

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1967

---

The following opinions have been furnished by this office in response to inquiries submitted by the various state officers and departments, district attorneys and city attorneys.

---

**373 Nevada Girls Training Center; Custody and Control of Paroled Inmates; Interstate Compact on Juveniles—The Legislature has vested the Superintendent of the Nevada Girls Training Center with broad discretion in selecting homes for inmates while they are released on parole. However, the committing juvenile court retains jurisdiction over such child and if the parents of a paroled child desire to be heard, they should petition that committing court. A parolee from the Nevada Girls Training Center may reside in a sister state pursuant to the Interstate Compact on Juveniles.**

Carson City, January 3, 1967

Mr. W. W. White, *Director, Department of Health and Welfare, Carson City, Nevada*  
89701

### STATEMENT OF FACTS

Dear Mr. White: You have requested from this office an opinion as to what action may lawfully be taken by parents of children who have been paroled from the Nevada Girls Training Center during the period of parole. You have informed this office that on past occasions parents have vigorously attempted to obtain custody of the child or direct and dictate the conditions of parole.

You also seek from this office an opinion as to whether or not parolees may be sent to a sister state which is a member of the Interstate Compact on Juveniles.

### ANALYSIS

We are dealing with a subject that has continually plagued sovereign entities—the relation of parent and child and the role to be played by the state. It cannot be denied that the parent has certain rights as well as duties in regard to his or her child. Any parental right possessed is, however, not absolute, but must yield to the best interests of the child. Even the natural right of a parent to the custody and control of his infant is subject to exception and may be restricted and regulated by appropriate legislation or judicial action. See 39 Am.Jur., Parent and Child, Section 15.

Most of the cases dealing with this topic have arisen because of mistreatment suffered by children inflicted by cruel or neglectful parents. The power of the state to interfere with the parent-child relationship is not limited to cases invoking parental misconduct or fault, however.

The power of the state to restrict the rights of a parent is based upon its position as *parens patriae* on the right of the child, as citizen and ward, to its protection as well as upon the state's interest in its own perpetuation.

The text writers of American Jurisprudence in the section above cited have stated:

The authority of the state, through its legislation, to restrict and regulate the parental power of custody and control over minor children covers a wide field of possible legislation, including such subjects as the education of the child, conditions of work and employment for children, the punishment and reformation of juvenile delinquents, the substitution of others in place of the natural parents, and numerous other phases of the child's existence.

In 26 Am.Jur., Houses of Corrections, Section 4, it is stated:

Where a child has been committed to an institution such institution may place the child in a private home subject to an agreement that if, in the discretion of the officials of such institution, the child's best welfare would require the return of the child, then the institution has the best right to the custody of the child and may bring habeas corpus in order to secure such custody.

Based upon the above, it necessarily follows that a parent does not enjoy an exclusive and paramount right of control over children, who, for one reason or another, have been delivered to the care and custody of the State of Nevada. Hence, we must look to appropriate legislative enactments to determine to what extent this State may control the disposition of children.

Realizing the need of some female children for professional guidance and training, the Legislature, in 1961, added to Chapter 210 of NRS a series of statutes designed to regulate the Nevada Girls Training Center. Among those statutes we find [NRS 210.670](#), which reads as follows:

1. When, *in the opinion of the superintendent*, an inmate deserves parole according to regulations established for that purpose, and parole will be to the advantage of the inmate, *the superintendent may grant parole under such conditions as he deems best.*

2. Each person paroled shall be provided with a reputable home and a school or work program. The school may pay the expenses incurred in providing such a home, which expenses shall be paid from funds made available to the school for such purpose.

3. When any person so paroled has proved her ability to make an acceptable adjustment outside the school, *the superintendent shall petition the committing court, requesting dismissal of all proceedings and accusations pending against such person.*

4. Any person who violates the conditions of her parole may be returned to the school (Italics added.)

The italicized portions of this statute make it clear that it was the intent of the Legislature to vest all rights of control during the period of parole in the designated officials of the Training Center. We conclude this to be proper. From this conclusion it does not follow that parents are not to be heard when they voice their opinion and desire as to the care of their children upon parole from the Nevada Girls Training Center. A heated quarrel or argument with the Superintendent, however, is not the answer. The laws of Nevada provide the remedy for the parent. This is the Juvenile Court Act, Chapter 62 of NRS.

Because all females housed in the Nevada Girls Training Center have been delivered there pursuant to an order of a juvenile court, they continue to be within the continuing jurisdiction of that court. [NRS 62.070](#) so provides:

When jurisdiction shall have been obtained by the court in the case of any child, the court shall retain jurisdiction of the child until it reaches the age of 21 years.

Hence, if the parent desires to contest the home chosen by the Superintendent of the Nevada Girls Training Center, a hearing should be sought before the court which issued the order committing the child to the Nevada Girls Training Center.

Proceeding now to the second phase of this opinion, we conclude that the Interstate Compact on Juveniles is available and may be utilized with regard to females paroled from the Nevada Girls Training Center.

The Intrastate Compact on Juveniles was enacted in 1957, the text of which may be found in Chapter 214 of the Nevada Revised Statutes. Article VII of that Compact reads in part:

(a) That the duly constituted judicial and administrative authorities of a state party of this compact (herein called "sending state") may permit any delinquent juvenile within such state, placed on probation or parole, to reside in any other state party to this compact (herein called "receiving state") while on probation or parole, and the receiving state shall accept such delinquent juvenile, if the parent, guardian or person entitled to the legal custody of such delinquent juvenile is residing or undertakes to reside within the receiving state. \* \* \*

The language lends itself to no conclusion other than that parolees may reside in a sister state which is a member of the Compact provided the parent, guardian, or person entitled to the legal custody of such child resides or undertakes to reside within that state.

#### CONCLUSION

The Superintendent of the Nevada Girls Training Center has the power to determine conditions of parole. If the parent of a paroled child desires to contest the imposed conditions, he may seek relief from the committing juvenile court. When determining the conditions of parole, the Superintendent may utilize the Interstate Compact on Juveniles.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: John J. Sheehan, *Deputy* Attorney General

---

**374 Municipal Judges—Modifies Attorney General Opinion No. 369 dated December 21, 1966.**

Carson City, January 4, 1967

Hon. Walter J. Richards, *Municipal Judge, City of Las Vegas, Las Vegas, Nevada 89101*

Dear Judge Richards: Our Opinion No. 369 is modified to the extent of holding that where a city charter, enacted by the Legislature, provides for the salary of municipal judge, such salary can only be changed by the Legislature by amendment.

In all other respects Opinion 369 is applicable.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**375 State Fish and Game Commission; Vacancies—An appointment by the Governor of a State Fish and Game Commissioner to replace a member who has resigned, continues only to the next general election and the qualification of a successor.**

Carson City, January 9, 1967

Mr. Frank W. Groves, *Director, Fish and Game Department, P.O. Box 678, Reno, Nevada*

Dear Mr. Groves: You have requested an opinion from this office covering the following situation:

Commissioner “A” tendered his resignation on February 21, 1966, and “B” was appointed by the Governor on April 18, 1966, for a term beginning with the aforementioned date of April 18, 1966, and continuing until the next general election by the people to be held in November 1966, and the qualification of his successor thereafter.

The appointed commissioner failed to file for reelection at the 1966 election and his name did not appear on the ballot.

Your question is whether by reason of the failure of “B” to file for the office, said office became vacant of the first Monday in January 1967.

ANALYSIS

[NRS 501.130](#) provides as follows:

1. At the general election in 1948, there shall be elected in each county of the state, on a nonpartisan ballot, one person as state fish and game commissioner.
2. The term of office of each commissioner first elected at the 1948 general election shall be:
  - (a) From the counties of Elko, Lincoln, Nye, Esmeralda, Lyon, Eureka, Pershing and Washoe, 2 years.
  - (b) From the counties of White Pine, Clark, Mineral, Douglas, Lander, Churchill, Ormsby, Humboldt, and Storey, 4 years.
3. After the expiration of the terms designated in subsection 2, the term of office of each commissioner shall be 4 years.

[NRS 501.140](#) provides;

1. In the event of a vacancy on the commission caused by death, resignation, failure of election, or a change of residence to a county other than that which the member was elected to represent, or other cause, the governor shall, within 30 days, appoint an actual and bona fide resident within the county affected by the vacancy until the vacancy can be filled by election.
2. The governor may declare a vacancy for any of the causes provided, and make his appointment after reviewing the case as presented to him by the county game management board or by a representative sportsmen’s organization within the county affected.

It will be noted that the statutory authority does not provide that the vacancy may be filled for the unexpired term of the *resigned* commissioner, but only until the vacancy

can be filled by election. The vacancy arising as a result of Commissioner “A’s” resignation could have been filled at the general election of 1966.

If the statute as set forth in [NRS 501.140](#) did not provide for the filling of the vacancy in a certain manner, the Constitution of Nevada would have set the matter at rest in exactly the same procedure. Article V Sec. 8 of the Nevada Constitution provides:

Sec. 8. Vacancies filled by the Governor. When any office shall, from any cause, become vacant and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a Commission which shall expire at the next election and qualification of the elected person to such office.

A similar provision is made by Article XVII Sec. 22 of our State Constitution, it having been resolved that members of the State Fish and Game Commission are state officers.

It is thus apparent that the Legislature wished to follow the guidelines established by our Constitution in authorizing the Governor to fill vacancies on the Fish and Game Commission.

#### CONCLUSION

It is therefore the opinion of this office that no person having filed for the office of State Fish and Game Commissioner from a certain county at the November 1966 general election, on the first Monday of January, 1967, that office became vacant; and the power lies with the Governor to fill such vacancy by appointment, said appointment to continue until the next general election.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

#### **376 Health Department; Tuberculosis—State Department of Health and Welfare legally obligated to provide diagnostic treatment and in-patient and out-patient care for indigent tuberculosis patients in Clark County.**

Carson City, January 19, 1967

Otto H. Ravenholt, M. D., *Director, Department of Health and Welfare, Carson City, Nevada 89701*

Dear Dr. Ravenholt: You have submitted to this office an inquiry which contains two questions:

1. Is the State Health Division legally obliged to provide diagnostic examination and out-patient care for indigent tuberculosis patients in Clark County as elsewhere in the State of Nevada?
2. Does the Department of Health and Welfare have any legal basis for refusing to provide such service in Clark County?

#### ANALYSIS

That indigent persons afflicted with active tuberculosis of a nature to constitute a threat to the health and safety of the public are entitled to be cared for at public expense, cannot be denied.

[NRS 443.105](#) reads 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.

It can be determined from reading the statute that a budget should be presented to the Legislature to cover the anticipated cost of treatment to such indigent patients.

The Legislature wisely foresaw the need of diagnostic examinations and in-patient and out-patient care for such indigents.

[NRS 443.115](#) reads as follows:

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.

Thus the directive to enter into contracts with hospitals or other institutions having the necessary facilities to meet the requirements of the statutes is clear and unambiguous, even to the extent of authorizing out-of-state institutions when none are available in Nevada.

In 1960 the Legislature appropriated \$350,000 for the construction, furnishing, and equipment of a building at Southern Nevada Memorial Hospital, Clark County, Nevada, for the care and treatment of persons infected with active tuberculosis.

The law provided that upon completion the authority and responsibility for the administration, operation, and repair of such tuberculosis treatment unit should rest with the Board of Trustees of said Hospital, except that the authority to admit patients for treatment was vested in the Department of Health solely.

It is this division of authority which lies at the bottom of the present controversy. The provision of the law that the unit should contain 20 to 30 beds has been the cause of controversy between the Hospital and the Department of Health.

But even the 1960 law (Chapter 255 of the 1960 Statutes of Nevada) under Section 5 provides that the cost of care and treatment of indigent patients are to be paid in accord with Chapter 443 of NRS.

This office issued an opinion on April 19, 1966 (Attorney General's Opinion No. 329), which is closely allied with the opinions herein expressed.

#### CONCLUSION

It is therefore the opinion of this office that the State Department of Health and Welfare is legally obligated to provide diagnostic examinations and out-patient care for indigent tuberculosis patients in Clark County.

It is the further opinion of this office that the State Department of Health and Welfare has no legal basis to refuse such service to indigents in Clark County, Nevada.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**377 Churches; Taxation—A religious group which cultivates acreage for farm purposes is not entitled to the tax exemption provided in [NRS 361.125](#) or [361.140](#), said property not falling within the category of places of worship, their contents, or the land upon which such buildings and contents are located. (Modified by AGO 421 dated 6-14-67.)**

Carson City, January 19, 1967

Hon. Merlyn H. Hoyt, *District Attorney, White Pine County, Ely, Nevada*

Dear Mr. Hoyt: You have presented to this office a question which concerns the exemption from taxes of a religious organization.

The organization owns several hundred acres, 100 of which are devoted to raising crops. The cultivation is accomplished by the work of the members of the religious sect. The products are then sold to the general public, and the money obtained therefrom is devoted solely to church purposes.

The question advanced is whether the property is exempt from taxation under Sections 361.125 and 361.140 NRS.

[NRS 361.125](#) reads as follows:

Churches, chapels, other than marriage chapels, and other buildings used for religious worship, with their furniture and equipment, and the lots of ground on which they stand, used therewith and necessary thereto, owned by some recognized religious society or corporation, and parsonages so owned, shall be exempt from taxation; but when any such property is used exclusively or in part for any other than church purposes, and a rent or other valuable consideration is received for its use, the same shall be taxed.

It can readily be determined that the only church properties exempt from taxation are churches, chapels, and other buildings used for religious worship, with their furniture and equipment, and the lots of ground on which they stand.

Certainly a farm which is cultivated and tilled and from which a profit is derived does not fall within the category of this definition. Furthermore, the legislative intent is plainly shown by the language, “but when any such property is used exclusively or in part for any other than church purposes, and a rent or *other valuable consideration* is received for its use, the same shall be taxed.”

The exemption was intended to apply only to places of worship, their contents and the lots of ground on which they stand. This is confirmed by Attorney General’s Opinion No. B967 dated November 13, 1950, issued by my distinguished predecessor who not sits in the Senate of the United States.

#### CONCLUSION

It is therefore the opinion of this office that an acreage cultivated by a religious sect does not fall within the exemptions of [NRS 361.125](#) nor [NRS 361.140](#).

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---



**378 Public Employees Retirement—A public employee, in order to be entitled to retirement at 55 years of age, must have completed 30 or more complete years of service in the retirement plan.**

Carson City, January 23, 1967

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

Dear Mr. Buck: You have related to this office by letter dated January 21, 1967 the following facts:

An employee of the State of Nevada began service on September 1, 1936, and was employed until his death on June 19, 1966. In 1961 he selected an option to his retirement plan which protected his wife in case of his death under [NRS 286.590](#)(3) which reads as follows:

Option 3 consists of a reduced service retirement allowance payable during the member's life, with the provision that it continue after his death at one-half the rate paid to him and be paid for the life of the beneficiary which he nominates by written designation duly acknowledged and filed with the board at the time of retirement should beneficiary survive him.

ANALYSIS

Under [NRS 286.610](#)(1), member with 25 or more years of service, but who is not yet eligible for retirement by reason of age, may elect to protect a beneficiary under the terms and conditions of one of options 2 to 5, inclusive, as described in [NRS 286.590](#).

The public employee who started serving the State on September 1, 1936, elected option 3 of the retirement plan on October 2, 1961; thus, the 25-year period provided in [NRS 286.610](#)(1) was met.

[NRS 286.610](#)(3) reads in part as follows:

Should the member die after the election has become effective, the designated beneficiary, if surviving, shall become eligible for receipt of an allowance under the elected plan at such time as the deceased member would have reached retirement age.

[NRS 286.510](#)(2) provides that an employee other than a police officer or fireman, who has attained the age of 60 years, and who has completed a minimum of 10 years of credited service, may be retired.

[NRS 286.510](#)(3) provides that any employee who has completed 30 years of service and who has attained the age of 55 years, may be retired.

A calculation of the state service of the public employee here considered reveals that he served 29 years, 9 months, and 19 days, or 29.803 years.

Thus, it can be clearly shown that the employee served more than 10 years but less than 30, and therefore falls into the category of those whose retirement age is set at 60 years of age. It is regrettable that the employee did not attain the 30 years of service, as he would have been 55 years of age on February 17, 1968, and under the option plan adopted, the widow will not be able to receive benefits until the date of what would have been his 60th birthday, or February 17, 1973.

CONCLUSION

It is therefore the opinion of this office that a public employee, in order to be entitled to retirement at 55 years of age, must have completed 30 complete years or more of service in the public employees retirement plan.



Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**379 Contracts between Public Officers and Public Bodies—A justice of the peace may not enter into an insurance contract directly with the county in which he holds office.**

Carson City, January 31, 1967

John Chrislaw, Esq., *District Attorney, Douglas County, Douglas County Courthouse, Minden, Nevada*

Dear Mr. Chrislaw: You have requested an opinion as to whether or not a justice of the peace who is an insurance agent may offer to sell and sell insurance to the county in which he holds office.

We assume at the onset that this is not a situation where the county purchases its insurance from a company who in turn distributes a portion of the premium to the several insurance agents in the county.

We assume that we do have a situation where a justice of the peace who is an insurance agent proposes to offer to sell and sell a certain type or types of insurance to the county in which he holds office, for which he will receive a commission.

**ANALYSIS**

An insurance policy is a contract. A payment of a certain consideration by the insured or obligee is made to the insurer or obligor in return for a promise to reimburse the insured in some manner and to some extent for certain types of losses which the insured may sustain. Therefore, the insurance agreement is a contract by any definition.

The insurance agent who binds the insurance company is an agent of the company and not of the insured.

**OPINION**

The situation resolves itself into one where a public officer would be trying to represent two adverse interests. Article VI, Section 1 of the Constitution of Nevada provides:

The judicial power of this State shall be vested in a Supreme Court, District Court, and Justices of the Peace \* \* \*

Section 8 provides that the Legislature shall determine the number of justices of the peace to be elected in each city and township of the State. Also, the statutes provide for the compensation by the county of the justices of the peace.

Thus, it follows that a justice of the peace is a public officer, and more particularly a state officer.

[NRS 269.050](#) provides in part:

1. It shall be unlawful for any town officer to be interested in any contract made by such officer, or be a purchaser or be interested in any purchase of a sale made by such officer, in the discharge of his official duties.

[NRS 281.230](#) provides in part:

1. The following persons shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind or nature inconsistent with loyal service to the people resulting from any contract or other transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way interested or affected:

(a) State, county, municipal, district and township officers of the State of Nevada;

13 C.J. 432, Section 371, provides that:

\* \* \* Another class of agreements which are within the rule are those between a state, a county or other municipal corporation for the doing of work or the furnishing of supplies with one of its own officers, \* \* \* or in which he is interested.

[NRS 350.360](#) provides in part:

\* \* \* 2. "Municipality" means:

(a) A county.

(b) A city.

(c) An unincorporated town or city \* \* \*

Therefore, it follows that a direct contract of insurance between a justice of the peace and the county in which he holds office would be contrary to the statute hereinabove cited and the public policy which they express.

As a result, it is the opinion of this office that the answer to your question is in the negative.

Moreover, this opinion is in coherence with and supplementary to Attorney General's Opinion No. 329 of April 30, 1954, and is not in conflict with Attorney General's Opinion No. 346 of July 13, 1966, which deals with a very special fact situation and a different aspect of public policy.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George G. Holden, *Deputy Attorney General*

---

**380 University of Nevada; Open Meetings, Board of Regents—Open meeting law applies to formal assemblages of the whole Board of Regents as a deliberative body, wherein there is joint, official deliberation and action.**

Carson City, January 31, 1967

Dr. Charles J. Armstrong, *President, University of Nevada, Reno, Nevada*

#### STATEMENT OF FACTS

Dear President Armstrong: You have requested an opinion of this office concerning [NRS 396.100](#), the University Open Meeting Law, as it applies to committee meeting of the Board of Regents of the University of Nevada. These meetings are conducted by a portion of the board and no final action is taken. They are held for the

purpose of developing recommendations which are presented to a full board for action in meetings open to the public.

#### ISSUE

Whether the open meeting law extends to committee meetings conducted by less than the full Board of Regents?

#### ANALYSIS

This office has previously determined that the state open meeting law applies only to formal assemblages of public boards, commissions, or agencies. (Attorney General's Opinion no. 241 dated August 24, 1961.) The statute with which we are presently concerned is very similar in its application. In our previous opinion we cited *Turk v. Richard*, 47 So.2d 543, wherein the Florida Court, in determining the application of an open meeting law, said:

The real question in the case is, what did the legislature mean by the words "all meetings" when it enacted the statute requiring that all meetings of any city or town council should be held open to the public of any such city or town? *The governing body of a municipality can act validly only when it sits as a joint body at an authorized meeting duly assembled pursuant to such notice as may be required by law; for the existence of the council is as a board of entity and the members of the council can do no valid act except as in integral body \* \* \*. Unless, therefore, the members of the council formally come together, in the manner required by law, for the purpose of joint discussion, decision and action with respect to municipal affairs there can be no "meeting" of this governing body, within the legally accepted sense of the term, for the individual or separate acts of a member or the unofficial agreements of all or a part of the members of the council are ineffectual and without binding force; joint, official deliberation and action as provided by law being essential to give validity to the acts of the council.* (Citations.)

The rule being plain as to what is necessary to constitute a "meeting" under the law pertaining to municipal corporations, it must be assumed that when the legislature of the state enacted a statute providing that "all meetings of any city or town council \* \* \* of any city or town \* \* \*" it had knowledge of the general law pertaining to municipal corporations and intended the term "all meeting" to have reference only to such formal assemblages of the council sitting as a joint deliberative body as were required or authorized by law to be held for the transaction of official municipal business; \* \* \* (Italics added.)

In view of these holdings, this office is of the opinion that [NRS 396.100](#) does not apply to committee meetings conducted by less than the full Board of Regents of the University of Nevada.

Another reason may be advanced in support of this conclusion. The Supreme Court of the State of Nevada has determined that the Board of Regents is autonomous in all executive and administrative matters. *King v. Board of Regents*, [65 Nev. 533](#); cf. Attorney General's Opinion No. 124 dated April 14, 1964. The conduct of committee meetings may vary well be within the scope of this judicially declared autonomy.

#### CONCLUSION

[NRS 396.100](#) applies to formal assemblages of the whole Board of Regents as a deliberative body wherein there is joint, official deliberation and action. This would not include committee meetings conducted by less than the whole board, for the purpose of studying matters that may be presented to the whole board for official action.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: Daniel R. Walsh, *Chief Deputy* Attorney General

---

**381 Savings and Loan Accounts—The survivor of a joint tenancy in a savings account in a savings and loan association may withdraw such account without the same being subject to probate.**

Carson City, January 31, 1967

Mr. Marvin L. Wholey, *Commissioner of Savings Associations, Nevada State Department of Commerce, Carson City, Nevada*

Dear Mr. Wholey: By your memo of January 27, 1967, you have requested an opinion concerning joint tenants in savings accounts in savings and loan associations.

QUESTION

May a joint tenant withdraw a savings account from a savings and loan association organized or doing business in this State upon the decease of the other joint tenant, without probate or other administration?

ANALYSIS

[NRS 673.018](#) provides:

“Member” defined. “Member” means a person owning a savings account of an association, or a person borrowing from or assuming or obligated upon a loan held by an association, or purchasing property securing a loan held by an association, and any other person obligated to an association. A joint and survivorship relationship, whether of investors or borrowers, constitutes a single membership.

[NRS 673.031](#) provides:

“Savings account” defined. “Savings account” means that part of the savings liability of the association which is credited to the account of the holder thereof.

[NRS 673.350](#) provides:

Joint Ownership; payment as valid discharge of association; voting rights.

1. Shares, share accounts or investment certificates may be issued to or in the name of two or more persons or the survivor or survivors. In the event of the death of any of them the association or company shall be liable thereon only to the survivor or survivors. While any of them are living, payment to any of them shall discharge the liability to all.

2. The joint ownership of shares or share accounts shall not confer the right to vote to any greater extent than if such shares or share accounts were held by an individual.

[NRS 111.065](#) provides in part:

Joint tenancy in real and personal property:

2. A joint tenancy in personal property may be created by a written transfer, agreement or instrument.

Since the statutes do not define “joint tenants” we may rely on the general law. The words “joint tenants” have settled meaning both at common law and under statutes. *Smith v. Shrieves*, 13 Nevada 303.

One of the fundamental incidents of joint tenancy is the right of survivorship. *Roberts v. Greer*, 22 Nevada 318.

An estate in Joint Tenancy is one held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and having as its distinguishing feature the right of survivorship. 20 Am.Jur.2d 94.

The essence of joint tenancy as opposed to other types of co-ownership is the basic proposition that each has an equal right to the whole of the estate.

Savings and loans association deposits may be held in joint tenancy. 20 Am.Jur.2d 98.

The claim of survivorship attaches at the time of death; thus, the interest of the decedent cannot vest in his heirs, devisees, or representatives. The interest of the deceased tenant passes to the survivor by reason of the tenancy and not by the probate laws. 20 Am.Jur.2d 95.

It seems quite clear that Nevada has no clear prohibition against the withdrawal of a savings account by the survivor of a joint tenancy in such account, thus allowing the general law to prevail.

Also, it appears that the interest of decedent tenant passes instantly to the survivor and may not, therefore, become subject to probate.

Some states have statutes which expressly prohibit a withdrawal by the survivor prior to probate of decedent’s estate. Such provisions abrogate the common law and are passed generally for special reasons such as tax liability etc.

Again, such is not the case in this jurisdiction.

#### OPINION

It is the opinion of this office that the survivor of a joint tenancy in a savings account in a savings and loan association may withdraw the same immediately after the death of the decedent free of probate or other limitation.

It is to be noted that this opinion refers only to situations where a bona fide joint tenancy exists.

It is further noted that such tenancies must be created as provided by law, else the presumption of tenancy in common will prevail.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George G. Holden, *Deputy Attorney General*

---

**382 Savings and Loan Associations; Short-term Real Property Loans—The principal amount of a short term real property loan must be amortized in monthly installments.**

Carson City, February 1, 1967

M. L. Wholey, *commissioner, Department of Commerce, Savings, and Loan Division,*  
*Carson City, Nevada 89701*

#### STATEMENT OF FACTS

Dear Mr. Wholey: You have presented to this office the following statement of facts concerning a proposed loan to be made by a savings and loan association in Nevada. At some time in the past, the savings and loan association in question made a loan to a certain individual whereby the recipient agreed to repay interest in monthly installments and repay the principal in one payment, which by the terms of the agreement is due and payable 3 years from the date of the loan. The date for the payment of the principal is approaching and the borrower is neither able to make the payment nor able to obtain refinancing from other sources. The association making the original loan desires to renew the short-term loan for an additional 3 years and makes inquiry of you as to whether this new short-term loan may provide for monthly payments of interest only, with the principal amount to be due in 3 years, or if the principal must be amortized. Security for the loan is real property and the loan is for an amount not in excess of 35 percent of the appraised value of the security. Hence, we are dealing with a short-term real property loan.

#### ANALYSIS

The answer to this question is found by reading [NRS 673.0325](#), [673.006](#) and [673.3245](#), which read as follows:

673.0325 "Short-term loan" means *a direct reduction loan* for a term of 3 years or less." (Italics added.)

673.006 "Direct-reduction loan" means a loan repayable in consecutive monthly installments, equal or unequal, beginning not later than 90 days after the date of the advance of the loan, sufficient to retire the debt, interest and principal within 30 years; but the initial loan contract shall not provide for any subsequent monthly installment of any amount more than 50 percent larger than any previous monthly installment."

673.3245 "An association may make short-term real property loans to eligible members under the *direct reduction loan plan* in accordance with [NRS 673.006](#) and [673.324](#), and the initial loan contract may provide for monthly installments of an amount more than 50 percent larger than any previous monthly installments." (Italics added.)

It is apparent from the above statutes that the Legislature intended the type of loan with which we are here concerned to be repaid on a "direct reduction" basis. By the terms of the statutes above quoted, this requires a monthly payment of interest and principal. The loan which is contemplated by the association in question does not provide for a monthly payment of principal and therefor is not permissible under the law.

The controlling statute, [NRS 673.3245](#), does not state what percentage of the principal must be repaid each month. The statute is quite broad in that it permits the savings and loan association and the borrower to fix this amount by contract. Under the statute, it would be entirely possible for the rate of amortization of the principal to be quite small with a large payment coming due at the end of the loan period. This procedure would comply with the terms of the statute, and accomplish the objectives of the association and the borrower.

#### CONCLUSION

If a savings and loan association makes a short-term real property loan, the principal amount of that loan must be amortized by monthly payments of an amount to be agreed upon by the association and the borrower.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: John J. Sheehan, *Deputy* Attorney General

---

**383 Public Employees Retirement—A public employee, who is a member of the Public Employees Retirement System, who is absent from public employment for a total of more than 5 years during any 6-year period, forfeits membership in the system and all previously acquired retirement rights.**

Carson City, February 6, 1967

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

Dear Mr. Buck: You have directed to this office an inquiry based upon the following facts:

A schoolteacher became a member of the Public Employees Retirement System of Nevada as of September 1, 1949. She terminated her services on August 31, 1954, and withdrew contributions which she had made to the system for 5 years.

The teacher returned to covered employment on September 1, 1961, for an absence of 7 years.

The question submitted is whether the teacher can be covered for retirement benefits for the period in which she made contributions between September 1, 1949 and August 31, 1954.

#### ANALYSIS

[NRS 286.400](#) (1a) provides as follows:

1. An employee shall cease to be a member of the system and shall forfeit all previously accrued retirement rights if:

(a) He is absent from the service of all employers participating in the system for a total of more than 5 years during any 6-year period after he becomes a member of the system; \* \* \*

It can thus readily be determined that the teacher in the case submitted was absent from August 31, 1954 through August 31, 1961, a period of 7 years, and thus is barred from receiving benefits for a period from September 1, 1949, to August 31, 1954, under the provisions of [NRS 286.400](#) (1a).

#### CONCLUSION

It is therefore the opinion of this office that a public employee, who is a member of the Public Employees Retirement System, who is absent from public employment for a total of more than 5 years during any 6-year period, forfeits membership in the system and all previously acquired retirement rights.

Respectfully submitted,



HARVEY DICKERSON, Attorney General

---

**384 Public Schools—School authorities do not have the authority to discipline, suspend, or expel a student whose designated infraction occurs off school property. (Modified by AGO 388 dated 2-23-67.)**

Carson City, February 8, 1967

The Honorable John E. Stone, *District Attorney, Yerington, Nevada*

Dear Mr. Stone: You have propounded to this office an inquiry which involves the propriety of school authorities' limiting vehicular travel by a student during the lunchtime period.

Your questions were as follows:

1. Can the school authorities properly restrict motor vehicle activity during the lunch period?
2. Does the conduct of student "A," referred to above, constitute a violation of the above rules as to warrant his suspension from school?

ANALYSIS

We believe the statutes speak for themselves. [NRS 392.460](#) reads as follows:

1. Members of every board of trustees of a school district, superintendents of schools, principals and teachers have concurrent power with peace officers for the protection of children in school and on the way to and from school, and for the enforcement of order and discipline among such children.
2. Subsection 1 shall not be construed so as to make it the duty of superintendents of schools, principals and teachers to supervise the conduct of children while not on school property.

It will be noted that the school authorities have concurrent power with peace officers for the protection of children on the way to and from school. Webster defines "concurrent" as "acting in conjunction with; a union of action." An example of this is the posting of traffic directors at school intersections in the common interest of the protection of children by both the city and the school.

But once the child has left the school grounds, the jurisdiction of school authority ceases and the responsibility for protection of children en route to and from school devolves upon the municipality or political subdivision in which the school is located. This was clearly the intent of the Legislature in enacting [NRS 392.460\(2\)](#).

CONCLUSION

It is the opinion of this office that school authorities do not have the authority to discipline, suspend, or expel a student whose designated infraction occurs off school property. To sanction such a philosophy would unduly extend the jurisdiction of school authorities into a realm that is properly that of the municipalities or political subdivisions in which the school (or schools) is located.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

---

**385 county commissioners; Travel Expenses—County commissioners entitled to travel expenses as prescribed by [NRS 245.060](#) and [281.160](#) when traveling from place of residence to county seat on official county business.**

Carson City, February 9, 1967

The Honorable William Beko, *District Attorney, Tonopah, Nevada*

Dear Mr. Beko: You have related the following factual situation to this office: Two county commissioners reside at places located away from the county seat. Both residences are more than 100 miles from Tonopah, although the distance is not relevant in this situation except as it effects reimbursement for their expenses in visiting the county on official business.

You ask whether these county commissioners are entitled to travel expenses as provided for in [NRS 245.060](#) and [281.160](#).

[NRS 245.060](#) reads as follows:

1. When any county or township officer or any employee of the county shall be entitled to receive his necessary traveling expenses for the transaction of public business, such expenses shall include living expenses computed as provided in [NRS 281.160](#), but the amount allowed for traveling by private conveyance shall not exceed the amount charged by public conveyance. When it appears to the satisfaction of the board of county commissioners that travel by private conveyance is more economical, or where it appears that, owing to train, airplane or bus schedules or for other reasons, travel by public conveyance is impractical, or in case a part of the route traveled is not covered by public conveyance, the board of county commissioners, in its discretion, is authorized to allow for traveling by private conveyance an amount not to exceed 10 cents per mile so traveled.

2. Any county or township officer presenting a claim to the county for any expenses allowed by law shall attach itemized vouchers and receipts for the same to his claim, and the county commissioners of the several counties are prohibited from allowing such claim unless accompanied by vouchers and receipts as required by this section.

[NRS 281.160](#) reads as follows:

1. Except as otherwise provided by law, when any district judge, state officer, commissioner, representative of the state, or other state employee of any office, department, board, commission, bureau, agency or institution operating by authority of law, and supported in whole or in part by any public funds, whether the public funds are funds received from the Federal Government of the United States or any branch or agency thereof, or from private or any other sources, shall be entitled to receive his expenses in the transaction of public business outside the municipality or other area in which his principal office is located, such person shall be paid up to \$15 for each 24-hour period during which he is away from such office and within the state, and up to \$20 for each 24-hour period during which he is outside the state.

2. Such person may receive expenses for a period of less than 24 hours in accordance with regulations of the state board of examiners.

3. Any person enumerated in subsection 1 may receive an allowance for transportation pursuant to public business, whether within or without the municipality or other area in which his principal means, considering total cost, time spent in transit and the availability of state-owned automobiles. The allowance for travel by private conveyance is 10 cents per mile so traveled, except that if a private conveyance is used for reasons of personal convenience in transaction of state business, the allowance for travel is 6 cents per mile so traveled.

4. The state board of examiners may adopt regulations, and may require other state agencies to adopt regulations, in accordance with the purpose and intent of this section, and a state agency may, with the approval of the state board of examiners, adopt an expense reimbursement rate of less than \$15 for travel within the state and \$20 for travel outside the state for each 24-hour period where unusual circumstances make such rate desirable.

#### ANALYSIS

The provisions of [NRS 245.060](#) and [NRS 281.160](#) are in compliance with Article 4 Section 21 of the Nevada Constitution which provides that all laws shall be of general and uniform operation throughout the State.

The county commissioners are not required to be elected from Tonopah exclusively. Therefore, it would be inequitable to require county commissioners residing at other than the county seat to pay their own travel and subsistence expenses while at the county seat engaged on official business.

#### CONCLUSION

It is therefore the opinion of this office that county commissioners residing at a place other than the county seat are entitled to travel and subsistence allowances as provided for in [NRS 245.060](#) and [NRS 281.160](#).

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**386 Sales and Use Tax; Refunds Upon Repossession of Property Sold on a Conditional Sales Contract—Retail automobile dealers who sell automobiles and fail to collect the sales tax thereon are not entitled to a refund of any part of the sales tax in the event of a subsequent repossession necessitated by a default in installment payments on the part of the purchaser.**

Carson City, February 10, 1967

Hon. Paul Laxalt, *Governor of Nevada, Chairman, Nevada Tax Commission, Executive Chamber, Carson City, Nevada*

#### STATEMENT OF FACTS

Dear Governor Laxalt: On February 6, 1967, the Nevada Tax Commission met in Carson City, Nevada. At that meeting there appeared representatives of the various automobile dealers doing business in this State. It was the desire of these representatives to convince the Tax Commission that the automobile dealers should receive a refund of the sales tax from the State if there was a repossession of a sold automobile because the purchaser defaulted in his installment payments.

It was explained to the Tax Commission that it was normal business procedure on the part of automobile dealers should receive a refund of the sales tax from the State if there was a repossession of a sold automobile because the purchaser defaulted in his installment payments.

It was explained to the Tax Commission that it was normal business procedure on the part of automobile dealers to require a down payment of at least 25 percent of the sales price from the purchaser. The purchaser would then secure financing from a banking institution for the balance of the purchase price, and repay the bank on an installment plan. It was further explained by the automobile dealers that the banks would require an agreement on the part of such dealers that in the event the purchaser defaulted in making the installment payments, the dealer would repossess the automobile and pay to the bank the balance of the installment loan less future carrying charges and interest.

It is when a repossession is required that the automobile dealers request a refund of the sales tax. In support of this wish, it was explained that sales taxes were not collected from the purchaser at the time the sale was made, but that such taxes were also financed by the banking institution. It was argued at the Tax Commission meeting that the full amount of the sales tax was paid by the dealer to the State of Nevada. In the event of a repossession, however, the dealer would have to pay to the bank the balance of the installment loan, a part of which is the sales tax. Hence, it was argued that the dealer should receive a refund from the State in an amount equal to the amount of sales tax still unpaid by the purchaser to the banking institution.

Because of the legal nature of the request made by the automobile dealers, the Governor of the State of Nevada, acting as Chairman of the Nevada Tax Commission, referred the matter to the Attorney General of Nevada for appropriate research and a legal opinion as to the validity of the argument propounded by the representatives of the automobile dealers.

#### ANALYSIS

The answer to whether or not the requested refund should be allowed is to be found in Chapter 372 of NRS, known as the Sales and Use Tax Act.

The statute imposing the sales tax is [NRS 372.105](#), which reads as follows:

Imposition and rate of sales tax. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2 percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after July 1, 1955.

This office has previously held in Attorney General's Opinion No. 128 dated January 18, 1960, that automobiles sold within the State of Nevada were subject to this tax. We concur with that opinion at this time.

Clearly, under the factual situation above outlined there has been a "sale" as defined in [NRS 372.060](#). The pertinent portions of that statute read:

1. "Sale" means and includes any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. \* \* \*

3. "Sale" includes: \* \* \*

(d) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

It is the opinion of this office that an automobile dealer is a "retailer" and hence liable for the sales tax imposed. [NRS 372.055](#) in part reads:

1. "Retailer" includes:

(a) Every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others.

It is the further opinion of this office that clearly an automobile is “tangible personal property” within the meaning of [NRS 372.085](#), which reads as follows:

“Tangible personal property” means personal property which may be seen, weighed, measured, felt or touched, or which is in any other manner perceptible to the senses.

From a reading of the above, it is the unalterable position of this office that the sales tax was properly imposed.

Additional authority for this conclusion is the fact that there are specific statutory exemptions from the imposition of sales tax. See [NRS 372.260](#) to [372.350](#), inclusive.

The well-known maxim “expressio unius est exclusio alterius” can be applied here. This rule of statutory construction simply means that when the statute affirmatively designates particular items there is an inference that all others are excluded. In this case there are expressed exemptions from the sales tax and there is no mention of repossessed automobiles. Such being the case, it is the opinion of this office that there should be no refund.

There are additional statutes upon which we can rely. [NRS 372.115](#) reads:

Assumption, absorption of tax by retailer; unlawful advertising.

1. It is unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold or that if added it or any part thereof will be refunded.

2. Any person violating any provision of this section is guilty of a misdemeanor.

[NRS 372.110](#) reads:

Method of collection of sales tax. The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done.

These statutes add great weight to the conclusions reached by this office. Clearly, the dealer subjects himself to criminal sanctions if he either directly or indirectly advertises or holds out to the public or any customer that any part of the sales tax will be absorbed by the dealer. By statute, the dealer has the right to collect the tax from the purchaser at the time a sale is made. By following this statutory procedure the dealer would not be out of pocket one cent. This is not a harsh ruling. It was admitted by the dealers at the Tax Commission meeting that 25 percent of the purchase price was required as down payment. Nothing prohibits the dealer from paying the sales tax from this sum. By so doing, he would fulfill his duty to pay the sales tax to the State and would be out of pocket nothing, as he would have passed the tax on to the purchaser.

As additional authority for these conclusions some decisions of sister states will be cited.

In *Olympic Motors v. McCoskey* (Wash. 1942), 132 P.2d 355, the court was confronted with the following question:

Where property (automobiles) is sold under a conditional sales contract and its repossessed after part payment, is the sales tax to be computed on the full amount of the sale or only upon amounts actually collected thereunder?

In answer, the court stated:

While one may sell his personal property under a conditional sales contract and waive his right to collect the full purchase price at the time of sale in favor of the alternate right of repossession, that waiver has no effect on the sales tax liability.

Later in the opinion it was stated:

The authorities uniformly hold that the fact of repossession under a conditional sales contract does not entitle the taxpayer to a refund; that upon conditional sales the tax is computed on the full sales price and upon recapture of this property for nonpayment of installments there is no refund or right to credit.

In *Wurlitzer Co. v. State Board of Tax Administration* (Mich. 1937), 275 N.W. 248, the following question was presented:

May a licensee in making its monthly returns pursuant to the Michigan General Sales Tax Act, lawfully deduct from gross proceeds of retail sales any unpaid balances on cancelled conditional sales contracts, where there has been a recapture of the merchandise?

The court stated:

Upon conditional sales the tax is computed on the full sale price, and upon recapture of the property for nonpayment of installments, there is no refund or right to credit.

In *Gardner-White Co. v. Dunkel* (Mich. 1941), 295 N.W. 624, it was held:

In view of the fact that a tax becomes due when a contract is accepted by both seller and buyer, plaintiffs are not entitled to compute the tax as and when each installment payment is actually made on its conditional sales contract, nor may any deduction be made for bad debts or credit losses.

Additional authority may be found in: *Montgomery Ward & Co. v. Fry* (Mich. 1936), 269 N.W. 166, and *State v. Hayes* (Ala. 1957), 98 So.2d 422.

### CONCLUSION

The sales tax is imposed for the privilege of selling tangible personal property, and is properly imposed upon the total amount for which the property is sold. The fact the seller, in this case automobile dealers, does not require full payment of the purchase price at the time of sale and transfer of possession, in no way eliminates his responsibility to pay the tax. If there is a subsequent default in the sales contract and a repossession is necessitated there is no statutory authority for a refund of sales taxes and such being the case, none is to be made. The application of this conclusion should in no way operate to the detriment of the dealer. By statute, the automobile dealer, and all other retailers, may protect themselves by collecting from the purchaser the full amount of the sales tax at the time of the sale.

Additionally, it must be pointed out that to allow a refund of sales tax upon repossession would constitute an unjust enrichment on the part of the dealer, for upon repossession, the dealer regains possession of the automobile.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: John Sheehan, *Deputy Attorney General*

---

**387 Real Property; Escheat—Nevada real estate belonging to a California domiciliary dying there intestate and without heirs cannot escheat to California, nor may the moneys derived from the sale thereof be reached by a California Public Administrator.**

Carson City, February 20, 1967

The Honorable George E. Franklin, Jr., *District Attorney, Clark County, Las Vegas, Nevada 89101*

Dear Mr. Franklin: In a letter dated January 20, 1967, you requested the opinion of this office as to whether a California administrator, pursuant to escheat proceedings in that state and ancillary administration here, could reach Nevada real estate previously owned by an intestate, heirless California domiciliary. The California administrator is seeking to have the land sold and the proceeds turned over to him on behalf of that state.

**QUESTION**

May the State of Nevada turn over the proceeds of the sale of Nevada land to another state on the request of its administrator pursuant to escheat proceedings in the foreign state?

**ANALYSIS**

The usual precepts of comity between the states do not apply when a foreign state is attempting, through escheat, to reach lands located outside its boundaries. *Finney v. Guy*, 189 U.S. 335, 47 L.Ed. 839, 23 S.Ct. 558 (1903); *Dalton v. McLean*, 14 A.2d 13 (Maine, 1940); 16 AmJur.2d Conflict of Laws, Secs. 5, 6. Escheat is basically a situation of a state, in its sovereign capacity, claiming real property in order to apply it or the proceeds thereof to its own benefit. We have, then, a foreign state attempting to reach property here simply on the basis of failure of any claims to be asserted in the jurisdiction of the previous residence of the deceased domiciliary. The contest is one between two opposing sovereign entities. It arises from the fact that Nevada has no authority providing for the escheat on land within its boundaries to another state. The conflict is increased by the principle applied in conflict of law situations involving land, that the law of the place where the land is located shall govern its disposition. In *re Melrose Avenue in Borough of the Bronx*, 234 N.Y. 48, 136 N.E. 235 at 237, 23 A.L.R. 1233 (N.Y., 1922); *Smith v. Smith*, 50 N.E. 1083 at 1085 (Ill. 1898). Further, land does not lose its characterization as real property for disposition purposes simply by being converted into money. *Smith v. Smith*, *supra*; 3 Pomeroy, Equity Jurisprudence (5th ed.) § 1167. In a practical sense, were the escheat of land or its proceeds to another state allowed, the benefits of [NRS 154.120](#) allowing previously undiscovered heirs to reclaim the land or its sale proceeds would be nullified or greatly reduced.



In the absence of express statutory authority, our courts do not have the power to turn over escheatable land or its proceeds for the benefit of a sister state. The required authority is not found within the Nevada Revised Statutes.

We have provision for the probate of foreign *wills* and for the appointment of ancillary administrators ([NRS 136.260](#)).

The escheat of general property of Nevada domiciliaries is provided for in [NRS 134.120](#) and [154.010](#), but nowhere in statute or decisional law do we find provision for the escheat of real property to a sister state.

It has been the rule of law in this State since its inception that the common law shall apply except where expressly displaced by statute. The common law which this State has traditionally subscribed to is that which was adopted and observed by the original colonies with subsequent changes introduced by the later union of states up to the time of the formation of this State. [NRS 1.030](#); *Hamilton v. Kneeland*, [1 Nev. 40](#) (1865); *State of Nevada v. Swift*, [10 Nev. 176](#) (1875); *Evans v. Cook*, [11 Nev. 69](#) (1876); *Cunningham v. Washoe County*, [66 Nev. 60 at 64 \(1949\)](#); See generally 3 Sutherland, *Statutory Construction* (3rd ed.) 1, §§ 5301, 5305.

The English common law provided for the escheat of land, upon the failure of heirs, to the lord of the fee or to the king in the case of crown lands. 16 Halsbury's Laws of England (3rd ed.) 427. The domicile of the tenant or owner was not considered. I Cooley's Blackstone (4th ed.) 260, 490; 4 Tiffany, *Real Property* (3rd ed.) § 12, 1237. See esp. 61 Col.L.Rev. 1319 (1961). In this country, it has been the practice by statute and custom to place these sovereign rights of escheat in the people of a state. In re Melrose Avenue in Borough of the Bronx, *supra*; *Smith v. Smith*, *supra*; *Matthews v. Ward's Lessee*, 10 Gill & J. (Md.) 443 at 451 (1839). No case has been discovered where, in the absence of an express statute, a state has relinquished its traditional rights of escheat of land in the absence of a will and the total failure of heirs. This being so, the land or the moneys derived from its sale must escheat, if at all, to the State of Nevada.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George H. Hawes, *Deputy Attorney General*

---

**388 Schools; Student Discipline; Augmenting Attorney General Opinion No. 384, dated February 8, 1967—Authority to discipline students by suspension or expulsion must be in line with reasonable and ordinary regulations.**

Carson City, February 23, 1967

The Honorable John E. Stone, *District Attorney, Lyon County, Yerington, Nevada 89447*

Dear Mr. Stone: On February 8, 1967, this office issued Opinion No. 384, which held that school authorities' authorization to suspend or expel a student does not expand to property not under the control of the school.

The facts which were not set out are as follows: The Board of School Trustees has drafted and put into effect a regulation which prohibits the use of a vehicle by students (whether on school property or not) during the noon hour. One of the students parks his motorcycle off the school grounds but rides it to school and home for lunch and back.

ANALYSIS

Under [NRS 391.210](#) principals and teachers may be directed to exercise such powers as the Board of School Trustees may have under NRS 391.

NRS 392.030 provides that rules put into effect by a Board of School Trustees must be reasonable and necessary.

It should first be pointed out that, of course, when children travel under the authority of school officials on school transportation, with the consent of parents, the rules promulgated by a Board of School Trustees which reasonably cover discipline are in effect, even though they leave the property of the school. In such cases, the educational authorities are in loco parentis—that is, take the place of parents.

But as pointed out in *Cotterly v. Muirhead*, 244 S.W.2d 920, it is the legal duty of parents to require their children 16 years of age or under to attend school, but the way and manner such children are to be conveyed to school is a business problem to be solved by the parents.

Thus if a child has a valid license to operate a vehicle and the parents delegate him the authority to reach school and return home by that method of conveyance, a rule of a school board prohibiting compliance with the parents' decision is arbitrary and not reasonable and ordinary as required by [NRS 392.030](#).

In *Gabrielli v. Knickerbocker*, 74 P.2d 290, the Court stressed this requirement:

All rules and regulations for government of schools must be reasonable and not arbitrary. A school district's rules and regulations are to be liberally construed, but legal procedures must be shown to have been substantially followed in the deprivation of a constitutional right.

As pointed out in Attorney General's Opinion No. 384, the school authorities have concurrent authority with peace officers for the protection of children in school and on the way to and from school. This means a concerted effort jointly exercised. Under the circumstances of this case, could a police officer arrest and prohibit a licensed rider of a motorcycle from using the streets of a city during the noon hour provided he obeyed the traffic laws? We think not, and yet the school effects what the law cannot.

#### CONCLUSION

It is therefore the opinion of this office that in the case presented to this office, school authorities cannot suspend or expel a student lawfully licensed to ride a vehicle, for using that vehicle off school property during the noon hour.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

#### **389 School districts are not exempt from imposition of local room tax for lodgings provided for visiting school band members.**

Carson City, March 8, 1967

The Honorable Jerry C. Lane, *District Attorney, Eureka County, P.O. Box 308, Eureka, Nevada 89316*

Dear Mr. Lane: You have requested the opinion of this office on the matter of whether a city may impose a room tax upon the school system of another political subdivision.

## STATEMENT OF FACTS

A county school band was sent to Carson City to participate in the 1966 Nevada Admission Day celebration. Lodging for the band members was engaged at a local motel and the motel manager, in his bill to the sponsoring school district, included charges for the local room tax, pursuant to a properly enrolled city ordinance passed under the authority of [NRS 268.095](#).

## QUESTION

May a local transaction tax consisting of a tax upon transient room rentals be imposed by a city upon the proper educational activities of another political subdivision which take place within the boundaries of the taxing entity?

## ANALYSIS

The tax in question constitutes an imposition by a municipal corporation upon the proper activities of another political subdivision necessarily taking place within the boundaries of the taxing entity. That a burden is imposed upon the educational activities of the school district is unquestioned. The quality of that burden is not in point. The sole question is whether *any* burden upon educational activities is proper when imposed by another governmental entity. The issue should further be defined as a contest between two political subdivisions and whether or not one has the power to tax the activities of the other, rather than the power of the *state* to tax either of them. It is presumed that neither would have greater taxing power than the state.

The general rule with regard to *property* is that a state may not tax the tangible real and personal property of its political subdivisions, nor may its property, in turn, be taxes by local taxing entities. *Maricopa County v. Fox Riverside Theatre*, 135 P.2d 513 (Ariz. 1943); *Hammond Lumber Co. v. Los Angeles*, 55 P.2d 891 (Calif. 1936); 16 McQuillin, *Municipal Corporations* (3rd ed. rev.) 167, § 44.57. See generally, 51 Am.Jur.2d 550, *Taxation*, § 557.

In Nevada, the rule is embodied in statute. [NRS 361.060](#), [361.055](#). Under this rule, property of one municipality would be exempted from taxation even when located in another taxing area. *Collector of Taxes of Milton v. City of Boston*, 180 N.E. 116, 81 A.L.R. 1515 (Mass. 1932); *Anoka County v. City of St. Paul*, 261 N.W. 588, 99 A.L.R. 1137 (Minn. 1935); See also 51 Am.Jur.2d 554, *Taxation*, § 564.

The second general proposition, although not without contrary authority, is that, in the absence of specific statutory provision, the enactment of a *property* tax exemption does not exempt the *activities* of political subdivisions from the burden of taxation levied by other taxing bodies. *McClain County v. Oklahoma Tax Commission*, 95 P.2d 605 (Okla. 1939); *In re City of Enid*, 158 P.2d 348, 159 A.L.R. 358 (Okla. 1945). See also 51 Am.Jur.2d 551, *Taxation*, § 558, and cases cited therein. The Nevada Revised Statutes contain no such exemption.

Thus, municipalities and other political organizations may be required to obtain licenses prior to engaging in certain activities outside their boundaries, and to pay various excise taxes imposed upon these activities. *Ibid*.

There seems insufficient authority within the Nevada Revised Statutes for treating local educational activities differently from other routine activities. True, the Legislature has shown concern for the promotion and financing of education in such matters as the exemption of school districts from payment of sales taxes. ([NRS 354.140](#)) and educational use of surplus road funds and escheated estate moneys ([NRS 404.040](#), [448.050](#)). Political subdivisions enjoy certain tax benefits as well. They are exempted from the burdens of sales and use taxes in sales of personal property ([NRS 372.325](#) (4), 372.345), and from the necessity of paying automobile privilege taxes on motor vehicles ([NRS 371.100](#)). On the other hand, however, political subdivisions must pay excise taxes upon purchases of gasoline ([NRS 36.220](#), Attorney General's Opinion No. 272 of August

1, 1927). At no time has there been any clear-cut expression of legislative intent to wholly exempt the educational or other activities of political subdivisions from all taxation.

Tax exemptions exist only as a result of constitutional provision or clear legislative enactment. *Drexler v. Tyrrell*, [15 Nev. 114](#) (1880); Attorney General's Opinion No. 208 of May 29, 1936, and Opinions of the Attorney General collected at 38 *Nevada Digest* 13977, *Taxation* § 70; 3 Sutherland, *Statutory Construction* (3rd ed.) 296, § 6702.

It is only where a deliberate purpose of the legislature to grant an exemption is expressed in clear and unequivocal terms that a claim to an exemption can be maintained. *Clarke v. Union Trust Co. of Dist. of Columbia*, 63 A.2d 635 (Md. 1949).

The Nevada constitutional provisions often quoted in this area are not self-executing:

\* \* \* and there shall also be excepted *such property as may be exempted by law* for municipal, educational, literary, scientific or other charitable purposes. Article 10, Sec. 1, Nevada Constitution. (Italics added.)

The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural and moral improvements \* \* \* Article 11, Sec. 1, Nevada Constitution.

Enabling legislation is required to convert the intentions of the constitutional drafters into binding precepts of law. To date, the Legislature has not seen fit to take this action.

It should be noted in passing that the so-called "room tax" is not a creature of statutory law. It has been enacted in several municipalities under the presumed authority of [NRS 268.095](#), which allows local licensing and regulation of the various trades, professions, and businesses. (See also [NRS 244.335](#) and Attorney General's Opinion No. 254 of November 3, 1961). Its validity seems never to have been tested in the Nevada Supreme Court.

No specific exemption having been found, the tax is proper and assessable against the sponsoring school district.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George H. Hawes, *Deputy* Attorney General

---

**390 Municipal Corporation—An agreement by a municipal corporation with a nonprofit corporation to sanction the issuance of bonds to cover construction and to take possession at the conclusion of 29 years is beyond the municipal corporation's power and unconstitutional in that it constitutes the lending of the municipality's credit.**

Carson City, March 8, 1967

The Honorable G. W. Belcher, *Assistant City Attorney, City Hall, Reno, Nevada*

Dear Mr. Belcher: You have submitted a problem to this office which includes the following facts:

International Air-O-Tel, Inc., a Texas corporation, now holds lease options and purchase agreements of approximately 22 acres of land adjacent to Reno Municipal Airport on which will be constructed a 300-room hotel facility, together with space for a first-class casino and food services such as would be required to meet the needs of the air traveling public coming into the City of Reno and to meet the competition of first-class entertainment.

A nonprofit corporation has been or will be organized, and the promoters hold a lease-option agreement on land adjacent to the Reno Municipal Airport and intend to build a high-rise hotel by the issuance of \$17,500,000 worth of bonds repayable within a 29-year period.

The corporation desires to transfer to, and requests the acceptance by, the City of Reno of this property at the conclusion of the payment of the bonded indebtedness.

#### ANALYSIS

There is now no existing legal vehicle for the contemplated project about which a reasonable doubt does not arise concerning the validity of the proposal.

There is no specific statute or ordinance that we can find, nor clear or express authority to enter into this type of agreement, nor do we think this is a legitimate public purpose. It might well be held, and we so believe, that such a transaction would constitute an unconstitutional loan of the credit of the municipality. (Article VIII, Sec. 10, Constitution of Nevada.)

This office in Attorney General's Opinion No. 138 dated May 19, 1964, held as set forth in NRS Annotations:

Where Internal Revenue Service ruling provided that interest from corporation bonds would be tax exempt if state or political subdivision approved corporation and bond issue and held beneficial interest in corporation during time indebtedness was outstanding, non-profit corporation to stimulate industrial development within state, financed by revenue bonds meeting requirements for tax exempt interest, could not be formed because compliance with IRS ruling would require either state or political subdivision to loan its credit to corporation in violation of [Nev. Art. 8, §§ 9, 10](#).

Not only this, but [NRS 81.400](#) (2) prohibits a nonprofit corporation from accumulating income for a period longer than 5 years except as specifically approved by the Attorney General.

In *The Nebraska-Iowa Bridge Corp. v. McCrory*, 59-2 U.S.T.C. ¶ 9679 (D. Neb. 1959), a district court ruled that the net revenues from a bridge were to be taxed to the corporation owning the bridge. In that case, the corporation owning the bridge merely made an agreement with the states of Nebraska and Iowa that the corporation would continue to operate the bridge as a toll bridge as before, but that after sufficient net revenues were collected to pay off the corporation's outstanding bonds and to pay \$400,000 to its shareholders for their equity, the bridge would be transferred to the states. It was further agreed that if at any time the states paid off plaintiff's debt and paid the \$400,000 themselves, plaintiff would then convey the property to the states.

The district court ruled that plaintiff's net revenues were not exempt from taxation, as exemption is allowed only if the income inures to the benefit of a state or a subdivision of the state. The court stated that this requires that the income be paid to or vest in the state immediately in order for the income to be exempt—that future benefit or advantage to a state would not be enough. Moreover, the court pointed out that here the income was really being used to pay plaintiff's debt already outstanding at the time of the



agreement. Moreover, plaintiff was taxed on its income by the states themselves, indicating that the states did not consider plaintiff their agent.

If the financing were to be used for a proper purpose by a political subdivision, there would probably be no unconstitutional lending of credit involved in the present situation, but here it is assumed the nonprofit corporation would be formed under the regular nonprofit corporation laws ([NRS 81.350-81.400](#)) of the state and would not be a municipal corporation as such, unless a proposed enabling act so provided.

The holdings in *Washoe County Water Conservation District v. Beemer*, [56 Nev. 104](#), 45 P.2d 779 (1935) and *McLaughlin v. Housing Authority of the City of Las Vegas*, [68 Nev. 84](#), 227 P.2d 206 (1951) are not apropos for the reason that the water conservation district and the housing authority were performing public functions and were political subdivision.

The Nevada nonprofit corporation statute expressly provides that such corporations are to be organized for nonprofit purposes. [NRS 81.350](#). The Revenue Service appears to be concerned only with the income of the title-holding nonprofit corporation itself and not to be concerned with the commercial employment of the property for profit by the lessee of the property. Nevertheless, whenever property is owned and leased for commercial purposes by a nonprofit corporation which does not pay an income tax on rentals received and which is able to obtain cheap financing because interest on bonds issued by it is exempt from taxation, an advantage to the commercial lessee results which its competitors do not enjoy when they hire the facilities of a profit-making owner, particularly if there is such a competitor present, as is apparently the case in the current hotel proposal.

The Nevada Supreme Court has ruled, in accordance with overwhelming general law, that counties and municipal corporations have only such powers as are expressly granted to them or which are granted to them by necessary implication. If there is any doubt as to the existence of power, the doubt is resolved against the existence of power. See *State ex rel. King v. Lathrop*, [55 Nev. 405](#), 36 P.2d 355 (1934).

In the case of governmental or legislative functions, it is improper to bind a municipal governing body's successors in office beyond the present term of office; but in the exercise of the municipal business or in the exercise of a proprietary power, the governing body may bind the municipality for as long a period of time as is reasonably necessary to accomplish a legal purpose. An agreement which does not exceed 20 years would not appear unreasonably long, but an agreement beyond that period of time is getting into a questionable area.

#### CONCLUSION

It is therefore the opinion of this office that an agreement by a municipal corporation with a nonprofit corporation to sanction the issuance of bonds to cover construction and to take possession at the conclusion of 29 years is beyond the municipal corporation's power and unconstitutional in that it constitutes the lending of the municipality's credit.

Respectfully submitted,

HARVEY DICKERSON  
Attorney General

---

**391 Property Tax; Penalties—The penalties imposed pursuant to [NRS 361.483](#) for the failure to pay property taxes are cumulative.**

Carson City, March 14, 1967

Hon. John E. Stone, *Lyon County District Attorney, Court House, Yerington, Nevada*

#### STATEMENT OF FACTS

Dear Mr. Stone: By letter dated February 7, 1967 you requested from this office an interpretation of [NRS 361.483](#). Specifically, you asked the following question:

#### QUESTION

Are the penalties for the failure to pay the taxes in sections 2 and 3 cumulative or does the delinquent taxpayer only have to pay the five percent penalty mentioned in subsection 3 (d)?

#### ANALYSIS

The statute in question reads as follows:

Payment of taxes; quarterly installments; penalties.

1. Taxes assessed upon the real property tax roll are due and payable on the 1st Monday in July.
2. Taxes may be paid in four equal installments. If a person elects to pay in quarterly installments, the first installment is due and payable on the 1st Monday of July, the second installment on the 1st Monday of October, the third installment on the 1st Monday of January, and the fourth installment on the 1st Monday of March.
3. If any person charged with taxes which are a lien on real property fails to pay:
  - (a) Any one quarter of such taxes on or before the day such taxes become due and payable, there shall be added thereto a penalty of 2 percent.
  - (b) Any two quarters of such taxes, *together with accumulated penalties*, on or before the day the later of such quarters of taxes becomes due, *there shall be added thereto a penalty of 3 percent of the two quarters due*.
  - (c) Any three quarters of such taxes, *together with accumulated penalties*, on or before the day the latest of such quarters of taxes becomes due, *there shall be added thereto a penalty of 4 percent of the three quarters due*.
  - (d) The full amount of such taxes, *together with accumulated penalties*, on or before the 1st Monday of March, *there shall be added thereto a penalty of 5 percent of the full amount of such taxes*. (Italics added.)

The right of the taxing entity to pay taxes when due is well established. The authors of American Jurisprudence state in *51 Am.Jur., Taxation*, Sec. 970:

The continuance of regular and uniform receipt of the public revenue is essential to the continued existence of the state; it cannot tolerate delay in the payment of taxes, and to induce prompt payment of taxes when due, the legislatures of the several states have very generally imposed penalties upon taxpayers who fail to pay their taxes within a specified period. Such an imposition is doubtless within the constitutional power of the legislature.

Whether or not the penalties provided for by the statute are to be cumulative or not is a matter of statutory construction. In 71 A.L.R.2d commencing on page 986 there is an annotation entitled "Recovery of Cumulative Statutory Penalties." On page 991 thereof we find:



There is what amounts to universal agreement among courts that the question whether cumulation of statutory penalties is proper is essentially one of construction of the statute imposing the penalty.

#### CONCLUSION

It is the opinion of this office that [NRS 361.483](#) lends itself to but one construction and that is that the penalties imposed thereby are cumulative. The italicized portions of the statute lend this office to such conclusion.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: John Sheehan, *Deputy Attorney General*

---

**392 Nevada State Athletic Commission—The commission may not waive license fees under [NRS 467.107](#) in cases of authentic boxing contests not exempt by [NRS 467.170](#).**

Carson City, March 20, 1967

Mr. James Deskin, *Executive Officer, Nevada State Athletic Commission, 4417 Hillcrest Avenue, Las Vegas, Nevada*

Dear Mr. Deskin: You have asked the question as to whether or not the State Athletic Commission may waive license fee provided in [NRS 467.107](#) when there are amateur boxing contests.

#### ANALYSIS

[NRS 467.107](#) provides for a license fee of 30 percent of the total gross receipts of any boxing contest \* \* \*

[NRS 467.170](#) provides for exemptions under the statute. This section exempts any amateur boxing match conducted by or participated in exclusively by any school, college, et cetera.

#### CONCLUSION

It is the opinion of this office, therefore, that the commission may not waive a license fee imposed by statute unless there is a specific statutory exemption, and an amateur contest in itself is not grounds for exemption.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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

---

**393 Nevada State Athletic Commission—[NRS 467.070](#) gives commission sole direction, management, control, and jurisdiction over all boxing contests. The commission may use its sound discretion in the issuing of permits.**

Carson City, March 20, 1967

Mr. James Deskin, *Executive Officer, Nevada State Athletic Commission, 4417 Hillcrest Avenue, Las Vegas, Nevada*

Dear Mr. Deskin: You have asked the question whether the State Athletic Commission has authority to issue or deny permits for individual boxing matches.

#### ANALYSIS

[NRS 467.070](#) gives the commission “sole direction, management, control and jurisdiction over all boxing contests \* \* \* and no boxing contest shall be conducted within this state except in accordance with the provisions of this chapter.”

[NRS 467.105](#) provides that every promoter, in order to present a program \* \* \* shall obtain a permit from the commission for each such program.

#### CONCLUSION

It is the opinion of this office that the commission has the authority to issue or deny permits in its sound discretion, and if the commission deems the issue of a permit would be detrimental to boxing generally, then the commission has the authority to deny the application of such permit.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

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

---

**394 Education—School band uniforms owned by school district comprise proper equipment of educational facility and must be available to students thereof without cost in form of rent or other charge.**

Carson City, March 22, 1967

Mr. Burnell Larson, *Superintendent of Public Instruction, Department of Education, Carson City, Nevada*

Dear Mr. Larson: You have asked the opinion of this office on the matter of whether a school district may exact a rent fee from its students for the use of district-owned band uniforms.

#### ANALYSIS

The activity is a proper function of school districts and comprises part of the educational process.

Band uniforms, when acquired by a school district, become, in effect, public property usable by the students of that district without charge. The exaction of such a rental charge is alien to the concept of free education. Charges for the use of other school equipment such as text books and manual training devices are prohibited by statute. [NRS 393.160](#), [393.170](#). The band uniforms, having been acquired with public funds, are public property and are usable without payment of rental charges. Incidental fees such as this are not proper in the absence of explicit statutory authority. *Morris v. Vandiver*, 145 So. 228 (Miss. 1933); see cases collected at 79 C.J.S. 374, *Schools and School Districts*, § 455.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George H. Hawes, *Deputy Attorney General*

---

**395 Nevada Industrial Commission—Heart disease is not such a disease as contracted in the usual and ordinary course of events and is not incidental to the employment for firemen, and is not therefore an occupational disease.**

Carson City, March 23, 1967

Mr. Keith Mount, *Member, Nevada Industrial Commission, Carson City, Nevada*

Dear Mr. Mount: You have called the attention of this office to Senate Bill 64 which amends Chapter 617 of the Nevada Revised Statutes. This chapter deals with occupational diseases. The act covers all employees of those employers required to be covered by the act. You ask if said law is constitutional.

ANALYSIS

[NRS 616.270](#) reads as follows:

Employers to provide compensation; relief from liability.

1. Every employer within the provisions of this chapter, and those employers who shall accept the terms of this chapter and be governed by its provisions, as in this chapter provided, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for any and all personal injuries by accident sustained by an employee arising out of and in the course of the employment.

2. In such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this chapter otherwise provided.

In [NRS Chapter 616](#) the rates of premium for compensation insurance with the Nevada Industrial Commission, the method of reporting death or injuries, the benefits to be paid, the method of presentation and examination by physicians, the distinction between permanent and partial or temporary disability, etc., are set forth. All of these factors enter into the premium rates to be paid by employers.

Chapter 617 NRS was enacted so as to provide protection for those employees engaged in hazardous occupations which lead in many instances to occupational diseases substantiated by a complete medical examination. These diseases are set forth in [NRS 617.450](#). Heart disease is not one of these diseases.

[NRS 617.455](#) protects firemen who, as a result of firefighting, incur a disease of the lungs, and the same protection is given those engaged in activities which lead to silicosis or permanent disease of the respiratory tract.

In order to more fully understand the objects of Senate Bill 64, it is hereby set forth in toto:

Section 1. Chapter 617 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. Notwithstanding any other provisions of this chapter, diseases of the heart, resulting in either temporary or permanent total disability or death, shall be

considered occupational diseases and compensable as such under the provisions of this chapter if caused by extreme overexertion in times of stress or danger and a causal relationship can be shown by competent evidence that the disability or death was due to an injury arising out of and in the course of the employment of a person who, for 10 years or more, has been employed in a full-time continuous, uninterrupted and salaried occupation of firefighting for the benefit or safety of the public.

2. Notwithstanding any other provision of this chapter, diseases of the heart, resulting in either temporary or permanent total disability or death, shall be considered occupational diseases and compensable as such under the provisions of this chapter if caused by extreme overexertion in times of stress or danger and a causal relationship can be shown by competent evidence that the disability or death was due to an injury arising out of and caused by the performance of duties as a volunteer fireman by a person entitled to the benefits of chapter 616 of NRS pursuant to the provisions of [NRS 616.070](#) and who, for 10 years or more, has served continuously as a volunteer fireman and who has not reached the age of 55 years before the onset of such disease.

3. It shall be presumed, if proven by establishment of a causal relationship that the employee suffered some extraordinary exposure or overexertion, that a disease of the heart has arisen out of and in the course of the employment, unless the contrary is shown by competent medical evidence, of any fireman who is covered under subsection 1, who has undergone a medical examination, including an electrocardiogram, within 15 months prior to the date of the filing of a claim for compensation, when such medical examination failed to reveal any evidence of such disease.

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

The question then arises as to whether this act is constitutional in that it affords to firemen benefits not afforded to other employees engaged in hazardous occupations where extreme overexertion might occur—for example, police officers.

It can readily be seen that the inhalation of smoke, which is peculiar to firemen, might lead to diseases of the lungs and the respiratory tract, and that this arises as a result of an occupational hazard not encountered by employees in other law enforcement and public protection fields.

No rule since the Workmen's Compensation Act was passed has proved more essential to its sound and orderly administration than the one which requires that an injury, to be compensable, must be shown to have resulted from an accident arising out of and in the course of employment, *Brown v. Carolina Aluminum Co.*, 32 S.E.2d 320.

The rule of causal relation has kept the act within the limits of its intended scope, that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits. *Vause v. Vause Furn. Equipment Co.*, 63 S.E.2d 173.

The same situation which confronts us here was met in North Carolina by the leading case of *Duncan v. City of Charlotte*, 66 S.E.2d 22. North Carolina, under an amendment to Chapter 1078, Session Laws of 1949, amended the act to provide that certain classified heart diseases, including coronary occlusion, should be deemed and treated as compensable occupational diseases as to active or voluntary members of city fire departments.

A fireman of Charlotte died, after a strenuous trip, of a coronary attack, and the commission in North Carolina held that the duties of the deceased fireman, performed by him over a long period of time, subjected him to “unusual exertion, strain and emotion;”

that the coronary occlusion from which he died was a direct result of, and bore a causal connection with, the hazards of his employment.

The Supreme Court of North Carolina (*Duncan v. Charlotte*, supra) pointed out that the state had included in its act 25 occupational diseases which were the *usual and natural incidents* of particular types of employment.

An occupational disease, the court pointed out, has been defined as “A disease contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be incidental to a particular employment.”

This office feels that common experience does not reveal that heart disease is incidental to the work performed by a fireman. As the court in *Duncan v. Charlotte* said:

In reality the statute seeks to confer upon firemen a special privilege not accorded other municipal employees, nor to employees in private industry. It places on the taxpayers a burden which the Constitution declares it was not intended for them to bear. It creates for firemen substantial financial benefits, to be paid from the public treasury under the guise of workmen’s compensation benefits, without establishing an occupational disease as the *usual* incident or result of this particular employment. Any such payment is in direct conflict with the foregoing Constitutional prohibition against separate emoluments and special privileges, and the Legislature has no power to authorize a municipal corporation to pay any such gratuity to a particular class of employees.

Once the premiums paid by public employers reach the Nevada Industrial Commission, they become, to all intents and purposes, public funds, subject to the same constitutional prohibitions imposed on appropriated funds, and to use them to benefit a certain class of public employees engaged in activities similar to those engaged in by employees who do not receive such benefits is unconstitutional.

We do not say that where a causal connection can be established between injury to the heart and death that compensation could not be paid. What we do say is that in a similar situation, other public employees could also be paid.

#### CONCLUSION

It is the opinion of this office, for the reasons hereinbefore set forth, that Senate Bill 64 is unconstitutional.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

#### **396 Elections; Taxation—Statutory requirement that candidates for elective office be taxpayers is satisfied by candidate’s payment of personal or real property taxes.**

Clarence L. Young, Esq., *City Attorney, Lovelock, Nevada*

Dear Mr. Young: You have asked the opinion of this office on the matter of whether the statutory prerequisite of [NRS 266.170](#) and [266.215](#) that mayor and city council candidates be taxpayers within their respective cities is satisfied when a candidate is not an owner of real estate and pays only personal property taxes.

#### ANALYSIS

Our Nevada Constitution is silent on the propriety of property qualifications for voters or candidates for elective office. The constitution neither provides for them nor forbids their introduction by the Legislature. It is not entirely clear whether qualifications added by a legislature to those contained in a state's constitutional provisions on voting and candidacy are proper.

Two areas of thought exist on the question. One is that the constitutional qualifications, once set, are exclusive and may not be added to, even in the absence of a constitutional prohibition against additions. Representative of this view are *Thompson v. Dickson*, 275 P.2d 749 (Ore., 1954); *Campbell v. Hunt*, 162 P. 882 (Ariz., 1917); Justice Vanderbilt's exhaustive treatment of the subject in *Imbrie v. March*, 71 A.2d 352, 18 ALR2d 241 (N.J., 1950); *1 Cooley on Constitutional Limitations* (8th Ed.) 140. The second holds to the theory that legislative additions to voter-candidate qualifications are proper when the state constitution does not specifically prohibit them. Nevada subscribes to the latter view permitting legislative additions to those qualifications set out in Article XV, Section 2 and Article II, Section 1 of the Nevada Constitution. *State v. Ruhe*, [24 Nev. 251 at 262, 52 P. 274](#) (1898); *Riter v. Douglas*, [32 Nev. 400 at 435, 109 P. 444](#) (1910); *State ex rel. Schur v. Payne*, [57 Nev. 286, 62 P.2d 921](#) (1937). The "taxpayer" provisions, then, would appear valid under the Nevada Constitution. Further, the United States Constitution has not yet been interpreted to prohibit voter-candidate property qualifications in state elections.

The meaning which the Legislature meant to attach to the word "taxpayer" in this context is unknown. Nothing helpful in this regard appears in earlier legislation or in the report of the Constitutional Debates.

In the absence of constitutional or statutory guidelines it would be improper to narrow the meaning of the word "taxpayer" to a lesser scope than ordinarily conveyed by the bare word itself. The few judicial pronouncements on the matter in this State have consistently advocated that a liberal meaning be given voter-candidate qualification statutes to enable governmental participation by the greatest possible number of citizens. *State ex rel. Schur v. Payne*, [57 Nev. 286, 62 P.2d 921](#) (1937); *Riter v. Douglas*, [32 Nev. 400 at 427, 109 P. 444](#) (1910). See also Sutherland, *Statutory Construction*, (3rd Ed.) § 7215.

#### CONCLUSION

Until some indication is given by the Legislature or the judiciary that a restrictive meaning is to be given suffrage statutes, "taxpayer" in this context must be taken to mean any person who pays either real or personal property taxes within the city in which he seeks elective office.

Respectfully submitted,

HARVEY DICKERSON  
Attorney General

By: George H. Hawes  
Deputy Attorney General

---

**397 A nonprofit corporation formed under [NRS 81.350-81.400](#) for the purpose of giving effect to the "anti-poverty" program is within the scope of the exemptions contained in [361.140](#).**

Carson City, April 13, 1967



Mr. W. F. Cottrell, *Executive Director, Economic Opportunity Board of Clark County,*  
932 West Owens, Las Vegas, Nevada 89106

Dear Mr. Cottrell: You have asked us whether or not “Operation Opportunities—Clark County, Nevada” is liable under the Nevada personal property tax provisions.

#### FACTS

The above named is a private Nevada corporation formed under the provisions of [NRS 81.350](#)-81.400. It is alleged to be a nonprofit corporation and was filed as such with the Secretary of State.

The corporate articles provide that there is no capital stock and there is no authority in the articles which would permit the company to engage in any kind of profit making operations.

The avowed purpose of the corporation is to give effect to and to carry out the provisions of the Economic Opportunities Act of 1964 which could apply in Clark County.

The company receives funds from both federal and local contributions—90 percent federal funds and 10 percent local contributions.

Such funds may only be used for the “anti-poverty” program in Clark County to help educate, train and retrain persons in need of such help. Also, to advance loans in proper cases. All of this with the overall objective of increasing the economic capacity of deserving persons.

Personal property bought by the company does not become its property until certain conditions are fulfilled.

#### THE LAW

[NRS 361.140](#) states:

1. In addition to the corporations defined by law to be charitable corporations there are hereby included: (a) Corporations whose objects and purposes are for public charity, religious or educational, and whose funds have been derived in whole or in part from public donations; and (b) Corporations prohibited by their articles of incorporation from declaring or paying dividends, and where the money received by them to is devoted to the general purpose of charity and no portion of the same is permitted in inure to the benefit of any private individual engaged in managing the charity, and where indigent persons without regard to race or color may receive medical care and attention without charge or cost.

2. All buildings belonging to a corporation defined in subsection 1, together with the land actually occupied by such corporation for the purposes described and the personal property actually used in connection therewith, are exempt from taxation when used solely for the purpose of the charitable corporation.

[NRS 361.050](#) states:

All lands and other property owned by the United States, not taxable because of the Constitution or laws of the United States, shall be exempt from taxation.

#### CONCLUSION

The question of course is whether the subject corporation falls within the definitions contained in [NRS 361.140](#) above. We conclude in the affirmative.



It will be seen that this is not an alms-giving organization, but that is not decisive of the question raised. Charity in the legal sense is not confined to mere alms-giving or the relief of poverty and distress, but has wider signification, which embraces the improvement and promotion of the happiness of man \* \* \*"  
*Bruce v. Y.M.C.A.*, [51 Nev. 372](#).

It is to be seen that the question here is controlled by the authority of the *Bruce* case.

It seems clear then that the facts bring the subject organization within the operation of the statute and it is as a result exempt.

In view of the foregoing, we need not go into the matter of the effect of the federal moneys involved in the purchase of the company property.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George G. Holden, *Deputy Attorney General*

---

**398 County Planning Commission; County Zoning Adjustment Board—Planning commission not empowered under Nevada law to sit as a whole as county zoning adjustment board.**

Carson City, March 31, 1967

The Honorable John Chrislaw, *District Attorney, Minden, Nevada*

Dear Mr. Chrislaw: You have requested an opinion from this office as to whether a county ordinance which provides that the members of the county planning commission may be, as a body, the zoning board of adjustment, is within the statutory provisions of Nevada law.

ANALYSIS

We believe the law is very clear on this subject. [NRS 278.040](#), which deals with planning commissions, provides that members of the planning commission shall hold no other public office, except that one member may be a member of the zoning board of adjustment.

[NRS 278.280](#), which deals with zoning boards of adjustment, provides that members of such board shall hold no other public office, except that one member may also be a member of the planning commission.

This clearly indicates that not more than one member of each board may sit as a member of the other public entity.

CONCLUSION

It is therefore the opinion of this office that Ordinance No. 121 of the county of Douglas, insofar as it applies to empowering the planning commission to sit en banc as a board of adjustments to hear and decide appeals (ART. 11, Section A) and to sit en banc as a board of adjustment under Article 12, Section A, does not comply with the statutes of Nevada.

Respectfully submitted,

**399 Taxation—Real estate tax liens for prior assessments are extinguished upon acquisition of property of the State; and a purported tax sale thereof and tax deed thereto is void.**

Carson City, April 3, 1967

Mr. John E. Bawden, *State Highway Engineer, Department of Highways, Carson City, Nevada 89701*

Dear Mr. Bawden: You have set forth the following facts:

The tax receiver of Washoe County proposes to issue to the county treasurer, as trustee, tax certificates for approximately forty parcels of land purchased by the State for the proposed Interstate Highway 80 in Reno. These parcels were purchased in 1963 by agreements requiring the sellers to pay real property taxes accruing to date of recording the deed, which was not done at the time because the amount of assessment and combined tax rate was not known until set by the Nevada Tax Commission in the following spring. In addition, you relate that issuance of tax certificates is also proposed for two parcels acquired by the State through condemnation for unpaid sewer and street assessments levied by the City of Reno.

QUESTION

Whether real estate taxes accrued or to accrue prior to acquisition of title by the State constitute an enforceable lien on subsequent-owned State land which can be satisfied by sale pursuant to [NRS 361.565](#) to [361.595](#)?

ANALYSIS

The courts have adopted the rule that publicly owned property is to be exempt from the operation of the general property tax laws of the state, and tax statutes are consistently construed as not embracing property of the state or its instrumentalities unless the legislative intention to include such property is plainly and clearly expressed. 51 Am.Jur., Taxation, §§ 557, 559.

The rationale of this presumption is set forth at 51 Am.Jur., supra, § 560: Property of the State is exempt from the operation of its own taxing statutes because, as the sovereign power, the State, through its officers or through its political subdivisions it creates, such as counties, receives the revenue from the taxes levied and collected, and, from the means thus furnished, discharges the duties of and pays the expenses of government. The State's property constitutes one of the instrumentalities by which it performs the very functions of government. This implied exemption of property on the State from operation of its own tax statutes can be overcome only by the most positive legislative enactment. As one court cogently observed: "The reason for the tax exemption of public property is that its taxation would not inure to any public advantage, since in such case the tax debtor is also the tax creditor." *Dayton Metro. Housing Auth. v. Evatt*, 53 N.E.2d 896.

In the early case of *People v. Doe*, 36 Cal. 220, it was said:

The Constitution and laws upon the subject of taxing property are therefore to be understood as referring to private property and persons and not including public property and the state, or any subordinate part of the state government, such as counties, towns, and municipal corporations.

There is no positive expression by the Nevada Legislature that publicly owned property is to be taxed or even governed by the operative provisions and effect of Chapter 361, of NRS, the general property tax statute. On the contrary, Article X, Section 1, of the Nevada Constitution provides for exemption by law of property devoted to municipal (or governmental) purposes. The Legislature has expressly prescribed the exemption of state-owned property from taxation. [NRS 361.055](#).

It would indeed be absurd to even suggest that the Legislature ever contemplated both the exemption of state property from taxation and yet the sale of state property for unpaid taxes. Such a construction would defeat the very purpose for the exemption. *Smith v. City of Santa Monica*, 127 P. 920, 921.

It may therefore be concluded that the provisions of Chapter 361 of NRS for sale of real property to satisfy lien for unpaid taxes do not apply to property in public ownership.

There are, however, additional grounds beyond those already noted for concluding that any attempted tax sale of public land would be void and ineffective to convey any title to a purchaser.

The precise question presented has been before the courts not infrequently. In *Smith v. City of Santa Monica*, supra, the city acquired title to real property for park purposes against which there were then pending and unpaid tax liens for 3 years' taxes. The plaintiff acquired title through a tax deed pursuant to the County Controller's order to the tax collector to sell. The California Supreme Court held the tax sale void, saying:

It results therefore that at the time \* \* \* the sale made to plaintiff the title to the property, excepting such title as the state itself acquired by the tax collector's deed to it, was vested in the city \* \* \*, or, in other words, that the state, to enforce the payment of state and county taxes, was selling into private ownership the public property of one of its agencies.

The state does not tax the property of a municipality for state and county purposes, because this would be taxation of its own property. For the same reason, when the property has come into the ownership of a municipal corporation, it will not attempt to enforce the tax by the sale of the property. The absurdity of its so doing would be apparent in the case where a county had acquired such property under the circumstances here present, and the state should sell it. To do what? To retain a portion of the tax in its own treasury, and to pay to the county a portion of the money derived from the sale of the county's own land. It may safely be said that when a municipal corporation acquires property under such circumstances the title which the state takes by the tax collector's deed is merged into the larger title which the municipality holds under the trusts, both for the public, as distinguished from the state, and also for the state, as the supreme sovereign, as well \* \* \*. Here the lien itself is merged and lost in the title which the state itself has taken. The present question is, has the limited title which the state holds \* \* \* been merged in the title which the municipality has acquired? The answer, we think, must be in the affirmative. The moneys which are thus made a charge upon the property are moneys of the state. The disposition of them is wholly a matter of state policy, and it cannot be supposed that it was ever in contemplation that the controller could authorize the sale of public lands of municipal corporations for such a charge, even though the charge in its origin was a valid lien on the lands. (pp. 920, 921)

In *City of Long Beach v. Board of Supervisors*, 328 P.2d 964, the question was whether preexisting tax liens on city-owned property outside the city limits, which became exempt from further taxation upon annexation to the city, ceased to exist. It was held that when the property was annexed by the city the parcels were in legal effect discharged from existing tax liens, the court observing:

Moreover, it would appear that the qualification of land \* \* \* for exemption from taxation, including existing tax liens, in and of itself, would render the collection of such taxes improper aside from the administrative cancellation of taxes once properly levied. If that were not so, it would follow that the collection of taxes on property declared by the Constitution to be tax exempt would be proper. While it may be desirable and more orderly that cancellation be obtained, the failure to do so cannot make valid a tax lien on property constitutionally exempt from taxation \* \* \*.

Whether cancellation was available or had been denied would seem to be immaterial. The exemption was applicable when the property became qualified upon annexation, and the existing liens on each of the four parcels of property and the city's tax liabilities as of that date, regardless of the date of acquisition \* \* \*, disappeared. (p. 967)

Cases similarly holding the unenforcibility of a prior tax lien existing on property subsequently acquired by the public are: *People v. Chambers*, 233 P.2d 557 (Calif.); *People v. Fink*, 37 Cal.Rptr. 724 (Calif.); *Reid v. State*, 74 Ind. 252; *Harlan v. Blair*, 64 S.W.2d 434 (Ky.); *Flannagan v. Land Devel. Co.*, 83 So. 39 (La.); *Collector of Taxes v. Revere Bldg.*, 177 N.E. 577 (mass.); *Foster v. Duluth*, 140 N.W. 129 (Minn.); *Laurel v. Weems*, 56 So. 451 (Miss.); *Housing Auth. v. Bjork*, 98 P.2d 324 (Mont.); *State v. Locke*, 219 P. 790 (N. Mex.); *Childress County v. State*, 92 S.W.2d 1011 (Tex.); *State v. Stovall*, 76 S.W.2d 206 (Tex.); *Gasaway v. Seattle*, 100 P. 991 (Wash.); *State v. Frost, County Treasurer*, 64 P. 902 (Wash.); *Halvorsen v. Pacific County*, 156 P.2d 907 (Wash.); *State v. Snohomish County*, 128 P. 667 (Wash.).

Only one case is noted contra to this array of authorities, the case of *Triangle Land Co. v. Detroit*, 170 N.W. 549 (Mich.).

Assuming, arguendo, that public property legally can be sold for prior taxes, the tax receiver takes the title as trustee for both the state and county. [NRS 361.570](#). Also, part of the taxes assessed and to be collected is to be paid the state, [NRS 361.745](#), the county and local municipalities being permitted to retain the balance. Thus, the absurd situation depicted by the court in *Smith v. City of Santa Monica*, supra, would result, that is, the state would be ordering its agent, the county, to sell state land with which to pay state taxes levied pursuant to legislative mandate.

The rule of unenforcibility is the same in cases of property acquired by the public through condemnation proceedings. 45 A.L.R.2d 529-555. The majority rule is that the lien is discharged from the property and attaches to or follows the award for the property. See *Gasaway v. Seattle*, supra, holding that when the city acquired real estate by the exercise of power of eminent domain, the county could not hereafter enforce a prior tax lien even though such county had not been made a party to the condemnation proceedings.

The Supreme Court of Montana stated in *Housing Auth. v. Bjork*, supra:

The general rule governing the precise question before us is stated in 61 C.J. 945 as follows: "where land is taken under eminent domain by a municipality or like entity, a lien for taxes is extinguished." To this same effect is 26 R.C.L. 299, note 2. Many cases support this rule: \* \* \* The purpose of most of the above cited cases is that the lien for taxes follows the funds fixed as compensation for the property \* \* \*. (325, 326)

The Tennessee Supreme Court recently observed:

Of course we will take judicial notice of the fact that in these eminent domain \* \* \* suits what the government pays is based on the theory of just compensation of the land, free and clear of liens \* \* \*. There is nothing unjust

about requiring the landowner to pay off tax liens. *White v. Uelley*, 387 S.W.2d 821.

Regarding the sewer and street assessments levied by the City of Reno, it should be noted that [NRS 37.070](#) requires only the claimants and occupants be named in the complaint as defendants. [NRS 37.080](#) contemplates and provides that other persons or entities which may have an interest may intervene therein to assert and protect such interest from the eventual award. The fact that publication of the summons with a description of the land is usually done, as was done in the instant condemnation proceedings, provides sufficient notice to such other persons or potential intervenors.

It might be urged that special assessment liens arise from benefits conferred upon the land and thus may be superior to the lien for general real estate taxes. [NRS 268.430](#) and [271.420](#) do not regard them as such. There is considerable case law to the effect that special assessment liens are likewise extinguished by state acquisition of the land. *Board of Capitol Managers v. Brasie*, 210 P. 63 (Colo.); *Kansas Homes Devel. v. Kansas Turnpike Auth.*, 317 P.2d 794; annotation at 45 A.L.R.2d 522.

Regardless of distinctions drawn by some authorities between a general tax lien and a special assessment tax lien, *In re Walker River Irr. Dist.*, [44 Nev. 321](#), 355; *State Hwy. Comm. v. City of Topeka*, 393 P.2d 1008 (Kan.), it is well settled that a city, county, or other taxing entity may not levy upon and sell the lands of the parent state.

The collection of these unpaid taxes is not lost merely because they cannot be satisfied by a sale of the state-owned property. [NRS 361.650](#) through 361.700 provides for suits instituted by the District Attorney against the owners of land at time of assessment and contemplates a judgment in personam. Also, the agreement between the State and former property owner for the sale of land to the State, wherein the former agreed to pay the taxes is essentially a contract for the benefit of a third party, and the county may sue on such promise made for its benefit.

#### CONCLUSION

It is therefore the opinion of this office that the question of whether real estate taxes accrued or to accrue prior to acquisition of title by the State constitute an enforceable lien on the subsequently owned state property which can be satisfied by a sale thereof must be answered in the negative; and that any attempted or purported sale thereof or tax deed thereto is void.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**400 Savings and Loan Associations—Charges for late payments permissible if reasonable. Interest stated in note or made for late payments may not in the aggregate exceed 12 percent per annum.**

Carson City, April 17, 1967

Mr. A. W. Tongish, *Acting Commissioner, Savings and Loan Division, Department of Commerce, Carson City, Nevada 89701*

Dear Mr. Tongish: You have asked my opinion on certain questions having to do with interest and late payment charges charged by savings and loan associations on installment notes secured by deeds of trust. Your questions were apparently prompted by

a letter from Mr. James Wadsworth, District Attorney of Lincoln County, a copy of which was attached to your letter dated March 31, 1967.

### QUESTIONS

1. May a savings and loan association note provide for stated annual interest, plus a penalty of 3 percent per annum on payments in default?
2. May a savings and loan association provide in the trust deed note for a late charge payment "in an amount equal to 10 percent of such installment, or \$10, whichever is greater?"

### ANALYSIS

The question of interest charges is not only controlled by [NRS 673.330](#), but also by the plenary authority and limitation found in [NRS 99.050](#). The latter section provides as follows:

1. Parties may agree, for the payment of any rate of interest on money due, or to become due, on any contract, not exceeding, however, the rate of 12 percent per annum. Any judgment rendered on any such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment; but only the amount of the original claim or demand shall draw interest after judgment.
2. Any agreement for a greater rate of interest than herein specified shall be null and void and of no effect as to such excessive rate of interest.

[NRS 673.330](#) provides, inter alia, that "initial loan fees shall not be in excess of that amount which together with the first year's interest will exceed the rate of 12 percent per annum."

You have mentioned a particular savings and loan association's trust deed note which provides for a penalty on payments in default in the amount of "the stated rate plus 3 per centum per annum during the time such default continues." Without knowing the amount of the stated rate in such note, we are unable to determine if the penalty interest violates the provision of [NRS 99.050](#) which limits all aggregate interest to which parties may agree to 12 percent per annum.

However, if the *stated rate* exceeds 9 per centum of the amount of money actually loaned to the borrower by the association, the amount which exceeds the stated rate plus the 3 percent penalty is invalid and in violation of the section, even though the parties agree on such a rate.

Certainly any loaning agency has a right to make a service charge for late payments. But just as certainly such a charge must be reasonable, considering the amount in default and the period of lateness. There does not appear to be any statute defining a reasonable charge for late payments.

In view of the apparent need for clarity and certainty in this matter, it might be well for the savings and loan commissioner to issue a rule or regulation under the authority of [NRS 673.043](#), after consultation with the several savings and loan associations, which rule or regulation could set the limits of late charges considering all the relevant factors.

### CONCLUSION

As to Question No. 1, the answer is yes, if the stated interest on the amount actually loaned together with the 3 percent penalty does not exceed 12 percent. If the stated interest plus the 3 percent penalty exceeds 12 percent, the answer to Question No. 1 is no.

As to Question No. 2, late charge penalties may be charged if they are reasonable considering the amount in default and the degree of lateness.



As to what is or is not reasonable, the commissioner must determine that under the authority conferred on him by [NRS 673.040](#) and [673.043](#).

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**401 Public Officers; State Senator; City Fire Chief—Fire chief, under appointment by and subject to rules and regulations of city council, may serve as member of the Legislature.**

Carson City, April 20, 1967

James Brooke, Esq., *City Attorney, City Hall, Sparks, Nevada*

Dear Mr. Brooke: You have requested an opinion from this office as to whether the fire chief of the City of Sparks may simultaneously hold the elective position of state senator.

ANALYSIS

Article III, Section 1 of the Nevada Constitution provides as follows:

The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

The question revolves around the determination as to whether the fire chief is charged the exercise of powers which conflict with his services as a senator, or vice versa.

Under Section 10 of the Sparks city charter, his duties and powers are prescribed as follows:

Section 10. There shall be a chief of the fire department, who shall be appointed by the mayor, subject to the confirmation of the council. He shall be at least twenty-five years of age and a citizen of the United States. He shall see that all laws, rules, regulations and ordinances concerning the department are carried into effect and observed. He shall diligently observe the condition of all apparatus in use by the department from time to time, shall report to the council with his recommendation for the betterment of the department, and to increase its efficiency. He shall have power, subject to confirmation by the council, to appoint the necessary number of firemen as may be required by the council. He shall exert himself to protect property from fire, and generally to exercise vigilance for the safety of the city against conflagrations. He shall receive such salary or compensation as may be prescribed by the city council.

It would appear from the above that his powers and duties are such as have been prescribed by the city council by ordinance. He is designated as the watch dog and enforcer of the rules and regulations passed by the council which govern the conduct of the fire department. He must report to the council. He cannot set salaries of hired personnel, nor does he have any jurisdiction over the establishment of his own salary.



The problem, therefore, cannot be rationally approached with a conclusion that the fire chief is charged with the exercise of any powers which would conflict with his duties as state senator. He could not establish the size in number of employees, nor could he determine the budgetary amount to be apportioned to the department. The exercise of such powers as might conflict with Article III, Section 1 of the Nevada Constitution is reposed in the mayor and city council.

In Attorney General's Opinion No. 28 dated March 12, 1951, this office differentiated between an office which is a public office and a mere agency or employment, in holding that a state senator could not serve as a tax commissioner. It was pointed out that Article III, Section 1 forbids an officer in one of the three departments of government from holding at the same time an office in either of the other departments.

To the same effect, this office has held that a member of the Legislature may not hold positions of Director of Drivers' License Division of the State, member of the State Planning Board, deputy county assessor, mayor, or member of state boards and commissions.

In these cases the conflict of interest is apparent. The salaries and emoluments of state officers are set by the Legislature. The office of mayor is a public office within the executive realm of government.

If the fire chief's salary were set by the Legislature, his interest as a state senator would be self serving, and in case of said salary being raised by the Legislature, the raise might run afoul of Article IV, Section 8 of the Nevada Constitution.

The main purpose of separation of powers is so that the acts of each shall not be controlled by, or subjected to, directly or indirectly, the coercive influence of either of the others. (*Humphrey v. United States*, 295 U.S. 602, 70 L.Ed. 1611.) Pursuing this reasoning, the acts of the chief of the fire department are not controlled by, nor subject to the coercive influence of the Legislature, but of the city council.

It does not necessarily follow that an entire and complete separation either is desirable or was ever intended. (Ex parte Grossman, 267 U.S. 87, 69 L.Ed. 527; *People v. Kelly*, 347 Ill. 221, 179 N.E. 898.)

The courts have perceived the necessity of avoiding a narrow construction of the state constitution provision for the division of the powers of government with three distinct departments, for it is impractical to view the provision from the standpoint of a doctrinaire.

In *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 P. 411, for example, the court held that the separation of powers was not violated by the appointment of a member of the Legislature as auditor of the Board of Railroad Commissioners, where he was wholly subject to the power of the board. See also *Nevada ex rel. Zeb Kendall v. George A. Cole, State Controller*, [38 Nev. 215](#), 148 P. 551.

Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons belonging to one department may, in respect of some matters, exert powers which, strictly speaking, pertain to another department of government, is in most instances given a broad interpretation.

Justice Story perhaps defined the separation of powers more definitively than any other member of the United States Supreme Court when he wrote:

When we speak of a separation of the three great departments of government, and maintain that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hand which possesses the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.

Historically the requirement of the separation of powers was never applied to local governmental organizations. Thus, not only municipal corporations but counties, townships, school districts, drainage districts, and the like are frequently organized with only a single commission with all the powers, legislative, executive, and judicial, in the commission. The compelling argument in favor of this is that the closeness of local authorities to popular control affords an adequate sanction and protection.

#### CONCLUSION

This office is therefore of the opinion that the fire chief of Sparks may, without running afoul of constitutional prohibitions, hold the office of member of the State Legislature simultaneously.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**402 Fire Protection Districts; Counties—Wages and salaries of regular firemen are part of the costs of maintaining the count fire protection district and are included within the tax limit of 1/2 of 1 percent of the assessable property within the district.**

Carson City, May 8, 1967

Hon. John Chrislaw, *District Attorney, Douglas County Courthouse, Minden, Nevada*  
89423

Dear Mr. Chrislaw: You have requested an opinion of this office concerning [NRS 474.190](#)(2) which limits the tax levy to finance county fire protection districts. [NRS 474.190](#)(2) reads as follows:

The amount of money to be raised for the purpose of establishing and equipping the district with firefighting facilities shall not in any 1 year exceed 1 percent of the assessable property within the district. The amount of money to be raised for the purpose of maintaining the district each year shall not exceed one-half of 1 percent of the assessable property within the district.

#### QUESTION

Your specific inquiry is: Are salaries and wages of regularly employed firemen included as items of “establishing and equipping a county fire protection district and a fire-fighting facility,” or are they part of the “costs of maintaining the district”?

#### ANALYSIS

It is the opinion of this office that wages and salaries of regular firemen are part of the costs of maintaining the district each year and are not includable as fire-fighting facilities.

The answer to your question depends primarily upon the meaning of the term “maintaining” as opposed to “facilities.” In *Holman v. Santa Cruz County* (1949), 205 P.2d 767, the term “maintaining” was held to mean “the repair and keeping in good condition things in existence including salaries and costs of operation.”

While facilities have been held to include wages and salaries in some instances, generally the term includes inanimate things rather than human agencies. *Sloss-Sheffie Steel & Iron Co. v. Smith*, 64 So. 337 and 35 C.J.S. Facility 489.

Under our statutes, the term “facilities” is not so broad so as to include wages and salaries of regular firemen. The Legislature is presumed to have set forth all of the language of the particular statute with deliberation to accomplish a purpose. To apply such a broad meaning to “facilities” would render the second sentence of [NRS 474.190](#)(2) practically useless. Without the costs of wages and salaries of regular employees, the cost of maintenance and operation would be minimal or nonexistent.

The first sentence of [NRS 474.190](#)(2) provides that the 1 percent tax limit on assessed valuation of property is to raise money for the purpose of *establishing* and *equipping* the district with fire-fighting facilities. The italicized terms, particularly equipping, apply to objects and implements rather than personnel.

Section 474.160 enumerates the general powers of the board of directors of county fire protection districts. Subsection 6 thereof reads:

Employ agents and employees for the district sufficient to maintain and operate the property acquired for the purposes of the district.

There is no substantial difference between the term maintaining and operating. *Roberts v. City of Los Angeles*, 61 P.2d 323. From the language used in this subsection, it is clear that the Legislature associated the words agents and employees with maintaining and operating the property belonging to the district.

#### CONCLUSION

It is, therefore, the opinion of this office that wages and salaries of regular firemen are part of the costs of maintaining the county fire protection districts organized under [NRS 474.010](#) to [474.450](#) inclusive, and are included within the tax limitation of 1/2 to 1 percent of the assessable property within the district.

Respectfully submitted,

HARVEY DICKERSON  
Attorney General

By: Peter I. Breen  
Deputy Attorney General

---

**403 County Hospital Trustees—A county board of hospital trustees is a local government as defined by [NRS 354.474](#) and has authority to hire auditor of its own choosing in preparing hospital budget.**

Carson City, May 5, 1967

Hon. Mark C. Scott, Jr., *District Attorney, Elko, Nevada*

Dear Mr. Scott: You have posed to this office the question as to whether a county board of hospital trustees is a local government as defined by [NRS 354.474](#) and whether such board has the authority to retain an auditor of its choice to aid in the preparation of its budget.

#### ANALYSIS

[NRS 354.474](#) reads as follows:

The provisions of [NRS 354.470](#) to [354.626](#), inclusive, shall apply to all local governments. For the purpose of [NRS 354.470](#) to [354.626](#), inclusive, “local government” means every political subdivision or other entity which has the right to levy or receive moneys from ad valorem taxes, and includes without limitation counties, cities, towns, school districts and other districts organized pursuant to chapters 309, 310, 311, 314, 316, 318, 379, 473, 474, 539, 540, 542, and 543 of NRS.

The law clearly states that “local government” means every political subdivision or other entity which has the right to levy or receive moneys from ad valorem taxes.

Under [NRS 450.240](#)(3) the county commissioners annually, upon the request of the board of trustees of a county hospital, are authorized to levy a tax for the maintenance and operation of the county hospital. Such a tax would be levied based on the value of property and would therefore be an ad valorem tax, and would thus place the hospital in the category of “local governments” defined in [NRS 354.474](#).

[NRS 450.250](#) provides that the board of hospital trustees shall have the exclusive control for the expenditure of all moneys collected to the credit of the hospital fund.

Under [NRS 450.230](#) the preparation of the budget required of all governmental agencies of this state by Chapter 354 NRS, and the submission of the same to the county commissioners is placed upon the trustees.

Thus it can readily be seen that the management and control of the county hospital rests with the board of trustees. In compiling figures for submission to the county commissioners upon which a tax levy may be based, and in preparing the hospital’s budget, the determination as to the employee to be charged with such duty clearly lies in the laps of those entrusted with the task or running the hospital.

#### CONCLUSION

It is therefore the opinion of this office that the county board of hospital trustees receiving ad valorem taxes are local governments as defined by [NRS 354.474](#), and that the authority to hire auditors, or other necessary employees, rests with such board and not with the county commissioners.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**404 Taxation; Redemption—Property owner in redeeming property within period of redemption must pay all taxes, penalties, charges, and interest which have accrued against such property.**

Carson City, May 5, 1967

Hon. John E. Stone, *District Attorney, Yerington, Nevada*

Dear Mr. Stone: You have submitted to this office an inquiry as to whether a delinquent taxpayer in redeeming property against which a certificate has been issued by the tax receiver in accordance with [NRS 361.570](#) must pay all taxes which have accrued at the time of redemption plus interest and penalties, or only those which have accrued during the redemption period.

### ANALYSIS

The specific purpose of the law is to protect not only the county in the collection of delinquent taxes but to protect the property owner by allowing a 2-year redemption period.

The law provides that during the period of redemption when the property is held by the county treasurer as trustee it shall be assessed to the treasurer in the same manner as taxable property is assessed against private persons, and that after the period of redemption has expired and the property is sold or rented the proceeds shall be used to fully pay taxes, charges, penalties, and interest chargeable against the property. ([NRS 361.575](#).)

[NRS 361.585](#)(3) reads as follows:

Anything in [NRS 361.595](#) to the contrary notwithstanding, at any time prior to the public notice of sale by a county treasurer, pursuant to [NRS 361.595](#), of any property held in trust by him by virtue of any deed made pursuant to the provisions of this chapter, any person who was the owner, beneficiary under a deed of trust or mortgagee under a mortgage of such property, or to whom such property was assessed, prior to being so conveyed to the county treasurer, shall have the right to have such property reconveyed to him upon tendering to the county treasurer the amount of the taxes, costs, penalties and interest legally chargeable against such property, as set forth in subsection 4 of [NRS 361.570](#), together with interest at the rate of 10 percent per annum until the time of reconveyance.

The property can only be reconveyed upon the payment of all taxes, costs, and penalties assessed against said property.

[NRS 361.450](#)(1) clearly states:

Every tax levied under the provisions of or authority of this Chapter shall be perpetual lien against the property assessed until such taxes and any penalty charges and interest which may accrue thereon shall be paid.

### CONCLUSION

It is therefore the opinion of this office that a property owner exercising the right of redemption must pay all taxes, penalties, charges, and interest which have accrued against the property.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**405 Nevada Tax Commission; Net Proceeds of Mines—An oil well is a “mine.” When determining the gross yield and net proceeds of a mine, the Nevada Tax Commission is limited to the semi-annual periods, specified in [NRS 362.110](#) and [NRS 362.120](#).**

Carson City, May 9, 1967

The Honorable Paul Laxalt, *Chairman, Nevada Tax Commission, Carson City, Nevada*

### STATEMENT OF FACTS

Dear Governor Laxalt: On the 3rd day of May, 1967, the Nevada Tax Commission met in Carson City, Nevada, for the purpose of determining whether or not the extraction of oil was within the provisions of Chapter 362, Nevada Revised Statutes, and more particularly as that chapter relates to the net proceeds of mines. As a result of that meeting, the office of the Attorney General was requested to answer two questions:

1. Is the extraction of oil from the ground by use of the conventional oil well, in fact a mine?

2. Does the Nevada Tax Commission have any authority to consider a longer period of time than 6 months when ascertaining and determining the gross yield and net proceeds of operating mines pursuant to [NRS 362.110](#) and [NRS 362.120](#)?

#### ANALYSIS

Question No. 1 is answered "yes."

Question No. 2 is answered "no."

In answer to the first question, it is the opinion of this office that an oil well is in fact a mine. There is a split of authority on this particular point, but the weight of authority is in conformity with this opinion.

Sister states have had an opportunity to judicially answer this question in the past. In *Mid-Northern Oil Co. v. Walker* (Mont. 1922), 211 Pac. 353, it was held on page 356:

It must be conceded that the interests of the United States in the lands covered by plaintiff's leases are mineral in character; that oil is a mineral, and that an oil well is a mine.

That court cited *Burke v. Southern Pacific Railway Co.*, 234 U.S. 669. In this case, the Supreme Court of the United States held that petroleum has long been popularly regarded as a mineral oil, and on page 677 cited other cases which held that extracting oil from containing rocks was "mining for oil," and that "oil is a mineral substance obtained from the earth by a process of mining."

In 1930, the Supreme Court of Montana had another opportunity to discuss the question which has been presented to this office for determination. In *Rice Oil Company v. Toole County* (Mont. 1930), 284 Pac. 145, it was held that:

Oil is a mineral, and the process of extracting it from the rocks is mining.

Both *Burke v. Southern Pacific Railway Co.*, supra, and *Mid-Northern Oil Company v. Walker*, supra, were cited as supporting authority.

In *Luse v. Boatman* (Texas 1919), 217 S.W. 1096, it was held on page 1101:

Hence, we think the work "mine" is broad enough to include the process of boring through the ground for the purpose of reaching and extracting oil or gas; that it makes no difference whether the means used for extracting the mineral sought is that of pick and shovel or other implement used for excavating, or by drill or bit.

In 1964, the Supreme Court of Texas held, in *Southland Royalty Co. v. American Petroleum Corp.*, 378 S.W.2d 50, that:

The fact that the royalty provision in the case before us provides for proceeds of other minerals at the mine, seems to have given the Court of Civil Appeals some concern, but since the grant is for the purpose of mining and operating for gas, and *since it is so well settled that an oil or gas well is a mine*, it is thought that it is not necessary to discuss this matter. (Italics added.)



The court cited as supporting authority *Luse v. Boatman*, supra.

It is the considered opinion of this office that the above cited case authority is sufficient to conclude that an oil well is a mine. However, because of the impact of this opinion on the tax collecting procedure of the State of Nevada, I should like to discuss what text writers have said.

Thornton, *Oil and Gas*, 1960 Cumulative Supplement, Vol. I, states on page 2:

However, the extraction of oil and gas is sometimes designated as mining. It is such within the contemplation of a statute taxing every person engaged in the production of petroleum or other mineral or crude oil.

The text writer cites the case of *Mid-Northern Oil Co. v. Walker*, supra, and *Rice Oil Company v. Toole County*, supra.

On page 135 of the same text, the author states:

One engaged in drilling an oil well is not laboring in a mine, but extracting oil from rocks is mining.

This statement points out the fact that even experts in the field have difficulty in reconciling the split of authority as to whether or not an oil well is a mine. I believe, however, the controversy can be settled by reading from Kuntz, *A Treatise on the Law of Oil and Gas*, 1962 edition, Vol. I. In Sec. 13.3, page 300, it is pointed out that the minority rule is that oil and gas are not included within the term “minerals,” while the majority rule is that oil and gas are included within that term.

Following the majority rule, this office concludes that oil is a mineral, and the extraction of that mineral from the ground constitutes a mine. Hence, the provisions of Chapter 362 of Nevada Revised Statutes do apply to oil wells.

In answer to the second question, the applicable statutes read:

[NRS 362.110:](#)

1. Every person, corporation, or association operating any mine containing gold, silver, copper, zinc, lead or other valuable mineral or mineral deposit, whether metallic or nonmetallic, *must*, semiannually during July and January of each year, make and file with the Nevada tax commission a statement showing the gross yield and claimed net proceeds from each mine owned, worked or operated by such person, corporation or association during the 6-month period immediately preceding the 1st day of the month in which the statement is so required to be made. (Italics supplied.)

[NRS 362.120:](#)

1. The Nevada tax commission *shall*, from the statement and from all obtainable data, evidence and reports, compute in dollars and cents the gross yield and net proceeds of each semiannual period.

2. The net proceeds *shall* be ascertained and determined by subtracting from the gross yield the following deductions for costs incurred during such 6-month period, and none other: \* \* \* (Specific deductions follow.) (Italics supplied.)

The above quoted sections of the statutes use the words “must” and “shall” when referring to the functions and duties of the Nevada Tax Commission, and they limit those functions and duties to a 6-month period and none other. Similar language in statutes has consistently been held to be mandatory and conveying no discretion whatsoever.



It is therefore the opinion of this office that only the semi-annual period set forth in the statute may be considered by the Nevada Tax Commission when determining the gross yield and net proceeds of mining operations in the State of Nevada.

Respectfully submitted,  
HARVEY DICKERSON  
Attorney General

By: John Sheehan  
Deputy Attorney General

---

**406 Counties—County planning commission has no power to define “subdivision” by exceeding the statutory definition of “subdivision” in [NRS 278.320](#).**

Carson City, May 15, 1967

The Honorable Mark C. Scott, Jr., *Elko County District Attorney, Elko, Nevada*

Dear Mr. Scott: In your letter of April 24, 1967, you requested an opinion of this office concerning the power of a county planning commission to define the term “subdivision.” Your letter indicates that the planning commission of the County of Elko is in the process of drafting an ordinance concerning the subdivision of land. The Elko County Planning Commission has concluded that the minimum acreage exempt from the term “subdivision” should be forty acres rather than ten acres as set forth by [NRS 278.320](#) (2) (B) and (5), and therefore wishes to modify the statutory definition of the term “subdivision.”

**QUESTION**

Your specific question is: Does the county planning commission have the power and authority to define “subdivision” differently from the way the Legislature has defined the term in [NRS 278.320](#)?

**ANALYSIS**

In answering your question, we take it that by “differently,” you mean insofar as it applies to the facts with which we have been supplied. In other words, can the Elko County Planning Commission include more acreage under the definition of subdivision than does [NRS 278.320](#)? We must bear in mind certain general principles of law as they apply to planning and zoning. They have their source in the police power of the state. In our State, Chapter 278 empowers the governing bodies of cities and counties to regulate and redistrict the improvement of land and control the location and soundness of structures, and the power to regulate and restrict the use of land and improvements. The power of a county planning commission to regulate and restrict the use of land and control the location and nature of improvements is a power delegated by the state, and a local ordinance must not exceed, not be in conflict with, the enabling legislation. Cases stating these general rules are collected in 8 A.L.R.2d 955, 38 A.L.R.2d 1136, and 37 A.L.R.2d 1137.

Nevada has an express statutory provision on this subject in [NRS 278.370](#) (1), which reads as follows:

The enactment of local ordinances is hereby authorized. Local ordinances may prescribe detailed regulations which, in addition to the provisions of this

chapter, would govern matters of improvements, mapping, accuracy, engineering and related subjects, *but shall not be in conflict with this chapter.* (Italics added.)

Therefore, no local ordinance may be passed which is in conflict with the provisions of Chapter 278. The term “subdivision” has been defined by two statutes, [NRS 278.010](#) (1) (1) and [NRS 278.320](#). They read:

[NRS 278.010](#) (1) (1):

“Subdivision” refers to any land or portion thereof subject to the provisions of this chapter.

[NRS 278.320](#):

1. “Subdivision” refers to any land or portion thereof, shown on the last preceding tax roll as a unit or as contiguous units, which is divided for the purpose of sale or lease, whether immediate or future, by any subdivider into 5 or more parcels within any 1 calendar year.

2. “Subdivision” does not include either of the following:

(a) Any parcel or parcels of land in which all of the following conditions are present:

(1) Which contain less than 5 acres.

(2) Which abut upon dedicated streets or highways.

(3) In which street opening or widening is not required by the governing body in dividing the land into lots or parcels.

(4) The lot design meets the approval of the governing body.

(b) Any parcel or parcels of land divided into lots or parcels, each of a net area of 10 acres or more, a tentative map of which has been submitted to the governing body and has been approved by it as to street alignment and widths, drainage provisions and lot design.

3. In either case provided in subsection 2, there shall be filed a record of survey map pursuant only to the provisions of this chapter.

4. Nothing contained in this chapter shall apply to land platted for cemetery purposes not involving any street, road or highway opening or widening or easements of any kind.

5. Nothing contained herein shall apply to the division of land for agricultural purposes, in parcels of more than 10 acres, not involving any street, road, or highway opening or widening or easements of any kind.

The Elko County Planning Commission seeks to define the term “subdivision” in such a way that much more land would be subject to regulation than was contemplated by the statutory definition. This is in conflict with [NRS 278.320](#), because it exceeds the statutory definition. Being thus in conflict, the ordinance would be invalid.

#### CONCLUSION

It is the conclusion of this office that a county planning commission cannot pass an ordinance which, by exceeding the statutory definition of the term “subdivision,” becomes in conflict with the same.

Respectfully submitted,

HARVEY DICKERSON  
Attorney General

By: Peter I. Breen

**407 Fish and Game Commission—Indian may sell fish to another Indian on reservation exempted from provisions of [NRS 41.430](#), but not to non-Indian. On reservations not exempted no one can buy or sell fish.**

Carson City, May 15, 1967

Hon. William Macdonald, *District Attorney, Humboldt County Courthouse, Winnemucca, Nevada*

Dear Mr. Macdonald: You have requested an opinion from this office as to whether it is lawful for a non-Indian to purchase fish from an Indian on an Indian reservation in view of [NRS 503.330](#) which reads as follows:

1. Except as provided in this Title, it shall be unlawful for any person in the State of Nevada to buy, sell, offer, or expose for sale any variety of game fish at any period of the year.
2. Nothing in this section shall be so construed as to prohibit the sale at any time of salt water fish that shall have come from outside of the State of Nevada.

ANALYSIS

This office held in Attorney General's Opinion No. 120 dated December 28, 1959, that the State of Nevada does not have the right to regulate Indians taking fish from the waters of the Truckee River within the confines of the Pyramid Lake Indian Reservation, but does have the right where non-Indians are concerned.

In that opinion, reference was made to Attorney General's Opinion No. 914 dated April 28, 1950, wherein it was held that Indians living on reservations were amendable to the laws of Nevada when off the reservations, and could not, therefore, sell fish off the reservations, but could when on the reservation.

In 1955 the Legislature, pursuant to the provisions of Section 7, Chapter 505, Public Law 280 of the 83rd Congress, 67 Stat. 588, passed a law ([NRS 41.430](#)) which gave the State jurisdiction over public offenses committed by or against Indians, or to which Indians are parties, which arise in the Indian country in Nevada, but giving the county commissioners of each county the right to petition the Governor to exclude and except the area of Indian country in their respective counties from the operation of the section.

The Pyramid Lake Indian Reservation was thus excluded from the provisions of the act, and the rulings of the Attorney General insofar as the reservation is concerned are correct. It would seem, therefore, that the question of legality of the act of selling fish by an Indian on a reservation would depend on whether that reservation had been excluded from the exercise of state jurisdiction as provided for in Chapter 198 of the 1955 Statutes of Nevada ([NRS 41.430](#)).

If it had not been so exempted or excluded, then [NRS 503.330](#) would apply both as to Indians and non-Indians.

CONCLUSION

It is therefore the opinion of this office that an Indian may sell fish to another Indian on a reservation exempted from [NRS 41.430](#) as provided therein, but not to a non-Indian. That on reservations not exempted as provided for in [NRS 41.430](#), Indians cannot sell fish and neither Indians nor non-Indians can buy fish.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**408 City and County Building Codes—[NRS 244.368](#) and [NRS 278.580](#) clarified.  
[NRS 244.368](#) effective only when city building code requirements more stringent than county building codes. Same rule applies to [NRS 278.580\(3\)](#).  
County building code effective in all areas of county.**

Carson City, May 15, 1967

Hon. William Macdonald, *District Attorney, Humboldt County Courthouse, Winnemucca, Nevada*

Dear Mr. Macdonald: You have requested this office to clarify [NRS 244.368](#) and [NRS 278.580](#).

[NRS 244.368](#) reads as follows:

1. A city building code which has rules, regulations and specifications more stringent than the building code of the county within which such city is located shall supersede, with respect to the area within a 3-mile limit of the boundaries of such city, any provisions of such county building code not consistent therewith.
2. None of the provisions of this section shall be applicable to farm or ranch buildings in existence on March 30, 1959.

[NRS 278.580](#) reads as follows:

1. The governing body of any city or county may adopt a building code, specifying the design, soundness and materials of structures and rules, ordinances and regulations for the enforcement of the building code.
2. The governing body may also fix a reasonable schedule of fees for the issuance of building permits.
3. A city building code which has rules, regulations and specifications more stringent than the building code of the county within which such city is located shall supersede, with respect to the area within a 3-mile limit of the boundaries of such city, any provisions of such building code not consistent therewith.
4. None of the provisions of subsection 3 shall be applicable to farm or ranch buildings in existence on March 30, 1959.

Your questions are as follows:

“Question 1. Under the terms of [NRS 244.368](#) and [NRS 278.580](#) must there be a county building code in order that the city building code apply in the area within a 3-mile limit of the boundaries of the city, or will the city’s building code apply with or without a county building code in that area?

“Question 2. If there must be a county building code in effect in order for the provisions of [NRS 244.368](#) and [NRS 278.580](#) to be effective would a building code ordinance limited solely to the area within a 3-mile limit of the boundaries of the city be valid, or must any such building code be of general effect throughout the entire township within which the city is located or the entire county?”

#### ANALYSIS

It will be noted that [NRS 278.580](#) authorizes the governing body of any city or county to adopt a building code. But it is also easy to determine that [NRS 244.368](#) is only applicable within a 3-mile limit of the boundaries of a city when the city building code has rules, regulations, and specifications more stringent than the building code of the county. If there is no county building code, [NRS 244.368](#) is not effective.

This is confirmed by [NRS 278.580\(3\)](#) which is only confirmation of [NRS 244.368](#).

To allow a county building code to be effective only within a 3-mile limit of the boundaries of any city would be discriminatory or confiscatory as the case might be.

#### CONCLUSION

It is therefore the opinion of this office that a county building code must be in effect before [NRS 244.368](#) is even considered, and that the same result is reached by analysis of [NRS 278.580\(3\)](#). A county building code would of necessity be applicable to all areas of the county and could not be restricted to an area within 3 miles of the boundaries of any city within said county.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**409 Taxation—Collection of personal property taxes and taxes on the proceeds of mines are subject to the payment of percentages into the general fund of the counties as provided for in [NRS 361.530](#) and [362.170](#), and that such payments do not conflict with [NRS 387.225](#).**

Carson City, May 23, 1967

Mr. Ernest L. Newton, *Secretary, Nevada Tax Commission, Carson City, Nevada*

Dear Mr. Newton: You have requested this office to clarify [NRS 361.530](#) and [362.170](#) and reconcile the same with [NRS 387.225](#).

#### ANALYSIS

[NRS 361.475](#) provides that the county treasurer shall be ex-officio tax receiver and shall receive all taxes assessed upon the real property roll.

The collection of taxes from persons on the unsecured roll and those who have movable personal property is imposed by [NRS 361.505](#) through 361.560 on the county assessor.

Thus 361.530 provides that the county assessor on all tax moneys received under the foregoing provisions shall reserve and pay into the county treasury a percentage commission of 6 percent on the gross amount of collections.

[NRS 362.170](#) provides that from all moneys collected from the tax on the proceeds of mines by the county assessor there shall be held in reserve and paid into the county treasury for the benefit of the general fund a percentage commission of 3 percent on the gross amount of collections from the tax on the proceeds of mines.

The question thus arises as to whether [NRS 387.225](#) which provides that no tax collector or county treasurer shall receive any fees or compensation whatever for collecting, receiving, keeping, transporting, or disbursing any public schools money, conflicts with [NRS 361.530](#) and [362.170](#).

We believe not. The imposition and collection of the percentages to be collected under [NRS 361.530](#) and [362.170](#), are for the benefit of the general fund, and do not in any way reward the collector by adding to his regular compensation.

[NRS 387.225](#) clearly means, as is clearly expressed, that the word “fees” and “compensation” are to be considered together and with a unanimity of meaning. In short the tax collector is not to be rewarded for doing those things set forth in this section of the Nevada Revised Laws.

#### CONCLUSION

It is therefore the opinion of this office that the requirements of [NRS 361.530](#) and [NRS 362.170](#) for the payment of certain percentages into the general fund of the county must be adhered to by the county assessors, and that in complying with these sections of the statutes they are not in conflict with [NRS 387.225](#).

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**410 Bids; Local improvements—Municipalities do not have the power to accept any bids they desire for local improvements.**

Carson City, May 23, 1967

The Honorable Gregory J. Chachas, *City Attorney, P.O. Box 537, Ely, Nevada*

#### FACTS

Dear Mr. Chachas: An opinion has been requested of this office regarding the power and authority of a municipality to accept bids from contractors on local improvements. The City of Ely has invited sealed proposals from contractors for the construction of local sewer facilities. Several contractors have submitted bids and the City Fathers are concerned about their power to accept bids. You direct our attention to the city’s notice inviting sealed proposals, which contains the following language:

The city reserves the right to reject any and all bids or to waive any irregularities or informalities in any bid or in the bidding.

You then ask us whether the quoted language gives the city absolute authority to accept any bid it so desires.

#### ANALYSIS

[NRS 271.335](#) reads in part as follows:

4. The municipality may contract only with the responsible bidder submitting the lowest bid upon proper terms.
5. The municipality shall have the right to reject any and all bids and to waive any irregularity in the form of any bid.

We are concerned with two subsections of [NRS 271.335](#): one giving the city the right to accept any and all bids, the other requiring that a contract may be awarded only to the lowest responsible bidder.

Many cases have construed statutes identical to those in Nevada. Our research disclosed no cases where the “reservation of the right to reject any and all bids” invested

the municipality with absolute discretion to accept any bid it desired. Authorities construing these statutes are collected in 27 A.L.R.2d 914 and 10 *McQuillan on Corporations*, 29.73, 29.77.

The general rule seems to be that reservation of the right to reject any and all bids is not absolute, but gives the municipality the power to consider the quality of work, materials, etc., and award a contract to one who is not the lowest bidder, provided the authorities act in good faith in the exercise of honest discretion, and their decision has a sound and reasonable basis.

The term “lowest responsible bidder” has been held to confer discretionary powers. It empowers the awarding officials to consider the differences in the character or quality of the materials, articles, or work proposed to be furnished by the respective bidders, and their judgment will not be set aside in the absence of bad faith, fraud, or abuse of discretion.

Thus, the two terms have been construed to mean practically the same thing. The main difference appears to be that the right to “reject any and all bids” gives the municipality the additional power of rejecting all bids and readvertising, provided, of course, they exercise their honest discretion and do not attempt to defeat the purposes of competition. 31 A.L.R.2d 469; 10 *McQuillan on Corporations*, 29.73, 29.77.

The basic principle is that the municipality must honor the bid which is lowest. The terms “lowest responsible bidder” and “right to reject any and all bids” empower a municipality to consider other factors in accepting a bid. If a municipality had an absolute right to accept any bid it so desired, the competitive purpose of bidding would be lost, and favoritism and arbitrary and capricious action would be possible, to the derogation of the interests of the public.

#### CONCLUSION

The “right to reject any and all bids” does not give a municipality the absolute authority to accept any bid it so desires, but if a city awards a contract pursuant to [NRS 271.335](#), it may award such contract to one other than the lowest bidder, where this is done in good faith and is based upon the exercise of sound and reasonable discretion in the public interest.

Respectfully submitted,

HARVEY DICKERSON  
Attorney General

By: Peter I. Breen  
Deputy Attorney General

---

**411—Health and Welfare; Water Pollution Control—State Department of Health and Welfare proper state agency to regulate and control water pollution under state and federal statutes, and may adopt rules and regulations augmenting this power.**

Carson City, May 26, 1967

Mr. Wallace W. White, *Bureau of Environmental Health, Department of Health and Welfare, Carson City, Nevada*



Dear Mr. White: You have requested an opinion of this office on the regulation and administration of water pollution control by your bureau as an entity of the Department of Health and Welfare.

You submit the following questions:

1. Is the definition of pollution, Section 1g, Water Supply Regulations, apply and not in conflict with [NRS 445.010](#)?
2. Does authority, [NRS 445.040](#), applied to 33 USCA 466 and 466i, extend to PL 87-88, PL 89-234, PL 89-753, and the Federal Water Pollution Control Act, PL 84-660?
3. Does the Board of Health have authority to adopt water quality standards, Section 9 of Water Pollution Control regulations?

#### ANALYSIS

[NRS 445.060](#) gives the Department of Health and Welfare, through the Health Division of the department, the power to do whatever is necessary or appropriate to carry out, as the water pollution agency of Nevada, the steps necessary to secure to this State the benefits of the Water Pollution Control Act, C. 758, 62 Stat. 1155, known as the Federal Act.

The purpose of the Federal Act is to enhance the quality and value of the water resources and to establish a national policy for the prevention, control, and abatement of water pollution.

Under the Federal Act the state, in order to receive the benefits afforded by that act, must adopt (a) a water quality criteria applicable to interstate waters or portions thereof within such state, and (b) a plan for the implementation and enforcement of the water quality criteria adopted.

If a Secretary of the Interior determines that such criteria and plan meet the requirements that follow, such criteria and plan shall thereafter be the water quality standards applicable to such interstate waters or portions thereof. The requirements are that standards be:

1. Such as to protect the public health and welfare.
2. Such as to enhance the quality of the water and serve the purposes of the Federal Act.

There may be confusion if [NRS 445.010](#) is used to arrive at a determination of the definition of “water pollution” because a survey of this statutory provision reveals only those practices which result in pollution. Therefore, in order to augment the statute, it becomes necessary to do one of two things: (1) secure a legislative definition of pollution by amendment, or (2) define “water pollution” in regulations adopted by the Department of Health and Welfare.

We believe that the power having been given to the State Board of Health to adopt, promulgate, amend, and enforce reasonable rules and regulations consistent with law by [NRS 439.200](#), Regulation 1g of Water Pollution Control Regulations adopted July 16, 1957, effectively defines pollution. It reads as follows:

“Pollution” means the contamination or other alteration of the physical, chemical, or biological properties of any waters of the State, so as to create a nuisance or render such waters actually or potentially harmful or detrimental or injurious to public health, safety, or welfare, to domestic, agricultural, commercial, industrial, recreational or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

This office has reviewed the Nevada water pollution control statutes and has determined that adequate authority exists for the Department of Health and Welfare to enforce the same.

We also hold that [NRS 445.050](#) is in pari materia to Public Law 84-660 as amended by the Federal Water Pollution Control Act Amendments of 1961, Public Law

87-88, the Water Quality Act of 1965, Public Law 89-234, and the Clean Water Restoration Act of 1966, Public Law 89-753.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**412 Cities and Counties; Public Printing—Public printing of both cities and counties must be done by a newspaper or a commercial printing establishment within the county if either is equipped to do the same. If they are not so equipped, the public printing is still to be placed with the newspaper or commercial printing establishment, and they in turn must farm it out to a newspaper or commercial printing establishment in the State, equipped to handle the job.**

Carson City, May 29, 1967

The Honorable Leonard P. Root, *Mineral County District Attorney, P.O. Box 1217, Hawthorne, Nevada 89415*

Dear Mr. Root: In reply to your inquiry of May 26, 1967, concerning the law governing public printing for cities and counties, we refer you to [NRS 268.070](#) and [NRS 244.330](#).

Under [NRS 268.070](#), public printing required by the various cities of this State shall be placed with some bona fide newspaper or bona fide commercial printing establishment within the county in which the city is located.

When there is neither a bona fide newspaper nor bona fide commercial printing establishment within the county equipped to do the job, then printing so required shall be placed through the local bona fide newspaper or bona fide commercial printing establishment.

The apparent ambiguity in the law as to the placing of public advertising through a local newspaper or local commercial printing establishment may be resolved by the establishment of the fact that neither of these printing entities are equipped to do the printing desired.

The same rule applies to [NRS 244.330](#), which governs county printing.

However, it was apparently the intent of the Legislature in both instances to require public printing to be done in the State. [NRS 268.070](#) (3) reads as follows:

Except as otherwise authorized in subsection 5, printing required by cities of this state shall be done within this state.

[NRS 244.330](#) (3) reads exactly the same, except that the word “counties” is substituted for “cities.”

The subsection 5 referred to in both the statutes governing city and county public printing reads as follows:

5. Nothing in this section shall be construed as prohibiting the printing of city (county) bonds and other evidences of indebtedness outside the state.

CONCLUSION

It is therefore the opinion of this office that public printing of both cities and counties must be done by a newspaper or a commercial printing establishment within the county if either is equipped to do the same. If they are not so equipped, the public printing is still to be placed with the newspaper or commercial printing establishment, and they in turn must farm it out to a newspaper or commercial printing establishment in the State, equipped to handle the job.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**413 Public Schools; School Districts—A school district may not admit nonresident students without the receipt of tuition. Parents of a nonresident student are not required to pay tuition to attending school district. Attending school district may admit nonresident students with approval of State Board of Education. Attending school district may require tuition of nonresident district, not to exceed the actual per capita cost of instruction of students of the attending district.**

Carson City, June 1, 1967

The Honorable Robert List, *Ormsby County District Attorney, County Court House, Carson City, Nevada 89701*

Dear Mr. List: [NRS 392.010](#) provides for the admission of pupils from adjoining school districts, together with tuition and transportation charges.

Your Deputy, Peter D. Laxalt, has requested of this office an opinion concerning nonresident students, and has asked three questions, the first two of which may be restated.

#### QUESTION

1. May a county school district accept nonresident students without receipt of tuition or other costs to defray costs of education, operation and maintenance, and depreciation allocable per pupil?
2. If the answer to the first question is No, may such costs be required of the parent or guardian of the nonresident students?
3. If the answer to “1” is No, and costs may not be collected from the parents or guardian of a nonresident student, may Ormsby County School District under the circumstances here present commence a mandamus or other action to require the Nevada Department of Education and/or the Washoe County School District or other district to effectuate a reasonable plan where under Ormsby County School District would be reimbursed from state and/or Washoe district or other district funds for the costs to Ormsby County School District for enrollment and education of any Washoe County student residents?

#### ANALYSIS

[NRS 392.010](#) provides as follows:

1. The board of trustees of any school district may, with the approval of the state department of education:
  - (a) Admit to the school or schools of any school district any pupil or pupils living in an adjoining school district within this state or in an adjoining state when

the school district of residence in the adjoining state adjoins the receiving Nevada school district; or

(b) Pay tuition for pupils residing in the school district but who attend school in an adjoining school district within this state or in an adjoining state when the receiving district in the adjoining state adjoins the school district of Nevada residence.

2. With the approval of the state department of education an agreement shall be entered into between the board of trustees of the school district in which the pupil or pupils attend school, providing for the payment of such tuition as may be agreed upon, but transportation costs shall be paid by the board of trustees of the school district in which the pupil or pupils reside:

(a) If any are incurred in transporting a pupil or pupils to an adjoining school district within the state; and

(b) If any are incurred in transporting a pupil or pupils to an adjoining state, subject to the provisions of [NRS 392.350](#).

3. In addition to the provisions for the payment of tuition and transportation costs for pupils admitted to an adjoining school district as provided in subsection 2, the agreement may contain provisions for the payment of reasonable amounts of money to defray the cost of operation, maintenance and depreciation of capital improvements which can be allocated to such pupils.

The costs of operation and maintenance of a school district are borne, to a large extent, by local taxation in the district. Facilities for education of students are normally intended for those residing within a particular district. It is not the normal function of a school district to educate nonresident students. To require or permit education of nonresidents free of charge would present the possibility of imposing an onerous burden on a district to provide additional buildings, teachers, etc., at the expense of its own taxpayers and to the detriment of its own students. We do not find this contemplated in [NRS 392.010](#).

The answer to the first question, then, is No.

Subsection 2 of [NRS 392.010](#) makes it clear that the Legislature intended a scheme whereby the resident district would pay tuition and transportation costs where required, subject to the provisions of [NRS 392.350](#). The language of subsection 2 of [NRS 392.010](#) is mandatory. Thus, assuming a student is properly admitted to a nonresident district, the adjoining school district shall, with the approval of the State Board of Education, enter into an agreement on tuition. We must, therefore, conclude that the parents or guardians of the nonresident child are not required to pay tuition when their child attends school in an adjoining district.

Our subsection of NRS formerly provided that the costs of tuition could not exceed the actual per capita cost of instruction in the resident district. The 1965 Nevada Statutes amended this section to provide for "such tuition as may be agreed upon by the adjoining districts." 1965 Stats. of Nevada, Ch. 69, p. 100. Thus, the Legislature changed the provision with respect to tuition so that it is no longer limited to the per capita cost of instruction in the resident district. However, we believe that, providing the child's attendance is properly accomplished, the cost which may be required by the attending district as and for tuition may not exceed the actual per capita cost of instruction per pupil of the attending district. This is in conformity with the general rule of law. *State ex rel. Burnell v. School Dist.* (1934) 335 MO. 803; 74 S.W.2d 30.

The third question presents some difficult problems. Before the nonresident district can maintain any action, it is necessary that they have, first, properly admitted nonresident pupils. The first requirement, presenting no difficulty, is that the approval of the State Board of Education be obtained. The crux of the problem in this case is whether consent of the home board is required.

Most of the statutes of other states have a much more explicit definition of legislative intent. Some require express consent of the resident board and/or trustees. Others provide that in situation where the attending and resident districts cannot agree, the determination is made by a higher state official. 113 A.L.R. 177.

We believe this was the intention of the Nevada Legislature. The absence of an express requirement of consent by the resident board is obvious. This statute could have been much more exact in establishing guidelines for attendance of nonresident students.

[NRS 392.010](#)(1) provides that any school district may admit pupils from another district or pay the tuition for pupils from an adjoining district, with the approval of the State Department of Education. Subsection (2) provides an agreement shall be entered into between the board of trustees of the adjoining district. We take that subsection to mean a district may compel the admission of its resident students in an adjoining district, or it may admit nonresidents from an adjoining district and compel the resident district to pay tuition, provided the State Board of Education approves.

To say what form of action the attending school district could commence, and against whom, requires more facts than those supplied, and therefore no opinion is expressed on that subject.

#### CONCLUSION

A school district may not admit nonresident students without the receipt of tuition. Parents of a nonresident student are not required to pay tuition to attending school district. Attending school district may admit nonresident students with approval of State Board of Education. Attending school district may require tuition of nonresident district, not to exceed the actual per capita cost of instruction of students of the attending district.

Respectfully submitted,

HARVEY DICKERSON  
Attorney General

By: Peter I. Breen  
Deputy Attorney General

---

**414 State Banks; Retail Installment Sales; Credit Cards—State banks, when issuing retail credit cards, may charge rates of interest heretofore reserved for retail installment sellers.**

Carson City, June 6, 1967

1

Mr. Preston E. Tidvall, *Superintendent of Banks, Department of Commerce, Carson City, Nevada 89701*

Dear Mr. Tidvall: You have requested the opinion of this office upon the matter of whether a state bank, through the issuance of credit cards, may charge a rate of interest upon retail loan credits ordinarily reserved to retail installment sellers.

The bank intends to issue credit cards under the BankAmericard Plan, with the object being to allow the cardholder to obtain consumer goods on credit or to simplify the making of a money loan directly from the issuing bank. For the privilege of making deferred-payment purchases upon the credit of the issuing bank, the cardholder will contract to pay the issuing bank within 25 days of the monthly billing. The customer also has the option of paying 10 percent of the billed amount. If a percentage payment is made, a 1 1/2 percent "service charge" is assessed which, for purposes of this opinion, is

considered as interest. The rate of interest as represented by the service charge exceeds the rates of interest ordinarily available to banks upon the making of a small loan.

Any bank organized under the laws of the State of Nevada \* \* \* may charge *in advance* a rate of interest amounting to 8 percent on loans which do not exceed \$500 and a rate of interest of 7 percent on loans exceeding \$500 but not exceeding \$1500. [NRS 662.045](#) (Italics added.)

The recent Legislature enacted a measure that was apparently intended to allow banks, contrary to [NRS 662.045](#), to exact a rate of interest and to enter a field of enterprise heretofore denied them. Whether the legislation, Nevada Statutes 1967, Chapter 444,<sup>1</sup> accomplishes this intent is not without doubt.

Banks are ordinarily considered creatures of statute allowed to undertake only those activities and to charge those rates of interest specifically authorized; yet from the time of their creation, state banks within Nevada have engaged in activities customarily regarded as proper activities for banks, but not specifically provided for under the general powers of banking corporations set out in [NRS 662.010](#). One such activity is the lending of credit or the issuance, of letters of credit. This practice seems never to have been complained of, since it is part of the usual business of banking. Inasmuch as credit cards are letters of credit, or resemble

---

<sup>1</sup>“Section 1. Chapter 97 of NRS is hereby amended by adding thereto the provisions set forth as section 2 and 3 of this act.

“Sec. 2. *‘Cardholder’ means the person or organization to whom a credit card is issued or for whose benefit it is issued.*

“Sec. 3. *‘Credit Card’ means any instrument, whether in the form of a card, booklet, plastic or metal substance, or the number or other identifying description thereof, which is sold, issued or otherwise distributed by a business organization or financial institution, for the use by the person or organization named thereon for obtaining on credit goods, property, services or anything of value.*

“Sec. 4. [NRS 97.085](#) is hereby amended to read as follows:

97.085 ‘Retail buyer’ or ‘buyer’ means a person *or a cardholder* who buys or hires goods, or gives a security interest in goods, or agrees to do so, or agrees to have services rendered or furnished from a retail seller.

“Sec. 5. [NRS 97.095](#) is hereby amended to read as follows:

97.095 ‘Retail charge agreement,’ ‘revolving charge agreement’ or ‘charge agreement’ means an agreement entered into or performed in this state prescribing the terms of retail installment transactions which may be made thereunder the terms of retail installment transactions which may be made thereunder from time to time *by use of a credit card issued by the seller, a business organization or by a financial institution or otherwise* and under the terms of which a time price differential is to be computed in relation to the buyer’s unpaid balance from time to time.

“Sec. 6. [NRS 97.125](#) is hereby amended to read as follows:



97.125 'Retail seller' or 'seller' means:

1. A person engaged in the business of selling goods or services to retail buyers; *or*
2. *A business organization or financial institution which issues or otherwise distributes a credit card to be used in connection with a retail charge agreement.*

"Sec. 7. This action shall become effective upon passage and approval."

them sufficiently to be treated as such, it seems unlikely that the practice can be complained of on any legal basis.

A second area of consideration presents more difficulty, namely, that of whether the bank is an original party to a retail sales transaction. [NRS 97.125](#), as amended, constitutes a financial institution a retail seller when it issues a credit card used in a retail charge agreement. Yet this cannot be true in the ordinary sense of the word "seller," or the transaction will run squarely into the prohibitions of [NRS 662.140](#), preventing banks from participating directly or indirectly in the business of buying and selling merchandise.

No bank shall employ its moneys, directly or indirectly, in trade or commerce by buying or selling goods, chattels, wares or merchandise\* \* \* [NRS 662.140](#).

That the issuing bank is not sufficiently engaged in "buying" and "selling" within the prohibitions of the statute just cited is evident only upon a close examination of the deferred-payment credit card transaction. The credit card purchase requires the simultaneous operation of three agreements:

1. An initial agreement is entered into between the bank and a retail merchant whereby the latter agrees to turn over all "sales drafts" signed by the card-carrying customer in each transaction. In return for undertaking all matters of billing and collection, the bank, upon receipt of the "sales drafts," will pay the merchant the purchase price of the articles sold on credit, less a discount of 3 to 5 percent. This bank-merchant agreement can best be described as an open-end guaranty contract by which the bank is obligated to receive all "sales drafts" accepted by the merchant on the sales of retail goods, and to guarantee payment to the merchant. The credit card plan merchant must turn over each sales draft to the bank. It is evident that the bank acquires equitable rights in each "draft" as soon as it is signed by the customer. All that remains is the mechanical turning over of the drafts by the merchant in exchange for the purchase price less discount.

2. At the same time, a second underlying agreement is in effect between the bank and the cardholder, whereby the latter agrees to pay each "draft" according to a certain prearranged procedure.

3. Still a third transaction occurs while the two underlying agreements are in operation. This happens when the customer makes a credit card purchase and signs the "sales draft" as "purchaser-acceptor." In effect, the "purchaser-acceptor" customer, by his signature, signifies that he will pay the draft made by the seller of goods upon the credit the customer enjoys at the card-issuing bank as indicated by the credit card itself.

The bank, through its open-end guaranty contract with the merchant, has an interest in the transaction from the instant the "draft" is signed by the customer, although it has no control over the mechanics of negotiation between the customer and the retail seller. There is no assignment of the draft paper in the usual sense, because the bank's rights are, for the most part, already perfected by the pre-existing bank-merchant agreement. There is no loan of cash money as contemplated by usury statutes. There is only a loan of the bank's *credit* to the merchant. Still, the matter is different from the usual letter of credit situation. The bank has not agreed to pay if the customer does not. It



agrees to pay absolutely, and yet it has loaned no *money* to the customer. This is the letter of credit transaction without the request to pay and refusal by the letter bearer. The bank takes up the draft paper at a discount later, as it would other obligations arising outside the credit card transaction. Lastly, the bank is acquiring drafts upon which it is the drawee.

However we classify the credit card transaction, the interest restrictions of Chapter 97 of NRS apply, whether the loan is one of cash or credit or whether it constitutes a mere guaranty without the lending of anything.

Chapter 97 of NRS, entitled "Retail Installment Sales," was plainly enacted to govern those sales made by retail merchants when deferred payments were contemplated. The sense of the entire chapter points to a two-party transaction between a buyer and a seller. The use of a credit card issued by the seller to identify the holder and to facilitate the extension of credit would in no way disrupt the meaning or concept of Chapter 97.

When, however, a *third* party issues a credit card, and the sale is made with reliance upon the guaranties implicit therein, the application of the existing retail installment sales law becomes exceedingly difficult. The tripartite credit card transaction seems not to have been considered by the drafters of the Retail Installment Sales Act (now [NRS Chapter 97](#)), particularly when the card issuer is a bank. This shortcoming is not satisfactorily remedied by Nev. Stat. 1967, Chapter 444, *supra*, which classifies a retail seller as

\* \* \* a financial institution which issues \* \* \* a credit card to be used in connection with a retail charge agreement. Nev. Stat. 1967, Chapter 444, Sec. 6.

The legislation apparently seeks to authorize banks to enter a field of endeavor unlike any activity in the routine traditional business of banking. This is not the ordinary purchase of obligations upon the financial market, facilitated by the use of credit cards. Here is a guaranty by a bank upon a transaction in which it has no immediate interest except as it related to the underlying merchant-bank agreement. There is a continuing obligation of the bank to take up all sales drafts executed and to become a collection agent for sums owed pursuant to the daily purchase of ordinary consumer items.

While the practice of adding to the powers and authority of state banks by amendment to the Retail Installment Sales Act without amendment of the chapters specifically governing banks is extremely dubious and likely to prove deceptive to the casual reader, we cannot say that the Legislature was unaware of the already existing banking laws and that the amendment must necessarily fail.

The problem remains, however, that the new legislation makes banks "retail sellers" for certain purposes. The needs for regulation and supervision of state-chartered banks, as opposed to ordinary retail merchants, are as different as the nature of their enterprises. The application of existing laws to this new conglomerate transaction is extremely dubious.

We are not prepared to say how far into the retail sales transaction the bank may intrude itself without running afoul of [NRS 662.140](#) prohibitions against retail trade. *Any* degree of control over the purchase itself or over the merchant's conduct of his business would constitute a prohibited transaction.

The combination of banks and retail sellers, sought so strenuously to be avoided, would come dangerously close to reality by the exertion of any real control by the bank. The requirement that the signatory merchant must maintain a commercial account in the issuing bank, together with the bank's undoubted right to invade the account for the purpose of offsetting customer claims, comes very close to an intolerable degree of influence over the merchant's activities.

The means of imposition of the credit card program upon a retail merchant may be open to question, particularly if the issuing bank holds or acquires other indebtedness against the merchant. Unless the bank-merchant transaction is made at arm's length,

serious question of propriety will arise, with possible attendant action by the superintendent of banks.

Lastly, the bank intends that the cards shall facilitate direct cash loans to the cardholder and shall likewise entitle the credit card purchaser to interest-free credit if the monthly bills are paid within 25 days.

The direct cash loans would be subject to those regular bank interest rates pursuant to [NRS 662.045](#), since no retail installment purchase is directly involved.

When the monthly billing is paid within 25 days, no interest is charged, and so no opinion need be rendered treating that transaction.

#### CONCLUSION

Nevada banks may properly issue credit cards to be used in a retail charge agreement. Upon acquisition of the sales drafts executed pursuant to retail sales made through the use of credit cards, banks may charge the time price differential allowed retail sellers by [NRS 97.245](#).

Respectfully submitted,

HARVEY DICKERSON  
Attorney General

By: George H. Hawes  
Deputy Attorney General

---

**415 Nevada Tax Commission—A modified rule of the Nevada Tax Commission should not be applied retroactively when to do so would be to sanction the existence of two contradictory rules existing at the same time. The Nevada Tax Commission does not possess the power to waive penalties and interest imposed by statute.**

Carson City, June 5, 1967

Hon. Paul Laxalt, *Governor of Nevada Chairman of the Nevada Tax Commission,*  
*Carson City, Nevada*

Dear Governor Laxalt: At a meeting of the Nevada Tax Commission held in Carson City on the 23rd day of May, 1967 the office of the Attorney General was asked to issue an opinion interpreting certain rules and regulations promulgated by the Nevada Tax Commission together with [NRS 372.395](#), all of which concern the Sales and Use Tax Act. The first rule with which we are concerned provided that the postmark on a letter would be the “sole criteria” in determining when the letter was mailed. The reason for this rule was so the Tax Commission could determine when tax payments were made and whether or not they were delinquent. It appears that a certain taxpayer in Clark County, Nevada, deposited in a mail box his tax payment on the 30th day of September, 1966, the due date, but that letter was not picked up by postal employees and postmarked until some time after the 1st day of October, 1966. Hence, the postmark, revealed the tax was mailed at a delinquent time and subject to penalties. The rule above mentioned was in effect at the time these events transpired. Since that time the rule has been modified by the Nevada Tax Commission to the effect that the postmark is only “prima facie evidence” of the date of mailing.

As I earlier mentioned, we are also concerned with the application of [NRS 372.395](#), which reads:

1. The tax commission for good cause may extend for not to exceed 1 month the time for making any return or paying any amount required to be paid under this chapter.

2. Any person to whom an extension is granted and who pays the tax within the period for which the extension is granted shall pay, in addition to the tax, interest at the rate of 6 percent per annum from the date on which the tax would have been due without the extension until the date of payment.

#### QUESTIONS

1. Does the Tax Commission have any authority to waive penalties and interest imposed because of the delinquent payment of taxes?

2. Does the modified rule which provides the postmark will be “prima facie evidence” of the date of mailing have any retroactive effect?

3. Does [NRS 372.395](#) vest the Nevada Tax Commission with any authority to grant an extension of time in which to pay the taxes under the above mentioned facts?

#### ANALYSIS

Question No. 1 is answered in the negative.

Question No. 2 is answered in the negative.

Question No. 3 is answered in the negative.

[NRS 372.505](#) provides for the assessment of penalties and interest. That statute reads:

Penalty, interest for failure to pay tax: Amount; rates. Any person who fails to pay any tax to the state or any amount of tax required to be collected and paid to the state, except amounts of determinations made by the tax commission under [NRS 372.400](#) to [372.455](#), inclusive, within the time required *shall pay a penalty of 10 percent of the tax or amount of the tax, in addition to the tax or amount of tax, plus interest at the rate of one-half of 1 percent per month, or fraction thereof, from the date on which the tax or the amount of tax required to be collected became due and payable to the state until the date of payment.* (Italics added.)

This statute vests no discretion in the Nevada Tax Commission regarding the assessment of penalties. The italicized portion of the statute is written in mandatory language and must be followed.

Question No. 1 is answered “no.”

The rule proving the postmark will be “prima facie evidence” of the date of mailing was not effective until the 4th day of May, 1967. The prior rule which provided the postmark should be the “sole criteria” was in effect until that date. Certainly it was in effect when the events transpired with which we are here concerned. To allow the subsequent rule to be applied retroactively would be to sanction two contradictory rules existing at the same time. Such procedure should not be allowed.

Question No. 2 is answered “no.”

In answer to Question No. 3 it is the opinion of this office that [NRS 372.395](#) does not allow the Tax Commission at this late date to grant an extension of time in which to pay taxes. It is the opinion of this office that any extension must be applied for and obtained before the time taxes are delinquent. After the taxes are delinquent they are, of course, due and payable with penalties attached. It is too late then to apply to the Nevada Tax Commission for an extension of time in which to pay taxes. Therefore, it is the opinion of this office that [NRS 372.395](#) affords the delinquent taxpayer no relief and Question No. 3 is answered “no.”

Respectfully submitted,

HARVEY DICKERSON  
Attorney General

By: John Sheehan  
Deputy Attorney General

---

**416 Public Service Commission; Motor Vehicle Department—Sums in Regulatory Fund of Public Service Commission cannot be transferred to State Highway Fund in absence of legislative authority.**

Carson City, June 6, 1967

Mr. Reese H. Taylor, Jr., *Chairman, Public Service Commission, Carson City, Nevada*  
Attention: Mr. Gene Milligan, *Secretary*

Dear Mr. Taylor: Your commission has propounded to this office a question as to whether the Public Service Commission may transfer funds from the Regulatory Fund set up by [NRS 704.033](#)-704.039 to the State Highway Fund, when there are insufficient funds in the latter to meet the expenses authorized by [NRS 704.039](#).

ANALYSIS

The creation and sources of the State Highway fund are set forth in [NRS 408.235](#), which reads as follows:

1. There is hereby created in the state treasury the state highway fund.
2. The proceeds from the imposition of any license or registration fee and other charges with respect to the operation of any motor vehicle upon any public highway, city, town or county road, street, alley or highway in this state and the proceeds from the imposition of any excise tax on gasoline or other motor vehicle fuel shall be deposited in the state highway fund and shall, except for costs of administering the collection thereof, be used exclusively for administration, construction, reconstruction, improvement and maintenance of highways as provided for in this chapter.
3. Costs of administration for the collection of the proceeds for any license or registration fees and other charges with respect to the operation of any motor vehicle shall be limited to a sum not to exceed 22 percent of the total proceeds so collected.
4. Costs of administration for the collection of any excise tax on gasoline or other motor vehicle fuel shall be limited to a sum not to exceed 1 percent of the total proceeds so collected.
5. All bills and charges against the state highway fund for administration, construction, reconstruction, improvement and maintenance of highways under the provisions of this chapter shall be certified by the engineer or the accountant and shall be presented to and examined by the state board of examiners. When allowed by the state board of examiners and upon being audited by the state controller, the state controller shall draw his warrant therefor upon the state treasurer.

All moneys collected under Chapter 706 NRS (licensing and registration of motor vehicles) are to be deposited, under [NRS 706.200](#), with the State Treasurer for placement

in the State Highway Fund. All costs of administration of the Motor Vehicle Act are to be paid from the State Highway Fund.

There is no provision in the law for the transfer of any part of the Regulatory Fund provided for in [NRS 704.033](#)-704.039 to any other fund. In fact, [NRS 704.039](#) states that the Regulatory Fund shall be used *only* for the purposes therein set forth. The referred-to law reads as follows:

Moneys in the public service commission regulatory fund shall be used only to defray the costs of:

1. Maintaining a competent staff and equipment to regulate adequately all public utilities subject to the provisions of [NRS 704.033](#) to [704.039](#), inclusive.
2. Participating in all rate cases involving such utilities.
3. Investigations, inspections, audits and reports in connection with such regulation and participation.
4. All travel expenses and subsistence allowances of commission members and staff.

#### CONCLUSION

It is therefore the opinion of this office that no part of the Regulatory Fund set up by [NRS 704.033](#)-704.039 may be transferred to the State Highway Fund for the purpose of meeting the costs of administration of the Motor Vehicle Department as provided for by [NRS 706.190](#), in the absence of legislative authority.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**417 Labor Commissioner—An employer, under Chapter 609 of the Nevada Revised Statutes, cannot demand a deposit of a female employee required to wear a special uniform, whether the deposit is refundable in whole or in part.**

Carson City, June 7, 1967

Mr. Stanley P. Jones, *Labor Commissioner, Carson City, Nevada*

Dear Mr. Jones: Under Chapter 609 of the Nevada Revised Statutes, the wages, hours, and working conditions of female employees are provided for.

Where the employment requires special uniforms, [NRS 609.140](#) governs. It reads as follows:

*Employers to furnish special uniforms.* All special uniforms as to style, color or material required, shall be furnished by the employer and laundered by the employer without cost to the employee.

#### ANALYSIS

The Legislature, by the use of the conjunctive “and” imposed upon the employer the duty and obligation of both furnishing *and* laundering special uniforms without cost to the employee.

You have inquired as to whether an employer may require an employee to place a deposit to secure said uniform, refundable all or in part, depending upon the wear and tear on the uniform.

A clear understanding of the law indicates that an employer may not require such a deposit. Suppose the employer, upon return of the special uniform, determines that only 80 percent of the deposit should be returned, because in his opinion the wear on said garment constituted 20 percent of its original value. How could such a determination be reconciled with the mandate of the law that the uniform is to be furnished without cost to the employee?

#### CONCLUSION

It is therefore the opinion of this office that an employer, under Chapter 609 of the Nevada Revised Statutes, cannot demand a deposit of a female employee required to wear a special uniform, whether the deposit is refundable in whole or in part.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**418 Public Employees, Classified and Unclassified—Salary of unclassified employee listed in Chapter 525, 1967 Statutes of Nevada, cannot be reduced. Chapter 525 contemplates 8-hour day; thus overtime can be paid under [NRS 281.100](#)(4) even though overtime pay brings compensation above the budget limitation. Overtime allowed in unclassified service, except to elected officials.**

Carson City, June 9, 1967

Mr. Howard E. Barrett, *Director of Administration, Carson City, Nevada 89701*

Dear Mr. Barrett: You have directed two letters to this office, both dated June 5, 1967, in which you pose some interesting but complex questions. The Legislature, in an attempt to hold the line on government spending, resorts to Chapter 525 of the Statutes of 1967 to fix certain salaries by line budgeting.

You ask the following questions:

1. Can a position, the unclassified salary of which is set by Chapter 525, be paid less than the amount indicated in that statute?
2. Can a position, the unclassified salary of which is set by Chapter 525, be paid overtime salary in addition to regular salary?
3. Can a position legally be moved from the unclassified to the classified service (not including Gaming employees)?
4. Can a position legally be moved from the classified to the unclassified service (assuming that the agency has not used its quota of three unclassified positions)?
5. Can overtime be paid to a position in the classified service which, when added to the regular salary, exceeds the \$20,000 limit imposed by [NRS 284.175](#)?
6. Can an agency place an individual on actual contract (more than 40 hours per week) and pay above the \$20,000 for the hours exceeding the 40 hours allowed?

#### ANALYSIS

The Legislature had the power to set the indeterminate salaries by fixing the same within a certain range, including a minimum and a maximum. Instead they inserted mandatory language reading as follows: "The following state officers and employees in the unclassified service of the State of Nevada *shall* receive annual salaries in the amounts set forth following their specific titles." Then follow the positions, with one set salary for each.



This type of budgeting not only established the salary for 1967-68 but for 1968-69, unless modified at a special session of the Legislature. Therefore, the usual raises which generally accrue at the expiration of the biennium period are completely lacking.

#### CONCLUSION

Therefore, we answer Question No. 1, "No." A person in the unclassified service whose salary is set by Chapter 525 of the 1967 Statutes cannot be paid less than the amount indicated therein in the absence of legislative direction.

In answering Question No. 2, we must consider [NRS 281.100](#)(4), which permits the payment of overtime where such overtime is authorized by the officer responsible for his employment. The Legislature, in setting the salaries of unclassified personnel, is presumed to have done so upon the basis of 8 hours per day. Therefore, overtime can be paid to unclassified employees, except elected officials, even though the overtime payment increases the amount received by the employee beyond the line budgeted salary. This determination is different from and contrary to that expressed in an opinion issued by Attorney General Roger Foley on June 8, 1961, because the permissive legislation allowing overtime was enacted by the Legislature in 1965 (Chapter 80, 1965 Statutes of Nevada), which amended [NRS 281.100](#).

Answering Question No. 3: Only the Legislature may determine which positions are in the classified or unclassified service of the State. Therefore, a position in the unclassified service could not be moved into the classified service without legislative concurrence.

The answer to Question No. 4 is the same as that to Question No. 3. Such a change in positions would require legislative action.

As to Question No. 5, the answer is the same as the answer to Question No. 2.

Question No. 6 need not be answered, in view of the answer to Questions Nos. 2 and 4.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**419 State Board of Optometry—More than one examination annually (excepting special examinations) cannot be given to applicants for a license to practice optometry in Nevada. If an examination drafted by the National Board of Examiners is given it must comply with the provisions of [NRS 636.185](#) and must be graded by the Nevada Board of Optometry.**

Carson City, June 8, 1967

Harold B. Clark, O.D., Vice President, *Nevada State Board of Optometry, 1023 B Street, Sparks, Nevada*

Dear Mr. Clark: You have requested an opinion from this office as to whether the State Board of Optometry can accept the results of an examination given to applicants for a license to practice optometry by the National Board of Examiners in addition to an examination given by your Board in accordance with [NRS 636.170](#) through 636.190.

#### ANALYSIS

The law through [NRS 636.170](#) provides for annual and special examinations conducted by your board. To impose on applicants the necessity of taking a further

examination conducted by the National Board of Examiners would be a burden not contemplated by the law.

We can see no objection to conducting an examination drafted by the National Board, so long as it complies in subject matter with [NRS 636.185](#). However, we feel that a determination as to whether the applicant passes the examination is imposed on the Nevada Board.

It is therefore the opinion of this office that more than one examination annually (excepting special examinations) cannot be given to applicants for a license to practice optometry in Nevada. If an examination drafted by the National Board of Examiners is given it must comply with the provisions of [NRS 636.185](#) and must be graded by the Nevada Board of Optometry.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**420 Las Vegas Valley Water District—The Las Vegas Valley Water District, under the act creating it, as amended, need not comply with the preferential bidding requirements of Chapter 420 of the 1967 Statutes of Nevada.**

Carson City, June 9, 1967

Franklin Rittenhouse, *Counsel, Las Vegas Valley Water District, P.O. Box 460, Las Vegas, Nevada 89101*

Dear Mr. Rittenhouse: You have requested this office to determine whether Chapter 420 of the 1967 Statutes of Nevada, dealing with preference for Nevada bidders, is compelling where the Las Vegas Valley Water District is concerned.

#### ANALYSIS

Under Chapter 167 of the 1947 Statutes of Nevada, the Las Vegas Valley Water District was legislatively created. Under Subsection 13 of Section 1 of that act, one of the objects of the district was to make contracts, and to employ labor, and to do all acts necessary for the full exercise of all power vested in said district, or any of the officers thereof.

This office on February 7, 1955, issued Attorney General Opinion No. 8, in which we stated:

The Act of 1947, as amended in 1949 and 1951, is so far-reaching as to create an autonomy insofar as the Las Vegas Valley Water District is concerned, and insofar as its powers with regard to water are concerned. All cities within the district, and all boards and commissions, including the Public Service Commission, have powers subordinate to those of the district, once the district has acquired works or property in accordance with law.

Then again on October 26, 1955, in Attorney General Opinion No. 123, in authorizing the Las Vegas Valley Water District to install water meters, we pointed out:

That the Legislature did not intend to curtail the broad discretionary powers of the district is evidenced by the clear and unambiguous language therein contained to this effect:

“Sec. 19. This act shall in itself constitute complete authority for the doing of the things herein authorized to be done. The provisions of no other law, either general or local, except as provided in this act, shall apply to doing of the things herein authorized to be done, and no board, agency, bureau or official, other than the governing body of the district, shall have any authority or jurisdiction over the doing of any of the acts herein authorized to be done \* \* \*.”

We believe that the language of Section 19 refers to Section 13, which empowers the district to employ labor and do all acts necessary for the full exercise of all powers vested in said district, or any of its officers.

It can readily be seen that compliance with the general law, Chapter 420 of the 1967 Statutes of Nevada, might have a direct effect on the charges to water users within the district.

The power lies with the Legislature to modify the autonomous authority of the district if it so desires, but until it does so, the commissioners of the district need not comply with the 1967 act.

#### CONCLUSION

It is the opinion of this office that the Las Vegas Valley Water District, under the act creating it, as amended, need not comply with the preferential bidding requirements of Chapter 420 of the 1967 Statutes of Nevada.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**421 Churches; Taxation—Modifies Attorney General Opinion 377 so as to hold that acreage held by church solely for religious and charitable purposes and not for purpose of profit is exempt from taxation.**

Carson City, June 14, 1967

Hon. Merlyn H. Hoyt, *White Pine District Attorney, Ely, Nevada 89301*

Dear Mr. Hoyt: This office has reviewed your request for a determination of the taxability of certain land in White Pine County owned by a church and which is devoted to the raising of crops which in their original form or in the form of proceeds from their sale, is used for charitable or religious purposes, and feel that our Opinion 377 dated January 19, 1967, should be modified.

#### ANALYSIS

Our determination in our previous opinion was based on the provisions of [NRS 361.125](#), and from the facts presented, we were of the opinion that the lands were used in part for other than church purposes.

We have received information from the church involved which clearly indicates that the ruling should have been based on [NRS 361.140](#).

It is our understanding after reading the Articles of Incorporation of the church that it was incorporated in Nevada in 1933 in compliance with Chapter 50 of the 1915 Statutes of Nevada. The articles clearly set out that the church may acquire property for the benefit of religion and for works of charity.

We understand that the land is made productive by the labor of members of the church without wages. This is in truth a public donation and therefore complies with [NRS 361.140](#)(1a) which reads:

1. In addition to the corporations defined by law to be charitable corporations there are hereby included:

(a) Corporations whose objects and purposes are for public charity, religious or educational, and whose funds have been derived in whole or in part from public donations.

#### CONCLUSION

As such corporations are by law exempt from taxation, we must hold that land made productive by church labor, without compensation, the product or proceeds of which are made available for charity, is within the statutory exemption.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

---

**422 City Officials; Clarifies Chapters 400 and 404 of 1967 Statutes—Former salaries of named officials repealed and wiped out as of April 15, 1967. New salaries established by City Council of North Las Vegas and City Commissioners of Las Vegas, cannot be increased or diminished during terms for which present incumbents of city offices named in acts were elected.**

Carson City, June 14, 1967

Sidney R. Whitmore, Esq., *City Attorney, 400 Stewart Street, Las Vegas, Nevada 89101*

Dear Mr. Whitmore: Prior to the 1967 Session of the Legislature, salaries for elected city officials in Las Vegas and North Las Vegas were set by the charters of those cities and their subsequent amendments. The last such amendment, insofar as Las Vegas is concerned, was Chapter 377 of the 1963 Statutes of Nevada, and Chapter 447 of the 1963 Statutes of Nevada, insofar as North Las Vegas is concerned.

At the 1967 Session of the Legislature, that body enacted Chapters 400 (S.B. 451) and 404 (S.B. 450) governing salaries of elected officials in North Las Vegas and Las Vegas, respectively.

Chapter 400, Section 2 (which refers to North Las Vegas) provides:

The compensation of the mayor, councilmen and municipal judge shall:

1. Be fixed by the city council; and
2. Not be diminished or increased as to any such office during the term for which he has been elected or appointed.

This act became effective on April 15, 1967.

Chapter 404, Section 1, which refers to the City of Las Vegas, provides that the compensation of the mayor, commissioners, city attorney, and judges of the municipal court shall:

- (a) Be fixed by the board of commissioners; and

(b) Not be diminished or increased as to any such officer during the term for which he has been elected or appointed.

The act became effective on April 15, 1967.

#### ANALYSIS

On the day these acts became effective, former salary provisions for the officers names were repealed, and the salaries set by the City Council in North Las Vegas and the City Commissioners of Las Vegas went into effect. Regardless of the day on which the salary changes were made by the respective bodies of the two cities, they were retroactive to April 15, 1967.

Former salary acts contained no provisions prohibiting a raise or diminution in salary during the term for which the respective office holders were elected. The question then arises as to whether Article 15, Section 9, of the Constitution of Nevada would have prevented such raises. On cited Article reads as follows:

Art. 15, Sec. 9. The legislature may, at any time, provide by law for increasing or diminishing the salaries or compensation of any of the officers whose salaries or compensation is fixed in this Constitution; provided, no such change of salary or compensation shall apply to any officer during the term for which he may have been elected.

It is clear that the constitutional provision applied only to those elective officials named in the Constitution, and thus prior to the 1967 acts governing salaries for city officials in North Las Vegas and Las Vegas the Legislature could, and did, amend salaries. (See *State ex rel. Miller v. Lani, et al.*, [55 Nev. 123.](#))

What effect then are we to give to that provision of the 1967 acts (Chapters 400 and 404 of the 1967 Statutes of Nevada) which state that the salaries therein set forth shall not be diminished or increased during the term for which he has been elected or appointed.

Not being constitutional officers it means that the Legislature has applied the constitutional formula to the city salaries established under the law so that whatever that salary may be designated shall not be diminished or increased for the remainder of the term to which said city officers were elected.

If the legislative intent were otherwise, that august body would have provided that the raises established would take effect upon the election of the successors to the present city officials, and would have clearly set forth that at that time salaries could not be diminished or increased during the term of the newly elected officials.

But by the acts passed and signed by the Governor, former salaries were wiped out completely and therefore no amendment could refer to those emoluments.

#### CONCLUSION

It is therefore the opinion of this office that:

1. Chapters 400 and 404 of the 1967 Statutes of Nevada, repealed and wiped out the salaries of named city officials in effect as of the date of the passage and approval of said acts, to-wit, April 15, 1967.
2. The acts established the procedure for the setting of new salaries by the City Council of North Las Vegas and the City Commissioners of Las Vegas, and such salaries once established were retroactive to April 15, 1967.
3. That the provision against diminishing or increasing salaries of the officials named in the acts designated above referred to the salaries established under the new bills, and did not refer to salaries previously paid the named city officials.

Respectfully submitted,

**423 Medical Laboratory Certification and Improvement Law, 1967 Stat. Nev., Ch. 324—Medical laboratories must obtain license whether operating independently or as part of a property licensed hospital. Registered nurses may obtain specimens for testing as before passage of Chap. 324.**

Carson City, June 16, 1967

Mrs. Jean T. Peavy, R.N., *Executive Secretary, State Board of Nursing, 3600 Baker Lane, Reno, Nevada 89502*

Dear Mrs. Peavy: You have asked the opinion of this office upon two matters arising from the subject legislation:

1. Must all medical laboratories, including those within hospitals, obtain state licenses?
2. May registered nurses collect specimens for testing and analysis by licensed medical laboratories?

We answer both of these questions in the affirmative.

ANALYSIS

The measure would govern all medical laboratories except those specifically excluded. This would require the licensing of medical laboratories in hospitals, convalescent, and nursing homes, whether public or private.

Sec. 9. The provisions of this chapter apply to all public and private medical laboratories \* \* \* 1967 Stat. Nev., Ch. 324, Sec. 9.

The only exclusions are as follows:

1. A laboratory of any college, university or school which is conducted for the training of its students, actively engaged in research and approved by the state department of education.
2. Laboratories operated by the Federal Government.
3. Laboratories operated by licensed physicians solely in connection with the diagnosis or treatment of their own patients. Ibid., Sec. 9.

Hospitals, convalescent, and nursing homes are plainly *not* excluded, nor are laboratories solely because of their location within one of these institutions.

Further, coverage of the statute would not appear limited to “business entities,” as such.

Sec. 10. 1. No person, corporation, partnership or other form of business entity may operate \* \* \* a medical laboratory \* \* \* Ibid, Sec. 10.

It is in no way clear that the words “or other form of business entity” relate back to the word “person.” Had the Legislature meant the statute to govern only business enterprises, it seems likely that the words “sole proprietorship” instead of “person” would have been used.



Hospitals tend to be operated as corporations. Physicians are either employed directly by the operating corporation or allowed, for a fee, the use of the facilities of the physical plant. Therefore, the exclusion of Sec. 9(3):

3. Laboratories operated by licensed physicians solely in connection with the diagnosis or treatment of their own patients. Ibid., Sec. 9.

would, in most instances, not apply.

Inasmuch as the Nevada Legislature does not publish committee reports, no readily available insight into legislative intent is possible. Consideration of the usual reasons for enactment of medical laboratory licensing statutes, such as mail order analysis under substandard conditions, is entitled to little weight here in view of Sec. 27, which does not require licensure of preexisting laboratories until 1972.

The second question presented, as to whether registered nurses are to be permitted to obtain laboratory specimens, arises from Sec. 23 of the law, whereby:

No person other than a licensed physician or dentist may manipulate a person for the collection of specimens, except that technical personnel of a laboratory may collect blood, remove stomach contents, perform certain diagnostic skin tests or collect material for smears and cultures.

The scope of the new law is established, first, by the title of the legislation: “*Medical Laboratory Certification and Improvement Law*” (Italics added.)

The reach of the law is further defined by its preamble, which reads:

AN ACT establishing minimum standards for the licensing and operation of *medical laboratories*; providing penalties; and providing other matters properly relating thereto. (Italics added.)

Further, in Sec. 3, the following is set out:

Sec. 3. The legislature declares that:

1. The proper operation of medical laboratories within the state is a matter of vital concern affecting the public health, safety, and welfare.
2. The purpose of this chapter is to promote public health, safety and welfare by developing, establishing and enforcing:
  - (a) Minimum standards for the licensing of medical laboratories;
  - (b) Minimum qualifications for laboratory directors and the certification of laboratory personnel; and
  - (c) Performance standards for laboratories.

From the foregoing it appears that the law is intended to govern the taking of specimens for laboratory use solely within the confines of the laboratory itself by laboratory personnel.

#### CONCLUSION

1. Medical laboratories must obtain state licenses whether they are connected with hospitals or not.
2. Registered nurses may obtain specimens for testing as before passage of Chapter 324.

Respectfully submitted,

HARVEY DICKERSON, Attorney General

By: George H. Hawes, *Deputy* Attorney General

OPINION NO. 1967-424 NEVADA INSURANCE STATUTES CONSTRUE...

OPINION NO. 1967-424 Nevada Insurance Statutes Construed in Connection With Proposed (U.S.) Small Business Administration Regulation Intended To Implement a Federally Authorized Small Business Loan Guaranty Program—Any such loan guaranty program held to constitute the transaction of insurance business as defined in, and regulated by, present Nevada law.

Carson City, July 6, 1967

Mr. Louis T. Mastos, Commissioner of Insurance, Department of Commerce, State of Nevada, Carson City, Nevada 89701

Dear Mr. Mastos: You have asked the opinion of this office as to whether a regulation in relation to the guaranteeing of loans made by third parties to small business concerns, presently under consideration by the (U.S.) Small Business Administration, would bring small business investment companies within the scope of the insurance laws and regulations of the State of Nevada.

#### ANSWER

We have concluded that the question posed by your foregoing inquiry must be answered in the affirmative.

#### ANALYSIS

Black's Law Dictionary, Fourth Edition, provides the following definitions as herein relevant:  
At page 943:

INSURANCE. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. \* \* \* (Cases cited.)

\* \* \* \* \*

Commercial insurance is a term applied to indemnity agreements, in the form of insurance bonds or policies, whereby parties to commercial contracts are to a designated extent guaranteed against loss by reason of a breach of contractual obligations on the part of the other contracting party; to this class belong policies of contract credit and title insurance. (Case cited.)

\* \* \* \* \*

Guaranty or fidelity insurance is a contract whereby one, for a consideration, agrees to indemnify another against loss arising from the want of integrity or fidelity of employees and persons holding positions of trust, or embezzlements by them, or against the insolvency of debtors, losses in trade, loss by nonpayment of notes, or against breaches of contract. (Cases cited.)

\* \* \* \* \*

At page 1611:

SURETY. One who undertakes to pay money or to do any other act in event that his principal fails therein. (Case cited.) One bound with his principal for the payment of a sum of money or for the performance of some duty or promise and who is entitled to be indemnified by someone who ought to have paid or performed if payment or performance be enforced against him. (Case cited.) Everyone who incurs a liability in person or estate, for the benefit of another, without sharing in the consideration, stands in the position of a "surety," whatever may be the form of his obligation. (Case cited.)

A surety and guarantor have this in common, that they are both bound for another person; yet there are some points of difference between them. A surety is usually bound with his principal by the same instrument, executed at the same time on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to every known default of his principal. On the other hand, the contract of guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not the guarantor's contract, and the guarantor is not bound to take notice of its nonperformance. The surety joins in the same promise as his principal and is primarily liable; the guarantor makes a separate and individual promise and is only secondarily liable. His liability is contingent on the default of his principal and he only becomes absolutely liable when such default takes place and he is notified thereof. (Cases cited.) "Surety" and "guarantor" are both answerable for debt, default, or miscarriage of another, but liability of guarantor is, strictly speaking, secondary and collateral, while that of surety is original, primary, and direct. In case of suretyship there is but one contract, and surety is bound by the same agreement which binds his principal, while in case of guaranty there are two contracts, and guarantor is bound by independent undertakings. (Case cited.)

A surety is an insurer of the debt or obligation; a guarantor is an insurer of the solvency of the principal debtor or of his ability to pay. (Cases cited.)

NRS 682.050, "Insurance contract," "doing an insurance business" defined, as relevant herein, provides:

1. Except as provided in subsection 2, "insurance contract," as used in this Title, shall be deemed to include any agreement or other transaction whereby one party, herein called the insurer, or company is obligated to confer benefit of pecuniary value upon another party, herein called the insured or the beneficiary, dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event. A fortuitous event is any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party.

2. A contract of guaranty or suretyship is an insurance contract, within the meaning of this Title, only if made by a guarantor or surety who or which, as such, is doing an insurance business within the meaning of this Title.

3. "Doing an insurance business" within the meaning of this Title, shall be deemed to include:  
(a) The making, as insurer, or proposition to make as an insurer, of any insurance contract; and  
(b) The making, as guarantor or surety, of any contract of guaranty or suretyship as a vocation and not as merely incidental to any other legitimate business or activity of the guarantor or surety; \* \* \* (Italics added.)

As relevant hereto, NRS 681.030 Class 3: Casualty, fidelity and surety, further provides as follows:  
\* \* \* \* \*

5. Fidelity and surety.  
\* \* \* \* \*

(b) Insurance guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings and contracts of suretyship.

\* \* \* \* \*

6. Miscellaneous.  
\* \* \* \* \*

(c) Insurance against loss or damage which may result from the failure of debtors to pay their obligations to the insured and insurance of the payment of money for personal services under contracts of hiring.

We have noted from the copy of the letter dated June 21, 1967, addressed to you by the Small Business Administration (submitted as an attachment to your inquiry to us), that under the federally

authorized program (Sec. 102, Small Business Investment Act of 1958, as amended, 15 U.S.C. 661), the Small Business Administration evidently licenses privately owned and managed corporations, chartered under state law, for such specific purpose of providing funds to small business concerns through the purchase of equity securities and through the disbursement of long-term loans.

Such licensing prerequisite of small business investment companies would sufficiently appear to negate any inference that the guarantee by small business investment companies of loans made by third parties to small business concerns is merely incidental to some other legitimate business or activity of such guarantors; on the contrary, such licensing strongly suggests and substantially implies that such loan guarantees in fact constitute, or would probably constitute, a major or predominant part or portion of the business or commercial operations, or "vocation" of such loan guarantors. (See NRS 682.050, paragraph 3 (b) above.)

## CONCLUSION

Based upon established and accepted substantive concept and definition of "guaranty" insurance, manifestly amply contemplated and included within the broad terms and scope of applicable Nevada insurance law as herein cited, it is our considered opinion that the loan guaranty authority, provided for in the proposed regulation presently under consideration by the (U.S.) Small Business Administration, would bring small business investment companies within the scope of the insurance laws and regulations of the State of Nevada, since any such loan guaranty program would constitute the transaction of insurance business subject to presently applicable Nevada state insurance laws and regulatory powers.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John A. Porter, Deputy Attorney General

---

OPINION NO. 1967-425 NEVADA TAX COMMISSION; SALES AND U...

OPINION NO. 1967-425 Nevada Tax Commission; Sales And Use Tax; Sale of Gas Exemption—Gas which is sold in this State and delivered through a main, line, or pipe to the consumer is exempt from the sales and use tax.

Carson City, July 10, 1967

Mr. Roy Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

## STATEMENT OF FACTS AND QUESTIONS

Dear Mr. Nickson: The Secretary of the Nevada Tax Commission recently inquired of this office as follows:

1. The taxpayer is engaged in the business of sale and delivery of propane (liquefied petroleum). He leases a tank to his customer and, from time to time, delivers to his customer a quantity of propane which then is conducted through an underground pipe from the leased tank to this customer's place of business. The customer operates a service station. Should the gross receipts from sales of propane (and the rental on the tank) be included in the taxpayer's sales for sales tax purposes?

2. The taxpayer is engaged in the business of selling propane and owns a storage tank in the center of a business area. From that central tank the taxpayer delivers liquefied petroleum gas through a common pipeline to various commercial customers within a radius of 2 or 3 blocks. The gas is metered to the various business and commercial customers at the customer's property line. The customers include a service station, a doctor's office, a lawyer's office, a motel, and a restaurant. Are the sales of this liquefied petroleum gas to be included in the taxpayer's gross receipts for the purpose of sales tax?

## ANALYSIS

Within the Sales and Use Tax Act (Chapter 372 of NRS), there are several exemptions. NRS 372.295 reads:

There are exempted from the taxes imposed by this chapter the gross receipts from the sales, furnishing or service of, and the storage, use or other consumption in this state of, gas, electricity and water when delivered to consumers through mains, lines or pipes.

To apply this statute in this situation, we must first determine if propane is in fact a gas and hence within the provisions of this statute.

This question was considered in *Balthazor v. B. & B. Boiler & Supply Co.*, 217 P.2d 906 (Kan, 1950). On page 909 it is stated:

In this case we are considering, propane is a name given to a liquid which is really natural gas compressed at a low temperature and when released by means of a regulator through a small vent becomes an inflammable gas which flows through pipes to stoves.

In *Gable v. Tennessee Liquefied Gas Co.*, 325 S.W.2d 657 (Tenn. 1957), other cases dealing with this question were cited, and then it was stated:

Propane gas takes a gaseous form at normal temperatures and is kept in liquid form at such temperatures by application of pressure. \* \* \* One of the properties of the gas \* \* \*

From reading the above authorities, it is concluded that propane is in fact "gas" and comes within the scope of the statute above set forth. Having so concluded, we must determine if the gas is "delivered to consumers through mains, pipes, or lines."

In the first factual situation presented, it appears the propane is delivered via truck to the storage tank. Such being the case, this sale does not fall within the statutory exemption, as the propane is not delivered through either a main, pipe, or line. The fact that a short line is used to transport the gas from the tank to the point of actual consumption does not persuade this office to hold the sale exempt. The reason for this is the fact that the taxpayer has no control over this line and has not metered the volume of gas passing through it. The same conclusion was reached by the Attorney General of our sister state of California. The applicable California statute is Revenue and Taxation, Sec. 6353, which reads the same as NRS 372.295. When interpreting this statute (Opinion NS-4782, 1 Opinions Attorney General 226), the Attorney General of California stated:

If the seller of gas merely attached the tank to a pipeline owned by the consumer and received payment for the tank of gas, the sale would then be complete and would, in my opinion, be a taxable sale, since the seller does not make delivery of the gas to the consumer through mains, lines, or pipes. The consumer controls the delivery of the gas from the tank to his house appliances, and with this delivery the seller has no connection whatever.

This office concurs in this conclusion and holds at this time that the sale referred to in the first set of factual circumstances is not within the exemptions found in NRS 372.295.

We must now consider the tax implication of the lease of the gas tank by the taxpayer to the consumer. NRS 372.385 reads:

For the purposes of the sales tax, gross receipts from rentals or leases of tangible personal property shall be reported and the tax paid in accordance with such rules and regulations as the tax commission may prescribe.

The appropriate rule adopted by the Tax Commission is Ruling No. 61 adopted June 29, 1955. This rule reads:



If a person who purchases property under a resale certificate rents the property to others, he must pay tax to the state upon the cost of the property to him.

If, however, he makes no other use of the property (except retention, demonstration, or display) than the rental of it while holding it for sale, he may elect to pay the tax measured by the rental receipts in lieu of the cost of the property to him.

If a purchaser so elects, all receipts from leasing or hiring of the tangible personal property with respect to which such election has been made must be included in the measure of the tax. Complete and accurate records must be kept, clearly identifying the property leased or rented, showing the cost price and from whom purchased. Tax applies to the sale of the property following its use in rental service, without any deduction on account to tax paid measured either by the cost of the property or by the rental receipts.

We interpret this rule to mean that if the taxpayer in this case purchased the tank under a resale certificate, he may pay the tax based upon the cost of the property to him. Or the taxpayer may elect to pay the tax measured by the rental receipts.

If, on the other hand, the taxpayer did not purchase the tank under a resale certificate, he must have paid a sales tax when it was purchased and in that event no tax should be collected on the rental price.

With regard to the second factual situation presented, we reach a contrary conclusion and hold the sale to be exempt. This situation falls within the terms of the statute, for clearly we have here a " \* \* \* sale \* \* \* in this state of, gas \* \* \* delivered to consumers through mains, lines, or pipes." The sale is not completed when gas is placed in the tank, but is when it passes through the meter. The amount of the sale is determined by the meter reading, and the gas must of necessity pass through the main, pipe, or line to reach the meter, which is the point of sale.

The above referred to California Attorney General's Opinion discussed this point by stating:

Where a meter is installed by the seller in the consumer's pipeline, the meter registers the amount of gas consumed and payment would ordinarily be made on that basis, the seller retaining title to the unconsumed gas in the tank and to the meter. In this situation the seller would be delivering gas through a pipeline which he did not own, but by means of the meter he would regulate the flow and only the gas passing through the meter would be subject to charge. I am inclined to view that this type of sale would be exempt under section 5 (b).

On this point, then, we conclude that the sale as outlined in the second factual situation above set forth is exempt under NRS 372.295.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-426 NEVADA DEPARTMENT OF COMMERCE, SAV...

OPINION NO. 1967-426 Nevada Department of Commerce, Savings and Loan Division—Licensing and other regulatory requirements prescribed by Chapter 673 of NRS, as amended, held mandatorily applicable from their effective date to both domestic and foreign savings and loan associations doing, or desiring to do, such business in Nevada, notwithstanding such an association was so authorized and engaged prior to any such statutory requirement. Short of impairing actually existing and constitutionally protected contractual rights, a state, in exercise of its police power in the public interest, may validly impose reasonable conditions and regulatory controls on such foreign corporations doing, or desiring to do, such business within its jurisdiction.

Carson City, July 11, 1967

Mr. Andrew M. Tongish, Acting Commissioner, Savings and Loan Division, Nevada Department of Commerce, Carson City, Nevada 89701

Dear Mr. Tongish: Reference is made to your letter dated June 26, 1967, and attachments thereto, relative to your request for an opinion of this office as to the present legal status in this State of Western Savings and Loan Company, a Utah mutual corporation, and present applicability of the provisions of Chapter 673 of NRS, as amended, to said foreign corporation. We herewith also acknowledge receipt of the department's file on said company, submitted for our review in connection with your request and found most helpful for better understanding of all facts relevant to any definitive opinion by us.

#### FACTS

Commencing on June 19, 1896, and apparently until issuance of a "cease and desist" order by the department on April 1, 1964, for failure to qualify and make compliance with licensing and other regulatory requirements prescribed by Chapter 673 of NRS, as amended, Western Savings and Loan Company, a Utah mutual corporation (and its predecessors under different names) was doing a savings and loan business in Nevada only under the authority of Chapter 80 of NRS relating to the transaction of business generally in Nevada by foreign corporations.

It further appears that in early 1962 said foreign company, then and presently based and having its home office in Utah, became interested in establishing and sought permission and authority of the Nevada Department of Savings Associations (as created by Chapter 378, 1961 Statutes of Nevada, Chapter 673 of NRS) to establish an office and facilities in Las Vegas, Nevada, in order more efficiently to continue conduct of its savings and loan business in said city and other parts of Nevada. It was the said company's position and contention then, as presently also, that the provisions of Chapter 673 of NRS relating to qualification and licensing of its said business and the establishment of offices or branches, as well as the other regulatory requirements thereby imposed on foreign savings and loan associations in Nevada, were and are legally inapplicable to a foreign savings and loan association, such as Western, already authorized and engaged in the transaction of savings and loan business in Nevada prior to enactment of any such statutory regulatory requirements.

Review of official records and correspondence in said connection indicates that two previous commissioners of the department disagreed with Western's said contention, based on their own personal interpretation and construction of the provisions in Chapter 673 of NRS as applicable to foreign savings and loan associations, whether previously existing or doing business in Nevada or not. Written advice to this effect was given to Western, but such departmental view and decision was apparently not then acceptable to nor accepted by said foreign company, absent an official legal opinion by this office or court ruling and decision on the matter. In any case, Western has not made compliance with the licensing and some other regulatory requirements imposed by Chapter 673 of NRS, as amended, and the record shows that it was necessary for a "cease and desist" order to issue on April 1, 1964, for its failure to make such compliance with Nevada licensing and other applicable regulatory requirements.

Since issuance of said "cease and desist" order, Western has apparently taken no action to qualify and make compliance with Nevada licensing and other regulatory requirements. However, insofar as is presently known to the department, neither has it been doing any savings and loan business within the State of Nevada in such manner as would legally require it to have a Nevada license.

The matter of the right to do business in Nevada without making full compliance with the substantive and procedural requirements contained in Chapter 673 of NRS, as amended, was again recently revived by Western Savings and Loan Company. Apparently it is still said company's position and contention that, for the reasons already hereinbefore noted, it is exempt from any compliance with such Nevada licensing and other regulatory requirements presently statutorily prescribed. In present support for its said position and contention, Western has submitted certain legal authorities (apparently provided by its legal counsel) for review and consideration with issuance of any definitive legal opinion or departmental decision relative to its claimed right of exemption from any application of the said requirements of Chapter 673 of NRS, as amended, to it in the involved circumstances.

It is here noted as a fact that all such submitted legal authorities have been reviewed and herein given merited and appropriate consideration.

## QUESTION

Are the licensing and other regulatory requirements provided in Chapter 673 of the NRS, as amended, which pertain to foreign savings and loan associations doing, or desiring to do, such business in Nevada, presently applicable to Western Savings and Loan Company, a Utah mutual corporation, notwithstanding that it was so "authorized" and engaged in the transaction of such business within this State prior to enactment of such statutes imposing such regulatory requirements?

## ANSWER

It is our considered legal opinion that, except as otherwise herein specifically qualified, your inquiry, as embodied and contained in the question as stated, must be answered in the affirmative.

## ANALYSIS

The principle that certain business enterprises and operations seriously affecting, or capable of so affecting, the public interest and welfare are and properly may be subject to nondiscriminatory, reasonable state police regulatory power and controls, is presently too well established as to be open to serious question or to require the citation of legal authorities. Because of the fiduciary nature of their functions and services, savings and loan association, banks, and insurance companies have long been included among business or commercial enterprises which in the public interest may and should be so subject to state police power and regulatory controls.

It is also well established that a legislature can neither bargain away the state's inherent police power nor in anywise withdraw from its successors the power to take appropriate measures to safeguard or protect and promote public safety, health, morals, interest, and welfare. (See 18 Am.Jur.2d 626, et seq., Sec. 86, and related footnote citations.) In short, a state may impose reasonable and additional controls and requirements upon both new or already existing commercial activities or operations, whether conducted by individuals or domestic or foreign corporations doing or desiring to do business of a fiduciary nature within its jurisdiction, if deemed necessary or desirable in the public interest.

Even several of the cases cited to us by Western Savings and Loan Company itself, though allegedly supporting its exemption claim from any such regulatory requirements, indicate and hold otherwise. The following excerpts from these cases amply and explicitly confirm the validity of a state's exercise of its police power and the establishment of regulatory requirements in circumstances as are here involved, for protection of the public interest. Thus, in *Relfe v. Rundle*, at pp. 225-226 of 103 U.S. (26 L.Ed. 337), we find the following statement by the court:

\* \* \* No state need allow the corporations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of its provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution.

*American Building & Loan Assoc. v. Rainbolt*, 48 Neb. 434, 67 N.W. 493, another case cited to us by Western, while noting that state legislation would be violative of constitutional guarantee if its object, operation, or result would be to impair legitimate existing contractual rights, held that, except as so limited, a state has the power to enact a law designed to bring a designated class of foreign corporations within the jurisdiction of the courts of said state in order to protect persons dealing with them from fraud and imposition; and (if a statute so provides) declaring illegal the contracts of noncomplying building and loan associations, or making any such noncompliance a violation of law and a misdemeanor.

To like effect is *Bedford v. Eastern Building & Loan Assn.*, 181 U.S. 227, 21 S.Ct. 597, 45 L.Ed. 834, the last of the cases cited to us by Western on which comment is made herein:

The court recognizes the power of a state to impose conditions upon foreign corporations doing business within the state, but that cannot be exercised to discharge the citizens of the state from their contract obligations.

The other cases submitted by Western Savings and Loan Company to us for review and consideration, we concluded were either not in point, nor material or particularly relevant to the question and issue under consideration herein.

After review of the provisions of Chapter 673 of NRS, as amended, we have also concluded that the regulatory requirements therein prescribed cannot be said to be unreasonable as a matter of law. Nor can it fairly be contended that licensing and other regulatory requirements thereof are discriminatory, improper, or unreasonable, as applied to either domestic or foreign savings and loan associations doing or desiring to do such business in Nevada. In short, the licensing and regulatory requirements of Chapter 673 of NRS, as amended, are deemed proper and necessary in the public interest and therefore a valid exercise of its police power by the State of Nevada, having due regard to constitutional guarantees and prohibitions.

Though now perhaps of academic interest only, there is room for serious question as to whether, subsequent to the enactment of Nevada law prescribing licensing and other regulatory requirements, such permission, sanction, or "authority" as was relied upon by Western to conduct its savings and loan business in Nevada was, in fact, legally proper. It is our considered opinion that reliance solely on the general provisions of Chapter 80 of NRS relative to the requirements governing foreign corporations doing business in Nevada, was not legally proper or sufficient, albeit all concerned may have acted in good faith and thought otherwise. However, it is somewhat more understandable why the present question should have persisted, since Western's conduct of its savings and loan business in Nevada was permitted, allowed, and officially sanctioned by "authorization" for so long a period of time, though legally improper and insufficient.

## CONCLUSIONS

As respects specific application of the foregoing legal principles, observations, and comments to Western Savings and Loan Company, a Utah mutual corporation, and its present claim of exemption from Nevada licensing and other regulatory requirements contained in Chapter 673 of NRS, as amended, we conclude as follows:

1. That the requirement for qualification, licensing, establishment of offices or branches, and/or the doing of any further savings and loan business with its members resident in Nevada, became immediately applicable to said foreign mutual company upon enactment and effective date of such regulatory controls, now contained in Chapter 673 of NRS, as amended.

2. That compliance with all applicable regulatory requirements contained in said Chapter 673 of NRS, as amended, is mandatory if such foreign savings and loan company presently still desires to do such business in Nevada with its members who are here resident.

3. That exemption of said foreign savings and loan company from the otherwise applicable licensing and other regulatory requirements of Chapter 673 of NRS, as amended, is presently strictly limited to payments or other performance by Nevada resident members on savings and loan contracts originating or made in Nevada prior to the effective date of such statutory requirements; and such limited exemption is deemed inapplicable and invalid as to any such contracts made subsequent to April 1, 1964, the date of issuance by the Department of its "cease and desist" order for failure on the part of said company to make compliance with Nevada law with respect to its said business in this State.

4. The establishment of an office or branch, now or hereafter, for further conduct or solicitation of new or additional savings and loan business with its members who are resident within this State by said foreign company, mandatorily requires full compliance by it with all substantive and procedural regulatory requirements presently or hereafter prescribed of either domestic (Nevada) or foreign savings and loan associations, as the case may be. Such compliance embraces qualifications, licensing, payment of prescribed fees, hearings on applications, required reports, examination and audits, etc.

Finally, and by way of limited qualification of our foregoing general conclusions herein, and our answer to your inquiry:

5. That compliance by said foreign company with present Nevada licensing and other regulatory requirements, as applicable to all foreign savings and loan associations, in any event is unnecessary only if said company's savings and loan contracts have been, or are, entered into or made elsewhere than in

Nevada, and any such contract, by its terms, is legally to be executed or performed outside the State of Nevada. (Note: Since neither the making, nor the execution or performance of such contracts occurs within its jurisdiction, Nevada law would be inapplicable.)

It is deemed unnecessary to include herein any consideration or observations as to the legal remedies which are available, or the legal action which may appropriately be taken for noncompliance with the licensing and other regulatory provisions of Chapter 673 of NRS, as amended, by any savings and loan association, whether domestic or foreign, doing business within the State of Nevada.

We trust that the foregoing sufficiently answers your inquiry and proves helpful in the satisfactory and final resolution of the matter.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John A. Porter, Deputy Attorney General

---

OPINION NO. 1967-427 NEPOTISM—Wife of newly elected mem...

OPINION NO. 1967-427 Nepotism—Wife of newly elected member of board of county commissioners may not undertake employment which would require approval of said board.

Carson City, July 26, 1967

The Honorable Dennis E. Evans, Churchill County District Attorney, County Court House, Fallon, Nevada 89406

#### STATEMENT OF FACTS

Dear Mr. Evans: You have asked concerning the continued employment of a Churchill County employee since her husband was elected to, and is now serving as a member of, the Churchill County Board of County Commissioners.

You state that, prior to and since her husband's election to the board of county commissioners, she has been employed in the County Welfare Department to answer and handle telephone calls to the department on a part-time basis during the absence of the person regularly employed to do such work.

You also state that the Welfare Department has taken steps to enter the surplus food program and plans to allocate certain duties in this project to this employee, and that she has petitioned the county commissioners to increase her salary to \$100 a month. You ask if this would violate the provisions of NRS 281.210.

#### ANALYSIS

There have been numerous Attorney Generals' opinions issued on the subject of nepotism, in addition to the one mentioned in your letter, i.e., No. 178 dated August 31, 1960. There have also been numerous court decisions on the subject, as you know. As to the case of *Backman v. Bateman* (Utah), 263 P.2d 561, we do not believe that decision is applicable to the instant question and that it must be confined to its peculiar facts.

In the *Backman* case, the person involved was the principal of a high school employed for a period of 27 years under a series of contracts. All during his period of service he was required by law to be a participating member of the Teachers' Retirement Association, the funds for which were supplied by deductions from teachers' salaries. The law also provided that, where a teacher no longer continued his employment, such teacher lost all rights to his share of the retirement benefits, even to all his own contributions. The Utah nepotism statute was undoubtedly a clear deprivation of *Backman's* property without due process of law, and the Utah court so held in upholding *Backman's* right to continue in his position.

The generally accepted rule is that, absent a contractual relationship, there is no vested interest or estate in or to a public office or employment. Also, generally speaking, public office or employment is not a property right, nor a grant, contract, or obligation which cannot be impaired, but is a public agency or trust. 42 Am.Jur., "Public Officers," §§ 3, 8, 9. In this concept, our law differs from the common law in England, where numerous public offices were inheritable. See *State v. Murphy*, 30 Nev. 409; *Moore v. Strickling* (W. Va.), 33 S.E. 274.

In the instant case, we have nothing resembling any of the facts in the *Backman* case, for the employee in question has merely been a part-time employee of the County Welfare Department at a meager remuneration. Now, after her husband's election to the board of county commissioners, the Welfare Department has taken steps to participate in the surplus food program for the benefit of indigents, and desires her services at a salary that must be approved by the county commissioners. Right there we meet a roadblock in NRS 281.210, § 1, which provides as follows:

Except as provided in this section, it shall be unlawful for any individual acting as a school trustee, state, township, municipal or county official, or for any board, elected or appointed, to employ in any capacity on behalf of the State of Nevada, or any county, township, municipality or school district thereof, any relative of such individual or of any member of such board, within the third degree of consanguinity or affinity.

It is clear that the employee here involved comes within the prohibited degree of affinity. We must consider, however, the judicial definition of the word "employ," and in the decided cases we find no benefit to this employee. For example, in *Arlandson v. Humphrey* (Minn.), 27 N.W.2d 812, the court, inter alia, said that "employ" means to "procure or retain the services of" or "keep at work." Also, in *Morganthou v. Barrett*, 108 F.2d 481, the court said that the ordinary meaning of "employ" was "to keep at work."

It must also be remembered that NRS 281.210 has a severe penal provision with a maximum fine of \$1,000 and a maximum imprisonment of 6 months, or both such fine and imprisonment.

The public policy involved is naturally in favor of strictly enforcing the anti-nepotism statute in order to prevent a problem that historically has plagued states and municipalities.

## CONCLUSION

It is our conclusion that the employee in question may continue her limited part-time endeavor, but is precluded by the provisions of NRS 281.210 from entering upon the new welfare work which necessitates approval of salary by the board of county commissioners, of which her husband is a member.

So far as this opinion conflicts with AGO No. 178 dated August 31, 1960, we expressly disapprove of that former opinion.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Daniel R. Walsh, Chief Deputy Attorney General

---

OPINION NO. 1967-428 Purchasing—Purchases of supplies, material, ...

OPINION NO. 1967-428 Purchasing—Purchases of supplies, material, and equipment by counties, cities, irrigation districts, and school districts through State Purchasing Department not precluded by provisions of Chapter 459 of 1967 Statutes of Nevada.

Carson City, July 28, 1967

The Honorable Clinton E. Wooster, City Attorney, City Hall, Reno, Nevada 89501

STATEMENT OF FACTS



Dear Mr. Wooster: Your letter of July 24, 1967, asks if it is the opinion of this office that the provisions of Chapter 459 of the 1967 Statutes of Nevada preclude cities or counties from availing themselves of the service of the State Purchasing Department, as provided in NRS 333.470.

## ANALYSIS

It is well to note, at the outset, certain facts that may be used later as guidelines. For example:

1. There is no express repeal of NRS 333.470 in Chapter 459, 1967 Statutes of Nevada.
2. Chapter 459 Amends Title 27 of NRS.
3. The prior statute authorizing cities and counties to voluntarily use the services of the State Purchasing Department is found in Chapter 33 of NRS.
4. Although the two statutes, in part, are in *pari materia*, there is no conflict between the two.
5. In Chapter 459 the phrase "except as otherwise provided by law" is used several times prior to the statement of necessary procedure for the letting of contracts.

As in all cases of statutory construction, the *sine qua non* is the question of legislative intent. The unquestioned authority in this country is that the language of the statute is the primary source of the statutory meaning. *Fay v. District Court of Appeal (Cal.)*, 254 Pac. 896; *Commonwealth v. Anderson (Va.)*, 195 S.E. 516.

There being no express repealer in Chapter 459 of any other act in *pari materia*, we face the question of an implied repeal. However, it must be remembered that whether an act repeals another act by implication is wholly a judicial question, which is not affected by an expressed legislative declaration that a repeal has or has not been effected. *Great Northern Ry. v. Glover (Wash.)*, 77 P.2d 598; *Bookbinder v. United States*, 287 Fed. 790 (C.C.A.3d).

It has been authoritatively said that: "The Legislature is presumed to intend to achieve a consistent body of law." *Stevens v. Biddle*, 298 Fed. 209 (C.C.A.8th). In accord with this postulate, subsequent legislation is not presumed to effectuate a repeal of existing law in the absence of an expressed intent to do so; and the Legislature is presumed to know the existing law. Thus, if a repeal is intended, it must be expressed. *Continental Ins. Co. v. Simpson*, 8 F.2d 439 (C.C.A.4th). Accordingly, there is a presumption against an implied repeal. *Frost v. Wenie*, 157 U.S. 46; *United States v. Greathouse*, 166 U.S. 601. This rule is premised upon the policy that, if a repeal was intended, it would have been expressed. *Frost v. Wenie*, *supra*.

The motivating thought, or guiding principle, in statutory rules of construction and interpretation is to give harmonious operation and effect to all acts upon a given subject, where such a construction is reasonably possible. *Stevens v. Biddle*, 298 Fed. 209 (C.C.A.8th).

There is a well established presumption against implied repeals which is founded upon the concept that, in enacting legislation, the Legislature is presumed to envision the entire body of its laws. *Continental Insurance Co. v. Simpson*, *supra*.

Now, referring to our guidelines set out above, and considering them in the light of the stated rules of statutory construction and authorities, it is clear that, there being no express repealer, and there being no conflict between the two enactments, even though in *pari materia*, there can be no implied repeal. Furthermore, the statutes can clearly fit into a harmonious whole. Any enumerated entity wishing to avail itself of the provisions of Chapter 459 may do so; likewise, any entity wishing to use the provisions of NRS 333.470 may continue to do so. This seems to be especially clear in view of the use, in Chapter 459, of the phrase, "except as otherwise provided by law." This is also cogent evidence that the Legislature did not intend an implied repealer.

## CONCLUSION

In consideration of the foregoing and other authorities, it is the opinion of this office that Chapter 459, 1967 Statutes of Nevada, does not preclude the continued use of NRS 333.470.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Daniel R. Walsh, Chief Deputy Attorney General

---

OPINION NO. 1967-429 INTER-AGENCY SALE OF TAX DEED PROP...

OPINION NO. 1967-429 Inter-Agency Sale Of Tax Deed Property—NRS 277.050 supersedes NRS 361.595 to the extent that it authorizes an additional procedure by which a county may dispose of tax deed property.

Carson City, July 28, 1967

The Honorable Merlyn H. Hoyt, District Attorney, White Pine County, White Pine County Courthouse, Ely, Nevada 89301

#### STATEMENT OF FACTS

Dear Mr. Hoyt: You have requested an opinion from this office based upon the following facts:

For intended use as a state road asphalt storage area, the Nevada State Highway Department wishes to purchase two lots in East Ely from White Pine County. Delinquent taxes having remained unpaid, title to the lots is vested in the county for the benefit of the State and county, pursuant to the provisions of Chapter 361 of Nevada Revised Statutes. NRS 361.595 provides that the tax deed property may be sold according to the procedures set out therein.

On the basis of the foregoing facts, you have asked these questions:

#### QUESTIONS

1. May a direct sale of the two lots be negotiated and consummated between White Pine County and the State of Nevada, in view of the fact that tax deed property is held in trust by the county treasurer for the benefit of the county and State; or,
2. Must the statutory requirements contained in NRS 361.595 be met?

#### ANALYSIS

The provisions of two statutes appear to conflict. NRS 361.595 authorizes a board of county commissioners to direct the county treasurer to sell tax deed property according to the procedures outlined. NRS 277.050 details a procedure by which one public agency may sell, exchange, or lease any of its unused real property to another public agency. For the purposes of the statute, a "public agency" includes the State of Nevada and a county. NRS 277.050(1). Thus to the extent that NRS 277.050 authorizes a county to contract to sell its unused real property to the State, it conflicts with NRS 361.595, which requires that tax deed property, if sold, must be sold at public auction.

[O]ur chief concern is to learn the intent of the Legislature. \* \* \* Rules for statutory construction are merely aids in the ascertainment of the legislative intent. *Ronnow v. City of Las Vegas*, 57 Nev. 332, 363 (1937).

Pursuant to the provisions of Chapter 361 of NRS, the tax receiver may authorize the county treasurer, as trustee for the State and county, to hold delinquent tax property for a period of 2 years, unless it is redeemed sooner. If not redeemed within 2 years, title to the property vests in the county for the benefit of the State and county. NRS 361.570; *County of Clark v. Roosevelt Title Insurance Co., Ltd.*, 80 Nev. 530, 536 (1964). The tax receiver must execute and deliver a deed of the property to the county treasurer, who must hold the property in trust for the benefit of the State and county until "the same is sold pursuant to the provisions of this chapter." NRS 361.585.

NRS 361.595 authorizes the board of county commissioners in its discretion to order the sale of the tax deed property to the highest bidder at a public auction. *County of Clark v. Roosevelt Title Insurance Co., Ltd.*, 80 Nev. at 533. The intent of the Legislature was to provide the means by which full value might be realized and favoritism and fraud in the sale prevented. *Id.* at 536. Accordingly, the notice provisions of the

predecessor to NRS 361.595 have been held to be mandatory, not merely directory. *Lyon County v. Ross*, 24 Nev. 102, 113 (1897).

Because the trust is created by statute, the general rules governing the powers, duties, and liabilities of trustees is inapposite. “[T]he mode prescribed in making such sales excludes all other modes, and must be strictly pursued; \* \* \*.” *Id.*

But *Lyon County v. Ross*, *supra*, is distinguishable from the instant problem. Since that case was decided, the Legislature has enacted NRS 277.050, specifically authorizing public agencies to sell, exchange, or lease their unused real property to other public agencies. It is significant that Chapter 277 of NRS was enacted in 1955, 2 years after the last change was made in Chapter 361 of NRS. The interests of the public require that a different procedure for sale be employed where a public agency is selling to another public agency, rather than to an individual.

The most obvious alteration in the statutory procedure is the deletion of the public auction requirement and the authorization of sale by contract. Where real property is needed for public use by a state agency, no public purpose could be served by requiring the state agency to bid at a public auction. Should the agency fail in its bid, for example, condemnation, with its consequent cost of litigation to the general public, could become necessary to enable the agency to acquire the property. Furthermore, sale by contract eliminates a possibility attendant to sale at public auction, that the property might be sold at an inflated value. Yet the interest of the selling agency in receiving full value is adequately protected by the requirement that the purchasing public agency “shall pay

\* \* \* an amount at least equal to the appraised value of the real property \* \* \*.”  
NRS 277.050(3).

The apparent intent of the Legislature in enacting NRS 277.050 was to authorize inter-agency sales of real property without the necessity for public auction. Though NRS 277.050 does not specifically refer to NRS 361.595, upon its passage as Senate Bill No. 244 (approved March 29, 1955), it included a general repealer clause. “Sec. 9. All acts and parts of acts in conflict herewith are hereby repealed.” Chapter 388, § 9, [1955] Statutes of Nevada 749. This clause was deleted by the reviser when the Nevada Revised Statutes were enacted as the law of the State of Nevada in 1957.

The immediate question is whether the Legislature intended NRS 277.050 to repeal or limit the ambit of NRS 361.595.

NRS 277.050 is a special statute, specifically limited in its operation to sales, exchanges, and leases of real property by one public agency to another. On the other hand, NRS 361.595 provides generally for the sale of tax deed property, without expressly considering the identity of the purchaser. “Where one statute deals with a subject in general and comprehensive terms, and another deals with another part of the same subject in a more minute and definite way, the special statute, to the extent of any necessary repugnancy, will prevail over the general one.” *Ronnow v. City of Las Vegas*, 57 Nev. at 365.

In *Ronnow v. City of Las Vegas*, *supra*, the court held that the requirement of a general statute that municipal bonds “shall be redeemed in equal annual installments; provided, however, that the first installment may be for a greater or lesser amount than the remaining installments” and the grant of power in a later statute “To borrow money on the credit of the city for corporation purposes and to issue \* \* \* bonds therefore in such amounts and forms and on such conditions as the board of commissioners shall determine” were so “conflicting, inconsistent, and irreconcilable that in our opinion they cannot be harmonized, and cannot both stand. Such being the case, the special statute, being later, must prevail.” *Id.* at 367-68 (Emphasis in original.)

We believe that NRS 361.595 and NRS 277.050 are inconsistent and irreconcilable to the extent pointed out. Accordingly, we are of the opinion that NRS 277.050 repeals NRS 361.595 to the extent that it authorizes an additional statutory mode of procedure by which the county treasurer, as trustee, may dispose of tax deed property.

## CONCLUSION

We are therefore of the opinion that a direct sale of the two lots may be negotiated and consummated between White Pine County and the State of Nevada, pursuant to the provisions of NRS 277.050, and that the requirements of NRS 361.595 are superseded by NRS 277.050, to the extent that NRS 277.050 authorizes an additional procedure by which a county may dispose of tax deed property.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Daniel R. Walsh, Chief Deputy Attorney General

---

OPINION NO. 1967-430 STATE FUNDS—State depository law (...)

OPINION NO. 1967-430 State Funds—State depository law (Chapter 356 of NRS) requiring security for deposits thereof, construed; held, proper protection of public funds prohibits any abridgement or waiver of regulatory procedure and controls provided therein, for greater convenience or pecuniary benefit of any such bank depositories.

Carson City, August 9, 1967

Mr. Preston E. Tidvall, Commissioner, Banking Division, Nevada Department of Commerce, Carson City, Nevada 89701

Dear Mr. Tidvall: On behalf of the State Board of Finance, you have requested the opinion and advise of this office on a recurring question and problem related to the statutory requirements and regulatory controls applicable to deposits of collateral securities with the State Treasurer for the purpose of securing deposited State funds, as prescribed in Chapter 356 of NRS, in factual circumstances which may be predicated as follows:

#### STATEMENT OF FACTS

NRS 356.020 prescribes that all state funds deposited in a bank shall be secured by deposit of securities of a specified kind or nature, to be made by any such depository bank; and that said deposited securities shall be in the actual value (as distinguished from their face or par value) of at least 10 percent in excess of the amount of state funds deposited.

Quite often, and not unusually, transactions or requirements of such depository banks, occurring subsequent to such deposit of collateral securities with the State Treasurer for the purpose of securing deposited state funds, render it necessary or desirable that such a depository bank withdraw some or all of such deposited collateral securities from the custody and control of the State Treasurer, substituting for those withdrawn other securities of the same or equivalent nature and value.

Significant hereto is the fact that since deposited state funds are generally in a substantial amount, the related collateral securities deposited with the State Treasurer will also, generally, be in a correspondingly substantial amount. Also, significant hereto is the fact that even a slight increase in the market value of any such collateral securities (deposited with the State Treasurer to secure deposited state funds) makes their prompt withdrawal (from the custody and control of said state official) and their timely sale at any such advantageous market price, urgently desirable, if not absolutely necessary—if said depository bank is to effect their sale at a profit or good return, or even reduce or minimize its investment loss therein—if the bank should be of the opinion that in its best interest such action was indicated to be financially prudent. Of course, it is assumed that in any such case the bank is prepared to make, and would make, substitution of other securities of equivalent kind and actual value, for any securities that it might withdraw from the State Treasurer's custody or control.

#### QUESTION

Does present Nevada law, as applicable thereto, legally authorize any possible modification in existing statutory procedural requirements and regulatory controls on an administrative basis which would facilitate and expedite withdrawals (with equivalent substitution) of securities deposited with the State Treasurer to secure deposited state funds?

## ANALYSIS

Preliminarily, the 1933 case of *State v. Carson Valley Bank*, 55 Nev. 26, 23 P.2d 1105, interestingly notes that at common law, the sovereign (or state) had a right of preference as to funds deposited in a bank which might thereafter fail. Said case further notes the development of state depositary laws requiring security for deposits of state funds in banks, under which the sovereign's (state's) said right of preference over other bank depositors is generally deemed as waived. Presently (it may parenthetically be noted), general depositors' bank accounts are secured, in a reasonable amount, by federal government insurance. Since, however, such federal insurance is wholly inadequate, and therefore inapplicable to the relatively much larger amounts involved, deposited public funds are secured by bank depositary collateral securities, usually placed in the custody and control of the treasurer, or corresponding public fiscal officer.

The above-mentioned case also notes that for many years the law of our State, under penalty, prohibited the depositing of public moneys in banks; but that in 1913 the Legislature enacted a statute (Chapter 104, 1913 Stats., p. 127) which authorized the deposit of public moneys in banks at 2 1/2 percent interest on said deposits, and with the further condition (among others) that the bank deposit with the State Treasurer bonds of the United States, of this State, or of any county, municipality, or school district within the State, of the value of at least 15 percent in excess of the amount of state funds deposited, subject to the right to require additional security; and also, that the Treasurer shall enter into a written contract stating the terms upon which the state money is deposited with a bank. (See 55 Nev. pp. 30-31)

Except for some slight amendments, among them being the already-noted reduction from 15 percent to 10 percent "in excess of the amount (Ed., of state funds) deposited," the 1913 provisions are presently substantially embodied in Chapter 356 of NRS.

It may also be of some interest to note that the need and importance of available currency, or medium of exchange, has continually increased as our industrial economy has supplanted, or gained ascendancy and predominance over, the relatively more-static agricultural economy. Availability, and productive or economic use, of state deposited funds (even on a short-time basis) would appear to be sufficient justification for such bank deposits of public funds. Certainly, the economic welfare of the people of the State is better served thereby, than if such state funds were kept or stored in the state treasury or vault. The somewhat lower bank interest (when it is not completely waived) paid on deposited state funds is, therefore, sometimes "justified" on the basis that the banks make such deposited state funds available for sound promotion of the State's economy, or the general public welfare, and also because retention by the banks thereof is uncertain as to period of time, being more or less continuously subject to "call" to meet governmental costs and expenses.

We have touched upon the matter of relatively low interest which the depositary banks pay on state funds merely because we frankly believe it to be a factor properly to be considered against any claim or contention of inconvenience or pecuniary loss allegedly experienced or sustained by depositary banks because of existing "restrictive" regulatory controls governing withdrawals and substitutions of collateral securities deposited with the State Treasurer to secure deposited state funds.

We now turn to the specific statutory requirements on which reliance is placed for our answer and legal opinion and advice herein.

As relevant herein, NRS 356.020, relating to "state funds on deposit to be secured by deposits of securities," provides:

\* \* \* \* \*

2. The amount, in actual value, as distinguished from par value, of such deposit of securities by each such depositary bank, shall be at least 10 percent in excess of the amount of the deposit with such depositary bank. Such bonds and securities shall be approved in writing by the state board of finance and by the state treasurer.

3. The state treasurer of the state board of finance may, from time to time, require such a deposit of such additional bonds and securities, as herein permitted as security, as in their judgment shall be necessary to maintain such 10 percent in excess of each such deposit.

4. The bonds, or any part thereof, may be withdrawn on the written consent of the state treasurer and the state board of finance, but no withdrawal shall be permitted which shall reduce the security below the requirements hereof. (Italics supplied.)

As also relevant herein, NRS 356.050, relating to "State Treasurer's liability when depositary fails, becomes insolvent; deposits of securities for safekeeping," further provides:

1. Where the state treasurer, in accordance with the terms and provisions of NRS 356.010 to 356.110, inclusive, has deposited and kept on deposit any public moneys in depositaries so designated, he shall not be liable personally or upon his official bond for any public moneys that may be lost by reason of the failure or insolvency of any such depositary; but the state treasurer shall be chargeable with the safekeeping, management and disbursement of the bonds deposited with him as security for deposits of state moneys, and with the interest thereon, and with the proceeds of any sale under the provisions of NRS 356.010 to 356.110, inclusive.

2. The state treasurer is authorized to deposit for safekeeping with any reliable bank or trust company within or without this state any securities or bonds pledged with him, as state treasurer, as collateral or as security for any purpose whatever, but the same may only be so deposited by him with the joint consent and approval, in writing, of the pledgor thereof and the state board of finance. Any bonds or securities so deposited by him shall be deposited under a written deposit agreement between the pledgor and the state treasurer, to be held and released only upon a written order of the state treasurer or his deputy, and signed by the governor or acting governor and by one additional member of the state board of finance. (Italics supplied.)

And, finally, as herein relevant, NRS 356.110, related to "Penalties," provides as follows:

Every state officer or official who willfully shall violate any of the provisions of NRS 356.010 to 356.110, inclusive, shall be guilty of malfeasance in office, and upon conviction thereof shall be punished by imprisonment in the state prison for a term of not exceeding 15 years or by a fine of not less than \$10,000.

Clearly, under the foregoing statutory provisions, the State Treasurer—if he would avoid the drastic penalties fixed for any willful violation of law—may accept collateral from bank depositaries to secure state funds, only as approved by the State Board of Finance in writing (NRS 356.020, par. 2 above); and the State Treasurer may permit or authorize the withdrawal of (with equivalent substitution therefor) any said deposited collateral securities also only by written order of himself, the Governor (or acting Governor), and by one additional member of the State Board of Finance. (NRS 356.050 above.)

In short, such explicit, definite, and specific statutory requirements administratively entail the involvement of public officials other than, and in addition to, the State Treasurer himself, both as to the acceptance and/or release of any collateral securities deposited to secure deposited state funds; moreover, any such acceptance or release, in any event, can only be effected by written official authorization or order. In such connection, it must be further noted that any such official authorization or order on the part of the State Treasurer and the State Board of Finance presumptively may properly and legally only be made by their convening jointly and formally, their joint consideration of the items listed on the agenda for that particular official meeting (inclusive of an assumed request for withdrawal and equivalent substitution of collateral securities), and (after joint discussion and deliberation thereon) by official and recorded vote at such joint meeting, reflective of the joint decision of the public officials in attendance thereat. Such are the detailed, or step-by-step procedural requirements fairly and reasonably implied or intended by the Legislature by its enactment of the statutory provisions cited above.

Obviously, such statutory, procedural and administrative requirements preclude desired or desirable informality of any kind in connection with the processing of any application for withdrawal (with equivalent substitution therefor) of involved deposited collateral securities. And, as outlined, proper compliance with such statutory requirements necessarily does entail unavoidable delay, or the elapse of some period of time which, even if not substantial, (at least generally) would still be too long to permit quick and timely withdrawal of collateral securities by bank depositories for the purpose of selling them at market prices which might be advantageous.

## CONCLUSION

The requirements and procedural regulatory controls provided in Chapter 356 of NRS are definite, explicit, and specific as to what the Legislature deems proper and necessary for protection of deposited state funds, and such requirements preclude and prohibit any administrative abridgement or waiver for any desired greater convenience or pecuniary benefit of any such bank depository.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John A. Porter, Deputy Attorney General

---

OPINION NO. 1967-431 NEVADA TAX COMMISSION; PENALTIES A...

OPINION NO. 1967-431 Nevada Tax Commission; Penalties And Interest—Modifies Opinion No. 415 dated June 5, 1967.

Carson City, August 15, 1967

Mr. Roy Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: On the 5th day of June, 1967, this office issued an opinion (AGO 67-415) in which it was concluded the Nevada Tax Commission has no authority to waive penalties and interest imposed by statute. NRS 372.505 was relied upon. That statute reads:

Any person who fails to pay any tax to the state or any amount of tax required to be collected and paid to the state, except amounts of determinations made by the tax commission under NRS 372.400 to 372.455, inclusive, within the time required shall pay a penalty of 10 percent of the tax or amount of the tax, in addition to the tax or amount of tax, plus interest at the rate of one-half of 1 percent per month, or fraction thereof, from the date on which the tax or the amount of tax required to be collected became due and payable to the state until the date of payment.

We continue to be of the same opinion and agree with the conclusions reached in that opinion, at this time. The question remains however—"What is the due date of taxes?" This question is answered by NRS 372.355, which reads as follows:

The taxes imposed by this chapter are due and payable to the tax commission quarterly on or before the last day of the month next succeeding each quarterly period.

The quarterly periods end on the last day of March, June, September, and December. Such being the case, the taxpayer would have, pursuant to NRS 372.355 supra, until the last day of April, July, October, and January to pay the taxes due for the previous quarter.

We now conclude that the taxpayer in question, whose return was received by the Nevada Tax Commission during the early part of October, 1966, was timely, and to this extent AGO 67-415 is modified.

Very truly yours,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---



OPINION NO. 1967-432 NRS 706.430 Interpreted-Courtesy cars:. . .

OPINION NO. 1967-432 NRS 706.430 Interpreted—Courtesy cars: The operation of a courtesy car either with or without compensation is a violation of NRS 706.430 unless the required certificate of public convenience and necessity is applied for and received. Supplemented by AGO 67-434, dated 9-11-67.

Carson City, August 22, 1967

Mr. Reese Taylor, Chairman, Public Service Commission, Carson City, Nevada 89701

## STATEMENT OF FACTS

Dear Mr. Taylor: In recent weeks the greater Las Vegas area witnessed yet another strike in the taxicab industry which resulted in the use of what have come to be known as "courtesy cars." The "courtesy car" is a privately owned passenger automobile, driven by striking members of the teamsters union, in which the traveling public is carried from one point to another. Employees of the Public Service Commission prohibited the operation of "courtesy cars," relying upon NRS 706.430. This statute reads:

1. It shall be unlawful for a taxicab or other passenger motor carrier operating motor vehicles to transport passenger, either with or without compensation, between any point or place in the State of Nevada to any other point or place in the state without having first applied for and received a certificate of public convenience and necessity as provided for in NRS 706.010 to 706.700, inclusive. (*Italics added.*)

2. The provisions of this section shall not apply to any private motor vehicle owned and used for personal transportation only.

## QUESTION

The question of the authority of the Public Service Commission to prohibit the use of "courtesy cars" has been raised and presented to this office for answering.

## ANALYSIS

To answer this question we must first consider the opinions of two prior Attorneys General, AGO 49-830 issued November 28, 1949 and AGO 56-158 issued April 9, 1956. The first mentioned opinion held:

If the operation of the so called "courtesy car" is the principal business of the operator, and such transportation is for public convenience and necessity, this brings such operation within the provisions of NRS 706.430.

The author of that opinion was concerned first with whether or not the "courtesy car" was a taxicab and second if a fare was solicited. We need not concern ourselves at this time with either of these questions because NRS 706.430 as it now reads applies to all passenger motor carriers, (and certainly a "courtesy car" is such) operating either with or without compensation. See NRS 706.430 *supra*. The words "or other passenger motor carrier" were added to NRS 706.430 as of July 1, 1965 by Chapter 346, 1965 Statutes of Nevada. It is our conclusion that this phrase encompasses "courtesy cars" and we need not incorporate such cars within the definition of a taxicab in order for them to be included in NRS 706.430.

The second mentioned opinion held that "courtesy cars" could be operated during a strike, and the Public Service Commission could not prohibit the same, if no fare were solicited for the service rendered. It was concluded that no fare was solicited and hence the Public Service Commission could not prohibit the same.

As was pointed out above NRS 706.430 as it now reads, makes it unlawful for any passenger motor carrier either with or without compensation to transport passengers from one point or place in the State of Nevada to another point or place. Having concluded that "courtesy cars" are within the terms of NRS

706.430 we fail to see the importance of whether or not a fare or compensation is received for services rendered.

However, if any reader of this opinion remains concerned by the possibility that no fare was solicited by the "courtesy car" driver the concern should be eliminated, because in the window of "courtesy cars" was placed a sign informing passengers that drivers were on strike and that if such were not the case the usual fare to transport passengers, from a particular location to another, would be as follows. (Then followed the fares from McCarran Airport to major hotels and a list of prices generally collected on a distance basis). We conclude at this time that if the placing of a box in the back seat of a "courtesy car" into which tips could be placed was soliciting, as was held in the first above mentioned Attorney General's opinion, then the "fare schedule" above described is also soliciting a fare. Be that is it may we at this time hold the operation of "courtesy cars" as above described constitutes a violation of the provisions of NRS 706.430 and the Public Service Commission has the power to prohibit the continuation of such unlawful activity.

This office is aware of subsection 2 of NRS 706.430 but is of the opinion the activities of the drivers of the "courtesy cars" do not come within its provisions. The operators of the "courtesy cars" in question did not limit their use to "personal transportation" but on the other hand picked up passengers in front of hotels in greater Las Vegas or at McCarran Airport and deposited them at a different hotel location in the greater Las Vegas area.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-433 EQUAL RIGHTS COMMISSION—Except in ...

OPINION NO. 1967-433 Equal Rights Commission—Except in the area of public accommodation, the Legislature has delegated the Nevada Commission on Equal Rights of Citizens exclusive jurisdiction in areas of civil and equal rights.

Carson City, August 25, 1967

The Honorable Sidney R. Whitmore, City Attorney, 400 Stewart Street, Las Vegas, Nevada 89101

#### STATEMENT OF FACTS

Dear Mr. Whitmore: In 1960, the City of Las Vegas and the County of Clark provided by resolution for the creation of a Human Relations Commission. By the terms of that resolution, the commission was to report to the City of Las Vegas and the County of Clark on areas of racial unrest and discrimination. The Human Relations Commission was given no enforcement powers by such resolution, nor could that commission impose penalties upon persons determined by the commission to have unlawfully discriminated.

#### QUESTION

May the City of Las Vegas at this time adopt an ordinance vesting in the Human Relations Commission enforcement power and authority to impose penalties in the event such commission determines that unlawful discrimination exists?

#### ANALYSIS

It is the opinion of this office that, but for one exception, the area of equal rights and related matters has been preempted by the State of Nevada, to the exclusion of other political subdivisions of the state, including cities and counties. That exception is found in the legislative delegation in NRS 651.100, which

provides that "any county or incorporated city of this state may adopt a local ordinance prohibiting infringement of the rights or privileges secured by NRS 651.070 \* \* \*." The rights referred to are: "equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation."

As to other matters of equal rights, the Nevada State Commission on Equal Rights of Citizens has original and exclusive jurisdiction (subject to the jurisdiction of state courts). This state commission was created by the Legislature in 1961. Appropriate statutes are now found in Chapter 233 of Nevada Revised Statutes. NRS 233.060 vests in the state commission the power, and makes it their duty, among other things, to:

1. Foster mutual understanding and respect among all racial, religious, and ethnic groups,
2. Aid in securing equal health and welfare services and facilities for all residents of the State of Nevada,
3. Study and investigate problems between groups in the State of Nevada which may result in tensions, discrimination, or prejudice,
4. Investigate complaints of discrimination,
5. Secure the cooperation of various groups in educational campaigns devoted to the need for eliminating group prejudice, racial or area tensions, intolerance, or discrimination, and
6. Cooperate with and seek the cooperation of federal and state agencies in this regard.

It is the opinion of this office that the delegation of power by the Legislature to a state commission vests in that state commission the exclusive power to act within the scope of the powers actually delegated.

This conclusion is supported by McQuillin in his treatise on Municipal Corporations (3rd Ed.), Vol. 6, § 31.32:

Indeed, attached to every statute, every charter, every ordinance or resolution affecting, or adopted by, a municipality, is the implied condition that the same must yield to the predominant power of the state, when that power has been exercised. To hold otherwise would lead to serious confusion and often absurd results.

The author goes on to point out that in some cases, statutes and ordinances may exist simultaneously if they do not conflict with each other. We do not feel this exception is applicable at this time, as NRS 233.060, supra, makes it the duty of the state commission to perform the functions which the proposed city ordinance would place upon the Human Relations Commission. Such being the case, we conclude that the Nevada State Commission on Equal Rights of Citizens has exclusive powers and authority to act in the areas of civil and equal rights, save and except the area of public accommodation, as found in NRS 651.100.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-434 AGO 432 DATED AUGUST 22, 1967 SUPP...

OPINION NO. 1967-434 AGO 432 Dated August 22, 1967 Supplemented—NRS 706.690 as amended applies to the courtesy car operation as described in AGO 67-432.

Carson City, September 11, 1967

Mr. Reese Taylor, Chairman, Public Service Commission, Carson City, Nevada 89701

Dear Mr. Taylor: In a recent opinion (AGO 67-432, issued August 22, 1967) this office concluded that the operation of a "courtesy car" either with or without compensation is a violation of NRS 706.430 unless the required certificate of public convenience and necessity is applied for and received.

At this time you ask if NRS 706.690 would apply to the operation of "courtesy cars" as described in that opinion.

The answer to your question is "Yes."

NRS 706.690 was amended by the 1967 Legislature, Chapter 341. The amended portion of the statute reads:

Any person who:

1. Operates any carrier to which NRS 706.010 to 706.700, inclusive, applies without first obtaining a certificate, permit or license, or in violation of the terms thereof; or

\* \* \* \* \*

6. Advertises, solicits, proffers bids or otherwise holds himself out to perform transportation as a common or contract carrier in violation of any of the provisions of NRS 706.010 to 706.700, inclusive, shall be guilty of a misdemeanor.

There being no question as to the applicability of NRS 706.010 to 706.700 inclusive, we hold that NRS 706.690, including the penalties contained therein do apply to the "courtesy car" operation as described in AGO 67-432 (August 22, 1967).

Very truly yours,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-435 SCHOOL DISTRICTS; EMERGENCY LOAN N...

OPINION NO. 1967-435 School Districts; Emergency Loan Notices—The provisions of NRS 354.618 must be followed, and the Nevada Tax Commission has no authority to administratively waive the same.

Carson City, September 15, 1967

Mr. Roy Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89071

#### STATEMENT OF FACTS

Dear Mr. Nickson: Your letter of August 30, 1967, states that the local government budget division has requested an interpretation of NRS 354.618. As matters to be considered, you list the facts that the estimated population of the county is 308, that no newspaper is published within the county, that the school district boundaries are coterminous with those of the county, and that the school district enrollment is less than 40.

#### QUESTION

You request from this office an opinion as to whether or not the Nevada Tax Commission may administratively waive the requirement of NRS 354.618 (2) and substitute therefor the provisions of subsection 3, in counties having a population of less than 1,000 and wherein a newspaper is not published.

NRS 354.618 reads:

1. In case of great necessity or emergency, the governing body of any local government, by unanimous vote, by resolution reciting the character of the necessity or emergency, may authorize a temporary loan for the purpose of meeting such necessity or emergency.

2. Except as provided in subsection 3, before the adoption of any such emergency resolution, the governing body shall publish notice of its intention to act thereon in a newspaper of general circulation for a least one publication. No vote may be taken upon such emergency resolution until 10 days after the publication of the notice. The cost of publication of the notice required of a school district shall be a proper charge against the school district fund.

3. In school districts having less than 100 pupils in average daily attendance the publication of the emergency resolution may be made by posting conspicuously, in three different places in the school district, a notice containing in full the emergency resolution with the date upon which the board of trustees of the school district is to meet to act upon the emergency resolution. Posting of the notice shall be made not less than 10 days previous to the date fixed in the emergency resolution for action thereon.

#### ANALYSIS

Subsection 2 provides that but for one exception, and that is contained in subsection 3, the notice is required to be published in a newspaper of general circulation. Unless the particular factual situation conforms to the terms of subsection 3, the provisions of subsection 2 must be followed.

In any event, nowhere in the statute is mentioned a population of 1,000 or less, and as such the population of the county is not to be considered in determining the notice requirements. Only if the school district has less than 100 pupils in average daily attendance may subsection 3 be used.

#### CONCLUSION

It is therefore the opinion of this office that the Tax Commission may not waive the requirement of NRS 354.618(2) on the basis of the population of the county or the lack of a newspaper published therein, and that only if the average daily attendance in the school district is less than 100, may notice as contemplated in subsection 3 be used.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-436 SALES AND USE TAXES; NRS 372.280 C...

OPINION NO. 1967-436 Sales and Use Taxes; NRS 372.280 Construed—The term “fertilizer” as used in NRS 372.280(4) does not encompass insecticides and plant and weed killers, and the sale of the same is not exempt from sales and use tax.

Carson City, September 15, 1967

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

#### STATEMENT OF FACTS

Dear Mr. Nickson: By letter dated September 5, 1967, you requested an opinion from this office. In that letter, you stated that a certain taxpayer desires to have the Nevada Tax Commission rule that chemical insecticides and plant and weed killers are within the exemptions from sales and use tax found within NRS 372.280.

## QUESTIONS

The specific questions raised by your letter are as follows:

1. Do the NRS 372.280 exemptions of fertilizer and animal feed from sales and use taxation include an exemption for chemical insecticides and plant and weed killers used in crop production of food and animal feed?
2. If the answer to paragraph 1 above is in the affirmative, would the exemption also apply to the use of such items in clearing land not previously under cultivation in anticipation of planting food or animal crops?
3. If the answer to paragraph 1 is no, may the taxpayer remit sales and use taxes based on the price of the chemical insecticides and plant and weed killers but not on the costs relating to the application of the chemicals by use of an airplane?

## ANALYSIS

NRS 372.280 reads in part:

There are exempted from the taxes imposed by this chapter the gross receipts from sales of, and the storage, use or other consumption of: \* \* \*

4. Fertilizer to be applied to land the products of which are to be used as food for human consumption or sold in the regular course of business.

In construing statutes such as NRS 372.280, which is an exemption from a tax, we must apply the general rule of statutory construction, that "grants of tax exemptions are given a rigid interpretation against the assertions of the taxpayer and in favor of the taxing power." This rule is expressed in Sutherland, Statutory Construction (3rd Ed.), Vol. 3, § 6702.

We feel that to hold that chemical insecticides and plant and weed killers are within the definition of fertilizer, would be to expand the common and ordinary definition of that word in favor of the taxpayer, contrary to the above rule. "Fertilizer" has been defined in Webster's New International Dictionary (2nd Ed.) as "one that fertilizes; an agent in fertilizing or pollinating plants, as a bee; that which renders fertile." "Fertile" is defined in the same dictionary as "producing fruit, vegetation, etc., in abundance; fruitful, prolific, productive, rich; as 'fertile land pastures'." "Insecticide," on the other hand, is defined in that dictionary as "an agent or preparation for destroying insects, as an insect powder."

From these definitions, it is clear to this office that the terms "fertilizer" and "insecticide" are different, and substances which are insecticides do not effect the same results as substances which are fertilizers. That is, insecticides destroy insects, and fertilizers render land fertile. Question 1 is answered "No."

Because of the answer to Question 1, Question 2 need not be answered.

In regard to Question 3, it is our opinion that if the taxpayer can separate and distinguish to the satisfaction of the Nevada Tax Commission, through his billing practices, the costs incurred for the use of an airplane, and the sales price of the insecticides and plant and weed killers, then the sales tax may be remitted to the State based only upon the sales price of these chemicals. If, on the other hand, the billing practice of the taxpayer does not adequately separate these two items, the sales and use tax must be remitted to the State based upon the total contract price.

## CONCLUSION

Insecticides and plant and weed killers are not within the tax exemptions found in NRS 372.280.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-437 HEALTH DEPARTMENT—A person dispenses...

OPINION NO. 1967-437 Health Department—A person dispensing food for human consumption from a motor vehicle is subject to regulation by the State Health Department, and must have a permit from the department before being licensed by the appropriate governmental agency.

Carson City, September 18, 1967

Mr. Webster B. Hunter, Commissioner, Food & Drug, State Health Department, 790 Sutro Street, Reno, Nevada 89501

Dear Mr. Hunter: You have inquired of this office as to whether the transfer of fruit and vegetables from a fruit stand to a truck would exempt the vendor from the provisions of Chapter 116 of the 1943 Statutes of Nevada, under NRS 650.040.

#### ANALYSIS

In order to arrive at a conclusion it is necessary to review the language of the relevant statutes.

Several sections of Chapter 116 of the 1943 Statutes are applicable. Section 12 provides that it shall be unlawful for any person to operate a food establishment, after an inspection by a health officer, who does not possess an unrevoked permit from the health officer. This section shall apply to temporary or itinerant, as well as to permanently operated food establishments. Only persons who comply with the requirements of this act shall be entitled to receive and retain such a permit.

Section 1 defines "food establishment" as any place, structure, premises, vehicle, or vessel, or any part thereof in which any food product as defined the act intended for human consumption. The term "food product" is defined in part as any food intended for ultimate human consumption displayed or offered for sale, sold, or served in a food establishment as such establishment is defined in the act.

Under Chapter 650 NRS a traveling merchant is defined in part as "all persons vending from \* \* \* motor trucks or other vehicles."

NRS 650.040 exempts persons from the mandatory provisions of the act who are bona-fide producers or growers of the subject crop and who transport the same to a place of sale in a vehicle owned by him.

We do not believe the law as thus stated was meant to apply to a vendor who sets up the final place of sale in his vehicle. Contrariwise it was meant to apply to a vendor whose crop is purchased by the ultimate sales outlet, and finds it necessary to deliver the crop in his vehicle.

The licensing of those who dispose of "food products" is subject to a permit from the State Health Department.

Chapter 446 NRS makes no changes which are in conflict with the 1943 Statutes as designated hereinabove, insofar as this opinion is concerned.

#### CONCLUSION

It is therefore the opinion of this office that a person dispensing food for human consumption from a motor vehicle is subject to regulation by the State Health Department, and must have a permit from the department before being licensed by the appropriate governmental agency.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-438 UNIVERSITY OF NEVADA; STATE PLANNI...



OPINION NO. 1967-438 University of Nevada; State Planning Board—Bid submitted for construction of public building which does not conform to invitation to bid, in that first page of bid proposal is not submitted, where items comprising bid are to be listed and priced, should be rejected.

Carson City, September 20, 1967

Mr. William Hancock, Manager, State Planning Board, Carson City, Nevada 89701

Dear Mr. Hancock: You have inquired of this office as to whether the submission of a bid for a contract involving the Historical Society Building at the University of Nevada, which does not conform to the invitation to bid in that the first page of the bid proposal was not included with the bid, should be rejected.

#### ANALYSIS

A notice to bidders informing them directly or by reference of the matters to be bid upon and of the time and place of receiving bids is published, posted or mailed, according to statute. This procedure involves three vital principles: an offering to the public, an opportunity for competition, and last but not least a basis for exact comparison of bids; and any step which excludes or ignores any of these factors destroys the distinctive character of the system and thwarts the purpose of its adoption. (*Hannan v. Board of Education*, 25 Okl. 372, 107 P. 646.)

Experience has shown that the interests of the public are best conserved by offering contracts for public works to the competition of all persons able and willing to perform them, and in most, if not all, jurisdictions there are mandatory and peremptory constitutional and statutory provisions which prescribe competitive bidding by all persons wishing to obtain such contracts. Stern insistence upon positive obedience to the provisions included in the invitation to bid is necessary to maintain the policy of equal opportunity to all bidders.

If one bidder, for example, can submit an incomplete bid, so that many of the items required are not listed or priced and the total amount of the bid cannot be ascertained, it would be unfair to award the bid on that figure when the remaining bidders had submitted complete, itemized bids.

Under provisions of the law requiring public contracts to be let to the lowest bidder, the requirement that the advertisement for bids be accompanied by plans and specifications for the work to be done arises by necessary implication, for there can be no intelligent bidding for a contract unless all bidders know what the contract is.

Public authorities cannot lawfully ask each bidder to make his own plans and specifications and to base a bid thereon, and then after the bids are received, adopt one of the offered plans with its specifications and accept the accompanying bid. Such a procedure would be destructive of competitive bidding and would give public officials an opportunity to exercise favoritism in awarding contracts.

The same effect results from compelling all bidders to submit completed bids on which the extensions can be checked to ascertain if they agree with the total of the bid submitted, and allowing one bidder to submit only a partially completed bid which cannot be checked to ascertain if the items total the amount of the bid.

The technicalities which may be overlooked and which may be corrected are those involving an erroneous extension, so that the amount does not accord with the addition or multiplication. Such corrections may, for example, change the total bid, and when corrected may result in a material change which may affect the awarding of the contract.

For example, here, the instruction to bidders stated that bids must be submitted in the prescribed form. The prescribed form does not anticipate submission with only part of the form completed. The instructions also prescribe that all blank spaces must be filled in, in units, in both words and figures, with the unit price for the item or the lump sum for which the bid is made.

It has been held (*Maryland Pavement Co. v. Mahool*, 72 A. 833) that it is the general rule that the bid of one proposing to contract for the doing of a public work must, in order to secure the contract, respond or conform substantially to the advertised terms, plans, and specifications; otherwise, the board or official whose duty it is to award the contract may properly refuse to give the bid consideration. Indeed, it is the duty of the public authorities to reject all bids which do not comply substantially with the terms of the proposal, for any other rule would destroy free competition. (Annotated, 65 ALR 837.)

## CONCLUSION

In view of all the authorities, it is the opinion of this office that the submission of an incomplete bid does not conform to the law or the invitation to bid, and should be rejected.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-439 COMMITMENT MENTALLY ILL PERSONS—Ex...

OPINION NO. 1967-439 Commitment Mentally Ill Persons—Expenses of entire proceedings involved in the commitment of mentally ill persons, as determined by the District Judge, to be paid by State, despite fact no appropriation made by Legislature.

Carson City, September 26, 1967

Mr. Howard E. Barrett, Director, State Department of Administration, Carson City, Nevada 89701

Dear Mr. Barrett: You have called to the attention of this office that the Legislature amended NRS 433.210 (section 53, Chapter 541, Statutes of Nevada 1967), relieving the counties and financially able relatives of the costs of commitment of mentally ill persons, and imposed that burden on the State. However, the Legislature, in amending the act, failed to make an appropriation to cover such costs.

## ANALYSIS

The rule has become firmly established that an express grant of statutory power carries with it by necessary implication authority to use all reasonable means to make such grant effective. Sutherland, vol. 3, § 5401 (3rd Ed. 1943).

It is always to be presumed that the Legislature would not do a futile thing. Thus it has been stated:

An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty \* \* \* That which is clearly implied is as much a part of the law as that which is expressed.

Where a statute grants a right or implies a duty, it also confers by implication every particular power and every reasonable means necessary for the exercise of the one or the performance of the other.

## CONCLUSION

It is therefore the opinion of this office that the expenses of the entire proceedings involved in the commitment of mentally ill persons, as determined by the District Judge, are to be paid by the State, despite the fact the Legislature has made no appropriation to cover such payments.

The Special Session of the Legislature in 1968 should be requested to remedy this financial problem.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-440 PUBLIC EMPLOYEES RETIREMENT SYSTEM...

OPINION NO. 1967-440 Public Employees Retirement System—The Executive Secretary of the Public Employees Retirement Board, as head of that agency, is entitled to actuate the position of chief assistant, as provided for by NRS 284.140(3).

Carson City, September 27, 1967

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada 89701

Dear Mr. Buck: You have advised this office that an employee with the rating of accountant in your office recently resigned.

You have decided to leave the accountant position vacant for the time being, and to activate a new position of chief assistant, in accordance with the provisions of NRS 284.140(3).

You advise that the Public Employees Retirement Board is concerned with providing trained replacement personnel, in view of the present retirement status of the Executive Secretary and the Assistant Secretary.

#### ANALYSIS

NRS 284.140(3) places at the discretion of the head of each government department the appointment of one deputy and one chief assistant in the unclassified service.

There can be little dispute with the fact that the Executive Secretary of the Public Employees Retirement Board is the head of that department. He is the managing director of the entire system. He has complete authority, subject to review by the Public Employees Retirement Board, over the employees and the work performed by them. He has the duty of supervising the investments of that agency, and the responsible nature of his duties is indicated by the fact that the Public Employees Retirement Fund now stands at \$81,000,000, with 21,000 active members in the system.

#### CONCLUSION

It is therefore the opinion of this office that the Executive Secretary, as head of the Public Employees Retirement Board, is authorized under NRS 284.140(3) to fill the activated position of chief assistant, said employee to be in the unclassified service.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-441 BOARD OF PAROLE COMMISSIONERS—In d...

OPINION NO. 1967-441 Board of Parole Commissioners—In determining the amount of the unexpired term to be served by a parole violator, the board has the power to include or disregard the time spent by the violator in a county jail after arrest on a parole violation warrant.

Carson City, September 26, 1967

Mr. Paul R. Toland, Secretary, Board of Parole Commissioners, Carson City, Nevada 89701

Dear Mr. Toland: This office has been requested to give its impressions and comments on the subject of parole violations.

In the hypothetical case presented to us, a parolee has in some manner violated the terms of his parole. A warrant for his arrest is issued on January 1, 1967. The violator is arrested pursuant to this warrant

in Las Vegas on February 1, 1967. While incarcerated in Las Vegas, local charges are filed, but the violator cannot post bail due to a "hold" for the parole violation. The local charges are subsequently dismissed or disposed of, and the violator is returned to the Nevada State Prison, pursuant to the violation warrant, on August 3, 1967. You are concerned with the situation as presented above because, while the violator is not actually incarcerated in the Nevada State Prison, he is being detained in a local jail, part of the reason for which is the arrest on the parole violation warrant.

## QUESTION

In fixing the unexpired term to be served by a parole violator, can the Board of Parole Commissioners consider the date when the violator was arrested pursuant to the board's warrant, rather than the date of his actual return to prison?

## ANALYSIS

We shall first assume that the Board of Parole Commissioners properly revoked the violator's parole. The high courts of other states have passed upon questions quite similar to this one. *Patterson v. District Court of the City and County of Denver*, 410 P.2d 630; *Folks v. Patterson*, 412 P.2d 214. In each case, the parole violation warrant was issued shortly after the violator was jailed by the county authorities. In *Patterson v. District Court*, supra, the court said:

Actually, Griffin's confinement in the Denver County jail from February 8, 1965 to October 15, 1965 was occasioned by the fact that he had been informed against in a new criminal information, and hence for this period of time he was not being "kept in jail by the state department of parole." But even if this confinement were the result of action taken by parole authorities, under *Johnson v. Tinsley*, supra, such fact would not entitle Griffin to his release from the state penitentiary where, as here, his parole has now been revoked and he has been returned to the state penitentiary.

These decisions are referred to for the purpose of showing that it is unnecessary for the board to allow credit for the time served in the county jail by the hypothetical violator.

Indeed, the Legislature has seen fit to invest the Board of Parole Commissioners with the broadest discretion in fixing the amount of the unexpired term to be served by the violator. NRS 213.150 as amended by the 1967 Legislature reads in part as follows:

1. The board shall have full power to make and enforce rules and regulations covering the conduct of paroled prisoners, and to retake or cause to be retaken and imprisoned any prisoner so upon parole.

\* \* \* \* \*

6. Any person who is retaken and imprisoned pursuant to this section for a violation of any rule or regulation governing his conduct shall:

- (a) Forfeit all credits for good behavior earned prior to his parole; and
- (b) Serve such part of the unexpired term of his original sentence as may be determined by the board.

If the board has such broad power to fix the time to be served by a violator, it would certainly be entitled to consider the time and conditions under which a violator was in a county jail before his actual return to prison in making its decision. Cf. *Wey v. Hand*, 360 P.2d 880. The board may or may not determine to allow credit for such time. It has the power to do either.

## CONCLUSION

From the foregoing, it is the opinion of this office that in determining the amount of the unexpired term to be served by a parole violator, the Board of Parole Commissioners has the power to include or disregard the time spent by the violator in a county jail after arrest on a parole violation warrant.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Peter I. Breen, Deputy Attorney General

---

OPINION NO. 1967-442 STATE BOARD OF HEALTH—Clarifies Se...

OPINION NO. 1967-442 State Board of Health—Clarifies Section 26, Chapter 392 of the 1967 Statutes of Nevada.

Carson City, September 26, 1967

Mr. John K. Farnsworth, Air Pollution Control Officer, Clark County District Health Department, 625 Shadow Lane, Las Vegas, Nevada 89106

Dear Mr. Farnsworth: You have asked this office to clarify Chapter 392 of the 1967 Statutes of Nevada.

You are concerned with whether Section 26 which provides for rules and regulations adopted taking into consideration facts and circumstances bearing on the reasonableness of the emission of air contaminants involved, may be enforced.

#### ANALYSIS

Section 13 of the act gives to the State Board of Health the authority to promulgate, amend, and enforce reasonable rules and regulations concerning air pollution, and to delegate authority to enforce state rules and regulations to districts, counties, cities, or towns.

Section 24 gives the county or district board the authority to promulgate rules and regulations necessary to reduce the release into the atmosphere of air contaminants. It will be noticed that section 24, subparagraph 3 provides for the institution in a court of competent jurisdiction legal proceedings to compel compliance with the provisions of sections 2 to 40, inclusive, of the act, and any rule or regulation adopted by such county or district board. Section 26 is included in sections 2 to 40 and is therefore subject to enforcement.

I also call your attention to sections 28 through 35 which provide for notice and hearing where a person is in violation of a rule and regulation.

We will not go into the problem concerning persons exempted by agreement from enforcement as we can find no legal basis for such exemption.

#### CONCLUSION

It is therefore the opinion of this office that Section 26 of Chapter 392 of the 1967 Statutes of Nevada may be enforced when regulations pursuant thereto are adopted.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-443 NEVADA TAX COMMISSION; COUNTIES; A...

OPINION NO. 1967-443 Nevada Tax Commission; Counties; Assessments—The Nevada Tax Commission has the power to adopt dates and times when taxpayers must file reports. The taxes received from centrally assessed utilities should be allocated only to counties in which that utility has property in service or being used or operated. Only if the commission fails or omits to make an assessment, may the county make the same.

Carson City, September 28, 1967

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

## STATEMENT OF FACTS

Dear Mr. Nickson: The Nevada Tax Commission has the responsibility of assessing, for tax purposes, utilities doing intercounty or interstate business. There are approximately 50 such utilities under the jurisdiction of the Nevada Tax Commission. In order to adequately and properly assess these utilities, the Nevada Tax Commission has required all such centrally assessed utilities to submit to the Commission annual financial and distribution reports. The staff of the Commission then determines the valuations of the property and allocates the taxes due the various counties on an operating mile-unit formula pursuant to NRS 361.320. Such reports are to be submitted to the commission on May 1 of each year. The reports so submitted cover calendar years from January 1 to December 31. That is, the Nevada Tax Commission has established December 31 as a "cut off" date for the utility to establish financial worth and physical distribution of its intercounty and interstate operations. The primary reason for selection of these dates is to allow the utilities time to prepare the required reports and the staff of the commission time to process and analyze them prior to the first Monday in October, when the Nevada Tax Commission must establish the final valuation for assessment purposes.

As a result of the above procedure, it is possible for a utility to place property in operation after December 31, the cut off date, and prior to the first Monday in October, when the actual assessment and county allocation is made.

Just such a situation has arisen involving a major utility and a Nevada county. It appears the utility had facilities in the county on December 31, 1964, but the same were not yet in service or operating. Shortly thereafter, some time in January of 1965, the facilities were placed in operation. In the report filed by the utility it was revealed that there was "construction work in progress" but because there were no facilities actually "in service" in the particular county, no allocation of taxes was made to that county. The staff of the commission has interpreted NRS 361.320 (infra) as meaning that unless the utility has property "in service" in a county, that county will not receive any allocation of taxes due from the utility.

The county challenges the actions of the Nevada Tax Commission, and has proceeded under NRS 362.320(4), and sent to the utility a tax bill of several thousand dollars.

The county in question has presented to the Nevada Tax Commission the above outlined set of circumstances, and after conducting informal hearings where both the county and the utility presented arguments through counsel, the following questions were referred to the Attorney General by the Nevada Tax Commission for answering:

## QUESTIONS

1. Does the Nevada Tax Commission have statutory and/or administrative authority to establish a cut off date of December 31 preceding the beginning of the tax year for centrally assessed organizations to submit financial and distribution information on which to base valuations and allocations of taxes?

2. If the answer to 1 above is affirmative, does Lander County have any claim against the utility for 1965-66 taxes?

## ANALYSIS

We must first determine if the interpretation placed on NRS 361.320 by the Commission staff is correct.

NRS 361.320 reads:

1. At the regular session of the Nevada tax commission commencing on the 1st Monday in October of each year, the Nevada tax commission shall establish the valuation for assessment purposes of any property of an interstate and intercounty nature, which shall in any event include the property of all interstate or intercounty railroad, sleeping car, private car, street railway, traction, telegraph, water, telephone, air transport, electric light and power companies, together with their franchises, and the property and franchises of all railway express companies operating on any common or contract carrier in this state. Such valuation shall not include the value of vehicles as defined in NRS 371.020. (Italics added.)

2. The foregoing shall be assessed as follows: The Nevada tax commission shall establish and fix the valuation of the franchise, if any, and all physical property used directly in the operation of any such business of any such company in this state, as a collective unit; and if operating in more than one county, on establishing such unit valuation for the collective property, the Nevada tax commission shall then proceed to determine the total aggregate mileage operated within the state and within the several counties thereof, and apportion the same upon a mile-unit valuation basis, and the number of miles so apportioned to any county shall be subject to assessment in that county according to the mile-unit valuation so established by the Nevada tax commission. The Nevada tax commission shall prepare and adopt formulas, and cause the same to be incorporated in its records, providing the method or methods pursued in fixing and establishing the full cash value of all franchises and property assessed by it. Such formulas shall be adopted and may be changed from time to time upon its own motion or when made necessary by judicial decisions, but such formulas shall in any event show all the elements of value considered by the Nevada tax commission in arriving at and fixing the value for any class of property assessed by it. (Italics added.)

3. The word "company" shall be construed to mean and include any person or persons, company, corporation or association engaged in the business described.

4. In the case of omission by the Nevada tax commission to establish a valuation for assessment purposes upon the property mentioned in this section, the county assessors of any counties wherein such property is situated shall assess the same.

5. All other property shall be assessed by the county assessors, except that the valuation of land, livestock and mobile homes shall be established for assessment purposes by the Nevada tax commission as provided in NRS 361.325.

6. On or before the 1st Monday in December the Nevada tax commission shall transmit to the several county assessors the assessed valuation found by it on such classes of property as are enumerated in this section, together with the apportionment of each county of such assessment. The several county assessors shall enter on the roll all such assessments transmitted to them by the Nevada tax commission.

This statute uses the words "operating" and "used" when discussing the taxable property and the allocation of taxes to the various counties. Only if the property is operated or used in the county is that county entitled to a portion of the taxes on the mile-unit basis. The staff has interpreted the words "operated" and "used" to mean "in service," and this office finds nothing objectionable in such interpretation. The utility property not being in service in the county as of the cut off date, that county is not entitled to any portion or allocation of the taxes paid by such utility.

This is deemed to be a sound conclusion, if in fact the Nevada Tax Commission has the power to adopt such a cut off date. Statutes which relate to the power of the Nevada Tax Commission are:

NRS 360.200:

In addition to the specific powers enumerated in this chapter, the Nevada tax commission shall have the power to exercise general supervision and control over the entire revenue system of the state.

NRS 360.250:

The Nevada tax commission shall have the power:

1. To confer with, advise and direct county assessors, sheriffs as ex officio collectors of licenses, county boards of equalization, and all other county officers having to do with the preparation of the assessment roll or collection of taxes or other revenues as to their duties.

2. To establish and prescribe general and uniform rules and regulations governing the assessment of property by the county assessors of the various counties, not in conflict with law.



3. To prescribe the form and manner in which assessment rolls or tax lists shall be kept by county assessors.

4. To prescribe the form of the statements of property owners in making returns of their property.

5. To require county assessors, sheriffs as ex officio collectors of licenses, and the clerks of the county boards of equalization, and all other county officers having to do with the preparation of the assessment role or collection of taxes or other revenues, to furnish such information in relation to assessments, licenses or the equalization of property valuations, and in such form as the Nevada tax commission may demand.

NRS 360.270:

The enumeration of the powers in NRS 360.200 to 360.260, inclusive, shall not be considered as excluding the exercise of any necessary and proper power and authority of the Nevada tax commission.

NRS 361.280:

1. All county assessors shall:

(a) Adopt and put in practice the rules and regulations established and prescribed by the Nevada tax commission governing the assessment of property.

(b) Keep assessment rolls or tax lists in the form and manner prescribed by the Nevada tax commission.

(c) Use and require property owners to use the blank statement forms prescribed by the Nevada tax commission for making property returns.

2. Boards of county commissioners shall supply books, blanks and statements in the prescribed form for the use of county assessors.

After reading these statutes, it cannot be seriously contended that the Nevada Tax Commission could not prescribe by rule and regulation certain dates by which tax reports must be submitted. To hold to the contrary would cause mass administrative chaos in the assessment of property and collection of taxes.

Concluding, then, that the cut off date of December 31 was properly adopted, what authority does the county in question have to assess property placed in service after December 31?

NRS 316.320(4), supra, provides that only in the event of an omission to establish a valuation for assessment purposes by the Tax Commission may the county assess the same. The Nevada Tax Commission did not omit or fail to assess the property in question. The utility reported to the commission that the property in question was "construction work in progress" and the commission assessed the same. The tax has been paid the State of Nevada. There being no omission on the part of the Tax Commission, the county is without standing to proceed under NRS 361.320(4).

It being our conclusion that question 1 is answered in the affirmative, we are obliged to answer question 2, which is answered, in the foregoing paragraph, in the negative. In this regard, allow me to state that this opinion is by no means a final determination of the questions presented. The entire legislative and judicial branches of the government are available to any party aggrieved by the conclusions herein reached, and any party so disposed should be encouraged to turn to them for the purpose of seeking desired remedies.

## CONCLUSION

1. The Nevada Tax Commission has the power to adopt dates and times when taxpayers must file reports.

2. The taxes received from a centrally assessed utility should be allocated only counties in which that utility has property in service or being used or operated.

3. Only if the Nevada Tax Commission fails or omits to make an assessment may a county make the same.

4. Parties aggrieved by opinions of the Attorney General may seek relief from the judicial or legislative branch of the government.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-444 COMMITMENT OF MENTALLY ILL—Chapter...

OPINION NO. 1967-444 Commitment of Mentally Ill—Chapter 541 of Statutes of Nevada 1967 interpreted. Clarified by AGO 67-473, dated 12-14-67.

Carson City, October 3, 1967

Mr. Howard E. Barrett, Director, State Department of Administration, Carson City, Nevada 89701

Dear Mr. Barrett: You have requested this office to answer two questions concerning Chapter 541 of the Statutes of Nevada 1967, known as the Nevada Hospitalization of the Mentally Ill Act:

1. Is the cost of hospitalization of an allegedly mentally ill person prior to judicial commitment a cost of the commitment procedure chargeable to the State?

2. Is the cost of hospitalization of a committed indigent person in a private or county hospital a charge against the State or the county?

#### ANALYSIS

Hospitalization is not part of the commitment procedure. Black's Law Dictionary (4th Ed., p. 341) defines "commitment" as a proceeding for the restraining and confining of insane persons for their own and the public's protection. (Vance v. Ellerbe, 150 La. 388, 90 So. 735.)

The elements of commitment as set forth in sections 22 through 26 of Chapter 541 of the Statutes of Nevada 1967 are completely absent from sections 11 through 20, which cover voluntary admission or admission through other sources for observation, diagnosis, and temporary treatment.

It is only when, after diagnosis, the authorities, hospital representatives, relatives, or guardians are convinced that it is necessary, in order to protect the person and the public, that the wheels of commitment are set in motion by the detention as mentioned in section 21 of the act, and the judicial proceedings as mentioned in sections 22 through 26 are commenced.

Section 29 of the act provides that the estate of the mentally ill person or his parents (if a minor) or spouse or adult child shall bear, to the extent of their ability, the expense of maintenance, including treatment and surgical operations. It will be noted that such payments are to be made to the State of Nevada, thus implying that the costs, whether admission be to a public or a private hospital, are to be paid by the State of Nevada, if there be a deficiency. This is supported by section 31, which provides that sums paid by those held responsible by a court shall be paid to the State Treasurer.

The only charges, in the act as amended, which may be charged to the county from which the patient was first committed are those attendant upon treatment of a patient transferred from the Nevada State Hospital to another facility, by reason of the fact that the Nevada institution does not have the facilities to treat the person transferred (NRS 433.530 as amended), and only then if the diagnostic, medical, and surgical services are furnished by persons not on the Nevada State Hospital staff, and those made responsible for payment by the court order of commitment are unable to pay.

#### CONCLUSION

It is therefore the opinion of this office that (1) the cost of hospitalization of an allegedly mentally ill person prior to judicial commitment is not a part of the commitment procedure chargeable to the State and (2) the cost of hospitalization of a committed indigent person to a private or county hospital is a charge

against the State to the extent of any deficiency arising by reason of the inability of those responsible under the act to meet such expenses.

Where a person is transferred from the Nevada State Hospital to a general or a county hospital, due to the Nevada State Hospital's inability to treat the mental illness involved, the county from which the patient was first committed is responsible to the extent of any deficiency arising from the inability of relatives to meet the charges as directed by the original order of commitment.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-445 NEVADA STATE HOSPITAL; MENTALLY RE...

OPINION NO. 1967-445 Nevada State Hospital; Mentally Retarded Non-Educable Children—P.L. 89-614 provides federal funds for the care of mentally retarded non-educable dependents of members of the armed services on active duty. Hospital can accept moneys provided for by any federal law, and can accept gifts or bequests as provided for by NRS 433.195.

Carson City, October 3, 1967

Mr. Karl Harris, Director, Department of Health, Welfare and Rehabilitation, Carson City, Nevada 89701

Dear Mr. Harris: You have asked this office the following questions which are closely related to the care by the State Hospital of mentally retarded non-educable children:

1. Can the Nevada State Hospital accept moneys allotted under Public Law 89-614?
2. Can the Hospital accept social security benefits, hospital insurance, veterans' benefits, etc., if they are available?
3. Can the State Hospital accept moneys for the care and maintenance of mentally retarded non-educable children if the moneys are available from sources which would create no hardship upon the parents or guardians?

#### ANALYSIS

Public Law 89-614, 80 Stat. 862, amends Chapter 55 of Title 10 U.S. Code, to authorize an improved health benefits program for retired members of the uniformed services and their dependents, as well as active members and their dependents.

Under Section 1077(d) of the act, the dependent of a member of the uniformed forces on active duty for a period of more than 30 days, who is severely or moderately mentally retarded, is entitled to (1) diagnosis, (2) inpatient, outpatient and home treatment, (3) training, rehabilitation and special education, (4) institutional care in private non-profit, public, and state institutions and facilities, and (5) when appropriate, transportation from such institutions and facilities.

The members of the uniformed forces are required to share in the cost of benefits under 1077(e), but their share is low—\$25 per month for members in the lowest pay grade and \$250 per month for those in the highest commissioned pay grades. The government's share is not to exceed \$350 per month.

These amendments became effective January 1, 1967.

It is also apparent that the Nevada State Hospital may accept any moneys made available for citizens or military personnel if the federal government so provides.

NRS 433.195 provides as follows:

1. The superintendent is authorized to accept gifts or bequests of money or property to the hospital.
2. Monetary gifts or bequests shall be deposited in the state treasury in a fund to be known as the state hospital gift fund, which is hereby created. The fund shall be a continuing fund, and no money in the fund shall be transferred to the general fund at any time. The money in the fund shall be used for hospital

purposes only and expended in accordance with the terms of the gift or bequest. The money in the fund shall be paid out on claims as other claims against the state are paid. All claims shall be approved by the superintendent before they are paid.

It will be noted that such gifts or bequests are to be used for hospital purposes only, and expended in accordance with the terms of the gift or bequest. The question then arises as to whether the designation of the gift or bequest for the care and maintenance of mentally retarded non-educable children is a hospital purpose.

In *Cedars of Lebanon Hospital v. Los Angeles County*, 206 P.2d 915, the Court discussed "hospital purposes" as follows:

A hospital is primarily a service organization. It serves three groups: Its patients, its doctors, and the public. It furnishes a place where the patient, whether poor or rich, can be treated under ideal conditions. It makes available room, special diet, X-ray, laboratory, surgery, and a multitude of other services and equipment now available through the advances of medical science. Essential to the administration of these techniques is the corps of highly trained nurses and student nurses who are on duty 24 hours per day. In the large hospitals there are the interns and residents whose presence makes it possible for the hospital to do a better job. In addition, the hospital must be kept spotlessly clean; it must have power and utilities available even though the standard sources of these services is cut off. It must have special meals and diets prepared and served throughout the day and night. It must have administration to see that its services function properly and are coordinated, and that patients are received and cared for regardless of the hour or the patient's condition. Nothing can be left to chance because a slip may mean a life or many lives. These facilities also stand ready to serve the community in times of epidemic or disaster.

As to what is meant by the phrase "hospital purpose" we are persuaded that it embraces those facilities or services that must be regarded as reasonable, necessary or appropriate to accomplish the functions of a hospital in furnishing a complete and efficient hospital service to its patients, its doctors, and its community.

In *Casper v. Cooper Hospital*, 98 A.2d 605, the Court stated:

By like reasoning, a hospital purpose is not to be so narrowly construed as to limit its benefits to patients only,

which indicates that in this court's opinion, the care of patients is the primary hospital purpose.

We therefore reach the conclusion that gifts or bequests, where no designation is made, may be used as the hospital desires, which includes the care and maintenance of mentally retarded non-educable children.

## CONCLUSION

It is the opinion of this office that (1) Public Law 89-614 makes funds available for the mentally retarded dependents of veterans in the active service, (2) the State Hospital can accept benefits provided for by federal law, and (3) the State Hospital can therefore accept moneys for the care and maintenance of mentally retarded non-educable children under the provisions of NRS 433.195.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-446 OIL AND GAS LEASES, FEDERAL. MINES...

OPINION NO. 1967-446 Oil and Gas Leases, Federal. Mines and Mining—(1) A federal oil and gas lease is not a patented mine and therefore is not taxable as a patented mine. (2) A federal oil and gas lease is not an

unpatented mining claim and is therefore not protected by the exemption against taxation of unpatented mines in Art. X, Sec. 1, Nevada Constitution. (3) A federal oil and gas lease is taxable under NRS 361.157 and NRS 361.230. (4) Under NRS 361.157, a lessee is not required to put real property to a beneficial use, to be subject to taxation. (5) Taxation of federal oil and gas leases under NRS 361.157 does not amount to double taxation, despite the fact that a portion of the rentals received from lessee by the federal government is remitted to the states for public highways and schools. Statutory construction—As used in NRS 361.157, the term “or” is disjunctive and provides alternative classifications for the imposition of taxes.

Carson City, October 4, 1967

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: The Nevada Tax Commission has requested an opinion from this office on several subjects concerning the taxability of oil and gas leases on public lands owned by the United States Government. Several questions are asked—they have been rephrased somewhat for the purpose of clarity and brevity.

1. Is an oil and gas lease taxable as a patented mine?
2. Is an oil and gas lease protected by the exemption against taxation of unpatented mining claims found in Article X, Section 1 of the Nevada Constitution?
3. Is an oil and gas lease taxable under NRS 361.230 and 361.157?
4. If no development, exploration or other beneficial use is being made of a federal oil and gas lease, is the same excluded from taxation?
5. Since the federal government remits a portion of its rental fees under oil and gas leases to the State of Nevada, would a tax on the lease-hold amount to double taxation?

In answer to the first question, it is the understanding of this office that the oil and gas lessees have neither applied for nor been issued a patent by the United States or the State of Nevada. Further, the holder of a federal oil and gas lease cannot obtain title to the leased lands by virtue of the lease, nor approach the incidents of ownership of a fee patentee. 30 USCA § 181 et seq.; McKenna v. Wallis, 344 F.2d 432; Pan American Petroleum Corp. v. Pierson, 284 F.2d 649. Therefore, since the lessee of federal lands under an oil and gas lease cannot obtain a patent, the land cannot be taxed as patented land.

The answer to the first question is no.

The second question posed is whether an oil and gas lease from the federal government amounts to a mine or a mining claim within the constitutional prohibition against taxation of an unpatented mining claim.

Article X, Section 1, reads as follows, in part:

The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, when not patented, the proceeds of which shall be assessed and taxed, and when patented, each patented mine shall be assessed at not less than five hundred dollars (\$500), except when one hundred dollars (\$100) in labor has been actually performed on such patented mine during the year, in addition to the tax upon the net proceeds; \* \* \*

Prior to 1920 oil and gas, as well as other minerals, were subject to location and appropriation as placer claims. In 1920, the federal government withdrew oil and gas, along with certain other minerals, from location on federally owned lands. Instead, a system of leasing was devised, whereby the United States retained title to the lands and received a royalty on oil and gas withdrawn from beneath the earth's surface. Thus, the method of disposing of these resources was changed from the location method to a plan whereby permits, and later leases, were granted.

We do not believe, however, that a federal oil and gas lease is entitled to the protection of Article X, Section 1 of the Nevada Constitution merely because a new system was devised to secure the right to appropriate oil and gas. If such a lease is exempt from taxation, then it must fit within the definition of a mine or mining claim of its own accord.

It is a well-established principle of mining law in Nevada that the basis of a valid mining claim is discovery. It is the single most important act required, and without it there is no valid mining claim. Round

Mountain v. Round Mountain Sphinx, 36 Nev. 593, 138 P. 71. In Dredge Corp. v. Hustie Co., 78 Nev. 69, 369 P.2d 676, Justice Badt said:

It is the foundation of the right with which all other acts are idle and superfluous.

See Best v. Humboldt Placer Mining Co., 371 U.S. 334, 9 L.Ed.2d 350, 83 S.Ct. 379.

In Freemont Lumber Co. v. Slarrell Petroleum Co., 364 P.2d 773, 779, 223 Ore. 180, it was held that prospecting, exploring and investigating did not constitute "mining" within mineral lease. The court, in quoting from J.M. Guffey Petroleum Co. v. Murrel, 53 So. 705, 127 La. 466, said:

When the term mine is used, it is generally understood that the excavation so named is in actual course of exploration \* \* \* no occurrence of ore is designated as a mine unless something has been done to develop it by actual mining operations. (*Italics added.*)

In Perkins v. Long-Bell Petroleum Co., 227 La. 1044, 81 So.2d 389, a mineral lease was defined as merely a contract which permits the lessee to explore for minerals on the land of the lessor in consideration of the payment of a rental and/or bonuses. See also Prestridge v. Humble Oil and Refining Company, 131 So.2d 810.

These leases cover thousands of acres. Apparently there has been no development on the lands they cover, nor has there been discovery of oil. Article X, Section 1 of the Nevada Constitution cannot be broadened to cover such a drastically new concept. The land secured is perhaps 100 times larger than the conventional mining claim.

In West v. Work, 11 P.2d 828, certiorari denied, 271 U.S. 689, 70 L.Ed. 1153, it is said that the mineral leasing act was "the expression of a new policy for the disposition of public lands open to exploration or entry by lease, than by alienation."

The very enactment of a new method of disposing of oil and gas makes it clear that oil and gas leases are not mining claims.

The Constitution is a living thing and is to be interpreted in the light of changing conditions. Evans v. Job, 8 Nev. 22. An interpretation cannot be condemned merely because conditions are new; there cannot be a departure from the basic principles therein. King v. Board of Regents, 65 Nev. 533, 200 P.2d 221. We believe that to interpret an oil and gas lease as an unpatented mining claim would be a departure from the basic principles of Article X, Section 1 of our Constitution.

The following conclusion in no way conflicts with our Opinion No. 67-405, dated May 9, 1967. There it was determined that an oil and gas well was a mine. We are not here concerned with a well or a hole in the ground. We are concerned with a lease. We thus conclude that an oil and gas lease on federal lands is not an unpatented mining claim and, therefore not entitled to the protection of Article X, Section 1 of the Nevada Constitution.

The answer to the second question is no.

NRS 361.157, as amended by Chapters 88 and 455 of the 1967 Nevada Legislature, provides as follows:

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 or the Bureau of Reclamation of the United States Department of the Interior; or

(e) Property of any Indian or of any Indian tribe, band or community which is held in trust by the United States or subject to a restriction against alienation by the United States.

2. Taxes shall be assessed to such lessors or users of real estate and collected in the same manner as taxes assessed to owners of real estate, except that 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.

The applicable provision of NRS 361.230 provides:

1. \* \* \*

2. If the county board of equalization shall ascertain that any land within its county has been assessed upon a valuation of less than \$1.25 per acre, or has not been assessed at all, the board shall notify the county assessor immediately to pay into the county treasury the taxes due on such land, in such a sum as will yield the full amount of taxes due upon such land upon its true value, which valuation shall not be less than \$1.25 per acre. If a county assessor fails to pay such taxes within 10 days after such notification by the county board of equalization, the district attorney shall file and prosecute diligently a suit against the county assessor and his surety or sureties on his official bond for the amount of such taxes.

These two statutes, read together, make it clear that a lease such as the one in question is taxable, subject to the remaining questions.

The answer to the third question is yes.

According to the representations made by the Tax Commission, the oil and gas leases in question are not being used by the lessees. That is, there is no exploration or active development toward beneficial use. We are not inclined to think this is necessary.

Under our construction of the statute, there are three distinct situations where real estate, otherwise exempt, becomes taxable under this statute: (a) when it is leased; (b) when it is loaned; and (c) when it is otherwise made available and used in connection with a business conducted for profit.

The final portion of NRS 361.157(1) reads:

\* \* \* 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. \* \* \*

The Legislature was presumed to have meant each and every word used in the statute. In construing this statute, we must endeavor to construe it as a whole, and give effect to all its parts. We find no difficulty with the term "or." It is a disjunctive term, and in this case, we believe it provides an alternative. Property may be leased in connection with a business for profit. It may be otherwise acquired (by gift for example) and used in such business. Both leasing and using are not essential. Either will do. Cf. *Lewis v. Lewis*, 71 Nev. 301, 289 P.2d 414. *Seaborne v. District Court*, 29 P.2d 500. The use of "or" usually indicates a disjunctive or alternative and generally corresponds to "either." *People v. Smith*, 279 P.2d 33, 44 Cal.2d 77. The term cannot be construed as "and" unless necessary to harmonize provisions of statute, give effect to all its provisions, save it from unconstitutionality or to effectuate obvious intent of legislation. *Smith v. City of Casper, Wyoming*, 419 P.2d 704, 706.

The answer to the fourth question is no.

The obvious purpose of this statute is to classify certain types of interests in real property and subject them to taxation. These classifications are set-off by a comma. The term "or" between "leased" and "used" is used in a disjunctive sense. In this case, the properties are being leased. It is therefore unnecessary to consider what type of, or how much, "use" is required. We conclude that the existence of a lease is sufficient to invoke the taxability provisions of NRS 361.157.

Section 1(b) of NRS 361.157 provides:

Federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed;

\* \* \*



Under 30 USCA § 191, states receive 37 1/2 percent of the proceeds from money realized from sales bonuses, royalties and rentals of public lands under the mineral leasing act. This money is to be used for public roads and schools. The commission questions whether a tax on the lease would be double taxation in view of this payment to states.

It has been said that the uses to which the moneys must be put are those normally supported by taxation. One might say this of all public, state institutions and projects.

Title 30, USCA § 191 certainly does not indicate that the federal government intended these payments to be made in lieu of taxation. If this logic were followed, we could say that there could be no income tax on oil production because 37 1/2 percent of all royalties are paid to states. Since pipelines are included under this statute, they would also be untaxable.

The Supreme Court of the United States has determined that the states have the right to tax oil leases on their property. *Mid. Northern Oil Co. v. Walker*, 45 S.Ct. 440, 268 U.S. 45, 69 L.Ed. 841. The statute states that nothing shall be construed so as to affect the right of the states, in respect to such private persons and corporations, to levy and collect taxes as though the Government were not concerned.

Thus it was the intention of Congress to remove from controversy the very problem that besets us here, that is double taxation. The payments to the states do not amount to a tax, or payment in lieu of taxation. Therefore, a state tax on the lessee of federal oil and gas leases does not amount to double taxation.

The answer to the fifth question is no.

## CONCLUSION

It is therefore the opinion of this office that:

1. A federal oil and gas lease is not a patented mine and therefore is not taxable as a patented mine.

2. A federal oil and gas lease is not an unpatented mining claim and is therefore not protected by the exemption against taxation of unpatented mines in Article X, Section 1 of the Nevada Constitution.

3. A federal oil and gas lease is taxable under NRS 361.157 and NRS 361.230.

4. Under NRS 361.157, a lessee is not required to put real property to a beneficial use, to be subject to taxation.

5. Taxation of federal oil and gas leases under NRS 361.157 does not amount to double taxation, despite the fact that a portion of the rentals received from lessee by the federal government is remitted to the states for public highways and schools. As used in NRS 361.157, the term "or" is disjunctive and provides alternative classifications for the imposition of taxes.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Peter I. Breen, Deputy Attorney General

---

OPINION NO. 1967-447 NEVADA TAX COMMISSION; SALES AND U...

OPINION NO. 1967-447 Nevada Tax Commission; Sales and Use Tax—(1) Sales of tangible personal property to a national bank is subject to a sales tax. (2) Sales of tangible personal property by a national bank is not subject to sales tax. (3) "Use" tax does not apply to tangible personal property used, stored or consumed by a national bank.

Carson City, October 5, 1967

Mr. Roy Nickson, Secretary, Tax Commission, Carson City, Nevada 89701

STATEMENT OF FACTS

Dear Mr. Nickson: You have requested this office to inform you as to the legality of imposing upon national banks in this State the sales and use tax as set forth in Chapter 372 of NRS.

## ANALYSIS

The matter of state taxation of national banks and the related problems have been presented to this office in the past. Our latest opinion in this regard is AGO No. 63-45 of June 21, 1963. The tax therein involved was a "privilege tax on automobiles" owned by a national bank. It was concluded in that opinion that state taxation of national banks must be limited to the methods permitted and allowed by Congress, and that in the absence of such permissive legislation, no state assessment could be made. We, at this time, agree with the conclusions reached in that opinion.

Cases in addition to those cited in that opinion have been decided by courts in our sister states which lend support to that opinion and our current opinion that the State of Nevada may not collect a use tax from national banks, but may collect a sales tax when personal property is sold to a national bank.

In *Security First National Bank v. Franchise Tax Board*, (Cal. 1961), 359 P.2d 625, it was held that "National Banks, such as plaintiffs, may be taxed by a state only as expressly permitted by Congress" (cases cited). That case then points out that Section 5219 of the Revised Statutes of the United States (12 USC 548) sets forth the four methods by which a state may tax those banks. This section provides that shares of national banks may be taxed by states by

1. Taxing the shares,
2. Include dividends derived therefrom in the taxable income of an owner or holder thereof,
3. Tax the association on their net income;
4. According to or measured by their net income.

The author of that opinion then goes on to point out that "It is settled that taxation of personal property, which is not a method of taxation permitted in Section 5219, is improper." The court cited *Owensboro National Bank v. Owensboro*, 173 U.S. 664, 19 S.Ct. 537, 43 L.Ed. 850. In that case it was stated:

It follows then necessarily from the conclusions that the respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress.

Other cases concluding the same are *First National Bank v. Anderson*, 269 U.S. 341, 46 S.Ct. 135, 70 L.Ed 295:

National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property, and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent.

*Des Moines National Bank v. Fairweather*, 267 U.S. 103, 44 S.Ct. 23, 68 L.Ed. 191. After quoting 12 U.S. 548, it was stated:

This section shows, and the decisions under it hold, that what Congress intended was that national banks and their property should be free from taxation under state authority, other than taxes on their real property and on shares held by them in other national banks; \* \* \*.

*First National Bank v. Adams*, 258 U.S. 362, 42 S.Ct. 323, 66 L.Ed. 661 states:

Section 5219 (12 USC 548) Revised Statutes prescribes the full measure of the power of the several states to impose taxes upon national banking associations or their stockholders. Any assessment not in conformity therewith is unauthorized and invalid.

Other cases in point are *Talbott v. Silver Bow County*, 139 U.S. 438, 11 S.Ct. 594, 35 L.Ed. 210; *Maricopa County v. Valley Bank*, 318 U.S. 357, 53 S. Ct. 587, 87 L.Ed. 834.

The above cases compel the conclusion that national banks may be taxed only as Congress has consented, and that consent is found in 12 U.S.C. 548 supra.

Our own Supreme Court has considered the taxation of national banks. In *National Bank v. Kreig*, 21 Nev. 404 it was held that:

\* \* \* it is now well settled by the decisions of the Supreme Court of the United States, which in such matters is the final arbiter, that national banks are only subject to state taxation upon their real estate, and upon the shares of stock in the bank owned by the stockholders.

In *State of Nevada v. First National Bank of Nevada*, 4 Nev. 348 the appropriate syllabus reads:

The State may impose a tax upon the real estate and shares of national banks within its limits, but Congress has reserved to itself the exclusive power over the taxation of banks and bank property of other descriptions.

There have been a few cases decided which deal with sales and use tax.

In *National Bank of Detroit v. Department of Revenue*, 66 N.W.2d 237 (Michigan 1954) it was held that notwithstanding tax immunity enjoyed by national banks, retail sales of tangible personal property to such instrumentalities of the federal government are subject to sales tax. The rationale of the court was that the incidence of the tax was on the retailer making the sale. It was pointed out that applicable law did not require the retailer to pass the tax on to the purchaser. The bank argued that for the most part the tax was passed on to the purchaser (bank). The court rejected this argument.

The court went on to hold that sales made by the bank were not subject to sales tax because the incidence of such tax would be upon the bank. Such is the same situation in Nevada. NRS 372.105 imposes the sales tax upon the retailer. NRS 372.110 states that the tax "shall be collected by the retailer from the consumer insofar as it can be done." In California we find the same statutes. In an often cited opinion—*Western Lithograph Co. v. State Board of Equalization* (1938) 78 P.2d 731, 11 C2 156, 117 ALR 838—it appeared the Western Lithograph Company sold to the Bank of America National Trust & Savings Association tangible personal property for a total purchase price of \$11,868.33. A 3 percent sales tax was paid by Western Lithograph Company on this amount. A claim for refund was then made by Western Lithograph Company based on the fact the bank was an instrumentality of the United States and could not be taxed except in accordance with 12 USC 548. The court stated:

We may assume, for the purposes of this proceeding, that if the tax imposed pursuant to the provisions of the State Retail Sales Tax Act is a tax on the consumer or purchaser of the goods sold, then the petitioner is entitled to the relief sought.

The court went on to hold, however, that the sales tax imposed was upon the retailer, that it was not a tax on the purchaser and, therefore, in the case of sales made to a national bank, the tax was not upon a federal instrumentality and must be paid by the retailer. The claim for refund was denied.

We conclude at this time that this case controls and that sales of tangible personal property to national banks are subject to sales tax, to be paid by the retailer. It necessarily follows then that sales of tangible personal property by a national bank are not subject to sales tax as the tax would be upon the national bank.

As to the "use" tax we conclude the Nevada Tax Commission is without the authority to collect it from a national bank. NRS 372.183 states:

An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this state at the rate of 2 percent of the sales price of the property.

The "use" tax is an excise tax upon the privilege of using, storing or consuming property. The tax is upon the person using, storing or consuming and in the case of property used, stored, or consumed by a national bank, the tax would be upon that national bank. The above cited authority compels the conclusion that such tax is not allowed.

In support of the above we would direct the attention of the Nevada Tax Commission to the recent case of *Department of Employment v. United States*, 17 L.Ed.2d decided by the United States Supreme Court on December 12, 1966 wherein it is stated:

\* \* \*—the Red Cross is like other institutions—e.g. national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute.

It should be noted that we are aware of AGO 61-263 issued December 8, 1961 in which it was concluded "national banks, even though admittedly instrumentalities of the Federal Government, are subject to and liable for payment of nondiscriminatory Nevada 'sales' and 'use' tax as to transactions not directly related to the attainment of national purposes, or not consummated by them in the status of the Federal Government." The author of that learned opinion did not have available to him the later cases which have been relied upon in this opinion, and to the extent that opinion differs from the conclusions hereinafter set forth that opinion is modified.

## CONCLUSION

1. Sales of tangible personal property to a national bank is subject to sales tax.
2. Sales of tangible personal property by a national bank is not subject to sales tax.
3. "Use" tax does not apply to tangible personal property used, stored or consumed by a national bank.

Respectfully submitted,  
Harvey Dickerson, Attorney General  
By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-448 Nevada Tax Commission; NRS 372.325 Intrpreted—In ...

OPINION NO. 1967-448 Nevada Tax Commission; NRS 372.325 Interpreted—In granting or denying sales and use tax exemptions pursuant to NRS 372.325, the Nevada Tax Commission should consider (1) the purpose for which the applicant was created, (2) that the exemptions are the exception rather than the rule, (3) that the applicant has the burden of proving it falls within the terms of the statutory exemption, (4) that contributors to the charitable fund may be recipients of the charity, and (5) that the class of recipients is not be increased or decreased, and all members of the same class are to be treated the same.

Carson City, October 12, 1967

Mr. Roy Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

## STATEMENT OF FACTS

Dear Mr. Nickson: This office has been asked by the Nevada Tax Commission to provide procedural guidelines which will, in the future, guide the commission in granting or denying sales and use tax exemptions to organizations created for charitable or eleemosynary purposes, pursuant to NRS 372.325(5). The pertinent portion of the statute reads:

There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to:

\* \* \* \* \*

5. Any organization created for religious, charitable or eleemosynary purposes, provided that no part of the net earnings of any such organization inures to the benefit of any private shareholder or individual.

## ANALYSIS

The words "charitable" and "eleemosynary" have been held to be synonymous, and for the purposes of this opinion we shall so consider them. *Nixon v. Brown*, 46 Nev. 439 (1923).

Clearly, by the terms of the statute above set forth, the organization must be created for a charitable purpose before tax exemption statutes will attach. The Supreme Court of Nevada has adopted the following definition of the word "charity":

A charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. *Bruce v. Y.M.C.A.*, 51 Nev. 372, 380 (1929).

Before granting the exemption, the Nevada Tax Commission should satisfy itself that the applying organization's activities, as set forth in its Articles of Incorporation or Charter, come within this definition. In this regard, the following rules should be considered:

1. Tax exemption is an exception and not the general rule, and a statute granting an exemption is to be strictly construed.
2. Any doubt as to whether the institution is entitled to such an exemption must operate against the claimant, because the burden of proof is upon it to show clearly and unequivocally that it comes within the terms of the exemption.

These two rules are announced in the annotation following the case of *People v. First National Bank*, reported in 108 A.L.R. 277.

The beneficiaries of charity sometimes contribute to the fund from which the charity is disbursed. In this regard, I would cite to the commission the following cases:

*Preacher's Aid Society v. Jacobs*, 32 S.W.2d 343 (Ky. 1930), wherein it was held that the fact that superannuated preachers were required to make small payments in order to become and remain members of a society that furnished aid to them, did not affect the exemption of the society's endowment fund as a public charity.

In *Camp Emoh Associates v. Inhabitants of Lymon*, 166 A. 59 (Me. 1933), it was held that the fact donations were made by parents of children to help defray the costs incurred by a camp did not eliminate the tax exempt status of the camp, because the camp supplied care, training, shelter, and food freely and without expectation of reward.

Our sister state of California held, in *Fredericka Home for the Aged v. San Diego County*, 221 P.2d 68 (Cal. 1950), under a statute which required the property to be "used exclusively for \* \* \* charitable purposes" that plaintiff qualified as a charitable institution, notwithstanding it charged an entry fee which amounted to 65 percent of the institution's income.

These cases, and a host of others which may be found in opinions of other states, announce the rule that payments made to the charitable fund by recipients of the charity do not deprive the charitable organization of tax exemption otherwise allowable.

The class of recipients has from time to time presented problems to high courts and text writers when dealing with recipients of charity. In 15 Am.Jur.2d, Charities, § 29, it is stated:

In setting up a charity or charitable trust, the ultimate beneficiaries are frequently persons yet unborn or whose precise identification, for other reasons, is practically impossible.

While the specific recipient may well be undetermined, the class of beneficiaries must not be enlarged or decreased after the charity is established. This rule is announced in 15 Am.Jur.2d, Charities, § 30:

The class to whose benefit a charitable trust is to be applied must be fixed by the instrument creating it, in order that the trust be valid and enforceable.

Once the class of beneficiaries has been established, all persons within that class are eligible to receive benefits. Additional consideration may not be demanded from some.

## CONCLUSION

It is conceded at this time that all areas of controversy which may arise may not be answered by the rules set forth in this opinion. It is hoped, however, that this opinion, together with the Attorney General's Opinion No. 59-61 of June 5, 1959, wherein the following questions were answered, will be sufficient to guide the commission in either granting or denying sales and use tax exemption.

Questions answered by that opinion were:

1. Are religious and charitable organizations excluded from the provisions of the Sales Tax Law relative to "retailers" on sales by them?
2. In the event that the foregoing question is answered in the affirmative, are said organizations entitled to refund of taxes paid by them:
  - (a) if not collected from their purchasers?
  - (b) if collected by such organizations from their purchasers, the persons who actually bore the economic burden of such exacted tax payment?

\* \* \* \* \*

5. Are sales by religious or charitable organizations of donated tangible personal property (e.g. cooked food, ice cream, cakes, etc.), or proceeds from admission charges to amateur shows, sponsored by or given under the auspices of religious or charitable organizations in order to raise funds for the fundamental purposes and objects of such organizations, exempt from payment of taxes under the Sales and Use Tax Law?

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-449 NRS 361.160 INTERPRETED; FREE PORT...

OPINION NO. 1967-449 NRS 361.160 Interpreted; Free Port Law—The shipment of personal property from outside the State of Nevada to a warehouse within this State for the purpose of repair and replacement of worn parts, with a final destination outside the State of Nevada, is that type of business operation contemplated by NRS 361.160, and is entitled to the tax exemption therein contained.

Carson City, October 17, 1967

Mr. Clark G. Russell, Director, State of Nevada, Department of Economic Development, Carson City, Nevada 89701

Dear Mr. Russell: A large nationwide manufacturing concern is interested in commencing operations in Nevada. The desired operation is described as a "Repair Exchange Service and Change-Over Program." It is estimated that 60 percent of the activities of the business will be warehousing and 40 percent repair and exchange service. The operation desired in Nevada would be as follows: distributors in other western states would obtain broken or worn parts that customers had returned or had replaced; these parts would be sent to the Nevada facility where they would be exchanged for new or rebuilt parts. The broken or worn parts would be disassembled, cleaned, repaired, assembled, and then returned to the distributor. An inventory of spare parts would be maintained in Nevada. None of the repaired items would remain within Nevada because the

business concern does not have a distributor in this State; approximately 55 to 60 employees are contemplated.

## QUESTION

Would the above-described operation come within the tax exemptions found in NRS 361.160?

## ANALYSIS

NRS 361.160, sometimes referred to as the Free Port Law, reads as follows:

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

(a) Which is moving in interstate commerce through or over the territory of the State of Nevada; or  
(b) Which was consigned to a warehouse, public or private, within the State of Nevada from outside the State of Nevada for storage in transit to a final destination outside the State of Nevada, whether specified when transportation begins or afterward.

Such property is deemed to have acquired no situs in Nevada for purposes of taxation. Such property shall not be deprived of exemption because while in the warehouse the property is assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled or repackaged, 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. (Italics added.)

If the business operation, as above outlined, is within the terms of the statute, it must come within the provisions of subsection (1) (b). To come within this subsection we must find, first, the property was "consigned to a warehouse \* \* \* from outside the State of Nevada \* \* \* to a final destination outside the State of Nevada \* \* \*" and, second, that the tax-exempt status of the property is not lost because of the repair work done on the same.

The first requirement is met since all of the property in question will be sent by and returned to "distributors," none of whom are located in Nevada. The second requirement is of more difficulty; however, we do feel it is sufficiently met. Clearly, the parts would be "disassembled" and then "assembled." This is within the terms of the statute. The fact that new parts may be added during the assembly stage does not alone render the property taxable, in the opinion of this office. This conclusion is based on that portion of the statute which reads: "The exemption granted shall be liberally construed to effect the purposes of NRS 361.160 to 361.185, inclusive."

## CONCLUSION

We conclude that shipment of personal property, from outside the State of Nevada to a warehouse within this State for the purpose of repair and replacement of worn parts with a final destination outside the State of Nevada, is that type of business operation contemplated by NRS 361.160 and is entitled to the tax exemptions therein contained.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-450 DETECTIVE LICENSING BOARD—A person...

OPINION NO. 1967-450 Detective Licensing Board—A person who advertises his business as one related to security is subject to licensing as provided by Chapter 496 of the 1967 Statutes. Dogs used in such business cannot be classed as guards.

Carson City, October 17, 1967

Mr. Don F. Brown, Chairman, Nevada Detective Licensing Board, Carson City, Nevada 89701

Dear Mr. Brown: You have requested this office to issue a formal opinion to the Detective Licensing Board as to whether dogs used in guard and security work can be defined as "guards" under the provisions of Section 24 of Chapter 496 of the 1967 Statutes.

Sec. 24 reads as follows:

"Private patrolman" means a person engaged in the business of employing and providing for other persons watchmen, guards, patrolmen or other individuals for the purpose of protecting persons or property or to prevent the theft, loss or concealment of property of any kind.

#### ANALYSIS

The purpose of Chapter 496 of the 1967 Statutes is to throw an arm of protection around the public by providing that those who assume the responsibility of protecting property shall be licensed (Sec. 5) after a suitable examination (Sec. 8).

There can be no doubt that a person engaged in security work should, for the reason set forth in the preceding paragraph, be licensed.

The type of advertising used in delineating the services to be rendered should be a guideline to the board in arriving at a determination as to whether a person engaged in business is operating a security service. It is only reasonable to conclude that where one advertises that he provides "24-hour security, men and dogs" or that he furnishes "safe and secure escort guards," he is advertising subject to licensing as set forth in Sec. 5 (2).

Animals are not such protectors of the public as contemplated by the Legislature, and therefore do not come within the definition of "guard" as set forth in Sec. 24.

#### CONCLUSION

It is therefore the opinion of this office that a person who advertises his business as one related to security is subject to licensing as provided by Chapter 496 of the 1967 Statutes, and that dogs in such business cannot be classed as "guards."

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-451 PERSONNEL DEPARTMENT; ANNUAL AND S...

OPINION NO. 1967-451 Personnel Department; Annual and Sick Leave—State employee who works in excess of 8 hours per day not entitled to more than 1 1/4 days per month annual leave nor to more than 1 1/4 days per month sick leave.

Carson City, October 17, 1967

Mr. James F. Wittenberg, State Personnel Administrator, State Personnel Division, Carson City, Nevada 89701



Dear Mr. Wittenberg: You have inquired as to whether a state employee who works more than an 8-hour-day shift is entitled to more than 1 1/4 days annual leave per month or more than 1 1/4 days per month sick leave.

#### ANALYSIS

NRS 284.350 (1) provides as follows:

Except as provided in subsection 2, all employees in the public service, whether in the classified or unclassified service, shall be entitled to annual leave with pay of 1 1/4 working days for each month of service, which may be cumulative from year to year not to exceed 30 working days. Any annual leave in excess of 30 working days shall be used prior to January 1 of the year following the year in which the annual leave in excess of 30 working days is accumulated or the amount of annual leave in excess of 30 working days shall be forfeited on such date. The personnel division may by regulation provide for additional annual leave for long-term employees, and for prorated annual leave for part-time employees.

NRS 284.355 (1) provides as follows:

Except as provided in subsections 2 and 3, all employees in the public service, whether in the classified or unclassified service, shall be entitled to sick and disability pay with 1 1/4 working days for each month of service, which may be cumulative from year to year not to exceed 90 working days. The personnel division may by regulation provide for additional sick and disability leave for long-term employees, and for prorated sick and disability leave for part-time employees.

If the law provided for annual leave or sick leave based on "days" instead of "months" an employee working more than 8 hours would be entitled to additional annual and/or sick leave, as the case might be. However, the Legislature restricted annual and sick leave to an exact figure per month.

To secure additional time credited to annual or sick leave, the Legislature would have to amend the act.

That the Legislature intended to restrict annual and sick leave is supported by statutes and regulations allowing overtime and compensatory time for those employees who work more than 8 hours (see NRS 281.100(4), Attorney General Opinion 67-418 dated June 9, 1967.)

#### CONCLUSION

It is therefore the opinion of this office that state employees who work more than 8 hours per day are not entitled to annual leave in excess of 1 1/4 days per month, nor to sick leave in excess of 1 1/4 days per month.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-452 IRRIGATION DISTRICT BOND COMMISSIO...

OPINION NO. 1967-452 Irrigation District Bond Commission—Provisions of Chapter 539 of NRS construed; held, said commission presently has no jurisdiction, authority, or power (nor is it required or under any statutory duty) to approve and certify the financial soundness or feasibility of a proposed irrigation district construction project, the legality of prior district proceedings had relative thereto, or the legality of a bank loan indebtedness to be incurred to fund any such district project.

Carson City, October 20, 1967

Mr. Preston E. Tidvall, Chairman, Irrigation District Bond Commission, Nye Building, 201 South Fall Street, Carson City, Nevada 89701

Dear Mr. Tidvall: You have requested the opinion and advice of this office on the question hereinafter stated, based upon the following:

#### STATEMENT OF FACTS

The Walker River Irrigation District seeks the approval of the Irrigation District Bond Commission for proposed incurrence of indebtedness, by way of a bank loan, in the amount of approximately \$120,000, such proceeds to be used for repair, correction, addition, and improvement of the spillway facilities at Bridgeport Reservoir, California, represented as being urgently necessary and required by the California Division of Safety of Dams, as a condition to further use of such reservoir at present levels on the part of said Walker River Irrigation District.

In such connection, there was submitted to the Irrigation District Bond Commission certified copies of (1) Resolution of the Board of Directors of the Walker River Irrigation District (dated March 15, 1967), for the holding of an election in the district on the question for proceeding with said spillway project; (2) official election ballot; (3) canvas of said election results showing 183 "Yes" and 38 "No" votes. Also, (4) the application for approval of plans and specifications in connection with the proposed spillway project; and (5) copy of a letter from the First National Bank of Nevada concerning possible grant of the loan in the amount estimated to be required for the proposed district project, however, in effect conditioned upon commission approval thereof as financially sound, and that such district indebtedness or obligation (in connection with grant of the involved bank loan) would be one legally incurred and, therefore, valid.

In an accompanying letter with said application to your commission, the district's attorney acknowledges that the district has no intention of issuing any bonds to fund the proposed district spillway project, and that said requested commission approval of any such district indebtedness, and of the proposed bank loan to fund said project, are not mandatory; however, he properly and fairly indicates that such commission approval, if given, " \* \* \* will signify the fact that the indebtedness is legal and will add stability to our private financing."

#### QUESTION

Based on the foregoing facts, is the Irrigation District Bond Commission authorized or empowered, and required, to approve the proposed district spillway project as financially sound and/or feasible, and to approve and certify as legal said district's incurrence of indebtedness and a bank loan in the approximate amount of \$120,000 therefor?

#### ANALYSIS

Representatives of the Irrigation District apparently place chief reliance on the provisions of NRS 539.480 for such requested commission approval of the proposed district project, and certification as to the legality of all proceedings heretofore had in relation thereto, as well as the proposed indebtedness and bank loan therefor.

As relevant thereto, said NRS 539.480, "Incurrence of indebtedness not in excess of \$30,000 when approved by irrigation district bond commission; issuance of warrants; levy, collection of assessments," provides as follows:

1. For the purpose of organization, or for any of the purposes of this chapter, the board of directors may, at any time with the approval of the irrigation district bond commission, incur an indebtedness not exceeding in the aggregate the sum of \$30,000, nor in any event exceeding \$1 per acre, and may cause warrants of the district to issue therefor, bearing interest at 6 percent per annum. The directors shall have the power to levy an assessment of not to exceed \$1 per acre on all lands in the district for the payment of such expenses. (Italics added.)

(NOTE—Chapter 364, 1967 Statutes of Nevada, has increased the authorized amount of indebtedness to “ \* \* \* not exceeding \* \* \* the aggregate \* \* \* sum of \$50,000 \* \* \*”)

Unfortunately, said statutory provisions provide no sufficient legal basis, support, or assistance for the district representatives' position. Our careful review of all of the provisions of Chapter 539 of NRS (generally applicable to irrigation districts) and, more specifically, of the provisions of NRS 539.637-539.665 (particularly applicable to the Irrigation District Bond Commission), has resulted in our concluding that, except as specifically and restrictively authorized and required, as and when bond issues are involved for the funding or refunding of irrigation district projects, the Irrigation District Bond Commission is without jurisdiction or authority to consider and/or approve and certify the legality of irrigation district projects, such as the one herein described.

In support of such conclusion, we submit the following specific grounds:

A. Preliminarily, it is presently too well established to admit question thereof, that boards and commissions, such as the Irrigation District Bond Commission, have only such authority and powers as have been expressly granted by the Legislature, or as may be necessarily incidental for the purpose of carrying out such (express) powers into effect.

B. NRS 539.263, relating to “Contract not to be let unless sufficient money in treasury or payable in district bonds,” provides as follows:

No contract of any kind shall be let by the board of directors unless there is sufficient money in the district treasury at the time of such contract is let to pay fully for the work or material so contracted for, or unless such contract is made payable in bonds of the district as provided for in NRS 539.570 to 539.577, inclusive. (*Italics added.*)

C. The Walker River Irrigation District admittedly held the election for determination of the question of whether or not to proceed with the described proposed spillway project prior to making of the present application for the Bond Commission's approval and certification thereof, inclusive of the involved indebtedness and proposed bank loan therefore. Analogously, and presumptively, such special election should have been called and held only after approval of the proposed improvement, or construction work, by the Irrigation District Bond Commission. (See NRS 539.433.)

D. NRS 539.477, relating to “Debt or liability in excess of express provisions void; incurrence forbidden,” which provides as follows:

The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this chapter. Any debt or liability incurred in excess of such express provisions shall be absolutely void. (*Italics added.*)

E. The proposed indebtedness (or bank loan) to be incurred for the involved district spillway project is stated to be in the approximate amount of \$120,000. Because of such fact, the Irrigation District Bond Commission is without jurisdiction, authority, or power, to approve such involved indebtedness or proposed bank loan, merely on the basis of the provisions of NRS 539.480 (as amended by Chapter 364, 1967 Statutes of Nevada) which restrictively limits any such authority or approval to a maximum of \$50,000, or \$1 per acre on all lands in the district, whichever is the lesser amount. (See Annotations to NRS 539.480;) also, (NRS 539.540-539.613, inclusive, relating to “Bonds for Purchase and Construction.”)

F. Confirmation of election results, bond or other funding proposed, and apportionment of benefits and involved levy of assessments for proposed funding, inclusive of the regularity and legality of all proceedings related to, or connected therewith, lies with the district courts, in the first instance, (see NRS 539.443, 539.467, 539.565, 539.567) and not at all with the Irrigation District Bond Commission.

We have also considered the provisions of NRS 539.640 and 539.660, additionally cited to us for consideration herein, as perhaps authorizing the requested commission approval and certification of the proposed indebtedness and legality of the involved bank loan. Again, it is our considered opinion that said references merely provide for the filing of a resolution by the district with the commission to establish the availability of district bonds as legal investments for trust funds, e.g. the funds of all insurance companies, banks, both commercial and savings, and trust companies. Upon the receipt of such a district resolution, the commission is thereupon required, “ \* \* \* without delay, (to) make or cause to be made an investigation of the

affairs of the district and report in writing upon such matters as it may deem essential \* \* \*," and particularly upon certain enumerated points therein, not material and, therefore, here omitted. (See NRS 539.643)

It is to be noted that Chapter 539 of NRS makes no provision for the exercise of any supervisory jurisdiction whatsoever over irrigation districts by the Irrigation District Bond Commission, except as bond funding or refunding may be involved; irrigation districts are not even required to file any reports with said commission. (See NRS 539.205, which provides for the filing of at least an annual report with the "state engineer," after approval of plans, "to show progress of the work of the district" and whether or not the formulated plan "is being successfully carried out, and whether or not in the opinion of the board the funds available will complete the proposed works.")

Also, Chapter 516, 1967 Statutes of Nevada, makes presently inapplicable to irrigation districts the provisions and requirements of the Local Government Budget Act, thus making such districts acting through their boards of directors, solely responsible for proper conduct of their affairs, as limited only by the courts, unless bond funding or refunding of district projects should be involved; then only is the Irrigation District Bond Commission (as previously noted) restrictively authorized to exercise any jurisdiction.

We further submit that the Irrigation District Bond Commission's proper jurisdiction, function, and power, respecting irrigation districts only, should generally correspond to those of General Obligation Bond Commissions, as set forth and provided in Chapter 515, 1967 Statutes of Nevada, namely:

In determining whether to approve or disapprove a proposal to issue bonds, the commission shall not undertake to determine whether the purpose for which it is proposed to issue such bonds is a public purpose or meets a public need. The commission shall consider, but is not limited to the following criteria:

1. The amount of debt outstanding on the part of the political subdivision proposing to issue the bonds.
2. The effect of the tax levy required for debt service on the proposed general obligation bonds upon the ability of the political subdivision proposing to issue the bonds and of other political subdivisions to raise revenue for operating purposes.
3. The anticipated need for other bond issues by the political subdivision proposing to issue the bonds and other political subdivisions whose tax-levying powers overlap, as shown by the county or regional master plan, if any, and by other available information.
4. The public need to be served by the proceeds of the proposed bond issue, as compared to other demands, both operational and capital, to be met from available and anticipated tax and other revenues.

Manifestly, were the Irrigation District Bond Commission to accede to the involved request for approval and certification as to fiscal soundness and legality of the indicated spillway project, it would be exercising jurisdiction and powers excessive of those embodied in the foregoing criteria. Even more important, however, any such approval and certification by said commission would definitely constitute the exercise of jurisdiction and powers which said commission does not have under presently applicable Nevada law and, therefore, would be entirely unauthorized, illegal, and void.

It should, however, be clearly noted that we here express no legal opinion whatsoever, either way, concerning the feasibility, financial soundness, legality of district proceedings heretofore had relative to the involved spillway project, or legality of the proposed bank loan indebtedness to fund such district project. This opinion and advise is strictly limited to the following.

## CONCLUSION

The Irrigation District Bond Commission, under presently applicable Nevada law, has no jurisdiction, authority, or power (nor is it required or under any statutory duty) to approve and certify the financial soundness or feasibility of a proposed irrigation district construction project, the legality of prior district proceedings had relative thereto, or the legality of a bank loan indebtedness to be incurred to fund any such district project, as requested by the application of the Walker River Irrigation District presently before said commission for decision.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John A. Porter, Deputy Attorney General

---

OPINION NO. 1967-453 NEVADA STATE PRISON; ELIGIBILITY F...

OPINION NO. 1967-453 Nevada State Prison; Eligibility For Parole—A convicted rapist must serve a minimum prison term of 5 years before becoming eligible for parole.

Carson City, October 26, 1967

Warden Carl G. Hocker, Nevada State Prison, P.O. Box 607, Carson City, Nevada 89701

#### STATEMENT OF FACTS

Dear Warden Hocker: A prisoner at the Nevada State Prison was sentenced to not less than 5 nor more than 6 years for the crime of rape.

#### QUESTION

Can a prisoner serving a 5 to 6-year sentence for the crime of rape become eligible for parole after serving one-third of this minimum sentence under NRS 213.210?

#### ANALYSIS

It is our opinion that a convicted rapist must serve his 5-year term before becoming eligible for parole.

The pertinent provision of NRS 200.360 provides:

1. Rape is the carnal knowledge of a female, forcibly and against her will, and a person duly convicted thereof shall be punished by imprisonment in the state prison for a term of not less than 5 years and which may extend to life; \* \* \*

NRS 213.120(4) provides that, with certain limitations, a person may be eligible for parole after serving one-third of his minimum sentence. One such limitation on the application of this section is:

\* \* \* other than a prisoner who has been sentenced for rape to a term of not less than 5 years which may be extended to life \* \* \*

This language is exactly that used in NRS 200.360. Thus it is clear the Legislature intended to remove a rapist from the benefits provided by NRS 213.120.

We find further support of this conclusion in the new criminal code. NRS 200.390, 1967 Statutes of Nevada, p. 470, Chapter 211, Section 55 (1) (b), provides the punishment for rape. It reads, in part, as follows:

(b) If no substantial bodily harm results:

(1) By imprisonment for life; or

(2) By imprisonment for a definite term of not less than 5 years.

Under either sentence eligibility for parole begins when a minimum of 5 years has been served.

The new legislation is most exact in stating what we believe to be the intention of NRS 200.360.

#### CONCLUSION

It is therefore the opinion of this office that a convicted rapist must serve a minimum of 5 years before becoming eligible for parole.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Peter I. Breen, Deputy Attorney General

---

OPINION NO. 1967-454 SCHOOL TRUSTEES—A member of a board...

OPINION NO. 1967-454 School Trustees—A member of a board of school trustees who owns and manages a gasoline station can sell products to a public agency possessing a credit card issued in pursuance of a contract between the State of Nevada and a company producing and delivering petroleum products, without contravening NRS 360.400.

Carson City, October 26, 1967

The Honorable James L. Wadsworth, District Attorney, Lincoln County, Pioche, Nevada 89043

Dear Mr. Wadsworth: You have set forth certain facts as follows: A school trustee in Lincoln County is the owner and manager of a service station selling Brand A gasoline. He is also the distributor of Brand A products in that area.

The State Purchasing Department has furnished to the school district a Brand A credit card.

The question you advance is "Can the school district purchase, through the Brand A credit card as bid by the State of Nevada, gasoline from a station owned and managed by a school trustee who is the distributor of, and sells, Brand A products?"

#### ANALYSIS

NRS 360.400 provides: No member of any board of trustees shall be financially interested in any contract made by the board of trustees of which he is a member.

The contract in this instance is not between the school trustees and the oil company but between the Nevada State Purchasing Department and the company. Therefore, the member of the board of school trustees is not estopped to sell gasoline to any person, company, agency, or political subdivision in possession of a Brand A credit card.

In the only Nevada case which touches on this problem a plaintiff trustee who, without prior understanding with a defendant contractor at the time a bid was awarded for school construction, and who had no pecuniary interest in the contract, was not estopped to afterward furnish labor and materials to defendant contractor. (Worrell v. Jurden, 36 Nev. 85, 132 P. 1158)

The present set of facts are completely different from those set forth in Attorney General's Opinion No. 57-257, dated April 24, 1957. In that instance the school trustees were a party to the contract for the delivery of petroleum products to the schools and this office properly held that a member of the board of school trustees who handled petroleum products could not be a party to the contract in view of NRS 360.400.

#### CONCLUSION

It is therefore the opinion of this office that a member of a board of school trustees who owns and manages a gasoline station can sell products to a public agency possessing a credit card issued in pursuance of a contract between the State of Nevada and a company producing and delivering petroleum products, without contravening NRS 360.400.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-455 GOVERNMENT IN THE STATE OF NEVADA ...

OPINION NO. 1967-455 Government in the state of Nevada may make payroll deductions for items not specifically mentioned in statutes; provided, however, that the employee(s) concerned shall first duly authorize such deduction(s) in writing; and provided further, that any such deduction(s) be so authorized in good faith and not to defraud creditors.

Carson City, November 2, 1967

Mr. James C. Lien, Assistant Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Lien: By your letter of October 20, 1967, you have posed questions to this office regarding payroll deductions for public officers for items not specifically enumerated by statute. Examples include credit union payments, professional dues, savings plans, and the like. By enclosure you have specifically inquired about payroll deductions for U.S. Treasury Bonds.

#### QUESTION

Can state and local government in the State of Nevada make payroll deductions for items not specifically enumerated in statutes?

#### ANALYSIS

A payroll deduction from the salary of a public officer or employee is, in legal effect, an assignment. The subject of such assignments by public officers or employees has caused the courts to disagree, from the standpoint of public policy. While there is authority to the contrary, it is generally held that public officers or employees may not make such assignments of wages or salary before they are earned. The reasoning behind the rule so announced is that such assignments may tend to impair the efficiency of public service by reducing incentive of the officer or employee. The foregoing rule applies, however, in the absence of statute. 6 Am.Jur.2d 236-7, Assignments § 52.

Legislation on this subject in the State of Nevada is less than distinct. Laws governing public officers and employees generally are found in Title 23 of Nevada Revised Statutes. Laws governing the office of the state controller are found in Chapter 221 of Nevada Revised Statutes. Laws relating to compensation, wages and hours generally appear in Chapter 608 of Nevada Revised Statutes. This entire body of legislation must be examined in detail to resolve the question here presented.

NRS 281.130, subsection 1, provides:

1. The fees and salaries of all persons holding office or positions of profit under the government of the State of Nevada, or under any county, township, city, town or school district within the state, shall be subject to attachment and execution for all debts and liabilities created or incurred by such officials or other persons. All assignments, sales, or transfers of such fees and salaries, previous to becoming due, unless made in good faith and not to defraud creditors, shall be void as against all such debts and liabilities.

By virtue of the last sentence in the foregoing subsection, all assignments, transfers or sales, and therefore any duly authorized payroll deduction, is valid so long as the same is made in good faith and not in fraud of creditors' rights.

The mention of specific instances in which payroll deductions for public officers or employees are authorized, raises the question of whether the Legislature intended, by their mention, to prohibit payroll deductions for any purpose not so mentioned. A review of those instances compels the conclusion that unspecified payroll deductions are not prohibited.

NRS 227.130 provides:

1. The state controller is authorized and directed to withhold from each claimant's pay the amounts specified in the revenue act of the United States as is now in force and such amounts as may hereafter be further specified by additional enactments of Congress, and transmit such amounts deducted to the Internal Revenue Service of the United States Department of the Treasury.

2. The state controller is authorized to provide for the purchase of United States Savings Bonds or similar United States obligations by salary or wage deduction for officers and employees of the state government who made written requests for such deductions and purchases. For the purpose of allowing any and all state officers and employees the opportunity of requesting salary or wage deductions for the purchase of United States Savings Bonds or similar United States obligations, the state controller shall provide forms authorizing the deductions and purchases and shall make them readily available to all state officers and employees.

Subsection 1 of this statute authorizes and directs deductions to be made for federal income tax. It is significant that this deduction is compelled by law to be made and is not dependent upon the authorization or consent of the employee. The remaining portion of the statute specifically allows deductions for purchases of United States Savings Bonds.

Other statutory mention of deductions occurs in connection with Chapter 286 of NRS, governing Public Employees' Retirement. Section 286.410 specifies the amount of each employee's contribution and directs that contributions be made through the medium of payroll deductions. Subsection 4 thereof provides:

4. From each payroll during the period of his membership, the employer shall deduct the amount of the member's contributions and transmit the deduction to the board at intervals designated by the board.

Again, it is significant that participation in the retirement program is compulsory; and that the foregoing subsection directs in mandatory language that the deduction be made without the necessity of the employee's consent or authorization.

Similar provisions are found in NRS 287.050-287.240 governing deductions for Social Security contributions. Here also the deductions are mandatory, not based on the consent of the employee. See NRS 287.170, 2. and 287.180, 3, (b).

NRS 287.041-287.049 implements the group insurance plan for state employees. NRS 287.046 authorizes deductions for premium payments of employees who wish to elect coverage under the plan. The obvious intent of the last-mentioned section is to provide an efficient means of funding the program. It states that employees who wish to participate shall contribute by means of authorizing a payroll deduction for that purpose. It reads as follows:

Any state or participating school district officer or employee who elects to participate in the state's group insurance program shall be entitled so to participate, and the department, agency, commission or school district which employs such officer or employee shall pay the state's share of the cost of the premiums of such group insurance from funds appropriated or authorized as provided in NRS 287.044. Employees who elect to participate in the state's group insurance program shall authorize deductions from their compensation for the payment of premiums on such insurance.

These scattered instances wherein payroll deductions are mentioned, do not amount to an attempt by the Legislature to enumerate purposes for which employees may wish to authorize deductions, thereby precluding and prohibiting all others. NRS 608.110 subsection 1 provides:

1. Nothing in this chapter shall be so construed as to preclude the withholding from the wages or compensation of any employee of any dues, rates or assessments becoming due to any hospital association or to any relief, savings or other department or association maintained by the employer or employees for the benefit of the employees, or poll tax, or other deductions authorized by written order of an employee.

At one time this chapter was intended to be confined to private employment rather than to include public employment. See NCL 2778. That restriction was expressly removed by the language of NRS 608.010, which reads:



As used in this chapter, "private employment" means all employment other than employment under the direction, management, supervision and control of this state or any county, city or town therein, or any office or department thereof.

The scope and operation of NRS 608.110 is not limited to private employment as are some other parts of Chapter 608. Therefore, this section specifically authorizes the use of whatever deductions an employee, private or public, shall authorize in writing, subject only to good faith as delineated in NRS 281.130, 1. This construction is in harmony with the provisions contained in § 6025.3, State Administrative Procedures.

## CONCLUSION

It is the opinion of this office that government in the State of Nevada may make payroll deductions for items not specifically mentioned in statutes; provided, however, that the employee(s) concerned shall first duly authorize such deduction(s) in writing; and provided further, that any such deduction(s) be so authorized on good faith and not to defraud creditors.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

---

OPINION NO. 1967-456 STATE BOARD OF ARCHITECTURE; SALES...

OPINION NO. 1967-456 State Board of Architecture; Sales Tax—The Nevada State Board of Architecture is a state agency or instrumentality within the meaning of NRS 372.325(3), and as such is exempt from the imposition of sales tax on purchases made by it. Modified by AGO 67-464, dated 11-27-67.

Carson City, November 3, 1967

Mr. Raymond Hellmann Secretary-Treasurer, Nevada State Board of Architecture, 137 Vassar Street, Reno, Nevada 89502

Dear Mr. Hellmann: We acknowledge receipt of your letter of October 27, 1967, requesting an opinion from this office based on the following facts.

The Nevada State Board of Architecture has in the past purchased products from a business in the State of Nevada. For some time, the board has claimed to be exempt from the imposition of sales tax on products sold to it, upon the grounds that it is a state agency. The Nevada Tax Commission has taken exception to this claim of exemption and has now sought to impose sales taxes and delinquencies upon the business selling or having sold its products to the Nevada State Board of Architecture.

## QUESTION

Is the Nevada State Board of Architecture exempt from the payment of sales tax, as a state agency or instrumentality?

## ANALYSIS

The exemptions from the computation of the amount of sales tax upon the gross receipts from the sale of tangible personal property are specified in NRS 372.325. Subsection 3 of that section specifies "the

state of Nevada, its unincorporated agencies and instrumentalities." It follows that if the Nevada State Board of Architecture is such an agency or instrumentality, its claim of exemption is valid.

The Nevada State Board of Architecture is a creature of statute and is covered by the provisions of Chapter 623, Nevada Revised Statutes. NRS 623.050, subsections 1 and 2, provide:

1. There is hereby created the state board of architecture of the State of Nevada, in which shall be vested the administration of the provisions of this chapter.

2. The board shall consist of 5 members who shall be appointed by the governor, and who shall each hold office for a term of 4 years.

The purpose of this chapter, and therefore the function of the Nevada State Board of Architecture, is set forth in NRS 623.010 as the following:

\* \* \* to safeguard life, health and property, and to promote the public welfare.

This is accomplished by procedures which are designed to insure that those who affect the public interest and safety by the practice of architecture are fully qualified.

The provisions of Chapter 623 of Nevada Revised Statutes are specifically referred to in NRS 281.235, which governs the participation by public officers and employees in business transactions with the state or its agencies, institutions, departments, political subdivisions, and the like. It is doubtful that NRS 281.235 would so refer to Chapter 623, Nevada Revised Statutes, unless the Legislature intended and understood the Nevada State Board of Architecture to be a state agency and its members to be public officers and employees.

In the light of the foregoing statutes creating the board and specifying its functions, we conclude that the question posed must be answered in the affirmative.

Nothing expressed in this opinion shall be construed to infer that sales tax may not be imposed upon a retailer who sells tangible personal property to an exempt agency. See NRS 372.105. The fact that such retailer is unable to collect sales tax so imposed from a customer who is exempt, does not mean that such retailer may not be liable for the payment of sales tax. NRS 372.110.

## CONCLUSION

The Nevada State Board of Architecture is a state agency or instrumentality within the meaning of NRS 372.325(3), and as such is exempt from the imposition of sales tax on purchases made by it.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

---

OPINION NO. 1967-457 PRE-NEED BURIAL CONTRACTS—Provisio...

OPINION NO. 1967-457 Pre-Need Burial Contracts—Provisions of Chapter 689 of NRS construed; held, definition of "burial contract" therein deemed to include and to be applicable to a specific contract of such nature, presently being publicly offered and sold within the State of Nevada to residents therein; hence Nevada corporation so engaged is subject to licensing and other regulatory requirements therein, as well as those contained in Regulation No. 30 thereunder.

Carson City, November 9, 1967

Mr. Louis T. Mastos, Commissioner of Insurance, Department of Commerce, State of Nevada, Carson City, Nevada 89701

Dear Mr. Mastos: Reference is made to your letter of October 19, 1967, requesting our legal opinion and advise respecting your licensing and other jurisdictional and regulatory powers over a Nevada corporation's contracts for the sale or furnishing of burial services and merchandise, together with a burial lot, when said contracts are made in the State of Nevada, and with residents therein.

## STATEMENT OF FACTS

Review of the considerable data submitted with your inquiry sufficiently establishes a multi-corporation and rather complex operation or business, involving a substantial sum of money, in such pre-need burial services and merchandise contracts, requiring some preliminary analysis and clarification for proper appreciation of the nature and scope of the problem underlying your present inquiry.

Directly or proximately involved in said pre-need contracts are (1) Memorial Guardian Plans, Inc., (licensed pursuant to Chapter 689 of NRS and, for convenience, hereinafter referred to as "Burial Society"), and (2) Memory Gardens of Las Vegas, Inc., (unlicensed under said Chapter 689 of NRS and, for convenience, hereinafter referred to as "Cemetery Corporation"). The officers of both these Nevada corporations (as shown by the records on file in the office of the Secretary of State, Nevada) are the same; presumptively, the principals, or stockholders, are also the same persons.

A holding corporation (3) Guardian Consultants and Management, Inc., (also a Nevada corporation), has the same officers as have the two above-named subsidiary corporations, but apparently is not limited to the same, or the same number of principals, or stockholders. Said holding corporation is reliably presumed to own at least all the stock of Memorial Guardian Plans, Inc., (the Burial Society). Though apparently presently inactive (because it did not file the required annual list of officers for the current period July 1, 1967 to July 1, 1968), there also seems to have been involved another Nevada holding corporation, namely (4) Management and Sales Services, Inc., which owned, and perhaps still owns, a controlling interest in Guardian Consultants and Management, Inc., the above-mentioned other holding corporation. While the purpose, function, or need of said holding corporations in the business operations, or pre-need burial contract plan or program of the Burial Society and the Cemetery Corporation are certainly open to speculation and questions, we shall nevertheless herein mainly concern ourselves with the roles and activities of said Burial Society and the Cemetery Corporation, the related two subsidiary corporations.

It is additionally necessary to indicate that Bunker Brothers Mortuary, Inc., (also a Nevada corporation) is involved herein; both on the basis of a direct contract with the Burial Society, as well as the specifically designated mortician in the contracts sold by Burial Society to "Memorial Purchasers," and for fixed or agreed fees or charges, said Bunker Brothers has obligated itself to perform or furnish certain agreed burial merchandise and services in accordance with the terms of said contracts.

The "Memorial Services Agreement" between the (licensed) Burial Society and "Memorial Purchasers" (as relevant herein) provides that: in consideration of payments as fixed, Bunker Brothers Mortuary (or its successors or assigns) will conduct a complete funeral and furnish a casket of the quality described (regardless of future price increases) and will provide for other articles of professional service and facilities as described, for the final rites and interment, entombment or cremation of the "Memorial Purchaser," but expressly excludes "outside vault, container, or cemetery lot;" installment payments may be made therefor on a monthly, quarterly, semi-annual, or annual basis; after first deduction of a service fee (not to exceed 25 percent of the contract price), the Burial Society is required to pay a bank or trust company, as trustee, all sums paid by the "Memorial Purchaser" in excess of such service fee, until the full contract price is paid, such sums to be held in trust; all such trust deposits shall be held, invested and distributed in accordance with the trust agreement entered into between the Burial Society and the selected bank or trust company, designated as trustee, with such trust agreement being made available for inspection by the "Memorial Purchaser" either at the office of the Burial Society or the trustee bank or company; a money-back arrangement (if the death of the "Memorial Purchaser" occurs outside the general Las Vegas area, and the Bunker Brothers' services are not requested or utilized) whereby the accumulated trust deposits or funds are to be applied to like services as performed by a mortuary elsewhere, or refunded to the legal representative of the "Memorial Purchaser;" in the event of the death of the "Memorial Purchaser" before full payment of the contract price, payment or agreement for payment of the balance due on the contract price before funeral services will be provided; while not in default under the agreement, the "Memorial Purchaser," on 15 days' notice, may withdraw the amount of his accumulated trust deposits, or installment payments, by written

request to Burial Society; if "Memorial Purchaser" has defaulted in payments and has failed to pay the full contract price, all parties are to be relieved of all liabilities and obligations; however, upon request, Burial Society will issue a non-transferable credit memo for the amount of the accumulated trust deposits or funds to be allowed as a credit, either by Bunker Brothers Mortuary against the costs of its funeral arrangements for the defaulting "Memorial Purchaser" at the time of his death, of a quality equal to that provided in the agreement, or applied upon a new memorial agreement. (A number of other included provisions, not material hereto, are here omitted.)

Related to the foregoing contract provisions and relevant herein, a direct contract between Burial Society and Bunker Brothers Mortuary (among other matters) provides that Burial Society shall pay or cause to be paid to Bunker Brothers the following: (1) for each service in respect of a fully-paid agreement, three-fourths of the contract price (or, if a credit memo is involved and honored by Bunker) an amount equal to the balance of the accumulated deposit within 5 days after proof of death; (2) annually, or as convenient, three-fourths of the net income derived from the permanent trust fund established by Burial Society to receive the moneys paid under the agreements and deposited in trust; (3) in the event of the death of an agreement purchaser for whom no credit or other insurance policy is in effect at his death providing for payment of the balance due under the agreement, and Bunker Brothers conducts the funeral and furnishes the services required under the agreement, Burial Society shall pay to Bunker Brothers all funds collected from decedent or on his account, in excess of \$100. Said contract further provides that Bunker Brothers Mortuary may terminate the same in the event that Burial Society shall fail to sell less than 250 agreements in any year of the first 2 years of the contract, or less than 300 such agreements in any year thereafter.

We next consider the contracts made by the (unlicensed) Cemetery Corporation. These contracts (as relevant hereto) provide that: the company agrees to sell and the purchasers agree to buy, for interment purposes only, described burial space(s) and associated articles and services in Mountain View Gardens of Memory, and purchasers agree to pay the amount therein fixed for each space, article, or service; enumerated as available merchandise or services are concrete vault, urn, markers, vase, setting, interment, and recording, cremation service, burial lot, mausoleum or ground crypts or niches, IBM set-up charge, endowment care trust fund, insurance charge (a monthly payment at a flat rate, disregarding the reducing balance), and service charge. Said contracts further provide for monthly installment payments of the contract price, payment of interest at the rate of 1/2 percent per month on all unpaid balances until paid; first application of payments shall be to interest due, then on the purchase price of property purchased, thereafter to the endowment care trust fund, and finally to the merchandise and services contracted for; and if (for specified reasons) it is unable to make performance, the company is to refund to purchasers all moneys paid under the contracts.

Finally, as regards such (unlicensed) Cemetery Corporation Contracts, it appears that for some past period, as well as presently, and at the suggestion or instance of sales personnel of either or both Burial Society and/or Cemetery Corporation (related subsidiary corporations under a single or common direction and control), purchasers of the (licensed) Burial Society's pre-need contracts have been, and presently are being, influenced and persuaded to withdraw funds paid by them on said contracts and held in trust, for purchase of the (unlicensed) Cemetery Corporation contracts, which do not provide for trust deposit of such funds, to guarantee or assure future delivery of merchandise or performance of services, (with the possible exception of nominal allotments to the Endowment Care Trust Fund,) at the time of the death of such purchasers, as therein contractually agreed.

## QUESTIONS

A. Does the (unlicensed) Cemetery Corporation's present contract come within the purview of the definition and regulatory provisions of Chapter 689 of NRS?

B. Is said Cemetery Corporation (in the circumstances herein described) subject to the jurisdiction of the Nevada Insurance Division for licensing and other regulatory requirements of Chapter 689 of NRS, and Regulation No. 30, adopted thereunder?

## ANSWERS

To both questions "A" and "B": Yes.

## ANALYSIS

As herein relevant, Chapter 689 of NRS provides as follows:

NRS 689.010 Scope of Chapter. This chapter shall apply to any person, firm, corporation, society or association of individuals engaged in the business of providing burial benefit or award for the payment, whole or in part, of funeral, burial or other expenses relating to the deceased members, certificate holders or subscribers by their levying of assessments or by the charging of a fee or premium. (Italics supplied.)

NRS 689.020 "Burial contract," "burial certificate" defined.

1. Within the meaning of this chapter, a "burial contract" or "burial certificate" is an instrument in writing whereby any person, firm, corporation or company, in consideration of the payment of a specified sum of money, or any other valuable consideration, promises or agrees to embalm or inter or otherwise dispose of, or procure the embalment, or interment, or other disposal of the remains of any person who is living at the time of the execution of such instrument in writing. (Italics supplied.)

NRS 689.030 License: Issuance by commissioner; expiration; limitations on issuance, renewal.

1. No person, firm, corporation or company shall transact the business of issuing burial contracts or burial certificates in this state without procuring a license to do so from the commissioner.

\* \* \* \* \*

NRS 689.040 Issuance of burial contracts, burial certificates governed by life insurance laws.

All of the provisions of the laws of the State of Nevada which pertain to or govern life insurance are hereby made applicable to and the same shall govern the issuance of burial contracts or burial certificates.

Nevada Insurance Department Regulation No. 30 (dated December 2, 1963) provides:

1. Issuers of burial contracts or burial certificates shall make application for a license therefor on forms provided by the Insurance Commissioner, and every such burial contract or burial certificate shall have the prior approval of the Insurance Commissioner before issuance.

2. Pay a license fee of \$10 per year, or fraction thereof, as per NRS 686.020.

3. Submit with the first and each annual license application, an annual financial statement on forms prepared and issued by the Insurance Commissioner.

4. Pay a filing fee of \$10 for such Annual Financial Statement.

5. Prior to being licensed, each licensee must establish and thereafter maintain a trust account in a licensed bank or other federally insured depository within this State in which all sums paid by a memorial contract purchaser, in excess of the service charge, shall be deposited; and a copy of such trust agreement must be filed with, and be approved by the Insurance Commissioners.

6. Burial contracts or burial certificates shall not provide for assumption of contingent liability by the licensee under which, in the event of the death of the purchaser prior to the payment in full thereof, the face amount of the contract will nevertheless be paid the person furnishing the services or burial; however, such provision does not preclude the burial society of the purchaser, from providing credit life insurance for the express purpose of completing the contract in case of death of the purchaser prior to payment.

It has been submitted and argued on behalf of the involved (unlicensed) Cemetery Corporation that the contracts sold by it (as hereinabove described) do not fall within the cited statutory definition of a "burial contract" and, therefore, that said Cemetery Corporation is not subject to the jurisdiction, nor the licensing or other regulatory requirements of Chapter 689 of NRS, and Regulation No. 30 thereunder. No challenge has been made to the applicability of the provisions of Chapter 689 of NRS and Regulation No. 30 to the (licensed) Burial Society's contacts, also hereinabove described.

The serious actual and potential evils of "burial contracts" have been the subject of much discussion, Congressional hearings, and many written criticisms. Among some of the written material on the subject are: the June and July, 1964 issues of "The Director," a publication of the National Funeral Directors Association; "Facts Every Family Should Know About Funerals and Interments" and "The Pre-arrangement and Pre-financing of Funerals," issued by the Association of Better Business Bureaus; and a U.S. Senate Report (dated January 31, 1965) entitled "Frauds And Deceptions Affecting the Elderly" (Investigation, Findings And

Recommendations: 1964, reprint of Part 4 "Pre-need Burial Service"). Also available are a number of adjudicated court cases and decisions, involving constitutional and other legal questions relative to such contracts. Rulings or decisions in such cases, reviewed for purposes of this opinion, appear to be not only sufficient, but also conclusively determinative of the matter and questions here under consideration.

It will serve no useful present purpose to make a detailed or comprehensive analysis of all, or the many and various legal considerations involved or generally connected with pre-need burial contracts. In the interest of some required brevity with an obviously complex problem such as this, the basic factors and considerations, or legal principles, for determination of the submitted specific questions and our opinion and advice thereon, may be summarized as follows:

1. "Enactment of statutes having for their object the prevention of fraud and deceit is within the police power of the state; and such power may be exercised to protect the ignorant and rash, as well as the intelligent and prudent, from being imposed on." (State v. Memorial Gardens Devel. Corp., 101 SE2d 425, 143 W.Va. 182, 68 ALR2d 1233, dissenting opinion, at page 1246, citing 16 CJS Constitutional Law, Sec. 187.)

Per State ex rel. Fishback v. Globe Casket & Undertaking Co., 82 Wash. 124, 143 P. 878, 879, LRA 1915B, 976 (cited in the above W. Virginia case): "\* \* \* some of the potential evils of just such a contract as here considered were pointed out in this language: 'Again, the contract is not one that the courts will strain the laws to uphold. It is freighted with the greatest possibilities for fraud. Since the corporation was organized under the general incorporation laws, it could not enter upon its business when its capital stock was all subscribed. It is not required to have or keep any paid-up capital. Its duration is limited to 50 years. The officers of the corporation may handle and dispose of the funds received in payment of the certificates in any manner they please. It is certain that many of these certificates will not be ripe for redemption for a number of years, and it is reasonably certain that some of them will survive the life of the corporation itself. If, therefore, the company were permitted to continue the business, and all or any considerable proportion of these certificates were ever redeemed it will be a consummation unique in human experience.'"

2. Equally applicable to the described contract of the (unlicensed) Cemetery Corporation herein, the dissenting opinion in the above-cited West Virginia case (reflective of the minority view even when decided, and subsequently legislatively over-ruled), 68 ALR2d 1233, at page 1248, et seq., further states as follows:

"The majority concedes, as it must, Queensbury v. Estep, W. Va., 95 SE2d 832, that the undertaking business, as such, falls squarely within the class of businesses which may be regulated by the Legislature by virtue of the police power, yet it undertakes to separate the business of defendant from that phase of the undertaking business which may be regulated. On one side of the supposed imaginary line it places the casket, but the vault wherein the casket rests is on the other side. On one side of such supposed line is the act of embalming, while the opening and closing of the grave and the actual lowering of the body to its final resting place are on the other side. Can there possibly be any such artificial separation of such phases of such a business? At least, since the age of the Homo Neanderthalensis, ethnologists inform us, men have endeavored to dispose of human bodies with respect, honor, and ceremony. That ceremony in this State has almost universally included the casket, the vault, the grave, and the lowering of the body to its final resting place. I can conceive of no possible imaginary line which separates a phase of that ceremony into a business not reachable by the police power of the State. To demonstrate almost universal concern and interest as to such matters, touching the general welfare of the people, we need only look from Arlington to the family cemetery at almost every front door. Yet the court holds, in effect, that that which is of universal interest and concern is no concern of the police power of the State.

"The majority concedes that 'such subjects as insurance or related risk businesses' fall squarely within the reaches of the police power. Is not the contract under consideration, in fact, a form of insurance or related risk? All authorities which I have been able to find, and none is cited to the contrary, so hold. In Renschler v. State, 90 Ohio St. 363, 107 NE 758, LRA 1915D, 501, Ann.Cas. 1916C, 1014, a contract to the same effect as the contract here involved, insofar as can be determined from the opinion, was before the court. In the opinion it was stated: '\* \* \* By all the tests to which the contract may be subjected, it unerringly leads one to the conclusion that the intention of the parties was on the one hand to receive and on the other hand to provide a fund to pay the burial expenses of the insured.'

" 'The contract being naked insurance and nothing else, it is subject to regulation by the insurance department. (Citing cases and text material).' In addition to the authorities cited in that opinion, see Falkner v. Memorial Gardens Association, Tex.Civ.App., 298 SW2d 934; State v. National Co-Operative Burial Association of Galena, 79 Kan. 28, 98 P. 1134; Oklahoma Southwestern Burial Association of Ardmore v.

State, 135 Okl. 151, 274 P. 642, 68 ALR 704; Annotation, 68 ALR 1525; Michie's West Virginia Code 1955, 33-1-3a.

"As pointed out in the majority opinion, the case of *Falkner v. Memorial Gardens Association*, Tex.Civ.App., 298 SW2d 934, involving the precise questions decided in the instant case, holds directly opposite to that of the majority herein. The conclusion reached in the *Falkner* case are substantially supported by other cases. None is cited as holding the contrary, and I find none. (Citing a number of cases) Apparently, every pertinent question posed in the instant case was answered effectively by the reasoning in the *Falkner* case, contrary to the answers given in the instant case. In the opinion of the *Falkner* case it is stated (228 SW2d 941): 'Clearly the Act applies alike to all individuals and corporations desiring to sell prearranged or prepaid funeral services or funeral merchandise to be delivered at an undetermined future time dependent upon the death of the contracting party; it is an actual classification by the Legislature and it is made to apply to all persons and corporations in the class. 9 Tex. Jur. p. 555, Sec. 119. The Act does not prohibit the conduct of the business but merely regulates it. This the Legislature has the authority to do. \* \* \*' In *Prata Undertaking Company v. State Board of Embalming & Funeral Directing*, 55 RI 454, 182 A 808, 810, 104 ALR 389, after a discussion of the types of businesses which may be regulated by the police power, the Court stated: '\* \* \* The undertaking business is an enterprise of this type, and the safeguarding of the public in relation to its health, safety, morals, comfort, and general welfare is the primary object sought by and is the basis of such legislation (cases cited). It is of importance to all that such a business be conducted properly, and only by those who are qualified to carry out its responsibilities. \* \* \*'."

"\* \* \* In considering the question, it must not be overlooked that under the contract defendant is not required to make any expenditure whatever until sometime after the 'request' for delivery of the merchandise or performance of the service contracted for, and not even then unless the 'full sum' contracted to be paid has actually been received by it. In addition, the defendant collects a 'service charge' over and above the sum contracted to be paid and, by the terms of the contract, may 'use for the best interests of the company, or its nominees,' the income from the trust fund. In no other business have I been able to observe a practice whereby prospective purchasers are required to furnish or advance capital funds necessary for the operation of a business. The contract involved actually provides a 'service charge' to be paid by the purchaser. Does that not necessarily lead the purchaser to believe that no other deduction is intended? \* \* \* The most complete and conclusive answer to the question (ed., inclusion of a provision for payment of an additional charge to enable the defendant company in that case to 'remain in business'), however, is the well known fact that undertakers now, and always have, successfully operated such businesses, furnishing all such merchandise and services, and more, without payment therefor, before delivery of the merchandise or the furnishing of the services. Assuming, however, that the defendant is correct in its contention (ed., inability to remain in business if refund of payments made were required), must the general welfare of the people of the State be abrogated, and the right to exercise the police power denied the Legislature for the purpose of enabling an individual to remain in business? Must the police power of the State depend on such uncertainties, or should the pre-eminent excellence thereof be deemed more staid? Does it not clearly appear that the contention of necessity for immediate deductions from the trust moneys contracted to be paid to the defendant is for the purpose only of pyramiding profits to the heights hoped for, not merely for the purpose of enabling defendant to remain in business?" (Italics supplied.)

Note to foregoing excerpt: The conclusion reached by the majority of the court in the above-cited West Virginia case (reflective of the minority view even at the time it was decided) has since been abrogated and rendered inapplicable by subsequent legislative amendment of the law construed by the court in that case. (See 1965 Cumulative Supp. To W. Va. Code of 1961 (Michie) Sec. 4678 (21) et seq., (47-14 et seq.)) The majority view as to presently applicable law is reflected in the strong and better-reasoned dissenting opinion in said West Virginia case, excerpted at some length above. In a number of decisions rendered subsequent to that in the West Virginia case, a majority of the courts in other states have expressly rejected the result and decision reached by the majority, in favor of the views and conclusions expressed in the dissenting opinion therein, or else, have rendered their decisions in accord with the reasoning and conclusions in the (Texas) *Falk* case, *supra*, approvingly cited in the foregoing excerpt from the dissenting opinion in the West Virginia case, *supra*.

In addition to the cases cited in said excerpted dissenting opinion from *Memorial Gardens Devel. Corp.* case (*supra*), and the (Texas) *Falk* case (*supra*), see: *Reserve Vault Corporation v. Jones* (Ark.) 356 SW2d 225; *Messerli v. Monarch Memory Gardens Inc.*, (Idaho) 397 P.2d 34; *Utah Funeral Directors & Embalmers v. Memorial Gardens of the Valley, Inc.*, 17 Utah 2d 227, 408 P.2d 190; *Memorial Gardens*

Assn., Inc. v. Smith, 16 Ill.2d 116, 156 NE2d 587; Anno: Burial Services—Pre-Need Contracts, 68 ALR2d 1251 et seq. and ALR Later Case Service, to name the most recent, or latest, of the adjudicated cases on the subject.

\* \* \* \* \*

At this point, and with reference to the specific questions presently under consideration:  
Black's Law Dictionary (4th Ed.) defines "Burial" as follows:

"Act of burying a deceased person, sepulture, interment, act of depositing a dead body in the earth, in a tomb or vault, or in the water; the act of interring the human dead." (Citing Brady v. Presnell, 204 N.C. 659, 169 S.E. 278, 280 and Lay v. State, 12 Ind. App. 362, 39 N.E. 768)

Burial Insurance is therein defined as follows:

A contract based on legal consideration whereby obligor undertakes to furnish obligee or one of the latter's relatives a death burial reasonably worth fixed sum. (Citing Sisson v. Prata Undertaking Co., 49 RI 132, 141 A 76.)

See also, Appleman, "Insurance Law And Practice," generally.

The provisions of NRS 689.010 and 689.020 herein-cited (especially as emphasized), in our considered opinion, are sufficiently broad and definite to include and apply to the (unlicensed) Cemetery Corporation's contract (herein described), as well as to subject said Cemetery Corporation to the licensing and other regulatory requirements of said Chapter 689 of NRS and Regulation No. 30 thereunder. We base such opinion and conclusion on the same ground as stated in the quoted excerpts from the dissenting opinion in the West Virginia case (supra): "I can conceive of no possible imaginary line which separates a phase of that (ed., funeral) ceremony into a business not reachable by the police power of the State." Can there be any reasonable doubt or question that the preparation or embalming of a deceased human body; its placement in a casket; the furnishing of flowers, music, religious services; the funeral procession, the placement in a vault or crypt, or lowering thereof into a grave; or (if cremation is involved) the providing of an urn for the ashes, involve both merchandise and services inseparably essential to the proper "burial," "interment," "or other disposal" of said deceased human body to its final (earthly) resting place?

It is our considered conclusion that such was the Nevada Legislature's view of the matter, and its reasonable intent and object in enacting Chapter 689 of NRS, and the answer to our foregoing question should, and must, be definitely in the negative.

We want further to note that the fact pattern here-involved has far-reaching and very serious implications to purchasers of both (licensed) Burial Society's and (unlicensed) Cemetery Corporation's pre-need burial contracts.

We have already indicated that these two subsidiary corporations are owned, controlled, managed, and directed by the same officers, directors, and stockholders, or principals. We have also further indicated that personnel of either or both said related corporations are influencing or persuading purchasers of the (licensed) Burial Society's pre-need contracts to withdraw the accumulated payments already made by them, and presently held in trust, for the purpose of purchasing the contracts of the (unlicensed) Cemetery Corporation—with no provision or requirement whatsoever for the deposit of such purchase moneys in any other corresponding trust fund. Also, said Cemetery Corporation contracts impose no restriction or limitation of the use of any part or even all such moneys received by the said Cemetery Corporation, for any purpose whatsoever, with the possible exception of the allotment of nominal amounts therefrom to the Endowment Care Trust Fund. (Statement of Facts.)

Now, it is true that the purchasers of the (unlicensed) Cemetery Corporation's contracts are reported to be given credit memos for received moneys, or withdrawn trust funds, theretofore on deposit in connection with their purchased contracts from the (licensed) Burial Society. However, as already noted in the within Statement of Facts, Bunker Brothers Mortuary (designated to furnish or provide burial merchandise and services in said pre-need contracts) has apparently neither authorized nor given its consent to the withdrawal of deposited trust funds for the purpose of purchasing the (unlicensed) Cemetery Corporation's pre-need contracts.

In short, as third party beneficiary under the (licensed) Burial Society's pre-need contracts, as well as under the provisions of its direct contract with said Burial Society, Bunker Brothers Mortuary may properly



and legally refuse to honor (Cemetery Corporation's) said credit memos, both because of default in required, scheduled payments on the part of such purchasers of the Burial Society contracts, and/or failure or breach on the part of said Burial Society to invest and administer said accumulated trust funds for the principal and ultimate benefit of Bunker Brothers Mortuary, as contractually agreed. (Statement of Facts.)

From correspondence made available to us in connection herewith, such appears to be the precise legal position taken, or presently intended to be taken, by Bunker Brothers Mortuary in all instances of withdrawal of trust funds by purchasers of the (licensed) Burial Society's pre-need contracts, and application of such withdrawn trust funds to the purchase of the (unlicensed) Cemetery Corporation's pre-need burial contracts.

If Bunker Brothers Mortuary adheres to such present view and position (or assessment of its legal rights and obligations in such instances) then it must follow that all such persons (by withdrawal of their credited Burial Society trust funds and purchase therewith of the Cemetery Corporation's pre-need burial contracts) have probably deprived themselves of, or lost, the purchased pre-need burial merchandise and services which Bunker Brothers Mortuary was expected to provide and furnish them upon death, under the (licensed) Burial Society's contracts. Additionally, (since not required to be held in trust by said unlicensed Cemetery Corporation), such persons no longer have even a present guarantee or assurance that the moneys paid by them for purchase of the Cemetery Corporation's pre-need burial contracts will, in fact, either be used for their intended purpose and benefit only, or that such paid contract purchase moneys will even (or ever) be available at the time of their death for their intended purpose or benefit—when performance by the (unlicensed) Cemetery Corporation will alone be due and, therefor, be demandable as a legal right.

Parenthetically (and further emphasizing the scope and seriousness of the problem), the following possibilities (probabilities) and considerations may properly be noted—herein merely posed as additional questions:

1. Will the (unlicensed) Cemetery Corporation even be in existence at the time when, under the terms of its present contract, it is legally required to make performance and render or provide burial merchandise and services to deceased purchasers of its contracts?

2. Even if then in existence, will said Cemetery Corporation be financially and otherwise able to make such performance in discharge of its legal obligations under said contracts; or, in the alternative, will it be financially able to make refund (inclusive of legal interest thereon) of moneys previously received by it thereunder, to the heirs or legal representatives of the deceased purchaser of its contracts?

3. On the other hand, and equally important, will the purchasers of the (unlicensed) Cemetery Corporation's present pre-need burial contracts, at the time of their death, still be resident at their present addresses, or in the same general area, or even within the State of Nevada, so that the contractually-purchased burial merchandise and services can conveniently be then utilized, assuming such to be available and forth-coming from the (unlicensed) Cemetery Corporation?

A number of other considerations and possible questions suggest themselves in connection with various aspects of pre-need burial contracts generally. However, the foregoing (certainly partially indicative of the serious nature and scope of the problems involved) should suffice to justify the need for state regulation in the field, which is the immediate purpose of our legal opinion and advice herein.

It is our understanding that a "cease and desist" order has heretofore been issued to Memory Gardens of Las Vegas, Inc. Such order is certainly proper on a preliminary basis. It is hoped that it may suffice, and that compliance will be made therewith. If not, then it is our considered advice that, to the extent necessary, further remedial and corrective action is not only justified but warranted on your part, in the public interest, for proper resolution of the involved problem.

## CONCLUSION

The present contents and provisions of the submitted contract, represented to us as being publicly offered and sold by the Memory Gardens of Las Vegas, Inc., (herein referred to as Cemetery Corporation) within the State of Nevada and to residents therein, are deemed to fall within the definition of "burial contract," as provided in NRS 689.010 and 689.020, thus subjecting said Cemetery Corporation to the jurisdiction of the Nevada Insurance Division for licensing and other regulatory requirements of said Chapter 689 of NRS and Regulation No. 30 thereunder, as the same apply to pre-need contracts for the sale or furnishing of burial services and merchandise.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John A. Porter, Deputy Attorney General

---

OPINION NO. 1967-458 EMPLOYEES—Male employee, working i...

OPINION NO. 1967-458 Employees—Male employee, working in an establishment wherein females are also employed, not entitled to benefits of Chapter 609, Nevada Revised Statutes.

Carson City, November 13, 1967

Mr. Stanley P. Jones, Labor Commissioner, Carson City, Nevada 89701

#### STATEMENT OF FACTS

Dear Mr. Jones: Chapter 614 of Nevada Revised Statutes was amended by the Legislature and approved by the Governor as amended on February 24, 1967. The amendment made discrimination because of sex an unlawful employment practice. By the terms of the amended statutes, it is an unlawful employment practice for employers, labor organizations, employment agencies, and joint labor-management committees to discriminate because of an individual's sex.

#### QUESTION

In view of this amendment, you make inquiry as to whether a male employee, working in an establishment wherein females are also employed, would be entitled to the benefits contained in Chapter 609 of Nevada Revised Statutes.

#### ANALYSIS

Chapter 609 of Nevada Revised Statutes, enacted in 1937, is entitled "Women and Minors." NRS 609.030 states in part:

With respect to the employment of females in private employment in this state, it is the sense of the legislature that the health and welfare of female persons required to earn their livings by their own endeavors, require certain safeguards as to hours of service and compensation therefor. (*Italics added.*)

The Legislature then provided for minimum wages, food and lodging, maximum hours, meal periods, rest periods, when seats must be provided, uniforms, and certain other working conditions designed for the benefit of female employees. Nowhere in Chapter 609 is there language which would make the provisions therein contained applicable to male employees.

Chapter 609 is "special" or "class" legislation. That is, its architects designed it for the protection and benefit of a special class of individuals—female employees. We feel such legislation is valid. The rule is stated in 16 Am.Jur.2d, "Constitutional Law," § 514:

Classification on the basis of special considerations to which women are naturally entitled is permissible.

\* \* \* \* \*

The physical characteristics of women place them at such a disadvantage in the struggle for existence as to form a substantial difference between the sexes. These factors form a basis for legislation

regulating the condition of labor of women in limiting the hours of their employment and in prescribing minimum wages for them, the courts taking the view that a woman's health is likely to be weakened or impaired where she is required or permitted to work long hours day after day under the pressure usually attending the labor of an employee who is subject to the control, direction, and dismissal of the employer.

The right of the Legislature, in the exercise of its police power, to pass laws to safeguard the health of women employees, has been so often affirmed by the courts that it cannot now be considered an open question. See 31 Am.Jur. "Labor," § 763.

The Legislature has not been convinced that male employees require the same employment conditions as their female counterparts, and hence did not include male employees within Chapter 609 of Nevada Revised Statutes.

## CONCLUSION

Having concluded that Chapter 609 of Nevada Revised Statutes is designed for the benefit and protection of female employees, and that such is valid legislation, we conclude that male employees are not allowed to avail themselves of the provisions of that chapter, since they do not come within the class sought to be benefited, i.e., female employees.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-459 TAXATION; LICENSING—Tax or license...

OPINION NO. 1967-459 Taxation; Licensing—Tax or license fee imposed upon door-to-door sales representatives, where product is stored outside Nevada, and where sales representative does not receive part of purchase price at time of sale, is unconstitutional as imposing undue burden on interstate commerce contrary to Section 8 of Article I of the United States Constitution.

Carson City, November 16, 1967

Hon. Gregory J. Chachas, City Attorney, 450 Aultman Street, Ely, Nevada 89301

Dear Mr. Chachas: You have requested an opinion as to whether Ely Ordinance No. 247 which generally provides for and required an Ely City license for the transaction, or carrying on, of businesses, trades, and professions, can be constitutionally applied to a cosmetic firm employing door-to-door salesmen under the circumstances outlined below.

The firm in question employs sales representatives who call directly on the buyer in a house-to-house canvass. No money is collected from the purchaser by the sales representative. The order is sent by the representative directly to the out-of-state manufacturer, no stock being stored by the sales representative in this State.

The ordered goods are then shipped to the sales representatives who deliver to the customer, collect for the goods, and retain a portion thereof as their commission. The balance is mailed to the out-of-state manufacturer.

## ANALYSIS

The Supreme Court of the United States has held on many occasions that the imposition of a licensing tax on out-of-state manufacturers engaged in interstate commerce is unconstitutional as imposing an undue burden on such commerce in violation of Section 8 of Article I of the United States Constitution.

Robbins v. Shelby County Taxing District, 120 U.S. 489; Stoutenburgh v. Hennick, 129 U.S. 141; Asher v. Texas, 128 U.S. 129; McCall v. California, 136 U.S. 104; Brennan v. Titusville, 153 U.S. 289; Caldwell v. North Carolina, 187 U.S. 622; Rearick v. Pennsylvania, 203 U.S. 507; Dozier v. Alabama, 218 U.S. 124; Rogers v. Arkansas, 227 U.S. 401; Crenshaw v. Arkansas, 227 U.S. 389; Stewart v. Michigan, 232 U.S. 665; Real Silk Hosiery Mill, Inc. v. Portland, 268 U.S. 325; Best & Company v. Maxwell, 311 U.S. 454; Nippert v. City of Richmond, 327 U.S. 416; Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602; Memphis Steam Laundry v. Stone, 342 U.S. 389; West Point Wholesale Grocery Co. v. City of Opelika, 354 U.S. 390; Hathaway v. Texas, 373 U.S. 540; Halliburton Oil Well Co. v. Reilly, 373 U.S. 64.

The State of Nevada through its Supreme Court in the case of *Ex parte Rosenblatt*, 19 Nev. 439, held that an act providing for the licensing of traveling merchants and merchants doing business through soliciting agents, commonly known as "drummers," was unconstitutional and void because repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several states. In so deciding, the Nevada Supreme Court cited and followed the controlling precedent of the United States Supreme Court in *Robbins v. Taxing District, Shelby County*, 120 U.S. 489.

Our Supreme Court in the case of *Ex parte Taylor and Rounds*, 35 Nev. 504, held an act to provide for the licensing of itinerant and unsettled merchants, traders, peddlers, and auctioneers was unconstitutional as violative of Section 8 of Article 1 of the Constitution.

Taylor and Rounds were held under arrest charged with violation of the aforementioned act for soliciting purchasers for Spalding Manufacturing Company of Grinnell, Iowa, a manufacturer and wholesaler and retail dealer in buggies, motor cars, and other vehicles, said company having no store or other place of business in Nevada. They sought release by habeas corpus.

The Nevada Attorney General in his brief states: "A careful examination of the authorities cited in such brief, and of a great many other authorities not cited therein, convinces me that the points advanced by petitioners in these cases are founded upon true principles of law, and that the statute brought into court for review by the petitioners, upon which this action is founded, is unconstitutional and void. \* \* \* The general trend of judicial decision, since the decision of the case of *Robbins v. Shelby Taxing District*, 120 U.S. 489; 7 Sup.Ct 592; 30 L.Ed. 694, by the Supreme Court of the United States, has been to declare void any statute imposing an occupational tax which in any way interferes with interstate commerce and there can be no question but that the statute here in consideration does and was so intended to interfere." (See also *Bryan v. City of Sparks*, 36 Nev. 573.)

In the First Judicial District Court, Judge Gregory, in deciding the case of *Evans v. City of Fallon*, et al., held a Churchill County ordinance which imposed a license on the plaintiff as a sales representative of Avon Products, Inc., unconstitutional. This decision was not appealed.

The same reasoning was reached by Judge Georgetta in the case of *City of Reno v. Philip Ossman*. This decision was not appealed.

## CONCLUSION

It is, therefore, the opinion of this office that Ordinance No. 247 of the City of Ely cannot apply to door-to-door salesmen who represent out-of-state dealers who do not store their products in Nevada, where no part of the purchase price is collected by the sales representative at time of purchase.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-460 STATE SEAL, REPRODUCTION OF—It is ...

OPINION NO. 1967-460 State Seal, Reproduction Of—It is unlawful to use any reproduction or facsimile of the Great Seal of the State of Nevada, or any part thereof, for any commercial purpose whatsoever.

Carson City, November 16, 1967

The Honorable John Koontz, Secretary of State, Carson City, Nevada 89701

## QUESTION

Dear Mr. Koontz: Based upon an inquiry to your office from Frank M. Jordan, Secretary of State of the State of California, you have requested the opinion of this office on whether the laws of the State of Nevada permit reproduction of the State Seal or its components in connection with and for the purpose of manufacture and sale of such items as ash trays, cuff links, bracelet charms, paper weights, pennants or flags, medals, advertising, or programs.

## ANALYSIS

NRS 235.010, subsection 4, expressly prohibits any use whatsoever of the State Seal for commercial purposes. It provides:

4. Every person who maliciously or for commercial purposes uses, or allows to be used, any reproduction or facsimile of the great seal of the State of Nevada, in any manner whatsoever, shall be guilty of a misdemeanor.

We note in this analysis an earlier opinion regarding use of the State Seal. AGO No. 51-82 (July 19, 1951) concluded that a replica of the State Seal could lawfully be used as an emblem on clothing. That conclusion was based upon the absence of statutory or case law prohibiting such use. The opinion reasoned that such use seemingly would not result in misuse of the State Seal insofar as wrongful verification of documents was concerned.

However, subsection 4 of NRS 235.010 was enacted subsequent to the issuance of AGO No. 51-82 (July 19, 1951). Statutes of Nevada 1955, ch. 95 p. 138. To the extent that AGO No. 51-82 (July 19, 1951) is inconsistent with this opinion, the former is deemed modified.

## CONCLUSION

It is therefore the opinion of this office that it is unlawful to use any reproduction or facsimile of the Great Seal of the State of Nevada, or any part thereof, for any commercial purpose whatsoever.

Respectfully submitted,

Harvey Dickerson, Attorney General

By: Robert A Groves  
Deputy Attorney General

---

OPINION NO. 1967-461 MUNICIPAL COURT; JUSTICE COURT; BA...

OPINION NO. 1967-461 Municipal Court; Justice Court; Bail—Failure of one accused in misdemeanor case to appear at time set for hearing due to circumstances beyond his control should not result in forfeiture of bail.

Carson City, November 20, 1967

Hon. Helen Herr, State Senator, 1330 Las Vegas Boulevard South, Las Vegas, Nevada 89104

Dear Senator Herr: You have asked this office to clarify those provisions of NRS 178 which refer to the forfeiture of bail.

It is our understanding that the Municipal Court in Las Vegas has followed a hard line in its interpretation of NRS 178.150 and NRS 178.155, without taking into consideration the impossibility of appearance of the person on bail at the time set by the court.

#### ANALYSIS

It is our understanding, for example, that if a person charged with a misdemeanor deposits bail through a bail bondsman, and at the time for appearance is in custody in a state prison, that the bail is declared forfeited. This we believe to be completely wrong and not in accordance with the statutes.

NRS 178.150(1) states that if the defendant, without sufficient excuse neglects to appear for arraignment, or for trial or judgment \* \* \* the bail shall be forfeited.

NRS 178.155 provides that if at any time within 90 days after such entry (forfeiting bail) the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just.

It is patently clear that the retention of the body of a person in a corrective institution, where he has been committed by a legal process, is the "sufficient excuse" contemplated by the Legislature in NRS 178.150. This is buttressed by the language of NRS 178.155 providing that if within 90 days from the date of forfeiture the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct that the forfeiture be discharged upon such terms as may be just.

While it is true that the Legislature used the word "may" instead of "shall" in NRS 178.155, we believe this to be directive rather than permissive. Otherwise the solons would not have added the words "as may be just."

The procedure of discharging a forfeiture of bail where facts sustain the fact that the defendant could not appear at the time of a set hearing, is followed by nearly every court in Nevada. At the very least the bail should be continued until the accused is released from custody in a penal institution.

#### CONCLUSION

It is the opinion of this office that if one accused of a misdemeanor in the lower courts is unable to appear in such court at a time set for a hearing, because of his custody reposing in a penal institution, the forfeiture of bail should be discharged, or at least continued until his release from custody.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-462 PUBLIC EMPLOYEES RETIREMENT—Legisl...

OPINION NO. 1967-462 Public Employees Retirement—Legislature by amending NRS 286.660, denied right of contributor to designate beneficiaries when survivors fall in categories established by NRS 286.673 through 286.677.

Carson City, November 21, 1967

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada 89701

Dear Mr. Buck: You have requested this office to unravel what appears to be inconsistent provisions of Chapter 286 of the Nevada Revised Statutes.

Prior to 1967, NRS 286.660 provided for distribution of moneys to the credit of a contributor without reference to NRS 286.673-286.677, so that no problem arose over distribution to beneficiaries in accordance with the designation of the contributor. However, the 1967 Legislature amended NRS 286.660 by providing that a contributor had the right to designate beneficiaries only if payment from his contributions were not due to survivors as designated in NRS 286.673-286.677. These included minor children, widows with minor

children, widows of a contributor with 15 or 25 years' service, and dependent parents. In such cases, the money of the contributor in the Retirement Fund is to be distributed according to formulas adopted by the Legislature.

You have asked these questions:

1. Does the presence of an eligible beneficiary under NRS 286.673 through NRS 286.677 invalidate the designation of a beneficiary under NRS 286.660?
2. If the answer is "yes," will the provisions of NRS 286.678 take precedence over NRS 286.600?

## CONCLUSION

Question No. 1 is answered in the affirmative. Question No. 2 is answered in the affirmative.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-463 REAL ESTATE BROKERS; LICENSING—A p...

OPINION NO. 1967-463 Real Estate Brokers; Licensing—A person who is an officer in several real estate corporations which have separate businesses at different addresses, should take out a duplicate license for each office or place of business in excess of one, from which he proposes to transact business.

Carson City, November 27, 1967

Mr. Don McNelley, Administrator, Real Estate Division, Department of Commerce, Carson City, Nevada 89701

Dear Mr. McNelley: Reference is made to your letter requesting the legal opinion and advice of this office respecting the issuance of multiple real estate brokers' licenses under presently applicable provisions of Chapter 645 of Nevada Revised Statutes.

## STATEMENT OF FACTS

It is indicated that a real estate broker who is an officer of a Nevada corporation and designated and qualified by such corporation to act as a real estate broker on its behalf, is requesting issuance to him of a second and separate real estate broker's license as an officer of a second and separate real estate corporation. Such applicant is presumptively the sole owner and stockholder of the involved two Nevada corporations. Additionally, the two corporations, and conduct of their separate corporate business operations, would be located in different counties within the State of Nevada. However, though some difficulties and problems may reasonably be inferred in connection therewith, supervision of both offices and the real estate businesses of the two corporations would be under such applicant, without benefit of another licensed real estate broker or broker-salesman in either of the offices who could be charged with the responsibility for either particular office.

Finally, it is indicated that the policy of the Nevada Real Estate Division has been  
“\* \* \* one person, one license, whether it be issued to an individual, copartnership or corporation.”

## QUESTION

Is the issuance of multiple real estate brokers' licenses authorized under the provisions of Chapter 645 of Nevada Revised Statutes, as amended, and Rules and Regulations adopted thereunder?

## ANSWER

As herein conditioned or qualified, "No."

## ANALYSIS

Corporations may act as real estate brokers in the State of Nevada in accordance with NRS 645.370. It is therein provided that any such corporation so desiring to act as a real estate broker must, in its application for a broker's license, designate some officer of the corporation to act as a real estate broker agent of the corporation, who must also file an application for such license jointly with that filed by the corporation. The license when granted to such corporate officer only permits him to act as a real estate broker as an officer and/or agent of the corporation and not in his own behalf. Also, the license issued to the corporation shall bear the name of such member or officer thereby jointly licensed as a real estate broker.

NRS 645.380 provides that each and every member or officer of a corporation who will perform or engage in any act, activity, or transaction as specified in NRS 645.030, authorized as legally performable solely by a licensed real estate broker, other than the member or officer designated by the corporation for such purpose, is also " " " required to make application for and take out a separate broker's license in his own name individually. The license issued to any such (additional) member or officer of a " " " corporation shall entitle such member or officer to act as a real estate broker only as an officer or agent of the " " " corporation and not on his own behalf."

NRS 645.590 (as relevant hereto) provides:

If any real estate broker licensed " " " as an officer of a corporation, should discontinue his connection with such " " " corporation, and thereafter desire to act as an individual real estate broker, or become associated with any other " " " corporation, the broker shall be required to file an application " " " for a new license as an individual broker " " " or as an officer of such new corporation. (Italics supplied.)

NRS 645.550 (as herein relevant) provides as follows:

1. Every person " " " or corporation licensed as a real estate broker " " " shall have and maintain a definite place of business within the state " " " for the transaction of real estate business " " " and which shall serve as his, their or its office for the transaction of business under the authority of the license, and where the license shall be prominently displayed.
2. The place of business shall be specified in the application for license and designated in the license.
3. No license issued " " " shall authorize the licensee to transact business from any office other than that designated in the license.

As relevant herein, NRS 645.530, relating to "Licenses: Possession and display," provides:

2. Each real estate broker shall:

(a) Display his license conspicuously in his place of business. If a real estate broker maintains more than one place of business within the state, a duplicate license shall be issued to such broker for each branch office so maintained by him, and the duplicate license shall be displayed conspicuously in each branch office. (Italics supplied.)

Finally (as relevant hereto), Section VI, Rules and Regulations, provides as follows:

3. No broker shall operate under a fictitious name unless he shall comply with Chapter 602 of NRS and file with the division a certified copy of the certificate issued by the county clerk. No more than one license shall be issued under the same or a confusingly similar name.

4. Every branch office shall be under the supervision of a broker " " " and, in connection with the operation of a branch office, such broker " " " shall assume all of the responsibility of and be subject to all the obligations and penalties imposed upon a broker under Chapter 645 of NRS, and these Rules and Regulations. The division shall not, except under exceptional circumstances and after consultation with the



commission, issue a license to a salesman (read broker also) employed or residing in a different county from that of his employing broker (read corporation also) unless the broker operates a licensed branch office in such county. (Italics supplied.)

Attorney General Opinion No. 50-870 of February 16, 1950, considered a somewhat similar or related question, substantially on the basis of the same foregoing statutory and regulatory provisions, and concluded that a corporate officer jointly licensed with a corporation as a real estate broker " \* \* \* may not also receive an individual real estate broker's license to act in his own behalf."

Certainly, if a corporation is validly considered to be a separate legal entity, then a licensed real estate corporate officer-broker, statutorily prohibited from acting otherwise than on behalf of the corporation, should similarly and also be ineligible for additional licensing as a real estate broker for another legally distinct or separate corporation, as well as himself, individually. Such conclusion is sufficiently legally justified on the basis of the involved public interest. The relationship of real estate broker and his principal (whether seller or purchaser) is fiduciary in character, based on reciprocal confidence and trust. By its very nature, therefore, a licensed broker is properly legally prohibited from any conflict of interest or relationship which reasonably or presumptively could infer his serving of two masters at the same time.

Identification by licensing with two legally separate corporations at the same time would, ipso facto, be contrary to such prohibition, even though in fact no conflict of interest actually existed or was present. Which of the corporations would the jointly licensed officer of multiple corporations be representing in connection with any given real estate transaction? The mere posing of such question suggests the serious administrative problem which would devolve upon a governmental agency to properly and effectively supervise, regulate and control jointly licensed real estate brokers of multiple corporations subject to its jurisdiction.

Applicable Nevada statutory and regulatory provisions, among other matters, expressly prescribe fixed or required supervisory responsibilities in the conduct of a licensed real estate broker's business, either for himself, individually, or for a copartnership, association, or corporation. They further expressly prescribe that a licensed broker shall conduct said business only as authorized, and at the location or address specified in the license. Also, a real estate broker, if he maintains more than one place of business within the state, pursuant to NRS 645.530 "shall be issued" a "duplicate" license for each branch office so maintained by him.

In the submitted fact situation, the foregoing requirements are properly relevant and material. If we are concerned with two legally separate or distinct corporations or entities, it would follow that two separate corporate offices or locations are involved, and one such office cannot be regarded as a "branch" of the other, so as to authorize the issuance of a "duplicate" license.

On the other hand, if, as indicated, the two involved corporations are solely owned by one stockholder who can properly conduct, manage, and/or supervise both real estate corporation businesses at the same time, then the real party in interest in both said corporations is the one and same person, already jointly licensed as an officer of one solely owned corporation.

12 C.J.S., "Brokers," Sec. 8, pp. 15-16, as respects such a situation, states as follows:

Under a statutory provision that, where a real estate broker's license is issued to a corporation or association, authority to transact business thereunder is limited to one officer of such corporation or association, to be designated in the application and named in the license, and each other officer, desiring to act as a real estate broker in connection with the business of the corporation or association or otherwise, must make application for and take out a license in his own name individually, an officer of a real estate corporation is not required to take out an individual broker's license, unless he desires to act as a real estate broker in connection with the business of the corporation or otherwise. A person who is an officer in several real estate corporations need not take out more than one broker's license in his own name if the several corporations transact business from the same address; but if the corporations have separate places of business at different addresses, and the officer desires to engage actively in the business of each of them, he must, when required by statute, take out a duplicate license for each office or place of business in excess of one, from which he proposes to transact business \* \* \*." (Italics supplied. The Pennsylvania statute cited for the foregoing is substantially similar to the corresponding provision in Nevada law.)

However, it should be understood that some states, on the basis of their particular statutes relative thereto, do grant multiple real estate brokers' licenses; and that, presumptively, grant of multiple licenses under such statutes in the circumstances here present might well be proper and valid.

We merely here indicate that applicable Nevada law certainly does not clearly or definitely authorize or require multiple licensing of real estate brokers in cases of officers of several real estate corporations. On the contrary, insofar as Nevada statute deals with the matter at all, it would seem to provide for issuance of a duplicate license in such circumstances. A person licensed by the State as a real estate broker is thereby authorized to perform the functions and responsibilities evidenced by such license, irrespective of whether he does so individually, as a member of a partnership, or as an officer of a corporation or several corporations. The grant of two or more such licenses by the State for performance of functions or responsibilities similar in nature and character, regardless of the parties involved—absent cogent and justifiable need therefor—is unnecessary.

Of course, NRS 645.190 authorizes the imposition of any additional, reasonable and/or clarifying regulation and restriction on licensees, both in respect of the instant problem or any other, consistent with applicable express statutory provisions, if and when deemed to be in the public interest.

## CONCLUSION

For avoidance or minimization of potentially involved administrative problems, duplicate licensing is presumptively indicated and preferable in cases of officers of multiple real estate corporations, if and when they are substantially the real parties in interest or owners of such similarly engaged corporations.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John A. Porter, Deputy Attorney General

---

OPINION NO. 1967-464 TAXATION; USE AND SALES TAX—Modifi...

OPINION NO. 1967-464 Taxation; Use And Sales Tax—Modifies Opinion No. 67-456.

Carson City, November 27, 1967

Mr. Roy Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: You have called our attention to the last paragraph of our Opinion No. 67-456, dated November 3, 1967.

We agree that such opinion should be modified by deleting the following:

Nothing expressed in this opinion shall be construed to infer that sales tax may not be imposed upon a retailer who sells tangible personal property to an exempt agency. See NRS 372.105. The fact that such retailer is unable to collect sales tax so imposed from a customer who is exempt, does not mean that such retailer may not be liable for the payment of sales tax. NRS 372.110.

Opinion No. 67-456 is modified accordingly.

The conclusion reached is in no way modified or changed.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-465 NEVADA TAX COMMISSION; NET PROCEED...

OPINION NO. 1967-465 Nevada Tax Commission; Net Proceeds Of Mines; Statute Of Limitations—The Nevada Tax Commission may at any time examine the records of a mining operation to determine net proceeds for assessment purposes. A suit for the collection of such taxes must be commenced within 3 years. The Nevada Tax Commission may rescind an arbitrary assessment because of subsequently obtained information.

Carson City, November 28, 1967

Mr. Roy Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

#### STATEMENT OF FACTS

Dear Mr. Nickson: A certain mine operator in the State of Nevada filed a defective and improper statement showing gross yield and net proceeds for the 6-month period ending December 31, 1966. Such statement is required by NRS 362.110. Because of the improper statement, the Nevada Tax Commission levied an arbitrary assessment on February 28, 1967, in accordance with NRS 362.230. On July 6, 1967, the mine operator filed an amended statement for the period in question, which complied with the statutory requirements. This amended statement revealed the mining operation to be in a net loss position, and therefore no tax was due the State for the 6-month period ending December 31, 1966. On August 30, 1967, the commission ruled that the amended statement should control, and rescinded the arbitrary assessment pending an opinion from this office confirming the authority to rescind the arbitrary assessment. Hence you propound to this office the following query.

#### QUESTION

Does the Nevada Tax Commission have the authority to rescind an arbitrary assessment levied pursuant to NRS 362.230?

#### ANALYSIS

From reading Chapter 362 of the Nevada Revised Statutes, it would appear that the Nevada Tax Commission's power to examine the records of a mining operation for the purpose of determining net proceeds is limitless. However, the use of the information obtained from late or subsequent examinations for reassessment purposes is limited. To determine the time limit during which such information may be used, we must concern ourselves with NRS 11.190, which is the statute of limitations controlling actions which are based on statutory liability. That statute reads in part:

An action upon a liability created by statute, other than a penalty or forfeiture, (must be commenced within 3 years).

That taxes are a liability created by statute has been determined by our own Supreme Court. In the case of *State of Nevada v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220 (1879), it was held: that a tax is a statutory obligation has not only been decided, but it cannot be denied. The court went on to hold that the revenue laws of this State do not except taxes from the operation of the statute of limitations or extend the time for bringing suits for their collection beyond the period allowed by that statute. That case dealt with the collection of taxes on the net proceeds of mines, and applied Section 8524 N.C.L. 1929, which is now that part of NRS 11.190 above quoted.

This office on March 1, 1944, issued Attorney General Opinion No. 44-115, which considered the question presented at this time. The conclusion in that opinion read:

It is, therefore, the opinion of this office that while the Nevada Tax Commission may examine, or cause to be examined, the books and records of mining companies and operators of mines for the purpose

of adjustment or reassessment of net proceeds tax at any time, still, any such reassessment so made cannot be enforced by suits in the courts of this State after the expiration of three years from the original assessment. We suggest, therefore, that any examination of the books of mining companies and operators of mines for the purpose of reassessment of the net proceeds tax for any particular year should be so made as to permit the reassessment being made within such time as would admit of the bringing of suit for the collection thereof within three years from the date of the original assessment.

We at this time find that conclusion to be sound. It follows, then, that if the later examination reveals that the assessment should be modified, the Nevada Tax Commission has authority to do so. Because the amended statement convinced the commission that no tax was due, the commission had authority to rescind its prior assessment.

## CONCLUSION

In view of the above, we hold:

1. That at any time, the commission may examine the records of a mining operation for the purpose of determining net proceeds for assessment purposes.
2. That a suit for the collection of such tax found to be due and owing the State of Nevada is within the confines of the 3-year statute of limitations.
3. That information obtained, after an arbitrary assessment has been levied, may justify the rescission of that assessment, and if such is the case, the Nevada Tax Commission has authority to issue the appropriate order.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-466 PUBLIC HEALTH; PUBLIC HEALTH SANIT...

OPINION NO. 1967-466 Public Health; Public Health Sanitarians—Requirements of Subsection 1 of Section 15 of Chapter 212 of the 1967 Statutes of Nevada not applicable to applicants who fall within categories established by Subsections 2 and 3 of Section 15.

Carson City, November 28, 1967

R. Arthur Warden, R.S., Secretary, Board of Registration, Public Health Sanitarians, 1010 Robin Street, Reno, Nevada 89502

Dear Mr. Warden: You have requested this office to interpret Chapter 212 of the 1967 Statutes of Nevada. Your main concern is whether certain employees now working in state and local health departments are qualified to be registered by your board as Public Health Sanitarians.

## ANALYSIS

It is true that under Section 15, Subsection 1, of Chapter 212 of the 1967 Statutes of Nevada, certain requirements are established for those making application to be registered by your board as Public Health Sanitarians, one of which requirements is an examination. We feel that this section of the act refers to those making application who do not fall within the categories established by Subsections 2 and 3 of Section 15 of the act.

Subsection 2 reads as follows:

Every person who, on or before July 1, 1967, has passed a written examination certified by the American Public Health Association or an examination prepared and certified and given by an official examining agency of the State of Nevada or one of its political subdivisions qualifying him as a public health sanitarian, if such person applies for registration under this chapter on or before June 30, 1968.

Subsection 3 reads as follows:

Every person who, on or before July 1, 1967, was employed as a practicing public health sanitarian in this state, or who is a registered public health sanitarian with the National Association of Sanitarians and a resident of this State, if such person applies for registration under this chapter on or before June 30, 1968.

These two sections absolve the persons therein described from meeting the standards set forth in Subsection 1 of Section 15, by substituting different requirements consistent with having taken the steps therein prescribed prior to the effective date of the act.

Subsection 1 of Section 16, which requires that only those persons who meet the educational and experience qualifications set forth in Subsection 1 of Section 15 of the act shall be eligible to be examined for registration as Public Health Sanitarians, refers to those persons making application after the effective date of the act, and who do not fall into the categories designated in Subsections 2 and 3 of Section 15.

However, even those applicants designated in Subsection 2 and 3 of Section 15 must apply for registration prior to June 30, 1968.

## CONCLUSION

It is therefore the opinion of this office that the requirements of Subsection 1 of Section 15 of Chapter 212 of the 1967 Statutes of Nevada are not applicable to applicants who fall within the categories established by Subsections 2 and 3 of Section 15, but such applicants must apply for registration prior to June 30, 1968.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-467 FISH AND GAME COMMISSION—The commi...

OPINION NO. 1967-467 Fish and Game Commission—The commission has no authority to (1) expend moneys from the Fish and Game Fund to construct and maintain public campgrounds on wildlife management areas, (2) contract in a manner which would obligate it to expend funds for such purposes, or (3) rent trailer spaces to private individuals on a monthly basis on wildlife management areas.

Carson City, December 4, 1967

Mr. Frank W. Groves, Director, Fish and Game Commission, P.O. Box 10678, Reno, Nevada 89510

Dear Mr. Groves: We have received your letter of November 1, 1967, wherein you have posed several inquiries based on the following factual situation:

## STATEMENT OF FACTS

In its program of game management, the Fish and Game Commission acquires lands throughout the State of Nevada for development as wildlife management areas. As these areas are improved and game resources propagate, increased public use by sportsmen follows as a direct result. This increased public use carries with it, unfortunately, a certain measure of indiscriminate camping and other practices detrimental to wildlife and injurious to property. Examples include sanitation problems, littering, destruction of fences, and the like. It has been proposed that the prevalence of such practices might be alleviated if public

campgrounds were constructed and maintained to provide accommodations for those harvesting fish and game resources. In this connection, you have asked whether the Fish and Game Commission has the authority to expend moneys from the Fish and Game Fund to construct and maintain public campgrounds to be located on state-owned wildlife management areas.

Secondly, the Legislature has directed that \$30,000 annually be paid to the Fish and Game Commission and \$30,000 annually be paid to the Division of State Parks, said funds to come from the motor vehicle fuel taxes paid on fuel used in watercraft for recreational purposes. The funds so paid to the Park Commission are to be utilized only for development and improvement of boating facilities and other outdoor recreational facilities associated therewith. It has been proposed that the Fish and Game Commission enter into a contract with the Park Commission, under which the latter agency would construct campground, restroom, and boat launching facilities at three areas within the Sunnyside Wildlife Management Area. Such contract, in turn, would obligate the Fish and Game Commission to expend a sum equivalent to 10 percent of the cost of development and construction of such facilities, to maintain the same after initial construction. It is suggested that in maintaining these facilities, the Fish and Game Commission can better regulate the use made by the public of the Sunnyside Wildlife Management Area. In this connection, you have inquired whether the Fish and Game Commission has authority to enter into such a contract.

Finally, the Sunnyside Wildlife Management Area is located approximately 190 miles from Las Vegas, and about 70 miles from the nearest town having public lodging and accommodations. It is suggested that proper use of the wildlife area raises a need for an area to be set aside for trailer parking, because such will tend to reduce or eliminate unregulated camping adjacent to shooting areas, which is essential to proper regulation of hunting. In this connection, you have inquired whether the Fish and Game Commission has authority to rent trailer space on a monthly basis to private individuals on state-owned lands within the wildlife management area.

## ANALYSIS

1. The basic function of the members of the Fish and Game Commission, individually and collectively, is the enforcement of all laws of the State of Nevada respecting the protection, preservation, and propagation of fish, game animals, and game birds within the State. NRS 501.210. In furtherance of this function, the Fish and Game Commission is authorized to spend moneys from the Fish and Game Fund to acquire lands and property rights, and to construct, operate, and maintain facilities for the protection and propagation of fish and game animals. NRS 501.225. It is also authorized to acquire lands and water areas for use as game refuges (NRS 504.090), and for use as wildlife management areas (NRS 504.140). The functions of the State Park System are delineated in NRS 407.065. Subsection 1 thereof provides:

(The system is hereby authorized to:) Designate, establish, name, plan, operate, control, protect, develop and maintain state parks, monuments and recreation areas for the use of the general public.

The Fish and Game Commission may expend Fish and Game funds only for those purposes authorized by law. This authority appears in NRS 501.255. It provides in part:

3. The fish and game fund shall be used for and subject to:

(a) The payment of the expenses of propagating, restoring and introducing fish in the public waters of this state.

(b) The propagation, protection, restoration and transferring of game birds and animals in this state.

(c) The payment of the expenses incurred in the prosecution of offenders against the fish and game laws and fish and game license laws of the state.

(d) The cost of acquisition, construction, management and maintenance of fish hatcheries in the state.

(e) All other necessary expenses attendant upon the protection and propagation of fish and game.

(f) The payment of the expenses incurred in the administration and enforcement of the provisions of Chapter 488 of NRS (Nevada Boat Act), but total expenditures from the fish and game fund for this purpose shall not exceed the total sums received by the commission pursuant to the provisions of NRS 365.535 and 488.075.

4. All moneys in the fish and game fund shall be used for the purposes specified in this section and not diverted to any other fund or use, and shall not revert to general state funds.

Chapter 501 of NRS contains several other references to expenditures of funds by the Fish and Game Commission. Under NRS 501.115(2), and NRS 501.117(2), the commission may do all that is necessary (and, by implication, this includes the spending of money) to secure to the State of Nevada the benefits of the Pittman-Robertson Act (16 USC §§ 669-669j) and the Dingell-Johnson Act (16 USC §§ 777-777k), respectively. However the programs available to the State of Nevada under these acts relate to the selection, acquisition, restoration, rehabilitation, and improvement of land and water areas for the feeding, resting, and breeding of wildlife, and for the hatching, breeding, feeding, and resting places of fish having material value for sport or recreation.

In addition, NRS 501.225 provides:

The commission shall have full power and authority to use so much of any available funds as may be necessary for the acquisition of lands, water rights, and easements and other property, and for the construction, maintenance, operation and repair of fish hatcheries and other means and appliances for the protection and propagation of fish and game in the State of Nevada.

All of these provisions of law are entirely consistent with the language of NRS 501.255. Nowhere in this statute can there be found authority to expend Fish and Game funds for the construction, maintenance, and operation of public campgrounds. Your letter appears to concede this fact. We are not convinced that the construction and operation of campgrounds bears any reasonable causal relationship to the protection and propagation of fish or game within the meaning of NRS 501.255.

We are referred to NRS 504.090 and 504.130.

NRS 504.090: The commission may acquire title, by lease, purchase, gift or proclamation, to such lands as the commission may deem suitable for public shooting grounds or recreational areas.

NRS 504.130: 1. The commission is made the administrative body for state recreation grounds and game refuges and shall establish and put into effect a practicable method of propagating wildfowl, game birds and game animals with the State of Nevada, to the end that such wildfowl, game birds and game animals may be used in stocking the state recreation grounds and game refuges.

2. The commission is empowered to make such expenditures out of any appropriation created therefor as it may deem necessary in improving such recreation grounds and game refuges and in caring for such wildfowl, game birds and game animals, and such other and further expenditures out of any appropriation created therefor as the commission may deem necessary in carrying out the provisions of this Title.

These statutes are not inconsistent with NRS 501.255. They form a part of the body of laws governing game refuges. They do not authorize the Fish and Game Commission to expend moneys from the Fish and Game Fund for purposes other than those enumerated in NRS 501.255(3). See NRS 501.255(4). In our judgment, the Fish and Game Commission may not lawfully spend moneys from the Fish and Game Fund to construct and operate campgrounds. This is more properly a function of the State Park System.

2. The proposed contract between the Fish and Game Commission and the State Park Commission contemplates the expenditure of funds derived from the motorboat fuel tax program. The share of these moneys allocated to the Fish and Game Commission can be used by it only for the administration and enforcement of Chapter 488 (Nevada Boat Act). NRS 365.535(2)(a). The share allocated to the State Park System is to be used only for the improvement of boating facilities and recreational facilities associated with boating. NRS 365.535(2)(b). In this connection, the State Park System may contract with other agencies for the development, improvement, and maintenance of such facilities. NRS 407.069. However, such contracts may not validly obligate the Fish and Game Commission or any other state agency to expend moneys in manner or for a purpose forbidden by law. We are not satisfied that maintenance of a campground, boating facilities, or the like, bears any reasonable causal relationship to more effective regulation of public fishing. This is more properly the function of the State Park System. In our judgment, the Fish and Game Commission may not lawfully execute the proposed contract.

3. To the extent that proposed rental of trailer space might involve the expenditure of moneys from the Fish and Game Fund for installation of trailer parking facilities, upkeep of parking areas, and the like, the foregoing analysis regarding authorized expenditures is applicable. In the event that no such expenditure of funds would be involved, the rental of a trailer space or campsite area does not appear to be a proper function of the Fish and Game Commission. The end sought to be achieved by the proposal is the elimination of public camping adjacent to shooting areas within the wildlife management area. The commission has determined that this is necessary to effective regulation of hunting practices. The statutes governing such wildlife management areas are found in NRS 504.140-504.145, inclusive. Subsection 1 of NRS 504.145 provides:

1. The commission may prescribe regulations governing entry and access to, and occupancy and use of, lands controlled by the commission under cooperative agreements or owned or leased by the commission for the purposes of wildlife management areas or refuges for wildlife protection, propagation, restoration or management or for the purpose of public recreation.

Pursuant to this statute, the commission has express authority to prescribe rules and regulations governing camping within the management area, thereby enabling it to accomplish directly the end sought to be achieved. Although the commission may make reasonable regulations governing recreational uses of wildlife management areas, we believe that it has no authority to rent trailer spaces to private individuals for these reasons: First, trailer space rental income is not a source of revenue which the commission is entitled to pursue under NRS 501.255(1). Secondly, there does not appear to be any reasonable causal relation between such trailer space rental and more effective game management within the area. Thirdly, the function of providing for facilities or areas to accommodate the sportsmen using such areas more properly belongs to the State Park System. Finally, the acceptance by the commission of compensation for use by the public of the management area could subject the commission to a higher degree of care to the general public, resulting in increased liability exposure in the event of injury, accident, or death attributable to conditions in the area under control of the commission. We are satisfied that the commission has no authority to do any act which would so subject it to increased liability exposure.

## CONCLUSION

It is the opinion of this office that:

1. The Fish and Game Commission has no authority to expend moneys from the Fish and Game Fund to construct and maintain public campgrounds on state-owned wildlife management areas.
2. The Fish and Game Commission has no authority to enter into an agreement with the State Park System which would obligate the commission to expend moneys from the Fish and Game Fund for maintenance of camping areas.
3. The Fish and Game Commission has no authority to rent trailer spaces on a monthly basis to private individuals within wildlife management areas.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

---

OPINION NO. 1967-468 PUBLIC SERVICE COMMISSION, APPLICA...

OPINION NO. 1967-468 Public Service Commission, Applications To—When the Nevada Public Service Commission is in receipt of two or more applications, such applications being “actually exclusive,” the hearing and deciding of less than all such applications prior to the hearing of all would violate the Ashbacker Doctrine. Neither by statute nor regulation has there been established in the State of Nevada a date after



which applications filed with the Public Service Commission should not be considered. Hence, the Public Service Commission should hear all applications prior to the decision of one.

Carson City, December 7, 1967

Mr. Reese Taylor, Chairman, Public Service Commission, Carson City, Nevada 89701

#### STATEMENT OF FACTS

Dear Mr. Taylor: On the 21st day of November 1967 there was held in the offices of the Public Service Commission an informal hearing attended by the members of the Public Service Commission, a representative of the Attorney General's Office and attorneys representing five applicants who seek a certificate from the commission allowing them to operate a community antenna television system (CATV) in the greater Las Vegas area. Counsel for a single intervenor also attended. Each of the applicants are competing with the other for this valuable certificate. The first such application was filed with the Public Service Commission on January 3, 1966. The second applicant filed his application January 7, 1966. Both of these applicants have had a partial hearing on the merits of their application. Both hearings were recessed and at this date have not been reconvened. Those partial hearings took place in March of 1966. Since those partial hearings the three remaining applications have been received by the commission. Those applications were filed on January 25, 1967, February 21, 1967, and June 19, 1967.

At the informal meeting above referred to, the commission and the representative of the Attorney General's Office called to the attention of the various applicants and intervenor the fact that a case is currently pending in the United States District Court for the District of Nevada, the purpose of which is to contest the jurisdiction of the Public Service Commission over community antenna television systems. This case was based upon NRS 704.020. A three-judge court in that case ruled that there had not been an exhaustion of administrative or state judicial remedies on the part of the plaintiff which operates a CATV system in Northern Nevada, and dismissed the same. The case was then appealed to the United States Supreme Court. While this appeal was pending, the Nevada State Legislature passed Chapter 458 which relates to the Public Service Commission's jurisdiction over CATV systems. The United States Supreme Court remanded the case to the District Court for further consideration in view of the new legislation. A Supplemental Complaint has been filed in the United States District Court and this office has on the 1st day of December filed both a Motion to Dismiss and an Answer. The date of the final determination of this case is at best speculative, likewise the ultimate decision in this case is something this office does not desire to predict.

All of these facts were pointed out to the applicants at the informal conference. Notwithstanding this pending case, each of the applicants elected to proceed forthwith with hearings to determine the successful applicant in the Las Vegas area. Having concluded to proceed, the commission presented to the applicants the following procedural question: "Should the commission continue the hearings on the first two applications and make a decision relating to them prior to hearing the subsequent three applications, or in the alternative, hear all five applications prior to making any decision?" It was advocated at the conference by the first two applicants that their hearings should be concluded and a decision made by the commission as to whether or not either of them should be issued a certificate. The three other applicants contended that all five applications should be heard before the commission decides any of them.

Because of the importance of expeditiously bringing additional television entertainment to the Las Vegas area, the commission ordered that each of the applicants deliver to the Attorney General's Office by December 1, Points and Authorities supporting their respective positions on proper procedure. The Attorney General's Office, after reviewing such Points and Authorities would by December 10 issue an opinion directing the commission as to which course it should take in hearing the applications. This is that opinion.

#### ANALYSIS

In support of their contentions the two applicants which had partial hearings rely upon a letter dated December 9, 1965, the pertinent portions of which read:

The Commission, for many months, has been studying its jurisdiction on community antenna facilities. NRS 704.020 Public Utilities Defined, paragraph (d) states: "Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce."

The Attorney General's opinion dated April 22, 1964, Opinion No. 64-128, indicates that all intrastate community antenna operations are subject to the jurisdiction of the Public Service Commission of Nevada. Therefore, it becomes mandatory at this time that you fill in the enclosed applications, returning an original and three copies, with all exhibits, in conformance with NRS 704.330 and Rule No. 14.1 of the Commission's Rules of Practice and Procedure. Bulletins on NRS 704, inclusive, and Rules of Practice and Procedure are available in both the Carson City office and the Las Vegas office of the Public Service Commission. Therefore, we request the enclosed applications be completed, an original and three (3) copies, within thirty (30) days.

The office will ask the Attorney General to take whatever legal steps are necessary should any operating Community Antenna Company fail to file an application for a certificate of public convenience and necessity, as described in NRS 704.030, within thirty (30) days from the receipt of this letter.

This letter is signed by one commissioner and was mailed to the first two applicants and other interested persons. The letter was not sent to the latter three applicants.

We do not feel this letter determines the final date upon which applications may be timely filed with the Public Service Commission. A review of the appropriate statutes and Rules of Practice and Procedure before the Public Service Commission of Nevada reveals there is no mention of a "deadline" or "cut off" date after which applications may not be received.

Rules relied upon by applicants Nos. 1 and 2, as cited in their Points and Authorities are: 1.3 which states, "These rules shall be liberally construed to secure just, speedy and economical determination of all issues presented to the Commission." Rule 5 which regulates the procedure relating to "intervention." Rule 9.8 which states, "the Commission may consolidate two or more proceedings in any one hearing when it appears the issues are substantially the same and the rights of the parties will not be prejudiced by such hearing."

This office does not read those rules as providing for any "cut off" date nor forbidding the commission from hearing the subsequent filed applications. Likewise no statutory prohibitions can be found. Because neither the Legislature, when drafting statutes, nor the Public Service Commission when adopting rules and regulations saw fit to provide for a "cut off" date we conclude there is none.

As to the letter of December 9, 1965, above quoted we hold that it is reasonable to interpret it as a mere request rather than a mandate. Note the last sentence of the second complete paragraph uses the word "request" when the author of the letter is speaking for the commission. Only when the author is interpreting a former Attorney General's Opinion and a statute does he state applications must be filed with the commission. In this conclusion the commissioner was correct since the appropriate statute and Attorney General's Opinion hold the Public Service Commission has jurisdiction over CATV systems. Neither the Attorney General's Opinion nor the statute mention a period of time in which applications must be received by the Public Service Commission. Rule 14.1 cited in that letter sets out the form and contents of applications but does not establish a "cut off" date. In conclusion, we read the letter of December 9, 1965, as saying that

1. The filing of an application with the Public Service Commission is mandatory;
2. A request that the same be filed within 30 days.

If, pursuant to the third paragraph of that letter the commission had sought advice from this office, we would have then advised, and we do now, the letter failed if it was indeed intended to establish a "cut off" date after which no further applications could be received.

In Points and Authorities submitted, some mention was made of "cut off" dates applying to other regulatory agencies, both state and federal. Those dates, however, were established by either statute or administrative rule and are not binding on Nevada administrative agencies. There being no statutory or regulatory "cut off" date, we hold that to now decide applications 1 and 2 would be in violation of the Ashbacker Doctrine hereinafter discussed.

Before leaving the matter of "cut off" dates, it seems appropriate to state that we feel the commission has authority to determine a proper deadline date for the filing of applications which compete with already

filed applications. Such action would control the filing of applications in the future and prevent the recurrence of the procedural questions we now must resolve.

Having concluded that the application of applicants Nos. 3, 4, and 5 are timely, we also hold they should be heard prior to a decision's being rendered on the merits of applications Nos. 1 and 2, as such prior filing does not necessarily control the final decision of the commission.

There is authority to support our conclusion both in administrative decisions and court opinions. Appropriate administrative decisions are *Re Don S. Dugan, dba Dugan Oil and Transport Co.*, 99 PUR (NS) 430. Here the South Dakota Public Utilities Commission states on page 433:

Priority of filing of an application may be the deciding factor between rival applicants when it is a close question as to which rival applicant is best qualified and can and will render the best service.

The Nevada Public Service Commission stated in 1922 in *Re Frank J. Sullivan, et al.*, PUR 1922 C "The Interurban Transit Company claim priority because its application was filed first. Priority in the filing of an application has even less weight than priority of actual service. \* \* \* It appears, therefore, that the chief question to be decided is which applicant offers the best service to the public and in order to decide this question a brief description of the communities to be served should be given."

In the same year the Nevada Public Service Commission decided *Re Morris*, PUR 1922 B 459. In this case all interested persons consented to the consolidation of the several applications. When considering priority of filing application the commission stated:

Mere precedence in time should be used only as a last resort, in determining rights such as here involved, and this is especially true when there is no substantial difference in time.

In *Re Gibson*, PUR 1926 A, 826 the author, a member of the California Railroad Commission, stated:

I do not believe, however, that mere priority of filing, other things being different, must or should govern the granting of a certificate in any case arising under the Auto Stage Trust and Transportation Act; but I do believe that all other things being equal the applicant first to the docket should receive the reward due to his diligence, even though in the race he is only eight days ahead of his competition.

It cannot be denied that to determine if all five applicants with which we are concerned are equally qualified to provide the requested service, a presentation by each must be had. This of necessity requires the granting of a hearing.

Judicial determinations in point are as follows:

*Application of Dakota Transportation*, 291 NW 589 (SD, 1940). In this case two applications were received by the regulating agency seeking authority to operate over a given route. The court was presented with the question of priority upon an appeal from the administrative decision. Said the court:

The legislature has granted no rights of priority in an applicant who first applies for a certificate. The public interest clearly did not require the granting of both applications for certificates to operate over the same route. The principal consideration was not which applicant was first in point of time, but an administrative question of deciding which applicant would better serve the public interest was primarily involved.

*Application of National Freight Lines*, 40 NW (2d) 612 (Iowa, 1950).

In some instances where two or more applications are filed for authority to render the same initial service, only one of which should be granted, and each applicant is equally qualified, a regulatory body grants the application first filed. However, even in such instances controlling effect need not be given priority of filing. And the commission was not required here to grant H & W's application because it was filed before that of National.

Black Hawk Motor Transit Company of Illinois Commerce Commission, 48 NE 2nd 341 (Ill. 1943).

Mere priority in time of application for a certificate of convenience and necessity is not, of itself, controlling in such cases, but it is an element to be considered in determining the reasonableness of the order of the commission.

In 1963 the Illinois high court had opportunity to consider the question of priority again. In *Citizens Valley View Company v. Illinois Commerce*, 192 NE 2nd 392 (Ill. 1963) the Black Hawk Motor case was cited with approval.

What these holdings stand for has come to be known as the Ashbacker Doctrine. The doctrine was established in *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 US 327, 66 S.Ct. 148, 90 L.Ed. 108 (1946). In this case an application was filed for authority to construct a new broadcasting station. Prior to the time this application was acted upon a different application was received seeking authority to expand existing facilities in the same area. The Federal Communications Commission granted the first application and set the second for hearing. The applications were "actually exclusive." Appropriate statutes provided for hearing before the Federal Communications Commission. The court speaking through Justice Douglas stated:

We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their applications becomes an empty thing. We think that is the case here.

This doctrine, that parties making mutually exclusive applications are entitled to comparative hearing, has grown rapidly as is pointed out in *Administrative Law Treatise*, Vol. 1, Sec. 8.12 by Kenneth Culp Davis.

That the five applications herein are "actually exclusive" is presumed by this office. Hence we hold the Ashbacker Doctrine to be controlling. Such being the case we hold each of the applicants must receive a hearing prior to the decision on the merits of any of them.

## CONCLUSION

When the Nevada Public Service Commission is in receipt of two or more applications, such applications being "actually exclusive," the hearing and deciding of less than all such applications prior to the hearing of all would violate the Ashbacker Doctrine.

Neither by statute nor regulation has there been established in the State of Nevada a date after which applications filed with the Public Service Commission should not be considered. Hence, the Public Service Commission should hear all applications prior to the decision of one.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

---

OPINION NO. 1967-469 NEVADA HISTORICAL SOCIETY—The Boar...

OPINION NO. 1967-469 Nevada Historical Society—The Board of Trustees of the Nevada Historical Society may not lawfully pay its Assistant Executive Secretary a salary in excess of that prescribed by law, merely because she is performing the additional duties of the Executive Secretary.

Carson City, December 8, 1967

Mr. Russell W. McDonald, Secretary, Board of Trustees, Nevada Historical Society,  
Box 1129, Reno, Nevada 89504

Dear Mr. McDonald: Mrs. Clara Beatty was Executive Secretary of the Nevada Historical Society. She died October 25, 1967. At the time of her death, Mrs. Marion Welliver was Assistant Executive Secretary. By action of the Society's Board of Trustees, Mrs. Welliver has been designated "Acting Executive Secretary." The Society intends to seek applications from interested persons for appointment to the position of Executive Secretary on a permanent basis. The annual salaries of the Executive Secretary and Assistant Executive Secretary are specified by law. By your letter of December 1, 1967, you have inquired about the legality of increasing Mrs. Welliver's salary to the level of that of the Executive Secretary, pending appointment of a new and permanent Executive Secretary.

#### ANALYSIS

Statutes of Nevada 1967, ch. 525, in part provides:

Section 1. Chapter 281 of NRS is hereby amended by adding thereto a new section which shall read as follows:

The following state officers and employees in the unclassified service of the State of Nevada shall receive annual salaries in the amounts set forth following their respective specific titles:

\* \* \* \* \*

Nevada Historical Society:	
Executive Secretary	\$8,700
Assistant Executive Secretary	6,600

\* \* \* \* \*

Sec. 39. Chapter 382 of NRS is hereby amended by adding thereto a new section which shall read as follows:

Employees of the Nevada historical society in the unclassified service of the state shall receive annual salaries in the amounts specified in section 1 of this act.

We do not believe that the Board of Trustees may raise Mrs. Welliver's salary as contemplated, so long as she holds the office of Assistant Executive Secretary, even though she is performing additional duties on a temporary basis. The fact that she has been designated "Acting" Executive Secretary is not significant.

During the absence of the Governor from the State of Nevada, the Lieutenant Governor is by law designated "Acting" Governor; and he performs duties in addition to those regularly attendant upon his office as Lieutenant Governor. However, this fact does not entitle him to receive an increase in his salary to match that of the Governor's during the Governor's absence.

If Mrs. Welliver wishes to resign her present position and accept an appointment as Executive Secretary, even on a temporary basis, she will be entitled to receive the lawfully designated salary therefor. Otherwise, she may not.

#### CONCLUSION

It is the opinion of this office that the Board of Trustees of the Nevada Historical Society may not lawfully pay its Assistant Executive Secretary a salary in excess of that prescribed by law, merely because she is performing the additional duties of the Executive Secretary.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

---

OPINION NO. 1967-470 BLOOD ALCOHOL TESTS; LIABILITY FOR...

OPINION NO. 1967-470 Blood Alcohol Tests; Liability For Administration Of—A person may, without his consent, lawfully be subjected to the extraction of blood and administration of a blood alcohol test, when all of the following conditions are present: the test was incident to lawful arrest; there existed reasonable cause to believe the person arrested was driving under the influence of intoxicants; the test was administered at the direction of a peace officer; the extraction of blood was done by a physician in a simple, medically acceptable manner; and the extraction was done in a hospital environment. Those assisting peace officers in connection therewith, as well as peace officers themselves, would be immune from civil and criminal liability if all of the foregoing conditions exist. Modified by AGO 68-487, dated 2-2-68.

Carson City, December 11, 1967

Peter D. Laxalt, Esq., Deputy District Attorney, Ormsby County Courthouse, Carson City, Nevada 89701

#### FACTS

Dear Mr. Laxalt: By your letter of November 27, 1967, you have inquired about what liability, if any, may be imposed upon a county hospital should it assist in the taking of blood for blood alcohol tests from a person without his consent. Your letter stated that the issue arose in connection with an incident in which a California driver was hospitalized following an automobile accident. Police officers who pursued him over the state line suspected him of being intoxicated and requested the blood alcohol tests.

#### ANALYSIS

I believe that analysis compels the conclusion that the decision of the United States Supreme Court in *Schmerber v. California*, 384 U.S. 957 (1966) is of significance here. The case arose prior to the enactment of California's "implied consent" law. Thus, it was premised upon a situation in which California and Nevada laws were similar.

In *Schmerber*, the Supreme Court, by 5-4 decision, held in effect that consent or the lack of it was immaterial. The decision is far reaching, has been widely followed, and has become the law of Nevada, at least by implication. See *Downing v. Marlia*, 82 Nev. 294, 300. In the present analysis, *Schmerber* must be strictly confined to its facts:

These facts may be summarized as follows:

1. The test was incident to lawful arrest;
2. There existed reasonable cause to believe the person arrested was driving under the influence of intoxicants;
3. The test was administered at the direction of a peace officer;
4. The extraction of blood was done by a physician in a simple, medically acceptable manner; and
5. The extraction was done in a hospital environment.

A review of California's "implied consent" law discloses remarkable similarity to *Schmerber* in its requisites. See Cal.Veh.Code §§ 13353.4. Thus, the statutory plan under which consent to a blood alcohol test is obviated requires that all the elements present in *Schmerber* must exist. Where any such element is lacking, the statutory plan is violated and it could not be said that its "consent" could be imposed. The California statutes also include a provision absolving hospitals and doctors from liability in the proper administration of the test.

In cases where police officers are in the performance of duties of law enforcement, they cannot be held liable for assault and battery provided they act in a reasonable manner. The same immunity extends to those who assist police officers. See 6 Am.Jur.2d 126, Assault and Battery § 148. This would apply to hospitals and doctors who assist law enforcement officials in the sense here under consideration.

In summary, the law of this State under Schmerber and the law of California at the present are substantially the same. We conclude that where all the elements of Schmerber exist, consent is immaterial and no liability on the part of hospitals or doctors will obtain. If all elements are not present, consent is essential; otherwise liability would attach. The "implied consent" of the California law appears to add nothing to the analysis. Therefore, the question of its extra-territorial effect is really not reached.

One further qualification must be added. The authority of a California peace officer in the State of Nevada may be questionable, depending on the facts of each case. Therefore, a hospital or doctor may be exposed to liability unless administration of a blood test is done at the specific request of a Nevada peace officer acting with proper jurisdiction in the case, who has reasonable cause to request it under Schmerber.

## CONCLUSION

It is therefore the conclusion of this office that a person may, without his consent, lawfully be subjected to the extraction of blood and administration of a blood alcohol test when all of the following conditions are present: the test was incident to lawful arrest; there existed reasonable cause to believe the person arrested was driving under the influence of intoxicants; the test was administered at the direction of a peace officer; the extraction of blood was done by a physician in a simple, medically acceptable manner; and the extraction was done in a hospital environment.

Those assisting peace officers in connection therewith, as well as peace officers themselves, would be immune from civil and criminal liability if all of the foregoing conditions exist.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

## MEMORANDUM

March 6, 1968

To: All District Attorneys

From: Harvey Dickerson, Attorney General

Attorney General's Opinion No. 67-470, dated December 11, 1967, and Attorney General's Opinion No. 68-487, dated February 2, 1968, are supplemented by the following information:

The case of *Downey v. Marlia*, 82 Nev. 294, supports the theory that the extraction of blood for the determination of alcohol content may be made by a nurse or technician, as well as a doctor, and that analysis may be made by a qualified laboratory technician.

In this case, the Supreme Court of our State referred to *Schmerber v. California*, 384 U.S. 957 (1966).

It would therefore seem that, in our State at least, it has been determined that if all of the other requirements of *Schmerber* are met, blood may be extracted by a nurse or technician as well as by a physician, and that a qualified technician is authorized to make the analysis necessary in such cases.

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-471 UNIVERSITY OF NEVADA; SALARIES OF ...

OPINION NO. 1967-471 University Of Nevada; Salaries Of Desert Research Institute Alien Employees—  
Salaries of aliens employed at the Desert Research Institute may be paid from appropriated funds.

Carson City, December 11, 1967

Mr. Neil Humphrey, President, University of Nevada, Reno, Nevada 89507

Dear Mr. Humphrey: You have requested our advice concerning the following question:  
QUESTION

May salaries of aliens employed at the Desert Research Institute be paid from state appropriated funds?

#### ANALYSIS

The problem arises through NRS 281.060, which provides, with limited exceptions, that only citizens or wards of the United States or those honorably discharged from the United States Armed Forces shall be employed by any officer or political subdivision of the State of Nevada. However, this statute is contained within Title 23 of the Nevada Revised Statutes relating to public employees in general.

Because of the nature of the scientific research conducted by the institute, it has been found that the limited employment of aliens is desirable and sometimes essential to the proper implementation of the act establishing the Desert Research Institute. The Legislature has recognized this and exempted the institute from the application of Title 23. The following statutes deal specifically with this problem:

NRS 396.7953 (2):

In devising and establishing such personnel policies and procedures, the board of regents shall not be bound by any of the other provisions of this chapter or the provisions of Title 23 of NRS, and none of the other provisions of this chapter or the provisions of Title 23 of NRS shall be applicable to any person employed in connection with the operation of contractual or sponsored research activities of the institute except as may be prescribed by the board of regents.

NRS 396.7955 (2):

None of the other provisions of this chapter or the provisions of Titles 23 or 31 of NRS or any other statute relating to public officers and employees or public financial administration shall apply to the receipt, investment, management, disbursement, use, expenditure or accounting for any moneys or property received by the board of regents pursuant to NRS 396.7952, except as provided in subsection 4 of NRS 396.7952.

#### CONCLUSION

Salaries of aliens employed at the Desert Research Institute may be paid from appropriated funds.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Daniel R. Walsh, Chief Deputy Attorney General

---

OPINION NO. 1967-472 FISH AND GAME COMMISSION—Reasonabl...



OPINION NO. 1967-472 Fish and Game Commission—Reasonable public notice is a condition precedent to the action by the Fish and Game Commission to change the classifications of wild animals, wild birds, and fish under NRS 501.110.

Carson City, December 12, 1967

The Honorable William MacDonald, District Attorney, Humboldt County, Winnemucca, Nevada 89445

Dear Mr. MacDonald: According to NRS 503.590, among other things predatory animals and birds, reptiles and non-game animals and birds may be kept live in captivity, but game animals and birds cannot.

Prior to 1965, mountain lions were predatory animals, according to NRS 501.070. In that year, on May 22, 1965, the Fish and Game Commission reclassified them as "game animals," as is permitted under NRS 501.110. In the following sessions of the Legislature, the classification statutes for "predatory" and "game" animals were not amended to reflect the change by the Fish and Game Commission.

According to the information we have, mountain lions were reclassified as "game animals" under Amendment No. 2 to General Regulation No. 2 in a general session of the Fish and Game Commission on May 22, 1965. On June 3 and 10, 1965, notice was published in the Carson City Appeal by the Fish and Game Commission, which provided:

The Nevada Fish and Game Commission does hereby serve formal notice of intent to amend Commission General Regulation 2 as follows:

\* \* \* \* \*

The mountain lion shall be deleted from the list of predatory animals and added to the list of game animals.

Your question concerns whether or not the possession of live mountain lions constitutes a crime under NRS 503.590. Your concern is with the fact that the 1967 Legislature did not amend its statutes classifying mountain lions to conform to the Fish and Game Regulations. This opinion does not reach that question because, as our analysis shows, we believe the notice requirements of NRS 501.110 were not complied with by the commission.

## ANALYSIS

NRS 501.035 to and including NRS 501.095 and NRS 501.110 establish classifications for wild animals, wild birds and fish, and place the species in various categories. For example, NRS 501.070 classifies the mountain lion as a "predatory animal." NRS 501.110 further permits the Fish and Game Commission to change the classification of a species of wild animal, wild bird or fish under certain conditions. It provides:

2. Whenever it is in the public interest to do so, and upon reasonable public notice, the commission may add to or take from any of the appropriate classifications any animal, bird or fish. (*Italics added.*)

We conclude that the reclassification of mountain lions as "game animals" by the commission is invalid because it did not comply with the "public notice" requirements of NRS 501.110(2). This subsection explicitly states that wild animals, wild birds and fish may be reclassified "upon reasonable public notice." We take this to mean that reasonable public notice is a condition precedent to action by the commission. It is safe to say that the purpose of notice in this case is to inform the public of a fundamental change in the Fish and Game Laws of this State and permit an opportunity for interested persons to present their views to the commission. These are the usual objects of notice in any case.

We cannot lose sight of the fact that wild animals, wild birds and fish are natural resources belonging to the people of the State of Nevada, and that their reclassification carries far-reaching implications and consequences. The public should have and does have, in our opinion, the right to become informed of a proposed reclassification and to present its views prior to its enactment.

The notice given by the commission in this case is lacking in two respects. It was published in the newspaper more than 3 weeks after the change was adopted by the commission. It also failed to inform the public of when or where they might present their views on the subject.

We are not persuaded that NRS 501.250 applies in this case. This statute provides:

Whenever in this Title the commission is required to make publication of any official order or regulation with regard to open or closed seasons, bag limits, hours or other regulatory matters, such publication shall be made by insertion of a legal notice in a newspaper of general circulation in the State of Nevada or in the locality to which the order or regulation applies. Such legal notice shall be published once in such newspaper and the order or regulation shall become effective as soon as such publication is accomplished, unless otherwise specified in the order or regulation.

An example of the application of NRS 501.250 can be found in NRS 503.130. It provides in part:

The commission shall annually proclaim, by printed notice, published in the manner provided in this Title, such seasons, bag limits, and other regulations for the hunting of upland game birds \* \* \*.

If the Legislature had intended NRS 501.250 to apply in the reclassification of wild animals, wild birds and fish, we believe it would have used the same or similar language as is found in NRS 503.130. It did not. We believe that the notice required for the reclassification of wild animals, wild birds and fish is independent of that required by other provisions of Title 45 of NRS.

## CONCLUSION

It is the conclusion of this office that reasonable public notice is a condition precedent to the action by the Fish and Game Commission to change the classification of wild animals, wild birds and fish under NRS 501.110.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Peter I Breen, Deputy Attorney General

---

OPINION NO. 1967-473 COMMITMENT OF MENTALLY ILL—Costs o...

OPINION NO. 1967-473 Commitment of Mentally Ill—Costs of emergency hospitalization are chargeable to the patient and his family and if there is a deficiency, to the State. Clarifies AGO 67-444, dated 10-3-67.

Carson City, December 14, 1967

Karl R. Harris, Directory, Department of Health, Welfare, and Rehabilitation, Nye Building, Carson City, Nevada 89701

Dear Mr. Harris: You have requested this office to further clarify and expand AGO 67-444, October 3, 1967, concerning Chapter 541 of the Statutes of Nevada 1967, known as the Nevada Hospitalization of the Mentally Ill Act.

The question presented is as follows:

When an alleged mentally ill person is hospitalized for emergency observation and diagnosis prior to hospitalization under a court order, who is responsible for the hospitalization costs incurred?

## ANALYSIS

The Nevada Hospitalization of the Mentally Ill Act provides that certain persons may hospitalize one who appears to be mentally ill "and, because of such illness, is likely to injure himself or others if he is not immediately detained." Such hospitalization is for purposes of emergency observation and diagnosis. Chap. 541, Sec. 14, Statutes of Nevada 1967.

Section 53 (1), Chapter 541 directs that the costs of the commitment proceedings shall be paid by the State. However, it was held in AGO 67-444 that emergency hospitalization costs were not costs of the commitment proceedings. Further, because of the explicit language of the act, it was held that these costs are not chargeable to the counties.

Section 29 provides as follows:

1. When a person is committed to a hospital under one of the various forms of commitment prescribed by law, the parent or parents of a mentally ill person who is a minor or the husband or wife or adult child of a mentally ill person, if of sufficient ability, and the estate of such mentally ill person, if such estate is sufficient for the purpose, shall pay the cost to the State of Nevada of such mentally ill person's maintenance, including treatment and surgical operations, in any hospital in which such person is hospitalized under sections 2 to 51, inclusive, of this act. (Italics added.)

A person hospitalized for emergency observation and diagnosis under Section 14 is a person "hospitalized under sections 2 to 51, inclusive \* \* \*." It cannot be argued that section 29 applies only to those ultimately committed by court order for persons "committed to a hospital under one of the various forms of commitment prescribed by law" includes those under

1. Voluntary hospitalization
2. Hospitalization of non-protesting persons
3. Emergency hospitalization
4. Hospitalization under court order

Therefore, we are of the opinion that the primary responsibility of emergency hospitalization costs rests with the family and estate of the hospitalized person as specified in section 29.

AGO 67-444 also held that when there is a deficiency between the actual expense of maintenance and the amount paid by those responsible under section 29, that deficiency shall be paid by the State of Nevada.

The act, in section 24(3) provides:

The district court shall also hold a hearing in order to determine liability for expenses of hospitalization of the allegedly mentally ill person if it is determined that he is mentally ill and should be hospitalized as provided under sections 2 to 51, inclusive, of this act.

Since a person admitted for emergency observation and diagnosis under section 14 incurs hospitalization costs and since admission for such purposes is conditioned upon a determination and certification by a psychiatrist or physician that the person has symptoms of a mental illness, and, as a result thereof, is likely to injure himself or others unless he is immediately hospitalized (section 15), a hearing must be held by the district court to determine liability under section 29, whether or not the alleged mentally ill person is ultimately judicially committed.

## CONCLUSION

It is therefore the opinion of this office that the primary responsibility of emergency hospitalization costs rests with the family and estate as specified in section 29. A hearing must be held by the district court to make the determination.

If, after such a hearing, a deficiency exists, the State of Nevada must assume responsibility for that deficiency.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Grayson, Deputy Attorney General

---

OPINION NO. 1967-474 NUISANCE; HOUSE OF PROSTITUTION—Co...

OPINION NO. 1967-474 Nuisance; House of Prostitution—County Commissioners have the authority to pass an ordinance prohibiting houses of prostitution within the limits of their respective counties, and to enforce the same. County commissioners also have the authority, without ordinance, to order the abatement of houses of prostitution within the limits of their respective counties.

Carson City, December 28, 1967

Mr. Henry Dahlstrom, Chairman, Board of County Commissioners, Goldfield, Nevada 89103

Dear Mr. Dahlstrom: You have asked this office to determine (1) whether a county in Nevada may pass an ordinance barring houses of prostitution within said county, and (2) whether a house of prostitution within the county may be abated as a nuisance per se.

#### ANALYSIS

NRS 244.095-NRS 244.115 authorizes county commissioners to initiate and pass ordinances. These ordinances must be based upon the advancement and protection of the general welfare, and not in conflict with any federal or state statutes or constitutional requirements.

This office feels that an ordinance barring houses of prostitution does not fall afoul of any state or federal statute or constitutional barrier, and is therefore enforceable. This is supported by the finding of Nevada's Supreme Court in *Kelley v. Clark Co.*, 61 Nev. 293, to the effect that a house of prostitution is a nuisance per se, and that county commissioners have the duty, under NRS 244.360, whenever they have knowledge, either by personal observation, complaint in writing, or other satisfactory evidence, to take immediate action to notify the district attorney to inform the keepers of a nuisance to abate the same within 5 days of the delivery notice to such keepers.

One of the arguments advanced in *Kelley v. Clark* (supra) by attorneys for the defendant was to the effect that the statutes do not declare houses of prostitution to be a nuisance. The court in answering this contention declared:

We are of the opinion that they are nevertheless such a nuisance. As stated in 46 C.J. 653: "It is not necessary that the evil sought to be remedied be declared a nuisance by the statute itself, so long as the object to be attained was one that could properly be reached by the police power."

The court called attention to *Farmer v. Behmer*, 100 P. 901, 903, wherein the California Supreme Court stated,

A house of prostitution is a nuisance per se, and is so regarded wherever situated.

The Nevada Supreme Court went on to say that there was no merit in the contention that Nevada Law limits the jurisdiction of county commissioners relative to public nuisances to unincorporated towns or cities in their respective counties. It further stated:

The statute makes it clear that the county is the real party in interest in an action to abate public nuisances existing within the limits of said county.

#### CONCLUSION

It is therefore the opinion of this office that county commissioners have the authority to pass an ordinance prohibiting houses of prostitution within the limits of their respective counties, and to enforce the same. County commissioners also have the authority without ordinance to order the abatement of houses of prostitution within the limits of their respective counties.

Respectfully submitted,

Harvey Dickerson, Attorney General

---

OPINION NO. 1967-475 DEPARTMENT OF MOTOR VEHICLES; MOTO...

OPINION NO. 1967-475 Department of Motor Vehicles; Motor Vehicle Carrier Fees, Exceptions—Clarification of Opinion No. 61-209 dated February 10, 1961. Private carriers may be allowed the exemption provided under subsection 1c of NRS 706.670 on a particular vehicle for operation within a 5-mile radius of any city wherein he maintains an established place of business and from which that specific vehicle is habitually operated.

Carson City, December 29, 1967

Mr. A. W. Latta, Jr., Director, Dept. of Motor Vehicles, 555 Wright Way, Carson City, Nevada 89701

Dear Mr. Latta: You have requested clarification of Opinion No. 209 issued February 10, 1961, specifically as to whether a private motor carrier is entitled to the exemption provided by subsection 1(c) of NRS 706.670 for private carriers operating from each city in which there have a base of operations.

#### ANALYSIS

NRS 706.670 subsection 1(c) exempts "private motor carriers of property operating within a 5-mile radius of the limits of a city or town" from the provisions of NRS 706.010 to 706.700 inclusive.

A private motor carrier of property is 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. Carriers of any property for compensation, direct or indirect, are specifically excluded from the definition of private carrier.

NRS 706.130 declares the primary legislative purpose in enacting Chapter 706 to be to provide for regulation and compensation for the use of the public highways of this State. The vehicles falling within the 5-mile radius of a city would utilize the public highways of this State, beyond the 5-mile radius, very little as pointed out in Opinion 61-209 since their travel within the 5-mile radius would be primarily on city streets.

To allow the exemption for only one city where a private carrier has an established place of business, no matter how many other cities in which he is established, would be inconsistent with the reasoning behind the enactment of the exemption. The exemption would, however, apply only to vehicles based in, and habitually operated within, a particular city and would not be applicable where a vehicle based and consistently used within one city was temporarily assigned to another city where the carrier also has a base of operations.

#### CONCLUSION

NRS 706.670, 1(c) exempts from the provisions of NRS 706.010 to 706.700, inclusive, only those private carriers who have an established place of business within a given city and only those vehicles regularly and habitually operated within a 5-mile radius from that city. Therefore, the exemption may be allowed on a particular vehicle only for operation in a single city. However, a private carrier may be allowed the exemption on individual vehicles in any city wherein he maintains an established place of business and from which a specific vehicle is habitually operated.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Thomas H. Cook, Deputy Attorney General

---