kind, class or nature.” The courts often state the rule as follows:

Where general words follow a specific enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding words. *United States v. Stever*, 222 U.S. 167; *Edgecomb v. His Creditors*, [19 Nev. 149](#).

The rule is justified on the ground that “had the legislature intended the general words to be used in their unrestricted sense, it would have made no mention of the particular words, but would have used ‘only one compendious’ expression.”

*Rex v. Wallis*, 5 T.R. 375, 101 Eng. Repr. 210 (1793).

*In re Bush Terminal Co.*, 93 F.2d 659.

In the latter case the statute read: “Oil, gas, gasoline *and other combustibles*” (Italics supplied.) The court in applying the rule or doctrine of “*ejusdem generis*,” said:

The rule of *ejusdem generis* applies to such a statute. This rule is based on the theory that, if the legislature had intended words to be used in their unrestricted sense, it would have made no mention of the particular classes. The words “other” or “any other” following an enumeration of particular classes ought to be read as “other such like” and to include only those of like kind or character. (Citing several cases.)

We believe the doctrine of *ejusdem generis* must be applied in the instant case so as to limit the meaning of the words “or other federal agency.” A review of the legislative history leading up to the passage of [NRS 361.157](#) shows that the Assembly Bill (No. 185) which when enacted became [NRS 361.157](#), was amended five times before final passage. It is also known that the amendments to subsection (d) were sponsored by groups interested in the livestock industry. A consideration of the three classes of lands specifically exempted demonstrates that on all three such classes of lands, livestock is grazed. It becomes apparent then that the motivating desire which caused the Legislature to exempt those three classes of lands was the intent to prevent the possibility of the Nevada livestock industry, already overburdened with production costs, from being further burdened by taxes for the right to graze their livestock on governmentally owned land.

It is not only proper or correct, but mandatory, then, that in construing the last four words of subsection (d), “or other federal agency,” to limit the meaning thereof as if the general words

read: “Or other federal agency controlling or administering real property upon which livestock may be grazed.”

It is therefore the considered opinion of this office that the general words “or other federal agency,” of themselves, do not exempt real property controlled or administered by the Atomic Energy Commission from taxation under the provisions of [NRS 361.157](#).

It is imperative to note that such real property is only subject to taxation when used by “a private individual, association, partnership or corporation in connection with a business conducted for profit.”

It should also be noted that, although Section 1 of [NRS 361.157](#) provides that the real estate is “subject to taxation,” the tax is really levied upon the contractor using such real property and the amount of the tax measured or determined by the value of such realty. Further, the tax, if unpaid, cannot become a lien upon the said realty, but constitutes a debt due from the contractor to the taxing authority.

Personal Property: Turning now to a consideration of [NRS 361.159](#), it is noted that there is no exemption comparable to the provisions of subsection (d) of [NRS 361.157](#). Furthermore, the exemption in [NRS 361.157](#)(d) by no means of construction can be held to apply to the provisions of [NRS 361.159](#).

We are therefore only concerned with the express provisions of [NRS 361.159](#).

Section 1, to repeat, reads:

Personal property exempt from taxation which is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property.

It is patently clear, therefore, that under the provisions of 361.159, subsection 1, personal property exempt from taxation for any reason which is “leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for a profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property.

Again, it must be noted that the tax is assessed to the user of and measured by the value of the property used, the personality, and, if unpaid, does not become a lien on the personality, but constitutes a debt due from the user to the taxing authority. AS to the constitutionality of the statutes, we will discuss that question just prior to the conclusion of this opinion.

Privilege Tax on Automobiles: [NRS 371.100](#) provides for a privilege tax on vehicles otherwise exempt which are leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit.

Section 2, which authorizes the tax, is preceded by Section 1, which provides that:

The privilege tax imposed by this chapter does not apply to vehicles owned by the United States, the State of Nevada, any political subdivision of the State of Nevada, or any county, municipal corporation, city, unincorporated town or school district in the State of Nevada.

It is important to note the sequence of the provisions of this NRS section. Section 1 sets forth the exemptions by providing that the tax imposed on vehicles “does not apply to vehicles owned by the United States, the State of Nevada, or any political subdivision of the State of Nevada, or any county, municipal corporation, city, unincorporated town or school district in the State of Nevada.”

Then follows Section 2, which provides as follows:

Vehicles exempted from the privilege tax by this section which are leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit are subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such vehicle.



It must be noted that the exemptions are in the first section. Section 2 then begins: Vehicles exempted from the privilege tax by this section which are leased, loaned, or otherwise made available to and used by individuals or enumerated business entities “in connection with a business conducted for profit are subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such vehicle.”

It appears with compelling force that what the Legislature intended to say was in effect: “Notwithstanding the exemptions on the basis of ownership in Section 1, if any of such owners lease, lend or otherwise make available their vehicles to users in business conducted for profit, then the tax applies in the same amount and to the same extent as though the lessee or user were the owner of such vehicle.

This construction seems inescapable.

Constitutionality: In connection with this subhead, it is well to remember, and it often is not, that the federal constitution *is a grant of powers*. If authority to do a certain function cannot be found within the federal constitution, that certain act may not be done, nor that certain function performed.

On the other hand, a state constitution is a limitation of powers; therefore, if the act to be done or the function to be performed is not prohibited by the state constitution, the act may be done and the function performed.

See *Union High School Dist. No. 1 v. Taxpayers*, etc. (Wash.), 172 P.2d 591; *Harbert v. Harrison County Court*, (W.Va.), 39 S.E.2d 177.

However, state statutes must be tested not only by the state constitutional provisions, but also measured by the federal constitutions to determine if such statutes are in violation of any provision of the federal constitution, or congressional act enacted pursuant thereto. In such a process of measurement, the United States Supreme Court is the supreme arbiter. We are extremely fortunate in the instant matter to have decisions of the United States Supreme Court squarely holding that the three tax acts above discussed are clearly constitutional.

These cases are: *United States et al. v. Boyd*, 378 U.S. 39; *United States v. Muskegon*, 355 U.S. 484; and *United States v. Detroit*, 355 U.S. 466.

In *United States v. Detroit*, the court was concerned with a Michigan statute, very similar to [NRS 361.157](#). In that case, the United States was the owner of an industrial plant in Detroit, Michigan. It leased a portion of that plant to Borg-Warner Corporation for a stipulated annual rental, for use in the latter’s private manufacturing business conducted for a profit. The lease provided that Borg-Warner could deduct from the agreed rental any taxes paid by it under the act mentioned, or under similar state statutes enacted during the term of the lease, but the government reserved the right to contest the validity of such taxes.

A tax was assessed against Borg-Warner, pursuant to the tax statute, based upon the value of the leased property computed at the rate used for calculating real property taxes. Borg-Warner paid a portion of the tax under protest, and thereafter the United States and Borg-Warner sued in the state court for a refund of the taxes paid. The suit was based upon the premise that the tax was repugnant to the United States Constitution because it imposed a levy upon government property and discriminated against those using such property. The lower court upheld the tax and the Michigan Supreme Court affirmed (77 N.W.2d 79), the U.S. Supreme Court took appellate jurisdiction.

The U.S. Supreme Court affirmed, and in doing so, said: (2 L.Ed. p. 427)

A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582, 583, 81 L.Ed. 814, 818, 819 S.Ct. 524. In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold. Public Act 189 was apparently designed to equalize the annual tax burden carried by private business using exempt property with that of similar businesses using nonexempt property. Other things being the same, it seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same

interval. In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for Michigan to compute it tax by the value of the property used.

A number of decisions by this Court support this conclusion. For example in *Curry v. United States*, 314 U.S. 14, 86 L.Ed. 9, 62 S.Ct. 48, we upheld unanimously a state use tax on a contractor who was using government-owned materials although the tax was based on the full value of those materials. Similarly in *Esso Standard Oil Co. v. Evans*, 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800, the Court held valid a state tax on the privilege of storing gasoline even though part of the tax which was challenged was measured by the number of gallons of government-owned gasoline stored with the taxpayer. While it is true that the tax here is measured by the value of government property instead of by its quantity as in *Esso* such technical difference has no meaningful significance in determining whether the Constitution prohibits this tax. Still other cases further confirm the proposition that it may be permissible for a State to measure a tax imposed on a valid subject to state taxation by taking into account government property which is itself tax-exempt. See e.g. *Home Ins. Co. v. New York*, 134 U.S. 594, 33 L.Ed. 1025, 10 S.Ct. 593; *Plummer v. Coler*, 178 U.S. 115, 44 L.Ed. 998, 20 S.Ct. 829; *Educational Films Corp. v. Ward*, 282 U.S. 379, 75 L.Ed. 400, 51 S.Ct. 700, 71 ARL 1226; *Pacific Co. v. Johnson*, 285 U.S. 480, 489, 490, 76 L.Ed. 893, 896, 897, 52 S.Ct. 424.

In concluding the opinion, the court said:

Today the United States does business with a vast number of private parties. In this Court the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law. Cf. *Penn-Diaries v. Mile Control Commission*, 318 U.S. 261, 270, 87 L.Ed. 748, 753, 63 S.Ct. 617. Of course this is not to say that Congress, acting within the proper scope of its power, cannot confer immunity by statute where it does not exist constitutionally. Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve. As the Government points out Congress has already extensively legislated in this area by permitting States to tax what would have otherwise been immune. To hold that the tax imposed here on a private business violates the Government's constitutional tax immunity would improperly impair the taxing power of the State.

*U.S. v. Muskegon* is a companion case to *Detroit*. There are only two factual differences between the two cases. In *Muskegon* the taxpayer was using the property of the government under a permit and not a formal lease, and the taxpayer was paying no rent. The taxpayer refused to pay the tax and the state authorities brought suit to recover the amount assessed. The United States intervened, contending the tax was invalid because it imposed a levy upon government property. As in *Detroit*, the trial court sustained the tax and the Michigan Supreme Court affirmed. On appeal to the U.S. Supreme Court, that court also affirmed.

The court in its decision (2 L.Ed. p. 438) said:

There are only two factual differences between this case and No. 26. First, *Continental* is not using a property under a formal lease but under a "permit"; second, *Continental* is using the property in the performance of its contracts with the Government. We do not believe that either fact compels a different result.

Constitutional immunity from state taxation does not rest on such insubstantial formalities as whether the party using government property is formally designated a "lessee." Otherwise immunity could be conferred by a simple stroke of the draftsman's pen. The vital thing under the Michigan statute and we think permissibly so, is that *Continental* was using the property in connection with its own commercial activities. The case might well be different if the Government had reserved such control over the activities and financial gain of *Continental* that it could properly be called a "servant" of the United States in agency terms. But here *Continental* was not so assimilated by the Government as to become one of its constituent parts. It was free

within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them.

If under certain conditions the State can tax Continental for use of government property in connection with its business conducted for profit—and as set forth in No. 26 we are of the opinion that it can—the fact that Continental was carrying out a contract with the Government does not materially alter the case. Continental was still acting as a private enterprise selling goods to the United States. In a certain loose way it might be called an “instrumentality” of the United States, but no more so than any other private party supplying goods for his own gain to the Government. In a number of cases this Court has upheld state taxes on the activities of contractors performing services for the United States even though they were closely supervised in performing these functions by the Government. *See e.g. James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L.Ed. 155, 58 S.Ct. 208, 114 ALR 318; *Alabama v. King & Boozer*, 314 U.S. 1, 86 L.Ed. 3, 62 S.Ct. 43, 140 ARL 615; *Curry v. United States*, 314 U.S. 14, 86 L.Ed. 9, 62 S.Ct. 48, *Wilson v. Cook*, 327 U.S. 474, 90 L.Ed. 793, 66 St.Ct. 633.

The Curry case seems squarely in point. There a contractor acting pursuant to a cost-plus contract with the United States purchased certain materials. These materials were shipped to a government construction project where they were used by the contractor in performance of the contract. By agreement title to the materials passed to the Government as soon as they were shipped by the vendor. The State imposed a tax on the contractor, based on the value of the materials, for using them after they had been delivered to the work site. This Court unanimously upheld that state use tax, although it clearly amounted to a tax on the use of government property in performing a government contract.

The case of *U.S. v. Boyd*, 378 U.S. 39, decided by the Supreme Court on June 15, 1964, is clear authority for the constitutional validity of the NRS sections we are here concerned with. That decision settles beyond any doubt the question of whether or not AEC contractors are liable under state taxation statutes in the amount of the value of the materials used, even though these materials are owned by the United States.

That case squarely holds:

1. that the use of government-owned property by a federal contractor, in connection with commercial activities, for his profit or gain, is a separate taxable activity, even if the tax is finally borne by the United States (pages 44-48).

(a) It is not material whether the contractor is making products for sale to the government, or is furnishing services (page 46).

(b) Contractors operating for profit pursuant to contracts with the United States, or agencies thereof, do not become instrumentalities of the United States and thus partake of governmental immunity (pages 47-48).

2. Although payment of use taxes will increase the cost of the atomic energy program, Congress was aware of the problem when it repealed Section 9 of the Atomic Energy Act in 1953 (pages 49-51).

In concluding its opinion, the court, beginning on page 49, said:

It is undoubtedly true, as the Government points out, that subjection of government property used by AEC Contractors to state use taxes will result in a substantial future tax liability. But this result was brought to the attention of Congress in the debates on the repeal of § 9(b), which exempted the activities of AEC contractors from state taxation; indeed the AEC argued that the repeal would substantially increase the cost of the atomic energy program by subjecting AEC Contractors to state “sales and use taxes” and “business and occupation” taxes. Nonetheless, Congress, well aware of the principle that “constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly on the United States,” S. Rep. No. 694, 83d Cong., 1st Sess., 2, repealed the statutory exemption for the declared purpose of placing AEC Contractors in the same position as all other government contractors. Act of August 13, 1953, c. 432, 67 Stat. 575. The principles laid down in *King & Boozer*, *Curry*, *Esso* and *Muskegon*, we think, strike a proper judicial accommodation between

the interests of the States' power to tax and the concerns of the Nation, they are workable, and we adhere to them. If they unduly intrude upon the business of the Nation, it is for Congress, in the valid exercise of its proper powers, not this Court, to make the desirable adjustment.

In the case of *Curry v. U.S.*, 314 U.S. 14, at page 18, the court, in a unanimous opinion said:

As pointed out in the opinion of the King and Boozer case, *by concession of the government and on authority, the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon government contractors* because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the government. (Italics supplied.)

In view of these clear and square holdings of the United States Supreme Court, it ill becomes federal functionaries to contest the validity of the tax statutes here under consideration.

In concluding this analysis it is well to point out that the federal government owns 86.2 percent of all the land in Nevada. (See 1965 Annual Report of General Services Administration.) Thus, it is readily seen that the State of Nevada and its several taxing districts have only 13.8 percent of all Nevada land on which to levy ad valorem taxation for the support of all governmental functions, including education. Small wonder the schools have to repeatedly seek financial aid from the state general fund.

#### CONCLUSION

Because of the number of legal questions posed, it appears wise to set forth each question followed by the answer thereto. We therefore answer your questions as follows:

1. Does the exemption provided by [NRS 361.157\(d\)](#) apply to [NRS 361.159](#)?

Answer: No, although it is our belief, as above stated, that the exemption in subsection (d) of 361.157 applies only to land controlled or administered by the three federal agencies specifically mentioned therein.

2. If your answer to the question above is in the negative, is it constitutional?

Answer: Yes.

3. Is the tax imposed by [NRS 361.159](#) considered personal property tax or privilege tax?

Answer: Privilege tax.

4. Is the tax imposed by [NRS 371.100\(2\)](#) a privilege or personal property tax?

Answer: Privilege tax.

We answer your last three questions as follows:

1. Construction equipment not used on the public highways of this state.

Answer: Taxable under [NRS 361.159](#).

2. Motor vehicles used solely within the Nevada Test Site, on roads and highways constructed solely by federal funds, access to which is not open to the public except by express permission of the Atomic Energy Commission.

Answer: Taxable if used by a private contractor in connection with a commercial venture for profit, even though governmentally owned.

3. Motor vehicles operated both within and without the Nevada test Site.

Answer: Taxable if used by a private contractor in connection with a commercial venture for profit, even though governmentally owned.

The courts appear to make no differentiation between (1) fixed price or lump sum contractors; or (2) cost-plus-fixed-fee, advanced fund contractors.

*Please note*, if the contractor agrees to do work without any fee, or for only a nominal fee, plus his cost, he is not taxable. *U.S. v. Livingston*, 179 Fed.Sup.9—affirmed per curiam 348 U.S. 281.

Contractors which are subdivisions or agencies of state governments are not taxable. To come within the provisions of the statutes in question; there must be a *private contractor* carrying on a commercial venture *for a profit*.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

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**342 Public Utilities—All public utilities operating trucks outside a 5-mile radius of the city must motor carrier license their trucks under Chapter 706 of NRS. All public utilities except motor vehicle carriers are subject to the mill tax in Chapter 704.**

Carson City, June 24, 1966

Mr. Louis P. Spitz, *Director, Department of Motor Vehicles, Carson City, Nevada*

Dear Mr. Spitz: On September 10, 1963, this office issued Opinion No. 69. It concluded that “trucks used to advance the purpose of any private commercial enterprise must be licensed under Chapter 706 of NRS.” The authority for the conclusion was found in [NRS 706.520](#) which requires every *private carrier* to be so licensed.

Subsequent to Opinion No. 69, several public utility companies recently informed you that they wished clarification as to whether the tax in Chapter 706 was applicable to them. These utility companies have stated that they feel that NRS Section 704.033 and NRS Section 706.100 are in conflict. They have stated that since they are subject to the jurisdiction of the Public Service Commission and the payment of the mill tax as set forth in subsections (1) and (2) of [NRS 704.033](#), they are to subject to the private motor carrier of property licensing provisions as set forth in Chapter 706, and that they are not included within the definition of a private motor carrier of property as set forth in NRS Section 706.100.

#### ANALYSIS

[NRS 706.100](#) defines private motor carrier of property as “. . . any *person* engaged in the transportation by motor vehicle of property sold, or to be sold, or used by him in the furtherance of any private commercial enterprise.” [NRS 706.090](#) includes a corporation in the definition of person. A public utility may act as a private commercial enterprise (73 Corpus Juris Secundum at page 1003 opts for this position). Cited is *City of Phoenix v. Kosum*, 54 Ariz. 470, 97 P.2d 210. The opinion at page 213 stated “. . . the fact that a business or enterprise is, generally speaking, a public utility does not make every service performed or rendered by those owning or operating it a public service, with its consequent duties and burdens, but they may act in a private capacity as distinguished from their public capacity, and in so doing are subject to the same rules as any other private person so doing.”

Cited with approval in the Phoenix case was *Killam v. Norfolk & W. R. Co.*, 122 Va. 541, 96 S.S. 506. It was stated on page 510 of this opinion “that a public service corporation may act in a private capacity, as distinguished from its public capacity, is now well settled. *Townsend v. Norfolk Ry. & L. Co.*, 105 Va. 22, 52 S.E. 970, 4 L.R.A. (N.S.) 87, 115 Am. St. Rep 842, 8 Ann. Cas. 558; *Terrell v. C. & O. Ry. Co.*, 110 Va. 340, 348, 66 S.E. 55, 32 L.R.A. (N.S.) 371; *Southern Ry. Co. v. McMenamin*, 13 Va. 121, 73 S.E. 980.”

The case further stated on page 510 that “. . . If such works were not constructed for the very public duties for which the public service corporation was incorporated, but as incidental, adjunctive, or appurtenant thereto merely, however necessary to the performance of the former duties, their operation will be considered and classed as an operation by the corporation in its *privately capacity*.” (Italics supplied.)

This authority then makes it clear that a public utility may act in a private capacity, that is as a private commercial enterprise. Thus the operation of trucks by the public utilities subjects the utilities to a tax under Chapter 706 of NRS.

It is also the opinion of this office that NRS Section 704.033 and NRS Section 706.100 are not in conflict. [NRS 704.033](#) subsection (1) only exempts those public utilities from payment of the mill tax which are classified as such because their primary business is as motor carriers, such as common carriers of property and passengers. This statute does not exempt from the private carrier licensing requirements of Chapter 706 of the Nevada Revised Statutes all vehicles owned and operated by utilities subject to payment of the mill tax as has been indicated above. NRS Section 704.033 only purports to exempt from the mill tax those public utility motor carriers whose primary business is the carrying of property or passengers. That section says nothing about exempting other public utilities from the private carrier licensing requirement of Chapter 706 of NRS.

The tax upon the operation of vehicles does not amount to double taxation of the utilities subject to the mill tax on their gross operating revenue. The use of the highways of this State constitutes a separate privilege than that of the conduct of the business.

Chapter 706 does not define the words “motor vehicle carrier” but other jurisdictions have done so. Their definitions are authority for the strict limitation of the exemption in Chapter 424. In *Brooks Transp. Co. v. City of Lynchburg*, 185 Va. 135, 37 S.E.2d 857, at page 860 the court upheld the following definition: Motor vehicle carrier is “every person, firm, corporation, association, their lessees, trustees or receivers, owning, controlling, operating or managing any common carrier by motor vehicle or restricted common carrier by motor vehicle and operating as such common carrier or restricted common carrier by virtue of authority from the Interstate Commerce Commission or the State Corporation Commission, or both, and using the streets of the city in the business of transporting persons or property for compensation by motor vehicle.” And in *Burbridge v. P.U.C.*, 91 Colo. 134, 12 P.2d, at page 1116, the court stated “the term ‘motor vehicle carrier’ when used in this Act (Chapter 134, section 1(d) p. 499 Session Laws of 1927) means and includes every corporation, person, firm, association or persons, lessee, trustee, receiver or trustee appointed by any court, owning, controlling, operating or managing any motor vehicle used in serving the public in the business of transporting persons or property for compensation over any public highway between fixed points or over established routes, or otherwise, who indiscriminately accept, discharge and lay down either passengers, freight or express, or who hold themselves out for such purposes by advertising or otherwise.”

#### CONCLUSIONS

A public utility must motor carrier license trucks under Chapter 706 of NRS as private carriers when operated on public highways outside a 5-mile radius of town. The rationale is that a public utility may act in a private capacity, that is, as a private commercial enterprise.

A public utility not specifically a “motor vehicle carrier” as defined herein is also subject to the mill tax in [NRS 704.033](#). As was stated in Opinion No. 69, referred to above, “any ambiguity in the legislation has to be resolved against an exemption.”

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By: Michael E. Fondi, *Deputy Attorney General*

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**343 University of Nevada; Tuition for Married Students—Marriage does not change the resident or nonresident status of University of Nevada students for tuition purposes.**

Carson City, July 1, 1966

Mr. N. Edd Miller, *Chancellor, University of Nevada, Reno, Nevada*

## STATEMENT OF FACTS

Dear Mr. Miller: By letter dated June 20, 1966, you presented certain questions to this office concerning the admission of a nonresident student into the University of Nevada and the possibility of that student subsequently being considered as a bona fide resident of the State of Nevada for tuition purposes.

The student with which we are here concerned first arrived in the State of Nevada on July 19, 1965, and has continuously since that date resided within this State. The student was admitted to the University of Nevada on August 5, 1965, as a nonresident student and paid nonresident tuition fees, in addition to other enrollment fees and charges. The student was married at the time of registration and gave an off-campus permanent address located in the State of Nevada. Her husband is a resident of Nevada and holds a position which could be considered permanent. The following semester (spring of 1966), the student registered at the University of Nevada and on February 15, 1966, submitted a form requesting she need not pay nonresident tuition fees. At this time, the student had resided in the State of Nevada for 6 months and 27 days. Her application for resident status was denied. On March 9, 1966, the student, through her husband, filed a letter of appeal with the Registrar of the University of Nevada which in essence claims that his wife is entitled to be considered as a resident of the State of Nevada for tuition purposes.

The statutes with which we are here concerned are:

[NRS 396.540](#):

1. For the purposes of this section:

(a) "Bona fide resident" shall be construed in accordance with the provisions of [NRS 10.020](#). The qualification "bona fide" is intended to assure that the residence is genuine and established for purposes other than the avoidance of tuition.

(b) "Tuition charge" means a charge assessed against students who are not residents of Nevada and which is in addition to registration fees or other fees assessed against students who are residents of Nevada.

2. The board of regents of the University of Nevada may fix a tuition charge for students at the university and at Nevada Southern University, but tuition shall be free to:

(a) *All students whose families are bona fide residents of the State of Nevada*; and

(b) All students whose families reside outside of the State of Nevada, providing such students have themselves been bona fide residents of the State of Nevada *for at last 6 months prior to their matriculation at the university*; and

(c) All public school teachers who are employed full time by school districts in the State of Nevada; and

(d) All full-time teachers in private schools in the State of Nevada whose curricula meet the requirements of [NRS 394.130](#).

3. In its discretion, the board of regents may grant tuitions free each university semester to worthwhile and deserving students from other states and foreign countries, in number not to exceed a number equal to 3 percent of the total matriculated enrollment of students for the last preceding fall semester. (Italics supplied.)

[NRS 10.020](#):

The legal residence of a person with reference to his right of naturalization, right to maintain or defend any suit at law or in equity, or any other right dependent on residence, is that place where he shall have been actually, physically and corporeally present within the state or county, as the case may be, during all the period for which residence is claimed by him. Should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay and continue his residence, the time of such absence shall not be considered in determining the fact of such residence.

The University of Nevada has interpreted these statutes and has affixed such interpretation to the Application for Resident Fees filled out by the student. In part, they read:

A legal resident is one who has continuously resided in the State of Nevada for at least six months immediately preceding the first academic day of a regular semester for which the student is registered for seven semester credits or more at the University of Nevada.

Periods of attendance at the University of Nevada as a full-time non-resident student shall not be utilized as any part of the six months requirement referred to above. Marriage does not alter the resident status of an individual.

It was upon the foregoing statutes and interpretations that the University of Nevada denied the student her request to be considered a resident of Nevada for tuition purposes.

#### QUESTION

Does the student above referred to enjoy the status of a resident for tuition purposes at the University of Nevada?

#### ANALYSIS

The appeal submitted on behalf of the student was based primarily on subsection 2(b) of [NRS 396.540](#), supra. That is, it was contended that since the student was actually residing within the State of Nevada in excess of six months, she was entitled to attend the University as a resident, notwithstanding the majority of this time elapsed after her matriculation. With this contention, we do not agree. If we were to so hold, every nonresident student, after attending the University of Nevada for a 6-month period, could from that day forward attend the University tuition free. Such could not have been the intent of the Legislature. This is in conformity with AGO 84 (8-10-59).

The next question is whether the student is a member of a bona fide resident family as contemplated by [NRS 396.540\(2\)\(a\)](#). The answer to this question, in our opinion, is found in the analysis of the legislative history of the law and the application of the rules of practical construction.

[NRS 396.540\(2\)](#) has long been the law in Nevada with the exception of subsections (c) and (d). For example, 1929 NCL § 7735 reads as follows:

The board of regents of the University of Nevada shall have the power to fix a tuition charge for students at the university; provided, however, that tuition shall be free (a) to all students whose families are bona fide residents of the State of Nevada, and (b) to all students whose families reside outside of the State of Nevada providing such students have themselves been bona-fide residents of the State of Nevada for at least six months prior to their matriculation at the university. As amended, Stats. 1921, 7.

In our opinion, the term “families” in (a) and (b) was to be applicable to one and the same family unit, to wit; parents and children, not husband and wife. This is evident from subsection (b) which obviously was not intended to include husbands and wives within the term “families.”

A statute is also to be construed with reference to its manifest object, and if the language is susceptible to two constructions, one of which will carry out and the other defeat such manifest object, it should receive the former construction. See: 2 Sutherland, Statutory Construction, Sec. 4704. The manifest object of this statute is to provide tuition free education to bona fide residents of Nevada and their children, and further to reimburse the taxpayers of Nevada for the cost of educating nonresidents. If such were allowable, a nonresident couple could easily defeat the purpose by simply getting married to attain the status of residents for tuition purposes.

The legal relationship of husband and wife is more easily disposed of than that of parent and child.



In any event, we believe that a further and stronger reason exists that would require tuition payment by the student in question. [NRS 396.540](#) (1)(a) provides that the qualification “bona fide resident” is intended to assure that the residence is genuine and established for purposes other than the avoidance of tuition. The determination of bona fide residence is a factual one and University officials may exercise some degree of judgment. In this case, it has been decided, and promulgated as a regulation, that marriage will not affect the resident status of an individual. We believe this is proper.

We need only look to California to find even more restrictive requirements. In that state, a student must be a bona fide resident for more than 1 year before being allowed free tuition, or be a child of and maintain his place of abode with a resident of the state. No allowance is made for the relationship of husband and wife. See: Wests Cal. Anno. Code, Sec 23754 and 23756 (1965 pocket supp.).

#### CONCLUSION

Marriage does not change the resident or nonresident status of University of Nevada students for tuition purposes.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: Daniel R. Walsh, *Chief Deputy* Attorney General

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**344 Legal Notices and Advertisements—A legal notice or advertisement must be published in a newspaper which is both circulated and printed at least in part in the county for which the notice or advertisement is required.**

Carson City, July 7, 1966

Hon. Grant Davis, *Churchill County District Attorney, Courthouse, Fallon, Nevada*

Dear Mr. Davis: You have requested from this office an opinion interpreting [NRS 238.030](#). Churchill County has had in the past one newspaper which has been published and printed within Churchill County for a period in excess of 104 consecutive weeks. There is also in Churchill County a weekly newspaper which, until recently, was printed in a different county but sold and circulated within Churchill County for a period of time in excess of 104 consecutive weeks. The Churchill County Clerk desires to be informed as to whether or not legal notices or advertisements may be published in either or both of these newspapers.

#### ANALYSIS

The applicable provisions of [NRS 238.030](#) read:

1. Any and all legal notices or advertisements shall be published only in a daily, a triweekly, a semiweekly, a semimonthly, or a weekly newspaper of general circulation and printed in whole or in part in the county in which the notice or advertisement is required to be published, which newspaper if published:

(a) Triweekly, semiweekly, semimonthly, or weekly, shall have been so published in the county, continuously and uninterruptedly, during the period of at least 104 consecutive weeks next prior to the first issue thereof containing any such notice or advertisement.

(b) Daily, shall have been so published in the county, uninterrupted and continuously, during the period of at least 1 year next prior to the first issue thereof containing any such notice or advertisement.

As to the newspaper which is printed in Churchill County and published and circulated daily therein, there is no legal reason why legal notices and advertisements could not be published therein pursuant to [NRS 238.030](#). Such newspaper clearly meets all of the requirements of that statute.

As to the other newspaper, a different conclusion is reached. As has been stated, this weekly newspaper has been sold and circulated throughout Churchill County for the required period of time, but it has not been “printed in whole or in part” in that county for the required length of time. Because the statute requires the weekly newspaper to have been printed, at least in part, for 104 weeks within the county immediately preceding the legal notice or advertisement, and because the weekly newspaper in question has not met this mandatory provision of [NRS 238.030](#), it is the opinion of this office that legal notices and advertisements may not be placed in that weekly newspaper.

Any ruling to the contrary would be in violation of well-recognized rules of statutory construction. [NRS 238.030\(1\)](#) is what is commonly referred to as a mandatory statute. The procedures for publication set forth in the statute are prefaced by the word “shall” which designates the Legislature intended these provisions to be mandatory, and subject to no exception. See: 2 Sutherland, Statutory Construction, 3d Edition, Section 2803.

#### CONCLUSION

Legal notices and advertisements must be in a newspaper which is of general circulation and printed in whole or in part in the county in which the notice or advertisement is required.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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### **345 Elections; Filing for More Than One Elective Office—A person may file for an elective office and at the same time hold another elective position.**

Carson City, July 7, 1966

Hon. Grant Davis, *Churchill County District Attorney, Churchill County Courthouse, Fallon, Nevada*

Dear Mr. Davis: In a letter dated June 27, 1966, you have informed this office that a member of the Nevada Fish and Game Commission is anticipating filing for an elective county office in Churchill County. Because of the provisions found in [NRS 281.055](#) you ask the following:

1. Does the person in question have the right to file for an elective county office and at the same time be a member of the Nevada Fish and Game Commission?

#### ANALYSIS

Prior to 1965, [NRS 281.055](#) made it unlawful for any person to file for or hold two salaried elective offices at the same time. This statute was amended in 1965, however, and the word “salaried” was deleted therefrom. The statute now reads:

1. Except as otherwise provided in subsection 2, no person may:
  - (a) File nomination papers for more than one elective office at any election.

(b) Hold more than one elective office at the same time.

2. The provisions of subsection 1 shall not be construed to prevent any person from filing nomination papers for or holding an elective office of any special district (other than a school district), such as an irrigation district, a local or general improvement district, a soil conservation district or a fire protection district, and at the same time filing nomination papers for or holding an elective office of the state, or any political subdivision or municipal corporation thereof.

Sec. 2. Any person who is an incumbent in two or more elective offices on the effective date of this act may serve the remainder of the terms for which he was elected or appointed.

\* \* \*

The above statute prohibits one person from filing nomination papers for *or* from holding more than one elective office at the same time. It is silent as regards filing such papers *and* at the same time holding a different elective office. Hence it is concluded that a person currently occupying an elective position may file nomination papers for a different elective office, but if he is elected to that office, he must then resign from one or the other because of subsection (1)(b) above.

#### CONCLUSION

The prospective candidate may file for the elective county office, but if elected he must resign from one of the two elective offices he would then hold.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**346 County Officers: Receiving Compensation From the County for Services Rendered—A licensed, qualified and practicing mortician is allowed to receive compensation from the county for services rendered in the burial of indigents notwithstanding the fact he is also a justice of the peace and ex-officio coroner.**

Carson City, July 13, 1966

Hon. Peter L. Flangas, *District Attorney, Lyon County Courthouse, Yerington, Nevada*

Dear Mr. Flangas: Your letter of inquiry dated July 8, 1966 has been received by this office. In that letter you relate the following facts: A licensed, qualified, and practicing mortician, who is a resident of Lyon County, is considering filing as a candidate for the office of justice of the peace. If elected, he will be the ex-officio coroner. (See [NRS 259.020](#).) Being ex-officio coroner and justice of the peace, the person would be an officer of the county and as such is concerned as to whether or not he would be entitled to receive his fees for services rendered as a mortician in the preparation of indigent persons for burial. This concern stems from the following two statutes:

[NRS 259.180](#) Burial of deceased: When a charge against the county. After the inquest, if no one take charge of the body, the justice of the peace shall cause the same to be decently buried and pay the expense thereof from any money found with the deceased. If no such money is found, then the same shall be charged against the county.

[NRS 345.080](#) Unlawful purchases, sales; contracts may be void; penalties.

1. It shall be unlawful for any county officer to be interested in any contract made by him, or be a purchaser or be interested in any purchase of a sale made by him in the discharge of his official duties.

\* \* \*

It must be noted that the person with whom we are here concerned is the only mortician in Lyon County and if it is determined that such person does not have the right to perform services as a mortician in connection with the burial of indigents and receive compensation for the same, the bodies of such indigent persons will have to be sent to a sister county, at considerable expense and inconvenience.

#### QUESTION

Does the person in question, if elected justice of the peace, have the right to perform services as a mortician in the preparation of indigents for burial, and receive compensation from the county pursuant to [NRS 259.180](#)?

#### ANALYSIS

Because the person in question would be both justice of the peace and coroner, a literal reading of the above statutes would seem to preclude him from entering into a contract for the performance of services as a mortician at the request of county officials and receiving payment therefor. But did the Legislature, in passing the above statutes, intend such a result? We do not think so.

Statutes imposing restrictions on the rights of public officers to be parties to contracts concerning property or interests over which they have control by virtue of their public office are common. The rule is aptly stated in 43 Am.Jur., Public Officers, 294.

Contracts entered into by a public officer in his individual capacity to render services to the public may, however, be merely voidable, *or the circumstances may be such that it would be inequitable not to require payment for the benefits received.* (Italics added.)

Cases are then footnoted in which various public officers had performed valuable services for the city, county, or state, and sought compensation. The courts ruled that if the basic purpose of the contract was not illegal or contrary to public policy, the public officer could receive compensation which was reasonable and commensurate with the services rendered. The courts did not give effect to the contract themselves, but held it would be “manifestly inequitable” if payment was not made.

With this information as a background, it is the ruling of this office that the proposed candidate, who is also the mortician, may run for and be elected to the office of justice of the peace, and if the occasion should arise, he may perform services as a mortician in caring for the bodies of deceased indigents, and if the decedent has no estate he may receive compensation from the county. Considering the fact that he is the only mortician in the county, this is the only practical conclusion. It must also be noted that a further safeguard against the possibility of profiteering or the interference with the free will and judgment of the person in question when acting as coroner is [NRS 245.070](#), which reads:

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

The amount of compensation to be received for services rendered as a mortician will be controlled by this statute and [NRS 428.090](#):

1. When any nonresident, or any other person not coming within the definition of a pauper, shall fall sick in any county, not having money or property to pay his board, nursing or medical aid, the board of county commissioners of the proper county shall, on complaint being made, give or order to be given such assistance to the poor person as the board may deem just and necessary.

2. If such sick person shall die, then the board of county commissioners shall give or order to be given to such person a decent burial.

3. The board of county commissioners shall make such allowance for board, nursing, medical aid or burial expenses as the board shall deem just and equitable, and order the same to be paid out of the county treasury.

\* \* \*

These two statutes vest in the board of county commissioners the power to determine the amount of compensation to be paid the mortician performing services relating to burial of indigents in the county. It is deemed that this is a sufficient protection for the residents of Lyon County, that a strict and literal interpretation of [NRS 259.180](#) and [NRS 245.080](#) is not needed.

#### CONCLUSION

A justice of the peace, who is the only licensed, qualified, and practicing mortician in the county, may take charge of deceased indigents and cause them to be properly buried and receive compensation from the county considering the fact that he is the *only* mortician in the county and the board of county commissioners determine the amount of compensation to be received by such person when acting as a mortician.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**347 Military Leave—Under [NRS 284.365](#) when an individual on military leave of absence returns to state service, he is entitled to the benefits of merit salary increases attached to the position to which he returns, and to accrued annual leave and sick leave for the period of time actually spent in the service.**

Carson City, July 13, 1966

Mr. James F. Wittenberg, *State Personnel Administrator, Carson City, Nevada*

Dear Mr. Wittenberg: You have propounded to this office a question as to whether an individual in state service, who is absent on military leave of absence, is entitled to merit salary increases during his absence, and whether such individual accrues annual and sick leave while on military leave.

#### ANALYSIS

The purpose of [NRS 284.365](#) is to afford to one who serves his country the same benefits that would accrue to those remaining in state employment during his absence.

We think the wording in italic in the following provision of the statute should receive the most liberal interpretation: "If within such period (referring to a period not to exceed 90 days following his separation from military service) he applies for reinstatement, he shall be reinstated to his former class or position, *or to a class of position having like seniority, status and pay* \* \* \*."

We interpret this latter phrase, "like seniority, status and pay," to include the position as affected by merit raises.

We feel that sick leave and accrued annual leave should be allowed for the actual time in the service, but not for the additional 90 days after leaving the service.

### CONCLUSION

It is therefore the opinion of this office that under [NRS 284.365](#) when an individual on military leave of absence returns to state service, he is entitled to the benefits of merit salary increases attached to the position to which he returns, and to accrued annual leave and sick leave for the period of time actually spent in the service.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**348 Nevada Youth Training Center; Inspection of Records—The records relating to youths housed in the Nevada Youth Training Center are available to the Department of Parole and Probation only upon an order of the court.**

Carson City, July 25, 1966

Mr. W. Wallace White, *Director, Department of Health and Welfare, Carson City, Nevada*

Dear Mr. White: You have advised this office of the following situation existing at the Nevada Youth Training Center located at Elko, Nevada:

When an inmate of the Nevada Youth Training Center becomes of the age that he may be sentenced under the criminal laws of the State, the Department of Parole and Probation requests from the center the records pertaining to that inmate so as to enlighten them as to the proper recommendation to be made. The superintendent of the center desires to deliver all such information to the Department of Parole and Probation because by so doing, the possibility of duplicating work and efforts would be avoided. The center also receives many requests for such information from the Federal Bureau of Investigation and from branches of the armed services. Because of a strong desire to protect the rights of the youth now residing at the Nevada Youth Center, you ask the following question:

### QUESTION

What records relating to inmates may legally be made available to requesting parties by the Nevada Youth Training Center?

### ANALYSIS

It must be noted at the outset of this opinion that confidentiality is to be fostered and encouraged in matters relating to the records of juveniles housed in institutions of correction. Research has indicated that at least 34 states currently have statutes which in effect greatly limit or totally forbid public disclosure of records relating to the youth housed in correctional institutions. Many of these statutes allow inspection of such records only upon an order of the court. With this underlying rule in mind, we will consider applicable Nevada law.

[NRS 62.200](#)(3), (4) read as follows:

3. No adjudication by the court upon the status of any child shall operate to impose any of the civil disabilities ordinarily resulting from conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be

deemed a conviction, nor shall any child be charged with crime or convicted in any court, except as provided in [NRS 62.080](#). This disposition of a child or any evidence given in the court shall not operated to disqualify the child in any future civil service application or appointment; *nor shall the name or race of any such child in connection with any proceedings under this chapter be published in any newspaper without a written order of the court.*

4. Whenever the court shall commit a child to any institution or agency it shall transmit at the time the child is received at the institution or prior thereto a summary of its information concerning the child. *The institution or agency shall give to the court such information concerning such child as the court may at any time require.* (Italics added.)

[NRS 62.270](#) reads:

Records: Maintenance and inspection. The court shall make and keep records of all cases brought before it. The records shall be open to inspection *only by order of the court* to persons having a legitimate interest therein. The clerk of the court shall prepare and cause to be printed forms for social and legal records and other papers as may be required. (Italics added.)

[NRS 176.350](#) Information obtained by parole and probation officers and employees privileged; nondisclosure. All information obtained in the discharge of official duty by a parole and probation officer or employee of the board shall be privileged and shall not be disclosed directly or indirectly to anyone other than the board, the judge, district attorney or others entitled under [NRS 176.220](#) to [176.350](#), inclusive, to receive such information, unless otherwise ordered by the board or judge.

#### CONCLUSION

The statutes above set forth compel the conclusion that a court order is required before the records relating to youths housed at the Nevada Youth Training Center are to be made available for inspection by the Department of Parole and Probation.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**349 Nevada State Prison; Sentencing and Probation—Upon revocation of probation, the suspended sentence commences to run immediately.**

Carson City, July 26, 1966

Mr. Jack Fogliani, *Warden, Nevada State Prison, P.O. Box 607, Carson City, Nevada 89701*

#### STATEMENT OF FACTS

Dear Mr. Fogliani: In a letter received the 18th day of July, 1966, you informed us of the following sequence of events leading to the incarceration of a certain inmate.

On June 30, 1964, the inmate pleaded guilty to a charge of forgery in Clark County and received a suspended sentence of from 1 to 14 years in the Nevada State Prison. On that same date, the sentencing judge suspended the period of commitment, placed the defendant on formal probation for a period of 2 years, and specified conditions of the probation.

On September 21, 1964, the inmate was again brought before the same district judge and probation was revoked because the inmate had been arrested for possession of narcotics and because the conditions of probation had not been met.

On July 2, 1965, the inmate was brought before a different district judge upon the charge of possession of narcotics, was found guilty and thereupon was sentenced to 2 to 5 years. On the same date the judge revoked the probation which had been granted on June 30, 1964, and which had already been revoked.

#### QUESTION

Is the time for the commencement of the 1 to 14 year sentence the date of the first or second probation revocation?

#### ANALYSIS

When a judge desires to place a convicted defendant on probation, he has two choices. First, he may at that time sentence the defendant and then suspend that sentence and impose the conditions of probation. Second, the imposition of the sentence may be deferred, probation may be granted and if such probation should later be revoked, sentence would then be imposed.

As was pointed out in the statement of facts, the person with whom we are here concerned was found guilty, a sentence of from 1 to 14 years was imposed and was then suspended with probation being granted. Hence, the judge chose to follow the first choice above set forth. The rule for determining when the suspended sentence is to commence is set forth in 21 Am.Jur.2d, Criminal Law, Section 567:

If the probation was granted by suspending the execution of a sentence, the order revoking probation activates the original sentence and requires that it be now executed.

A leading case in point is *Roberts v. United States*, 320 U.S. 264, 88 L.Ed. 41, 64 S.Ct. 113:

But when the court imposed sentence but suspended the execution of it, it would seem that when the suspension of execution is revoked the original sentence becomes operative.

In this case, we find the sentence was imposed and suspended. Hence, relying on the above authority, we must conclude that immediately upon revocation of the probation, the original sentence of from 1 to 14 years is to commence. The subsequent revocation of probation was an unnecessary act since there no longer was any probation period in effect.

When a person is convicted, sentenced, and granted probation, the sentence as originally imposed commences to run immediately upon revocation of probation.

#### CONCLUSION

The sentence of from 1 to 14 years commenced running on September 21, 1964, when probation was first revoked.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**350 Insurance—An out-of-state insurer of a risk located in Nevada which utilizes no nonresident agents or brokers but conducts business solely via direct correspondence must pay its resident countersigning agent on a commission basis. The amount of the commission is subject to contractual agreement between such insurer and the countersigning agent. (Modifies AGO 321, 4-5-66.)**



Carson City, August 5, 1966

Mr. Louis T. Mastos, *Commissioner of Insurance, Department of Commerce, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Mastos: At the request of out-of-state insurers, Attorney General's Opinion No. 321, dated April 5, 1966, is reviewed and clarified. The conclusion of that opinion read as follows:

1. The resident agent of a direct writing insurer is to be paid on a commission basis pursuant to [NRS 684.350](#).
2. Only if the commissioned resident agent is to perform additional services during the life of the policy is the agent's compensation subject to contractual agreement between the insurer and the agent.

#### QUESTION

The requesting insurers ask the following question:

If the insurer utilizes no agent or middleman between the insurer and the insured but solicits insurance solely by correspondence, does the compensation received by the resident countersigning agent have to equal 5 percent of the premiums paid?

#### ANALYSIS

As was pointed out in Attorney General's Opinion No. 321, April 5, 1966, such agent *must* be paid on a commission basis and not on a straight or flat basis unless such agent is to perform "additional services during the life of the policy." If no additional services are desired then compensation is to be by commission. The only question left is: What is the amount of that commission to be? We find the answer to this question in subsection 3 and 4 of [NRS 684.350](#).

Subsection 3 provides that when the contract of insurance is negotiated by a "company which is not represented by a licensed nonresident agent or broker \* \* \* [it] shall be countersigned by a resident agent who is compensated on a commission basis \* \* \*." The Legislature fixed on basis for determining the amount of that commission.

Subsection 4 of the above referred to statute provides that a commission of at least 5 percent of the premium shall be paid the resident countersigning agent "on such business produced by a licensed nonresident agent or broker."

As has been stated, the insurers requesting this clarification do not employ or utilize nonresident agents or brokers, but conduct their business directly between the home office and the insured. Hence, subsection 3 of [NRS 684.350](#) controls, and all that subsection requires is that the resident countersigning agent be paid on a commission basis, the amount of that commission not being provided. Therefore, the insurer and the resident countersigning agent are free to determine an amount mutually agreeable.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**351 Professional Engineers; Land Surveyors—Under provisions of Chapter 625 NRS, these are distinct and separate professions, and words "Professional Engineer" erroneously or inadvertently appearing before designation "Land Surveying" in a certificate issued to one qualifying as and becoming registered as a land surveyor, do not authorize him also to act as a professional engineer. State Board of Registered Professional Engineers authorized to correct such error or inadvertence**

**by recalling all certificates issued since 1947 and furnishing corrected replacements, and hereafter, to issue only corrected annual renewal cards to registrants.**

Carson City, August 18, 1966

H. B. Blodgett, *Executive Secretary, State Board of Registered Professional Engineers, P.O. Box 5208, Reno, Nevada 89503*

#### STATEMENT OF FACTS

Dear Sir: For many years the Nevada State Board of Registered Professional Engineers granted licenses to qualified applicants as "Professional Engineers," which licenses further specified or designated the field in which the licensee was qualified to practice, such as "Civil Engineering," "Mining Engineering," "Land Surveying," etc. Consequently, the license of one found qualified as a surveyor, read, "Professional Engineering, Land Surveying." This practice appears to have been followed because of the close relationship between land surveyors and professional engineers in general, and the further fact that the early statutes failed to make a clear distinction between the qualifications for, or the practiced of, these two professions. Chapter 625 NRS, as amended by the 1947 Legislature, gave the terms proper clarification and meaningful definition, and provided separate requirements for license qualifications in each field. Nevertheless, until 1956, the board continued to use the same wording in its certificates, i.e., "Professional Engineer, Land Surveying," and, until recently, to issue annual renewal or membership cards to registrants with the same wording. This situation has given rise to the questions hereinafter propounded.

#### QUESTIONS

1. May the Board of Registered Professional Engineers, in 1966 and thereafter, recall any certificate issued by previous boards which indicate certification as "Professional Engineer, Land Surveying," and substitute therefore a certificate indicating certification as "Registered Land Surveyor" when the record fails to show adequate preparation for, or experience in, the practice of engineering as defined by Statute?
2. In preparing and issuing the annual renewal cards to registrants paying the prescribed fee, therefor, may the board, in 1966 and thereafter, cause such cards to be inscribed "Registered Land Surveyor" when the person to whom the card is issued was, in fact, certified by a previous board as "Professional Engineer, Land Surveying"?

#### ANALYSIS

At the outset it is emphasized that Chapter 625 NRS, defines, controls, governs, and prescribes the qualifications and requirements for licenses in the fields of both professional engineering and land surveying. It is clear from the provisions of [NRS 625.180-240](#), inclusive, that the qualifications and requirements for becoming registered as a professional engineer are separate and distinct from and vastly different than those prescribed for registration as a land surveyor under [NRS 625.250-380](#), inclusive. Although the two professions are under the supervision of one board, the qualifications and licensing requirements necessary for registration in each may not be interchanged, substituted, or dispensed with. One examined as a land surveyor and found qualified in that field is entitled to a certificate designating him as such and no more. To become registered as a professional engineer, he must possess the qualifications and meet the requirements of the above statutes, including the taking and passing of an examination. This, in our opinion, was the legislative intent in enacting these statutes, and the board must be guided by their provisions. (See AGO No. 301, 11-5-53.)

Any certificate registering a land surveyor after 1947 when Chapter 625 NRS was given its present wording, and which certificate reads, "Professional Engineer, Land Surveying," authorizes the practice of land surveying only, and in no wise qualifies or registers the holder thereof as a professional engineer. Replacing all such certificates at this time with one

designating the holder as a "Land Surveyor," constitutes no more than the correction of an error or oversight and is within the board's power.

Since a license issued to one who qualifies as a land surveyor authorizes the practice of land surveying only, he has no authority to act as a professional engineer. Neither should his annual renewal card designate him as such. Even though the license issued originally to a land surveyor carried the word "Professional Engineer, Land Surveying," all further annual renewal cards should be limited in their designation to "Land Surveyor."

#### CONCLUSION

In the opinion of this office Question No. 1 should be answered in the affirmative. It appears that the form of certificate of license with the wording "Professional Engineer, Land Surveying," was in use before the statute was amended to place professional engineers and land surveyors in separate distinct fields. When this was done in 1947, this form became obsolete and should have been revised. Being in erroneous form, it could not clothe a licensee with any greater authority than the Board of Registered Professional Engineers was empowered to bestow. Proper steps should now be taken to correct this error such as recalling any previously issued erroneous certificates.

It is our further opinion that Question No. 2 should also be answered in the affirmative. Issuing an annual registration card with the designation "Land Surveyor," to one who has qualified for no more than that, is not only permissible, but as we view the law, mandatory upon the board. No authority exists for enlarging the designation is such registration card by prefixing the words "Professional Engineer" or any other words. And this is true regardless of the fact that the original certificate or license may have contained any such words.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: C. B. Tapscott, *Chief Assistant Attorney General*

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**352—Marking and identification of school district vehicles of pleasure car type. School district motor vehicles of the pleasure car type designed to carry not more than eight pupils and the driver are exempt from the marking and identification requirements of Chapter 392 of NRS.**

Carson City, September 7, 1966

Theodore H. Stokes, Esq., *Ormsby County District Attorney, Court House, Carson City, Nevada*

Dear Mr. Stokes: The Ormsby County School District has purchased a motor vehicle suitable for the transportation of nine people which is to be used part time for the transportation of pupils to and from school and at other times for general school purposes, such as transportation of school officials to administrative meetings. The question arises as to whether it is necessary under Nevada law to paint and mark this vehicle as a school bus.

#### QUESTION

Is it necessary for a school district to paint and mark a motor vehicle of the pleasure car type designed to carry nine people and used part time for the transportation of pupils?

#### ANALYSIS

The statutes dealing with the problem do not clearly manifest legislative intent when read in the context of the chapters set forth in the Nevada Revised Statutes. Chapter 392 of NRS

details the statutory requirements for equipment and identification on school buses (see [NRS 392.410](#)), but does not define a school bus. “Vehicles” are defined in [NRS 392.320](#) to mean “school buses, station wagons, automobiles, and other motor or mechanically propelled vehicles or either or any of them, required by the school district for the transportation of pupils.” Station wagons and automobiles are not classified as school buses, but as vehicles.

[NRS 392.410](#) requires every “school bus” to be equipped with a flashing red light system in addition to the requirements imposed by the State Board of Education. Chapter 392 does not specifically omit or include passenger automobiles used for the transportation of pupils from these requirements. It is therefore necessary to look to the legislative history of the law and other statutes dealing with the same subject matter, in pari materia, to arrive at a determination of legislative intent.

One statute, [NRS 483.160](#), specifically defines a “school bus” as follows:

“School bus” means every motor vehicle regularly used for the transportation of pupils to and from school or school activities, except motor vehicles of the pleasure car type when carrying not more than eight pupils and the driver.

Chapter 483 deals with the licensing of drivers and not with the marking and identification of school buses. However, provisions in an act which are omitted in another act relating to the same subject matter will be applied under the other act when not inconsistent with its purposes. 2 Sutherland, Statutory Construction, p. 531 (1943 Ed.). We do not believe the application of the definition of a “school bus” contained in Chapter 483 of NRS to the marking and identification requirements of Chapter 392 to be inconsistent with the purposes of Chapter 392.

Finally and controlling, we believe, is Assembly Bill 121, introduced and passed in 1961, as Chapter 186, Statutes of Nevada 1961. This bill clearly manifests the intent to exclude motor vehicles of the pleasure car type when carrying not more than eight pupils and the driver from the requirements of Chapter 392. It amended [NRS 392.410](#) and at the same time amended [NRS 483.160](#) to redefine a “school bus” as above described. If the definition did not apply to Chapter 392 as well as Chapter 483, it could not have been legally passed in one bill. It is only when subjects treated in two or more statutes deal with a common subject that they might validly be enacted in one bill. 1 Sutherland, Statutory Construction, p. 365 (1943 Ed.).

#### CONCLUSION

School district motor vehicles of the pleasure car type designed to carry not more than eight pupils and the driver are exempt from the marking and identification requirements of Chapter 392 of NRS.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: Daniel R. Walsh, *Chief Deputy* Attorney General

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**353 Minimum Wage Law; Tips and Gratuities—Tips and gratuities received by employees may be credited as wages in determining compliance with the state minimum wage law provided the requirements of [NRS 608.160](#) are met and provided further, that there is an explicit contract between the parties by which such tips and gratuities are either turned over to their employer or an accounting made by the employee to the employer. If the tips and gratuities and wages do not meet the minimum requirements of law, the employer would be chargeable with the deficiency.**

Carson City, September 7, 1966

Mr. E. J. Combs, *Labor Commissioner, Carson City, Nevada*

### STATEMENT OF FACTS

Dear Mr. Combs: [NRS 608.250](#) establishes a minimum wage of \$1.25 per hour for male employees over 18 years of age. A question is now presented as to whether tips or gratuities may be regarded as part of the minimum wage.

### QUESTION

May an employer classify tips or gratuities received by an employee as part of the basic wage of such employee in determining compliance with the state minimum wage law?

### ANALYSIS

[NRS 608.160](#) provides as follows:

1. Every person who takes all or any part of any tips or gratuities bestowed upon his employees, or who credits the same toward payment of his employees' wages, shall, and is hereby required to, post in a conspicuous place where it can be easily seen by the public, upon the premises where such employees are employed and work, a notice to the public that tips or gratuities bestowed on employees go or belong to the employer. Such notice shall contain the words "Notice: Tips Given Employees Belong to Management." The letters of these words shall be in bold black type at least 1 inch in height.

2. Any person who takes all or any part of the tips or gratuities bestowed upon his employees without posting the notice required to be posted by subsection 1 shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$100 nor more than \$500, or by imprisonment in the county jail for not less than 30 days nor more than 6 months, or by both fine and imprisonment.

It is obvious that under this statute such money may be credited to wages provided certain conditions are met. See Attorney General's Opinion No. 694, dated October 28, 1948. The most likely problem is one of mechanics in the establishment of a workable program. Under the above statute the requirement of posting is evident and that all tips would belong to the employer. The next step is to establish a legally sufficient method of taking and/or applying such tips as wages.

Several state Supreme Courts have dealt with this issue under various state minimum wage laws. See annotation, 65 A.L.R.2d, p. 974, et seq. The most apropos is *Padilla v. Henning Hotel Co.*, 319 P.2d 874, 65 A.L.R.2d 968 (Wyo. 1958), wherein a bellhop sought to recover from his employer the difference in the wages alleged to have been received and the minimum wages prescribed by the law. It appeared that, under an oral agreement between the parties, the employee was to receive a stipulated monthly salary, plus such tips as the employee might receive from others. *There was no requirement for the turning of such tips over to the employer's custody or for an accounting to the employer.* The opinion analyzes various federal and state decisions and concludes that tips received by an employee from third persons are not to be credited as wages in determining compliance with the state minimum wage law, in the absence of an explicit contrary understanding between the parties. It would seem, therefore, that any contract of this nature would have to be explicit and either require the turning of such tips over to the employer's custody or an accounting by the employee to the employer. It must be stressed that this question has not been decided in Nevada, and any such contract should be drafted with this in mind. In any event, if the tips and wages did not meet the minimum requirements of the law, the employer would be chargeable with the deficiency. No mutual agreement to the contrary would be valid, but would be contrary to declared public policy. Attorney General's Opinion No. 694, *supra*.

## CONCLUSION

It is the opinion of this office that tips and gratuities received by employees may be credited as wages in determining compliance with the state minimum wage law provided the requirements of [NRS 608.160](#) are met and provided further, that there is an explicit contract between the parties by which such tips and gratuities are either turned over to the employer or an accounting made by the employee to the employer. If the tips and wages do not meet the minimum requirements of law, the employer would be chargeable with the deficiency.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: Daniel R. Walsh, *Chief Deputy* Attorney General

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**354 Libraries—Cities may establish libraries in accordance with [NRS 266.345](#). The provisions of [NRS Chapter 379](#) should be followed where applicable. Whether or not there are trustees is within the discretion of the establishing agency, but if there are library trustees they should follow the provisions of [NRS 379.105](#).**

Carson City, September 26, 1966

Mrs. Mildred J. Heyer, *Secretary, Nevada Council on Libraries, Supreme Court Building, Carson City, Nevada*

Dear Mrs. Heyer: Recently the Nevada Council on Libraries requested that this office furnish an opinion on the following matters:

### QUESTIONS

1. Which takes precedence, [NRS Chapter 379](#), which sets forth state laws governing libraries, or [NRS 266.345](#), which grants city councils the right to establish, maintain, and regulate free libraries?
2. If [NRS 266.345](#) takes precedence, should Chapter 379 be amended to set forth the manner in which city libraries are established?
3. Interpretation of [NRS 266.345](#).

### ANALYSIS

The applicable statutes with which this opinion is concerned are [NRS 266.345](#) and Chapter 279. [NRS 266.345](#) was adopted for the first time in 1907 and still remains in full force and effect. It states that city councils shall have the power to establish, maintain, and regulate free public libraries and reading rooms as is or may be provided by law, and to perpetuate free libraries and reading rooms as may have been heretofore established in such cities.

[NRS Chapter 379](#) is an entire statute dealing with county, city, and town public libraries. This statute appears to have been adopted for the most part in 1945 and to have been the subject of several amendments since that time. [NRS 379.070](#) provides for the establishment of free public libraries in cities and unincorporated towns. It does not provide for the appointment of city boards of library trustees such as are provided for counties.

A careful reading of the statutes clearly shows that there is no direct conflict. The Legislature in 1907 intended that city councils should have the power to establish, maintain, and regulate free public libraries as is or may be provided by law. This section has never been repealed. [NRS Chapter 379](#) sets forth some of the procedures for the establishment of free public libraries in cities or unincorporated towns. The Legislature, when it enacted this statute in 1956, did not see fit to specify whether or not the city councils should provide library trustees or even if

such trustees were necessary. Then, in 1959, the Legislature enacted Section 379.105 which was amended in 1965. This statute provides that the library trustees of any city or town's free public library and their successors shall do certain things.

We have, then, three statutory provisions on the same subject. One gives the power to create the libraries to cities, another sets forth certain requirements for this establishment, and a third refers to the duties of library trustees of any city or town free public library. None of the three sets forth any requirement that there be library trustees.

This is an unfortunate situation, which undoubtedly leads to the request to determine which statute takes precedence. If these statutes were in actual conflict, the later statute must control. *State v. Nevada Tax Commission*, [38 Nev. 112](#), 145 P. 905.

It is the opinion of this office that these statutes on the same subject must be construed together so as to give effect to the language of all of them with a view to harmonizing them, if possible, so as to allow all of them to stand. This construction will allow the libraries where they have been established to continue their worthy efforts. The authority for this view is clear in Nevada law, as there are many decisions which state that statutes which relate to the same subject matter are in pari materia and should be construed together. *State v. Esser*, [35 Nev. 429](#), 120 P. 557; *Ex Parte Ah Pah*, [34 Nev. 283](#), 119 P. 770; *State v. Eggers*, [36 Nev. 372](#), 136 P. 100; *Carson City v. Board of County Commissioners*, [47 Nev. 415](#), 224 P. 615.

Therefore, the answer to the question of precedence is that the statutes should be reconciled and since they are not in direct conflict, none of them takes precedence. Cities may establish libraries in accordance with [NRS 266.345](#). They should follow all of the provisions of [NRS 379.070](#) in the establishment of libraries. If the cities or towns choose to have library trustees, these library trustees should follow the provisions of [NRS 379.105](#).

One might interpret [NRS 379.070](#) as requiring that city or town free public libraries must have library trustees since the statute provides for their powers. In our opinion, if the Legislature intended that such trustees be mandatory, it should have said so. While such trustees might be desirable, it should be left to the agency creating the library to determine whether or not there should be trustees. It may also determine the method of their selection. This view is reinforced by the fact that the Legislature did set forth the manner in which county library district trustees should be elected, but it is not specific in the matter of city or town library trustees.

With regard to an interpretation of [NRS 266.345](#), the statute seems self-explanatory except as to one phrase which is as follows: “\* \* \* as is or may be provided by law \* \* \*” The law to which this statute refers is the law of the State of Nevada as it existed in 1907 or as it existed at any time thereafter. This provision gives great scope to the statute and allows it to stand even though the Legislature imposes additional requirements on the establishment, maintenance, and regulation of libraries in the future.

#### CONCLUSION

All of the statutory provisions relating to libraries in the State of Nevada should be read and construed so as to permit them all to stand. Therefore, cities may establish libraries in accordance with [NRS 266.345](#). The provisions of [NRS Chapter 379](#) should be followed where applicable. Whether or not there are trustees is within the discretion of establishing agency, but if there are library trustees they should follow the provisions of [NRS 379.105](#).

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: Don W. Winne, *Deputy* Attorney General

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**355 An institution offering instruction in hypnotism to general public is required to be licensed by the Department of Education.**

Carson City, September 26, 1966

Mr. E. A. Haglund, *Supervisor, Area Administration and Certification, Department of Education, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Haglund: A certain institution has placed in newspapers an advertisement extending to the general public "courses in scientific hypnosis and self-hypnosis." Listed in the advertisement are the following courses to be taught:

1. Authoritarian and "permissive" susceptibility tests, recognition and classification of subjects.
2. Standard methods of induction, techniques of contemporary experts, methods of the old masters.
3. Latest developments and advanced techniques: Visualization methods, sensorimotor techniques, confusion techniques, arm and hand levitation methods, rehearsal techniques, carotoid artery and "nerve pressure" methods (for doctors only), etc.
4. Rapid and "instantaneous" methods. Electronic methods—brain wave synchronizer.
5. "Placebo" techniques. Prize winning methods.
6. Waking hypnosis. Use of hypno-aids.
7. Stages of hypnosis and how to judge trance depth.
8. Techniques of deepening hypnosis.
9. Modus operandi of self-hypnosis.
10. How to become hypnotic technicians or consultants.

The advertisement also states:

The institution offers a variety of courses designed to meet the individual needs of every student. All courses are practical and down to earth, concentrating heavily on the "how to do it" aspects. Students are TRAINED to actually produce the hypnotic state and use it skillfully and effectively in accordance with ethical practices in the various fields.

#### QUESTION

Should the above described institution be required to obtain a license as an educational institution pursuant to Chapter 394 NRS?

#### ANALYSIS

[NRS 394.200](#) reads:

Definitions. As used in [NRS 394.210](#) to [394.420](#), inclusive, unless the context otherwise requires:

1. "Board" means the state board of education.
2. "Privately owned correspondence, business or trade school" *means a school maintaining a place of business in Nevada from which or in which it gives training for a consideration or remuneration in any business, trade, technical or industrial occupation, but does not include:*
  - (a) Public or tax-supported institutions.
  - (b) Parochial, denominational or eleemosynary institutions.
  - (c) Schools licensed under other provisions of Nevada law.
  - (d) Schools primarily offering instruction in the avocational, recreational or entertainment fields, including schools of dancing, schools of charm and schools of photography.
  - (e) Correspondence schools accredited by the National Home Study Council.
  - (f) Schools belonging to accrediting associations recognized by the Office of Education of the Department of Health, Education and Welfare. (Italics supplied.)



It is concluded by this office that the institution with which we are concerned is a “privately owned \* \* \* business or trade school” within the above quoted statute.

Clearly, the institution is “in Nevada,” it “gives training” and receives for this “a consideration or remuneration.” The training is specifically offered to “physicians, dentists, psychologists, and laymen who wish to qualify as skilled hypnotic technicians or consultants.” Hence, it is concluded that the training is in a business, trade, or occupation.

#### CONCLUSION

It is concluded by this office that the activities of the institution with which we are here concerned bring it squarely within the definition of [NRS 394.200\(2\)](#). Such being the case, the licensing provisions of [NRS 394.280](#) to and including [NRS 394.420](#) are applicable, and must be complied with.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**356 Cities and counties may enter into cooperative agreements pursuant to Chapter 277 of NRS and may thereafter join in requesting federal funds for mutually beneficial purposes.**

Carson City, September 26, 1966

Hon. Edward G. Marshall, *Clark County District Attorney, Court House, Las Vegas, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Marshall: By letter dated July 22, 1966, you advise this office that certain cities located within Clark County, together with Clark County, desire to apply for federal funds and expend the same for governmental purposes which will mutually benefit both such cities and Clark County. You also advise this office that federal funds are being withheld until the cities and county enter into an agreement which would guarantee that any federal funds furnished would be used to serve the common interest of both the cities and county. You then ask if applicable Nevada law will permit the cities and county to enter into such an agreement and then apply for available federal funds.

#### ANALYSIS

We find the answer to your question in Chapter 277 of NRS. [NRS 277.045\(1\)](#) provides:

Any two or more political subdivisions of this state, including without limitation counties, incorporated cities and towns, unincorporated towns, school districts and special districts, may enter into a cooperative agreement for the performance of any governmental function. Such an agreement may include the furnishing or exchange of personnel, equipment, property or facilities of any kind, or the payment of money.

It is the opinion of this office that this statute alone affords sufficient legal authority for the cities and county in question to enter into the proposed agreement, provided the purpose of the agreement is the performance of some “governmental function.”

Additional authority may be found in [NRS 277.100](#) and [NRS 277.110](#), which are as follows:

277.100 Definitions. As used in [NRS 277.080](#) to [277.180](#), inclusive, unless the context otherwise requires:

1. "Public agency" means:

(a) Any political subdivision of this state, including without limitation counties, incorporated cities and towns, unincorporated cities or towns, school districts and other districts.

(b) Any agency of this state or of the United States.

(c) Any political subdivision of another state.

2. "State" includes any of the United States and the District of Columbia.

277.110 Joint exercise of powers, privileges, authority by public agencies; agreements.

1. Any power, privilege or authority exercised or capable of exercise by a public agency of this state may be exercised jointly with any other public agency of this state, and jointly with any public agency of any other state or the United States to the extent that the laws of such other state or of the United States permit such joint exercise. Any agency of this state when acting jointly with any other public agency may exercise all the powers, privileges and authority conferred by [NRS 277.080](#) to [277.180](#), inclusive, upon a public agency.

2. Any two or more public agencies may enter into agreements with one another for joint or cooperative action pursuant to the provisions of [NRS 277.080](#) to [277.170](#), inclusive. Such agreements shall be effective only upon ratification by appropriate ordinance, resolution or otherwise pursuant to law on the part of the governing bodies of the participating public agencies.

These two statutes clearly authorize the cities in Clark County and Clark County to enter into cooperative agreements.

#### CONCLUSION

Because of the above, it is concluded by this office that the proposed cooperative agreements between the political subdivisions involved is allowed and such political subdivisions may jointly apply for any federal funds which are available.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**357 Savings and Loan Associations—A savings and loan institution in Nevada may not engage in the construction and rental of buildings which are not used principally for a residential purpose.**

Carson City, September 23, 1966

M. L. Wholey, *Commissioner, Savings and Loan Division, Department of Commerce, Carson City, Nevada*

Dear Mr. Wholey: One of the savings and loan associations which is subject to your supervision has purchased some property for the purpose of building an office for the association. It is not presently possible for the association to proceed with such building. In order to earn some income, it desires to enter into a lease agreement whereby it will build a one-story, mercantile type building for a lessee for a period of 5 years, with an option to extend the lease for an additional 5 years. You have requested that this office render an opinion as to whether or not

this savings and loan association may engage in such activity and still be in compliance with the law of the State of Nevada.

#### ANALYSIS

Savings and loan associations in the State of Nevada are supervised by the Commissioner of Savings Associations under the provisions of [NRS Chapter 673](#). The Legislature obviously intended to regulate such associations quite carefully as the statute goes into considerable detail, including many definitions. Such associations are only given the powers defined in the statute.

The pertinent sections of [NRS Chapter 673](#) are as follows:

673.227 Land and office buildings of association; limitation on costs. An association may purchase property for its office buildings or construct its office buildings on property purchased by it, providing that the total cost of land and improvements does not exceed 70 percent of the association's capital, surplus and reserves.

673.276 Permissible investments.

1. An association shall have the power to invest in:

(a) Without limit, obligations of, or obligations guaranteed as to principal and interest by, the United States or any state.

(b) Stock of a federal home-loan bank of which it is eligible to be a member.

(c) Any obligations or consolidated obligations of any federal home-loan bank or banks.

(d) Stock or obligations of the Federal Savings and Loan Insurance Corporation.

(e) Stock or obligations of a national mortgage association or any successor or successors thereto.

(f) Demand, time or savings deposits with any bank or trust company, the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) Stock or obligations of any corporation or agency of the United States or any state, or in deposits therewith to the extent that such corporation or agency assists in furthering or facilitating the association's purposes or powers.

(h) Savings accounts of any insured state-licensed association and of any federal savings and loan association.

(i) Bonds, notes or other evidences of indebtedness which are general obligations of any city, town, county, school district or other municipal corporation or political subdivision of any state.

2. An association may invest any portion of its funds in loans to its borrowing members secured by first lien deeds of trust or mortgages upon real property. Additional loans or advances on the same property, without intervening liens, shall be deemed to be first liens for the purpose of this chapter, but no one loan can be made in excess of 2 percent of the total assets of the association.

3. An association may create loans by investment in real property within 100 miles of its home office, and such investment may include the subdivision and development of such real property principally for residential use. No association shall have investments under this subsection at any time greater than 5 percent of its assets. No investment made pursuant to this subsection may be held by an association for more than 3 years except with the permission of the commissioner.

The initial action of the association in purchasing the property for its office building was in accordance with the statute, provided that the total cost of land and improvements does not exceed 70 percent of the association's capital, surplus, and reserves. They have apparently met this requirement as no question was raised as to its cost.

Now, however, the association desires to convert this property, for a period of at least 5 years, from an office building site to an investment by constructing a building and leasing it for a 5-year period with an option for an additional 5 years. By such a conversion, it is the opinion of this office that the association can no longer qualify the purchase of the property under the

provisions of [NRS 673.227](#). It must be considered an investment and be subject to the provisions of [NRS 673.276](#) as there seems to be no other category in the statute under which one could properly consider the property.

Paragraph 3 of [NRS 673.276](#), clearly states the only method by which an association may invest in real property. It must be for the purpose of creating loans within 100 miles of its home office, and such investment may include the subdivision and development of such real property principally for residential use. No mention in the statute is made of an investment for any business use or as a landlord for business use. The term “residential use” is the only permissible category. The savings and loan association in this instance is not concerned with residential use.

There is only one other means by which the association might be able to proceed with the development as requested. [NRS 673.225](#) provides that notwithstanding any other provision of the chapter, every association whose accounts are insured by the Federal Savings and Loan Insurance Corporation or its successor, shall possess the same rights, powers, privileges, immunities, and exceptions which are possessed by any federally chartered association. The association being considered is insured by the Federal Savings and Loan Insurance Corporation and, therefore, has all the rights, powers, and privileges granted any federally chartered association. But even this section is of little assistance, for no authority can be found which grants any federally chartered association the right to construct and lease buildings which are not for a residential use.

#### CONCLUSION

It is the opinion of this office that a savings and loan institution in Nevada may not engage in the construction and rental of buildings which are not used principally for a residential purpose.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: Don W. Winne, *Deputy Attorney General*

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**358 Public Service Commission; Public Employees Retirement Act—Field investigators for the Public Service Commission do not have police powers classified as such by the Legislature, and are not, therefore, police officers as defined by [NRS 286.510](#) under the Public Employees Retirement Act, and are not entitled to early retirement.**

Carson City, September 27, 1966

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

Dear Mr. Buck: You have inquired of this office as to whether field investigators for the Public Service Commission may be regarded as “police officers” and thus qualify for the earlier retirement afforded police officers under [NRS 286.510](#).

#### ANALYSIS

The Legislature has designated by special statutes those agents and investigators who have police powers. Field investigators for the Public Service Commission have not been classified by the Legislature as having police powers.

#### CONCLUSION

Field investigators for the Public Service Commission do not have police powers and do not fall within the classification set out in [NRS 286.510](#), and are not, therefore, entitled to early retirement under the provisions of the Public Employees Retirement Act.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**359 Justice Courts; Suspended Sentences—The justice courts in this state have no power to suspend a sentence either in whole or in part.**

Carson City, September 28, 1966

Hon. William J. Raggio, *District Attorney, Washoe County, Reno, Nevada*

STATEMENT OF FACTS

Dear Mr. Raggio: We have received from your office a letter dated September 15, 1966, in which you ask the following:

QUESTION

Does a justice of peace in the State of Nevada have the power to suspend a sentence at the time of its imposition either in whole or in part?

ANALYSIS

The architects of the Nevada State Constitution have provided us with the answer to your question.

Art. 5, Sec. 14, provides in part:

The legislature is authorized to pass laws conferring upon the *district courts*, authority to suspend the execution of sentence, fix the conditions for, and to grant probation, and within the minimum and maximum periods authorized by law, fix the sentence to be served by the person convicted of crime in said courts.

Pursuant to this constitutional grant of power the Legislature has enacted [NRS 176.300](#), in which, inter alia, provides for the suspension of sentences imposed by the district court. By the very terms of this statute and those accompanying it in Chapter 176 of NRS, the power to suspend sentences is limited to the district court.

In an effort to exhaust all possible theories which may be presented in an effort to reach a contrary conclusion, let us now look at the statutory provisions regarding sentencing in the justice courts of this State. Chapter 188 NRS contains these statutes.

[NRS 188.010](#) reads:

Pronouncement of Judgment. After a plea or verdict of guilty, or after a verdict against the defendant, the Court must appoint a time for rendering judgment, which must not be more than 2 days nor less than 6 hours after the verdict is rendered, unless the defendant waives the postponement, or the judgment is arrested, or a new trial granted. If postponed, the court may hold the defendant to bail to appear for judgment. Unless such postponement is demanded, it shall be deemed to be waived.

[NRS 188.020](#) reads:

Judgment Rendered for Fine and Imprisonment or Costs. When the defendant pleads guilty, or is convicted, either by the court or by a jury, the court shall render judgment thereon of fine and imprisonment, or both, with or without costs.

A casual study of these statutes makes it clear that a suspended sentence is beyond the authority of justice courts. The statutes are mandatory, they state “the court *must* appoint a time for rendering judgment” and “the court *shall* render judgment.” The word “suspended” or its equivalent is never used.

The conclusion we have reached conforms to that expressed in Wharton’s Criminal Law and Procedure Vol. 5, section 2192, wherein it is stated:

In the absence of statutory provision, a court does not possess any power to suspend a sentence.

#### CONCLUSION

The suspension of a sentence is limited to sentences imposed by district courts in this State by the Nevada State Constitution. The justice courts of this State have no such power.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**360 Elections—Where two candidates for county office are of the same party and are the only candidates for that office, and thus go into the general election without appearing on the primary ballot, and one of such candidates dies subsequent to the primary but prior to the general election, the remaining candidate remains on the ballot. No power is given the county central committee of the party involved to name another candidate to oppose the living candidate, because no vacancy arises on that party’s slate for the office.**

Carson City, September 29, 1966

Hon. Peter Flangas, *Lyon County District Attorney, Court House, Yerington, Nevada*

Dear Mr. Flangas: You have submitted to this office a problem confronting Lyon County by reason of the death of Walter Whitacre, a candidate for election to the office of county clerk and treasurer.

Mr. Whitacre was a member of the Republican Party. His only competitor for the office sought is also a Republican. Therefore, there was no contest in the primary, both candidates going over to the general election.

The question which we now face is this: Is the remaining Republican candidate home free, or may the Lyon County Republican Central Committee designate a candidate of the same party to run in the general election?

#### ANALYSIS

This question has never been resolved by our Supreme Court, but my distinguished predecessor, Senator Alan Bible, in a learned opinion dated September 30, 1946, held that where the names of two party candidates are omitted from the primary ballot because they are the only candidates for office and one such candidate dies after the primary but before the general election, vacancy in nomination exists and should be filled in the manner provided by NCL 2429 (now [NRS 293.165](#)). In the case in question there were two Republican candidates for the State Senate.

With this opinion we disagree. We feel that the statute quoted envisaged a Republican and a Democrat, neither of whom has opposition in the primary, going over to the general election. Should either the Democrat or the Republican die, the county central committee of the deceased's party could fill the spot by selecting a member of their party to run in opposition to the candidate of the opposing party.

But here, the situation is entirely different. The Democrats chose not to place a candidate in the field. Therefore, the only party represented in the general election was the Republican Party. They still have a candidate for county clerk and treasurer and thus there is no vacancy in their slate for that office.

#### CONCLUSION

It is therefore the opinion of this office that under the election laws as they now stand, the remaining candidate for the office of county clerk and treasurer should remain on the ballot, and that no right is conferred on the Republican County Central Committee to name another member of the Republican Party as a candidate for county clerk and treasurer.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**361 Public Employees' Retirement Act—Retirement contributions on teachers' salaries paid for "extra services" classified as professional, to be paid by State Board of Education from Public School Teachers' Retirement Fund and not collected by school district where salary is earned. State board authorized by law to determine which services are professional in nature so as to require contribution thereon from this fund.**

Carson City, October 26, 1966

Superintendent of Public Instruction, State of Nevada, *Carson City, Nevada*

Dear Sir: In your letter regarding retirement contributions from teachers' earnings for extra services and which was subsequently modified, the following facts were presented.

#### STATEMENT OF FACTS

Certain properly certified school personnel about the State, particularly principals and counselors who are employed on a 12-month contract basis, are frequently given extra duties in the system during the summer months for which they are compensated on a per diem basis. These duties include preparation of classroom schedules, readying classrooms, cataloging libraries, assignment of students, counseling, etc. Professional people trained in the field of education and familiar with the particular school's programming are best suited to perform these duties which are in many instances commingled with the regular duties performed during the school year. Many of the programs, schedules, etc., necessitating extra summer work, are designed to fulfill school requirements for the next ensuing school year, and their execution definitely becomes the responsibility of the particular person arranging or planning them. This situation has created the questions hereinafter propounded.

#### QUESTIONS

1. Should the school district collect contributions upon the extra salary paid to the personnel mentioned?
2. Can payments be made from the Public School Teachers' Retirement Fund by the State Board of Education to pay the employer's share of such contribution?

3. As new programs and new types of services develop within the various school districts of the State, is it within the state authority of the State Board of Education to determine which extra services are professional in nature and as such would require the State Board of Education to pay the employer's share of retirement contribution on extra salaries from the Public School Teachers' Retirement Fund?

#### ANALYSIS

This office has previously ruled that public school teachers' salaries upon which the State Board of Education is required to collect contributions and make payment thereof into the State Employees' Retirement Fund pursuant to [NRS 286.450](#) and [NRS 286.380](#), does not include earnings from extra duties such as (a) conducting adult education courses not supported from state taxes, (b) driving buses, performing janitorial services, or maintenance work, or (c) teaching summer classes which are supported from tuition charges and not from public taxes. Attorney General's Opinion No. 77, October 15, 1963. We also ruled that retirement contributions upon any enlarged earnings of the nature specified under (a), (b), and (c) above, should be withheld by the county school board where applicable and paid into the State Retirement Fund along with the employer contributions as provided for under [NRS 286.290\(2\)](#) and [NRS 286.410\(2\)](#). See Attorney General's Opinion No. 107, January 31, 1964.

These opinions were based upon the fact that such extra duties such as bus driving, janitorial and maintenance services are not a part of required teaching services, and that since both adult education and summer school classes are paid for from a tuition fee by those attending rather than from taxation, extra teaching services performed for these purposes are not a state charge. Hence, the extra compensation received for either of these services should not be included in the teacher's gross salary upon which retirement contributions are made by the State. It was also pointed out in the second of these opinions above cited, that contributions on extra earnings of this particular nature should be made by the county school board involved.

We must now determine whether the extra duties enumerated in the facts hereinabove stated fall within the category of teaching services subject to contributions by the State Board of Education as provided for in [NRS 286.380\(5\)](#).

Generally, the scope of duties to be performed by a teacher is specified in his or her contract (see 38 ALR 1414 for general discussion). With the extensive programs carried on in today's schools, including those of Nevada, it becomes obvious that a teacher's duties extend far beyond those delineated in the contract of employment. However, where they are such as to require the expenditure of a vast amount of time over and above that reasonably contemplated in the contract, or if performed during the vacation period, or under certain other unusual circumstances, or are of an extraordinary nature, they may properly be classed as extra duties for which added compensation is justified. It should be strongly emphasized that innumerable duties not specifically mentioned in a teacher's contract must nevertheless be performed without extra compensation in keeping with long established practices of the teaching profession.

Under the facts hereinabove stated, it is assumed that the school boards concerned have determined that the duties which are being compensated for are extra duties and extend beyond the purview of the teacher's contract. If so, then we have but to determine their nature. While teaching in its strict sense is confined to the act of instructing or imparting knowledge, the work of administrators and counselors is much more comprehensive. The fact that performance of their duties conflicts with the school program during the regular school year, makes it necessary that they be performed during vacation. This fact, however, does not make them any the less of a professional nature. Furthermore, they are similar to many of the duties called for in their contracts and they also serve the same purpose and have the same ultimate goal, viz, the education of the student. In our opinion the duties of these persons constitute an essential part of the administrative operation of the school and are as much a part of the program of educating the student as is classroom instruction.

Payment for services of this nature should be made from the same fund from which regular salaries are paid, and become a part of the gross compensation of the personnel concerned and subject to applicable laws pertaining to retirement contributions of public employers.



The Statutes fail to list what constitutes professional services in any school system. Some criteria would be helpful for this purpose, but certainly the various county school boards have no authority to make a determination of the question each time it arises. In the opinion of this office the State Board of Education is sufficiently vested with this power and duty. Under the provisions of [NRS 385.110](#) that board is empowered to prescribe and cause to be enforced a course of study. It provides in part as follows:

The state board of education shall prescribe and cause to be enforced the course of study for the public schools of this state; \* \* \*

It must be inferred therefrom that the board is vested with power to determine what administrative functions (both those enumerated in a contract and those suggested as necessary extra duties) are necessary to carry into effect and enforce its prescribed course of study. This section is buttressed by the provisions of [NRS 385.080](#), the pertinent part of which reads:

The board shall have power to adopt rules and regulations not inconsistent with the constitution and laws of the State of Nevada for its own government and *which are proper or necessary for the execution of powers and duties conferred upon it by law*; \* \* \* (Italics supplied.)

By rule the state board could classify the different types of extra duties performed in the public schools so as to cover those now being performed or which may develop in the future.

#### CONCLUSION

From the foregoing, this office concludes as follows:

1. School districts are not required to collect and pay over to the State Board of Education contributions from salary paid a teacher for performance of “extra duties” when the latter falls within the category of professional services as determined by the state board. This question is answered in the negative.
2. Payments may be made from the Public School Teachers’ Retirement Fund by the State Board of Education which is authorized to pay the employer’s share of the contribution on all compensation paid for teaching services together with that paid for performance of extra services which the board has classified as professional or administrative services. Question No. 2 is answered in the affirmative.
3. The State Board of Education is authorized to determine the nature of extra services performed by a teacher, i.e., whether they are professional so as to require the board to pay retirement contributions thereon from the Public School Teachers’ Retirement Fund. The question is answered in the affirmative.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: C. B. Tapscott, *Chief Assistant Attorney General*

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**362 Motor Vehicle Fuel Taxes; County Road and Bridge Fund—Incorporated cities may share in county road and bridge fund generally only when there are ad valorem tax moneys appropriated thereto. [NRS 403.450](#) only applies against ad valorem tax funds. Incorporated cities may not share in said fund against motor vehicle fuel tax moneys received by the county pursuant to [NRS 365.180](#) and [365.550](#). Incorporated cities may share in the proceeds of motor vehicle fuel taxes imposed and distributed pursuant to [NRS 365.190](#) and [365.560](#) after the same shall have been distributed to**

**the counties where the county has not refused the same and where a proper request has been made by the city.**

Carson City, November 22, 1966

Hon. C. L. Harding, *Mayor, City of Caliente, Caliente, Nevada 89008*

Dear Mayor Harding: You have requested an opinion of this office with respect to the entitlement relationship between the City of Caliente and Lincoln County with regard to motor vehicle fuel tax receipts. We understand the facts set out to be as follows:

#### STATEMENT OF FACTS

1. That the City of Caliente has requested an apportionment of the county road and bridge fund.
2. That the commissioners have failed to grant any such apportionments.
3. That the commissioners have not levied an ad valorem tax for roads and bridges.
4. The commissioners have not refused the motor vehicle fuel tax proceeds under Section 365.190 NRS.
5. That the commissioners have not granted an apportioned share of the receipts under [NRS 365.190](#) to the city.
6. That the city has not been granted any portion of motor vehicle fuel taxes directly from the State.

Your request then appears to be subject to division into three questions as follows:

Question 1: Is the City of Caliente entitled to a share of the county road and bridge fund?

Question 2: Is the City of Caliente entitled to a share of the receipts of motor vehicle fuel taxes imposed and collected pursuant to Section 365.180 NRS?

Question 3: Is the City of Caliente entitled to a share in the receipts from motor vehicle fuel taxes imposed and collected pursuant to Section 365.180 NRS?

#### ANALYSIS

It is not unusual that some difficulty exists in this area in view of the rather extensive amending and repealing legislative action in regard to distribution of fuel taxes to political subdivisions of the State.

At the outset, we can say that Section 266.610 NRS is a part of the Incorporation Act and as such may not prevail when in conflict with the general law; thus we will not consider its effect further. (43 C.J. Art. 310, p. 296; AGO No. 75. 1955)

The pertinent sections of the Nevada Revised Statutes are as follows:

244.150 Levy of taxes. The board of county commissioners shall have power and jurisdiction in their respective counties to levy, for the purposes prescribed by law, such amount of taxes on the assessed value of real and personal property in the county as may be authorized by law.

244.155 Roads and Bridges. The board of county commissioners shall have power and jurisdiction in their respective counties to lay out, control and manage public roads, turnpikes, ferries and bridges within the county, in all cases where the law does not prohibit such jurisdiction, and to make such orders as may be necessary and requisite to carry its control and management into effect.

403.450 Apportionment of county general road fund to incorporated cities.

1. To provide funds for paying the expenses of road work, the several boards of county commissioners shall, from time to time upon the request of the city council, apportion to each incorporated city within the respective counties such proportion of the general road fund of the county as the value of the whole property within the corporate limits of such city or cities, as shown by the last assessment roll, shall bear to the whole property in the county, inclusive of property within the incorporated cities.

Thus we find a power to levy an ad valorem tax for roads and bridges, together with duty to maintain, etc. It is significant that while there is a power to tax, *there is no duty*. Hence, many counties find that the proceeds of the motor vehicle fuel tax are adequate to comply with [NRS 244.155](#), and as a result do not levy an ad valorem tax; therefore, there are no funds against which Section 403.450 NRS can operate in the absence of clear legislative authority.

The motor vehicle fuel tax is not an ad valorem tax, it is an excise tax, a peculiar creature of statutory origin, and as such it is subject to strict statutory construction under the statutes *as they are at any given time*.

365.180 Additional excise tax levied on motor vehicle fuel.

1. In addition to any other tax provided for in this chapter, there is hereby levied an excise tax of one-half cent per gallon on motor vehicle fuel.

365.190 Optional levy of additional excise tax: Action by commissioners.

1. Subject to the provisions of subsection 3, in addition to any other tax provided for in this chapter, there is hereby levied an excise tax of 1 cent per gallon motor vehicle fuel.

2. This tax shall be accounted for by each dealer as to the county in which it is sold to the retailer and shall be collected in the manner provided in this chapter. The tax shall be paid to the tax commission and delivered by the tax commission to the state treasurer. He shall receipt the dealer therefor.

3. The provisions of this section shall be deemed to be optional. The board of county commissioners of any county may decline to accept the 1 cent per gallon tax by adoption of a resolution passed prior to July 1, 1947, and which shall be reconsidered and passed once each year within 60 days prior to July 1 of each year as long as the board of county commissioners desires so to act. Upon the adoption of such a resolution no tax shall be collected.

365.540 Deposits in state highway fund, county gasoline tax fund.

1. \* \* \*

2. The money collected as prescribed by [NRS 365.180](#) and [365.190](#), after the remittances and deposits have first been made pursuant to the provisions of [NRS 365.535](#), shall be placed to the credit of the county gasoline tax fund by the state treasurer and shall be allocated by the tax commission to the counties as prescribed in [NRS 365.550](#) and [365.560](#).

\* \* \* \* \*

365.550 Allocation to counties of tax receipts collected under [NRS 365.180](#): Formula; remittances; limitations on use.

1. The receipts of the tax as levied in [NRS 365.180](#) shall be allocated monthly by the tax commission to the counties upon the following formula:

(a) One-fourth in proportion to total area.

(b) One-fourth in proportion to population, according to the latest available federal census.

(c) One-fourth in proportion to road mileage and street mileage (non-federal aid primary roads.)

(d) One-fourth in proportion to vehicle miles of travel on roads (non-federal aid primary roads.)

2. The amount due the counties under the formula shall be remitted monthly. The state controller shall draw his warrants payable to the county treasurer of each of the several counties, and the state treasurer shall pay the same out of the proceeds of the tax levied in [NRS 365.180](#).

3. Moneys received by the counties by reason of the provisions of this section shall be used exclusively for the construction, maintenance and repair of county roads,

and for the purchase of equipment for such work, under the direction of the boards of county commissioners of the several counties, and shall not be used to defray expenses of administration.

4. The formula computations shall be made as of July 1 of each year by the tax commission, based on estimates which shall be furnished by the department of highways. The determination so made by the tax commission shall be conclusive.

365.560 Allocation to counties of tax receipts collected under [NRS 365.190](#); apportionments to counties and incorporated cities; limitations on use of receipts.

1. The receipts of the tax as levied in [NRS 365.190](#) shall be allocated monthly by the tax commission to the counties in which the tax payment originates.

2. Such receipts shall be apportioned between the county and incorporated cities within the county from the general road fund of the county in the same ratio as the assessed valuation of property within the boundaries of the incorporated cities within the county bears to the total assessed valuation of property within the county, including property within the incorporated cities.

3. All such money so apportioned to a county shall be expended by the county solely for the construction, maintenance and repair of the public highways of the county and for the purchase of equipment for such work, and shall not be used to defray the expenses of administration.

4. All such money so apportioned to incorporated cities shall be expended only upon the streets, alleys and public highways of such city, other than state highways, under the direction and control of the governing body of the city.

The Motor Vehicle Fuel Tax Act was originally passed in 1935 (Chapter 74, Statutes of Nevada 1935 at 161). There was, however, no provision for distribution to political subdivisions contained therein.

In 1947 the act was amended to include a Section 2.1 which imposed an additional tax of 1 1/2 cents per gallon as follows:

Section 2.1. Notwithstanding any other provision of this act, there is hereby levied an excise tax on motor vehicle fuel, in addition to any other tax in this act provided, of one and one-half (1 1/2) cents per gallon. This tax shall be accounted for by each dealer as to the county in which it is received and shall be collected in the manner provided in this act and shall be paid to the state treasurer, who shall receipt the dealer therefor. The amount of the tax as levied in this section and collected by the treasurer shall be by him paid over within 30 days after its receipt to the county treasurer of the county in which the tax payment originates, and by the county treasurer be placed to the credit of the county road and bridge fund. The proceeds of such tax, except for costs of administration, shall be expended by the county for the construction, maintenance, and repair of the public highways of said county, and incorporated cities within said counties to be apportioned from the general road fund of the county on the ratio which the assessed valuation of property within the boundaries of said incorporated cities bears to the total assessment valuation of the counties inclusive of property within incorporated cities, and all such moneys so apportioned shall be expended upon the streets, alleys and public highways of such city under the direction and control of the governing body of said city, other than state highways, and for no other purpose. Any refunds to be made of the tax in this section provided shall be paid in the manner provided in this act, and deducted from the amount of any later payment to the county or counties in which the tax was collected. The county commissioners of any county may decline to accept the tax provided in this section by adoption of a resolution passed prior to the effective date of this act and which shall be reconsidered and passed once each year within sixty (60) days prior to July 1 of each year as long as the county commissioners desire so to act and upon the adoption of such a resolution no tax shall be collected as in this section provided within the boundaries of such a county. (Chapter 276, 1947 Statutes of Nevada, 850)

Subsequently, in 1949, Section 2.1 of the act was amended by dividing the section into Section 2.1(a) and 2.1(b) as follows:

(a) Notwithstanding any other provision of this act there is hereby levied an excise tax on motor vehicle fuel, in addition to any other tax in this act as provided, of one-half (1/2 ) cent per gallon. This tax shall be accounted for by each dealer and shall be collected in the manner provided in this act and shall be paid to the state treasurer, who shall receipt the dealer therefor. The receipts of the tax as levied in this subsection and collected by the state treasurer shall be allocated quarterly by the state treasurer, to the counties and shall be used exclusively on county roads under the direction of the boards of county commissioners of the several counties upon the following formula:

\* \* \*

(b) In addition hereto there is hereby levied an excise tax, in addition to any other tax in this act provided, of one cent ( 1 cent ) per gallon. This tax shall be accounted for by each dealer as to the county in which it is sold to the retailer and shall be collected in the manner provided in this act and shall be paid to the state treasurer who shall receipt the dealer therefor. The receipts of the tax as levied in this subsection, and collected by the state treasurer, shall be allocated quarterly by the state treasurer to the counties in which the tax payment originates and shall be expended by the county for the construction, maintenance and repair of the public highways of said county and incorporated cities within said counties, to be apportioned from the general road fund of the county on the ratio which the assessed valuation of property within the boundaries of said incorporated cities bear to the total assessment valuation of the counties inclusive of property within incorporated cities, and all such money so apportioned shall e expended upon the streets, alleys and public highways of such city under the direction and control of the governing body of said city, other than state highways, and for no other purpose. (Chapter 316, 1949 Statutes of Nevada, 648)

Therefore, in view of the foregoing, and in the fact framework which presently exists in Lincoln County—that is to say there being no ad valorem tax moneys in the Lincoln County Road and Bridge Fund—there is nothing against which [NRS 403.450](#) can operate, and the answer to Question 1 is in the negative, except as hereinafter set forth.

The 1947 and 1949 amendments show the progressive interaction between cities and counties and reveals a clear legislative intent as to the one-half cent levy under [NRS 365.180](#), and the answer to Question 2 is in the negative.

Again, the legislative progression herein clearly reveals a legislative intent that the cities are to share in the one-cent levy imposed by [NRS 365.190](#) and the answer to Question 3 is in the affirmative.

This opinion is not in conflict with Attorney General’s Opinion No. 73, dated June 26, 1951.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George G. Holden, *Deputy* Attorney General

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**363 School Teachers’ Sick Leave; Industrial Insurance—Where sick leave is part of a teacher’s contract of employment and an incident thereto, salary paid to the teacher thereunder may not be charged against entitlement under [NRS 616.585](#) in the event of an injury in the course of employment.**

Carson City, December 6, 1966

Hon. L. E. Blaisdell, *District Attorney, Hawthorne, Nevada*

Dear Mr. Blaisdell: In response to your request for an opinion from this office, you are advised as follows:

#### THE FACTS

It appears that a public school teacher employed by the Mineral County School District has been injured while in the course of her employment and the said teacher has accumulated a certain amount of sick leave.

#### THE QUESTION

When a public school teacher has suffered a personal injury while in the course of her employment, must she use the sick benefits provided in her contract before being entitled to the compensation provided for in the Industrial Insurance Act?

#### ANALYSIS

There is no question that school teachers are within the confines of the act nor that the teacher was injured in the course of employment.

The pertinent sections of NRS are set forth as follows:

[NRS 391.120](#): (1) Board of trustees of the school districts in this state shall have the power to employ legally qualified teachers, to determine the salary to be paid each teacher, and the length of the term of school for which teachers shall be employed. These conditions shall be embodied in a written contract to be signed by the president and the clerk of the board of trustees and the teacher, or by a majority of the trustees and the teacher. A copy of the contract, properly written, shall be delivered to each teacher not later than the opening of the term of school.

[NRS 391.180](#) (5) Boards of trustees may pay the salary of any teacher unavoidably absent because of personal illness or accident, or because of serious illness, accident or death in his family.

[NRS 616.515](#) Every injured employee within the provisions of this chapter shall be entitled to receive, and shall receive promptly, such accident benefits as may reasonably be required at the time of the injury and within 6 months thereafter, which may be further extended by unanimous vote of the commission for additional periods as may be, in the opinion of the commission, required.

[NRS 616.585](#) Every employee in the employ of an employer, within the provisions of this chapter, who shall be injured by accident arising out of and in the course of employment or his dependents as defined in this chapter, shall be entitled to receive the following compensation for temporary total disability:

(1) During the period of temporary total disability, but in no event for more than 100 months, 65 percent of the average monthly wage; and, if there be one or more persons residing in the United States dependent upon the workman during the time for which compensation is paid, an additional 15 percent for each dependent, but no more than 90 percent of the average monthly wage.

In actuality, the real question may be regarded as whether or not salary paid pursuant to the sick leave provisions in [NRS 391.180](#)(5) can be taken as a set-off or reduction of the teacher's entitlement under [NRS 616.585](#).

Our study indicates that there is little unanimity among the several states in the provisions of the several industrial insurance or workman's compensation acts and, as a result, it is somewhat difficult to derive a general rule from the decisions of the several states.

There are, in the main, three principal types of such acts: where the act itself determines that sick benefits generally either are or are not deductible; where the matter is discretionary with commission and where the act is silent.

Our act is of the latter variety and we are unable to find any Nevada cases in point.

The cases on acts similar to ours in other jurisdictions are somewhat in conflict where there is a general proposition of a full salary being paid the injured employee during his disability. However, there have been enough decisions on the precise situation at bar that we may deduce what we believe to be the general rule—that is to say—where a salaried employee is granted certain sick leave as incident to the contract of employment and it is not a gratuity or advance compensation for his injury.

The rule is best stated by the case of *Texas Indemnity Co. v. Holloway*, 30 S.W.2d 921:

During several months following employee's alleged incapacity to labor, he received from the employer an annuity or sick benefit which the employer provided for all employees as an incident to their employment. The compensation insurance carrier was in no sense a party to that arrangement, never contributed to the benefit fund, and therefore was not entitled to a credit on account of such benefits.

It has been otherwise stated that such sick leave has already been earned and as such is due and payable.

It would seem then that the two entitlements run parallel to each other. One arises by contract, the other by statute, and there being no statutory prohibition, the employee is entitled to both—the one having nothing to do with the other.

Again, in providing for sick leave for teachers the Legislature could well have provided that such was to be a set-off against industrial insurance entitlement. Since such is not the case, we must assume such was not the legislative intent.

#### CONCLUSION

Therefore, it is the opinion of this office that the teacher herein may take her sick leave at the same time as the compensation provided for in [NRS 616.585](#).

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George G. Holden, *Deputy Attorney General*

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**364 County Clerks; Fee for Filing Notary Public Bond—Unless the county clerk is specifically authorized by statute to collect a fee for services rendered in the filing of notaries public bonds, such fee may not be demanded.**

Carson City, December 12, 1966

James H. Thompson, Esq., *Chief Counsel, Department of Highways, Carson City, Nevada*

Dear Mr. Thompson: You request from this office an answer to the following question:  
Should the State of Nevada pay the Ormsby County Clerk a \$2.50 fee for the filing of a notary bond required for an employee of the State of Nevada in connection with the discharge of his official duties?

#### ANALYSIS

It is the opinion of this office that such a filing fee may not be collected by the Ormsby County Clerk's office.

The statutes relating notaries public are found in Chapter 240 of Nevada Revised Statutes. [NRS 240.030](#) reads:

Fee for commission; oath and bond.

1. Each notary public shall:

(a) Before entering upon the duties of his office and at the time he receives his commission, pay to the secretary of state the sum of \$25 for the state general fund.

(b) Take the official oath as prescribed by law, which oath shall be endorsed on his commission.

(c) Enter into a bond to the State of Nevada in the sum of \$2,000, to be approved by the district judge of the county for which the notary public may be appointed.

2. *The bond, together with the oath of office, shall be filed and recorded in the office of the county clerk of the county.* (Italics added.)

Because of the mandatory statute all persons who are appointed notary public must secure the bond in question and file the same with the county clerk. This is the case whether the notary public is employed by the State of Nevada or otherwise.

We must now examine applicable statutes to determine if the county clerk has the power to refuse to accept and file the bond of a newly-appointed notary public and demand as a condition precedent to filing such bond, the payment of \$2.50.

In Chapter 19 of NRS, we find the statutes regulating the fees to be collected by county clerks. Unless the fee charged by the county clerk is authorized by this chapter, the county clerk is not to demand the same. [NRS 19.070](#) reads:

No other fees shall be charged than those set forth in this chapter, nor shall fees be charged for any other services than those mentioned in this chapter.

In [NRS 19.120](#) to and including [NRS 19.280](#) we find the fee schedules of the county clerks of each of the 17 counties in the State of Nevada. Because of [NRS 19.070](#), supra, these fee schedules are conclusive. It is interesting to note that in 12 of the counties there is a specific provision calling for a fee of from \$1 to \$2.50 for "filing and recording a bond of a notary public." In Douglas, Elko, Ormsby, Storey, and White Pine counties we find no such provision. Because of the absence of such statutory authority the county clerks in these five counties are without power to demand any fee and must accept the bond of a notary public and file the same free of charge.

Additional authority for this conclusion is found in McQuillin, The Law of Municipal Corporations, 3d Edition, Volume 4, Section 12.189, wherein it is stated:

Fees cannot be taken by an officer for the performance of duties imposed by law, except where authority to collect fees is expressly provided by law \* \* \*

Just a few of the cases which support this conclusion are:

*State v. Niewoehner*, 155 P.2d 205 (Mont. 1946):

The fees of the clerk are prescribed by the legislature. No fee is prescribed for the filing of a motion and therefore, no fee could be accepted by the clerk for he may not collect any fee not prescribed by law.

*State v. Wilder*, 18 S.E.2d 324 (S.C. 1941): This was a proceeding by the State of South Carolina to compel the clerk of the court to file, abstract, and index copies of tax warrants. The clerk refused to perform these functions until a fee was paid. The court said:



Costs being purely of statutory origin and creation, it cannot be denied that, whenever an officer claims that he is entitled to a given item of costs, he must point out the statutory provision which confers the right to charge the item in question.

*McQuay, Inc. v. Hunter*, 105 So.2d 478 (Miss. 1958):

It is well settled that statutes authorizing officers to charge and collect fees will be strictly construed as against this officer, and if compensation for services is not clearly provided by statute, it must be denied.

Later in the opinion there appeared:

It is a doctrine of the common law, founded in public policy, that an officer shall be confined to the compensation or fee prescribed by statute.

#### CONCLUSION

Because the matter of fees is regulated by the Legislature, and because the Legislature has not authorized the County Clerk of Ormsby County to collect a fee for the filing of a notary public bond, it is the opinion of this office that such fee need not be paid and the Ormsby County Clerk is obligated to accept and file all such bonds.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: John J. Sheehan, *Deputy* Attorney General

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**365 Judgment and Execution—[NRS 176.150](#) has no application when an inmate of the Nevada State Prison has been found guilty of a capital offense and the penalty of death is imposed.**

Carson City, December 13, 1966

Mr. Jack Fogliani, *Warden, Nevada State Prison, P.O. Box 607, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Fogliani: In a letter dated December 2, 1966, you apprise this office of the following sequence of events:

1. Mr. Pierce Spillers was received at the Nevada State Prison on July 7, 1965, from Clark County, Nevada, and commenced serving concurrent sentences of from 1 to 5 years after having pled guilty to two charges of second degree burglary.

2. While Mr. Spillers was serving the above mentioned sentences he was charged with a crime of rape in Washoe County, Nevada; was found guilty and sentenced to suffer the penalty of death.

3. On the 1st day of December, 1966, the Honorable Grant L. Bowen announced the judgment of the court and set the date of execution sometime during the week commencing February 7, 1967, and ending February 13, 1967.

You then call to our attention [NRS 176.150](#) and ask what, if any, significance this statute has upon the date set for execution.

#### ANALYSIS

[NRS 176.150](#) provides:

Conviction of two or more offenses:  
Concurrent and consecutive sentences.

1. Whenever a person shall be convicted of two or more offenses, and sentence has been pronounced for one offense, the court in imposing any subsequent sentence may, in its discretion, provide that the sentences subsequently pronounced shall run either concurrently or consecutively with the sentence first imposed.

2. If the court shall make no order with reference thereto, all sentences shall run concurrently; *but whenever a person under sentence of imprisonment shall commit another crime and be sentenced to another term of imprisonment, such latter term shall not begin until the expiration of all prior terms.* (Italics supplied.)

It is the opinion of the office that the above statute has no bearing upon the sentence of death imposed. Only if a person who is incarcerated in the Nevada State Prison is sentenced to another *term of imprisonment* does this statute control. The death penalty is not the same as a prison term. Hence, it is the opinion of this office that the sentence of death may be carried out pursuant to the direction of the Honorable Grant L. Bowen. This, of course, is subject to any rights of appeal, et cetera.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: John J. Sheehan, *Deputy* Attorney General

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**366 Nevada State Highway Department—The Department may rent specialized equipment from an employee where there is no extra compensation to said employee for his personal services in operating said equipment and where the hourly rental is at least competitive with other sources of such equipment and where the hiring authority has no interest in the ownership of such equipment.**

Carson City, December 12, 1966

The Honorable John E. Bawden, *Nevada State Highway Engineer, Carson City, Nevada*

Dear Sir: You have requested an opinion of this office regarding the hiring of an airplane owned by an employee of the Highway Department.

#### THE FACTS

1. That on occasion the department needs aerial photography in the preparation of initial surveys and in the planning stage of a given piece of road construction;
2. That one of the employees of the department owns an airplane, carrying complete photographic equipment;
3. That said employee can and will rent the said airplane to the department on an hourly basis at a rate which is less than any other offers to date;
4. The said employee can and will fly and operate such equipment during the course of his employment without other or extra compensation for his services.

#### THE QUESTION

May an employee of the State Highway Department rent to said department certain specialized equipment, on an hourly basis, with no extra compensation for his personal services without being in contravention of the law?

#### ANALYSIS

In the first instance, there is no contract prohibited by [NRS 408.890](#).

Secondly, by definition there is no contract in violation of [NRS 281.220](#)(1)(2).

Thirdly, the hiring authority has no interest of any kind or nature in the proceeds of the rental nor in the ownership of the equipment.

There does not appear here, under the facts stated, to be a transaction against the best interests of the people of the State of Nevada in violation of [NRS 281.230](#); on the contrary, since the employee receives no extra compensation for his personal services in flying the equipment, and since the rental costs are alleged to be less for the equipment than could be obtained elsewhere, it would appear that the subject transaction would be in the best interests of the State of Nevada.

#### CONCLUSION

It is the opinion of this office that under the facts stated, there is no violation of law nor impropriety renting such specialized equipment from the employee of the department.

However, it is to be remembered that any such transactions will be entered into at the peril of the hiring authority and this opinion is precisely oriented to the exact fact situation herein set forth.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George G. Holden, *Deputy* Attorney General

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**367 Foreign Corporations; Free Port Law; Necessity for Qualification to Do Business—  
Goods destined for a sister state are a part of interstate commerce and while  
warehoused in this state are tax exempt pursuant to [NRS 361.160](#). A foreign  
corporation need not register with the Secretary of State to do business because it  
stores its products in Nevada warehouses nor because some of those goods will be  
consumed in Nevada.**

Carson City, December 13, 1966

Hon. John Koontz, *Secretary of State, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Koontz: You have forwarded to this office a letter from the American Tobacco Company in which is requested a legal opinion regarding a proposed marketing plan which the company desires to initiate.

The company has advised you that at the present time all shipments of its products to customers in Nevada are made via public carrier, either direct from their factories in the east or from warehouse stocks in other states. The company now feels that the volume of standing orders for its products has reached a point that it is desirable to utilize the facilities of public warehouses in the State of Nevada in an effort to better serve its customers in both this state and sister states. Under the new marketing plan the company would have no employees at the public warehouses, nor would it buy or rent any specific areas of the warehouse. The warehousemen would be compensated in proportion to the weight of the goods handled. The warehousemen would have no authority to order stock, sell merchandise or perform any act in connection with the business of the company other than to deliver merchandise according to specific instruction emanating from the main office of the company in New York City.

We are further advised that under the proposed plan all orders for products would be sent from the customer directly to the New York office and either accepted or rejected there. All payments would be made to the New York office with the proposed warehousemen taking no part in collection.

At the present time the company employs two promotional representative who travel the State of Nevada in an effort to establish good will between customers and the company. The representatives make no sales, nor do they take orders. Only if a customer is out of a given product does the representative supply an emergency stock. The product is sold "at cost" and no profit is realized.

#### QUESTION

Based upon the above statement of facts, the company desires to know:

1. Whether or not the goods in question come within the provisions of [NRS 361.160](#), the so-called free port law.
2. Should the company be required to qualify to do business within the state as a foreign corporation?

#### ANALYSIS

To answer the first question, we must examine [NRS 361.160](#), which reads as follows:

"Personal property in transit" defined; exemption.

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

(a) 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, or because the property is being held for resale to customers outside the State of Nevada. The exemption granted shall be liberally construed to effect the purposes of [NRS 361.160](#) to [361.185](#), inclusive.

2. Personal property within this state as mentioned in [NRS 361.030](#) and [NRS 361.045](#) to [361.155](#), inclusive, shall not include personal property in transit through this state as defined in this section.

This office in the past has had the opportunity to interpret this statute. In Attorney General's Opinion No. 775 dated July 12, 1949, we said when confronted with a similar situation:

We think the reading of the statute in question discloses that its purpose is to enable a nonresident owner of personal property to ship the same into the State of Nevada for the purpose of storage in a warehouse within this State and thereafter to ship such personal property to points without the State of Nevada without being required to pay the personal property tax upon such personal property so long as it remains in the warehouse and not sold or disposed of to any person or persons or points within the State of Nevada.

We stated in Attorney General's Opinion No. B-963 dated November 1, 1950;

In our opinion such a warehouse could be utilized for the no situs purpose provided always that the manufacturer so maintaining such warehouse keeps the finished goods claimed under the no situs provision separate and apart from any finished goods he may store therein for sale in the State of Nevada. In our opinion, if he commingled such

goods without clearly designating the no situs goods, then the whole of such goods is subject to taxation in this State.

We stated in Attorney General's Opinion No. 95 dated November 26, 1963:

An out-of-state destination for goods shipped into the State for storage must be specified within a reasonable time after their transportation. Otherwise, the situs of such goods becomes fixed and subject to taxes like other personal property not in transit. A careful reading of the statute convinces us that this was the legislative intent, even though the goods for which tax exemption is claimed are not to be distributed within the State.

Considering the above opinions and applying them to the instant factual situation, it is the opinion of this office that the merchandise in question is not subject to taxation while it is being temporarily housed in this State awaiting shipment to another state. However, the merchandise which is ultimately destined to be sold to consumers in this State has gained a taxable situs in Nevada while it rests in the warehouse. It no longer is an item of interstate commerce and is subject to taxation in this State. The applicable statutory provision is [NRS 361.175](#), which reads:

Monthly report required when property reconsigned to final destination within state. If any such property is reconsigned to a final destination in the State of Nevada, the warehouseman shall file a monthly report with the county assessor of the county in which the warehouse is located, in the form and manner prescribed by the Nevada tax commission. All such property so reconsigned shall be assessed and taxed.

We will now consider the second question propounded. This office has held in two prior opinions that the free port law ([NRS 361.160](#)) has no bearing on whether or not a foreign corporation must qualify as doing business in this State. See Attorney General's Opinion No. 205 dated September 29, 1952, and Attorney General's Opinion No. 218 dated November 7, 1952. We must then look to other applicable statutory enactments.

Chapter 80 of NRS controls foreign corporations. In part, [NRS 80.010](#) reads:

1. Before commencing or doing any business in this state, every corporation organized under the laws of another state, territory, the District of Columbia, a dependency of the United States or a foreign county, which enters this state for the purposes of doing business therein, shall \* \* \*

Thereafter follows a lengthy list of requirements which we deem unnecessary to set forth.

In 1952 an opinion was issued from this office which supplies our answer. See Attorney General's Opinion No. 218 dated November 7, 1952. In that opinion it was concluded that several foreign corporations need not qualify to do business in this State because they utilized a local public warehouse as an intermediate storage depot between points of shipment and points of destination located outside the State of Nevada a single time. The opinion went on to note, however, that this conclusion was limited to the factual situation then presented and did not control "\* \* \* situations wherein foreign corporations store their products with an independent warehouseman within this State under contracts of a continuing, or although isolated yet so frequent as to establish a continuing nature \* \* \*." Such is the situation with which we are here concerned. We also have the added fact that some of the goods will never again leave the State of Nevada since the company will distribute them to retail outlets located in Nevada. The question then is: Are these factors sufficient to conclude that the company in question is "doing business" in this State? We think not. If a contrary conclusion were reached, every foreign corporation which sells a small portion of its products in Nevada would have to comply with our foreign corporation act. We continue to be of the impression which was aptly expressed in Attorney General's Opinion No. 155 dated July 27, 1964. In that opinion it was concluded that because the Legislature expressed its intent that the "free port" law be liberally construed so as to encourage

foreign corporations to utilize its tax free advantages, so must it have been the intent of the Legislature not to attach a “\* \* \* hidden charge in regard to this privilege, namely, a charge for qualifying to do business in Nevada.”

It was also noted in that opinion (as in the case in the factual situation resulting in this opinion) that any work done on the products of the foreign corporation would not be done in this State by employees of the foreign corporation would not be done in this State by employees of the foreign corporation, but by a private contractor. It was then concluded: “This type of operation would clearly distinguish the case if the corporation were not otherwise clearly exempt from the necessity of qualifying to do business in Nevada.”

#### CONCLUSION

Those products of the company in question which are temporarily warehoused in this State and which are destined for ultimate delivery outside of this State come within the provisions of [NRS 361.160](#) and are tax exempt.

Those products of the company in question which are ultimately destined for consumption in this State have gained a taxable situs when they reach the warehouse in this State.

Under the factual situation as outlined above, the company in question need not qualify to do business in this State as a foreign corporation.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: John J. Sheehan, *Deputy* Attorney General

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**368 Basic Sciences; Examinations—State Board of Examiners in Basic Sciences has discretionary power to determine if examination taken in sister state, or before national licensing board, is substantially equivalent to examination proposed by [NRS 629.070](#).**

Carson City, December 21, 1966

R. W. Warburton, D.C. *Secretary-Treasurer, Nevada State Board of Chiropractic Examiners, 329 North Sierra Street, Reno, Nevada 89501*

Dear Dr. Warburton: You have requested of this office an interpretation of [NRS 629.080](#) as amended by the 1966 Statutes enacted at the special session of the Legislature (Chapter 16, 1966 Statutes).

[NRS 629.080](#) now reads as follows:

1. The board may, in its discretion, waive the examination required by [NRS 629.070](#), when proof satisfactory to the board is submitted, showing that the applicant has passed an examination in the basic sciences substantially equivalent to the examination required by this chapter, administered by an examining or licensing board of another state.
2. The board shall waive such examination when proof satisfactory to the board is submitted showing that the applicant has passed such an examination administered by a national examining board.

#### ANALYSIS

It is apparent that the Legislature intended to establish two separate and distinct categories for exemption from the examination established by [NRS 629.070](#). If the board of examiners determines that an applicant has passed an examination substantially equivalent to the examination required by [NRS 629.070](#), administered by an examining or licensing board of another state, they may waive the examination required in this State.

The words “substantially equivalent to” leave the board of examiners with a discretionary evaluation as to whether the examination should be given or waived.

[NRS 629.080\(2\)](#) is hampered by the language used. The words “such an examination” refer back to an examination “substantially equivalent to” that required by [NRS 629.070](#), as qualified by [NRS 629.080\(1\)](#). Therefore, the board of examiners has the same broad powers with regard to waiver of an examination where the applicant has taken an examination before a national examining board as it had where the examination was before the board of a sister state.

#### CONCLUSION

It is therefore the opinion of this office that the State Board of Examiners in the Basic Sciences has the discretionary power to compel the taking of an examination in basic sciences, or to waive such examination, whether the equivalent examination was given in a sister state or by a national examining board.

If the act does not comply with legislative intent, the remedy lies in further legislation.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**369 Municipal Judges—There is no constitutional or statutory barrier to the compensation of municipal judges being increased or diminished during the term for which they were elected. (Modified by AGO 374 dated 1-4-67.)**

Carson City, December 21, 1966

Hon. Walter J. Richards, *Municipal Judge, City of Las Vegas, Las Vegas, Nevada 89101*

Dear Judge Richards: In reply to your letter of October 20 in which you inquire as to whether there is any statutory or constitutional provision which would prevent the city commissioner from raising your salary, please be advised that we can find none.

#### ANALYSIS

Article 6, Section 1 of the Nevada Constitution provides for the establishment of municipal courts by the Legislature.

Article 6, Section 15 of the Nevada Constitution provides that the compensation of Justices of the Supreme Court and District Judges cannot be increased or diminished during the term for which they were elected. No mention is made of Municipal Judges.

Article 15, Section 9 of the Nevada Constitution provides that the salaries of officers whose salary or compensation is fixed by the Constitution may be increased or diminished by the Legislature, but not during the term for which they were elected. No mention is made in the Constitution of Nevada for salaries to Municipal Judges.

It was held in *State ex rel. Miller v. Lani*, [55 Nev. 123](#), 27 P.2d 537 (1933) that the language of Article 15, Section 9 of the Nevada Constitution which authorizes the Legislature to increase or diminish the salaries of officers whose salaries are fixed by the Constitution refers only to state officers, as does the provision against increasing or diminishing salaries during the term for which they were elected.

It will be noted that Article 17, Section 5 of the Constitution refers only to state officers. A former Attorney General held in an opinion dated March 7, 1910, that Article 15, Section 9 did not apply to county or township officers or state officers created by statute.

#### CONCLUSION

It is therefore the opinion of this office that the compensation of Municipal Judges may be increased or diminished during the term for which they were elected.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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**370 Mining; Taxation—A mineral survey plat, standing alone, does not constitute a patent, nor does it serve to transfer public domain to private ownership. A mining claim may not be placed on the county tax rolls as realty until the county assessor has conclusive evidence that such claim is no longer in public domain.**

Carson City, December 21, 1966

Hon. Robert E. Berry, *Storey County District Attorney, 320 Flint Street, Reno, Nevada*

Dear Mr. Berry: You have requested an opinion of this office concerning evidence of ownership of patented mining claims and evidence of patented mining claims in Nevada.

#### STATEMENT OF FACTS

It appears that a certain person has filed with the Storey County Recorder documents purporting to be evidence of title to mining claims and which also purport to evidence that such claims are patented.

These documents are in the form of photostatic copies of documents of record in the files of the Land Office of the U.S. Bureau of Land Management. They are entitled "Survey No. ...., Plat", and then describe the particular claim and are signed by the U.S. Surveyor-General in and for the State of Nevada at the time.

From the sample enclosed in your letter, there appears to be no granting, habendum, or conveyancing language; in short, it appears to be no more than what it purports to be: A survey of the property with a description contained therein which, taken together with the field notes from which the plat or survey was made, would be a survey adequate to support a patent application.

#### QUESTION

Does the filing with the county recorder of a photostatic copy of a plat or survey of a mining claim, taken from Bureau of Land Management records, constitute sufficient evidence of title to warrant the county assessor's placing the mining claim, that might or might not have been subsequently granted a patent, upon the tax roll as a patented mine and the property of the person or company named on the plat as owner of the "claim"?

#### ANALYSIS

A patent is a deed issued by a sovereignty. A deed is a conveyance of realty or, in some instances, an interest in realty. A deed is an instrument in writing which, by the use of certain words and phrases on its face, causes the title to realty to pass. Thus, it follows that the instruments in question must have all the attributes of a deed.

There must be words describing the parties and the property, there must be words describing the consideration which supports the conveyance, there must be words and phrases



containing the granting clause and the habendum clause, and there must be proper execution as provided by law.

The instruments in question contain no such words or phrases except to describe the property and determine its locus.

It is a matter of common knowledge in the mining industry that in the early days of Nevada mining a great many patent applications were made which were dropped after survey. Therefore, the existence of such survey plats as herein discussed raises only the barest presumption that a patent was ever issued.

#### CONCLUSION

As a result of the foregoing, this office concludes that the answer to your question is in the negative. Moreover, before the property described in such instruments can be properly placed on the tax rolls, it will have to be established by legally competent evidence that a patent did in fact issue so as to transfer the property described from the public domain to private ownership.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George G. Holden, *Deputy* Attorney General

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### **371 Utilities; Regulation—A landlord organization generating and selling electricity to its tenants is subject to regulation by the Nevada Public Service Commission.**

Carson City, January 3, 1967

Mr. William E. Mooney, *Secretary, Public Service Commission of Nevada, Carson City, Nevada*

Dear Mr. Mooney: In a letter dated December 5, 1966 you requested the opinion of this office as to whether the Public Service Commission could regulate a landlord corporation furnishing electrical power to its tenants from a generating plant leased by the corporation.

#### STATEMENT OF FACTS

The owners of a shopping center propose to install a power generating plant, fueled by natural gas, known in trade circles as a "Total Energy Plant." The plant will furnish electricity with other services to the shopping center tenants under a monthly package billing plan. The unit providing these services will be leased from another corporation and will be under the sole control of the landlords. The entire operation will take place on land entirely owned in fee simple by the shopping center owners.

#### QUESTION

Does the electrical generating unit together with the operating corporation comprise a public utility within the meaning of [NRS 704.020\(2\)\(b\)](#), thereby subjecting it to regulation by the Nevada Public Service Commission?

#### ANALYSIS

The controversy may be resolved by a plan reading of [NRS 704.020\(2\)](#), wherein:

2. "Public utility" shall also embrace \* \* \* (b) Any plant or equipment \* \* \* for the production \* \* \* or furnishing to other persons \* \* \* (of) \* \* \* power in any form \* \* \*

There is no room for interpretation when the words of a statute, as here, are clear and unambiguous and the legislative intent plainly appears therein. *Brown v. Davis*, [1 Nev. 409](#) (1865); *State ex rel. Blaisdell v. Conklin*, [62 Nev. 370 at 373, 151 P.2d 626](#) (1944).

On the basis of the facts presented, the “Total Energy Plant” is clearly a “plant,” the function of which is to generate and furnish electrical power to the tenants of the property. The existence of a landlord-tenant relationship between the supplier and the tenant consumers does not deprive this segment of the public of the protection in matters of service quality and changes to which it would otherwise be entitled. Unless state regulatory measures are imposed, the tenants herewith have no practical means of insuring equitable rates or proper service. Further, they would appear to be without any real bargaining power in the matter of charges made for electrical service.

We are not unaware of decisions elsewhere holding the activities of similar installations to be beyond the regulatory power of the regulating agency. The statutes under which these cases were decided, however, vary significantly from [NRS 704.020](#), being much more narrow in the grant of power given the regulatory agency. No cases have been discovered treating statutes sufficiently alike [NRS 704.020](#) to be persuasive.

The fact that the power plant, the buildings it will serve, and the ground underneath are all either owned or controlled by one corporation does not resolve the matter. The decisive factor is whether the public or a part of it will be affected by these operations. The obvious reason for regulatory legislation is the protection of a public having no individual bargaining power as to the quality of service given or the rates charged. Experience has shown that this disparity in bargaining power would continue even where the power rates initially negotiable.

Proposed service to the entire public is not a prerequisite to regulatory jurisdiction. The “public” need not include the state or even an entire community. For the purpose the [NRS 704.020](#) the “public” need comprise only a minimum of two persons. Attorney General’s Opinion 109 (2-7-1964). In the present instance at least sixty individuals or firms will be affected by the power generated and distributed. These tenants in effect comprise a captive public and as such are entitled to the protection afforded by the Public Service Commission. We do not reach the question of whether the corporation furnishing the electrical power is to be a public service corporation in all respects if granted a Certificate of Public Convenience and Necessity, and thereby obligated to serve all who apply to it for electrical power. We merely say that the owning corporation here may be regulated in the rates charged for electrical service and may be regulated in the rates charged for electrical service and may be compelled to obtain a Certificate of Public Convenience and Necessity before commencing operations.

Lastly, the situation here is not one of submetering and resale as presented in the case of the *Sierra Pacific Power Co. v. Nye*, [80 Nev. 88](#), 389 P.2d 387, 1964, or that of a single user as contemplated in Attorney General’s Opinion 109 (2-7-1964).

#### CONCLUSION

The generation and furnishing of electrical power by a landlord to his tenants is an activity subject to regulation by the Public Service Commission.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George H. Hawes, *Deputy* Attorney General

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**372 Housing Authorities—Negotiations prior to settlement in the sale and purchase of property need not be conducted openly, being contrary to the public welfare, but the formal acceptance of the negotiated settlement should be made in open meeting.**

Carson City, December 29, 1966

Leonard T. Howard, Sr., Esq., 310 South Virginia Street, Reno, Nevada 89501

#### QUESTION

Dear Mr. Howard: You have requested an opinion of this office as to whether negotiations between the Housing Authority and potential sellers of property to the Authority may be held confidential until negotiations are concluded. [NRS 241.010](#) provides as follows:

In enacting this chapter, the legislature finds and declares that all public agencies, commissions, bureaus, departments, public corporations, municipal corporations and quasi-municipal corporations and political subdivisions exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

#### ANALYSIS

We do not feel that the word "deliberations" as used in the preceding paragraph is used in the connotation of "negotiations." In order to arrive at a price which will be of the greatest benefit to the public, it is necessary to negotiate, and any cause of action which disturbs this long accepted procedure is deleterious to the public welfare.

In all public matters the importance of the "open meeting law" is the assurance that the public will be informed, and that no secret deals will be entered into by the responsible agency. Thus, if after negotiations are completed in the sale or purchase of property, the public is made aware of the result in an open meeting held for that purpose, the spirit of the law is met.

[NRS 241.030](#) reads as follows:

Nothing contained in this chapter shall be construed to prevent the legislative body of a public agency, commission, bureau, department, public corporation, municipal corporation, quasi-municipal corporation, or political subdivision from holding executive sessions to consider the appointment, employment or dismissal of a public officer or employee to hear complaints or charges brought against such officer or employee by another public officer, person or employee unless such officer or employee requests a public hearing. The legislative body also may exclude from any such public or private meeting, during the examination of a witness, any or all other witnesses in the matter being investigated by the legislative body.

This referral to executive sessions is not exclusive so as to restrict executive sessions to personnel matters. This office held in an opinion dated August 24, 1961, that the open meeting law applied only to formal meetings of public boards, commissions, and agencies when deliberations are conducted and formal action taken. Thus in the present case the meeting when the formal action of accepting the result of the negotiations is consummated should be open.

#### CONCLUSION

This office therefore concludes that negotiations prior to settlement in the sale and purchase of property need not be conducted openly, being contrary to public welfare, but that the formal acceptance of the negotiated settlement should be made in open meeting.

Respectfully submitted,

HARVEY DICKERSON, Attorney General