

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-01 CITIES AND TOWNS; ELECTIONS: A person chosen by a city council to replace a city council member who dies during his term may hold the office until the replacement's successor is elected and qualified at the next general election.

Carson City, January 22, 2002

Terrence P. Marren, City Attorney, Office of the City Attorney,
10 East Mesquite Boulevard, Mesquite, Nevada 89027

Dear Mr. Marren:

You have requested an opinion from this office regarding the following question.

QUESTION

When a person is chosen by a city council to replace a city council member who dies during incumbency, how long may the deceased member's replacement hold the office?

ANALYSIS

A Mesquite city council member was elected to a four-year term in June 2001. The member's term of office would have ended in June 2005. However, the member tragically died in July 2001, shortly after being elected. Pursuant to the provisions of NRS 266.225, the mayor and city council promptly selected a replacement for the deceased member. Your question is, how long may the deceased member's replacement hold the office?

NRS 266.225 provides in relevant part:

[A]ny vacancy occurring in the office of councilman by death . . . must be filled by the mayor and city council at the first regular meeting after the vacancy, when the council and the mayor, . . . shall by a majority vote elect some person possessing the requisite qualifications, who shall hold the office until the election and qualification of his successor at the next general city election. [Emphasis added.]

The plain language of the statute mandates that the term of the deceased member's replacement ends when the replacement's successor is elected and qualified at the next general city election.

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According to the facts you have provided, that will occur in June 2003. “Where the language of a statute is plain and unambiguous, and its meaning is clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.” *Del Papa v. Board of Regents of the Univ. and Community College Sys. of Nevada*, 114 Nev. 388, 392, 956 P.2d 770, 774 (1998).

CONCLUSION

A person chosen by a city council to replace a city council member who dies during his term may hold the office until the replacement’s successor is elected and qualified at the next general election.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

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AGO 2002-02 PERSONNEL; RECORDS; NEVADA ATTORNEY FOR INJURED WORKERS: The office of the Nevada Attorney for Injured Workers (NAIW) is a division of the Department of Business and Industry (Department). The NAIW is the appointing authority for the division's staff and reviews personnel evaluations for purposes of approval or disapproval, while the Director of the Department makes findings and renders decisions about such evaluations in the context of formal grievance proceedings. The NAIW has exclusive authority to oversee and manage the legal functions of the division and to maintain the legal case files of injured workers. Provided that the Director does not preempt the NAIW's statutory authority, the Director has authority to oversee and manage the administration of all the divisions within the Department and is entitled to maintain the personnel files of the NAIW's staff if the arrangement would benefit departmental administration as a whole.

Carson City, January 22, 2002

Nancyann Leeder, Nevada Attorney for Injured Workers
1000 West William Street, Suite 208, Carson City, Nevada 89701

Dear Ms. Leeder:

You are the current Nevada Attorney for Injured Workers (NAIW). In order to hold your position, you are required to be a licensed attorney in the State of Nevada. NRS 616A.435(2). You have requested an opinion from this office concerning several issues related to your supervision and authority over the attorneys and clerical staff employed in the office of the NAIW.

QUESTION ONE

Is the Nevada Attorney for Injured Workers the appointing authority for NAIW staff pursuant to NRS 616A.440?

ANALYSIS

The office of the NAIW was a stand-alone agency until the reorganization of the executive branch in 1993. Act of July 9, 1993, ch. 466, § 1144, 1993 Nev. Stat. 1861. At that time, the office was incorporated within the

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Department of Business and Industry (Department).¹ NRS 616A.435. The Governor appoints the Nevada Attorney for Injured Workers for a term of four years. *Id.* Your question focuses on whether the Director of the Department or the NAIW is the appointing authority for the office of the NAIW. We conclude that the NAIW is the appointing authority, but the Director also has authority concerning personnel management.

The NAIW has express authority to employ licensed attorneys as deputies, who are in the unclassified service of the state, and clerical and other necessary staff, who are in the classified services of the state.² NRS 616A.440.

NAC 284.022 defines “appointing authority” as “an official, board, or commission having the legal authority to make appointments to positions in the state service, or a person to whom the authority has been delegated by the official, board, or commission.” An appointment is “the acceptance by an applicant of an offer of employment by an appointing authority and their mutual agreement as to a date of hire.” NAC 284.023. Therefore, making an appointment to a position in the state service is synonymous with “employ.” Pursuant to the cited statutes and the definitions in the regulations of the Personnel Commission, it is the NAIW who is the appointing authority for the unclassified staff of deputy attorneys and the clerical staff in the classified service.

Although the NAIW has authority to select and appoint classified and unclassified staff, the Director of the Department also possesses significant authority concerning personnel management in the divisions within the Department. The Director has authority to conduct such investigations and studies as are deemed necessary to determine the most efficient and economical use of the personnel of the Department. NRS 232.005. The Director may transfer personnel from one division in the Department to other divisions in the

¹Before the 1993 reorganization, the Department of Business and Industry was named the Department of Commerce. The Department of Commerce was one of the three “super departments” created during the 1963 reorganization, each new department incorporating various stand-alone agencies in the executive branch. Act of April 12, 1963, ch. 339, § 2, 1963 Nev. Stat. 661.

²The Director of the Department of Business and Industry may possibly have discretion to appoint an executive director of the office of the NAIW, as authority to appoint that particular position is not “expressly vested in another person, board or commission by specific statute.” See NRS 232.520(1).

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Department if it is found that such transfers would result in greater utilization of personnel, improve the efficiency of departmental operations, result in economies within the Department, or improve its organization. *Id.*

The Director's authority under NRS 232.005 to scrutinize the personnel management activities of division heads within the Department and to make interdepartmental personnel transfers was not enacted until two years after the Legislature created the Department and incorporated into it a number of previously independent state agencies. Act of April 14, 1965, ch. 506, § 1, 1965 Nev. Stat. 1431. Perhaps the legislation was enacted in response to the Attorney General's interpretation that because the appointment authority for the heads of the divisions within the Department rested in the Governor, the Director needed express statutory authority to exercise such administrative discretion. *Op. Nev. Att'y Gen. No. 195* (December 31, 1964). In that opinion, the Attorney General reasoned that the Governor's retention of ultimate appointment authority for division heads "indicates that the Legislature felt that the primary responsibility for the successful operation of these [agencies should rest with the Governor's] appointees" and that the Director could not "require the personnel of one division [within the Department] to perform services for another." *Id.* at 91-92. We must assume the Legislature was aware of the various policy considerations involved in granting the Director this personnel management authority vis-à-vis employees whose appointing authorities are heads of divisions within the Department, and that the Legislature purposely drafted NRS 232.005 to read as it does. *Randono v. CUNA Mutual Ins. Group*, 106 Nev. 371, 793 P.2d 1324 (1990).

However, considering the unique function³ of the NAIW, the specialized skills required of both its attorney and non-attorney staff, and the professional and legal obligations owed to its clients, it is uncertain whether the Director would find that NAIW staff transfers among other divisions in the Department could result in greater utilization of personnel, improve efficiency of Department operations, result in economies within the Department, or improve its organization as contemplated by NRS 232.005.

³ The unique nature of the NAIW is discussed in the analysis of Question Three, *infra*.

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CONCLUSION TO QUESTION ONE

The Nevada Attorney for Injured Workers is the appointing authority entitled to select and employ the unclassified staff of deputy attorneys and the clerical staff in the classified service. Nevertheless, the Director of the Department of Business and Industry also has significant authority concerning personnel management in the divisions within the Department.

QUESTION TWO

Is the Director of the Department of Business and Industry entitled to review and approve or disapprove personnel evaluations of NAIW staff?

ANALYSIS

Your question focuses on whether the Director of the Department or the NAIW, as the appointing authority for that agency, has the authority to independently conduct and manage the performance evaluation process of the attorneys and other staff of the NAIW office. In the first instance, we conclude that the authority to review the personnel evaluations of NAIW staff for purposes of approval or disapproval rests exclusively in the NAIW. The Director's role with respect to rendering judgment on the merits of personnel evaluations of classified NAIW staff arises during the grievance process, as set forth in the Nevada Administrative Code.

After a decade and a half as a stand-alone state agency, the NAIW was incorporated into the Department in 1993. NRS 232.510. As discussed above, the NAIW has authority to appoint deputy attorneys, clerical, and other staff deemed necessary to carry out the NAIW's statutory duties. NRS 616A.440. The NAIW also has authority to exercise the powers of an appointing authority contemplated in the Rules for Personnel Administration because everything lawful and necessary to the effectual execution of that power is given by implication of law. State ex rel. *Hinckley v. Sixth Judicial Dist. Court*, 53 Nev. 343, 1 P.2d 105 (1931).

After consultation with the Director of the Department of Personnel, the appointing authority is responsible for establishing the work performance standards of an employee. NRS 284.335. The appointing authority is also

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responsible for ensuring that each classified position has standards and the employees are evaluated using those standards. NAC 284.468. The employee's immediate supervisor performs the evaluation for transmission to the appointing authority. NRS 284.337. As supervising attorney to the deputy attorneys, the NAIW would conduct the performance evaluations for the deputy attorneys. The appointing authority is required to file the performance evaluation of probationary and post-probationary employees in the classified service with the Director of the Department of Personnel. NRS 284.340. The appointing authority also has authority to establish the essential functions of the positions within the agency on a case-by-case basis. NAC 284.356. The appointing authority must base this determination on a thorough review and analysis of the nature of the job and the actual performance of the employees, and during the process of considering applicants and making hiring decisions the appointing authority must fulfill legal obligations with respect thereto. *Id.*; NAC 284.357.

Although managing and conducting the personnel evaluation process and rendering final approval of employees' evaluations rests in the NAIW as appointing authority, the Director functions in the role of an intermediate appellate tribunal when permanent classified employees invoke the grievance process set forth in the Rules for Personnel Administration.⁴

When a permanent classified employee disagrees with a performance evaluation, he or she may invoke the grievance process set forth at NAC 284.658 to 284.697, inclusive. NAC 284.478. If the performance evaluation is still contested after initial review under NAC 284.478, the employee must file a written grievance within ten days, identifying the specific points of disagreement. NAC 284.678. If the grievance is not resolved at the lower levels, it is forwarded to the head of the division, in this case the NAIW. NAC 284.686. If the permanent classified employee has not received satisfactory relief within ten working days after the NAIW receives the grievance, the

⁴ The Director's function to provide appellate-type review in the formal grievance process for employees of divisions within the Department is not limited to reviewing contested performance evaluations. The Director functions in that role whenever permanent classified employees invoke the grievance procedure because they feel they have suffered "an injustice relating to any condition arising out of the relationship between an employer and an employee, including, but not limited to, compensation, working hours, working conditions, membership in an organization of employees or the interpretation of any law, regulation or disagreement." NAC 284.658.

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employee may file the grievance with the highest administrator of the department that the division is within, in this case the Director. NAC 284.690.

The Director may conduct a hearing on the grievance, address findings of fact to the employee's specific points of disagreement with the evaluation, and render a decision in the matter.⁵ Id. The Director also has the option to allow the grievance to be forwarded directly to the Employee Management Committee (EMC) for final resolution. Id. The resolution becomes binding at any point during the process if an agreement is reached between the appointing authority and the employee or after the EMC renders a final decision, though the Budget Division of the Department of Administration must first approve resolutions with fiscal effect. NAC 284.697.

CONCLUSION TO QUESTION TWO

The authority to review personnel evaluations of Nevada Attorney for Injured Workers' staff for purposes of approval or disapproval rests exclusively in the Nevada Attorney for Injured Workers, in the first instance, as the appointing authority. However, the Director of the Department of Business and Industry has authority to review, make findings of fact, and render decisions about such evaluations in the context of the formal grievance procedure wherein permanent classified employees of divisions within the Department of Business and Industry may challenge the actions of their respective appointing authorities.

QUESTION THREE

Is the Director of the Department of Business and Industry entitled to perform the duties and functions of the NAIW?

ANALYSIS

This question reflects a concern about the overlapping boundaries of authority that exist between the director of a department and the head of a

⁵ Although the Director functions in a quasi-judicial capacity during the process, the authority does not extend to reversing the decision of the appointing authority absent agreement with the Director's decision by both the appointing authority and the grieving employee. See NAC 284.697(1)(a).

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division that is within the department, where both administrators are appointed by the Governor and have statutory duties and powers concerning the operation of the particular agency. It can be difficult to determine whether certain actions are in excess of one administrator's authority or whether they usurp the responsibility of the other. We conclude that the Director has authority to oversee and manage the administration of all the divisions within the Department and to establish policies for their efficient operation provided, however, that in carrying out such administrative functions, the Director may not preempt any specific authority or jurisdiction granted by statute to a division or take actions that would contravene a rule of court or a statute.

The duties and function of the NAIW are to provide legal representation to injured workers. The NAIW is required to be a licensed attorney, and the appointed deputies are required to be licensed attorneys. NRS 616A.435 and NRS 616A.440. The NAIW must establish and maintain two offices, one in the North and the other in the South. NRS 616A.445(1). The NAIW and staff function as a law firm. They represent claimants at the administrative, district court, and appellate levels. NRS 616A.455. The NAIW has authority to make the determination whether the decision rendered in a claimant's case by an administrative tribunal merits an appeal to a district court and ultimately to the Nevada Supreme Court. *Id.* The NAIW also has authority to set policies for the rejection of claims from the outset that are frivolous or lack merit. *Id.*

In order to represent the clients properly and adequately, it is critical that the NAIW hire attorneys and legal support staff with the competence and experience to perform their work effectively. The NAIW and staff of deputy attorneys are officers of the court and accountable under the Nevada Supreme Court's Rules of Professional Conduct (SCR). As the supervising attorney of the deputy attorneys, the NAIW has the authority and responsibility to ensure that the deputies conform to the Supreme Court's standards in the course of providing legal representation to clients. SCR 185. The NAIW has the correlated authority and obligation to ensure that the conduct of the non-lawyer staff is compatible with the professional obligations of the NAIW and deputies. SCR 187.

The specialized skills and professional obligations of a supervising attorney, deputy attorneys, and legal support staff are too numerous to catalog, but among the duties relevant to this analysis are the duty to keep confidential

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all information relating to the representation of a client unless the client waives the privilege (SCR 156), the duty of loyalty to the client and to avoid conflicts of interest (SCR 157), the duty to preserve professional independence in relation to non-lawyers (SCR 188), and perhaps the most basic duty, to provide competent representation with the legal knowledge, skill, thoroughness, and preparation reasonably necessary to meet the client's needs (SCR 151).

The Director is "responsible for the administration of all provisions of law relating to the jurisdiction, duties and functions of all divisions and other entities within the department." NRS 232.520(2). Moreover, the Director does have authority to "be considered as a member of the staff of any division or other entity of the department" when deemed necessary to fulfill those responsibilities. *Id.* However, the Director's authority is specifically limited by the statute, which states that its provisions "do not authorize the director to preempt any authority or jurisdiction granted by statute to any division or other entity within the department or authorize the director to act or take on a function that would contravene a rule of court or a statute." *Id.* The fact that injured workers represented by the NAIW include employees of a division or agency within the Department, and may even include a member of the Director's personal staff, presents additional issues that must be considered.

By virtue of the NAIW's status as the appointing authority for deputy attorneys and for the other reasons discussed above, the Director does not appear to have authority to supervise, train, evaluate, discipline, or terminate the deputy attorneys employed in the office of the NAIW. Similarly, the Director may not function as the NAIW, a deputy attorney, or a member of the legal support staff in providing representation to injured workers because of the likelihood that such involvement in the legal process would contravene rules of court and statutes.

However, the duties of the NAIW are expressly "limited to those prescribed by NRS 616A.455 and 616A.460." NRS 616A.435(3). As discussed above, the NAIW has authority to employ deputy attorneys and other necessary personnel and to carry out all the functions of an appointing authority with respect to the staff. The NAIW has authority to provide legal representation to injured workers and to exercise all the powers and responsibilities associated therewith and consistent with the statutory obligations. The NAIW has authority to decide whether or not to pursue an

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appeal of an injured worker's case and to set standards for the acceptance and rejection of injured workers' claims. NRS 616A.455. The NAIW also has authority to prepare and submit a budget for the maintenance and operation of that office in the same manner as other state agencies. NRS 616A.445(2). Notwithstanding that authority, however, the NAIW and the head of each of the other divisions within the Department are required to "administer the provisions of law relating to his division, subject to the administrative supervision of the director." NRS 232.530(2).

As discussed above, the Director's authority to administer the Department is far-reaching, extending to all the duties and functions of the divisions within the Department, even to the extent of being considered as a member of the staff of any division. NRS 232.520(2).

The Director has authority to:

Establish uniform policies for the department, consistent with the policies and statutory responsibilities and duties of the divisions and other entities within the department, relating to matters concerning budgeting, accounting, planning, program development, personnel, information services, dispute resolution, travel, workplace safety, the acceptance of gifts or donations, the management of records and any other subject for which a uniform departmental policy is necessary to ensure the efficient operation of the department. NRS 232.520(3)(a).

The Director also has authority to "[p]rovide coordination among the divisions and other entities within the department, in a manner which does not encroach upon their statutory powers and duties, as they adopt and enforce regulations, execute agreements, purchase goods, services or equipment, prepare legislative requests and lease or use office space." NRS 232.520(3)(b).

The Director has authority to:

Require divisions, offices, commissions, boards, agencies or other entities of the department to work together to carry out their statutory duties, to resolve or address particular issues or

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projects or otherwise to increase the efficiency of the operation of the department as a whole and the level of communication and cooperation among the various entities within the department. NRS 232.522(3).

Moreover, the Director has authority to scrutinize the management of personnel and transfer employees from one division in the Department to another if it would result in greater utilization of personnel, improve efficiency of operations, result in economies, or improve organization. NRS 232.005.

CONCLUSION TO QUESTION THREE

The Director of the Department of Business and Industry has authority to oversee and manage the administration of all the divisions within the Department, establish policies for their efficient operation, and function as staff of a division, provided however, that the Director does not preempt another administrator's statutory authority or contravene the law. The Nevada Attorney for Injured Workers has exclusive authority to provide legal services to injured workers and represent their cases at the administrative, district court, and supreme court levels. In accordance with the Nevada Attorney for Injured Workers' professional obligations established by law and status as the appointing authority, the Nevada Attorney for Injured Workers has exclusive authority to oversee and manage the legal functions performed by the deputy attorneys and legal staff involving the representation of injured workers.

As long as the Director of the Department of Business and Industry does not preempt the statutory authority of the Nevada Attorney for Injured Workers or contravene a law, the Director's administrative authority over the functions of divisions in the Department is broad and extensive. It encompasses the divisions' budgeting, accounting, planning, program development, personnel, information services, dispute resolution, travel, workplace safety, acceptance of gifts or donations, management of records, coordination in adopting and enforcing regulations, executing agreements, purchasing goods, services or equipment, preparing legislative requests, and leasing or using office space, and may also entail divisions working together to increase the operational efficiency of the Department. Of course, in exercising this administrative authority over agency functions, the Director must remain cognizant of, and

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refrain from, encroaching upon the statutory responsibilities and duties of the divisions within the Department.

QUESTION FOUR

Is the Director of the Department of Business and Industry entitled to keep files of confidential personnel information regarding the staff of the office of the NAIW?

ANALYSIS

Initially, a distinction must be made between the confidential personnel information of employees of the NAIW and the confidential information contained in the legal case files of the injured workers represented by the NAIW. The former files, commonly referred to as “personnel jackets,” are the personnel records of state employees containing information related to the employees’ conduct and performance, disciplinary history, salaries in previous jobs, labor negotiations, beneficiary designations, etc., that are confidential pursuant to NAC 284.718. The latter are legal case files containing all aspects of the injured employees’ disputed claims for worker’s compensation benefits, including confidential medical records and the attorney’s work product. We conclude that the Director is not entitled to keep the legal files of injured workers or have access to them at all, even if the worker is an employee of the Department. The Director may, however, maintain the personnel files of Department employees, consistent with the Director’s general administrative authority and the specific authority concerning the management of records and personnel. NRS 232.520(3).

Personnel files are clearly not public records open to anyone who requests inspection because they are declared to be confidential by law. NRS 239.010. Such records are available only to those with a legitimate and recognized right to access. The regulations provide that the following individuals have access to employees’ confidential personnel files: the employee and the employee’s representative with a signed release; the appointing authority or a designated representative within the employing agency; the Director of the Department of Personnel or representative; a state agency considering the employee for

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employment in that agency;⁶ the Board of Examiners considering a claim against the State involving the employee; the Employee Management Committee, a hearing officer, the Personnel Commission, the Nevada Equal Rights Commission, or a court; and persons “who are authorized pursuant to any state or federal law” or an order of the court. NAC 284.726 (emphasis added).

The Director’s broad statutory authority over personnel administration and the management of records supports the conclusion that the Director is authorized, pursuant to state law, to have access to personnel records.⁷ NRS 232.520(3)(a). Alternatively, the Director, who has express statutory authority in NRS 232.520(2) to “be considered the staff of any division or other entity” of the Department, certainly qualifies as a designee of the appointing authority, as well as a “representative of the agency by which the employee is employed.” NAC 284.726(2)(c). It would be absurd to read the subsection as denying access to the Director when the appointing authority of a division of the Department is required by statute to exercise his or her statutory duties and authority “subject to the administrative supervision of the director.” NRS 232.530(2). Furthermore, the Director would be considered the official custodian of the personnel records of all employees within the Department if a central personnel office for the Department were established, pursuant to the authority conferred by NRS 232.520. *See* NAC 284.718(1).

CONCLUSION TO QUESTION FOUR

The Director of the Department of Business and Industry is entitled to maintain files of confidential personnel information regarding the staff of the office of the Nevada Attorney for Injured Workers if the Director determined that management of such records in a central personnel office or other similar

⁶ The appointing authority considering the employee for employment in a state agency is denied access to information concerning the health, medical condition, or disability of an employee, which must be kept separate from the personnel jacket in a locked cabinet. NAC 284.726(3).

⁷ The Director already routinely reviews personnel files and evaluations in the course of conducting hearings and rendering decisions on employee grievances. NAC 284.690. Moreover, the Director’s specific authority to conduct investigations into the personnel operations and specific management strategies of agencies in the Department assumes the Director’s authority to access all personnel records of divisions within the Department. NRS 232.005.

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arrangement would benefit the administration of the Department and the agencies within it.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: RONDA L. MOORE
Deputy Attorney General

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AGO 2002-03 COMMISSIONERS; COUNTIES; DISTRICTS; ELECTIONS:

The commissioner districts must be drawn so that both the one person, one vote mandate and NRS 244.018(2) are complied with.

Carson City, January 31, 2002

Robert S. Beckett, Nye County District Attorney, Post Office Box 593,
Tonopah, Nevada 89049

Dear Mr. Beckett:

You have requested an opinion from this office regarding redistricting of the Nye County Commission.

QUESTION

When changes in population require redistricting of county commissioner districts and, by statute, incumbent commissioners are permitted to complete unexpired terms, what is the best way to redraw the districts?

ANALYSIS

The United States Supreme Court, in its landmark decision *Reynolds v. Sims*, 377 U.S. 533 (1964), held “that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.” *Id.* at 568.

In addition, the requirement to redistrict county commissioner districts comes from article 1, section 13 of the Nevada Constitution which states, “Representation shall be apportioned according to population.” *The Nevada Supreme Court, in County of Clark v. City of Las Vegas*, 92 Nev. 323 (1976), examined this principle in a case involving the potential consolidation of local governmental functions and services for Clark County and Las Vegas. The consolidation was not accomplished; however, the court confirmed the state’s commitment (at the local government level) to the one person, one vote concept implicit in both the Nevada and the United States Constitutions. *Id.* at 332. *See also Dungan v. Sawyer*, 250 F. Supp. 480 (D.C. Nev. 1965) finding that the provisions of the Nevada Constitution that apportion the state legislature were in accord with U.S. Supreme Court rulings.

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According to information you supplied this office, Nye County elects its five county commissioners from established commissioner districts rather than at large. As a result of the 2000 Federal Decennial Census, the county must establish new commissioner districts that equalize the population of each as much as practicable. Currently, there are three northern commissioner districts and two southern commissioner districts.

When redistricting county commissioner districts, NRS 244.018(2) must be considered. This statute states in pertinent part:

[I]f at the time a general election is to be conducted for the election of county commissioners from new districts there is incumbent any county commissioner, elected at large or from a validly established election district, whose term extends beyond the first Monday of January of the following year, he is entitled to serve out his term and shall be deemed to represent the new district in which he resides.

Of the three current northern commissioners, two commissioners will be entitled to serve out the remainder of their terms, until January 3, 2005, pursuant to NRS 244.018(2). The third northern district commissioner's term expires January 6, 2003. Of the two current southern commissioners, one commissioner will be allowed to complete the term on January 3, 2005, the other commissioner's term expires January 6, 2003.

The census data you provided indicates the difference between the most and the least populous current commissioner districts exceeds five to one, that is, the most populous commissioner district currently has a population of 14,015 people and the least populous commissioner district currently has a population of 2,454 people. This discrepancy in the number of people represented in the commissioner districts is constitutionally suspect under both the United States and the Nevada Constitutions, and is legally indefensible.

The Nye County Commission is no longer in compliance with the requirement of one person, one vote, and therefore the county commissioner districts must be redrawn.

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You enumerated a redistricting plan whereby the three northern commissioner districts would be combined into a single district, and two additional districts would be created in the southern part of the county. A problem arises because two of the northern commissioners are entitled to serve out their terms until January 2005. You suggested four alternatives to solve this problem.

The first alternative would be to have NRS 244.018(2) declared unconstitutional and have the two northern incumbent commissioners stand for election against each other in the 2002 election to determine who would represent the one northern commissioner district for the remaining two years of that term.

The second alternative would be to require one of the northern incumbent commissioners to represent one of the new southern commissioner districts.

The third alternative would be to phase-in redistricting over a period of two more years. Under this alternative, parts of one of the commissioner districts would be apportioned to other commissioner districts until the election in 2004, at which time all of the commissioner districts would be equal in population.

The fourth alternative would also be a phased-in redistricting, but it would combine two commissioner districts until the election in 2004, at which time these two districts would be split.

We have done extensive research and taken extra time in preparing this opinion because of the complex nature of redistricting. After analyzing each of the alternatives you propose, we find that none of these alternatives is adequate to meet the one person, one vote mandate and also be in compliance with NRS 244.018(2). Following is our examination of each of these alternatives.

In the material you provided, you point out that a flaw in the first proposal is that neither a district attorney nor the Attorney General could deprive an elected official of office without clear legislative authority or judicial order. We agree. Currently, there is no authority to have a "run off" election between two incumbent county commissioners when their districts have been

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combined. In fact, NRS 244.018(2) provides for the opposite: the incumbents are permitted to retain their seats.

Alternative two would require a county commissioner to represent a commissioner district in which the commissioner does not reside. This proposal would be in violation of NRS 244.018(2) and in addition, NRS 283.040(1)(f) requires an incumbent to be an actual resident of the district in which the incumbent was required to reside to be a candidate for office, and if the incumbent fails to be such a resident, the office becomes vacant. From these two statutes it is clear that the incumbent must reside in the district and for this reason, alternative two is unacceptable.

Alternatives three and four both involve a phased-in redistricting. These alternatives are the more appealing ones. However, we have found no case law that would support a phased in redistricting plan. Because these alternatives would require a two year period in which the one person, one vote mandate would not be adhered to, these alternative are also unacceptable.

Our recommendation is that the new commissioner districts be drawn to be in compliance with both the one person, one vote mandate and NRS 244.018(2). This means that portions of the northern parts of Nye County will have to be combined with portions of the southern parts of the county. In this way, each of the new commissioner districts will be equal in population therefore complying with the one person, one vote requirement. In addition, the incumbents who are entitled, by law, to retain their seats would be able to do so.

CONCLUSION

The results of the 2000 Federal Decennial Census show the population of Nye County has shifted from the north to the south. As a result, the county commissioner districts must be redrawn to bring the county into compliance with the one person, one vote standard.

NRS 244.018(2) permits incumbent commissioners to complete their unexpired terms and as a result three commissioners will be allowed to serve out their terms.

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It is the opinion of this office that the best solution is to redraw the commissioner districts so that both the one person, one vote mandate and NRS 244.018(2) are complied with, which will require northern parts of Nye County to be combined with portions of the southern parts of the county.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-04 CANDIDATES; CONSTITUTIONAL LAW; JUDGES: A district court judge, who was elected in 1996 for a six year term concluding in January 2003, resigned in 1998 to file as a candidate for a federal office and was unsuccessful, may not file as a candidate in 2002 for a nonfederal, nonjudicial office.

Carson City, February 6, 2002

Dean Heller, Secretary of State, Susan Morandi, Deputy Secretary for 1550 Elections, 101 North Carson Street, Ste 3, Carson City, Nevada 89701

Dear Secretary Heller and Ms. Morandi:

You have requested an opinion from this office regarding a former district court judge running for office.

QUESTION

May a district court judge, who was elected in 1996 for a six-year term, resigned in 1998 to file as a candidate for a federal office and was unsuccessful, file as a candidate in 2002 for a nonfederal, nonjudicial office considering the provision in the Nevada Constitution that provides district judges shall be ineligible to run for any nonjudicial office during the term for which they shall have been elected?

ANALYSIS

Article 6, section 11 of the Nevada Constitution states:

The justices of the supreme court and the district judges shall be ineligible to any office, other than a judicial office, during the term for which they shall have been elected or appointed; and all elections or appointments of any such judges by the people, legislature, or otherwise, during said period, to any office other than judicial, shall be void.

This provision has been part of the constitution since the constitution was adopted and amended in 1950. The amendment in 1950 added the words “or

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appointed” and was a result of an Attorney General Opinion issued in 1946 which concluded the provision did not apply to judges who were appointed. Op. Nev. Att’y Gen. No. 46-287 (April 11, 1946).

The Nevada Supreme Court has stated that the above provision does not apply to federal offices and therefore held a district judge could resign his judicial position and be a candidate for United States Congress. “Art. 6, § 11 of the Nevada Constitution has no application to federal offices.” *State ex rel. Santini v. Swackhamer*, 90 Nev. 153, 157, 521 P.2d 568, 570 (1974).

In order to be a candidate, one must be eligible for the office at the time of filing. In 1950 the Attorney General opined to the Secretary of State on whether “a duly elected Justice of the Supreme Court or District Judge whose term ends in 1950 (or technically it may be January, 1951, when his successor will take office) file for State Office (nonjudicial) in 1950 for a term of office that takes effect in January of 1951?” Op. Nev. Att’y Gen. No. 897 (March 29, 1950). The opinion stated, “‘eligible’ has reference to the status of the candidate at the time of filing for the election so that when the electors make their choice at the election it should be made from persons then eligible to the office which is sought by the candidate.” *Id.* The opinion went on to conclude, “a justice of the Supreme Court or district judge may not file as a candidate for any State officer [sic], other than a judicial office, during the term for which he shall have been elected.” *Id.* The opinion also stated that such judges may be candidates for federal office. *Id.* See also *Nourse v. Clarke*, 3 Nev. 566 (1868).

According to the constitution, the justices of the Supreme Court “shall hold office for the term of Six Years.” Nev. Const. art. 6, § 3. The district court judges shall also “hold office for the term of 6 years.” Nev. Const. art. 6, § 5.

The Supreme Court of Oklahoma addressed a similar restriction applying to legislators and stated:

The time for which the defendant was elected was the entire constitutional term of two years, and whether he resigned during that time or not he was not permitted to hold any other office

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under the authority of this state during such entire term. The members of the Constitutional Convention in framing and drafting said section made no exceptions to the disqualifications of the members of the House or Senate from receiving certain appointments or being elected to certain offices or being interested in certain contracts, whether they resigned or not.

Baskin v. Oklahoma ex rel. Short, 232 P. 388, 389 (Okla. 1925).

The Supreme Court of Washington addressed a similar issue in Washington ex rel. *Reynolds v. Howell*, 126 P. 954 (Wash. 1912). In this case, a sitting judge ran for the office of governor and his eligibility was challenged. Washington has a provision in their constitution that is similar to Nevada's. The court observed:

[T]hat the inhibition is not limited to the incumbency of the judge, but that it is extended to the term for which he shall have been elected. . . . [A] judge cannot qualify himself to hold an office other than a judicial one during his elective term, by resignation or by any other act on his part.

Id. at 955.

The Washington Supreme Court thus would not allow the judge to resign and then run for a nonjudicial office.

Based on the previous quote, a judge, while completing his or her term, may not be a candidate for a nonjudicial, nonfederal office. It is also clear that resignation does not remove the disqualification. More recently, constitutions have been amended to include a period of time, such as one year, before the judge can be a candidate for a nonjudicial, nonfederal office.

The United States District Court for the Eastern District of Michigan, Southern Division, recently dealt with the issue in *Worthy v. Michigan*, 142

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F.Supp. 2d 806 (E.D. Mich. 2000). A judge wished to run for county prosecutor. A provision of the Michigan Constitution made the judge ineligible for an elective nonjudicial office during her term and for one year thereafter, and the court upheld the constitutionality of the provision. The court explained:

[T]here are several rational justifications for the constitutional provision. The purpose of the Michigan constitutional provision is to divorce the judiciary from the political arena. The provision serves to separate the candidate's political, legislative, or executive branch ambitions from any impact upon [sic] they may have on his or her decision-making process or integrity as a Judge.

Id. at 814.

This provision of the Nevada Constitution would withstand a challenge based on the equal protection and due process guarantees of both the United States and the Nevada Constitutions. “[T]he right to run for office is not deemed a fundamental right.” *Nevada Judges Association v. Lau*, 112 Nev. 51, 56, 910 P.2d 898, 901 (1996). This case sets forth the test to be used to determine the constitutionality of an election restriction. The test is as follows: “[t]his court must consider: (1) the nature of the asserted injury to the protected rights, (2) the interests put forward by the state as justification for that injury; and (3) the necessity for imposing the burden on the petitioners’ rights rather than some less restrictive alternative.” Id., 112 Nev. at 54-55, 910 P.2d at 900.

While the provision at issue here may infringe on a voter’s right to vote for the candidate of his or her choice and on a judge’s right to hold office, the provision does not hamper a voter’s ability to vote in an election. The nature of any asserted injury would not be unconstitutionally severe and therefore the state must only have a rational basis for the restriction. The state’s interest in separating the judiciary from the political arena is sufficient to justify the reasonable restriction.

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We also examined a case from the Supreme Court of Texas which considered whether a provision of the Texas Constitution prevented a member of the Board of Regents of the Texas State University System from resigning and then serving as a state senator in the Texas legislature. *Wentworth v. Meyer*, 839 S.W.2d 766 (Tex. 1992). The court held that the regent's resignation prior to running for office placed him outside the prohibitions of the Texas Constitution and, therefore, he was eligible to hold office in the legislature. *Id.* at 769.

Wentworth can be distinguished from the scenario presented here both in the facts and in the legal analysis. The prohibition in the Texas Constitution is broader than the prohibition in the Nevada Constitution and applies to all judges, the secretary of state, the attorney general, court clerks, and to persons holding lucrative office under the United States, Texas, or a foreign government during the term for which the official is elected. Any of these elected officials are ineligible to hold office as a legislator. *Id.* at 767. Nevada's prohibition is not as broad as that of Texas and only applies to supreme court justices and district court judges. The Texas Supreme Court overruled two previous Texas cases in reaching the decision it did in *Wentworth*. *Id.* at 768. In doing so, the court found there was doubt as to the meaning of the constitutional text. *Id.* at 767. The language in the Nevada prohibition suffers from no such fault. The language is clear: During the term for which they shall have been elected or appointed, justices of the supreme court and the district judges shall be ineligible to any office, other than a judicial office.

Therefore, although the cases may appear similar, they are actually distinguishable and, of course, the Texas case has no precedential value in Nevada.

In Nevada, judges are also governed by the Code of Judicial Conduct. Canon 5(A)(2) states in part that "[a] judge shall resign from judicial office upon becoming a candidate for a non-judicial office either in a primary or in a general election." In light of the constitutional restriction discussed above, this canon clearly applies only to a judge who wants to be a candidate for a federal office.

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CONCLUSION

The Nevada Constitution provides that district judges shall be ineligible to hold any nonjudicial office during the term for which the district judge was elected. In order to be a lawful candidate, one must be eligible for the office at the time of filing. Accordingly, a district court judge, who was elected in 1996 for a six-year term concluding in January 2003, resigned in 1998 to file as a candidate for a federal office and was unsuccessful, may not file as a candidate in 2002 for a nonfederal, nonjudicial office.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Senior Deputy Attorney General

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AGO 2002-05 SIGNATURES; TIMESHEETS: There are no state or federal laws that prohibit electronic submission of timesheets. Timesheets may be submitted and verified with either a typed signature or with a digital signature.

Carson City, February 8, 2002

John P. Comeaux, Director, Department of Administration
209 East Musser Street, Room 200, Carson City, Nevada 89701-4298

Dear Mr. Comeaux:

You have requested a legal opinion from this office concerning the requirements of written signatures on timesheets.

QUESTION

Does any state or federal statute or regulation require a written signature by either an employee or the supervisor of an employee on a timesheet?¹

ANALYSIS

According to your memorandum dated October 11, 2001, the issue concerning the requirement of written signatures has arisen because the Integrated Financial System administration is involved in long-range planning and considering, among other things, the possible future electronic submission of timesheets by employees, with electronic approval by supervisors.²

First it must be determined whether, under Nevada law, there are any applicable statutes or regulations that carry any express requirement for a written signature on timesheets. Based upon our research, no such requirement appears to exist. Under Nevada law, the Director of the Department of Administration is vested with the broad authority to prescribe regulations concerning attendance and leave of state employees. Specifically,

¹ For purposes of this opinion, "timesheet" is that form described in NAC 284.5255.

² During the 2001 legislative session, Assembly Bill No. 658 was enacted which appropriated from the state General Fund to the budget division for the Department of Administration the sum of \$11,820,380 for the continuation of the development and implementation of the Integrated Financial System. Additionally, it appropriated from the state Highway Fund the sum of \$2,664,000 for the continuation of the development and implementation of the Integrated Financial System. See A.B. 658, 71st Leg. (Nev. 2001).

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NRS 284.345 provides that “the director shall prescribe regulations for attendance and leaves with or without pay or reduced pay in the various classes of positions in the public service.” NRS 284.345(1). Accordingly, NAC § 284.5255 was enacted to address the issue of timesheets. It reads, in pertinent part:

1. Except as otherwise provided in subsection 2, an employee shall provide an accurate accounting of the hours worked and leave used during a pay period on the appropriate form provided by his employer, including, without limitation, the specific times at which his work shifts started and ended. Entries must be made to account for all hours in the pay period, as prescribed by his employer. The employee shall submit the form in a timely manner to his supervisor or the designated representative of the supervisor.

2. An employee’s supervisor is responsible for reviewing the employee’s time sheet and verifying the accuracy of all hours worked and leave used by the employee.

Neither NRS 284.345 nor NAC 284.5255 carry any express requirement for a written signature of either the employee or the employee’s supervisor when providing an accurate accounting of the hours worked and leave used. The regulation only requires that the employee “submit” a form in a timely manner to his or her supervisor and that the supervisor “review” the timesheet and “verify”³ the accuracy of the form. Additionally, there are no statutory prohibitions on the electronic submission of timesheets.

Having determined that a written signature is not required by either an employee or the employee’s supervisor on a timesheet, the next issue is how does an employee submit an accurate accounting of his or her time and how does the supervisor verify the accuracy of the report. There appear to be two

³ Black’s Law Dictionary defines “verify” as “[t]o prove to be true; . . . to confirm the truth or truthfulness of; to check or test the accuracy or exactness of.” BLACK’S LAW DICTIONARY 1733 (4th ed. 1968).

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options available for the employee and the supervisor to “sign” the timesheet and thereby “submit” and “verify,” respectively, the information contained therein. The signatures can be typed signatures, or digital signatures can be used.

The Uniform Commercial Code, adopted by Nevada in NRS chapter 104, recognizes the use of typed signatures on commercial documents. NRS 104.1201(40) defines “signed” as including “any symbol executed or adopted by a party with present intention to authenticate a writing.” This definition would include a typed named adopted by an employee or by the supervisor with the present intention to authenticate (submit or verify) a timesheet.

Nevada also allows for electronic authentication of documents through the use of digital signatures.⁴ NRS chapter 720. Digital signatures are issued by a licensed certification authority. There is a cost involved in the issuance. The cost depends on the level of security required by the recipient of the document, the higher the level of security required, the more expensive the digital signature.

Governmental agencies are specifically authorized to use digital signatures in NRS 720.170, which provides:

1. Except as otherwise provided by specific statute, a public agency may provide that any document submitted to the public agency may be submitted electronically if the document is transformed by a digital signature.
2. As used in this section, “public agency” means an agency, bureau, board, commission, department or division of the State of Nevada or a political subdivision thereof.

If each person or governmental entity who is involved in the submission and acceptance of a record or other document agrees to the use of digital signatures, then NRS 720.160(1) allows digital signatures where a statute or rule of law requires that the record or other document be signed and the use of a message⁵ represents the record or other document. However, NRS 720.160(1) does not apply to a sworn statement, an acknowledgement, a record

⁴ NRS 720.060 defines “digital signature” as a “transformation of a message using an asymmetric cryptosystem.”

⁵ NRS 720.090 defines “message” as a “digital representation of information.”

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or other document required to be signed in the presence of a third party, or a record or other document with respect to which the requirement that the record or other document must be signed or in writing is accompanied by an additional qualifying requirement. NRS 720.160(2).

As a result of the enactment of NRS 720.140 and NRS 720.160, Nevada law authorizes and allows the use of digital signatures within the parameters identified by the Legislature.⁶ The digital signature option is available for timesheets because the exceptions set forth in NRS 720.160(2) do not apply. The timesheets do not require a sworn statement or an acknowledgement, and are not records or other documents required to be signed in the presence of a third party; nor are they records or other documents with respect to which the requirement that the record or other document must be signed or in writing is accompanied by an additional qualifying requirement. Thus so long as both the governmental entity and the employee agree to the use of a digital signature, the requirements of NAC 284.5255 and NRS 720.160 are satisfied by submitting a timesheet electronically with a digital signature.⁷

You have also inquired whether there are any federal statutes or regulations that require written signatures of an employee or supervisor on a timesheet. As to this issue, we are unable to identify any federal law that imposes such a requirement. In fact, the federal government, in many circumstances, permits the use of electronic forms and signatures. For example, the Internal Revenue Service authorizes an employer to establish a system for its employees to file withholding exemption certificates electronically. *See* C.F.R. § 31.3402(f)(5)-1(c) (2001).

Another example is Congress' enactment on June 30, 2000, of the Electronic Signatures in Global and National Commerce Act (E-Sign Act). *See* 15 U.S.C. § 7001 (2001). The E-Sign Act generally gives electronic signatures the same legal effect as their pen and ink counterparts. *See* Holland

⁶ Moreover, in a recent Attorney General Opinion rendered by this office, a similar issue was raised pertaining to whether the governor may endorse a Requisition Demands and Executive Warrant using a facsimile or automated signature. *Op. Nev. Att'y Gen. No. 2001-32* (October 11, 2001). In that opinion, this office opined that the governor is not prohibited from using a facsimile or automated signature when signing Requisition Demands and Executive Warrants. *Id.* Further, in the absence of explicit legislative authority to do so, the issuance of an executive order may be an appropriate means of allowing the governor, when within the State, to use a facsimile or automated signature on Requisition Demands and Executive Warrants. *Id.*

⁷ In order for the employee to agree to the use of a digital signature, it may be necessary to require that the digital signature be a condition of employment.

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& Hart LLP, New E-Sign Act has implications for employee benefits, Colorado Employment Law Letter, December 2000.⁸

Accordingly, there appears to be no federal law that imposes a requirement that written signatures of an employee or supervisor must be obtained on a timesheet.

CONCLUSION

There are no state or federal laws that prohibit electronic submission of timesheets. If the Department of Administration decides to proceed with the electronic submission of timesheets, there are two options to consider regarding how the timesheet will be signed by the employee and verified by the employee's supervisor: the employee submits and the employee's supervisor verifies the timesheet with either a typed signature or with a digital signature.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: SONIA TAGGART
Senior Deputy Attorney General

⁸ Nevada adopted the Uniform Electronic Transactions Act (UETA) in S.B. 49 of the 2001 legislative session. S.B. 49 also amended NRS chapter 720 to bring Nevada into compliance with E-Sign. See S.B. 49, 71st Leg. (Nev. 2001).

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AGO 2002-06 INSURANCE; OPEN MEETING LAW: The 1033 Committee formed at the pleasure of the Insurance Commissioner is not subject to the Open Meeting Law.

Carson City, February 8, 2002

Alice A. Molasky-Arman, Commissioner of Insurance, 788 Fairview Drive,
Suite 300, Carson City, Nevada 89701-5453

Dear Commissioner Molasky-Arman:

You have asked this office for an opinion regarding Nevada's Open Meeting Law and a committee formed by your office known as the "1033 Committee."

QUESTION

Is the committee, formed by the office of the Insurance Commissioner and known as the "1033 Committee," subject to the provisions of the Open Meeting Law, chapter 241 of the Nevada Revised Statutes?

ANALYSIS

The 1033 Committee was formed by the Commissioner of Insurance to address the requirements of the Violent Crime Control and Law Enforcement Act of 1994 (Act), 18 U.S.C., §§ 1033 and 1034. No federal or state law requires the formation of such a committee, nor is such a committee referenced in § 1033. Section 1033 of the Act is aimed at individuals, agents, and employees engaged in the business of insurance and whose activities affect interstate commerce. It also identifies certain activities as crimes and makes it a felony for persons who have ever been convicted of a state or federal felony involving dishonesty or a breach of trust to engage in the business of insurance, or to willfully permit others similarly unsuitable to engage in the business of insurance, unless they have the written consent of the state Insurance Commissioner. 18 U.S.C. § 1033(e)(1) and (2).

You have formed the 1033 Committee as an aid to carrying out your statutory duties under the Act and under the guidelines of the National Association of Insurance Commissioners. The committee is appointed by you and consists of key staff from your office and a deputy attorney general assigned to the Insurance Division. The committee considers the applications of those disqualified by Section 1033 that seek the written consent of the Insurance Commissioner to engage or participate in the business of insurance

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and advises the Insurance Commissioner regarding said applications. The committee also crafts proposed language for regulations to guide the procedure for relief from the law's prohibition and acts in an advisory capacity to the Insurance Commissioner. All decisions made in regard to § 1033 are the sole decision of the Insurance Commissioner.

Typically, the Open Meeting Law does not apply to internal staff groups or committees reporting to a supervisor. Whether the committee is subject to the Open Meeting Law turns on whether it fits within the definition of "public body." NRS 241.015(3). The threshold requirement for an entity to be considered a "public body" under the Open Meeting Law is that the entity expend, disburse, or be supported, in whole or part, by tax revenue or give advice or make recommendations to a public body subject to the Open Meeting Law. Op. Nev. Att'y Gen. No. 2000-18 (June 2, 2000). Open Meeting Law Manual, § 3.04 Ninth Edition, October 2001.

The 1033 Committee does not expend or disburse tax revenue. Your deputy commissioner informed us that there is no per diem or stipend paid to the committee members for their work on the committee, nor is there any budget allocation for the committee. Though the members are state employees, that does not cause the committee to be an entity supported by tax revenue. The state employees receive their governmental pay whether engaged in the work of the 1033 Committee or other business of their agency. Therefore, the 1033 Committee is not supported by tax revenue within the meaning of the Open Meeting Law, nor is it advisory to an entity that is supported by tax revenue.

A public body must be a multi-member entity. See Op. Nev. Att'y Gen. No. 241 (August 24, 1961). The use of the generic word "entity" in the definition of "public body" found in NRS 241.015(3) refers to a body, group, or organization that may be in any one of various forms, but is not an individual. Since the 1033 Committee advises an individual, the Insurance Commissioner, it does not advise or make recommendations to a public body. Because the 1033 Committee does not meet the threshold requirement for an "entity" to be a "public body," we will not address the other criteria in the definition of a public body.

CONCLUSION

The committee formed at the pleasure of the Insurance Commissioner and known as the 1033 Committee is not subject to the Open Meeting Law.

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Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN-CROSSLEY
Senior Deputy Attorney General

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AGO 2002-07 MOTOR VEHICLES; TAXES; COUNTIES; SCHOOL DISTRICT: The Department of Motor Vehicles should obtain the distribution percentages for the governmental services tax and the supplemental governmental services tax from the Department of Taxation in accordance with NRS 482.181. The Department of Motor Vehicles may not change the distribution of the basic and supplemental governmental services tax receipts without the approval of the Department of Taxation.

Carson City, February 13, 2002

Ginny Lewis, Director, Department of Motor Vehicles, 555 Wright Way,
Carson City, Nevada 89711-0900

Dear Ms. Lewis:

You have requested an opinion from this office clarifying the Department of Motor Vehicle's (DMV) distribution of the governmental services tax and the supplemental governmental services tax (formerly referred to as the basic and supplemental vehicle privilege tax).¹ The governmental services tax is imposed for the privilege of operating any vehicle upon the public highways of this state. NRS 371.030. The supplemental governmental services tax may be imposed by a county for the privilege of operating a vehicle upon the public streets, roads, and highways of the county. NRS 371.045. The taxes, based upon a percentage of the manufacturer's suggested retail price for the vehicle, are usually collected by the DMV² upon vehicle registration. The DMV merely collects this revenue and is not entitled to a share of its proceeds.³ These taxes are one of the largest sources of revenue for local governments and school districts. As explained below, the DMV is charged with distributing the proceeds to the counties and school districts based upon distribution

¹ The 2001 Legislature passed S.B. 59 which changed the designation of the "vehicle privilege tax" to the "governmental services tax." See S.B. 59, 2001 Nev. Stat. ch. 13 at 289. During the 2001 Session and the 17th Special Session of the Legislature, other revisions were made to the vehicle privilege tax statutes not pertinent to the issues discussed herein. See A.B. 501, 2001 Nev. Stat. ch. 223 at 1001; S.B. 522, 2001 Nev. Stat. ch. 377 at 1832; A.B. 11, 2001 Nev. Stat. ch. 8 at 144 (Special Session).

² On occasion, the tax is collected by the county assessors.

³ The DMV is paid a commission of 6% to cover its administrative costs in collecting these funds for the local governments and school districts. NRS 482.180(6).

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percentages and information from other entities. Problems may arise when the DMV is presented with conflicting information from these entities. You have inquired as to the governmental entity upon which DMV should rely for the distribution percentages and whether DMV can change the distribution of the tax proceeds without approval and direction from the entity providing the distribution information.

QUESTION ONE

From which governmental entity should the Department of Motor Vehicles (DMV) obtain the distribution percentages for the governmental services tax and the supplemental governmental services tax?

ANALYSIS

This issue may be answered by reviewing the taxation and governmental services tax statutes and applying relevant rules of statutory construction. First, we note that the governmental services tax must be distributed in accordance with NRS 482.181(3), which provides that the DMV must distribute the governmental services tax to the county school district within the county before distributing the tax to the local governments within the county. It provides in pertinent part: “[T]he taxes levied by each local government, special district and enterprise district are the product of its certified valuation, determined pursuant to subsection 2 of NRS 361.405, and its tax rate, established pursuant to NRS 361.455 for the fiscal year beginning on July 1, 1980. . . .” NRS 482.181(3). Second, we observe that the Nevada Tax Commission (Commission) certifies and regulates, through the Department of Taxation (Taxation), the assessed property valuations and tax rates, the figures used in the distribution formula.⁴ We must interpret the governmental services tax statute and the taxation statutes together.

The Nevada Supreme Court will interpret a statute in harmony with other rules or statutes. *State, Div. Of Insurance v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. Adv. Op. 27, 995 P.2d 482, 486 (2000), citing *Bowyer v. Taack*, 107

⁴ Assessed property valuations and tax rates for each governmental entity are multiplied to calculate the distribution percentages for the governmental services tax. The Commission, which oversees Taxation, certifies the tax rates for all local governments pursuant to the provisions of NRS 361.455. Further, Taxation regulates and oversees the property valuations certified by the counties.

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Nev. 625, 627, 817 P.2d 1176, 1177 (1991). When the Legislature enacts a statute, it is presumed that it does so “with full knowledge of existing statutes relating to the same subject.” *Id.*, citing *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985). Because DMV distributes the appropriate percentage of the governmental services tax to the school districts pursuant to NRS 482.181, and the assessed property valuations and tax rates are calculated by Taxation according to NRS 361.405 and 361.455 respectively,⁵ we must read these statutes in harmony with each other.

The first part of the governmental services tax distribution formula utilizes the assessed property valuations for each entity. *See* NRS 482.181(3). Taxation initially receives the certified property valuations for each kind of property on the assessment roll from each county auditor, who certifies the results to Taxation on or before April 15 of each year. NRS 361.405(2).⁶ Taxation then reviews the submitted property valuations that have been certified by the county auditor for accuracy. The Commission may enter on the assessment roll of any county any property found to be escaping taxation. *See* NRS 361.325(4). Upon review, Taxation then compiles the total available assessed property values within the county⁷ with the total tax rates for each governmental entity. This compilation is published yearly in a booklet entitled “Property Tax Rates for Nevada Local Governments” commonly referred to as the “Red Book.” These figures are used by local governments in the preparation of their budgets.

Another manner in which Taxation exercises control over the property valuations is through the Commission’s regulation of the factor for improvements and the factor for land utilized by the counties between appraisal years. Pursuant to NRS 361.260(5), the county assessor determines

⁵ While the governmental services tax statutes do not explicitly state which entity is to provide these figures to the DMV, the DMV is bound to use the assessed property valuations determined in accordance with NRS 361.405 and the tax rates determined in accordance with NRS 361.455. These statutes are not found in the vehicle privilege statutes, but rather, are contained within the taxation statutes. An examination of these statutes reveals that Taxation or the Commission certifies and/or has final oversight of these figures.

⁶ Additionally, the county assessor prepares and files a segregation report with Taxation showing the assessed values for each taxing entity within the county. NRS 361.390.

⁷ The available assessed property values are reported on the assessment roll and segregation report submitted to Taxation by the counties.

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the assessed value for property not reappraised for the current assessment year by applying a factor for improvements and a factor for land. The factor for land must be approved by the Commission. The factor for improvements must be adopted by the Commission.⁸ Thus, in effect, the Commission has the final say as to the valuation of property during years in which property is not reappraised.

Moreover, Taxation supervises and regulates the assessment of property valuations within each county by performing audits. Approximately every three years,⁹ the Commission performs an audit¹⁰ of each county's property assessment figures and procedures. Pursuant to NRS 361.333, the Commission compares the assessed values of comparable properties in each county and determines whether each county has adequate procedures to ensure that all property subject to taxation is being assessed in a correct and timely manner. Upon conclusion of the ratio studies, the board of county commissioners and the county assessor appear before the Commission to present evidence that all property subject to taxation within the county has been assessed as required by law. At the conclusion of the meeting, the Commission may order a specified percentage increase or decrease on the tax list and assessment roll. NRS 361.333; *see also* NRS 360.215; NRS 360.250. Taxation's oversight of the counties' assessed property valuations, the first prong of the governmental services tax distribution formula, makes it the appropriate entity upon which the DMV should rely to obtain the tax distribution percentages.

The second part of the governmental services tax distribution formula utilizes the certified tax rates for each entity. *See* NRS 482.181(3). The tax

⁸ Further, pursuant to NRS 361.333(c), if the ratio studies, discussed more fully below, reveal that the approved land and improvement factors are not being correctly applied, the Commission may order the board of county commissioners to employ one or more qualified appraisers approved by Taxation to determine whether the county has assessed all property subject to taxation. The appraisers then assist Taxation in preparing a report to the Commission as to their findings. If the report indicates that any property has not been assessed at the rate required by law, a copy of the report is transmitted to the board of county commissioners by Taxation. The board of county commissioners is then mandated to order the county assessor to raise or lower the assessment of such property to the rate required by law on the succeeding tax list and assessment roll.

⁹ The Commission allocates the counties into three groups and Taxation conducts the audit in one group each year, making sure that each county is studied at least once in every three years. NRS 361.333(2).

¹⁰ The audits are referred to as ratio studies.

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rates to be used in the formula for determining the tax distribution percentages are set forth in NRS 361.455.¹¹ Pursuant to NRS 361.455, the Commission sets and certifies the tax rates for all local governments. *See* NRS 361.455(5), (6). The Commission then certifies the combined tax rates to the board of county commissioners based on approved final budgets. *See* NRS 361.4547. Thus the Commission's certification of the tax rates for all local governments makes Taxation the appropriate entity to provide the distribution percentages to the DMV.

Finally, it is logical that the DMV obtain the distribution percentages for this large amount of revenue from an unbiased entity. Taxation does not have a stake in the figures utilized in the government services tax distribution formula, as it is not entitled to share in a portion of the tax proceeds. Taxation is an impartial entity that certifies and/or regulates these figures already and it would be premature to rely upon the property valuations certified by the counties prior to their review by Taxation and their compilation in the "Red Book."

After the DMV has distributed the basic privilege tax to the county school districts, it then deposits the money in the intergovernmental fund for distribution by Taxation pursuant to the provisions of NRS 360.680 and 360.690. *See* NRS 482.181(4). All money received or collected by Taxation for the governmental services tax must be deposited in the local government tax distribution account for credit to the appropriate county.

Pursuant to NRS 482.181, the DMV is to distribute the supplemental governmental services tax directly to the counties. Thus, while there is no need for calculation of the distribution percentages, as only one entity receives the funds, the DMV should use the figures provided by Taxation for the reasons explained above.

¹¹ NRS 361.455 provides, in pertinent part: 5. On June 25 or, if June 25 falls on a Saturday or Sunday, on the Monday next following, the Nevada tax commission shall meet to set the tax rates for the next succeeding year for all local governments so examined. 6. Any local government affected by a rate adjustment, made in accordance with the provisions of this section, which necessitates a budget revision shall file a copy of its revised budget by July 30 next after the approval and certification of the rate by the Nevada tax commission.

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CONCLUSION TO QUESTION ONE

The Department of Motor Vehicles (DMV) should obtain the distribution percentages for the governmental services tax and the supplemental governmental services tax every fiscal year from the Department of Taxation due to its certification and regulation of the figures utilized in the governmental services tax distribution formula. While the governmental services tax statutes do not explicitly state which entity is to provide these figures to the DMV, the DMV is bound to use the assessed property valuations determined in accordance with NRS 361.405 and the tax rates determined in accordance with NRS 361.455. An examination of these taxation statutes reveals that these figures are ultimately certified or regulated by the Department of Taxation or the Nevada Tax Commission.

QUESTION TWO

Does the Department of Motor Vehicles (DMV) have the authority to change the distribution of these tax receipts without the approval of and direction from the entity that provides the governmental services tax distribution percentages?

ANALYSIS

The DMV is required, pursuant to NRS 482.181, to certify monthly to the state Board of Examiners the amount of the basic and supplemental governmental services taxes it collects during the preceding month, and that money must be distributed monthly. NRS 482.181(1). When determining the scope of the DMV's authority, one must look to the plain language of the statute to be given effect. *Smith v. Crown Fin. Servs. of America*, 111 Nev. 277, 284, 890 P.2d 769, 773 (1995). When statutory language is clear on its face, its intention must be deduced from such language. *Worldcorp. v. State, Dep't of Taxation*, 113 Nev. 1032, 1035-36, 944 P.2d 824, 826 (1997). The plain language of NRS 482.181 does not authorize the DMV to change the distribution of these tax receipts unilaterally. As discussed above, the tax rates and assessed property values are ultimately compiled by Taxation in the "Red Book" for distribution to the local governments. The DMV would have no basis for altering the distribution percentages absent a directive from Taxation, as the DMV does not participate in the creation of these numbers.

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CONCLUSION TO QUESTION TWO

The Department of Motor Vehicles may not change the distribution of the basic and supplemental governmental services tax receipts without the approval of the Department of Taxation.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KIMBERLY A. BUCHANAN
Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-08 PUBLIC OFFICER; DISCLOSURE STATEMENTS; ETHICS COMMISSION: The members of the Commission on Professional Standards in Education are not entitled to receive compensation for serving on that commission and, therefore, are not required by NRS 281.561 to file annual financial disclosure statements with the Commission on Ethics.

Carson City, February 19, 2002

Jack W. McLaughlin, Ed.D., Superintendent of Public Instruction, Department of Education, 700 East Fifth Street, Carson City, Nevada 89701

Dear Dr. McLaughlin:

You have requested an opinion from this office regarding the following question:

QUESTION

Are members of the Commission on Professional Standards in Education (CPSE) required to file annual financial disclosure statements with the Commission on Ethics, pursuant to NRS 281.561?

ANALYSIS

Certain public officers are required to file annual financial disclosure statements with the Commission on Ethics, pursuant to NRS 281.561.

NRS 281.561(1) provides, in pertinent part, as follows:

Except as otherwise provided in subsection 2 or 3, if a candidate for public or judicial office or a public or judicial officer *is entitled to receive compensation for serving in the office in question*, he shall file with the commission, and with the officer with whom declarations of candidacy for the office in question are filed, a statement of financial disclosure, . . . [Emphasis added.]

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In addition, NAC 281.227 provides, in pertinent part, that “a public or judicial officer, *who is entitled to receive compensation for his office* must file a statement of financial disclosure in proper form with the commission.” [Emphasis added.] Therefore, if a member of a commission is not entitled to receive compensation for serving on the commission, he is not required to file annual financial disclosure statements.

Compensation is defined as “any money, thing of value or economic benefit conferred on or received by any person in return for services rendered, personally or by another.” NRS 281.4327. The Commission on Ethics interprets “entitled to receive compensation” to mean “entitled to receive any remuneration, not including any reimbursement for lodging, meals, travel or any combination thereof, which a candidate for a public or judicial office, or a public or judicial officer, has a right to receive for serving in the office in question.” NAC 281.022.

Members of the CPSE are appointed by the Governor pursuant to NRS 391.011. The members are entitled to “travel expenses and subsistence allowances provided by law for state officers and employees generally while attending meetings of the commission.” NRS 91.017(3). The members are not otherwise entitled to any payment for serving on the CPSE. NRS 281.160 sets forth the amounts to which state officers and employees are entitled for travel expenses and subsistence allowances. The allowed amounts are reimbursement and allowances for travel expenses and meals. NRS 281.160, State Administrative Manual, Chapter 0200 (January 15, 2002). Therefore, the only amounts the members of the CPSE are entitled to receive are for travel expenses and meals while attending meetings of the CPSE away from the member’s home.

Compensation, as used in NRS 281.561, only includes payment for services rendered and does not include reimbursement or allowances for travel expenses and meals. NRS 281.431, NRS 281.4327. The Commission on Ethics interprets “entitled to receive compensation,” as used in NRS 281.561, to exclude reimbursement for lodging, meals and travel. NAC 281.022. Because the members of CPSE are only entitled to receive travel expenses and meal allowances for serving on the CPSE, and are not entitled to receive

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compensation, they are not required by NRS 281.561 to file annual financial disclosure statements with the Commission on Ethics.¹

CONCLUSION

The members of the Commission on Professional Standards in Education are not entitled to receive compensation for serving on that commission and, therefore, are not required by NRS 281.561 to file annual financial disclosure statements with the Commission on Ethics.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: TINA M. LEISS
Senior Deputy Attorney General

¹ We caution you that the authority to enforce NRS 281.561 rests with the Commission on Ethics and ultimately the courts. However, we note that you have provided us with a letter from the Executive Director of the Commission on Ethics in which the Executive Director came to the same conclusion as this opinion.

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AGO 2002-09 PUBLIC OFFICER; PROPERTY; REDEVELOPMENT AGENCIES: NRS279.454(1) does not permit a member of a redevelopment agency from developing or transferring title to rely property within the redevelopment area that he owned in fee before he became a member of the agency.

Carson City, February 19, 2002

Bradford R. Jerbic, City Attorney, Office of the City Attorney, 400 Stewart Avenue, Ninth Floor, Las Vegas, Nevada 89101-2986

Dear Mr. Jerbic:

You have requested an opinion from this office as to the applicability of a certain statute to certain real property actions contemplated by a member of the Las Vegas Redevelopment Agency.

QUESTION ONE

Does NRS 279.454(1) prohibit a member of a redevelopment agency from developing real property within the redevelopment area, which property he owned in fee before he became a member of the agency?

ANALYSIS

By your written inquiry and our subsequent telephone conversation, you have provided the following facts. The Mayor of the City of Las Vegas owned certain real property within the Las Vegas Redevelopment Area (Area) in fee at the time of his election. The Las Vegas City Council has exercised its option under NRS 279.444 to declare itself the Las Vegas Redevelopment Agency (Agency). Upon his election, the Mayor became a member of the Agency, and he continues to own the property within the Area. As a member of the Agency, the Mayor participates in decision-making on plans and policies for redevelopment within the Area. The Mayor is considering developing the realty that he owns within the Area and is concerned that the property's development may run afoul of NRS 279.454(1) due to his status as a member of the Agency. NRS 279.454(1) provides in relevant part:

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[N]o officer . . . of an agency . . . who in the course of his duties is required to participate in the formulation of or to approve plans or policies for the redevelopment of a redevelopment area may acquire any interest in any property included within a redevelopment area within the community. If any officer . . . owns . . . such property, he shall immediately make a written disclosure of it to the agency and the legislative body which must be entered on their minutes. Failure to disclose constitutes misconduct in office.

The Mayor owned the subject property prior to his election and concomitant membership on the Agency. We note that the “immediate disclosure” requirement applies to all realty owned by the Mayor within the area at the time of his election. The mandate of the statute is that the Mayor must make a written disclosure of the fact of his ownership of the property within the Area to the Agency and to the legislative body, which in this case are both embodied in the Las Vegas City Council. The purpose of such a disclosure requirement was eloquently expressed in *C.J. Anderson v. City of Parsons*, 496 P.2d 1333 (Kan. 1972), when the Kansas Supreme Court had occasion to interpret a similar statute:

[A] public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public. If he acquires any interest adverse to those of the public, without a full disclosure it is a betrayal of his trust and a breach of confidence.

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Id. at 1337. NRS 279.454(1) therefore only requires disclosure by the Mayor of his ownership in the subject property. The statute does not affect the Mayor's right to develop the property as he sees fit.

CONCLUSION TO QUESTION ONE

NRS 279.454(1) does not prohibit a member of a redevelopment agency from developing real property within the redevelopment area that he owned in fee before he became a member of the agency.

QUESTION TWO

Does NRS 279.454(1) prohibit a member of a redevelopment agency from transferring title to real property located within the redevelopment area that he held in fee prior to becoming a member of the agency?

ANALYSIS

The facts are the same as in question one. The inquiry is now whether the Mayor, as a member of the Agency, may transfer title to the subject real property to his son without running afoul of NRS 279.454(1). For the reasons supporting our conclusion to question one, we conclude that NRS 279.454(1) does not prohibit such a divestiture of title by a member of the Agency.

CONCLUSION TO QUESTION TWO

NRS 279.454(1) does not prohibit a member of a redevelopment agency from transferring title to real property located within the redevelopment area that he held in fee prior to becoming a member of the agency.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-10 OSTEOPATHY; PHYSICIANS; CORPORATIONS: The corporate practice of medicine may only be conducted pursuant to NRS chapter 89.

Carson City, February 26, 2002

Rudy R. Manthei, D.O. President, Board of Osteopathic Medicine, 2860 E. Flamingo Rd. Suite G, Las Vegas, Nevada 89121

Dear Dr. Manthei:

You have requested an opinion from this office concerning the following:

QUESTION ONE

What laws exist in Nevada to hold corporations that affect the quality of health care delivery accountable for their actions?

ANALYSIS

The issue of the corporate practice of medicine was addressed in a previous Attorney General Opinion, Op. Nev. Att'y Gen. No. 219 (October 3, 1977). The conclusion in that opinion states that the corporate practice of medicine is only legal if conducted by a professional corporation pursuant to NRS chapter 89 or by a Health Maintenance Organization. That opinion explains the rationale of the corporate practice of medicine doctrine, which was more recently expounded upon by an Illinois court in *Berlin v. Sarah Bush Lincoln Health Ctr.*, 688 N.E. 2d 106 (Ill. 1997) as follows:

The rationale of the doctrine concludes that the employment of physicians by corporations is illegal because the acts of the physicians are attributable to the corporate employer, which cannot obtain a medical license. *See M. Hall, Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. Pa. L. Rev. 431, 509-10 (1988). The prohibition on the corporate employment of physicians is invariably supported by several public policy arguments which espouse the dangers of lay control over professional judgment, the division of the physician's loyalty between his patient and his profit making employer, and the commercialization of the profession. *See A. Willcox, Hospitals and the Corporate Practice of Medicine*, 45 Cornell L.Q.

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432, 442-43 (1960); *see also* *Kerner*, 362 Ill. at 455-56, citing *Dr. Allison, Dentist, Inc. v. Allison*, 360 Ill. 638, 196 N.E. 799 (1935).

Id. at 110.

There are no Nevada cases dealing with the issue of the corporate practice of medicine. However, NRS chapter 89, adopted in 1963, establishes the right to form a corporation to render certain professional services. NRS chapter 89 was most recently amended in 1995. NRS chapter 89 provides that “[E]ach person organizing the corporation must...be authorized to perform the professional service for which the corporation is organized.” NRS 89.040(1). A professional corporation may be organized to render a professional service relating to “[m]edicine, homeopathy and osteopathy, and may be composed of persons engaged in the practice of medicine as provided in chapter 630 of NRS, persons engaged in the practice of homeopathic medicine as provided in chapter 630A of NRS and persons engaged in the practice of osteopathic medicine as provided in chapter 633 of NRS.” NRS 89.050(2)(b). All officers, directors and shareholders must be licensed to render the professional services for which the corporation was incorporated. NRS 89.070 and 89.080.

In 1995, NRS 89.050 was amended to allow persons engaged in the practice of homeopathy to organize a professional corporation just as other physicians of medicine and osteopathy were allowed to do. *See* S.B. 423. Accordingly, the Legislature, by adopting S.B. 423, acknowledged the professional corporation as the only form of corporation for physicians to engage in medicine, homeopathy or osteopathy.

Since the issuance of Op. Nev. Att’y Gen. No. 219 (October 3, 1977), there have been no changes in Nevada statutes condoning the doctrine of corporate practice of medicine or vitiating the requirements of NRS chapter 89. A more recent development in health care from the 71st Session of the Legislature in 2001 was the requirement, contained within S.B. 483, that facilities providing refractive laser surgery be licensed. Although S.B. 483 provides for the licensure of facilities, it does not address the corporate form of the entities that own facilities for refractive laser surgery.

Another exception to the corporate practice of medicine doctrine examined in the 1977 Attorney General Opinion is the Health Maintenance Organization

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(HMO). HMOs are authorized by statute to provide health care and may employ or contract with physicians. NRS 695C.120(3). As was addressed in Op. Nev. Att'y Gen. No. 219 (October 3, 1977), an HMO shall not be deemed to be practicing medicine and is exempt from the provisions of the Medical Practice Act codified in NRS chapter 630. NRS 695C.050(3).

There are several other organizations that have been authorized by statute to provide or arrange for health care services since the 1977 Attorney General Opinion was issued. The Commissioner of Insurance is authorized to certify and regulate these organizations. The authorization granted to these organizations implicitly authorizes the corporate practice of medicine without complying with NRS chapter 89 or NRS chapter 630, although there is no specific statutory exemption, as provided in NRS 695C.050 for HMOs. One such entity is designated as a corporation for medical services, which is a nonprofit hospital, medical or dental service plan. NRS 695B.020.

Another such health care organization is a managed care organization that provides or arranges health care services through managed care. NRS 695G.090. The statutory provisions relating to managed care organizations were adopted in 1997. A managed care organization must employ a medical director who is a physician licensed in this state. NRS 695G.110. A managed care organization is an insurer, regulated by the Commissioner of Insurance. NRS 679A.150, 695G.020, 695G.040, and 695G.050. Authorized by statute in 1991, a prepaid limited health organization is another type of business that may provide limited health services on a prepaid basis if it obtains a certificate of authority from the Commissioner of Insurance pursuant to NRS 695F.100.

CONCLUSION TO QUESTION ONE

The laws that exist in Nevada to hold corporations that affect the quality of health care delivery accountable for their actions include NRS chapter 89, NRS chapters 695B, 695C, 695F, and 695G. The accountability arises from the fact that either all officers, directors and shareholders of a professional corporation are licensed by a state agency and accountable thereto or that the entity is certificated by and accountable to the Commissioner of Insurance.

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QUESTION TWO

Does the corporate practice of medicine usurp the authority of the state to protect the public?

ANALYSIS

As has been explained, the corporate practice of medicine doctrine still exists in Nevada, with certain exceptions. The corporate practice of medicine is permissible if the corporation is in the form of a professional corporation pursuant to NRS chapter 89, in the form of an HMO pursuant to NRS chapter 695C, a medical services corporation pursuant to NRS chapter 695B, or a managed care organization or prepaid limited health organization pursuant to NRS chapters 695G and 695F, respectively. Such corporations do not interfere with the authority of the state to protect the public. Each form of organization is regulated and protected by the state either by the regulatory agency that licenses the individuals that comprise the professional corporation or by the Commissioner of Insurance. It is either the licensing body or the Commissioner of Insurance that will hold the organizations accountable for the health care services rendered.

CONCLUSION TO QUESTION TWO

A review of Nevada statutes and case law reflects that the law is generally unchanged from that reviewed in Op. Nev. Att’y Gen. No. 219 (October 3, 1977). The corporate practice of medicine is still prohibited unless in the form authorized by NRS chapters 89, 695B, 695C, 695F and 695G. If a corporation is engaged in the practice of medicine and does not come within one of the above-referenced statutes, it would be operating unlawfully.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: CHARLOTTE MATANANE BIBLE
Assistant Chief Deputy Attorney General

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AGO 2002-11 DEBT COLLECTION; DUE PROCESS; CORPORATIONS:

Debt collection proceedings under NRS 353C are appropriate to collect uninsured employee claims funds payments so long as it can be established that the payment is past due. NRS 353C does not apply retroactively to collect debts incurred prior to the enactment of NRS 353C. NRS 353C proceedings may be used in cases involving dissolved corporations.

Carson City, March 6, 2002

Sydney H. Wickliffe, Director, D. Roger Bremner, Administrator, Department of Business and Industry, Division of Industrial Relations, 400 East King Street, Room 400, Carson City, Nevada 89703

Dear Ms. Wickliffe and Mr. Bremner:

You have requested a legal opinion from this office concerning the applicability of the collection procedures provided by chapter 353C of the Nevada Revised Statutes (NRS). Specifically, there are three fundamental questions posed in your letter. First, whether “353C proceedings” are appropriate for uninsured employer claims funds (UECF) cases. Assuming this question can be answered in the affirmative, whether due process affords an employer the ability to appeal each UECF expense paid and whether an action for collection of a UECF claim may be filed in justice court where the amount in controversy meets the jurisdictional amounts of small claims or justice court. Second, whether the statute of limitations provided for in NRS chapter 353C may be applied to collect debts incurred prior to the enactment of NRS chapter 353C. Third, whether 353C proceedings may be used in cases involving dissolved corporations.

QUESTION ONE

Whether 353C proceedings may be used by the Division of Industrial Relations (DIR) to collect UECF payments. If 353C proceedings may be used for UECF collection matters, whether due process affords an employer the ability to appeal each UECF expense paid and whether an action for collection of a UECF claim may be filed in justice court where the amount in controversy meets the jurisdictional amounts of small claims or justice court.

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ANALYSIS

Pursuant to NRS 616C.220, DIR is vested with the administration of UECF. As explained in your letter, if an employer does not have workers' compensation coverage during the time a worker is injured in the course and scope of employment, DIR determines whether there is an employer-employee relationship. If DIR finds such a relationship, it sends a letter of determination, with appeal rights, to the employee and employer. It then assigns the matter to the UECF and the file is referred to DIR's third party administrator (TPA). The TPA administers the claim by paying medical expenditures to healthcare providers and paying compensation to the injured worker or his dependents, if he is deceased. Under the current practice, the TPA sends determination letters regarding claims administration to the injured employee and sends copies to the uninsured employer. Appeal rights are provided with those determinations.

The uninsured employer is liable for all payments made on his behalf from the UECF or incurred by DIR pursuant to NRS 616C.220(4). Thus DIR sends monthly billings to the employer. DIR makes appropriate adjustments if it finds an amount is paid in error.

To determine whether 353C proceedings may be used for its UECF matters, UECF payments must first be considered "debt" under NRS 353C.040. "Debt" has been defined as follows:

"Debt" means a tax, fee, fine or other obligation:

1. That is owed to an agency or the State of Nevada; and
2. The payment of which is past due.

See NRS 353C.040.

It does not appear that UECF payments qualify as debt under NRS 353C.040. Clearly, UECF is an obligation owed to DIR because NRS 616C.220(5) states that the "employer . . . is liable for all payments made on his behalf . . . from the [UECF] or incurred by [DIR]." However, there appears to be no basis for finding that the UECF payment is past due at the time DIR sends a monthly billing statement to the employer for the claim. It may be possible to use 353C proceedings once the billing becomes past due. NRS 353C.100 defines when a debt is past due. It reads, in pertinent part:

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[A] debt is past due if the debt has not been remitted and paid to an agency or the State of Nevada as required by law, or as agreed upon by the debtor and the agency or the State of Nevada, as appropriate.

See NRS 353C.100.

In order for DIR to deem a UECF payment past due, DIR must adopt a regulation or enter into an agreement with the employer. DIR could adopt a regulation that provides a timeframe within which an employer must make the UECF claims payments. If a payment is not received within the timeframe specified in the regulation, it becomes past due. Alternatively, DIR could enter into an agreement with the employer delineating when the UECF payment becomes past due. If the UECF payment is not received within the timeframe specified in the agreement, it becomes past due. DIR may use 353C proceedings to collect uninsured employer claims funds payments so long as it can establish that the payment is past due in accordance with an adopted regulation or an agreement with the employer.

You have also requested advice on two related issues assuming 353C proceedings may be used for its UECF matters. First, whether due process requires DIR to afford the employer the ability to appeal each UECF expense paid by DIR. Second, whether, in a UECF collection matter where the amount in controversy meets the jurisdictional amounts of small claims or justice court, DIR may use NRS 353C.140 to bring an action in justice court or would it be required to file the action in district court under NRS 616C.220(6)(a).

To determine the requirements of procedural due process in any particular case, a court must balance: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of that private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest, including the function involved, and the fiscal and

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administrative burdens that the additional or substitute procedural requirements would entail.

DMV v. Vezeris, 102 Nev. 232, 236-237, 720 P.2d 1208, 1211-1212 (1986) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976)).

Applying and weighing these factors, a court would likely find that an employer would be directly affected by DIR's action of seeking reimbursement for payment from the UECF because it will financially impact an employer. It is also reasonable that a court would find that there is a risk of an erroneous deprivation of an employer's property if DIR fails to provide an employer with an opportunity to dispute the amount of the UECF payment. The employer may have information that shows that the payment of the medical expenses was erroneous or fraudulent, for example. Without affording the employer due process to dispute the amount of UECF expense paid, an employer may be erroneously held financially liable. Lastly, the court would find there was an increased administrative and fiscal burden on DIR if an employer was entitled to a hearing on each UECF payment.

Reviewing these factors, the risk of an erroneous deprivation of an employer's property appears to outweigh the increased burden of additional hearings. Although there is an administrative and fiscal burden of providing an employer an opportunity for a hearing, the burden may not be substantial because the hearing is limited solely to the issue of whether or not the payment was made in error and does not relitigate the initial ruling concerning whether there is an employer-employee relationship. For this reason, this office recommends affording the employer the ability to appeal each UECF expense paid.

The second issue you raised concerns the appropriate forum in which to file a collection action on an UECF payment. There are two relevant statutes that address this issue. For 353C proceedings, NRS 353C.140 provides that an action may be brought in a court of competent jurisdiction or, if the action is a small claim subject to NRS chapter 73, the action may brought in a court of competent jurisdiction to collect the debt plus any applicable penalties and interest. However, under NRS 616C.220(6)(c), DIR is allowed to recover payments that it has made "by bringing a civil action in district court."

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As to whether DIR may bring an action in small claims or justice court, in lieu of filing in district court as required by NRS 616C.220(b)(c), the language of NRS 353C.090 must be considered. This statute reads as follows:

The provisions of this chapter apply to an agency only to the extent that no other specific statute exists which provides for the collection of debts due the agency. To the extent that the provisions of this chapter conflict with such a specific statute, the provisions of the specific statute control.

See NRS 353C.090.

NRS 616C.220(6)(c) is a specific statute that allows DIR to recover payments made from UECF, and this statute unequivocally requires that an action be brought in district court. Thus allowing an action to be brought in small claims or justice court to recover UECF payments would conflict with the express requirement of NRS 616C.220(6)(c) and would thereby violate NRS 353C.090. For these reasons, DIR may not use NRS 353C.140 to bring an action in small claims or justice court but must file an action in district court in accordance with NRS 616C.220(6)(a).

CONCLUSION TO QUESTION ONE

The Division of Industrial Relations may use 353C proceedings to collect uninsured employer claims funds payments so long as it can establish that the payment is past due in accordance with an adopted regulation or an agreement with the employer. Assuming a 353C proceeding may be used for UECF matters, due process requires the Division of Industrial Relations to afford an employer the right to appeal each uninsured employer claims funds expense paid by the Division of Industrial Relations. Furthermore, to collect uninsured employer claims funds that are past due payments, an action should be filed in the district court in accordance with NRS 616C.220(6)(a).

QUESTION TWO

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Whether the statutes of limitation provided for in NRS chapter 353C may be applied to collect debts incurred prior to the enactment of NRS chapter 353C.

ANALYSIS

The statutes of limitation for civil actions are generally governed by NRS 11.190, which provides a two year statute of limitations for “[a]n action upon a statute for a penalty or forfeiture . . . except when the statute imposing it prescribes a different limitation.” *See* NRS 11.190(4)(b). However, in NRS chapter 353C there is a specific statute that governs the statute of limitations for actions brought by the attorney general to collect debts. *See* NRS 353C.140. NRS 353C.140 became effective July 1, 1999, and it provides that an action must be brought not later than four years after the date on which the debt became due or within five (amended in the 2001 Legislature to six) years after the date on which a certificate of liability was last recorded.

Under the rules of statutory construction, there is a general presumption in favor of prospective application of statutes unless the Legislature clearly manifests a contrary intent or unless the intent of the Legislature cannot otherwise be satisfied. *McKellar v. McKellar*, 110 Nev. 200, 203, 871 P.2d 296, 298 (1994). There is no indication from the legislative history or the statutes themselves that NRS 353C.140 applies retroactively. Thus we conclude that NRS 353.140 does not apply retroactively and that actions for the recovery of debts incurred and which became final judgments prior to July 1, 1999, are governed by NRS 11.190.

Thus if an agency has a penalty or fine that became a final judgment on November 15, 1998, a two year statute of limitations applies. However, if the penalty or fine became a final judgment on November 15, 2000, a four year statute of limitations applies, and the judgment must be renewed within five years after recordation of the judgment because it is governed under the 1999 legislation. Furthermore, if the penalty or fine became a final judgment on November 15, 2001, a four year statute of limitations applies, and the judgment must be renewed within six years after recordation because it is governed under the 2001 legislation.

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CONCLUSION TO QUESTION TWO

The statute of limitations provided for in NRS chapter 353C does not apply retroactively, and therefore debts incurred prior to July 1, 1999, are governed by NRS 11.190.

QUESTION THREE

If a state agency intends to pursue a collection action against a dissolved corporation, is the agency allowed to use 353C proceedings or is it forced to file a civil collection action in the district court, and as part of the collection action, petition the court for the appointment of receivers for the corporation.

ANALYSIS

NRS 78.600 provides, in pertinent part, that if a corporation is not in good standing, that is, if it is suspended, dissolved, expired, or revoked, the district court:

[O]n application of any creditor or stockholder of the corporation, at any time, may either continue the directors trustees as provided in NRS 78.590, or appoint one or more persons to be receivers of and for the corporation, . . . and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid.

Thus the Legislature has specifically addressed the issue of how dissolved corporations must be sued, by petitioning the court for the appointment of a receiver. The Legislature also specifically addressed where a dissolved corporation must be sued, in district court. The provisions of NRS chapter 353C do not conflict with NRS 78.600. Although NRS 353C.140 allows an agency, if the action is a small claim subject to NRS chapter 73, to bring an action in a court of competent jurisdiction, it does not mandate that the action

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be brought in a small claims court. In fact, the court of competent jurisdiction pursuant to NRS 78.600 is the district court. Moreover, statutory construction requires that, whenever possible, statutes should be read in harmony and rendered compatible. *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720 (1993); *State, Tax Comm'n v. Indep. Sheet Metal, Inc.*, 105 Nev. 387, 390, 776 P.2d 541 (1989).

CONCLUSION TO QUESTION THREE

A 353C proceeding may be brought against a dissolved corporation; however, NRS 78.600 requires that the action be brought in a district court, and as part of the action, the Division of Industrial Relations should petition the court for the appointment of a receiver.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: SONIA E. TAGGART
Senior Deputy Attorney General

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AGO 2002-12 PUBLIC RECORDS; PRIVACY AND SECURITY; MOTOR VEHICLES: Personal information from the Department of Motor Vehicles (DMV) files may be released in connection with matters relating to emissions testing services. The DMV director has discretion to deny any release that may be used for an unwarranted invasion of personal privacy. Driver's social security numbers and information that is correlated to license plate numbers may not be released in connection with matters relating to emissions testing services.

Carson City, March 8, 2002

Ginny Lewis, Director, Department of Motor Vehicles, 555 Wright Way,
Carson City, Nevada 89711

Dear Ms. Lewis:

You have requested an opinion from this office regarding the release of information for the purpose of allowing private entities to send mail to Nevada residents whose vehicles require emissions testing. These firms mail notices to vehicle owners about the emissions testing and generally include a coupon for a reduced fee at an emissions testing station near the motorist's home. Nevada has not yet acquired the capability to allow Nevada residents to indicate that they wish to be included in mailing lists that are sold by the Department of Motor Vehicles (DMV). The ability for residents to select this option is known as an "opt in" system.

QUESTION

Can the DMV, prior to establishing an "opt-in" system, release registration information to individuals, businesses, or both which intend to use the information to send notices to registrants concerning the need for emissions testing and which intend to influence the registrants' decision to use specific emissions testing businesses in their area?

ANALYSIS

Section 481.063 of the Nevada Revised Statutes (NRS) is a fairly long and complex statute. Seven of the eleven subsections begin with the phrase "except as otherwise provided" and refer to another subsection. Thus this requires a careful reading to sort out the relationship of the various subsections.

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NRS 481.063 was based largely on the Federal Driver's Privacy Protection Act, or DPPA, 18 U.S.C. § 2721, which was enacted in response to a tragic set of facts. An actress named Rebecca Shaeffer was part of a television program known as "My Sister Sam." An obsessed male fan obtained her address from an investigator, who had obtained it from the California Department of Motor Vehicles. The man then went to Ms. Shaeffer's apartment and killed her. 139 CONG. REC. 29, 466 (November 16, 1993) (remarks of Sen. Boxer). The Nevada Legislature enacted NRS 481.063 partially in response to the DPPA, but also out of concern for the safety of citizens in Nevada.

The analysis begins with NRS 481.063(3) which requires that certain information not be released in certain forms. It states, in pertinent part:

Except as otherwise provided in subsection 2, the director shall not release to any person [other than certain state or local government officials, insurance companies or private investigators] . . .

(a) A list which includes license plate numbers combined with any other information in the records or files of the department;

(b) The social security number of any person, if it is requested to facilitate the solicitation of that person to purchase a product or service; or

(c) The name, address, telephone number or any other personally identifiable information if the information is requested by the presentation of a license plate number.

NRS 481.063(3). Thus when information is released outside the agency it must be in a form that would not allow any person using the personal information to correlate a license plate number to the name and address of anyone appearing on the registration. This would prevent a stalker from recording a license plate number and later obtaining the address of the victim. In addition, subsection (3)(b) prohibits the release of a social security number

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in connection with any solicitation. This would include the use described in your letter for emissions testing purposes. Subsection 3 does provide one exception which allows a person, under certain circumstances, to obtain personal identifying information through a law enforcement agency when they report specified crimes involving theft. NRS 481.063(3).

The very next subsection provides, “4. Except as otherwise provided in subsections 2 and 5, the director shall not release any personal information” NRS 481.063(4). This is the strongest statement regarding the release of information in the entire section, but is qualified by the exceptions in both NRS 481.063(2) and (5). An examination of the exceptions shows that they cover a broad range of situations.

NRS 481.063(2) is straightforward. It allows the DMV to release information to an individual who presents a release from a vehicle lienholder or the individual about whom personal information is requested. The release must be less than 90 days old. Obviously, if a person signs a release and wants the DMV to release the information, it should be released.

The largest number of exceptions which allow release of personal information are contained in NRS 481.063(5). By enacting these exceptions, the Nevada Legislature has designated these specified uses of personal information to be in the public interest. The release of personal information for emissions testing purposes appears in those exceptions. NRS 481.063(5)(c)(3).

Subsection (5)(k) allows the release of personal information for “bulk distribution of surveys, marketing material or solicitations” provided that the DMV has implemented a system for drivers to signify their willingness to receive those materials, informally known as the “opt in” provision. NRS 481.063(5)(k). Notably, the prohibition in NRS 481.063(3) on releasing license plate numbers with corresponding names or addresses would remain in effect, even after the “opt in” system is in place.

It is apparent from the above discussion that subsection 3 prohibits the release of any person’s social security number or personal information based upon its correlation to a license plate number. The only exceptions are for purposes of obtaining personal identifying information through a law

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enforcement agency when a specified crime involving theft is reported, or when authorized under subsection 2 by a lienholder of the vehicle or by the person about whom the information is requested. Subsection 4 prohibits the director from releasing any personal information except when similarly authorized by a release pursuant to subsection 2 or as provided pursuant to the numerous exceptions set forth in subsection 5. Notably, the provisions of NRS 481.063(3) prohibiting the release of social security numbers and personally identifying information correlated to license plate numbers are not affected by the exceptions listed in subsection 5. "It is a well-recognized tenet of statutory construction that multiple legislative provisions be construed as a whole and where possible, a statute should be read to give plain meaning to all its parts." *Diamond v. Swick*, 117 Nev. ___, 28 P.3d 1087, 1090 (Adv.Op. 54, Aug. 17, 2001) (quoting *Gaines v. State*, 116 Nev. 359, 365, 998 P.2d 166, 169-70 (2000)). Accordingly, individuals or entities seeking the release of personal information in connection with soliciting the sale of emission testing services under NRS 481.063(5)(c)(3) may not be provided with social security numbers or personally identifying information that is correlated to an individual's license plate number.

The intent behind the enactment of NRS 481.063 was to provide drivers with a measure of protection concerning the release of personal information and to strictly limit the release of social security numbers and personally identifying information correlated to license plate numbers. Moreover, the DMV director has the discretion to deny any release of information if the director reasonably believes the use would be improper. NRS 481.063(7). This allows the DMV to review all requests for information on a case-by-case basis, and any information released should be closely tailored to the intended use. Accordingly, the release of sensitive personal information, such as organ donor status, should be strictly limited as well. Finally, the DMV may charge a fee for allowing access to information in DMV records when the information is to be used for private purposes. NRS 481.063(1).

CONCLUSION

Personal information from the Department of Motor Vehicles (DMV) files may be released prior to establishing an "opt in" system for bulk distribution of surveys, marketing materials, or solicitations, provided that the information is to be used for one of the purposes specified in the exceptions set forth in NRS

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481.063(5). The release of personal information in connection with matters relating to emissions testing services falls within the listed exceptions, and the DMV may charge the requestor a reasonable fee to access such information. The DMV director has discretion to deny any release of information if the director reasonably believes the information may be used for an unwarranted invasion of personal privacy. Finally, drivers' social security numbers and personally identifying information that is correlated to individuals' license plate numbers may be released only under strictly limited circumstances, and such information may not be released in connection with matters relating to emissions testing services.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: BRYAN L. STOCKTON
Deputy Attorney General

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AGO 2002-13 Withdrawn

AGO 2002-14 FIRST AMENDMENT; SCHOOL DISTRICTS; RELIGION:

The First Amendment prohibits the Lyon County School Board of Trustees from including an opening prayer and/or moment of silence that is observed for a religious purpose. The Board may, however, conduct a moment of silence if it articulates a secular purpose for doing so.

Carson City, March 18, 2002

Leon Aberasturi, District Attorney, Stephen B. Rye, Chief Deputy District Attorney, District Attorney's Office, 31 South Main Street, Yerington, Nevada 89447

Dear Messrs. Aberasturi and Rye:

The Office of the Governor requested an opinion concerning the competence of foreign consuls with regard to the registration of civil status. Specifically, the request referred to an inquiry by the Consulate General of France in Los Angeles in a letter dated March 24, 1999. The French Consulate states that they presently register the births, marriages, and deaths of nationals upon presentation of an American certificate. Their inquiry about whether Nevada recognizes a marriage of two French nationals residing in America does not specify where the marriage would take place. In addition, the letter does not explain the circumstance under which the French Consulate intends to establish a birth or death certificate. Attempt was made to obtain further information from the French Consulate on these issues, but they have not yet responded to my request.

QUESTION ONE

Would the authorities of Nevada recognize the marriage of two French nationals who reside on American soil by the Consuls General of France?

ANALYSIS

The letter from the French Consulate does not specify where the proposed marriage might take place. In Nevada, the bride and groom must obtain a marriage certificate from a Nevada county clerk pursuant to NRS 122.040, and

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the marriage must be solemnized pursuant to NRS 122.010. Licensed or ordained ministers and chaplains of the Armed Forces may obtain a certificate from the county clerk to solemnize a marriage. NRS 122.062. Solemnization of marriage may also be done by any supreme court justice, district judge, justice of the peace, municipal judge, and commissioner and deputy commissioner of civil marriages. NRS 122.080. Foreign consuls are not specifically authorized to solemnize a marriage in Nevada under Nevada law. Therefore, a marriage of two French nationals in Nevada requires a Nevada marriage certificate and solemnization by an appropriate individual.

Nevada specifically recognizes the validity of a marriage between Indians performed by tribal custom within closed Indian reservations and Indian colonies upon filing a specific certificate of declaration. NRS 122.160. Our statutes do not specifically address the validity of a marriage conducted by a foreign consul. In their letter, the French Consulate has not described their authority for marrying two French nationals.

Pursuant to the principles of full faith and credit contained in Article IV, Section 1 of the United States Constitution, Nevada authorities recognize marriage certificates authorized by another state. I have been unable to find any specific authority granted to the French Consulate by the State of California. ALBA WITKIN, SUMMARY OF CALIFORNIA LAW (9th ed. 1999) *cites to* RESTATEMENT, (SECOND), CONFLICT OF LAWS at § 283 (1988 Revisions), which provides that “[t]he practice of United States consuls is to be present officially only at such marriages as comply with the requirements of the country where celebrated.” Pursuant to Article VI of the United States Constitution, any authority of the French Consulate to marry individuals which is provided by treaty or federal law would be recognized in Nevada. Therefore, the specific circumstances and applicable authority would dictate whether the marriage could be recognized by Nevada authorities.

CONCLUSION TO QUESTION ONE

The marriage of two French nationals in Nevada requires a Nevada marriage certificate and solemnization by an appropriate individual absent some specific authority granted to the French Consulate to perform such services.

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QUESTION TWO

Is a foreign consul authorized to establish a birth or death certificate for a French citizen?

ANALYSIS

In their letter, the French Consulate describes the present practice of registering births, marriages, and deaths of French nationals upon presentation of an American certificate. The letter does not explain any different practice for establishing birth or death certificates.

If a French national dies in Nevada or has a child in Nevada, Nevada issues a death or birth certificate in accordance with the provisions set forth in NRS 440. Similarly, an American certificate is produced by any state in which a birth or death occurs. Under these circumstances, an American certificate would be available regardless of whether the French Consulate issued a similar document. Again, if a federal law or treaty authorizes the French Consulate to establish a birth or death certificate, Nevada authorities would recognize the document pursuant to Article VI of the United States Constitution.

CONCLUSION

This inquiry of whether Nevada authorities recognize birth, marriage, or death certificates established by the French Consulate cannot be answered without further explanation of the location and circumstances surrounding the establishment of the certificate. Nevada law does not provide for any specific authority to the French Consulate to produce these records. Nevada authorities will recognize the document if the French Consulate provides evidence of their authority to perform a marriage or establish a birth or death certificate.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: LINDA C. ANDERSON
Deputy Attorney General

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AGO 2002-15 AGREEMENTS; COUNTIES; WATER: Agreements entered into between Lincoln County and private corporation, creating a partnership whose purpose is the acquisition, development, and marketing of water and establishing a method of investment recovery and profit sharing, are *ultra vires*. The agreements do not serve a predominantly public purpose of the Legislature has not expressly authorized counties to engage in such an undertaking.

Carson City, March 20, 2002

Stewart L. Bell, District Attorney Office of the Clark County District Attorney,
Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Mr. Bell

You have asked this office to opine on the authority for and validity of two agreements entered into between Lincoln County, Nevada (the County), and Vidler Water Company, Inc. (Vidler). Together these agreements provide that Vidler and the County will partner to plan, acquire, develop, and purvey unappropriated waters in Lincoln County. They further provide a method for Vidler to recoup its outlay of capital and for the County to share in the profits of the enterprise after Vidler's full reimbursement.

QUESTION

Whether either or both agreements entered into between Vidler Water Company, Inc. and Lincoln County, creating a partnership whose purpose is the acquisition, development, and marketing of water in the County and establishing a method of investment recovery and profit sharing, are *ultra vires*.¹

BACKGROUND

The first agreement between Vidler and the County, dated September 21, 1998, is styled a "Memorandum of Understanding" (MOU). It recites that "VIDLER proposes to undertake certain water resource planning which will provide substantial benefit to LINCOLN COUNTY and its residents." MOU

¹ You have separately asked whether the agreements between Vidler and the County violate the public policy of the State of Nevada. The ensuing analysis addressing your first question subsumes discussion of the second, which therefore is not separately addressed.

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at 1. Under the auspices of such planning, Vidler and Lincoln County agree to file joint applications for unspecified water in the County,² for use in conjunction with land development to be undertaken by an affiliate of Vidler, and also for export outside the County under lease. *Id.* at 1. As consideration, the County agrees to pay Vidler \$25,000, an amount the parties recognize may increase if the scope of the “planning effort” is modified by the parties. *Id.* at 2. The agreement purports to bind the parties’ successors in interest. *Id.* at 4.

The second agreement, dated October 20, 1999, is styled a “Water Delivery Teaming Agreement” (Agreement). It recites that “LINCOLN/VIDLER are now desirous of developing water rights, appropriations and conveyancing infrastructure . . . and providing wholesale water to adjoining water districts and/or developers who require water.” Teaming Agreement at Recitals, 5. The Agreement is “anticipated to encompass future projects throughout Lincoln County relating to water marketing, water appropriation, water conveyancing, water wheeling and other water projects.” Teaming Agreement at 3. It further provides that “LINCOLN/ VIDLER are agreeable to setting forth in this Agreement the framework through which water rights will be developed and water will be marketed and through which capital will be expended and recaptured and net revenues divided between the parties.” *Id.* at Recitals 6. The Agreement establishes that Vidler, the “managing partner,” Agreement at 3, will “obtain all capital and financing required to construct and install the water development infrastructure,” *id.* at 1, and that Vidler will be repaid, with unspecified interest, for its investment from operating revenues generated by any projects which are developed. *Id.* at 2. The parties agree to a method of profit-sharing:

Any balance of net operating revenues
shall be divided equally with LINCOLN
COUNTY receiving fifty percent . . . and
VIDLER WATER COMPANY, INC.,

² This office is aware that numerous Lincoln/Vidler applications are pending before the State Engineer to appropriate water in Lincoln County. Furthermore, these applications are, at least in part, in competition with applications filed by the Las Vegas Valley Water District, and Lincoln County has requested the State Engineer to dismiss the applications filed by Las Vegas Valley Water District. This opinion makes no judgment regarding the relative merits of the applications or about Lincoln County’s request.

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receiving fifty percent . . . which monies shall be paid to the parties twice each year with one payment on February 15 of each year and the other on August 15 of each year.

Id.

As with the MOU, the Agreement purports to bind the parties' successors in interest. *Id.* at 4. In addition, the Agreement provides: "as to other water resource activities within Lincoln County the parties agree to disclose and obtain the consent of the other prior to proceeding forward." *Id.* at 11.

ANALYSIS

At the outset, this Office makes two preliminary observations regarding its own authority. First, it disclaims any responsibility, authority, or intent to judge the wisdom of agreements into which Lincoln County has entered. Counties are governed by and act through elected boards of county commissioners. NRS 244.010 to 244.090. Members of such boards are answerable to the county electors for lawful actions taken in such capacity.

Second, this Office concludes it has authority to provide an opinion in response to your request. The Attorney General's authority is expressly set forth in statute:

When requested, the attorney general shall give his opinion, in writing, upon any question of law, to . . . any district attorney . . . upon any question of law relating to their respective offices, departments, agencies, boards or commissions.

NRS 228.150(1). We construe broadly the term "relating to their respective offices," and thus provide legal counsel to officials of state and local governments when such guidance will assist the officials to effectively carry out their own legal responsibilities.

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Although your responsibilities as Clark County's District Attorney are tied to the area bounded by the county's legal borders, you serve as legal advisor to officials and political subdivisions whose affairs are directly affected by external events, entities, and influences. Matters affecting the conduct of county business do not simply cease at the county line. It would therefore be unreasonable to cabin the authority of this office to a strained and narrow reading of the legislative language in a way which prohibits issuance of opinions if the subject matter involves an external governmental entity.

In this instance, we have been apprised of numerous forms of actual and proposed interaction between Clark County and its subdivisions, on one hand, and by Lincoln and Vidler acting in concert, on the other. Generally speaking, officials within Clark County request legal advice from you, and you from us, about the nature of the Lincoln/Vidler relationship, before entering into governmental and business relations with it. This request is both prudent and reasonable, and is comparable to ordinary due diligence performed by private parties prior to entering into contractual relationships with one another. There is thus plainly a basis for this office to afford the counsel which you have requested, and the following analysis is provided for that purpose.³

We begin with the principle that boards of county commissioners are administrative agencies of the state and are required to perform such duties as are prescribed by law under NEV. CONST. art. 4, § 26. *Ex rel Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581 (1923); *City of Las Vegas v. Mack*, 87 Nev. 105, 481 P.2d 396 (1971). Their powers are derived exclusively from legislative acts. Op. Nev. Att'y Gen. No. 97-19 (June 2, 1997), Op. Nev. Att'y Gen. No. 88 (November 12, 1963). "It is well settled that county commissioners have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect." *State ex rel. King v. Lothrop*, 55 Nev. 405, 408, 36 P.2d 355 (1934).

We look, therefore, to state statutes to determine whether the Nevada Legislature has authorized counties to enter into agreements and engage in

³ We note these preliminary principles: it is the legislature which decides the State's water law policies. *Pyramid Lake Paiute Tribe v. Washoe Co.*, 112 Nev. 743, 749, 918 P.2d 697 (1996). The legislature has recognized the importance of water resources to all Nevadans: "water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public." NRS 533.025.

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activities such as those herein considered. In this endeavor, it is critical to initially characterize the nature of the agreements, and the qualities of the agreements which are being evaluated. Your request asks specifically about the lawfulness of the County's agreement to obtain Vidler's consent prior to "proceeding forward" with any other water resource activities in Lincoln County. Agreement at ¶¶ 3 and 11. You also ask whether the agreements illegally bind future county commissions.

It is our opinion that the County's agreements in both these respects are contrary to law.⁴ However, we recognize that these provisions may well be severable under both agreements, MOU at ¶ 9, Agreement at ¶ 10, the result being simply that the County would not be bound by these invalid covenants.

This, however, does not answer the broader question whether the agreements are *ultra vires*. This determination turns on whether the County has authority to do that which it has undertaken with Vidler. This requires us to characterize what it is that the County has undertaken.

Several significant indicators are present for purposes of characterizing the agreements. The County and Vidler have clearly formed a partnership, with Vidler as the managing partner. They have agreed to jointly apply for water rights, and to develop and market water as a commodity within and without the County. They have agreed that Vidler will act as capital partner and obtain all necessary financing; agreed that the revenues from marketing jointly-owned water will first be applied to reimbursement of Vidler's investment; and agreed that all net revenues will be divided equally between the County and Vidler. It

⁴ By agreeing not to undertake other water-related development without Vidler's consent, the County improperly gave veto authority to its partner. A county may not agree to limit its governmental functions. See, e.g., *Landau v. City of Leawood*, 519 P.2d 676, 680 (Kan. 1974) (citing *Northern Pacific Railway v. Duluth*, 208 U.S. 583 (1908), *New York & N E. R. Co. v. Bristol*, 151 U.S. 556 (1894)). See also *Byrd v. Martin*, *Hopkins*, *Lemon and Carter*, 564 F. Supp. 1425, 1428 (W.D. Va. 1983). County commissions also may not bind future boards in the exercise of their governmental function. *Edsall v. Wheler*, 285 N.Y.S.2d 306 (Supr. Ct. N.Y. 1967) ("courts have uniformly held efforts to bind future legislative boards to be illegal and *ultra vires*"), *Board of Klamath Co. Commrs. v. Select County Employees*, 939 P.2d 80 (1997) ("without question, 'an outgoing elected governing body of finite tenure which enter[s] into a contract involving a 'governmental' function cannot bind a subsequently elected body'"), *In the Matter of James A. Martin v. Hennessy*, 537 N.Y.S.2d 676 (Supr. Ct. N.Y. 1989) ("law is well settled that a municipal corporation performing a governmental function may not bind its successors"). Thus the County's agreement is invalid to the extent it purports to bind successive boards in such exercise of governmental discretion.

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is therefore indisputable that the County's agreements, read *in pari materia*, form a business relationship with a private corporation for the purpose of income generation through sale or lease of natural resources.

With this characterization in mind, we turn to the statutes to determine whether such agreements are authorized. County general and financial authorities are set forth at NRS 244.150 to 244.255. There is no provision among these statutes which, expressly or by implication, permits the County to form a partnership with a private corporation and to share in a for-profit enterprise. We therefore look elsewhere for such authority.

The Legislature has granted specific authorities permitting counties to foster economic development in the state. At NRS chapter 244A, the Legislature provides authority and means, pursuant to the County Economic Development Revenue Bond Law (Bond Law), to:

[P]romote industry and employment and develop trade by inducing manufacturing, industrial and warehousing enterprises and organizations for research and development to locate in, remain or expand in this state to further prosperity throughout the state and to further the use of the agricultural products and the natural resources of the state.

NRS 244A.695(1). To secure this object, specific authority is given counties to "finance or acquire . . . one or more projects or parts thereof." NRS 244A.697(1). A "project" is defined to include numerous undertakings, including manufacturing, industrial and warehousing enterprises, NRS 244A.689(1)(a); health and care facilities, NRS 244A.689(1)(c); a corporation for public benefit, NRS 244A.689(1)(e); affordable housing, NRS 244A.689(1)(f); pollution abatement facilities, NRS 244A.689(3)(a); and public utilities, NRS 244A.689(5).

Arguably relevant to the County's purposes is inclusion of the following in the definition of "project":

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3. Any land, building, structure, facility, system, fixture, improvement, appurtenance, machinery, equipment or any combination thereof or any interest therein, used by any natural person, partnership, firm, company, corporation (including a public utility), association, trust estate, political subdivision, state agency or any other legal entity, or its legal representative, agent or assigns:

....

(b) In connection with the furnishing of water if available on reasonable demand to members of the general public.

NRS 244A.689(3)(b).

If the County and Vidler meant to rely on these authorities for their agreements, our opinion is that their reliance was improper. As an initial matter, there is no bond issue proposed in connection with the MOU or Teaming Agreement. It is doubtful that the Legislature intended in NRS chapter 244A to confer authority apart from a bond issue. *Cf.* Op. Nev. Att’y Gen. No. 93-19 (August 10, 1993) (“[T]he term ‘project’ may not, in our opinion, be construed to include things other than that which is being financed with the bond proceeds”). However, it is unnecessary to conclude on this point, because other factors exist which disqualify the County’s actions.

Evident in NRS 244A.689(3)(b) is a legislative intent that a qualified water project have, at least as one of its principal aims, the provision of a water system to supply the needs of citizens of the County. From the occurrence of its mention together with numerous other projects (*e.g.*, public utilities, pollution abatement projects, and health and care facilities) which provide traditional government services or benefits to citizens, it is plain that the “furnishing of water” envisioned by the Legislature is limited in scope and purpose to projects which serve the County’s citizens. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (doctrine of *noscitur a sociis* provides that a word is known by the company it keeps and gathers meaning from the words around it). These provisions, in the

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context in which they appear, are not intended to authorize a county's partnering in a project for purveying County resources for profit, especially when the venture expressly plans export of resources from the County.

The MOU recites that it is also intended, in part, to develop "water resources necessary to meet future growth and economic development of designated areas within LINCOLN COUNTY." MOU at 1. However, pursuant to these agreements, the County and Vidler have prepared a draft water plan for Lincoln County which forecasts that water demand in the County will actually decrease in the future, from 67,516 acre-feet per year in 1995, to 65,063 acre-feet per year in 2020. *A Water Plan for Lincoln County (Draft)*, at 29, Table 4.2. Clark County is identified as the recipient of water moved through such a system. *Id.* at 38. Seen in context with the profit-sharing provisions of the Teaming Agreement, this option is self-evidently the primary objective of the partnership formed by Vidler and the County.

Even if the County's agreements fulfilled a need within the County for water, this Office is of the opinion that the arrangement still exceeds the County's authority, because the County, through its contracts, is engaging in private, for-profit enterprise. The County in this respect has stepped outside its normal role.

It is a fundamental constitutional limitation upon the powers of government that activities engaged in by the state, funded by tax revenues, must have primarily a public rather than a private purpose. A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government.

Idaho Water Resources Board v. Kramer, 548 P.2d 35, 59 (Idaho 1976). Compare *Everett v. County of Clinton*, 282 S.W.2d 30, 39 (Mo. 1955) (upholding county operation of rock quarry, where "[T]he record . . . satisfactorily refutes the theory that the county was engaging in a commercial enterprise. It was not a business venture for profit."). See generally Annotation, *Constitutionality of statute authorizing state to loan money or*

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engage in business of a private nature, 14 A.L.R. 1151, 1157 (1921) (“[I]t has been expressly held that the state has no power, either itself to engage in a business of a concededly private nature, or to authorize a political subdivision thereof so to engage”). Cf. 12 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 36.02 at 642 (3d ed. 1995) (“In the absence of express legislative sanction, [a municipal corporation] has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals”).

The same defect prevents County reliance upon the General Improvement District Law. General improvement districts are authorized to acquire infrastructure for delivery of water within the districts. Section 318.144 of the Nevada Revised Statutes provides:

The board may acquire, construct, reconstruct, improve, extend or better a works, system or facilities for the supply, storage and distribution of water for private and public purposes.

NRS 318.144(1).

This authority given to general improvement districts may be exercised by a board of county commissioners. NRS 244.157(1). However, the express purpose of districts established under NRS chapter 318 is, again, to provide essential services to constituents. See generally NRS 318.116 (enumerating basic powers of districts). Districts “are created for the sole purpose of assisting the state in the performance of its governmental function of distributing heat, light and power among its people *without profit*.” *State of Nevada v. Lincoln County*, 60 Nev. 401, 410, 111 P.2d 528 (Nev. 1941) (emphasis added). The service or product created by the district is to be “available *at cost* to the people of Nevada.” *Id.*, 60 Nev. at 413 (emphasis added).

The public purpose doctrine prohibits use of public property for private purpose. “A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government.” *Idaho Water Resource Bd. v. Kramer*, 548 P.2d 35, 59 (Idaho 1979). Public

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purpose doctrine clearly forms the context for county activities in Nevada. It finds expression in the State Constitution, NEV. CONST. art. 8, § 10 (“No county, city, town, or other municipal corporation shall become a stockholder in any joint stock company, corporation or association whatever, or loan its credit in aid of any such company, corporation or association, except, rail-road corporations[,] companies or associations”). It is also manifest in case law. *State ex rel. Brennan v. Bowman*, 89 Nev. 330, 332, 512 P.2d 1321 (1973) (“Public funds may not be spent for private purposes. . . . [I]f the County were to levy a tax to retire the bonds and if the purpose of the bond issue was private rather than public in nature, the law would be struck down. NEV. CONST. art. 1, § 8.”).

Revenue generation for the County does not fulfill the public purpose requirement, within the ordinary meaning of the term; there is “no authority which would dignify that objective, standing alone, as a public purpose.” *City of Corbin v. Kentucky Utilities Co.*, 447 S.W.2d 356, 358 (Ky. 1969). If profit-making were sufficient to satisfy the public purpose requirement, it would justify the County’s involvement in any legal business. Furthermore, even if some incidental benefit to the public resulted from the arrangement, it would not merit characterizing the arrangement as one serving a public purpose. The determination of public purpose is based upon the activity as a whole, and must demonstrate “a predominance of a public purpose or a close relationship to the public welfare.” *Id.* at 359.

We acknowledge that public purpose law has evolved: “The concept is elastic and keeps pace with changing conditions.” *Siegel v. City of Branson, Missouri*, 952 S.W.2d 294, 297 (Mo. App. 1997). “No hard and fast rules exist for determining whether specific uses and purposes are public or private.” *Id.* Even with this acknowledgement, there appears no predominant public purpose or close relationship to the public welfare in these circumstances.

Because a venture such as the one contemplated by Vidler and the County has as its primary purpose creation of revenue for the County and its partner, it is reasonable at least to expect the Legislature to speak explicitly when and if it authorizes such action. See *Hartford Accident and Indem. Co. v. Guardian Ins. Agency*, 19 P.2d 328, 331 (Ariz. 1933) (“If it were the intention of the legislature to give counties the unlimited right to engage in every nature of private business for which their property might be used, we think that intention

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would have been made manifest in language very different from that in question.”); *Taylor v. Dimmitt*, 78 S.W.2d 841, 843 (Mo. 1935) (“Authority for such action [entering a field of private business] should clearly appear”).

We therefore stop short of concluding that the Legislature lacks power to confer such authority on counties. Instead, we only conclude the Legislature has not done so by a clear statement in this case and that the County’s agreements with Vidler are not authorized under existing law and are therefore invalid.⁵

CONCLUSION

Counties, as agencies of the state derive their powers exclusively from legislative acts. We are aware of no provision of Nevada law that, either expressly or by implication, permits the County to form a partnership with a private corporation and to share in a for-profit enterprise of this nature. Nevada statutes that do authorize a County government to undertake projects intended to fulfill various public purposes do not allow engagement in profit-making enterprise.

The agreements entered into between Lincoln County and Vidler have as their primary purpose development and purveying of water resources for profit. Because this purpose is not a predominantly public purpose, and the Legislature has not expressly authorized counties to engage in such an undertaking, we conclude that Lincoln County lacks authority to enter into the agreements and acted in excess of its authority when it did so.

⁵ The Legislature has expressly provided authority for certain political subdivisions to purchase and sell water. *See, e.g.*, Act of May 10, 1993, ch. 100, § 2(6), (7) and (16), 1993 Nev. Stat. 159 at 160-162 (authorizing Virgin Valley Water District to purchase and sell water rights). The absence of such authority for Lincoln County’s venture therefore clearly signifies absence of legislative intent. The Legislature has also, by express language, provided authority for counties to impose a \$6 per acre-foot tax on water exported for use outside the county of origin. NRS 533.438. Employing the maxim *expressio unius est exclusio alterius*, *Bopp v. Lino*, 110 Nev. 1246, 885 P.2d 559 (1994), we conclude that the Legislature has provided the means by which counties may derive benefit from development of water for export, to the exclusion of other methods, including the one attempted here by Lincoln County.

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Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: C. WAYNE HOWLE
Supervising Deputy Attorney General

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AGO 2002-16 HEALTH; DEATH; ANATOMICAL GIFTS: Nevada's anatomical gift statute provides sufficient basis to establish the intent of the donor that can be relied upon in good faith. The heirs of a donor are not bound by a donor's intent to donate, making the redundant consent to the heirs a potential frustration of the donor's intent. An heir possesses a quasi-property interest in the body of the deceased under the 14th Amendment of the U.S. Constitution.

Carson City, March 29, 2002

Organ & Tissue Donation Task Force c/o Office of the Nevada Attorney General, 100 North Carson Street, Carson City, Nevada 89701

Dear Task Force Members:

During the January 24, 2002 public meeting, the Organ & Tissue Donation Task Force (Task Force) expressed its desire that this office issue a legal opinion regarding the following matters. Since the Task Force was formed as an advisory public body to the executive branch of government, this office has authority to opine pursuant to NRS 228.110 and NRS 228.150.

QUESTION ONE

Do Nevada's laws under Nevada Revised Statutes (NRS) sections 451.555 and 483.840, as administered, provide adequately for the expression of consent by potential donors to create a valid anatomical gift, which can then be acted upon, by medical providers and emergency responders at the appropriate time?

ANALYSIS

NRS 451.555 is one of the sections of Nevada's version of the Uniform Anatomical Gift Act (UAGA), which originally was created in 1968 and adopted by all fifty of the United States to provide for the gift of anatomical body parts and/or tissue by the donor at death. *Organ Donor Laws in the U.S. and the U.K.: The Need for Reform and the Promise of Xenotransplantation*, 10 IND. INT'L. & COMP. L. REV. 339, 355 (2000). Because of inadequacies in the 1968 UAGA, a new version was drafted in 1987 which was adopted by the American Bar Association in 1988. This version was not received as well as the first version. To date, only 15 states have adopted this new version.

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Nevada is one of those fifteen states. *Id.* at 358-359. The entire act is contained in NRS 451.500 to 451.590, inclusive. NRS 451.555 provides a procedure whereby a citizen of the State of Nevada may make an anatomical gift. In addition, the Nevada Legislature chose to authorize the Department of Motor Vehicles (DMV) to be the prime facilitator for this gift procedure. In 2001, Nevada's Legislature attempted to make the citizenry of this State more aware of the critical need for donated body parts for transplantation by amending NRS 483.840.

The purpose behind the UAGA and Nevada's recent legislation creating the above-referenced process is to bring to the general public's attention the critical need for organs for transplantation and to increase the number of organs available for transplantation. This statute created a means by which anatomical gift donors could express their intent to be donors and consent to the harvesting of their organs at death for needy recipients. By way of this statute, the Legislature designated the DMV as the facilitator for this process at the time of the issuance or renewal of a driver's license. At the time of renewal or application for a new license, the applicant is presented with a document which, among other questions, asks the applicant if he or she would like to be an organ donor. If the applicant checks the "Yes" box, a form from the Living Bank, a national repository for information on organ donors, is given to the applicant to complete in order to collect vital information, including the applicant's name, address, telephone number, date of birth, social security number, driver's license number, name of next of kin, and the address of the next of kin. Item 13 on this Living Bank form allows the applicant to express intent to make an anatomical gift:

13. In the hope that I may help others, I hereby make this anatomical gift, if medically acceptable, to take effect upon my death. The words and marks below indicate my desires:
I give: () Any needed organs and tissues.
() Only the organs and tissues listed below:

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This section of the application contains language conveying the intent to make the anatomical gift. In addition, section 14 allows a donor the option of designating the gift for only a Nevada resident by selecting the “Yes” box.

The form continues with a space for the donor’s signature and a date. At present, the form also has a space for the signature of two witnesses to this act. It has been suggested by members of the Task Force that the Living Bank form be stamped with additional wording to reflect Nevada’s law on organ donation. This stamp, affixed by DMV personnel and then provided to the donor, will state that the signature of another person, for and on behalf of the donor and two witnesses, is required if the donor is either under the age of 18 or is otherwise incapacitated and incapable of legally expressing the required intent. NRS 451.555(2)(a) and (b). Once the form has been received by the Living Bank, a donor card with the same testamentary language as the Living Bank form is sent to the donor with a space provided for the donor’s signature and also spaces for two witnesses’ signatures. The proprietors of the Living Bank have assured Task Force members that the card and new copies of the form will be changed to alert the donor, and anyone who sees the form or the donor card, that the witnesses’ signatures are not required unless the donor is under the age of 18 or otherwise incapacitated. Such a change in the card would emphasize to emergency responders, medical personnel, and organ procurement organizations that the wishes of the deceased should be honored in accordance with Nevada law, NRS 451.555, as explained above.

The history of giving one’s body, organs, or tissue at death for scientific research or for organ transplantation reflects reluctance on the part of the general public to participate in this scientific and life-saving process. One of the main reasons for this reluctance is founded in religious beliefs. Early English law granted sole jurisdiction to the church to dispose of the remains of the dead. Cemeteries were owned and operated by the church for centuries. The belief that the body and spirit would some day be reunited is the foundation of this practice. In America the courts followed the English law of “no property right” in a corpse, but recognized that “relatives have an interest in burying their dead without unlawful interference” *Arising from the Dead: Challenges of Posthumous Procreation*, N.C. L. REV. 901, 925 (1997).

U.S. law is still unwilling to declare definitively that there exists a proprietary interest in a dead body; and, therefore, it must be included in the

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estate of the deceased for purposes of disposition. Instead, the law has recognized a “quasi-property” interest in the corpse resulting in its disposal through the consent of the next of kin. *Massey v. Duke University*, 503 S.E.2d 155 (N.C. Ct. App. 1998); *Spiegel v. Evergreen Cemetery Co.*, 186 A. 585, 586 (N.J. Sup. Ct. 1936); *Arising from the Dead: Challenges of Posthumous Procreation*, N.C. L. REV. 901, 924-927 (1997). Therefore, the origin of the apparent reservations in modern Western society to allow for body and organ donation without the consent of the next of kin is easily discernible.

In a normal testamentary setting, the testator expresses his intent in a will for the disposal of all property at death. The will is a written memorialization of that intent in an instrument that has been signed by the testator and, usually, by two witnesses. In the absence of an executed will, the court divides the deceased’s property according to a reasonable determination of the heirs at law pursuant to intestate succession.

The process created by the UAGA, and the Nevada Legislature in NRS 451.500 through 451.590 and NRS 483.840, expresses the intent of the donor for the disposition of his or her body at death, similar to the intent associated with an executed will. With the testamentary wording used in the Living Bank form and the donor card sent to the donor, this intent is clear. Under these laws and with the documentation of that intent in place, medical providers and organ and tissue procurement agencies should not hesitate to harvest the organs of a donor who has expressed this intent. Nevertheless, there still exists reluctance on the part of medical personnel and organ procurement organizations to proceed with the harvesting of organs without the consent of the next of kin. 75 N.C. L. REV. 901, 929 (1997).

One provision of the UAGA which should help medical providers and organ procurement organizations to overcome this reluctance to proceed with the harvesting of organs, even with evidence of intent on the part of the deceased to donate organs and tissue, is a legislative protective umbrella against liability. Nevada’s provision is NRS 451.582(2), which states:

2. A hospital, physician, coroner, local health officer, enucleator, technician or other person, who acts in accordance with the terms of NRS 451.500 to 451.590,

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inclusive, or with any other laws of the State of Nevada relating to anatomical gifts or attempts *in good faith* to do so, is not liable for that act in a civil action or criminal proceeding. [Emphasis added.]

Persistent reluctance to proceed without the consent of the next of kin is apparently encouraged by statutory language that is not expressly binding upon the donor's heirs, except where the donor has expressed intent to *not* donate. A last minute change of mind by the donor can change everything. The failure of an heir or a organ donee to comply with any "known" intent of the donor to *not* donate could prove problematic regarding each actor's claim to "good faith" immunity from legal action. See NRS 451.555(12)(c) (during a terminal illness or injury, the donor may refuse to make any anatomical gift by an oral statement or other form of communication); see NRS 451.582(2) (to obtain immunity the actor must attempt, in good faith, to comply with all the terms of NRS 451.500 to 451.590, inclusive); see NRS 451.557(2)(b) (an heir may not make an anatomical gift if he knows of a refusal or contrary indication by the decedent); see NRS 451.557(4) (an heir's consent to donate may be revoked by any member of the same or a prior class of heirs prior to any removal of any organs); see also NRS 451.560(3) (" . . . If the donee knows of the decedent's refusal or contrary indications to make an anatomical gift or that an anatomical gift by a member of a class having priority to act is opposed by a member of the same class or a prior class under subsection 1 or NRS 451.557, the donee shall not accept the anatomical gift.")).

Although there is no case law in this State that has tested this immunity, it appears certain that any medical provider, organ procurement agency, coroner, or other health official who proceeds with organ harvesting in "good faith" from the body of a deceased donor would be protected from civil and criminal liability. Strict adherence to the provisions of chapter 451 of the Nevada Revised Statutes by all those involved in the donation process, including the donor, is important to afford protection under this law. Under similar statutes, courts in sister states have protected institutions from liability to the next of kin for harvesting organs if they acted with "good faith." *Ramirez v. Health Partners of Southern Arizona*, 972 P.2d 658 (Ariz. Ct. App. 1998); *Lyon v. U.S.*, 843 F.Supp. 531 (D. Minn. 1994); *Nicoletta v. Rochester Eye and Human Parts Bank, Inc.*, 519 N.Y.S.2d 928 (N.Y. Sup. Ct. 1987).

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“Good faith,” as used in the UAGA, affords protection to those that harvest organs when appropriate in the individual situation. “Good faith” has been defined in cases from various states with laws similar to NRS 451.582(2). The statutory good faith requirement is defined as activity involving an “. . . honest belief, the absence of malice and absence of design to defraud or to seek an unconscionable advantage.” *Rahman v. Mayo Clinic*, 578 N.W.2d 802, 805 (Minn. Ct. App. 1998). The court in *Rahman* adopted this definition of “good faith” from a line of cases, which addressed this same UAGA statutory protection for medical providers and organ procurement organizations. *Nicoletta*, 519 N.Y.S.2d at 930; *Perry v. St. Francis Hosp. & Med. Ctr.*, 886 F.Supp. 1551, 1558 (D. Kan. 1995); *Kelly-Nevils v. Detroit Receiving Hosp.*, 526 N.W.2d 15, 19 (Mich. Ct. App. 1995); *Andrews v. Ala. Eye Bank*, 727 So.2d 62, 65 (Ala. 1999).

CONCLUSION TO QUESTION ONE

The Nevada Revised Statutes provide adequately for expression of consent by potential organ donors to create a valid anatomical gift, especially in light of the Nevada Legislature’s evident intent to streamline the process of organ donations for transplantation. Nevertheless, providers and organ procurement organizations may still be reluctant to allow the harvesting of organs without the consent of the next of kin. A donor’s intent to donate does not bind an heir to the donor’s choice, except where the heir knows of a potential donor’s last expressed “intent” to *not* donate his organs. Once those that participate in the organ donation process are educated to the legal protections afforded their good faith actions under NRS 451.582(2), the reluctance to harvest without the redundant “consent” of the next of kin may dissipate.

QUESTION TWO

At the January 24, 2002 meeting of the Task Force, the question was posed concerning the difference between “intent” and “consent” as they pertain to tissue and organ donations and the implications of each for the purpose of facilitating the process of donations for transplantation.

ANALYSIS

I. Intent:

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The issue of “intent” has been addressed in the analysis above for Question One. Intent is generally used in the testamentary context for the efficient passing of one’s property at death. An executed will is the instrument that demonstrates the intent of a person who dies testate or, in other words, with an executed will. The intestacy laws, on the other hand, impress upon the property of a person who dies intestate (e.g., without a will) an “intent” for the purpose of effectuating the passing of the deceased’s property to the heirs as a matter of public policy.

For purposes of Nevada law, the intent memorialized in the Living Bank form and the donor card sent to the donor by the Living Bank covers this portion of this question adequately. This conclusion is reached regardless of the lingering question, among the courts, of whether there is a true property interest or a “quasi-property” interest in a corpse as explained in this opinion.

II. Consent:

The issue of “consent” is not as clear. In the common vernacular of the organ procurement agencies and those involved in the organ donor process, the word “consent” has been used interchangeably for the consent of both the donor and the next of kin to the harvesting of organs. However, a review of the scant common law on this subject reveals that the word “consent” has only been used in lawsuits involving organ harvesting to refer to the consent of the next of kin to the harvesting of the organs of a deceased loved one. *Jacobsen v. Marin Gen. Hosp.*, 192 F.3d 881 (9th Cir. 1999).

In *Jacobsen*, the Ninth Circuit Court of Appeals affirmed a lower U.S. District Court ruling that the Marin Hospital, the coroner, and the California Transplant Donor Network were not liable to the parents of their tourist son for the harvesting of his organs when the next of kin could not be located. These two courts relied upon the acting in “good faith” shield provided by the UAGA. The deceased was from Denmark and his parents, residing in Denmark, insisted that they would not have consented to the harvesting of his organs.

Generally, the courts have shielded a medical provider or organ procurement organization from liability to the next of kin for the harvesting of organs of the deceased when efforts to locate the next of kin have been

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frustrated in some way. *Kelly-Nevils v. Detroit Receiving Hosp.*, 526 N.W.2d 15 (Mich. Ct. App. 1995); *Brown v. Delaware Valley Transplant Program*, 615 A.2d 1379 (Penn. 1992).

In the *Nevils* case, a companion of the deceased represented himself as the deceased's brother and gave the hospital and organ procurement agency consent to harvest the deceased's organs. The court upheld the lawfulness of the procurement against the deceased mother's legal challenge to the harvesting of the organs, stating that they had acted "in good faith" even though the deceased's companion had misrepresented his relationship to the deceased.

In *Brown*, the court held the organ procurement agency was not liable to the next of kin for the harvesting of organs even though the state police were the only ones actively seeking the next of kin. The deceased's sister was found the following day, but beyond the time for successful harvesting of organs. The Pennsylvania court viewed the conduct as being taken "in good faith." Here the use of the word "consent" is clearer. In this context, courts have upheld such conduct as long as the medical provider or procurement organization acted in "good faith." See also *Ramirez v. Health Partners of S. Ariz.*, 972 P.2d 658 (Ariz. Ct. App. 1998); see also *Nicoletta v. Rochester Eye and Human Parts Bank, Inc.*, 519 N.Y.S.2d 928 (N.Y. Sup. Ct. 1987).

Outside of the United States, other countries have adopted different approaches to address the need for more organs for transplantation. In Austria, Belgium, Czech Republic, Denmark, France, Israel, Poland, Singapore, and Switzerland each have adopted some form of what is known as "presumed consent" laws, with Austria's presumed consent laws being the strongest. In general, in these countries, there is a presumption at death that the deceased has consented to the harvesting of organs unless the deceased manifested, before his demise, an express intent that he did not want his organs harvested at his demise. This is usually accomplished with a signed document, kept on file in a hospital registry, which states that the person does not want his organs harvested at death. 10 IND. INT'L. & COMP. L. REV. 350-354 (2000).

Great Britain attempted to pass presumed consent legislation, but the British Medical Association (BMA) would not support it. The primary reason for the BMA's choice not to support it was a fear on the part of doctors that

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“many of society’s disadvantaged [or uneducated] would not understand the mechanics of the legislation and would not know how to register their objections to organ donation.” *Id.* at 368.

The reluctance on the part of the general public to donate organs is evident in other Western countries also. Although presumed consent is the law in Belgium, France, and Austria, these laws have not succeeded in appreciably raising the number of organs available for transplantation in those countries. *Id.* at 350, 351.

III. Routine Inquiry and Required Request:

The approach of the United States towards organ procurement has been collectively called “routine inquiry and required request” under the National Organ Transplant Act (NOTA) of 1984. *Id.* at 361, 362. NOTA was enacted to “alleviate the shortage of organs and to improve the matching of donors and recipients by using a national system for organ procurement and distribution.” *Id.* at 360. In this law, Congress established a national task force to address a number of medical, legal, ethical, economic, and social issues related to this subject. In addition, a Division of Organ Transplantation was created which gave the Secretary of Human Resources the authority to issue grants to applicants proposing the “planning, creation, initial operation, and expansion of organ procurement organizations; . . .” *Id.* at 360.

NOTA also empowered the Secretary to contract with an entity to create an Organ Procurement and Transplantation Network and a Scientific Registry. *Id.* at 360. Perhaps the most important provision of NOTA prohibits the purchase and sale of human organs for valuable consideration. By including this last provision in NOTA, Congress has sent a message to the public that trafficking in organs for transplantation will not be tolerated. One of a number of constant criticisms aimed at the UAGA was the potential to create an illegal market in body parts from underprivileged peoples. With the inclusion of this prohibition in NOTA, Congress allayed many of the fears the general public was harboring about organ donation.

In the past, an organ procurement organization and a medical facility authorized to collect organ donations have routinely inquired of the next of kin and were required to request the consent of the next of kin for permission to

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harvest needed organs, hence the terms “routine inquiry” and “required request.” With the advent of the 1987 version of the UAGA and subsequent laws, this system has been modified to reflect the expressed intent of the donor. However, this approach has not yet been successful in appreciably increasing the number of organs available for transplantation. *Id.* at 358. Likewise, the European countries with presumed consent laws have found that the number of organs available for transplantation has not increased significantly with these laws. *Id.* at 350, 351. This reality strongly suggests that long-held cultural and religious beliefs are not easily set aside, making reasonable changes in the law the agents to influence cultural changes over time.

CONCLUSION TO QUESTION TWO

The word “intent” as used in the context of organ donation, refers to the expressed desires of the donor, manifested in a written form, which can be archived for retrieval at the demise of the donor for organ harvesting purposes. “Consent,” on the other hand, has been used interchangeably with “intent to donate organs” and with “consent to allow the harvesting of organs,” particularly when used in association with the next of kin giving permission for, or “consenting” to, the harvesting of a deceased loved one’s organs. The implications that intent and consent have upon the process of organ donation are addressed throughout this opinion. The laws failure to make the donor’s expressed intent to donate binding upon the heirs of the donor causes the individuals involved in the harvesting of organs and tissue to exercise caution respecting a perceived need for redundant consent by the heirs.

QUESTION THREE

Would the enactment of a “John Doe” organ donor law, similar to the one found in California, be consistent with Nevada law and the 14th Amendment of the United States Constitution?

ANALYSIS

As you know, a “John Doe” is an unfortunate soul whose identity cannot be determined and thus notifying his next of kin in the event of his death is problematic. In the law regarding dead bodies and organ donation, the modern view includes both traditional property interests of the next of kin, recognition

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of the advances in medical science, and the exigencies of viable organ harvesting. The balancing of these somewhat incompatible interests has been expressed through legislation. At least one court has recognized this legislation as the appropriate way to move sound public policy in the direction of a modern view, which minimizes the historical quasi-property interest restriction upon society's ability to reasonably utilize viable human remains for the greater good. A historical perspective of the property interest regarding a dead body is beneficial to our analysis. The Sixth Circuit Court of Appeals observed:

The earliest decisions involving property rights in dead bodies were concerned with whether decedents could control the disposition of their remains by will. The English common law held that there was no property right in a dead body, and, therefore, it could not be disposed of by will. *See, e.g., Williams v. Williams*, 20 Ch. D. 659, 665 (1882). Legal scholars have criticized the English common-law rule, noting that the primary reason for the rule was the historical anomaly that all matters concerning dead bodies were under the jurisdiction of the ecclesiastical courts and, thus, were not subject to common-law analysis. [*Citations omitted.*]

Though some early American cases adopted the English common-law rule that there was no property right in a dead body, other cases held that the rule was unsound in light of the rights of next of kin with regard to burial. *See, e.g., Renihan v. Wright*, 125 Ind. 536, 25 N.E. 822 (1890). The tendency to classify the bundle of rights granted by states as a property interest of some type was a direct function of the increased significance of those

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underlying rights. The prevailing view of both English and American courts eventually became that next of kin have a “quasi-property” right in the decedent’s body for purposes of burial or other lawful disposition. *See Spiegel v. Evergreen Cemetery Co.*, 186 A. 585, 586 (N.J. Sup. Ct. 1936) (“it is now the prevailing rule in England as well as in this country, that the right to bury the dead and preserve the remains is a quasi-right in property. . .”).

The importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements. The recent explosion of research and information concerning biotechnology has created a market place in which human tissues are routinely sold to and by scientists, physicians and others. Note, *Toward the Right of Commerciality*, U.C.L.A. L. REV. 207, 219 (1986). The human body is a valuable resource. *See Moore v. Regents of the University of California*, 51 Cal.3d 120, 271 Cal. Rptr. 146, 793 P.2d 479 (1990) (physician used patient’s cells in potentially lucrative medical research without his permission). As biotechnology continues to develop, so will the capacity to cultivate the resources in a dead body. A future in which hearts, kidneys, and other valuable organs could be maintained for expanded periods outside a live body is far from inconceivable.

Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991) (holding in a 42 U.S.C. § 1983 civil rights lawsuit that surviving spouse had a legitimate claim

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of entitlement in her spouse's dead body, including his harvested corneas, that is protected by the due process clause of the Fourteenth Amendment of the United States Constitution, requiring a pre-deprivation process).

However, from this historical foundation, a recent court decision appears to defer to the legislative body in establishing the scope of pre-deprivation "due process" for the quasi-property interest protected in *Brotherton*. See *Mansaw v. Midwest Organ Bank*, 97-0271-CV-W-6, 1998 U.S. Dist. LEXIS 10307 (W.D. Mo. 1998) (accepting *Brotherton's* quasi-property interest analysis, but finding that the due process protections afforded to this "de minimis" property interest did not require a separate notice and hearing. The "one parent" donor consent provisions adopted by the legislature in Missouri's Uniform Anatomical Gift Act was all the "due process" required for the non-custodial parent's quasi-property interest right in his deceased child's body); compare *Jacobsen v. Marin Gen. Hosp.*, 192 F.3d 881 (9th Cir. 1999) (affirming the dismissal of the surviving Danish parents' civil rights suit, without analysis, and pendent state claims because the coroner's search for "John Doe's" identity and next of kin in excess of the minimum statutory period of time under California's Anatomical Gift Act prior to harvesting was reasonable and in compliance with law). In *Jacobsen*, the foreign national parents' equal protection civil rights claim was dismissed below because it was not pled pursuant to 42 U.S.C. § 1983 and they further lacked standing as non-present foreigners. The civil rights issue was not appealed to the Ninth Circuit.

The fact that neither the United States Supreme Court nor the Ninth Circuit Court of Appeals has ruled on the specific question regarding what constitutes adequate due process for the quasi-property right of the next of kin in the organ donor context leaves the constitutionality of any proposed Nevada law regarding "John Doe" organ donation unavoidably uncertain. However, the Ninth Circuit has shown in *Jacobsen* that it generally is not offended by the presumed consent imposed upon a "John Doe" based upon a coroner's good faith search for identity and next of kin during the statutorily defined period prior to organ harvesting. Additionally, *Mansaw* lends some persuasive legal authority to the argument that the exigency of organ viability empowers the legislative branch of government to codify due process, which is less than full notice and an opportunity for hearing prior to deprivation of a quasi-property right.

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Thus, it cannot be firmly stated that the California Anatomical Gift Act provision (Health & Safety Code section 7151.5) for presumed consent of a “John Doe” provides adequate due process under the 14th Amendment of the United States Constitution. However, persuasive authority likewise prevents any unequivocal statement that the code section is per se unconstitutional.

Nevada’s Uniform Anatomical Gift Act, codified at NRS 451.500 to 451.590, inclusive, does not provide for any presumed consent by a “John Doe,” and contains no similar language to that found in California Health & Safety Code section 7151.5.¹ However, NRS 451.557(1)(c) does provide for

¹ Section 7151.5 provides: (a) Except as provided in Section 7152, the coroner or medical examiner may release and permit the removal of a part from a body within that official’s custody, for transplantation, therapy, or reconditioning, if all of the following occur: (1) The official has received a request for the part from a hospital, physician, surgeon, or procurement organization or, in the case of a pacemaker, from a person who reconditions pacemakers. (2) A reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of their option to make, or object to making, an anatomical gift. Except in the case where the useful life of the part does not permit, a reasonable effort shall be deemed to have been made when a search for the persons has been underway for at least 12 hours. The search shall include a check of local police missing persons records, examination of personal effects, and the questioning of any person visiting the decedent before his or her death or in the hospital, accompanying the decedent’s body, or reporting the death, in order to obtain information that might lead to the location of any persons listed in subdivision (a) of Section 7151. (3) The official does not know of a refusal or contrary indication by the decedent or objection by a person having priority to act as listed in subdivision (a) of Section 7151. (4) The removal will be by a physician, surgeon, or technician; but in the case of eyes, by one of them or by an enucleator. (5) The removal will not interfere with any autopsy or investigation. (6) The removal will be in accordance with accepted medical standards. (7) Cosmetic restoration will be done, if appropriate. (b) Except as provided in Section 7152, if the body is not within the custody of the coroner or medical examiner, a hospital may release and permit the removal of a part from a body if the hospital, after a reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of their option to make, or object to making, an anatomical gift, determines and certifies that the persons are not available. A search for the persons listed in subdivision (a) of Section 7151 may be initiated in anticipation of death, but, except in the case where the useful life of the part does not permit, the determination may not be made until the search has been underway for at least 12 hours. The search shall include a check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying the decedent’s body, or reporting the death, in order to obtain information that might lead to the location of any persons listed in subdivision (a) of Section 7151. (c) Except as provided in Section 7152, if the body is not within the custody of the coroner or medical examiner or a hospital, the local public health officer may release and permit the removal of any part from a body in the local public health officer’s custody for transplantation, therapy, or reconditioning if the requirements of subdivision (a) are met. (d) An official or hospital releasing and permitting the removal of a part shall maintain a permanent record of the name of the decedent, the person

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the consent of “either parent,” which makes the consent of one parent sufficient for harvesting a deceased child’s organs and tissue. This is the same uniform consent statute that was addressed and upheld as adequate “due process” in Missouri’s *Mansaw* case.

From a historical perspective, Nevada’s common law is void of any court precedent regarding the legal question of property or quasi-property interests of next of kin in a dead body. Except for Nevada’s modern Uniform Anatomical Gift Act, Nevada statutory law regarding dead bodies characterizes the topic in the context of duty and utility rather than “right.” *See* NRS 451.023 (“The husband or wife of a minor child or the parent of an unmarried or otherwise unemancipated minor child shall be primarily responsible for the decent burial or cremation of his or her spouse or such child within a reasonable time after death.”); *see also* NRS 451.061(3) (providing presumed consent for embalming dead bodies under certain conditions); NRS 451.430 (even a friend of the deceased, his social club, or his religious organization can claim his body for burial or cremation which had been donated to the Committee on Anatomical Dissection for medical education); NRS 451.010 (the coroner’s responsibility to dissect a dead body); *compare* NRS 451.555 (the prioritization of the right to consent or object to an anatomical gift).

(..continued)

making the request, the date and purpose of the request, the part requested, any required written or recorded telephonic consent, and the person to whom it was released. (e) In the case of corneal material to be used for the purpose of transplantation, the official releasing and permitting the removal of the corneal material and the requesting entity shall obtain and keep on file for not less than three years a copy of any one of the following: (1) A dated and signed written consent by the donor or any other person specified in Section 7151 on a form that clearly indicates the general intended use of the tissue and contains the signature of at least one witness. (2) Proof of the existence of a recorded telephonic consent by the donor or any person specified in Section 7151 in the form of any audio tape recording of the conversation or a transcript of the recorded conversation, which indicates the general intended use of the tissue. (3) A document recording a verbal telephonic consent by the donor or any other person specified in Section 7151, witnessed and signed by no less than two members of the requesting entity, hospital, eye bank, or procurement organization, memorializing the consenting person’s knowledge of and consent to the general intended use of the gift. These requirements are necessary only if the official agency chooses to participate in the transfer of corneal tissue with the requesting entity. (f) Neither the coroner nor medical examiner authorizing the removal of a body part or tissue, nor any hospital, medical center, tissue bank, storage facility, or person acting upon the request, order, or direction of the coroner or medical examiner in the removal of a body part or tissue pursuant to this section, shall incur civil liability for the removal in an action brought by any person who did not object prior to the removal of the body part or tissue, nor be subject to criminal prosecution for the removal of the body part or tissue pursuant to this section.

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This lack of common law history could play a roll in any court analysis of whether Nevada recognizes this quasi-property interest and the due process owed to it, if any. *See Brotherton*, 923 F. 2d at 481 (“Although the existence of an interest may be a matter of state law, whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the due process clause is determined by federal law.”); *see* Nev. Const. art. 1, § 8(5) (Nevada’s due process clause). It is possible for a court to find no form of property interest under a state constitution, but find that there is a quasi-property interest of the next of kin in a dead body under the 14th Amendment of the United States Constitution. *See Dampier v. Wayne County*, 592 N.W. 2d 809 (Mich. Ct. App. 1999) (the court finds that the Michigan Constitution does not recognize a property interest in a dead body, but one could state a property interest claim under the 14th Amendment of the United States Constitution under the *Brotherton* holding).

CONCLUSION TO QUESTION THREE

Nevada case law provides no guidance regarding whether the next of kin has a property interest in a dead body under the Nevada Constitution. Federal courts have recognized a quasi-property interest of the next of kin in a dead body pursuant to the 14th Amendment of the United States Constitution. However, one federal district court has held that the due process owed to this quasi-property interest was satisfied by the presumed consent statute codified by the Missouri Legislature, and did not require a separate notice and hearing prior to deprivation of the interest. Neither the United States Supreme Court nor the Ninth Circuit Court of Appeals has ruled on the specific question regarding what constitutes adequate due process for the quasi-property right of the next of kin in the organ donor context, which leaves the validity of any proposed Nevada law regarding “John Doe” organ donation unavoidably uncertain but not per se unconstitutional.

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Cordially,

FRANKIE SUE DEL PAPA
Attorney General

By: RANDAL R. MUNN
Senior Deputy Attorney General

GLADE MYLER
Deputy Attorney General

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AGO 2002-17 CONSTITUTIONAL LAW; ELECTIONS; CANDIDATES:

The State of Nevada may not, through its state constitution or through state statute, require a candidate for the United States House of Representatives or the United State Senate to reside in the State of Nevada prior to being elected.

Carson City, April 9, 2002

The Honorable Dean Heller, Secretary of State 101 North Carson Street, Suite 3, Carson City, Nevada 89701-4786

Dear Mr. Heller:

You have requested an opinion from this office regarding whether candidates for the United States House of Representatives or the United States Senate may be required to actually reside in the State of Nevada prior to being elected to either one of those offices.

QUESTION

May the State of Nevada require that candidates for either the United States House of Representatives or the United States Senate actually reside in the State of Nevada prior to being elected to office?

ANALYSIS

Your question is raised in response to the recent case of *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000); *cert. denied* 532 U.S. 904 (2001). The *Schaefer* case considered the constitutionality of a California law that required a candidate for the United States House of Representatives to establish residency in California prior to being elected. *Id.* at 1032. The *Schaefer* court concluded that requiring the residency of a candidate for the United States House of Representatives prior to election was in violation of the United States Constitution. *Id.* at 1039.

In *Schaefer*, a Nevada resident sought to file as a candidate in a special Congressional election in California. *Id.* at 1032. The Registrar of Voters refused to give the Nevada resident the nomination papers because he was not registered to vote in California as required by State law. *Id.* In order to be qualified to vote in California, an individual is first required to establish residency. *Id.* In California, an individual must ordinarily file nomination

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papers at least 83 days before an election and be a resident in the election precinct at least 29 days prior to the election. *Id.* at 1034.¹

At issue in the *Schaefer* case was the Qualifications Clause of the United States Constitution that states:

No Person shall be a Representative who shall not have attained the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, *when elected, be an Inhabitant of that State in which he shall be chosen.*

Id. at 1034, *citing* U.S. Const. art. I, § 2, cl. 2 (emphasis added).²

The *Schaefer* court took guidance from the United States Supreme Court's most recent examination of the Qualifications Clause, in the case of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). In *U.S. Term Limits*, the Supreme Court considered the constitutionality of an amendment to the Arkansas State Constitution imposing term limits on the state's congressional delegation. *Schaefer*, 215 F.3d at 1034, *citing* *U.S. Term Limits, Inc.*, 514 U.S. at 783. In *U.S. Term Limits*, the U.S. Supreme Court reviewed the case of *Powell v. McCormack*, 395 U.S. 486 (1969), in which the Court held "that in judging the qualifications of its members Congress is limited to the standing

¹ As *Schaefer* involved a special election, the candidate would only have been required to be a resident of the State of California for 43 days prior to the election. *Schaefer*, 215 F.3d at 1034, n. 2.

² The *Schaefer* case reviewed the Qualifications Clause as it related to election to the United States House of Representatives. However, there is also a Qualifications Clause for those seeking election to the United States Senate. U.S. Const. art. I, § 3, cl. 3 states:

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, who shall not, *when elected, be an Inhabitant of that State for which he shall be chosen.* [Emphasis added.]

This office believes that the analysis of *Schaefer* is equally applicable to the requirements for the election of United States Senators. The main case relied upon by the *Schaefer* court was *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). The *U.S. Term Limits* case involved an analysis of the Qualifications Clauses for both members of the House of Representatives and the Senate. *Id.* at 782.

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qualifications prescribed in the Constitution.” *Schaefer*, 215 F.3d at 1034, citing *Powell*, 395 U.S. at 550.

In *U.S. Term Limits*, the U.S. Supreme Court considered whether a state had the authority to add qualifications to those specified in the United States Constitution. *Schaefer*, 215 F.3d at 1035, citing *U.S. Term Limits*, 514 U.S. at 798. The Court first considered whether the Tenth Amendment to the United States Constitution reserved to the states the power to place qualifications on congressional delegations. *Schaefer*, 215 F.3d at 1035, citing *U.S. Term Limits*, 514 U.S. at 800-803.³ The *Schaefer* Court summarized the Tenth Amendment analysis of *U.S. Term Limits* in this way:

After reaffirming the holding in *Powell*, the *Term Limits* Court proceeded to determine whether the States had the power to add qualifications. See [*U.S. Term Limits*] 514 U.S. at 798. The Court first noted that such power could not have been reserved to the States under the Tenth Amendment as no federal government existed until the Constitution was ratified; the Tenth Amendment, therefore, could not have reserved a power to qualify delegates to a congressional body which did not yet exist. See *id.* [*U.S. Term Limits*] at 800-03. Concluding that the right to elect federal representatives was a “new right, arising from the Constitution itself,” the *Term Limits* Court then examined additional historical evidence specifically addressing the preclusion of States’ power to qualify congressional delegates. See *id.* [*U.S. Term Limits*] at 805. Despite the fact that “term limits or ‘rotation’ was a major source of controversy, the draft of the

³ U.S. Const. amend. X states: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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Constitution that was submitted for ratification contained no provision for rotation.” *Id.* [*U.S. Term Limits*] at 812. The Court was especially persuaded by “the Framers’ wariness over the potential for state abuse” and the need for national uniformity. *Id.* [*U.S. Term Limits*] at 811. Over a powerful dissent written by Justice Thomas and joined by three other justices, the Court concluded “that the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby ‘divested’ States of any power to add qualifications.” *Id.* [*U.S. Term Limits*] at 800-01.

Schaefer, 215 F.3d at 1034-35, citing *U.S. Term Limits*, 514 U.S. at 798-811 (footnote omitted).

After its review of the *U.S. Term Limits* decision, the *Schaefer* Court concluded that California did not possess the power to supplement the Qualifications Clause. *Schaefer*, 215 F.3d at 1035, citing *U.S. Term Limits*, 514 U.S. at 827. Using *U.S. Term Limits* as its guide, the *Schaefer* Court adopted a two-pronged analysis for determining whether California’s residency requirement violated the Qualifications Clause. First, the Court considered whether California law created an absolute bar to candidates who were otherwise qualified under the Qualifications Clause. *Schaefer*, 215 F.3d at 1035. Second, if there was not an absolute bar to otherwise qualified candidates, the Court asked whether the California residency requirement would have the likely effect of handicapping an otherwise qualified class of candidates. *Id.*

The *Schaefer* Court noted that the district court found that the residency requirement did not create a permanent and absolute bar to candidacy. *Id.* at 1036. However, the *Schaefer* Court found that the district court should have continued its analysis and determined whether the residency requirement would have an indirect effect of handicapping a class of nonresident

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candidates. *Id.* Using a historical analysis, the *Schaefer* Court concluded that “[t]he Framers discussed and explicitly rejected any requirement of in-state residency before the election.” *Id.*

The Court did find that a state can require the filing of a registration form to maintain order in its election proceedings. *Id.* at 1037, citing *Storer v. Brown*, 415 U.S. 724, 730 (1974). However, the Court found that requiring candidates to establish in-state residency prior to election hampers and burdens out-of-state residents. *Schaefer*, 215 F.3d at 1037. The *Schaefer* Court stated:

We therefore hold that California’s requirement that candidates to the House of Representatives reside within the state *before* election, violates the Constitution by handicapping the class of nonresident candidates who otherwise satisfy the Qualifications Clause.

Id.

The *Schaefer* Court rejected California’s argument that the residency requirement fell within its power to prescribe the times, places, and manners of elections for Senators and Representatives.⁴ The *Schaefer* Court stated that “California’s residency requirement falls outside the scope of Elections Clause cases because it neither regulates the procedural aspects of the election nor requires some initial showing of support.” *Id.* at 1038. Citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986), the *Schaefer* Court stated: “The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights . . .” *Id.*

The *Schaefer* Court squarely held that an in-state residency requirement for candidates to the position of the United States House of Representatives prior to election was unconstitutional. In determining whether the *Schaefer* decision and analysis is applicable in the State of Nevada, it is necessary to review Nevada law to determine the residency requirements for individuals seeking election to the United States House of Representatives and the United

⁴ U.S. Const. art. I, § 4, cl. 1 states: The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; . . .

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States Senate. The Nevada Constitution provides that “No person shall be eligible to any office who is not a qualified elector under this constitution.” Nev. Const. art. 15, § 3, cl. 1. Article 2, § 1 of the Nevada Constitution specifies the requirements of a qualified elector as:

All citizens of the United States (not laboring under the disabilities named in this constitution) of the age of eighteen years and upwards, who shall have actually, and not constructively, *resided in the state six months, and in the district or county thirty days next preceding any election*, shall be entitled to vote for all officers that now or hereafter may be elected by the people . . . [Emphasis added.]

The residency requirements for persons seeking election are tied to the requirements of being a qualified elector in the State of Nevada. Therefore, under the language contained in the Nevada Constitution, an individual seeking election to public office would be required to actually reside in this State for six months and in the district or county wherein he was seeking election for 30 days preceding the election. However, this office has already opined that the state residency requirements for entitlement to vote in state elections are preempted by the Fourteenth Amendment to the United States Constitution. *See Op. Nev. Att’y Gen. No. 85 (March 21, 1972); see also Dunn v. Blumstein*, 405 U.S. 330 (1972). Therefore, the six-month residency requirement specified in the Nevada Constitution is unconstitutional.

The Legislature of the State of Nevada has placed into statute the residency requirements of candidates for the United States House of Representatives and the United States Senate. Specifically, Nevada law requires that candidates for the elected office of a United States Senator must be nominated and elected in the manner provided by law for the nomination and election of state officers. NRS 304.010. Likewise, candidates for the elected office of Representative in the United States House of Representatives must be nominated in the same manner as state officers are nominated. NRS 304.040.

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NRS 293.1755(1) specifies the residency requirements for candidates as:

In addition to any other requirement provided by law, no person may be a candidate for any office unless, for at least the 30 days immediately preceding the date of the close of filing of declarations of candidacy or acceptances of candidacy for the which he seeks, he has, in accordance with NRS 281.050, actually, as opposed to constructively, resided in the state, district, county, township or other area prescribed by law to which the office pertains and, if elected, over which he will have jurisdiction or which he will represent.⁵

NRS 281.050(1) puts forth the requirement that a candidate have an actual residence within the state, county, or district in which he is to run for political office in order to qualify as a candidate. Therefore, upon review of the Nevada Constitution, a former opinion from this office, and the relevant provisions of the Nevada Revised Statutes, it is clear that Nevada law requires a candidate for either the United States House of Representatives or the United States Senate to actually reside in the State of Nevada 30 days immediately preceding the date of the close of filing of declarations of candidacy or acceptances of candidacy for the office which he seeks.

⁵ NRS 293.177(2)(a) requires a candidate to file a sworn declaration of candidacy which must include a statement that the individual has resided in the state, district, county, township, city or other area prescribed by law at least 30 days preceding the date of the close of filing of declarations of candidacy for the office. NRS 293.177(1) states:

Except as provided in NRS 293.165, a name may not be printed on a ballot to be used at a primary election unless the person named has filed a declaration of candidacy or an acceptance of candidacy, and paid the fee required by NRS 293.193 not earlier than the first Monday in May of the year in which the election is to be held nor later than 5 p.m. on the third Monday in May.

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Under the *Schaefer* decision, the Ninth Circuit Court of Appeals, whose jurisdiction includes the State of Nevada, has clearly held that requiring residency of a candidate for the United States House of Representatives prior to the candidate being elected violates the Qualifications Clause of the United States Constitution. The United States Supreme Court has not decided this specific issue. However, the United States Supreme Court has held that a state does not have the power to add to the Qualifications Clause of the United States Constitution. *U.S. Term Limits*, 514 U.S. at 827.

It is clear from the *Schaefer* decision that should the Nevada residency requirements of candidates for either the United States House of Representatives or Senate ever be presented to the Ninth Circuit Court of Appeals, they would be found to be unconstitutional. Further, there would most likely be no legal impediment to a candidate bringing such an action in federal court. Federal courts will abstain from hearing certain cases only “where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question.” *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973), *citing Zwickler v. Koota*, 389 U.S. 241, 249 (1967), *Harrison v. NAACP*, 360 U.S. 167, 176-177 (1959). As the Nevada residency statutes are clear, and not reasonably susceptible of an interpretation that might avoid constitutional adjudication, federal courts would most likely not abstain from rendering a decision, as they are required to guard and protect the rights granted under the United States Constitution. *Kusper*, 414 U.S. at 55, *citing Robb v. Connolly*, 111 U.S. 624, 637 (1884).

The Nevada Supreme Court has not been silent on the issue of the Qualifications Clause. In the case of *Stumpf v. Lau*, 108 Nev. 826, 839 P.2d 120 (1992), the Court considered the issue of whether the Secretary of State should be required to remove from the ballot an initiative proposal that sought to place term limits on the number of terms that a United States Congressman or Senator from Nevada may serve. The Nevada Supreme Court stated:

Opponents to the mandamus petition now before us made little or no argument urging that the people of this state have the power to alter the qualifications or terms limits of federal offices created by the Constitution

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of the United States. Not even Congress has the power to alter qualifications for these federal constitutional officers. See *Powell v. McCormack*, 395 U.S. 486 (1969). As this court noted in *State ex rel. Santini v. Swackhamer*, 90 Nev. 153, 155, 521 P.2d 568, 569 (1974) (quoting 1 Story on the Constitution, (5th Ed. § 627)), “[t]hose officers owe their existence and functions to the united voice of the whole, not of a portion of the people.” Further, as Justice Story has observed, “the States can exercise no powers whatsoever which exclusively spring out of the existence of the national government....” *Id.* Thus, the initiative petition, whether it enacts a law or amends the state constitution, can have no effect on the terms of members of the United States Congress.

Id. at 830.

The *Stumpf* Court went on to state that: “As Justice Steffen pointed out at oral argument, the obvious and proper way of going about effecting changes in the terms of federal constitutional officers is to amend the Constitution of the United States.” *Id.* at 834-35.

In *Santini v. Swackhamer*, 90 Nev. 153, 521 P.2d 568 (1974), the Nevada Supreme Court considered whether to hold art. 6, § 11 of the Nevada Constitution, which provides that judges are ineligible for certain offices, applicable to federal elections. The Court noted that the weight of the case law held that a state may not impose additional qualifications upon federal offices. *Id.* at 155-156, n. 3. The Court went on to state that art. 6, § 11 of the Nevada Constitution was not applicable to federal offices. *Id.* at 157. The *Swackhamer* Court also correctly pointed out that this office opined long ago that no state may add qualifications for federal office. *Id.* at 156, n. 7, citing Op. Nev. Att’y Gen. No. 897 (March 29, 1950).

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After carefully considering the *Schaefer* decision, the decision of the United States Supreme Court in *U.S. Term Limits*, and the language from the Nevada Supreme Court in the *Stumpf* decision, this office opines that it is unconstitutional for a state to require a candidate for the United States House of Representatives or the United States Senate to reside in that state prior to election to office.

Therefore, to the extent that the Constitution of the State of Nevada and state statutes require the residency of a candidate for the United States House of Representatives or the United States Senate prior to election, they are unconstitutional. Further, it is the advice of this office that the applicable state statutes be amended to reflect that a candidate for the United States House of Representatives or the United States Senate is not required to reside in the State of Nevada prior to election.

CONCLUSION

Pursuant to U.S. Supreme Court and Ninth Circuit Court of Appeals decisions, state law may not add to the qualifications specified in the United States Constitution for election to a United States congressional office.

The State of Nevada, therefore, may not, through its state constitution or through state statute, require a candidate for the United States House of Representatives or the United States Senate to reside in the State of Nevada prior to being elected. It is recommended that the Nevada Legislature revisit state laws imposing such residency requirements and consider amending state law to conform to federal constitutional mandates.

Sincerely,
FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT J. BRYANT
Deputy Attorney General

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AGO 2002-18 TAXES; AGREEMENTS; LINCOLN COUNTY: Lincoln County may tax a private contractor's possessory use or interest in a landfill owned by the City of Mesquite if Lincoln County finds that the contractor has sufficient durability, independence, and exclusiveness in the contractor's use of the property. Lincoln County must make that determination by weighting factors showing the amount of control the contractor has over the real property and the operation of that property. Lincoln County must also ascertain that the taxable value of the contractor's possessory use or interest does not exceed the full cash value of that use or interest. Lincoln County may not place a lien against the City of Mesquite's property to secure the tax liability of the contractor.

Carson City, April 18, 2002

Terrance P. Marren, , City Attorney, City of Mesquite, 10 East Mesquite Boulevard, Mesquite, Nevada 89027

Dear Mr. Marren:

You have requested an opinion from this office on issues regarding the taxation of Virgin Valley Disposal's use or possession of the Mesquite Landfill.

FACTUAL BACKGROUND

The questions arose in relation to the agreement between Virgin Valley Disposal (Contractor) and the City of Mesquite (City) for the operation of the Mesquite Landfill (Landfill), in addition to the Contractor's collection of solid waste.

The Landfill is located in Lincoln County. It is a 40-acre site owned by the City. The City and Contractor entered into a Garbage Disposal Agreement in March of 1989. On April 26, 1995, the City and Contractor entered into the City of Mesquite Solid Waste Collection Agreement (Agreement). The term of this Agreement is for ten years with an option to renew for ten years, commencing May 1, 1995. On July 1, 1996, the City and Contractor entered into an agreement entitled Addendum to City of Mesquite Solid Waste Collection Agreement (First Addendum), and in June of 2001, the City and Contractor entered into an agreement entitled Addendum to Solid Waste

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Collection Agreement (the Second Addendum) (the Agreement, First Addendum, and Second Addendum are referred to collectively as the Agreements). The terms and conditions of the Agreement dated April 26, 1995, and the First Addendum dated July 1, 1996, are still in effect to the extent they do not conflict with the terms and conditions of the Second Addendum.

The Agreements cover the rights and obligations of the Contractor for collection of solid waste in the City, as well as the operation of the Landfill. The Contractor must collect solid waste from account holders in the City and haul all solid waste it picks up to the Landfill site. The Contractor is responsible for operation of the Landfill site and the methane gas monitoring wells. The Agreements set forth the days and hours the Landfill shall be opened and closed. The Agreements require the Contractor to abide by all federal, state, and local laws and rules related to the use and maintenance of the Landfill. The Contractor mans the Landfill at the Contractor's expense.

The Agreements are a fixed fee contract as they relate to compensation to the Contractor. The City collects the fees for collection of waste from account holders. The Contractor receives those fees from the City, minus 10 percent paid to the City as a franchise fee. The Contractor collects fees from those bringing solid waste to the Landfill. However, all paid residential subscribers of the City for waste collection do not pay a fee to dump normal household and landscape refuse. The rates for garbage collection and fees for dumping for residential subscribers are set by City ordinance. The Contractor pays 10 percent of the collected fees for use of the Landfill to the City. The City pays the Contractor when the City dumps garbage at the Landfill.

The City provides a current list of all residential accounts to the Contractor, and the list is to be updated monthly to coincide with the City's master list. The Agreements state that the Contractor is an independent contractor and not an employee of the City. The Contractor may negotiate fees with commercial users, but if they are unable to agree, the City will settle any disputes.

QUESTION ONE

Do the provisions of NRS 361.157 allow the taxation of Virgin Valley Disposal's use or possession of the Mesquite Landfill?

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ANALYSIS

NRS 361.157 provides, in applicable part:

1. When any real estate or portion of real estate which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a natural person, association, partnership or corporation in connection with a business conducted for profit or as a residence, or both, the leasehold interest, possessory interest, beneficial interest or beneficial use of the lessee or user of the property is subject to taxation to the extent the:

(a) Portion of the property leased or used; and

(b) Percentage of time during the fiscal year that the property is leased by the lessee or used by the user, in accordance with NRS 361.2275, can be segregated and identified. The taxable value of the interest or use must be determined in the manner provided in subsection 3 of NRS 361.227 and in accordance with NRS 361.2275.

The United States Ninth Circuit Court of Appeals in *United States v. Nye County*, 178 F.3d 1080 (9th Cir. 1999), upheld the constitutionality of NRS 361.157, as it taxed the *use* of the property, and did not tax the property itself, which was owned by a tax-exempt entity.¹ Additionally, the application of this statute to private contractors who had cost-plus or fixed fee contracts for the operation and maintenance of federal property and facilities was also upheld as constitutional. Furthermore, the legal background of this type of tax on a possessory or beneficial interest or use by a private contractor using

¹ In your correspondence you discuss the authority of Lincoln County to tax the real property owned by the City. However, the county should not be taxing the real property but instead should be taxing the Contractor's possessory or beneficial use of the property.

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government owned property shows that a tax on beneficial use is a concept that has been around for quite some time. *See United States v. New Mexico*, 455 U.S. 720 (1982); *United States v. Boyd*, 378 U.S. 39 (1964); *United States v. City of Detroit*, 355 U.S. 466 (1958); *United States v. Township of Muskegon*, 355 U.S. 484 (1958).

Therefore, in order to determine whether the Contractor's possession and use of the Landfill is taxable, it must be determined whether the elements of NRS 361.157 have been met. The required elements are as follows: (1) the taxpayer must lease, or otherwise have available the use of the real estate or portion of real estate which is otherwise tax exempt; (2) the real estate must be used in connection with a business conducted for profit or as a residence, or both; and, (3) it must be possible to segregate and identify the portion of the property leased or used, if only a portion is leased or used, and the percentage of time during the fiscal year that the property is leased or used, by the party having a leasehold interest, possessory interest, beneficial interest, or beneficial use of the property. *See* NRS 361.157.

The Contractor does have available for its use the real estate involved in the Landfill. The Contractor is responsible for manning the Landfill and keeps track of those entering the Landfill for dumping. The Contractor charges and retains a portion of the appropriate fees to users, or verifies the documentation submitted by residential subscribers who are not required to pay the fees. Additionally, the Contractor uses the Landfill to dispose of the solid waste the Contractor collects from the residential and commercial subscribers. Therefore, the first element of the statute is met.

The Contractor is using the real estate in connection with a business conducted for profit. There has been no contention made that the Contractor is a nonprofit entity, or that it is required under the Agreements to invest any profits back into the Landfill. Additionally, the Contractor is an independent contractor with the City. Therefore, it appears this element is met as well. The Contractor is conducting a commercial enterprise in its operation of the Landfill in connection with providing solid waste collection services to the City.

The segregation and identification of the portion of the property used, and the percentage of time it is used during the fiscal year, appears to be possible.

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A determination could be made as to what percentage of the land at issue is actually occupied by the Landfill and possessed and used by the Contractor. A factual determination must be done by the county assessor, in conjunction with information provided by the Contractor, to segregate and identify only that portion of the property so used. Such a determination by the assessor, if timely petitioned, would be subject to review by the county board of equalization and the state board of equalization. *See* NRS 361.355, 361.360.

The county assessor could also make a factual determination as to the percentage of time the property is used by the Contractor during the fiscal year, subject to the same review as stated above. In 2001, the Nevada Legislature adopted a new statute that would be controlling as to how the assessor would determine the percentage of time the property is used. *See* NRS 361.2275. The statute provides:

1. For purposes of NRS 361.157, 361.159 and 361.227, except as otherwise provided in subsection 2, property is leased or used by a natural person or entity at all times the natural person or entity has possession of, claim to or right to the possession of the property that is independent, durable and exclusive of rights held by others in the property, other than the rights held by the owner.

2. Property is not leased or used by a natural person or entity who possesses or occupies the property solely for the purpose of holding the property for another natural person or entity.

3. As used in this section:

- (a) "Durable" means for a determinable period with a reasonable certainty that the use, possession or claim with respect to the property will continue for that period.

- (b) "Exclusive" means the enjoyment of a beneficial use of property, together with the ability to exclude from occupancy

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persons or entities other than the owner who may interfere with that enjoyment.

(c) “Independent” means the ability to exercise authority and exert control over the management or operation of the property pursuant to the terms and provisions of the contract with the owner. A possession or use is independent if the possession or use of the property is sufficiently autonomous under the terms and provisions of the contract with the owner to constitute more than a mere agency.

The question of whether the Contractor has sufficient possession of, claim to, or right to the possession of the property that is independent, durable, and exclusive in order to have a taxable interest is another factual determination that needs to be made by the assessor. That type of determination should be based upon the agreement between the tax-exempt entity and the private contractor. *See Hearing on A.B. 433 Before the Senate Committee on Taxation, 2001 Legislative Session*, 16-17 (May 1, 2001). Courts reviewing whether a private contractor has a sufficient possession, claim, or right to property in order to have a taxable interest have weighed certain factors on a case-by-case basis.

When NRS 361.157 was challenged as unconstitutional, the Ninth Circuit Court of Appeals determined that the appropriate test to determine whether it was constitutional to tax the private contractor’s use of federal government property was to see if the contractor was so closely connected to the government that the two cannot be realistically viewed as separate entities, at least insofar as the activity being taxed is concerned. *See United States v. Nye County*, 178 F.3d at 1085; *see also United States v. New Mexico*, 455 U.S. at 740-741; *Arizona Dep’t of Revenue v. Blaze Construction Co.*, 526 U.S. 32, 35-36 (1999). This reasoning was consistent with prior federal cases that found it “vital” to the result that the contractor “using the property in connection with its own commercial activities” retained autonomy “to use the property as it thought advantageous and convenient in performing its contracts

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and maximizing its profits” See *United States v. Township of Muskegon*, 355 U.S. at 486.

In a case where a federal court found that a contractor had a mere license and not a taxable interest, the contract between the parties gave all management and control decisions to the government, the government had all risk of loss except for willful misconduct on the part of the contractor, the government could terminate the contract without any required notice to the contractor, and the contractor could not exclude others. *United States v. Jackson County*, 696 F. Supp. 479 (W.D. Mo. 1988).

In a case where the court found that the contractor had a taxable interest, the contractor could participate in determining the nature of the operation and access to the property in question enabled the contractor to participate in the field of fusion research, an activity it could not otherwise afford to conduct on its own. The court found this research to be different from mere “service” of federal property in that its very purpose was to obtain valuable knowledge, rather than merely to operate and maintain the device. The contractor benefited financially from the sale and application of knowledge obtained from experiments conducted with the use of the device. Furthermore, the court found that the contractor’s participation in determining the nature of the research conducted necessarily involved a level of use exceeding that of a business invitee providing contract services. See *United States v. County of San Diego*, 965 F.2d 691 (9th Cir. 1992).

California, which has a statute similar to NRS 361.2275, found a contractor was an agent for the governmental entity where the contractor was organized solely for the purpose of managing the real property and improvements owned by a local government, and the state had complete control over the contractor’s operation of the property. See *Pacific Grove-Asilomar Operating Corporation v. County of Monterey*, 43 Cal. App. 3d 675 (1974). The court found the following factors lead to a conclusion of an agency relationship: the contractor managed the property for use by the general public; the property was to be open at all times to the public, with no right of the contractor to exclude anyone; the contractor had to place any funds received in a trust account and all funds had to be used for the maintenance, operation, and improvement of the property; the contractor’s board of directors was appointed by a governmental entity; surplus funds were under state

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control; and, no changes in the contractor's corporation's articles and by-laws could be made without the consent of the state. *Id.*

In another case from California, the court found a contractor did have a taxable interest where the clubhouse of a municipal golf course was operated by a private contractor. The agreement with the municipality gave the contractor the exclusive right to serve refreshments for five years, with first right of refusal to any new agreement on the same matters; the contractor was to pay five percent of the gross receipts to the city; and, the kitchen and storeroom were possessed exclusively by the contractor. The court found that these factors showed features of relative durability, independence, exclusiveness, and fixedness. *See Mattson v. County of Contra Costa*, 258 Cal. App. 2d 205 (1968). The court stated that if a substantial balance of the factors is on the side of possessory interest, then there is a taxable interest. *Id.* at 208.

Here, there are certain factors that would weigh on the side of finding a mere agency, such as the facts that the City sets the fees for anything other than commercial users, the City sets the hours and days of operation, the City collects the fees for the garbage collection, residential subscribers are allowed to dump for free, and the City maintains the list of residential customers. However, on the other side, there are factors that weigh on the side of finding that the Contractor's operations are independent from the City: the Contractor negotiates and collects the fees from commercial users and charges fees to users of the Landfill, including collecting fees from the City for use of the Landfill; the Contractor is a for-profit entity; the Contractor can use the profits from the operation of the Landfill in whatever manner it chooses; the Agreements state the Contractor is an independent contractor; there are no limits on how the Landfill is operated other than complying with federal, state, and local laws and rules; the City pays the Contractor for the City's use of the Landfill; and, the Contractor can exclude anyone who is not one of the residential subscribers if they do not pay the fee for dumping.

The fact that the Agreements are for a period of ten years with an option to renew for another ten years would indicate the possession, claim, or right is durable. Additionally, the Contractor appears to enjoy the beneficial use of the property and has the right to exclude occupancy of persons other than the owner who may interfere with that enjoyment. The Contractor does have to allow residential subscribers to dump certain refuse, but that does not interfere

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with the Contractor's enjoyment of use of the property, and the Contractor may exclude others from entering unless they pay the appropriate fee and then the occupancy of others is limited to dumping refuse only. Only the Contractor has the right to charge fees for dumping. Based on these factors, it appears that the Contractor does have a taxable possessory interest and use of the Landfill.

CONCLUSION TO QUESTION ONE

Lincoln County may tax the Contractor's possessory use or interest in the Landfill, as long as the County segregates and identifies the portion of property used and the percentage of time it is put to use during the fiscal year. Pursuant to NRS 361.2275, to make a taxation determination under NRS 361.157, the County must find that the Contractor has sufficient durability, independence, and exclusiveness of the Contractor's use of the property, and the County must make that factual determination by weighing the factors showing the amount of control the Contractor has over the real property and the operation of that property.

QUESTION TWO

If the County may tax the property interest held by the Contractor, what is the proper method for determining the taxable value of that property interest?

ANALYSIS

NRS 361.227(3) provides, in relevant part:

3. The taxable value of a leasehold interest, possessory interest, beneficial interest or beneficial use for the purpose of NRS 361.157 or 361.159 must be determined in the same manner as the taxable value of the property would otherwise be determined if the lessee or user of the property was the owner of the property and it was not exempt from taxation, except that the taxable value so determined must be reduced by a

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percentage of the taxable value that is equal to the:

(a) Percentage of the property that is not actually leased by the lessee or used by the user during the fiscal year; and

(b) Percentage of time that the property is not actually leased by the lessee or used by the user during the fiscal year

The first step in valuation by the county assessor is making a determination of taxable value, pursuant to NRS 361.227. The assessor would then have to determine whether the taxable value of the beneficial use of the property by the Contractor exceeded the full cash value of that use. In a case like this, where it may be difficult to find comparable sales of reasonably comparable property, the assessor may use a capitalization of the fair economic income expectancy valuation method, based on the terms of the Agreements, to ensure that the taxable value does not exceed full cash value. *See, e.g., Inmar Associates, Inc. v. Township of Edison*, 2 N.J. Tax 59, 1 (1980).

The courts have held that the value of the property itself being put to a beneficial use is a reasonable value to be used for the value of the beneficial use. *See, e.g., United States v. County of San Diego*, 53 F.3d 965 at 969; *United States v. Boyd*, 378 U.S. at 44; *United States v. City of Detroit*, 355 U.S. at 470. However, the Sixth Circuit has held that the amount of the tax may not exceed the value of the property's use to the contractor. *See United States v. Hawkins County*, 859 F.2d 20 at 23. The Supreme Court has hinted at the same. *See United States v. New Mexico*, 455 U.S. at 741. Therefore, the assessor must make sure that the taxable value determined by the assessor does not exceed the value of the Landfill's use by the Contractor.

CONCLUSION TO QUESTION TWO

The Lincoln County Assessor must determine the taxable value pursuant to NRS 361.227. The land taxable value must be determined by determining the full cash value of the land, meaning the most probable price the property would bring in a competitive and open market under all conditions requisite to a fair sale. However, the assessor must also make sure that the taxable value

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does not exceed the full cash value of the interest held by the Contractor. Therefore, the assessor could use a capitalization of the fair economic income expectancy of the property to ensure that the taxable value of the Contractor's interest does not exceed the full cash value of that interest.

QUESTION THREE

May Lincoln County place a lien on the City's real property, which is being used by the Contractor?

ANALYSIS

The statute itself specifically precludes Lincoln County from filing a lien against the real or personal property owned by the tax-exempt entity. *See* NRS 361.157(3), which provides:

Taxes must be assessed to lessees or users of exempt real estate and collected in the same manner as taxes assessed to owners of other real estate, except that taxes due under this section do not become a lien against the property. When due, the taxes constitute a debt due from the lessee or user to the county for which the taxes were assessed and, if unpaid, are recoverable by the county in the proper court of the county.

Lincoln County may not legally place a lien against the real property. That property is not owned by the Contractor, and that property is not the subject of the tax. *See United States v. Nye County*, 178 F.3d 1080 (9th Cir. 1999), where the tax was upheld as constitutional because it is not on the property itself but on the contractor's use of the property. Therefore, it is not appropriate or legal for Lincoln County to place a lien against the real property owned by the City.

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CONCLUSION TO QUESTION THREE

Lincoln County may not place a lien against the City of Mesquite's real property, pursuant to NRS 361.157(3).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ELAINE S. GUENAGA
Senior Deputy Attorney General

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AGO 2002-19 PUBLIC BODIES MEETINGS; OPEN MEETING LAW: The Medical Liability Association of Nevada is not subject to the Open Meeting Law because it does not perform a traditional government function and thus does not fall within the definition of “public body” contained in NRS 241.015(3). The Governor’s Committee on Employment of People with Disabilities is subject to the Open Meeting Law because it falls within the definition of a “public body” contained in NRS 241.015(3) in that it owes its existence to state government, it acts in an administrative and executive capacity, and it is supported in part by tax revenue. The Advisory Council on Mortgage Investments and Mortgage Lending is not subject to the Open Meeting Law because is a legislative subcommittee for purposes of the Open Meeting Law and thus is exempt. Finally, the 1033 Committee is not subject to the Open Meeting Law because it is not supported by tax revenue and it is not advisory to a multi-member entity that is supported by tax revenue.

Carson City, May 2, 2002

Sydney H. Wickliffe, Department of Business and Industry, 555 East Washington Avenue, Suite 4900, Las Vegas, Nevada 89101

Dear Ms. Wickliffe:

This office has been asked to opine as to whether the Open Meeting Law, NRS chapter 241, applies to various boards and committees which are involved in some manner with the Department of Business and Industry.¹

A. Definition of Public Body

The Open Meeting Law only applies to public bodies. NRS 241.015(3) defines, in part, a public body as:

. . . any administrative, advisory, executive
or legislative body of the state or a local
government which expends or disburses or
is supported in whole or in part by tax

¹ The requests for opinions have come from various different section heads of the Department of Business and Industry. In order to consistently address all of the requests, the Office of the Attorney General has combined the request into a single response.

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revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof. . . . "Public body" does not include the legislature of the State of Nevada.

The statute requires two elements in order for an entity to be considered a public body. First, it must be an "administrative, advisory, executive or legislative body of the state or a local government." This means that the entity must: (1) owe its existence to and have some relationship with a state or local government; (2) be organized to act in an administrative, advisory, executive or legislative capacity; and (3) must perform a government function. *Open Meeting Law Manual*, § 3.01 (9th ed. 2001); AG File No. 00-030 (April 12, 2001). Second, it must expend or disburse or be supported in whole or in part by tax revenue, or advise or make recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue. *Id.*

B. Application to Specific Entities

1. Medical Liability Association of Nevada

QUESTION

Is the Medical Liability Association of Nevada (MLAN) subject to the Open Meeting Law?

ANALYSIS

To answer this question, we must first determine if MLAN is an administrative, advisory, executive, or legislative body of the state. If we answer this question affirmatively, then we must determine if MLAN expends or disburses or is supported in whole or in part by tax revenue, or advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue.

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MLAN is a Nevada Essential Insurance Association established by an emergency regulation promulgated by the Commissioner of Insurance pursuant to NRS 686B.180 *et seq.* MLAN is a non-profit, unincorporated association established to "provide for the issuance of medical malpractice liability insurance at adequate and actuarially sound rate levels for risk sharing and to assist eligible applicants in securing medical malpractice liability insurance." Emergency Regulation of the Commissioner of Insurance (Regulation), Section 3, LCB File No. E001-02 (Effective for 120 days after March 15, 2002). MLAN is to be a non-profit organization "for the purpose of minimizing, to the greatest extent practicable, the imposition of federal income and excise taxes upon assets otherwise available for the health and welfare of the citizens of the State." *Id.* Section 2(2).

The Regulation provides that the formation of MLAN is "necessary to advance and protect the health and welfare of the citizens of the state of Nevada by providing essential insurance to physicians so that the citizens of the state of Nevada are provided medical care." *Id.* Section 2(2). The Regulation states that "[i]t establishes procedures and requirements for a risk-sharing plan to provide medical professional liability insurance coverage for eligible physicians and other appropriate medical professionals on a self-supporting basis. This regulation is also intended to encourage the improvement in reasonable loss prevention measures and encourage the maximum use of the voluntary market." *Id.* Section 2(1). MLAN is not to directly compete with the voluntary market. *Id.*

MLAN shall be administered by a Board of Directors (Board) under the general supervision of the Commissioner of Insurance (COI). *Id.* Section 6(1). The Board members are appointed by the COI and serve at her discretion. *Id.* Section 6(2). The COI may determine the number of Board members so long as there are at least five, but no more than nine, Board members. *Id.* Section 6(3). Board members may be reimbursed from the assets of MLAN for reasonable expenses at the state prescribed rate and may receive a reasonable and equitable compensation as may be prescribed by the Board and approved by the COI. *Id.* Section 6(4)-(5). The Board shall meet as often as required to perform the duties of the administration of MLAN or on the call of the COI or the Board chair. *Id.* Section 7.

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To the extent approved by the COI, MLAN has the general powers and authority granted under the laws of the State of Nevada to carriers licensed to transact the kinds of insurance defined in NRS 681A.020 to 681A.080. NRS 686B.230(1). An essential insurance association may take any necessary action to make available necessary insurance, including but not limited to: (1) assessing participating insurers for amounts necessary to pay its obligations and other expenses; (2) enter into contracts; (3) sue or be sued; (4) investigate claims and adjust, compromise, settle, and pay covered claims to the extent of its obligation and deny all other claims; (5) classify risks as may be applicable and equitable; (6) establish appropriate rates, rate classification, and rating adjustments and file such rates with the COI; (7) administer any type of reinsurance program for or on its behalf or on behalf of any participating carriers; (8) pool risks among participating carriers; (9) issue and market, through agents, policies of insurance providing coverage in its own name or on behalf of participating carriers; (10) administer separate pools, separate accounts, or other plans as may be deemed appropriate for separate carriers or groups of carriers; (11) invest, reinvest, and administer all funds and moneys held by it; (12) borrow funds needed by it to effect the purposes of NRS 686B.230; (13) develop, effectuate, and promulgate any loss-prevention programs aimed at the best interests of it and the insuring public; and (14) operate and administer any combination of plans, pools, reinsurance arrangements, or other mechanisms as deemed appropriate to best accomplish the fair and equitable operation of the association for the purpose of making available essential insurance coverage. NRS 686B.230(2).

Each insurer authorized to transact casualty insurance business, as defined by NRS 681A.020, is a member of MLAN. Regulation, Section 4(1). All authorized physicians or other medical professionals who are equitably entitled to obtain insurance are eligible to apply for insurance with MLAN. *Id.* Section 5(1). If the combined losses and expenses incurred by MLAN during any calendar year are greater than the premiums earned and the investment income for that year, the Board must assess and collect monies from the insured's in an amount sufficient to cover the deficit. *Id.* Section 13(1). The amount of the assessment for each insured medical professional is limited to an amount equal to the annual premium which would be charged for the insured medical professional in that rating class at the time of the assessment. *Id.* Section 13(3). MLAN may then assess members in an amount sufficient to pay

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necessary obligations. *Id.* Section 14(1). MLAN is to be self-supporting. *Id.* Section 20.

The board of an essential insurance association is required to prepare a plan of organization for the fair, reasonable, and equitable administration of the association. The plan of operation must be approved by the COI. NRS 686B.220(3).

MLAN is required to contract with a qualified and professional insurance management company to operate the day-to-day activities of MLAN. *Id.* Section 11. The Board is required to give deference to the decision of the management company to reject an application and the COI shall give deference to the Board on upholding such a rejection. *Id.* Section 22(1). An applicant may appeal a rejection to the Board and then to the COI. *Id.*

The COI and the Board must take "all reasonable and necessary steps to dissolve the Association [MLAN] at the earliest date after essential insurance becomes readily available in the private market. The dissolution of the Association, including its assets and liabilities, shall be accomplished under the supervision of the Commissioner in an equitable and reasonable manner." *Id.* Section 25; *see also* NRS 686B.240(5).

There is no liability on the part of, and no cause of action of any nature arises against, MLAN or its agents or employees, members of the Board, or the COI or her representatives for any good faith performance of their powers and duties under NRS 686B.210 to 686.240.

For the purposes of this opinion, we assume that MLAN will operate independently of the Division of Insurance and will not use the services of state employees or use state property in carrying out its functions.

a. Does MLAN owe its existence to and have some relationship with a state or local government?

The first question in determining whether an entity is an "administrative, advisory, executive or legislative body of the state" is whether the entity owes its existence to or has some relationship with a state or local government. MLAN was created by statute and emergency regulation of the COI.

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Participation by members in MLAN is not voluntary but is required by statute and regulation. The Board members are appointed by the COI and serve at the discretion of the COI. Therefore, we find that MLAN owes its existence to and has a relationship with state government.

b. Is MLAN organized to act in an administrative, advisory, executive or legislative capacity and does it perform a government function?

For the purposes of this analysis, we have combined questions two and three into one analysis. If either of these questions is answered in the negative, then MLAN is not a public body within the meaning of the Open Meeting Law.

MLAN was established for the purpose of providing medical malpractice insurance to authorized physicians or other medical professionals. MLAN was formed by the State of Nevada, acting through the COI, to require the members, private insurance companies, to engage in a private business venture because the COI found that the formation of MLAN was necessary to advance and protect the health and welfare of the citizens of the State of Nevada. Thus, it may be viewed that the formation of MLAN was a government function, protection of the health and welfare of citizens of Nevada, carried out by the COI, acting in an administrative or executive capacity, but that the business ultimately to be carried on by MLAN, providing malpractice insurance to doctors, is not a government function. Therefore, the critical question is whether MLAN is engaged in a traditional government function.

This question, in connection with this type of entity, is not easily answered because MLAN has both public and private attributes. Other states have created entities similar to MLAN. Courts have struggled with the question of whether such entities are a part of the state producing differing answers depending on the purpose for the analysis. These entities may be considered state agencies, or a part of the state, for some purposes, but not for other purposes, because the factors important to the analysis may differ depending on the purpose.

One entity that has been considered in a number of different contexts is the Florida Residential Property and Casualty Joint Underwriting Association (JUA). The JUA is an entity similar to MLAN in that it was created so that

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certain persons who were unable to procure insurance would be able to obtain insurance through an involuntary association of insurers in the state. The Florida Supreme Court considered the nature of this entity in *In re Advisory Opinion to the Governor—State Revenue Cap*, 658 So.2d 77 (Fla. 1995). The court found that the revenues of the JUA were not revenues of the state for the purposes of a state constitutional provision regarding state revenue. The court based this opinion, in part, on its finding that the JUA did not perform a traditional government function. The court noted that although the JUA, by statute, is considered a political subdivision of the state for purposes of intangible taxes, it should not be considered a political subdivision for any other purpose. "[T]he Association is not performing a traditional governmental function. Its revenues are not subjected to legislative appropriation and are held solely for the purpose of satisfying insurance claims. Though created by the Legislature, in practical effect the Association operates like a private insurance company. It is evident that the monies collected by the Association are not the kind of revenues contemplated by article VII, section 1(e)." *Id.* at 81.

The nature of the JUA was later considered by two federal courts. The United States Court of Appeals for the Eleventh Circuit found that the JUA was entitled to state action immunity in a suit for alleged antitrust violations. *Bankers Ins. Co. v. Florida Residential Property and Cas. Joint Underwriting Ass'n*, 137 F.3d 1293 (11th Cir. 1998). The factors this court found that weighed in favor of the JUA being considered a political subdivision for antitrust purposes were that it was subject to the sunshine law, it was authorized to issue tax-free bonds, it operates under a detailed plan approved by the department of insurance, and the board members serve at the pleasure of the insurance commissioner. *Id.* at 1297.²

The court acknowledged that it would seem that the association was a private entity because it was an association of private, competing insurers. However, the court found that fact not important when the issue was antitrust because the association was not created to compete in or regulate an existing market, but rather it invented a market where none existed. The court found

² The JUA was found to be subject to Florida's sunshine law (open meeting law) because the legislation creating the JUA referenced the sunshine law and created some exemptions for the JUA from that law. Therefore, the JUA was specifically made subject to the sunshine law by the Florida legislature, unlike MLAN. See *Bankers Insurance Co.*, 137 F.3d at 1297.

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that the impossibility of competition is an indicator that the association represents a public and not a private interest. *Id.* Therefore, for the purposes of alleged antitrust violations, the court placed emphasis on different areas than did the Florida Supreme Court when determining the nature of the JUA's revenues and thus came to seemingly different conclusions.

The nature of the JUA was again considered by a federal court when it determined the JUA's federal income tax status. In *Florida Residential Property and Cas. Joint Underwriting Ass'n v. United States of America*, 2002 U.S. Dist. LEXIS 3996 (N.D. Fla. February 7, 2002), the court considered whether the JUA should be deemed an integral part of the State of Florida for purposes of exemption from federal income taxes.

The court went through a detailed background of the JUA. The JUA was created as a temporary measure to address the disruption in the residential insurance market after Hurricane Andrew caused severe damage to a large portion of Florida. The JUA was created to provide property insurance for those applicants who were, in good faith, entitled to procure insurance through the voluntary market, but were unable to do so. All insurers authorized to write the subject lines of insurance in the State of Florida are required to be members of the JUA.

The court found that the Internal Revenue Service (IRS) uses six factors to determine whether an entity is an integral part of the state and therefore exempt from federal income taxes. The factors are as follows:

1. Whether the entity is used for a governmental purpose and performs a governmental function;
2. Whether the entity performs on behalf of one or more states or political subdivisions;
3. Whether there are any private interests involved, or whether the state or political subdivision involved has the powers and interests of an owner;
4. Whether control and supervision of the entity is vested in a public authority;
5. Whether authorization is necessary for the creation or use of the entity; and

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6. The degree of financial autonomy and the source of the entity's operating expenses.

Weighing the above factors, the court found that the JUA is an integral part of the State of Florida for the purposes of exemption from federal income taxes. The court found that providing property insurance to property owners unable to procure insurance serves the governmental purposes of stabilizing the state's economy, serving the needs of a large segment of the public, and facilitating property ownership in the state. The court also found that the entity was under the supervision and control of the department of insurance and is an extension of the department of insurance. *Id.*

The court found that the state's governmental interest predominated over any private interests of the insurance industry because any profits and retained earnings ultimately inure to the State of Florida upon the dissolution of the JUA. The court also found it significant that the JUA was established in a special session of the Florida Legislature and is only intended to exist as long as there is a property problem. The court found that these factors weighed heavily in favor of the JUA being an integral part of the state. *Id.*

The court recognized that for other purposes, the JUA was not considered to be a governmental agency. The court acknowledged that the Florida Commission on Ethics determined that the Legislature had no regulatory power over the JUA except through the enactment of laws and described the JUA as a non-governmental entity made up of private insurance companies. The Division of Administrative Hearings of the State of Florida determined that the JUA is not a unit or organization of the executive branch of state government for the purposes of competitive bidding requirements for state agencies. The attorney general opined that revenues of the JUA were not state revenues for purposes of a state constitutional provision, and the Florida Supreme Court agreed. However, the court did note that the JUA was subject to Florida's sunshine and public records laws. *Id.*

Finally, the Florida Court of Appeals recently considered whether the Florida Windstorm Underwriting Association (FWUA) is a state agency subject to the Administrative Procedures Act (APA). *Florida Dep't of Ins. v. Florida Ass'n of Ins. Agents*, 2002 Fla. App. LEXIS 3304 (Fla. Dist. Ct. App. Mar. 15, 2002). The FWUA is an entity similar to the JUA. In holding that

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the FWUA was not subject to the APA the court noted that "it is relatively clear that the legislature intended than only entities performing a traditional governmental function would be subject to the Act. While the Association performs certain public functions, those functions are not traditional governmental functions. On the contrary, they are of a type traditionally performed by private insurers." *Id.*

The Supreme Court of Michigan considered whether the Michigan Catastrophic Claims Association (MCCA) was a state agency for the purposes of its APA. *League Gen. Ins. Co. v. Michigan Catastrophic Claims Ass'n*, 458 N.W.2d 632 (Mich. 1990). The Supreme Court reversed the Court of Appeals by holding that the MCCA was not subject to the APA. The MCCA is an unincorporated, non-profit association of private insurers which adopted a statutorily required plan of operation through its board of directors. The plan includes a method to calculate premiums for catastrophic claims coverage and to generate funds to pay those claims. The MCCA may make and collect premium assessments from member insurers. *Id.* at 634. While the case was pending, the Michigan Legislature statutorily pronounced the MCCA not to be a state agency subject to the APA. *Id.* at 635. However, the court still had to determine whether the MCCA was subject to the APA prior to that legislative enactment.

The Michigan Supreme Court determined that, given all of the characteristics of the MCCA, it was formed primarily for a private purpose and thus was a private association.

As we have already recognized, the association's formation may have bestowed an incidental benefit upon the public by facilitating availability of automobile insurance. Nonetheless, its primary purpose was to protect smaller insurers from the potentially severe financial repercussions of the no-fault act. The MCCA was enacted to create an association of insurance companies that could more evenly bear the expense of a catastrophic claim, as opposed to an

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individual company. We believe that this attempt to attain a less burdensome structure for handling catastrophic no-fault claims was intended primarily for private, not public, benefit.

Id. at 638-639.

However, the court did note that the Commissioner of Insurance was to be involved in the MCCA, but that the participation was not so pervasive or controlling as to render it a state agency. *Id.* at 638.³

In *Texas Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178 (5th Cir. 1992), the court considered the nature of the Texas Catastrophe Property Insurance Association (CATPOOL), an entity comprised of private insurers that writes insurance policies covering risks as prescribed by the State of Texas. CATPOOL is comprised of all of the property insurers in Texas. It must write windstorm, hail, and fire insurance in designated parts of the state. It writes its own policies and pays its own claims, first from premiums and then from assessments against the members. If its losses exceed a certain amount, it is entitled to limited tax credits from the state. *Id.* at 1179.

CATPOOL is run in accordance with a plan of operation adopted in a rulemaking procedure by the state board of insurance. Representatives of the member insurance companies comprise a majority of the board of directors. The directors are responsible and accountable to the state insurance board. *Id.*

The dispute arose in this case when Texas law was changed to require CATPOOL to be represented exclusively by the attorney general. CATPOOL sought a preliminary injunction preventing the attorney general from providing it with legal representation. The district court granted the preliminary injunction and the court of appeals affirmed. CATPOOL argued that the law requiring it to be represented by the attorney general violated its constitutional right to counsel of its choice. Therefore, the issue before the court of appeals was whether CATPOOL is a state agency and therefore precluded from

³ The MCCA is specifically exempt from Michigan's open meeting law. Mich. CLS § 15.263(8) (2001).

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asserting a constitutional claim against the state that created it. *Id.* at 1182. The court of appeals concluded that CATPOOL was not a part of the state and therefore could assert a constitutional claim against the state for depriving it of legal counsel of its choice.

The relevant inquiry, then, is one of identity: the material question is whether CATPOOL is a part of the state. The district court held that CATPOOL is not a part of the state, and we agree. If CATPOOL makes a profit, that money does not go to the state. Although some profits are used to purchase reinsurance, the member companies may receive distributions from profits. If losses exceed premiums, the member companies are assessed, not the public treasury. When CATPOOL loses, the bank accounts of its members are depleted, not the public treasury. The fact that losses are subsidized in part through the allowance of tax credits does not eliminate the risk to the private entities' capital. When CATPOOL wins, the bank accounts of its members may be augmented, not the public treasury. Hypothetically, if CATPOOL's lawyer is incompetent or disloyal, the members, who are private companies, lose money, not the public treasury.

That the state holds, and exercises, the coercive power to force private insurers doing business in Texas to cover certain risks does not mean that the money coming out of the companies' bank accounts is state money. It is private money directed to pay private claims. Indeed, the amount of money paid on individual claims depends on its attorneys' successfully advancing their positions. The act creating CATPOOL is not "a grant of political power," as in the case of a municipality or other political subdivision;

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CATPOOL is not “employed in the administration of the government”; and the funds that will be used if counsel is incompetent or disloyal come from the accounts of private companies, where that money could remain if it were protected by counsel. In short, the State of Texas is not alone interested in the assets of CATPOOL. Rather, the member companies are vitally interested in protecting their private monies, and the State of Texas cannot deprive those companies of the rights guaranteed them by the Constitution of the United States to protect their private property.

We hasten to recognize that a state has extremely broad powers to legislate for the welfare of those in the state. The State of Texas indeed has the power to create a state agency that is truly a part of the state—like the State Insurance Board—and fund that agency by burdensome taxes against insurers doing business in Texas. It could require that agency to rely solely on the services of the attorney general. Because private money is at risk through CATPOOL, the legislature has not created such an agency in CATPOOL. The state can deprive itself of any constitutional rights, as it deems wise, but it cannot prevent private insurers from protecting their own money with retained counsel of their choice.

Id. at 1182-1183 (citations omitted) (footnotes omitted).

Although the court found that CATPOOL was not a part of the state, it should be noted that the legislation creating CATPOOL specifically provides that meetings of the board of the association are open to the public and that notice of those meetings must be given in accordance with Texas law. TEX. INS. CODE Art. 21.49 § 5(k).

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We recognize that none of the above-cited authorities discuss a statutorily created insurance association in connection with the application of the state's open meeting law. As we have noted, the specific legislation creating the Texas and Florida entities, and Michigan's open meeting law, specifically make provision for those entities in relation to their open meeting laws, whereas Nevada legislation does not. However, these authorities are instructive on the question of whether these entities perform a government function and to show how the characterization of these entities may differ depending upon the purpose for which one is considering the nature of the entity. We must caution you that this analysis is strictly limited to the application of the Open Meeting Law to MLAN and should not be used for any other purpose.

The critical question in determining MLAN's status under Nevada's Open Meeting Law is whether MLAN performs a government function. We conclude that it does not and therefore is not a public body within the meaning of the Open Meeting Law. We conclude that the function to be performed by MLAN is essentially that of an insurance company. For purposes of the Open Meeting Law, we agree with the statements of the Florida Supreme Court, the Florida Court of Appeals, the Michigan Supreme Court, and the United States Court of Appeals for the Fifth Circuit when they each essentially found that insurance associations of this type do not perform traditional government functions.

We recognize that MLAN was formed for an important public purpose, and that the public in general will benefit from its existence. However, the business to be carried out by MLAN was previously engaged in by private insurers, not the government, and is traditionally engaged in by private interests. Losses of MLAN will be covered first by additional charges to the insured medical professionals and then by assessments to the members. There is no provision for an appropriation of public funds in the legislation or the Regulation establishing MLAN, and MLAN is to be self-supporting. The day-to-day activities of MLAN are to be carried out by a professional insurance management company, not a governmental agency. The general powers of MLAN, as set forth in NRS 686B.230(2), are generally those of a private insurance company. The totality of the circumstances shows that MLAN will act in a manner similar to a private insurance company, except it is subject to a closer association with the COI than other private insurance companies.

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However, we do not think that this association is so pervasive as to turn MLAN's business to provide insurance coverage to medical professionals into a traditional government function. See *League Gen. Ins. Co.*, 458 N.W.2d at 638. We also believe that the fact that the members of MLAN may not be participating voluntarily does not transform what is essentially the business of insurance into a government function. See *Texas Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d at 1182-1183. Therefore, for purposes of the Open Meeting Law only, we conclude that, although the formation of MLAN did promote an important public purpose, MLAN does not perform a traditional government function and is not a public body as defined by NRS 241.015(3).⁴ Because we have concluded that MLAN does not meet the first requirement to be a public body, we do not need to decide whether MLAN expends or disburses or is supported in whole or in part by tax revenue, or advises or make recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue.

2. Governor's Committee on Employment of People with Disabilities

QUESTION

The President of the Governor's Committee on Employment of People with Disabilities (Governor's Committee) has asked whether that committee is subject to the Open Meeting Law. This question was previously answered by Op. Nev. Att'y Gen. No. 2002-13 (March 14, 2002) issued by this office. This opinion will replace and supersede that opinion.

ANALYSIS

The Governor's Committee was formed by Executive Order of Governor Mike O'Callaghan on September 25, 1975. By Executive Order dated November 30, 1995, Governor Bob Miller clarified the mission of the Governor's Committee. By Executive Order dated July 14, 2000, Governor Kenny Guinn further clarified the role of the Governor's Committee.

⁴ We are expressing no opinion as to the status of MLAN or its Board members with respect to the Administrative Procedures Act, NRS chapter 41, NRS chapter 228, NRS chapter 281, or any other provisions regarding the rights, duties, and responsibilities of public or quasi-public entities or officials.

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The current mission of the Governor's Committee is to promote employment opportunities for people with disabilities. *See* Exec. Order (July 14, 2000). The Governor's Committee also functions as a liaison between the disabled community and businesses. *Id.* Another function of the Governor's Committee is to advise the governor on issues relating to the disabled community. *Id.* The Governor's Committee has ten members appointed by the governor. *Id.* The Governor's Committee uses gifts, donations, or grants as its source of funds to further its mission. *Id.*

Members of the Governor's Committee are reimbursed for travel and per diem expenses as allowed by state regulation from the budget of the Department of Business and Industry (Department). The Governor's Committee receives administrative support from the Department. *Id.*

During the 71st Legislative Session, Senate Bill 175 (S.B. 175) was passed. S.B. 175 became effective on July 1, 2001, and required the Governor's Committee to facilitate the purchase from, and use of, services of certain organizations by governmental agencies. *See* NRS 332.117(1), NRS 333.375(1), NRS 334.025(1). The Governor's Committee is required to receive payment from the governmental agency for facilitating the contract. NRS 334.025(4). We have been informed that funds collected pursuant to NRS 334.025(4) will be placed into the general budget of the Department. These funds will be used by the Department in its role as the administrative support agency for the Governor's Committee.

- a. Does the Governor's Committee owe its existence to and have some relationship with a state or local government?

The first question in determining whether an entity is subject to the Open Meeting Law is to determine whether it owes its existence to and has some relationship with a state or local government. The Governor's Committee was formed by executive order of the Governor. It is given administrative support by an agency in the executive branch of the state government. The Nevada Legislature placed duties on the Governor's Committee in S.B. 175. Therefore, the Governor's Committee owes its existence to and has a relationship with state government.

- b. Is the Governor's Committee organized

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to act in an administrative, advisory, executive, or legislative capacity, and does it perform a government function?

The next inquiry focuses on whether the Governor's Committee is organized to act in an administrative, advisory, executive, or legislative capacity, and whether it performs a government function. We believe that the Governor's Committee acts in an administrative and executive capacity when it acts to promote employment opportunities for people with disabilities, acts as a liaison between the disabled community and businesses, and disburses its funds collected from gifts, donations, and grants to further its mission. In addition, it acts in an administrative capacity when it facilitates the purchase from, and use of, services of certain organizations by governmental agencies.

The promotion of employment opportunities for people with disabilities is clearly a government function. Therefore, we conclude that the Governor's Committee meets the first test under NRS 241.015(3) in that it is an administrative, advisory, executive, or legislative body of the state or a local government, and it performs a traditional government function.

- c. Does the Governor's Committee expend or disburse or is it supported in whole or in part by tax revenue or does it advise or make recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue?

In order to be a public body within the meaning of the Open Meeting Law, the Governor's Committee must expend or disburse tax revenue, be supported in whole or in part by tax revenue, or advise or make recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue. This office has previously opined that the term "tax revenue" must be construed in the broadest possible sense. *Open Meeting Law Manual*, § 3.01 (9th ed. 2001).

The Department provides administrative support to the Governor's Committee. The Department is clearly funded by tax revenue. Thus, the Governor's Committee is supported, at least in part, by tax revenue through the administrative support of the Department. Given that "tax revenue" is to be

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broadly construed, the fact that the support is given through another agency in property and services funded by tax revenues, rather than direct money, does not change the nature of the entity as being supported by tax revenue. *See Stevens v. Geduig*, 719 P.2d 1001, 1009-1010 (Cal. 1986).

In addition, any monies that will be received by the Governor's Committee pursuant to NRS 334.025(4) will be tax revenue in that the monies will be coming from governmental agencies to the Governor's Committee for performing a traditional government function. The Legislature specifically provided for that money to be paid to the Governor's Committee. It does not matter whether or not that tax revenue will be flowing through the Department or whether it will be flowing directly to the Governor's Committee. Therefore, it is our opinion that the Governor's Committee is supported, at least in part, by tax revenue through the Department and is a public body subject to the Open Meeting Law. Because of this conclusion, we do not need to consider whether the Governor's Committee advises or makes recommendations to an entity which expends or disburses or is supported in whole or in part by tax revenue.

The conclusion in this opinion regarding the Governor's Committee reverses our opinion in Op. Nev. Att'y. Gen. No. 2002-13 (March 14, 2002) and that opinion is hereby de-published.

3. Advisory Council on Mortgage Investments and Mortgage Lending

QUESTION

The Commissioner of Financial Institutions (CFI) has asked whether the Advisory Council on Mortgage Investments and Mortgage Lending (Council) is a public body subject to the Open Meeting Law.

ANALYSIS

The Council was created by NRS 645B.860. The Council consists of five members appointed by the Legislative Commission whose names are taken from a list provided by the CFI. NRS 645B.860(2). The members serve two-year terms at the pleasure of the Legislative Commission.

NRS 645B.860(3)(b).

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The members serve without compensation and may not receive per diem or travel expenses. NRS 645B.860(3)(d). However, any member who is a public employee is entitled to be relieved of his duties, without loss of compensation, so that he can prepare for and attend meetings of the Council.

NRS 645B.860(5).

The purpose of the Council is as follows:

1. Consult with, advise and make recommendations to the commissioner [CFI] in all matters relating to mortgage investments and mortgage lending.
2. Make recommendations to the legislature concerning the enactment of any legislation relating to mortgage investments and mortgage lending.
3. Make recommendations to the legislature and the commissioner concerning educational requirements and other qualifications for persons who are engaged in any business, profession or occupation relating to mortgage investments and mortgage lending.
4. Conduct hearings, conferences, and special studies on all matters relating to mortgage investments and mortgage lending.
5. Provide a forum for the consideration and discussion of all matters relating to investments and mortgage lending.
6. Gather and disseminate information relating to mortgage investments and mortgage lending.
7. Engage in other activities that are designed to promote, improve and protect the reliability and stability of mortgage investments and mortgage lending in this state.

NRS 645B.870. The first inquiry with respect to the Council is whether the Council is a legislative subcommittee. If the Council is a legislative subcommittee, then it is not a public body within the definition of NRS 241.015(3).

NRS 241.015(3) states that the term “public body” does not include the Legislature of the State of Nevada. This office has opined that committees and subcommittees of the Legislature are likewise not subject to the Open Meeting Law. *See* Op. Nev. Att’y Gen. No. 113 (Feb. 1, 1973) (considering prior

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definition of “public body” which did not specifically exempt the Legislature); *see also Tarzian, Inc. v. Legislature*, 104 Nev. 672, 765 P.2d 1142 (1988).

The Council has attributes of a legislative subcommittee. The Council was created by an enactment of the Legislature. The Council members are appointed by the Legislative Commission and serve at the pleasure of the Legislative Commission. The Council makes recommendations to the Legislature regarding the enactment of legislation relating to mortgage investments and mortgage lending. The Council also makes recommendations to the Legislature concerning educational requirements and other qualifications for persons who are engaged in any business, profession, or occupation relating to mortgage investments and mortgage lending.

The Council also has other attributes. The members of the Council are appointed by the Legislative Commission from a list provided to it by the CFI. The Council consults with, advises, and makes recommendations to the CFI in all matters relating to mortgage investments and mortgage lending. The Council makes recommendations to the CFI concerning educational requirements and other qualifications for persons who are engaged in any business, profession, or occupation relating to mortgage investments and mortgage lending.

The Council has responsibilities which go beyond making recommendations to the Legislature and CFI. The remaining duties of the Council center around providing a forum on issues related to mortgage investments and mortgage lending, conducting hearings, and gathering and disseminating information. The Legislature did not provide for any method of support for the Council, except that the Legislature did provide for public employees to be able to serve on the Council without loss of compensation from their public employment.

Considering all of the above factors, we conclude that the Council is a legislative subcommittee for the purposes of the Open Meeting Law. The Council members are appointed by, and serve at the pleasure of, the Legislative Commission. The Council makes recommendations to the Legislature. However, functions of the Council which may be considered executive include making recommendations to the CFI, gathering and disseminating information related to mortgage investments and mortgage lending, and engaging in activities to promote, improve, and protect the reliability and stability of mortgage investments and mortgage lending. Although we recognize that the

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Council manifests these Executive Branch attributes, we believe that the Council is most appropriately treated as a legislative subcommittee for purposes of the Open Meeting Law. Therefore, it is our opinion that the Council is not a public body subject to the Open Meeting Law.

We have been informed that the Council wishes to comply with the Open Meeting Law. We believe that, although compliance is not required, the Council may comply with the Open Meeting Law if it so chooses, and that substantial compliance would help promote its purpose of providing a public forum and gathering and disseminating information related to mortgage investments and mortgage lending.

4. 1033 Committee formed by the Office of the Insurance Commissioner

The COI previously requested an opinion from this office concerning a committee known as the 1033 Committee, formed by the Office of the Insurance Commissioner. We responded to this request in Op. Nev. Att’y Gen. No. 2002-06 (Feb. 8, 2002). In that opinion we found that the 1033 Committee, formed at the pleasure of the Insurance Commissioner, is not subject to the Open Meeting Law because the entity is not supported by tax revenue nor is it advisory to a multi-member entity that is supported by tax revenue. We believe that opinion addresses all concerns regarding the 1033 Committee and the Open Meeting Law.

CONCLUSION

The Medical Liability Association of Nevada is not subject to the Open Meeting Law because it does not perform a traditional government function and thus does not fall within the definition of “public body” contained in NRS 241.015(3). The Governor’s Committee on Employment of People with Disabilities is subject to the Open Meeting Law because it falls within the definition of a “public body” contained in NRS 241.015(3) in that it owes its existence to state government, it acts in an administrative and executive capacity, and it is supported in part by tax revenue. The Advisory Council on Mortgage Investments and Mortgage Lending is not subject to the Open Meeting Law because is a legislative subcommittee for purposes of the Open Meeting Law and thus is exempt. Finally, the 1033 Committee, formed at the pleasure of the Commissioner of Insurance, is not subject to the Open Meeting Law because it is not supported by tax revenue and it is not advisory to a multi-member entity that is supported by tax revenue.

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Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: NORMAN J. AZEVEDO
Chief Deputy Attorney General

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AGO 2002-20 IDENTIFICATION CARDS; FELONS; REGISTRATION. No Nevada statute and no valid local ordinance provides for the creation or issuance of, or a requirement that a person carry and produce, an “ex-felon identification card.” If such a statute or valid local ordinance existed, a convicted person who has been effectively relieved of the obligation to register, either pursuant to court order or through a restoration of rights by the Pardons Board or Parole Board, would also be relieved of the obligation to carry and produce such an identification card.

Carson City, May 2, 2002

R. Warren Lutzow, Chief, Nevada Department of Public Safety, Division of Parole and Probation, 1445 Hot Springs Road, Suite 104, Carson City, Nevada 89706-0667

Dear Mr. Lutzow:

The Legislative Counsel Bureau has presented the following two-part question to your agency, which you have referred to this office, relating to ex-felon registration and the effect of an order restoring a convicted felon’s civil rights.

QUESTION

Is there a statutory requirement that a convicted felon carry an “ex-felon identification card”? If so, would an offender whose civil rights have been restored still be required to carry such an identification card?

ANALYSIS

The Nevada Revised Statutes contain no provisions that address the subject of an “ex-felon identification card.” Accordingly, we are unaware of any statutory authority that provides for the creation or issuance of such a card, or that requires such a card to be carried by a convicted felon and produced on demand. Further, we are unaware of any local ordinance that provides for the creation and issuance of such a card or production on demand. We are advised by members of the law enforcement community, however, that documents sometimes referred to as “ex-felon identification cards,” with photos and personal information relating to specific convicted felons, may have been

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produced at various times by local law enforcement agencies as part of their statutory role in registering persons convicted of specified crimes. *See* NRS 179C.100 and 179D.460. We are unaware of any agency that either currently issues such an identification card or that purports to require that a convicted person carry such a card and produce it to a law enforcement officer on demand.

Agencies we have contacted concerning this question indicate that they do provide a registering convicted person with a document that evidences the fact that the person has registered. This document is intended to serve as a receipt acknowledging the offender's compliance with the duty to register.

NRS 179C.100(5) authorizes the district court in which the conviction was obtained, the Nevada Board of Parole Commissioners (Parole Board), or the Nevada Board of Pardons Commissioners (Pardons Board) to restore certain offenders' civil rights and to order that the offender need not comply with the registration requirements of NRS 179C. NRS 179C.100(5) provides as follows:

When so ordered in the individual case by the district court in which the conviction was obtained, by the state board of parole commissioners or by the state board of pardons commissioners, whichever is appropriate, the provisions of this section do not apply to a convicted person who has had his civil rights restored.

NRS 179D.490 provides a procedure whereby a convicted sex offender may petition a district court to be relieved of the obligation to register. Finally, NRS 213.090, 213.155, and 213.157 specify the procedures for obtaining a restoration of civil rights and release from penalties and disabilities from the Pardons Board, the Parole Board, or a district court, respectively.

Even if a statute or valid local ordinance existed which authorized the production of an "ex-felon identification card" and required a convicted person to carry and produce such a card, a district court order lifting the requirement to register as a convicted person or an order of the Pardons Board or Parole Board restoring an offender's civil rights and effectively relieving the offender

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from the obligation to register would eliminate any obligation to comply with such a statute or ordinance.

CONCLUSION

No Nevada statute and no valid local ordinance provides for the creation or issuance of, or a requirement that a person carry and produce, an “ex-felon identification card.” If such a statute or valid local ordinance existed, a convicted person who has been effectively relieved of the obligation to register, either pursuant to court order or through a restoration of rights by the Pardons Board or Parole Board, would also be relieved of the obligation to carry and produce such an identification card.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

BY: JOE WARD, JR.
Senior Deputy Attorney General

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AGO 2002-21 PRACTICE OF LAW; STATUTES; WORKERS COMPENSATION: A non-attorney must be licensed by the Department of Administration to represent an employer in a hearing before an appeals officer in a contested worker's compensation case. A non-attorney may represent an insurer in a hearing before an appeals officer on a contested case as the insurer's agent, without being licensed by the Department of Administration.

Carson City, May 13, 2002

John P. Comeaux, Director, Department of Administration, Bryan A. Nix, Senior Appeals Officer, Department of Administration, 555 E. Washington, Las Vegas, Nevada 89101

Dear Messrs. Comeaux and Nix:

You have requested an opinion from this office as to whether a non-attorney may represent certain entities at a hearing before an appeals officer in a contested worker's compensation case.

QUESTION ONE

Must a non-attorney be licensed by the Department of Administration to represent an employer in a hearing before an appeals officer in a contested worker's compensation case?

ANALYSIS

The appeals officer hears contested claims for worker's compensation in the form of appeals from the decisions of the hearings officer. NRS 616C.345(1). Decisions of the appeals officer are clearly contested cases for purposes of judicial review. NRS 233B.032; Hampton v. Brewer, 103 Nev. 73, 733 P.2d 852 (1987), cert. denied, 482 U.S. 917 (1987).

In 1983 we had occasion to consider whether a non-attorney representative might properly represent a party in a hearing before the appeals officer under the then-existing statutory framework. Op. Nev. Att'y Gen. No. 83-14 (Oct. 27, 1983). Our analysis focused on whether such representation might constitute the practice of law, which may generally be performed only by a licensed Nevada attorney. NRS 7.285. We determined that practice before the

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appeals officer involved the kinds of activities that would constitute the practice of law, that is presentation of arguments, examination of witnesses, introduction of and objection to evidence, and the application of various laws to the facts of the case. Based on a thorough review of authorities from other jurisdictions, we stated, “A survey of the case law of other jurisdictions provides ample authority for the conclusion that a party, whether a corporation or a natural person, may not be represented by a non-attorney in hearings before the appeals officer.” Accordingly, and with the exception of a claimant representing his own personal interests, we opined that only a licensed Nevada attorney could properly represent a party before the appeals officer, regardless of whether the party was a claimant or an employer.

NRS 616C.310(2), Representation by “Any Other Agent”

In 1985, the Nevada Legislature enacted Assembly Bill 3 (A.B. 3), which amended NRS 616.541 by adding the following language: “2. An insurer or employer may be represented in a contested case by private legal counsel or by any other agent.” Act of March 25, 1985, ch 40, § 1, 1985 Nev. Stat. 50 (emphasis added). Therefore, to the extent our 1983 opinion held that an employer may be represented before the appeals officer only by a licensed attorney, the opinion was modified by this statutory amendment to allow representation of an employer by “any” non-attorney “agent” of the employer. The Nevada Supreme Court has expressed apparent approval of the statutory licensing provisions. In *Hampton*, 103 Nev. at 74, the Court addressed the 1985 legislative amendment to NRS 616.541, holding:

We conclude that the statutory scheme set forth above is clear; the statutes in question allow only an employer or an insurer to be represented by non-attorney agents in administrative proceedings held on contested SIIS claims. Accordingly, the district court did not err by granting respondent’s motion for summary judgment.

Further, we note that the Court has adopted the broad definition of “agent” to mean “one who has authority to act for another.” *Daly v. Lahontan Mines*

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Co., 39 Nev. 14, 22, 151 P. 514, 516 (1915). Finally, the relevant language of NRS 616.541(2), as first enacted in 1985, has not been changed but has been substituted in revision as NRS 616C.310(2).

NRS 616C.325(2), the Licensing Requirement for Non-Attorney Representation of an Employer

In 1993, the Nevada Legislature enacted Senate Bill 316 (S.B. 316), a massive piece of legislation that thoroughly reorganized Nevada's worker's compensation system. Act of June 18, 1993, ch. 265, 1993 Nev. Stat. 657. Section 178 of S.B. 316 amended NRS 616.5415(2) and provided that it was unlawful for a person to represent an employer unless the person was: (1) an employee of the employer; (2) employed by a trade association to which the employer belongs; (3) a licensed Nevada attorney; or (4) a licensed third party administrator.

At the end of the 1993 legislative session, the Nevada Legislature enacted Assembly Bill 374 (A.B. 374), a "trailer bill" which made changes to provisions of S.B. 316. Act of July 12, 1993, ch. 587, 1993 Nev. Stat. 2437. Section 22 of A.B. 374 amended NRS 616.5415(2) as follows:

2. It is unlawful for any person to represent an employer at hearings of contested cases unless that person is:

(a) Employed full time by the employer or a trade association to which the employer belongs that is not formed solely for the purpose of providing representation at hearings of contested cases;¹

(b) An employer's representative licensed pursuant to subsection 3 who is not licensed as a third-party administrator;

(c) Admitted to practice law in this state;
or

(d) A licensed third-party administrator.

[Emphasis added.]

¹ Your inquiry does not address the employees referred to in this paragraph.

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NRS 616.5415 was subsequently revised as NRS 616C.325. The language relevant to this opinion is in NRS 616C.325(2) and remains unchanged from the 1993 amendment. The licensure procedure referred to in NRS 616C.325(2) is codified at NAC 616C.350 to .377, inclusive, and requires that an applicant for a license to represent an employer must provide to the Department of Administration certain information and documentation, pass an examination, and maintain a place of business within Nevada.

We emphasize that the licensure requirements of NRS 616C.325(2) only apply to non-attorney representatives of employers. The statute does not address representatives of insurers, which issue is the subject of Question Two, following.

Resolution of the Conflict Between NRS 616C.310(2) and NRS 616C.325(2)

There is a clear conflict between the provisions of NRS 616C.310(2), which broadly allows an employer to be represented by an attorney or “any other agent,” without restriction, and NRS 616C.325(2), which imposes various restrictions on such representation in the form of licensing requirements. By complying only with the “any other agent” standard of the first statute, a person could avoid the licensure requirements of the second statute. Where statutes are susceptible to more than one interpretation or are in conflict with each other, it is the duty of courts to select the construction that best gives effect to the intent of the Legislature. *Smith v. Crown Fin. Servs. of America*, 111 Nev. 277, 284, 890 P.2d 769 (1995). For the following reasons, we believe that NRS 616C.325(2) takes precedence over NRS 616C.310(2), requiring a non-attorney to obtain the license required by NRS 616C.325(2) before representing an employer before the appeals officer.

First, “[w]here a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls.” *Laird v. Nevada Pub. Employees Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982), reh. denied (1982). Both of the statutory provisions relate to the representation of an employer by a non-attorney; however, NRS 616C.325(2) is much more specific in its requirements for such representation. Accordingly, under the tenet of statutory construction followed in *Laird*, NRS 616C.325(2) prevails over NRS 616C.310(2), and a person who is a non-attorney must comply with the licensure requirements of NRS

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616C.325(2) in order to lawfully represent an employer before the appeals officer.

Second, “[w]hen statutes are in conflict, the one more recent in time controls over the provisions of an earlier enactment.” Id. This tenet of statutory construction also supports the conclusion that NRS 616C.325(2) prevails over NRS 616C.310(2). NRS 616C.310(2) was most recently amended in 1985, whereas NRS 616C.325(2) was most recently amended in 1993.

CONCLUSION TO QUESTION ONE

A non-attorney must be licensed by the Department of Administration to represent an employer in a hearing before an appeals officer in a contested worker’s compensation case.

QUESTION TWO

Must a non-attorney be licensed by the Department of Administration to represent an insurer in a hearing before an appeals officer in a contested worker’s compensation case?

ANALYSIS

We begin our analysis with another look at NRS 616C.310(2): “An insurer or employer may be represented in a contested case by private legal counsel or by any other agent.” [Emphasis added.]

The licensure requirements of NRS 616C.325(2) for non-attorneys to represent employers do not apply to the representation of an insurer. Accordingly, there is no statutory conflict to be resolved in reference to non-attorney representation of insurers. We are therefore left with the clear mandate of NRS 616C.325(2) and the admonition in Hampton, 103 Nev. at 74, referring to NRS 616C.325(2) that, “[T]he statutory scheme set forth above is clear; the statutes in question allow only an employer or an insurer to be represented by non-attorney agents in administrative proceedings held on contested SIIS claims.” [Emphasis added.]

It is not clear why the Legislature chose to create a system of required licensing for non-attorney representatives of employers in worker’s

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compensation cases but not for representatives of insurers. However, we must apply the law as it is written, for it is not up to us to question the wisdom of legislative enactments. *Caruso v. Nevada Employment Security Dep't*, 103 Nev. 75, 76, 734 P.2d 224 (1987).

CONCLUSION TO QUESTION TWO

A non-attorney may represent an insurer in a hearing before an appeals officer on a contested case as the insurer's agent, without being licensed by the Department of Administration.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-22 SCHOOL DISTRICT; BOARD OF TRUSTEE; ELECTIONS:

The Clark County School District Board of Trustee's proposed bylaw would not provide for an election of officers since it mandates, in effect, an appointment process that selects persons based upon seniority to serve as president and vice president. Inasmuch as the proposed bylaw does not provide for the election of a person, it does not comply with the provisions of NRS 386.310. A school district board of trustees may not utilize a rotation system to select its president and vice president.

Carson City, May 13, 2002

Stewart L. Bell, District Attorney, Post Office Box 552215, Las Vegas,
Nevada 89155-2215

Dear Mr. Bell:

This is in response to your request for an opinion from this office concerning the provisions of NRS 386.310.

QUESTION

Does NRS 386.310 permit a school district board of trustees to create and utilize a rotation system to identify the board president and vice president, where the offices would necessarily be held by the persons who have the most seniority and have not already served as president or vice president?

ANALYSIS

The Nevada Legislature has addressed the election of officers of a board of trustees in NRS 386.310. That statute reads as follows:

1. The board of trustees shall meet and organize by:
 - (a) Electing one of its members as president.
 - (b) Electing one of its members as clerk, or
by selecting some other qualified
person as clerk.
 - (c) Electing additional officers as may be
deemed necessary.

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(d) Fixing the term of office for each of its officers.

Your request notes that the Clark County School District Board of Trustees (Board) has adopted a procedure to elect officers. You refer to “GP-10 Bylaw -- Officers,” which provides for the nomination and election of officers. The procedure set forth in the GP-10 bylaw, which is presently in effect, provides for the election of a president and vice president by the trustees. This procedure allows for the nomination of candidates and electronic voting until one person receives four votes. The term of office is for one year. The election is held at the first meeting in January and upon call of the president if an office becomes vacant.²

Your question is whether a proposed amendment to the GP-10 bylaw would meet the statutory mandate expressed in NRS 386.310. You have included a copy of the proposed amendment with your letter. The amendment provides that:

Officers shall be nominated for the position of President and Vice President, on a rotating basis, considering the following criteria:

1. Trustees who have not previously served as Vice President or President will have priority over those who have previously served in that capacity.

2. Trustees who have greater time of service with the board will have priority over those with less service time.

One office at a time shall be considered and the following procedure will be used for each office:

A. Nominations.

² The trustees have discretion to adopt a bylaw pertaining to elections of officers. The Legislature requires adoption of certain regulations, for example, pertaining to attendance. See NRS 386.365.

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1. Any board member may nominate for any office (including the nomination of oneself subject to the criteria listed above).

In effect, the person with the longest tenure who has not already served as president is the only trustee who may be nominated for president and the trustees will vote for that person. The proposed bylaw, therefore, does not allow trustees to select from among their number. The trustees are, instead, limited to approving the trustee or nominating from among the trustees with the most seniority. The trustees would presumably agree to the nomination procedure. Your question is whether this procedure would meet the statutory mandate of NRS 386.310.

In your request to this office, you have expressed a preliminary opinion that NRS 386.310 and the Board of Trustees' own GP-10 bylaw require that the president and vice president of the Board be elected in the traditional sense in an election where nominations and votes are unrestricted by a rotation system. As you have noted, BLACK'S LAW DICTIONARY 608 (7th ed. 1999) defines election as, "The process of selecting a person to occupy a position or office." NRS 386.310(1)(a) requires the trustees to meet and organize by electing a president. The proposed bylaw would contradict the plain meaning of the statute. Where the language of a statute is plain and unambiguous, and its meaning is clear and unmistakable, there is no room for contradiction, and the courts are not permitted to search for its meaning beyond the statute itself. *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998). The proposed bylaw would not allow the possible election of any trustee, but would provide for the appointment of only one trustee with the selection being mathematically arrived at by a comparison of terms. There would not be an election of a person, but an appointment based upon time served on the Board.

The election would be a formality and would merely confirm the person with the greatest amount of time on the Board. For this reason, it appears that there would be no meaningful election of a president or vice president, even though a casting of votes would be held. In effect, the actual election would occur if and when the Board votes to adopt the bylaw and thus limit itself to the provisions of the proposed bylaw. You suggest that the procedure in the proposed bylaw is not a valid election, since it is more of a selection process than the actual casting of votes for a person. Your reference to *expressio unius*

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est exclusio alterius is an appropriate aid to interpretation, since the Legislature refers to an election in NRS 386.310(1)(a) and not to a selection, rotation, or appointment. *See Bopp vs. Lino*, 110 Nev. 1246, 885 P.2d 559 (1994). The Legislature distinguishes between the election of the president and selection of a clerk in NRS 386.310(1)(b). Since the proposed bylaw selects the president, it does not appear to qualify as an election. The Board would not elect a president, but would instead merely confirm a seniority position. The proposed bylaw does not allow for an election and it appears that the procedure fails to meet the plain meaning of the statute.

CONCLUSION

The Clark County School District Board of Trustee's proposed bylaw would not provide for an election of officers since it mandates, in effect, an appointment process that selects persons based upon seniority to serve as president and vice president. Inasmuch as the proposed bylaw does not provide for the election of a person, it does not comply with the provisions of NRS 386.310. A school district board of trustees may not utilize a rotation system to select its president and vice president.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES C. SMITH
Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-23 PUBLIC OFFICER; CAMPAIGNS; ELECTIONS;
SECRETARY OF STATE: Elected public officers are generally prohibited from using campaign funds for typically personal and household expenses if the particular use would fulfill a commitment, obligation, or expense that would exist irrespective of the candidate's campaign or duties as an officeholder. In applying this analysis, each item or expense must be individually analyzed. Accordingly, the use of campaign funds to pay attorney fees for defending a public officer against an ethics charge violation under this test and the facts in this opinion would not be prohibited by NRS 294A.160(1).

Carson City, May 21, 2002

The Honorable Dean Heller, Secretary of State, 101 N. Carson Street, Suite 3, Carson City, Nevada 89701-4786

Dear Mr. Heller:

You have requested an opinion from this office as to whether the personal use of campaign funds, as contemplated in NRS 294.160, includes the payment of attorney fees associated with defending a public officer against an ethics charge. In addition, you have asked for the definition of the term "personal use of campaign funds" as used in NRS 294A.160.

QUESTION ONE

What is the definition of the term "personal use of campaign funds" as used in NRS 294A.160?

ANALYSIS

NRS 294A.160 prohibits the personal use of campaign funds and provides for the disposition of unspent contributions and penalties. NRS 294A.160 provides:

1. It is unlawful for a candidate to spend money received as a campaign contribution for his personal use.
2. Every candidate for a state, district, county, city or township office at a primary, general, primary city, general city or special election who is elected to

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that office and received contributions that were not spent or committed for expenditure before the primary, general, primary city, general city or special election shall:

- (a) Return the unspent money to contributors;
- (b) Use the money in his next election or for the payment of other expenses related to public office or his campaign;
- (c) Contribute the money to:
 - (1) The campaigns of other candidates for public office or for the payment of debts related to their campaigns;
 - (2) A political party;
 - (3) A person or group of persons advocating the passage or defeat of a question or group of questions on the ballot; or
 - (4) Any combination of persons or groups set forth in subparagraphs (1), (2) and (3);
- (d) Donate the money to any tax-exempt nonprofit entity; or
- (e) Dispose of the money in any combination of the methods provided in paragraphs (a) to (d), inclusive.

3. Every candidate for a state, district, county, city or township office at a primary, general, primary city, general city or special election who is not elected to that office and received contributions that were not spent or committed for expenditure before the primary, general, primary city, general city or special

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election shall, not later than the 15th day of the second month after his defeat:

(a) Return the unspent money to contributors;

(b) Contribute the money to:

(1) The campaigns of other candidates for public office or for the payment of debts related to their campaigns;

(2) A political party;

(3) A person or group of persons advocating the passage or defeat of a question or group of questions on the ballot; or

(4) Any combination of persons or groups set forth in subparagraphs (1), (2) and (3);

(c) Donate the money to any tax-exempt nonprofit entity; or

(d) Dispose of the money in any combination of the methods provided in paragraphs (a), (b) and (c).

4. Every candidate for a state, district, county, city or township office who is defeated at a primary or primary city election and received a contribution from a person in excess of \$5,000 shall, not later than the 15th day of the second month after his defeat, return any money in excess of \$5,000 to the contributor.

5. Every public officer who:

(a) Holds a state, district, county, city or township office;

(b) Does not run for reelection and is not a candidate for any other office; and

(c) Has contributions that are not spent or committed for expenditure remaining

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from a previous election, shall, not later than the 15th day of the second month after the expiration of his term of office, dispose of those contributions in the manner provided in subsection 3.

6. In addition to the methods for disposing the unspent money set forth in subsections 2, 3 and 4, a legislator may donate not more than \$500 of that money to the Nevada silver haired legislative forum created pursuant to NRS 427A.320.

7. The court shall, in addition to any penalty which may be imposed pursuant to NRS 294A.420, order the candidate or public officer to dispose of any remaining contributions in the manner provided in this section.

8. As used in this section, “contributions” include any interest and other income earned thereon.

NRS chapter 294A, Campaign Practices, does not provide a definition for the term “personal use” as it is used in NRS 294A.160(1). Moreover, there appears to be no judicial determination in Nevada that provides a definition, nor have there been any former opinions issued by the Nevada Attorney General’s Office specifically examining the term. A review of the legislative history of NRS 294A.160, however, provides some limited assistance in determining what the Legislature intended would constitute the personal use of campaign funds.

NRS 294A.160 was promulgated as Senate Bill No. 166 (S.B. 166) during the 1991 legislative session and became effective on October 1, 1991. Act of October 1, 1991, ch. 585, § 2, 1991 Nev. Stat. 1922. The original version of S.B. 166 did not contain the prohibition of “personal use of campaign funds” language found today in NRS 294A.160(1). However, the minutes of the Senate Committee on Government Affairs from January 30, 1991, state that Senator Cook spoke in favor of S.B. 166 and provided a

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statement that “[p]olitical contributions should not be converted to personal income or to pay an individuals [sic] personal expenses for example an individuals [sic] utility bill or personal house payment.” Hearing on S.B. 166 Before the Senate Comm. on Gov’t Affairs, 1991 Legislative Session, 10 (January 30, 1991). Senator Cook proposed the language of NRS 294A.160(1) as it is today. Hearing on S.B. 166 Before the Senate Comm. on Gov’t Affairs, 1991 Legislative Session, 13 (January 30, 1991). The minutes then reflect that Senator Raggio “indicated the language should be specific in the bill, stating no one in public office use campaign contributions for personal benefit” and moved to amend S.B.166 to reflect Senator Cook’s changes. Hearing on S.B. 166 Before the Senate Comm. on Gov’t Affairs, 1991 Legislative Session, 7 (January 30, 1991).

The Senate Daily Journal, published February 7, 1991, provides additional insight into further discussion by the legislators about debts relating to a campaign and the prohibition of using debts for personal use. Hearing on S.B. 166 Before the Senate Comm. on Gov’t Affairs, 1991 Legislative Session, 30 (February 7, 1991). The Senate Daily Journal provides that Senator Cook stated about S.B. 166:

There was discussion in the Committee on Government Affairs about the meaning of the phrase “for the payment of debts related to their campaigns.” There are certain real costs in connection with the holding of a public office for which the use of political contributions is fitting and proper. Certain items were discussed in the committee about the legislative intent of this bill regarding these costs. In order to do a good job, a legislator must keep current with various matters and must stay in touch with the voters. Costs are incurred which may include such items as conference, correspondence with the voters, travel in connection with conferences or meetings that are not reimbursable, meetings with

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various groups, attendance at charitable events, and town meetings. *Id.*

The minutes reflect that on March 12, 1991, Senator Cook addressed the intent of S.B. 166 in the Assembly Committee on Legislative Functions. Specifically, the minutes reflect that Senator Cook explained that “discussion occurred in the Senate Government Affairs Committee concerning the definition of: ‘. . . for the payment of debts relating to their campaigns.’ The bill’s intent, he stated, was to include real costs associated with holding of public office.” Hearing on S.B. 166 Before the Senate Comm. on Gov’t Affairs, 1991 Legislative Session, 31-32 (March 12, 1991) (emphasis added).

The minutes also reflect that the Nevada Council of Senior Citizens distributed a prepared statement asserting that “[a]llowing ‘. . . payment of other expenses related to public office or his campaign . . .’ is extremely vague and also fraught with possible misuse.” Hearing on S.B. 166 Before the Assembly Comm. on Legislative Functions, 1991 Legislative Session, 38 (March 12, 1991). The Nevada Council of Senior Citizens further contended that S.B. 166 would “be institutionalizing bad practices and improving conditions for the process to be further corrupted.” Hearing on S.B. 166 Before the Assembly Comm. on Legislative Functions, 1991 Legislative Session, 40 (March 12, 1991). There are no other clarifications or statements regarding the definition of “personal use of campaign funds” in the legislative history.

The State of Nevada, Legislative Counsel Bureau (LCB), by way of an informal letter opinion issued in December 1992 concerning certain specified expenditures, has addressed the language of NRS 294A.160(1). In that letter opinion, the LCB found that NRS 294A.160 permits the expenditure of campaign contributions, which are not spent or committed for expenditure during a campaign, in order to recover the amount paid for a list of registered voters and the amount of the fee paid pursuant to NRS 293.193 to file for office. In addition, the LCB opined that campaign contributions may be used to pay a spouse for services provided as the manager of an elected official’s campaign if the elected official is able to furnish adequate proof of the level of the spouse’s involvement and commitment and nature of services provided as the manager of the elected official’s campaign.

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Although only indirectly related to the term “personal use,” the Nevada Attorney General’s Office issued an opinion on November 5, 1998, which defined the term “campaign contributions.” In so doing, the Attorney General’s Office reiterated a clear statement from the Legislature that if campaign contributions were converted to personal use, the contribution became a personal gift. The opinion cited to a hearing on 1991 Assembly Bill No. 190 (A.B. 190) as follows:

In the 1991 Legislature, the then chairman of the Commission on Ethics (Ethics Commission) defined campaign contributions as “public funds in the sense that they are solicited and received for a public purpose, the election to public office to serve the public. They are not solicited or given for private or personal use and, if used personally, that use converts the contribution to a personal gift.”

Op. Nev. Att’y Gen. No. 98-29 (November 5, 1998).

Finally, we note that the Nevada Secretary of State’s Office provides a “Campaign Guide” that alerts individuals who receive campaign contributions to various legal provisions governing contributions including, but not limited to, contribution restrictions, reporting requirements, and the legal requirement that campaign contributions be maintained in a separate account and not commingled with other monies. The Campaign Guide, however, does not attempt to define “personal use” and simply reiterates the prohibition in NRS 294A.160(1) that “It is unlawful for a candidate to spend money received as a campaign contribution for his or her personal use.”

While personal use regulation has had limited exposure in the State of Nevada, it has been an issue addressed by the federal government and many states. The University of California Berkeley, Institute of Governmental Studies did a comparison in December 1997 of California’s use regulations with the federal government and other states. RAY LA RAJA ET AL., *Cashing in on the Campaign: The Personal Use of Campaign Funds in California*,

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INST. OF GOVERNMENTAL STUDIES (December 1997). The comparison provides a brief synopsis of the history of the federal rules governing the personal use of campaign funds. “The federal rules governing personal use of campaign funds arise out of the 1979 amendments to the Federal Election Campaign Act. Although the provision disallowing personal use of campaign funds was passed in 1979, the specific rules were not issued until some fifteen years later. What prompted the Federal Elections Commission (FEC) to write the rules was the passage of the Ethics Reform Act of 1989.” *Id.* The federal government developed the Federal Elections Commission (FEC) as a regulatory arm to, among other things, enforce the rules on the use of campaign funds. *Id.*

The federal rules regarding the personal use of campaign funds are currently codified in 2 U.S.C. § 439a (2001) and 11 C.F.R. 113.1 (2001). The use of campaign funds by a candidate to “defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of a Federal office” is allowed pursuant to 2 U.S.C. § 439a (2001). Further, 11 C.F.R. 113.1 (2001) provides a specific list of examples of expenses that are considered personal use which do not “defray any ordinary and necessary expenses incurred in connection with his or her duties.” Specifically, 11 C.F.R. 113.1(1)(i) (2001) provides in relevant part:

- (i) Personal use includes but is not limited to the use of funds in a campaign account for:
 - (A) Household food items or supplies;
 - (B) Funeral, cremation or burial expenses;
 - (C) Clothing, other than items of de minimis value that are used in the campaign, such as campaign “T-shirts” or caps with campaign slogans;
 - (D) Tuition payments, other than those associated with training campaign staff;
 - (E) Mortgage, rent or utility payments -
-

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(1) For any part of any personal residence of the candidate or a member of the candidate's family; or

(2) For real or personal property that is owned by the candidate or a member of the candidate's family and used for campaign purposes, to the extent the payments exceed the fair market value of the property usage;

(F) Admission to a sporting event, concert, theater or other form of entertainment, unless part of a specific campaign or officeholder activity;

(G) Dues, fees or gratuities at a country club, health club, recreational facility or other nonpolitical organization, unless they are part of the costs of a specific fundraising event that takes place on the organization's premises; and

(H) Salary payments to a member of the candidate's family, unless the family member is providing bona fide services to the campaign. . . .

However, the list of expenses enumerated in 11 C.F.R. 113.1(1)(i) (2001) which specifically do not "defray any ordinary and necessary expenses incurred in connection with his or her duties" and therefore are statutorily deemed personal use is not exhaustive. Indeed, it would be difficult to see how it could be "given the myriad circumstances that might be described as related to campaign or official work, especially in areas such as meals and travel." LA RAJA, *supra*, at 2. Instead, 11 C.F.R. 113.1 (2001) provides the FEC with discretion to look at items on a "case by case" basis to determine if the expense would exist "irrespective" of the candidate's campaigning or officeholder status. 11 C.F.R. 113.1(1) (2001) provides in relevant part:

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(ii) The Commission will determine, on a case by case basis, whether other uses of funds in a campaign account fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder, and therefore are personal use. Examples of such other uses include:

(A) Legal expenses;

(B) Meal expenses;

(C) Travel expenses, including subsistence expenses incurred during travel. . . .

(D) Vehicles expenses, unless they are de minimis amount. . . .

The federal rules are designed as a preventative regulatory strategy. LA RAJA, *supra*, at 1. “The rules mark out what specific kinds of activities are disallowed rather than leaving discretion to the candidate or campaign treasurer to test the limits of what is politically relevant.” *Id.* For example, the rule is clear that “a Congressman must buy groceries whether he is an elected official or not. He cannot write off the purchase of these groceries or the use of a vehicle to pick them up on the campaign account. If the Congressman gets a parking ticket while picking up groceries he cannot pay the fine with campaign funds for the same reason.” *Id.* Moreover, the “‘irrespective’ clause is useful in common categories of expenditures because it provides a concrete litmus test: are these activities common to all civilians, or is it the nature of the public office that requires them?” *Id.*

2 U.S.C. § 439a (2001) has recently been amended; the new version will take effect November 26, 2002. The amended version provides specificity to the analysis of the use of campaign contributions for certain purposes. In particular, 2 U.S.C. § 439a (2002), as amended, will delineate both permitted uses and prohibited uses of contributions. Permitted uses will be an application of the “ordinary and necessary” test, while prohibited uses will be treated as conversion, applying the “irrespective” test from 2 U.S.C. § 439a (2001). 2 U.S.C. § 439a (2001), as amended, states:

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(a) Permitted Uses. - A contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office, may be used by the candidate or individual -

(1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual;

(2) for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office;

(3) for contributions to an organization described in section 170(c) of the Internal Revenue Code of 1986; or

(4) for transfers, without limitation, to a national, State, or local committee of a political party.

(b) Prohibited Use. -

(1) In general. - A contribution or donation described in subsection (a) shall not be converted by any person to personal use.

(2) Conversion. - For the purpose of paragraph (1), a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office, including -

(A) a home mortgage, rent, or utility payment;

(B) a clothing purchase;

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- (C) a noncampaign related automobile expense;
- (D) a country club membership;
- (E) a vacation or other non-campaign related trip;
- (F) a household food item;
- (G) a tuition payment;
- (H) admission to a sporting event, concert, theater, or other form of entertainment not associated with an election campaign; and
- (I) dues, fees, and other payments to a health club or recreational facility.

In addition to adopting the “irrespective” test, the amendment to 2 U.S.C. § 439a (2001) has adopted the examples of personal use items from 11 C.F.R. 113.1 (2001) into 2 U.S.C. § 439a (2002). Further, the amendment enumerates and disallows additional specific items as personal use. However, the most significant change appears to be an attempt to increase the preventative nature of the federal rules regarding personal use of campaign funds by creating specific liability to violators for conversion. Obviously there has been no interpretation of the amendments to date.

The differences in personal use laws between the states are very broad. Most states rely “heavily on the notion that people have a common conception of what it means to spend money for activities directly related to a political purpose.” LA RAJA, *supra*, at 2. However, some states provide lists of prohibited expenditures similar to those of the federal government. Only a few states do not address the personal use of campaign funds. LA RAJA, *supra*, at 2. Relevant portions of statutes and regulations addressing the personal use of campaign funds in the states are summarized in the following table:

PERMITTED USE OF CAMPAIGN FUNDS BY STATE

| | | |
|---------|---|--------------------------------|
| Alabama | “[D]o not include personal and legislative living expenses” | ALA. CODE § 17-22A-7(2) (2001) |
|---------|---|--------------------------------|

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| | | |
|-------------|--|--|
| Alaska | "[M]ay not be . . . used to give a personal benefit . . . or converted to personal income" | ALASKA STAT. § 15.13.112(b) (2001) |
| Arizona | "[S]hall not be used for or converted to the personal use of the . . . individual" | ARIZ. REV. STAT. § 16-915.01(B) (2001) |
| Arkansas | "[S]hall not take any campaign funds as personal income." "A candidate who uses campaign funds to fulfill any commitment, obligation, or expense that would exist regardless of the candidate's campaign shall be deemed to have taken campaign funds as personal income." | ARK. CODE ANN. § 7-6-203(g) (2001) |
| California | "[S]hall not be used to pay for or reimburse the cost of professional services unless the services are directly related" "Expenditures which confer a substantial personal benefit shall be directly related to a political . . . purpose." "[S]ubstantial personal benefit means an expenditure of campaign funds which results in a direct personal benefit with a value of more than \$200" | CAL. GOV. CODE § 89513(b) (2001) |
| Colorado | Not "used for personal purposes not reasonably related to supporting the election" | COLO. REV. STAT. § 1-45-106(1)(a)(II) (2001) |
| Connecticut | "'[P]ersonal use' include expenditures to defray normal living expenses . . . and expenditures for the personal benefit of the candidate having no direct connections with . . . the campaign" | CONN. GEN. STAT. § 9-333i(g)(4) (2001) |
| Delaware | May make expenditures for "employing attorneys, accountants and other professional advisers" | DEL. CODE ANN. tit. 15 § 8020(15) (2001) |
| Florida | "[M]ay not use funds . . . to defray normal living expenses for the candidate" | FLA. STAT. ch. 106.1405 (2001) |
| Georgia | Used "only to defray ordinary and necessary expenses . . . incurred in connection with . . . campaign" "Contributions . . . shall not constitute personal assets of . . . candidate" | GA. CODE ANN. § 21-5-33(a) (2001) |
| Hawaii | "[S]hall not be used for personal expenses or to qualify for public funding" | HAW. REV. STAT. § 11-206(b) (2001) |
| Idaho | "[M]ay be used . . . to defray any ordinary and necessary expenses incurred in connection with his duties" | IDAHO CODE § 67-6610C (2000) |

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| Illinois | "None of the above provisions gives the Board the authority to question the propriety of disbursements whether for political or nonpolitical accounts." | Troy v. State Board of Elections, 406 N.E.2d 562, 564 (Ill. App.1980) |
| Indiana | May be used only: "(C) activity related to service in an elected office" "May not be used for primarily personal purposes" | IND. CODE § 3-9-3-4 (2001) |
| Iowa | "2. Campaign funds shall not be used for any of the following purposes: . . . b. Satisfaction of personal debts, other than campaign loans. c. Personal services, including the services of attorneys, accountants, physicians, and other professional persons. However, payment for personal services directly related to campaign activities is permitted." | IOWA CODE § 56.41 (2001) |
| Kansas | "No moneys received . . . shall be used or be made available for the personal use of the candidate" except "expenses of holding political office" "[P]ersonal use' shall include expenditures to defray normal living expenses for the candidate or the candidate's family and expenditures for the personal benefit of the candidate having no direct connection with or effect upon the campaign of the candidate or the holding of public office." | KAN. STAT. ANN. § 25-4157a (2000) |
| Kentucky | Not "for any purpose other than for allowable campaign expenditures." "'Allowable campaign expenditures' means expenditures including reimbursement for actual expenses, made directly and primarily in support of or opposition to a candidate . . ." (supported by Op. Att'y Gen. 82-255 (May 7, 1982)). | KY. REV. STAT. ANN. § 21.175 (2001) |
| Louisiana | "[F]unds shall not be used, loaned, or pledged by any person for any personal use unrelated to a political campaign, the holding of a public office or party position" | LA. REV. STAT. 18:1505.2(I) (2002) |
| Maine | "[M]ay dispose of a surplus exceeding \$50 by: . . . G. Paying for any expense incurred in the proper performance of the office to which the candidate is elected, as long as each expenditure is itemized on expenditure reports" | ME. REV. STAT. ANN. tit. 21 § 1017(8) (2001) |

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| Maryland | "[M]ay not expend a public contribution for: A. Any purpose that violates any law or regulation of the State" | MD. REGS. CODE tit. 33 § 14.04.05 (2001) |
| Massachusetts | "[R]esidual funds shall not be converted to the personal use of the candidate" | MASS. ANN. LAWS ch. 55, § 18(h)(15) (2002) |
| Michigan | Narrow restrictions on disbursement of unexpended funds. | MICH. COMP. LAWS § 169.245 (2001) |
| Minnesota | "[U]nless the use is reasonably related to the conduct of election campaigns, or is a noncampaign disbursement . . . (1) payment for accounting and legal services" | MINN. STAT. § 211B.12 (2000) |
| Mississippi | No apparent restrictions on expenditures. | |
| Missouri | "Contributions as defined in section 130.011, received by any committee shall not be converted to any personal use." However, "[c]ontributions may be used for any purpose allowed by law including, but not limited to: (1) Any ordinary expenses incurred relating to a campaign; (2) Any ordinary and necessary expenses incurred in connection with the duties of a holder of elective office" "Attorney's fees may be paid from candidate committee funds" | MO. REV. STAT. § 130.034 (2000) MO. REV. STAT. § 130.033 (2000) |
| Montana | Shall not "use the funds for personal benefit . . . (2) For purposes of this section, 'personal benefit' means a use that will provide a direct or indirect benefit of any kind to the candidate or any member of the candidate's immediate family." | MONT. CODE ANN. § 13-37-240 (2001) |
| Nebraska | "Any unexpended public funds shall be repaid to the state. . . ." | NEB. REV. STAT. ANN. § 32-1606(3) (2001) |
| New Hampshire | "Such surplus campaign contributions, however, shall not be used for personal purposes." | N.H. REV. STAT. ANN. § 64:4-b (2000) |
| New Jersey | "[A]ll moneys remaining available to any qualified candidate, shall be paid into the fund. . . ." "[C]ampaign expenses' means any expense incurred . . . other than those items or services which may reasonably be considered to be for the personal use of the candidate. . . ." | N.J. STAT. ANN. § 19:44A-11.2 (2001) N.J. STAT. ANN. § 19:44A-35 (2001) |

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| New Mexico | "It is unlawful for any candidate or his agent to make an expenditure of contributions received, except for the following purposes or as otherwise provided in this section: . . . (2) expenditures of legislators that are reasonably related to performing the duties of the office held, including mail, telephone and travel expenditures to serve constituents, but excluding personal and legislative session living expenses" | N.M. STAT. ANN. § 1-19-29.1 (2001) |
| New York | "Contributions received by a candidate or a political committee may be expended for any lawful purpose. Such funds shall not be converted by any person to a personal use which is unrelated to a political campaign or the holding of a public office or party position." | N.Y. ELEC. LAW § 14-130 (2001) |
| North Carolina | "Any money a candidate receives from the Candidates Fund that is unspent within 90 days after the general election shall be returned to the Candidates Fund." | N.C. GEN. STAT. § 163.278.55 (2000) |
| North Dakota | No apparent restrictions. | |
| Ohio | No apparent restrictions. | |
| Oklahoma | Repealed all its election expenditure laws. | |
| Oregon | Repealed due to <i>VanNatta v. Keisling</i> , 324 Or. 514, 931 P.2d 770 (1997). | |
| Pennsylvania | Residual funds may be used "to compensate any person for services rendered to a candidate" | 25 PA. STAT. ANN. § 3250 (2001) 25 PA. STAT. ANN. § 3241 (2001) |
| Rhode Island | Personal use prohibited. "'[P]ersonal use' is defined as any use other than expenditures related to gaining or holding public office and for which the candidate for public office or elected public official would be required to treat the amount of the expenditure as gross income under § 61 of the Internal Revenue Code of 1986, 26 U.S.C. § 61, or any subsequent corresponding Internal Revenue Code of the United States, as from time to time amended." | R.I. GEN. LAWS § 17-25-7.2 (2001) |

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| South Carolina | "No candidate, committee, public official, or political party may use campaign funds to defray personal expenses which are unrelated to the campaign or the office if the candidate is an officeholder nor may these funds be converted to personal use." | S.C. CODE ANN. § 8-13-1348 (2000) |
| South Dakota | No apparent restrictions. | |
| Tennessee | "[N]o candidate for public office shall use any campaign funds either prior to, during or after an election for such candidate's own personal financial benefit or any other nonpolitical purpose as defined by federal internal revenue code." | TENN. CODE ANN. § 2-10-114 (2001) |
| Texas | "A person who accepts a political contribution as a candidate or officeholder may not convert the contribution to personal use . . . (d) In this section, 'personal use' means a use that primarily furthers individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office. The term does not include: (1) payments made to defray ordinary and necessary expenses incurred in connection with activities as a candidate or in connection with the performance of duties or activities as a public officeholder" | TEX. ELEC. CODE ANN. § 253.035 (2000) |
| Utah | No apparent restrictions. | |
| Vermont | "No member of a political committee which has surplus funds after all campaign debts have been paid shall convert the surplus to personal use." | VT. STAT. ANN. tit. 17, § 2804 (2001) |

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| Virginia | “Amounts received by a candidate or his campaign committee as contributions that are in excess of the amount necessary to defray his campaign expenditures may be disposed of only by one or any combination of the following: . . . (vi) defraying any ordinary, nonreimbursed expense related to his elective office. It shall be unlawful for any person to convert any contributed moneys, securities, or like intangible personal property to his personal use.” | VA. CODE ANN. § 24.2-921 (2001) |
| Washington | “Contributions . . . may only be transferred to the personal account of a candidate . . . under the following circumstances: (1) Reimbursement for or loans to cover lost earnings incurred as a result of campaigning or services performed for the political committee. . . . (2) Reimbursement for direct out-of-pocket election campaign and postelection campaign related expenses made by the individual. . . . (3) Repayment of loans made by the individual to political committees” | WASH. REV. CODE § 42.17.125 (2001) |
| West Virginia | “[M]ay be used by the candidate to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of public office” | W. VA. CODE ANN. § 3-8-10 (2001) |
| Wisconsin | Surplus funds from state election fund grant must be returned. | WIS. STAT. § 11.50 (2000) |
| Wyoming | No apparent restrictions. | |

Most states limit campaign fund activities to expenses that are “directly related” or “ordinary and necessary” for conducting a campaign or performing official duties. LA RAJA, *supra*, at 2. Moreover, the phrase “personal use” appears to be a term of art, as its meaning is addressed by an application of law to individual fact items or expenses in each state. “The differences across the states are most likely a product of history, political culture, and particular scandals that created a demand for reform. Sometimes, the rules are changed according to the whim of an individual legislator.” LA RAJA, *supra*, at 3.

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In order to thoroughly investigate the differences between the states in defining the personal use prohibition under individual state statutes, it would be necessary to compare case laws, advisory opinions, and enforcement decisions issued by the relevant regulatory agencies of the states on each particular item or expense. *LA RAJA*, supra, at 2. Therefore, most of the analysis with regard to “personal use” addresses situations that have arisen with regard to specific items or expenses that a candidate or officeholder has alleged are “directly related” or “ordinary and necessary” for conducting a campaign or performing official duties. Few courts have attempted to actually find a general definition for personal use.

The Maryland Attorney General’s Office has attempted to articulate a definition for their prohibition against the “personal use” of campaign funds in an opinion issued October 19, 1993. Specifically, the Maryland Attorney General’s Office adopted a “but for” test to determine whether the use of campaign funds for an item or expense would be appropriate, that is, “but for the candidacy, they would not have occurred.” 78 Op. Md. Att’y Gen. 155 (October, 1993). The Maryland Attorney General started with the proposition that if there were no candidacy, the expense would not have been incurred. *Id.* The Maryland Attorney General further stated, “[p]ost-election expenditures ‘promote the success of the candidate,’ in the sense that they meet obligations that arose directly from the candidacy and that, if not satisfied, would hurt the candidate’s future prospects.” *Id.*

A few states apply a “substantial benefit test” to determine whether a payment from campaign funds is for personal use. On June 15, 1993, the Washington Attorney General’s Office opined that expenses are personal if they provide a personal benefit to the officeholder. 1993 Op. Wa. Att’y Gen. No. 12 (June, 1993). On August 18, 1982, the California Attorney General issued a narrower opinion, stating that:

A payment from campaign funds is for personal use if the payment creates a substantial personal benefit and does not have more than a negligible political, legislative, or governmental purpose. However, a payment from campaign funds is not for personal use if it is to

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replace articles lost, damaged, or stolen
in connection with political, legislative
or governmental activity.

65 Op. Cal. Att'y Gen. 493 (August, 1982).

One state, South Carolina, has even suggested that the term “personal use” can only be defined by looking at the nexus between the use of the funds and the intent of the donor. On August 17, 1988, the South Carolina Attorney General’s Office opined that while “[o]nly a court could categorically conclude whether particular facts or circumstances constitute a violation of such provisions” there is a “possibility that campaign funds are impressed with a trust which controls the manner of expending such funds for purposes other than campaign expenses.” Op. S.C. Att’y Gen. No. 88-150 (August, 1988).

As discussed and analyzed herein, the term “personal use,” as used in NRS 294A.160(1), cannot be narrowly defined. In fact, the term has been broadly defined under federal law and in the different states. In Nevada, the legislative history reveals that the Legislature generally intended to disallow expenditures of campaign monies for typical personal and household expenses such as food, clothing, rent, utilities and the like. Accordingly, we conclude that the intent behind NRS 294A.160(1) was to enact a standard similar to that adopted by the federal government and articulated in 11 C.F.R. 113.1(1). Specifically, we conclude that NRS 294A.160(1) prohibits use of funds in a campaign account if the particular use would fulfill a commitment, obligation, or expense that would exist irrespective of the candidate’s campaign or duties as an officeholder. In applying this analysis, each item or expense must be individually analyzed.

CONCLUSION TO QUESTION ONE

The term “personal use,” as used in NRS 294A.160(1), has not been specifically defined by the Nevada Legislature or the Nevada courts. An analysis of the personal use laws of the federal government and other states reveals a broad definition for the term “personal use.” Nevada’s legislative history reveals that the Legislature generally intended to disallow expenditures of campaign monies for typical personal and household

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expenses such as food, clothing, rent, utilities and the like. Based on that legislative history, we conclude that in enacting NRS 294A.160(1), the Nevada Legislature intended to enact a standard similar to that adopted by the federal government and articulated in 11 C.F.R. 113.1(1), and to thereby prohibit use of campaign funds if the particular use would fulfill a commitment, obligation, or expense that would exist irrespective of the candidate's campaign or duties as an officeholder.

QUESTION TWO

Does the use of campaign funds by a public officer to pay attorney fees associated with defending that public officer against an ethics violation charge before a city or state ethics board constitute the personal use of campaign funds, in violation of NRS 294A.160?

ANALYSIS

NRS 294A.160 does not specifically address the use of campaign funds to pay attorney fees for defending a public officer against an ethics violation charge. NRS 294A.160 does, however, provide in subsection 1 that "[i]t is unlawful for a candidate to spend money received as a campaign contribution for his personal use" and in subsection 2(b) that campaign contributions may be used for "the payment of other expenses related to public office or his campaign." Therefore, the question becomes, is the use of campaign funds to pay attorney fees for defending a public officer against an ethics charge considered "personal use" or "the payment of other expenses related to public office or his campaign?"

As discussed in question one above, there is no specific answer to that question in the laws of the State of Nevada, nor has there been a judicial determination made that would provide an answer. However, the federal government and several states have addressed this question.

The FEC has issued several advisory opinions that address the rule on the personal use of campaign funds and the "irrespective" clause of the federal rules. Specifically as to legal expenses, the FEC concluded, in Advisory Opinion Number 1996-24, that legal expenses do not exist irrespective of a candidate's campaign or officeholder status if the candidate

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is paying those legal expenses to defend himself/herself against allegations of improper or wrongful conduct made about a candidate in a campaign context. The FEC “recognized” that “the activities of candidates and officeholders may receive heightened scrutiny and attention because of either status as candidates and officeholders” which would not exist irrespective of a candidate’s campaign or officeholder status. *Id.* In Opinion Number 1997-12, the FEC “slightly” modified the test as stated in Opinion Number 1996-24. In Opinion Number 1997-12, the FEC concluded that there is a three-part analysis to determine if legal services would not exist irrespective of a candidate’s campaign or officeholder status. That test is:

- 1) any legal expense that relates directly and exclusively to dealing with the press, such as preparing a press release, appearing at a press conference, or meeting or talking with reporters, would qualify for 100% payment with campaign funds because you are a candidate or federal officeholder;
- 2) any legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds;
- 3) 50% of any legal expense not covered by 1 above that does not directly relate to allegations arising from campaign or officeholder activity can be paid for with campaign funds because you are a candidate or federal officeholder and are providing substantive responses to the press (beyond pro forma “no comment” statements).

(The test as stated in Advisory Opinion Number 1997-12 was confirmed by the Federal Election Commission in Advisory Opinion Number 1998-1).

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Some states have found that attorney fees for defending a public officer against an ethics violation charge is sufficiently related to the campaign or public office such that the use of campaign funds to pay the attorney fees is not considered personal use. In Ohio, an appellate court found that “not all payment of attorney fees with campaign funds is forbidden. The Ohio Elections Commission [OEC] allows the payment of attorney fees with campaign funds for representation against charges brought before the OEC itself. *State of Ohio v. Ferguson*, 126 Ohio App. 3d 55, 59, 709 N.E.2d 887, 890 (1998). The Texas Ethics Commission suggested the application of a test to determine if attorney fees could be paid with campaign funds: “[W]hether the legal expense arose directly from the requestor’s activities as a candidate.” Op. Tex. Ethics Comm. No. 105 (December 10, 1992).

Moreover, as stated in question one, the Maryland Attorney General’s Office asked, “would the expense have been incurred had there been no candidacy?” or “but for the candidacy” would the costs have been incurred? 78 Op. Md. Att’y Gen. 155 (October, 1993). The Maryland Attorney General concluded that the attorney fees to defend an ethics violation would not have been incurred had there been no candidacy, therefore the use of campaign funds to pay those fees was not personal use. *Id.* However, the Maryland Attorney General’s Office also addressed in a footnote the limited the use of campaign funds to pay attorney fees:

We do not suggest that campaign funds may generally be used for the cost of defending against criminal charges. If, for example, a candidate or incumbent is indicted for armed robbery, he or she may not use campaign funds to defend against the charge. While in one sense it would undoubtedly promote the success of the candidacy to be acquitted of the robbery charge, and in the case of an incumbent acquittal would protect his or her incumbency, there is no nexus between the charge of armed robbery and the candidacy. *Id.*

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However, in contrast, the Alabama Attorney General, in an opinion dated June 12, 2000, adopted an FEC advisory opinion that legal fees incurred pursuant to the defense of a criminal prosecution relative to official conduct in office may be paid from campaign funds. Op. Ala. Att'y Gen. No. 2000-165 (June, 2000), citing Federal Election Comm. Advisory Op. No. 1977-39 (August 26, 1977). Similarly, the South Carolina Attorney General's Office stated in an opinion dated September 29, 1986, "[f]unds to help pay personal legal fees appear to be distinguishable from campaign funds" Op. S.C. Att'y Gen. No. 86-71 (September, 1986).

Few states have found an absolute bar to the use of campaign funds to pay for attorney fees. The Tennessee Attorney General's Office opined on October 23, 1997, that "a candidate may not use surplus campaign funds to cover his or her legal expenses, regardless of whether the action is related to the performance of his or her job duties. Such expenses are not 'ordinary and necessary expenses incurred in connection with the office of the officeholder' within the meaning" of the Tennessee Code. Op. Tenn. Att'y Gen. No. 97-146 (October, 1997).

An analysis of the various laws and opinions on the use of campaign funds reveals that the federal government and most states are likely to find that, on a case-by-case basis, campaign funds used to pay attorney fees for defending a public officer against an ethics charge are expenses related to the public office or campaign.

CONCLUSION TO QUESTION TWO

There has been no specific legislative definition or judicial determination in the State of Nevada regarding whether the use of campaign funds by a public officer to pay attorney fees associated with defending that public officer against an ethics violation charge before a city or state ethics board constitutes the "personal use" of campaign funds, in violation of NRS 294A.160. However, applying the "irrespective" test, as concluded in question one to this opinion, it is the opinion of this office that the use of campaign funds to pay attorney fees to defend against ethics violations would not constitute the personal use of campaign funds in violation of NRS 294A.160.

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Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: MARK J. KRUEGER
Deputy Attorney General

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AGO 2002-24 EDUCATION; PUBLIC SCHOOLS; SCHOOL DISTRICT:

A Student repeating tenth grade who has taken the test in a previous year as a tenth grader has taken the examination before the completion of grade 10 and need not retake the examination administered pursuant to NRS 389.015.

Carson City, May 31, 2002

Jack W. McLaughlin, PhD., Superintendent of Public Instructions,
Department of Education, 700 E. Fifth Street, Carson City, Nevada
89701-5096

Dear Dr. McLaughlin:

You have requested an opinion from this office concerning the following:

QUESTION

Must all students who are classified as tenth graders take the examination administered pursuant to NRS 389.015, even though some students are repeating the tenth grade and have taken the test in a previous year as a tenth grader?

ANALYSIS

The test administered pursuant to NRS 389.015 is a norm-referenced test referred to as the TerraNova examination. Pursuant to NRS 389.015, the achievement and proficiency of students must be tested before the completion of grades 4, 8, 10, and 11. NRS 389.015(2)(b). Your question has arisen due to a particular school's achievement designation being negatively affected by the failure of repeat tenth graders to take the TerraNova examination.

The TerraNova examination scores are used to determine the achievement and proficiency of students and to measure the performance of schools, and are included in the school districts' accountability reports pursuant to NRS 385.347 and NRS 389.017. NRS 385.347 requires each school district to report on pupil achievement at each of its schools on an annual basis. Each school is evaluated for its pupil achievement and then designated as demonstrating exemplary achievement, high achievement,

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adequate achievement, or needing improvement. NRS 385.363. The designations are based upon: (1) the scores on the examination required by NRS 389.015; (2) the number of pupils who took the examination; and (3) the record of attendance. The designations are determined pursuant to criteria set forth in NRS 385.363, NRS 385.365, and NRS 385.367.

NRS 389.015 provides, in pertinent part, as follows:

1. The board of trustees of each school district shall administer examinations in all public schools of the school district. The governing body of a charter school shall administer the same examinations in the charter school. The examinations administered by the board of trustees and governing body must determine the achievement and proficiency of pupils in:

- (a) Reading;
- (b) Writing;
- (c) Mathematics; and
- (d) Science.

2. The examinations required by subsection 1 must be:

- (a) Administered before the completion of grades 4, 8, 10 and 11.
- (b) Administered in each school district and each charter school at the same time. The time for the administration of the examinations must be prescribed by the state board. [Emphasis added.]

NRS 389.017 provides, in pertinent part, as follows:

1. The state board shall prescribe regulations requiring that each board of trustees of a school district and each governing body of a charter school submit to the superintendent of public instruction and the department, in the form and manner prescribed by the superintendent, the results of achievement and proficiency examinations given in the 4th, 8th, tenth and eleventh grades to public school pupils of the district and charter schools. The state board shall not include in the regulations any provision which would violate the confidentiality of the test scores of any individual pupil.

....

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6. The superintendent of schools of each school district and the governing body of each charter school shall certify that the number of pupils who took the examinations required pursuant to NRS 389.015 is equal to the number of pupils who are enrolled in each school in the school district or in the charter school who are required to take the examinations except for those pupils who are exempt from taking the examinations. A pupil may be exempt from taking the examinations if:

(a) His primary language is not English and his proficiency in the English language is below the level that the state board determines is proficient, as measured by an assessment of proficiency in the English language prescribed by the state board pursuant to subsection 8; or

(b) He is enrolled in a program of special education pursuant to NRS 388.400 to 388.520 inclusive, and his program of special education specifies that he is exempt from taking the examinations. [Emphasis added.]

NRS 385.347 provides, in pertinent part, as follows:

1. The board of trustees of each school district in this state, in cooperation with associations recognized by the state board as representing licensed personnel in education in the district, shall adopt a program providing for the accountability of the school district to the residents of the district and to the state board for the quality of the schools and the educational achievement of the pupils in the district, including, without limitation, pupils enrolled in charter schools in the school district.

2. The board of trustees of each school district shall, on or before March 31 of each year, report to the residents of the district concerning:

(a) The educational goals and objectives of the school district.

(b) Pupil achievement for grades 4, 8, 10 and 11 for each school in the district and the district as a whole, including, without limitation, each charter school in the district.

Unless otherwise directed by the department, the board of trustees of the district shall base its report on the results of the examinations administered pursuant to NRS 389.015 and shall compare the results of those examinations for the current school year with those of previous school years. The report must include, for each school in the district, including, without limitation, each

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charter school in the district, and each grade in which the examinations were administered:

- (1) The number of pupils who took the examinations;
- (2) An explanation of instances in which a school was exempt from administering or a pupil was exempt from taking an examination; and
- (3) A record of attendance for the period in which the examinations were administered, including an explanation of any difference in the number of pupils who took the examinations and the number of pupils who are enrolled in the school. [Emphasis added.]

Repeat tenth graders are not specifically addressed in NRS 389.015, NRS 389.017, or NRS 385.347 in either exempting or requiring them to take the examination. NRS 389.015(2)(b) merely states that the examination be administered “before the completion of grades 4, 8, 10 and 11.”

At issue are those tenth graders that must repeat tenth grade because of insufficient credits to be promoted to eleventh grade. A pupil must earn a minimum of 11 credits to be promoted to the eleventh grade. NAC 389.659. There is no discretion for a local school district to waive the requirement. NAC 389.659(2). Although a repeat tenth grader could be promoted to the eleventh grade at the end of the first trimester, the TerraNova examination is administered in the fall, which is prior to the end of the first trimester, thereby foreclosing any opportunity to accumulate the credits necessary to be promoted.

However, NRS 389.015 only requires the examination to be administered before the completion of grade 10. This language is susceptible to at least two plausible interpretations. On the one hand, a student who repeats the tenth grade for having insufficient credits is nonetheless classified as a tenth grader, regardless of his taking eleventh or twelfth grade classes. Therefore, the statute could be interpreted to mean that all current tenth grade students must be administered the examination, since such students have not yet completed tenth grade, and must take the examination before completion of grade 10.

On the other hand, a repeat tenth grader who has taken the examination when in tenth grade the previous year has, in fact, been administered the

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examination before the completion of grade 10. Therefore, the school district has already complied with the statute in the prior school year with respect to the repeat tenth grader, and there is no requirement to take the same test a second time.

Normally, the words in a statute should be given their plain meaning unless such would violate the spirit of the act. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986); *Hotel Employees & Restaurant Employees Int'l Union v. State*, 103 Nev. 588, 591, 747 P.2d 878, 879 (1987). When a statute is plain and unambiguous, that is, clear on its face, a court should give the language its ordinary meaning and may not go beyond the language of the statute in determining the legislature's intent. *Id.*; *Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. Adv. Op. 68, 4 n.4, 34 P.3d 546, 550 n.4 (2001). Because of the different interpretations that could be given to the statute, the rules of statutory construction must be applied.

In this case, there are plausible arguments about the meaning of the language "before the completion of." When more than one interpretation of a statute can reasonably be drawn from its language, the statute is considered ambiguous, and the plain meaning rule cannot be applied. *Id.* Because the language "before the completion of" can be reasonably given more than one interpretation, the plain meaning rule cannot be applied in this case. Accordingly, the legislative intent of NRS 389.015(2), in conjunction with NRS 389.017 and NRS 385.347, must be determined.

In determining legislative intent, a review of the public legislative records on file with the Legislative Counsel Bureau may provide some guidance:

Legislative intent can be determined by looking at the entire act and construing the statute as a whole in light of its purpose. *Colello v. Administrator, Real Estate Division*, 100 Nev. 344, 347, 683 P.2d 15, 16 (1984). The expressly stated purpose of the statute is a factor to be considered. *Id.*

...

Pursuant to another rule of statutory construction, an ambiguous statute can be construed "in line with what

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reason and public policy would indicate the legislature intended.” *McKay v. Board of Supervisors*, *supra*, 102 Nev. at 649, 730 P.2d at 442.

Hotel Employees & Restaurant Employees Int’l Union v. State, 103 Nev. 588, 591-592, 747 P.2d 878, 880 (1987).

NRS 389.015, NRS 389.017, and NRS 385.347 were amended by the Legislature pursuant to S.B. 482, which is referred to as the Nevada Education Reform Act of 1997. The amendments in 1997 did not change the language at issue in NRS 389.015, but only added an additional grade, grade 10, to the grades that must be administered the examination referred to in NRS 389.015. Pursuant to the 1997 amendments, the norm-referenced test became the method of measuring school performance as well as measuring proficiency of students. Prior to the amendments, there was no measure of performance for high schools. To remedy the situation, the Legislature added grade 10 as a grade requiring norm-referenced testing. Minutes of June 26, 1997, Hearing Before the Senate Comm. on Finance, 69th Sess. 2. Although a grade level was added to the required testing, the language at issue, “before the completion of,” has never been changed in the numerous amendments that have been made to NRS 389.015. Therefore, it is necessary to review the legislative history of the initial adoption of NRS 389.015 pursuant to A.B. 400 in 1977.

The legislative history of A.B. 400 only generally discusses NRS 389.015. In the minutes of March 9, 1977, Hearing on A.B. 400 Before the Education Comm. Joint Meeting with Senate, 59th Sess. 2, the intent of A.B. 400 was discussed as follows:

Assemblyman Nicholas Horn, sponsor of A. B. 400 from District #15, summarized his bill as requiring periodic testing to determine proficiency in reading, writing and mathematics in grades 6, 9 and 12. Although the student would not be held back in the lower grades for failure to pass the examination, but would receive remedial

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help, he would be required to pass the proficiency test before graduation.

In the Statement of the Department of Education, which was an exhibit to the minutes of March 9, 1977, Hearing on A.B. 400 Before the Education Comm. Joint Meeting with Senate, 59th Sess. 14, it is stated that several of the bills specified grade levels at which certain examinations must be administered to students. It was recommended that testing begin early in the pupil's education experience so that opportunities for repeated testing and specialized instruction could occur. In the minutes of March 17, 1977, Hearing Before the Assembly Subcommittee on Education, 59th Sess. 29, it was stated:

The members agreed that it is not their intent to penalize any student but rather to set guidelines that the State Department of Education might develop and implement. Mr. Horn stressed that he is interested in developing proficiency while Mrs. Gomes wanted to be sure a student isn't tracked with failure. Although Mr. Goodman wanted to hold back those who don't meet the proficiency requirements along the way, Mr. Wright objected, saying this discourages the student from finishing school. The committee agreed the important thing is to identify early those needing help as well as the area of remediation so that the classroom teacher may provide help to encourage every student to attain minimum competency.

Unfortunately, the legislative history does little to clarify the meaning of "before the completion of." Since the legislative history lacks specific reference to the language at issue, the statute must be construed as a whole in light of its purpose and in line with what reason and public policy would indicate the Legislature intended. What is gleaned from the legislative history is that the purpose of the examination is to identify those needing help and the area of remediation. By requiring the proficiency examinations, the Legislature did not intend to penalize the students whose proficiency is tested.

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The norm-referenced examination is not required for a student to be promoted to the next grade level. If a student fails to demonstrate at least adequate achievement on the examination, the student may be promoted to the next higher grade, but his examination must be evaluated to determine the appropriate remedial study for the student. NRS 389.015(5).

In considering the whole statute, a review of NAC 389.655 regarding proficiency examinations may be of assistance in further determining the public policy behind taking the proficiency examinations. NAC 389.655 provides, in pertinent part, as follows:

1. A pupil must not be given a standard diploma until the pupil has, after entering grade 11, passed:

(a) The Nevada High School Proficiency Examination in Reading;

(b) The Nevada High School Proficiency Examination in Mathematics; and

(c) The Nevada High School Proficiency Examination in Writing for the Eleventh Grade and Above.

For pupils who graduate from high school before the 2004-2005 school year, the Nevada High School Proficiency Examination in Science must be used solely to gather information and data concerning the examination and must not be used as a condition for receipt of a high school diploma.

2. After entering grade 10, if a pupil passes one of the high school proficiency examinations, the pupil is not required to take that examination again to graduate. [Emphasis added.]

The Nevada High School Proficiency Examinations are different than the TerraNova norm-referenced examination. NRS 389.015 requires both examinations to be taken but only requires passage of the Nevada High School Proficiency Examinations to receive a diploma. NAC 389.655 does not require a tenth grader to re-take a proficiency examination in eleventh grade that he passed in tenth grade just because such examinations are required to be taken in the eleventh grade. It is apparent that taking and passing the examination accomplishes the purpose of the proficiency examination, and the fact that a student took the proficiency examination in a

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grade earlier than required is of no consequence to the purpose of the examination. Accordingly, the same rule of reason should apply to a student who took the norm-referenced test in a previous year as a tenth grader.

Failure to demonstrate adequate achievement on the norm-referenced examination is of no consequence to being promoted to the next grade. The purpose of the examination is to determine the needs of the student. If a student takes the norm-referenced test when he is originally a tenth grader, then the purpose of the examination has been accomplished. As long as a student takes the norm-referenced examination as a tenth grader, he has taken the examination before the completion of grade 10. If the results of the test resulted in remedial study, then the examination accomplished its purpose in identifying those students with needs. When the student is promoted to the eleventh grade, then the student will be required to take the proficiency examinations. Those examinations will determine if further remedial study is necessary.

It is clear from the legislative history of the initial adoption of NRS 389.015 that the Legislature did not intend to penalize students by requiring the taking of proficiency examinations. Requiring repeat tenth graders to retake a tenth grade test would be no more reasonable than if a student were made to retake a tenth grade class that he passed just because he is still in tenth grade.

The amendments made to NRS 389.015, NRS 389.017, and NRS 385.347 since 1977 must also be considered in interpreting the language of NRS 389.015. Since 1977, the norm-referenced examinations have taken on an additional purpose of measuring the performance of schools and making the schools accountable for the achievement levels of their students. The Legislature intended to make schools accountable for the performance of their students to improve education and benefit the students in doing so. See Minutes of June 26, 1997, Hearing Before the Senate Comm. on Finance, 69th Sess. 2. Accordingly, the original intention of the Legislature of not penalizing students is unchanged.

Considering the legislative history, the statute construed as a whole in light of its purpose, and applying reason and public policy, “before the completion of . . . grade 10” means that the test was intended to be taken by

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tenth graders and taken one time to determine any needs of the students and any areas of remediation. Although the norm-referenced test is also used for accountability purposes, those purposes can also be met if the score of the repeat tenth grader is included in the accountability report each year the pupil repeats the tenth grade without retaking the test.¹

CONCLUSION

A review of the legislative history, reason, public policy, and the controlling statute, NRS 389.015, construed as a whole in light of its purpose would indicate that the Legislature did not intend repeat tenth graders to take the norm-referenced examination repeatedly for the same grade level. Taking the norm-referenced examination once as a tenth grader serves the purpose of the examination. Taking the examination again as a repeat tenth grader does not further the purpose of the statute. Accordingly, if a student is repeating tenth grade and has taken the test in a previous year as a tenth grader, such student has taken the examination before the completion of grade 10 and need not retake the examination administered pursuant to NRS 389.015.

Notwithstanding the review and interpretation of NRS 389.015 set forth herein, the Legislature may have to review NRS 389.015 and other provisions of the Education Reform Act relating to achievement and accountability in light of the new federal requirements regarding annual assessment tests of all students set forth in H.R. 1, "Leave No Child Behind."

¹ Public Law No.107-110 (2001) commonly referred to as H.R.1, "Leave No Child Behind," is a new federal law that attempts to improve education by requiring annual assessment tests of not less than ninety-five percent of each group of students who are enrolled in the school. Id. at (a)(2)(I)(ii). The groups of students that must be assessed include all elementary and secondary school students, students with disabilities, students with limited English proficiency, economically disadvantaged students, and students from major racial and ethnic groups. H.R.1 requires annual assessment tests of all students, not just students in grades 4, 8, 10, and 11. Id. at (a)(2)(A)(i), (a)(2)(F). Although the language of the state statute may not require repeat tenth graders to take the same examination repeatedly, federal law appears not to allow the same privilege without the severe consequence of losing federal funding.

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Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: CHARLOTTE MATANANE BIBLE
Assistant Chief Deputy Attorney General

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AGO 2002-25 PAROLE AND PROBATION; HEARINGS: The failure of the Department of Public Safety's Division of Parole and Probation (Division) to afford a parolee a preliminary inquiry hearing would not prevent the Nevada Board of Parole Commissioners (Parole Board) from proceeding with a final revocation hearing. A full and fair final revocation hearing would render moot the lack of procedural safeguards during the first phase of the revocation process. The Parole Board must consider and determine whether the procedural deficiency prejudicially affected the parolee's ability to contest the charges and offer mitigating evidence. The Division's withdrawal of a parole violation report does not prevent the Parole Board from conducting a final revocation hearing.

Carson City, June 3, 2002

Dorla M. Salling, Chairman, Nevada Board of Parole Commissioners, 1445
Hot Springs Road, Suite 108-B, Carson City, Nevada 89711

Dear Ms. Salling:

As Chairman of the Nevada Board of Parole Commissioners (Parole Board), you have requested an opinion from this office. Your question arises from the following underlying events. In December of 2001, a Nevada parolee was arrested in Utah on a retake warrant and transported to Nevada by a private contractor. Although he did not waive his right to a preliminary inquiry hearing, he was returned to the Nevada Department of Corrections (NDOC) and not afforded such a hearing. He was brought before the Parole Board for his revocation hearing on January 28, 2002. At the beginning of the hearing, the Nevada Department of Public Safety's Division of Parole and Probation (Division) withdrew its parole violation report. Regardless, the Parole Board decided to proceed with the hearing because the parolee was present and the Board wanted to consider whether modifications to his parole agreement were warranted.

QUESTION

Thus, the issue presented is may the Parole Board conduct a revocation hearing on a parolee who was arrested on a retake warrant, detained, not

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afforded his right to a preliminary inquiry hearing, and who had his parole violation report withdrawn by the Division?

ANALYSIS

Parolees are entitled to due process in parole revocation proceedings. See *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Pierre v. Wash. State Bd. of Prison Terms & Paroles*, 699 F.2d 471 (9th Cir. 1983); see also Op. Nev. Att’y Gen. No. 82-17 (August 26, 1982). The due process requirements addressed in *Morrissey* are set forth in NRS 213.1511-213.1517. There should have been a “reasonably prompt informal inquiry conducted by an impartial hearing officer near the place of the alleged parole violation or arrest to determine if there is a reasonable ground to believe that the arrested parolee has violated a parole condition.” Op. Nev. Att’y Gen. No. 82-17 at p. 3. Alternatively, there should have been a waiver of the preliminary inquiry. When there has been no preliminary inquiry and no waiver, the Parole Board should consider the prejudice to the parolee in proceeding with a final revocation hearing. As stated earlier by this office:

Generally, the failure to hold a preliminary inquiry or the failure to hold a timely preliminary inquiry, does not require reversal [of a revocation decision] absent a showing of prejudice. See e.g. *Collins v. Turner*, 599 F.2d 657 (5th Cir. 1979), *People v. Knowles*, 362 N.E.2d 1087 (Ill.App.Ct. 1977); *Wilson v. State*, 403 N.E.2d 1104 (Ind.Ct.App. 1980); *People v. Blakely*, 233 N.W.2d 523 (Mich.Ct.App. 1975); *Ewing v. Wyrick*, 535 S.W.2d 442 (Mo. 1976); *Richardson v. New York State Board of Parole*, 341 N.Y.S.2d 825 (App.Div.1973), aff’d 333 N.Y.2d 33, 347 N.Y.S.2d 179. The court explained in *Howie v. Commonwealth*, 283 S.E.2d 197, 200 (Va. 1981) that since the purpose of the preliminary inquiry is to

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determine if there is probable cause to detain a parolee or probationer, once a final revocation hearing is held, the need for a preliminary inquiry is obviated and its denial no longer has any relation to the parolee's/probationer's incarceration.

The lack of procedural safeguards during the first phase of the revocation process is also rendered moot by a full and fair final revocation hearing. An analogous situation to that presented by the two-stage revocation process in this regard exists with respect to the criminal process. In *Mayer v. Moeykens*, 494 F.2d 855 (2d Cir.) cert. denied, 417 U.S. 926 (1974), the defendant alleged in a petition for post-conviction relief that the "failure to afford him a probable cause hearing prior to his incarceration amounted to a deprivation of due process of law that must be redressed by the reversal of his conviction." *Id.*, 494 F.2d at 359. Noting that the defendant's incarceration was the result of his conviction rather than deficiencies at the preliminary stages of detention, the court held that it could not "remedy, retrospectively, a possible denial of a 'fundamental' right which has no bearing on * * * present incarceration." *Id.* Analogously, an offender's status after the final revocation hearing is a result of the finding of violations by the board/court, not the result of errors that may have occurred during the preliminary stages of the revocation process. See *Collins v. Turner*, *supra*. In

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order to obtain appropriate relief from an alleged deprivation of rights in the revocation process, the parolee/probationer must seek relief at the time the deprivation of rights is actually occurring. A final revocation hearing, adequate in all respects, guarantees the protections of Morrissey and Gagnon.

. . . .

The denial of a preliminary inquiry or the denial of some form of due process at the preliminary inquiry is not grounds for reversal of revocation absent a showing of prejudice. A full and fair final revocation hearing will remedy any deficiencies that may have occurred in the preliminary stages of the revocation process.

Op. Nev. Atty Gen. No. 82-17 at pp. 75-76.

In an analogous situation, *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), the United States Supreme Court dealt with the Bail Reform Act of 1984 which requires a timely detention hearing. The Court held that:

[F]ailure to comply with the first appearance requirement does not defeat the Government's authority to seek detention of the person charged. We reject the contention that if there has been a deviation from the time limits of the statute, the hearing necessarily is not one conducted "pursuant to the provisions of subsection (f)." There is no presumption or general rule that for every duty imposed upon the court or the

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Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent.

United States v. Montalvo-Murillo, 495 U.S. at 717. In *Montalvo-Murillo* the High Court considered the safety of persons in the community and the principle of harmless-error analysis in determining that an automatic release as a sanction for delay in holding a detention hearing was not appropriate.

It is axiomatic that due process “is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. at 481. In considering the prejudice to the parolee:

[T]he delay must have been caused by government action that was not the result of the probationer’s own criminal conduct. In addition, the delay must have prejudicially affected the probationer’s ability to contest revocation. Prejudice might result from delays causing probationers difficulty in contesting the alleged facts constituting a violation of their release conditions; hardship in finding and presenting favorable witnesses; or inability to produce evidence of mitigating circumstances which might result in continued probation despite the violation.

United States v. Wickham, 618 F.2d 1307, 1310 (9th Cir. 1979).

Based on the foregoing, the Parole Board should consider whether the parolee would be prejudiced by its proceeding with a final revocation hearing. The focus should be on whether the deficiency in the preliminary stages of the revocation process would prejudicially affect the parolee’s ability to contest the allegations and charges, including his ability to provide mitigating evidence.

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Since the Division is an arm of the Parole Board, the Parole Board may proceed with a final revocation hearing even if the Division withdraws its parole violation report. The High Court explained, “In deciding to grant, deny, or revoke parole, they act in a quasi-judicial capacity, as an arm of the sentencing judge.” *Sellars v. Procunier*, 641 F.2d 1295, 1302 n. 15 (9th Cir. 1981), cert. denied, 454 U.S. 1102 (1981). Correspondingly, the Division is an arm of the Parole Board. *See Morrissey v. Brewer*, 408 U.S. at 480. As such, the Division is responsible for advising the Parole Board of violations of conditions of parole. See NRS 213.1095(9). It also has the duty of investigating cases referred to it by the Parole Board. See NRS 213.1096(1). It arrests parolees for the Parole Board. See NRS 213.150(2) and 213.151(1). It is responsible for notifying the Parole Board of such arrests. See NRS 213.151(4)(b). Finally, it is responsible for submitting written parole violation reports to the Parole Board. *Id.* As the arm of the Parole Board, once the Division submits a report to the Board, the Parole Board may use it in the performance of its duties.

The Parole Board proceeded with the final revocation hearing primarily to consider whether modifications to the parole agreement were warranted. The parole was reinstated. Even if the parolee was not under arrest or detained on a violation charge, the Parole Board could have summoned him to appear. As this office earlier opined in Op. Nev. Att’y Gen. No. 82-17 (August 26, 1982) at pp. 10-12:

The apparent reason for requiring a preliminary inquiry was that the arrest and detention of the respondents pending final revocation proceedings amounted to an infringement of their liberty interests and the conditional liberty of a probationer or parolee cannot constitutionally be infringed without probable cause. Accordingly, where a parolee/probationer is not held in custody to await the final revocation hearing, there has been no loss of liberty, *Moody*, *supra* at 87, and the reason for requiring a preliminary hearing is eliminated.

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United States v. Sciuto, 531 F.2d 842 (7th Cir. 1976); *United States v. Tucker*, 524 F.2d 77 (5th Cir. 1975), cert denied 424 U.S. 966 (1975); *United States v. Strada*, 503 F.2d 1081 (8th Cir. 1974); *Curtis v. State*, 370 N.E.2d 385 (Ind.Ct.App. 1978); *State v. Malbrough*, 615 P.2d 165 (Kan.Ct.App. 1980); *Howie v. Commonwealth*, 283 S.E.2d 197 (Va. 1981).

Statutory law in Nevada appears to support this conclusion. NRS 213.1511 and NRS 176.216 require that a probable cause inquiry be conducted before a parolee/probationer is returned to the custody of the Nevada State Prison or the court for revocation of his parole/probation. However, when addressing the revocation process, NRS 213.151, NRS 213.1511, NRS 213.1513, NRS 213.1515, NRS 213.1517, NRS 176.215, NRS 176.216, NRS 176.217 and NRS 176.218 all make reference to the “arrested” parolee/probationer or his “continued detention.” Furthermore, NRS 213.1515 and NRS 176.218 state that the inquiring officer shall determine “whether there is probable cause to hold the parolee/probationer for a * * * hearing on * * * revocation.” (Emphasis added.) The clear implication is that the preliminary inquiry is mandated when a warrant or detainer has been lodged against the alleged violator. The resulting loss of liberty occasioned by the hold requires that a preliminary inquiry be conducted to justify the

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detention pending a final revocation hearing. However, where the parolee/probationer has not been detained in custody, the need for a preliminary inquiry is eliminated. . . .

A preliminary inquiry is not required if a parolee/probationer is not arrested or detained on a parole/probation violation. Due process requires that an informal preliminary inquiry be conducted to determine whether probable cause exists to justify the loss of liberty occasioned by arrest or detention of an alleged parole/probation violator pending final revocation proceedings. Where no liberty is lost, a preliminary inquiry as to probable cause to “hold” is not required.

Accordingly, the Parole Board could summon parolees to appear before it to consider parole agreement modifications. Here, the parolee was already before the Parole Board.

CONCLUSION

There is no presumption that for every deficiency in the revocation process there must exist a corollary punitive sanction. The failure of the Department of Public Safety’s Division of Parole and Probation (Division) to afford a parolee a preliminary inquiry hearing would not prevent the Nevada Board of Parole Commissioners (Parole Board) from proceeding with the final revocation hearing. A full and fair final revocation hearing would render moot the lack of procedural safeguards during the first phase of the revocation process. Generally, the failure to have a preliminary inquiry hearing would not preclude the conduct of a final revocation hearing or require reversal of a revocation absent a showing of prejudice. Thus, the Parole Board must consider and determine whether the procedural deficiency prejudicially affected the parolee’s ability to contest the charges and offer mitigating evidence. Finally, the Division is an arm of the Parole

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Board and its purported withdrawal of the parole violation report does not prevent the Parole Board from conducting a final revocation hearing.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JOE WARD, JR.
Senior Deputy Attorney General

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AGO 2002-26 COUNTIES; NEPOTISM: The hiring of the Churchill County Manager's daughter by the Planning Director would violate NRS 281.210.

Carson City, June 17, 2002

Nancy Lee Varnum, Legal Counsel, Commission on Ethics, 3476 Executive Pointe Way, Suite 16, Carson City, Nevada 89706-7946

Dear Ms. Varnum:

You have requested an opinion from this office regarding whether members of the Ethics Commission may make campaign contributions.

QUESTION

Are members of the Commission on Ethics prohibited from making campaign contributions?

ANALYSIS

The statute that creates the Commission on Ethics (Commission), delineates its composition, and lists the prohibited activities by the members is NRS 281.455. Subsection 5 states:

None of the members of the commission may:

- (a) Hold another public office;
- (b) Be actively involved in the work of any political party or political campaign;
- or
- (c) Communicate directly with a member of the legislative branch on behalf of someone other than himself or the commission, for compensation, to influence legislative action, while he is serving on the commission.

NRS 281.455(5)(b) was added to the statute in 1991 by Assembly 190 Bill (A.B. 190). Act of July 2, 1991, ch. 517, § 8.5, 1991 Nev. Stat. 1591.

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NRS 281.455(5)(b) prohibits Commission members from being actively involved in political campaigns or in the work of political parties. The statute does not directly address the issue of Commission members giving campaign contributions.

We agree with your conclusion that active involvement necessarily includes an obligation of time, energy, effort, and either mental or physical activity. In the realm of political campaigns, this may include influencing voters through personal contact such as walking precincts, telephoning, speaking engagements, and the like. Clearly, the statute prohibits Commission members from engaging in this type of activity.

Examining the functions of the Commission will assist us in reaching a conclusion in this matter. Among its other functions, the Commission exercises quasi-judicial powers when it conducts investigations and takes appropriate action regarding alleged violations of the Nevada Ethics in Government Law (Ethics Law), found in NRS chapter 281, by public officers and public employees. See NRS 281.465(1).

Although the Nevada Supreme Court has not directly ruled that the Commission exercises quasi-judicial powers, it is clear from the Court's decisions regarding other agencies that the Commission exercises such powers. The Court in *Knox v. Dick*, 99 Nev. 514, 517-18, 665 P.2d 267, 270 (1983) agreed with the trial court that the Clark County Personnel Grievance Board "was quasi-judicial in nature." The Court went on to state, "The guidelines for the Clark County Personnel Grievance Board . . . include the taking of evidence only upon oath or affirmation, the calling and examining of witnesses on any relevant matter, impeachment of any witness, and the opportunity to rebut evidence presented against the employee." *Id.* at 518. In 1947, the Court

. . . conceded that quasi judicial powers must necessarily be exercised by the Nevada state industrial commission in virtually every award that it makes. This is true of many administrative boards and of many administrative officers, and is so patent that neither the listing of

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illustrations nor the citation of authorities
is required.

Provenzano v. Long, 64 Nev. 412, 427, 183 P.2d 639, 646 (1947). In 1968, the Court stated, “Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints.” *Checker v. Public Serv. Comm.*, 84 Nev. 623, 634, 446 P.2d 981, 988 (1968).

The Court has “recognized a distinction between purely judicial acts and quasi-judicial administrative acts. As a result, administrative officials can exercise administrative powers which are quasi-judicial in nature without violating the separation of powers doctrine.” *Nevada Indus. Comm’n v. Reiser*, 93 Nev. 115, 120, 560 P.2d 1352, 1354-1355 (1977).

In 1991, A.B. 190 made other changes to the Ethics Law found in NRS chapter 281. One such change was to give the Commission subpoena powers. In support of that change, the Attorney General wrote a letter to the Chair of the Assembly Legislative Functions Committee stating: “It is recommended that the Commission be given the power of subpoena in order to provide the full quasi-judicial powers necessary to conduct a thorough adversarial hearing prior to the imposition of any civil sanction.” Hearing on A.B. 190 Before the Assembly Comm. on Legislative Functions, 1991 Legislative Session, 66 (March 5, 1991).

From the above analysis, it is clear that one of the functions of the Commission is to exercise quasi-judicial powers, which means the Commissioners function in a judicial capacity, at least when applying the Ethics Laws to public officers and public employees. The Nevada Code of Judicial Conduct, Canon 5, permits judges to make campaign contributions and states:

A judge or judicial candidate shall
refrain from inappropriate political
activities.

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A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2) and 5C(1) a judge or a candidate* for election or appointment to judicial office shall not:

(a) act as a leader or hold an office in a political organization*

(b) publicly endorse or publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization; or

(d) solicit funds for a political organization or candidate.

The Commentary to Canon 5A(1) states, “A judge or candidate for judicial office retains the right to participate in the political process as a voter and privately contribute to a candidate or political organization.”

This Canon allows judges to make campaign contributions. The standard that applies to judges should also apply to those who act in a quasi-judicial capacity, such as Commission members. If judges are allowed to make campaign contributions, members of the Commission, who act in a judicial capacity, should be allowed to do the same.

CONCLUSION

Members of the Commission on Ethics are not prohibited from making campaign contributions.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Senior Deputy Attorney General

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AGO 2002-27 LANDSCAPE ARCHITECTURE; LOCAL

GOVERNMENT; BUILDING CODE: The definition of the practice of landscape architecture set forth in NRS 623A.060 includes landscape grading. Appendix Subsection 3309.8 to the Clark County Building Code is in conflict with this statute because it does not allow the Clark County Building Department to approve a grading plan submitted by a registered landscape architect. The Clark County Building Code may not limit the practice of landscape architecture in a manner that conflicts with state law. Accordingly, Appendix Subsection 3309.8 to the Clark County Building Code is invalid and landscape architects are authorized to design landscape-grading plans.

Carson City, July 16, 2002

Vern L. Krahn, President, State Board of Landscape Architecture, Post Office Box 51780, Sparks, Nevada 89435-1780

Dear Mr. Krahn:

This is in response to your request for an opinion from this office concerning the design of grading plans in Clark County and the scope of practice of registered landscape architects under the provisions of NRS 623A.060.

QUESTION

Is Appendix Subsection 3309.8 to the Clark County Building Code in conflict with NRS 623A.060?

ANALYSIS

Your letter makes reference to the provisions of Clark County Building Code Appendix Subsection 3309.8, entitled Regular Grading Requirements, and to NRS 623A.060. These provisions will be discussed in the order presented.

Appendix Subsection 3309.8 is part of the Clark County Building Code adopted by ordinance of the Clark County Commission in 1997. The Building Code's adoption is referred to in Section 22.04.010 of the Building Code, which recites that the Clark County Commissioners adopted the 1997 Uniform Building Code (UBC), published by the International Conference of Building Officials (ICBO), as well as certain amendments to the UBC that are referred to as the 1997 Southern Nevada Building Code Amendments. The subsection at issue in this opinion is contained in the

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1997 Southern Nevada Building Code Amendments. Appendix Subsection 3309.8 pertains to grading issues and provides as follows:

Appendix Subsection 3309.8 Regular Grading Requirements.

All grading plans, engineered or regular, shall be prepared, stamped, and signed by [a] Nevada-registered Professional Engineer or where acceptable per Nevada State law, a Nevada-registered Professional Land Surveyor.

The Board of County Commissioners is authorized to enact all or part of a uniform building code. NRS 244.105. Compliance with the Building Code is required. NRS 278.585, NRS 278.610. The Building Department may withhold issuance of a permit if the plan is not in compliance with the Code. NRS 278.570, 278.610.

The Nevada Legislature has defined the practice of landscape architecture in NRS 623A.060, which provides in pertinent part as follows:

"Practice of landscape architecture" defined. "Practice of landscape architecture" means to provide or hold professional services out to the public, including, without limitation, services for consultation, investigation, reconnaissance, research, planning, design, preparation of drawings and specifications, and supervision, if the dominant purpose of the services is for the:

1. Preservation, enhancement or determination of proper land uses, natural land features, ground cover and planting, naturalistic and esthetic values,

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natural drainage, and the settings and approaches to buildings, structures, facilities and other improvements; and

2. Consideration and determination of issues of the land relating to erosion, wear and tear, lighting characteristics, and design of landscape irrigation, lighting and grading. [Emphasis added.]

The State Board of Landscape Architecture is authorized to issue to qualified persons a certificate of registration to practice as a landscape architect. NRS 623A.165. The Board reviews the education, training, and professional experience of applicants and administers a professional examination. The practice of landscape architecture has been subject to licensure in Nevada since 1975, Act of May 26, 1974, ch. 712, § 14, 1975 Nev. Stat. 1466. Landscape architects are design professionals. Grading is the fundamental construction skill of the landscape architect.¹ Controlling storm water runoff is a major factor in preparing a grading plan.² The landscape architect's capabilities must include grading competency as an integral part of the design process.³ Grading and drainage concepts are part of the educational requirements and are tested in state and national examinations for licensure. Grading design is taught in university programs and is a subject that is included by the Nevada State Board of Landscape Architecture in its licensing tests. By including grading within the statutory definition of the practice of landscape architecture, Nevada law comports with these professional treatises.

The Blue Book⁴, a standard reference work, also provides guidance on this point. The Blue Book is prepared by a committee of professional licensing boards, public officials, contractors, and building inspectors to

¹ Harlow C. Landphair, Fred Klatt Jr., *Landscape Architecture Construction*, 3d Ed. Prentice Hall, 1999, Ch. 3: Site Grading and Earthwork for Landscape Architects, p. 41.

² Harvey M. Rubenstein, *A Guide to Site Planning and Landscape Construction*, 4th Ed. John Wiley & Sons, 1996, Ch. 8: Site Drainage, p. 179.

³ Jot D. Carpenter, editor, *Handbook of Landscape Architectural Construction*, Landscape Architecture Foundation, 1976, Chapter 3, Landscape Grading Design, p. 54.

⁴ The Blue Book, *A Reference Manual of Nevada Law Governing Design for the Construction Industry*, 2000 Ed., p. 39.

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assist in solving design and construction problems in Nevada. On page 39, the following frequently asked question is posed with the following answer:

LA-6. May a landscape architect prepare and stamp site, grading and drainage plans as part of a submittal for a permit?

Yes, such plans may be prepared or stamped by architects, landscape architects, residential designers or civil engineers. Land surveyors may prepare or stamp site, grading, and drainage plans as long as they are for residential subdivisions containing four lots or less.

As noted, NRS 623A.060(2) includes grading within Nevada's statutory definition of the practice of landscape architecture. The Clark County Building Code, Appendix Subsection 3309.8, however, authorizes grading plans to be prepared, stamped and signed only by Nevada-registered engineers and land surveyors. Appendix Subsection 3309.8 thus precludes a Nevada-registered landscape architect from preparing a stamped and signed grading plan in Clark County and therefore limits the scope of practice of the landscape architect.

The Clark County Building Code may not independently limit the practice of landscape architecture in a manner that conflicts with state law. *See Falcke v. County of Douglas*, 116 Nev. 583, 588, 3 P.3d 661, 664 (2000) ("Because counties obtain their authority from the legislature, county ordinances are subordinate to statutes if the two conflict.") (citing *Lamb v. Mirin*, 90 Nev. 329, 332-333, 526 P.2d 80, 82 (1974) (that which is allowed by the general laws of a state cannot be prohibited by local ordinance)). *See also* Op. Nev. Att'y Gen. 95-03 (March 13, 1995).

CONCLUSION

The definition of the practice of landscape architecture set forth in NRS 623A.060 includes landscape grading. Appendix Subsection 3309.8 to the

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Clark County Building Code is in conflict with this statute because it does not allow the Clark County Building Department to approve a grading plan submitted by a registered landscape architect. The Clark County Building Code may not limit the practice of landscape architecture in a manner that conflicts with state law. Accordingly, Appendix Subsection 3309.8 to the Clark County Building Code is invalid and landscape architects are authorized to design landscape-grading plans.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES C. SMITH
Deputy Attorney General

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AGO 2002-28 INSURANCE; RETIREMENT; CLAIMS: A former firefighter's or police officer's claim for coverage of conclusively presumed occupational heart disease belongs to the insurance carrier for the claimant's former public employer. The former firefighter's or police officer's date of separation from service in such capacity and wages earned immediately prior to such date of separation form the basis upon which disability benefits are to be calculated.

Carson City, August 7, 2002

Susan Dunt, Risk Manager, Jim Fry, CWCP, CPL, Department of Administration, Risk Management Division, 400 West King Street, Suite 301, Carson City, Nevada 89703-4222

Dear Ms. Dunt and Mr. Fry:

You have requested an opinion from this office on two questions.

QUESTIONS

When a firefighter or police officer retires from public service, becomes employed by a private company, and is subsequently diagnosed with heart disease, does the claim for coverage belong to the previous public employer's insurance carrier or to the current employer's insurance carrier? Under these hypothetical facts, what is the date upon which wages are calculated?

ANALYSIS

A. Carrier liability for conclusively presumed heart disease

The Nevada statute that creates a conclusive presumption of occupational heart disease for firefighters and police officers is NRS 617.457, which provides in pertinent part:

1. Notwithstanding any other provision of this chapter, diseases of the heart of a person who, for 5 years or more, has been employed in a full-time continuous, uninterrupted and salaried occupation as a fireman or police officer in this state before the date of disablement are conclusively presumed

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to have arisen out of and in the course
of the employment.

. . .

Initially, we note that the Nevada Supreme Court has held that the conclusive presumption of occupational heart disease set forth in NRS 617.457(1) applies to any firefighter [or police officer¹] who was once employed in such occupation on a full-time continuous, uninterrupted and salaried basis for five years or more, but who was not so employed at the time the heart disease was diagnosed, despite the intervening length of time since separation from public service as a firefighter or police officer. Specifically, in *Gallagher v. City of Las Vegas*, 114 Nev. 595, 598, 959 P.2d 519, 521 (1998), the Court addressed the following issue:

The primary issue in these appeals is whether the presumption of NRS 617.457(1) applies to a firefighter who was once employed in the occupation on a full-time continuous, uninterrupted and salaried basis for five years or more, but is no longer so employed at the time of disablement.

In *Gallagher*, the firefighters' former public employer, the City of Las Vegas, asserted that the Nevada Legislature could not have intended to apply a presumption of occupational heart disease for firefighters who retired prior to disablement due to heart disease, and pointed out that, "there would be coverage for a firefighter who is employed when he is twenty and quits when he is twenty-five, then develops heart disease when he is sixty," *Gallagher*, 114 Nev. at 599, 959 P.2d at 521. The City thus argued that NRS 617.457(1) should thus be read to require a minimum five years of full-time continuous, uninterrupted and salaried service immediately preceding the time of disablement. *Id.*

¹ Although the Court in *Gallagher* addressed claims submitted by two retired firefighters, the conclusive presumption set forth in NRS 617.457(1), and thus the *Gallagher* decision, apply equally to retired police officers.

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In *Gallagher*, the Supreme Court reviewed the history of amendments to NRS 617.457 since its enactment in 1969. The Court specifically noted the conclusive presumption adopted by amendment to the statute in 1989 and concluded that, as long as five years of full-time continuous, uninterrupted and salaried employment were served, any intervening period of time following public employment was immaterial to the conclusive presumption, and that the City's position was unreasonable.² Specifically, the Court concluded that:

Because *Gallagher* and *Sorensen* were employed in full-time continuous, uninterrupted and salaried occupations as firefighters in this state for more than five years before they were disabled, their heart diseases are conclusively presumed to have arisen out of and in the course of their employment. NRS 617.457(1). *Gallagher* and *Sorensen* are therefore entitled to occupational disease benefits as a matter of law. We need not decide whether substantial evidence supports the appeals officers' determinations that *Gallagher* did not, and that *Sorensen* did not, prove a causal connection between disease and employment.

Gallagher, 114 Nev. at 601-602, 959 P.2d at 523.

The qualifying employment referred to in NRS 617.457(1) which gives rise to this conclusive presumption of occupational heart disease is the position held by the firefighter or police officer when he initially completes five years of "full-time continuous, uninterrupted and salaried occupation" in

² We note that while NRS 617.455(5) creates a conclusive presumption of occupational lung disease for firefighters and police officers who have served five years or more, and NRS 617.457(1) creates a conclusive presumption of occupational heart disease for the same employees, the Nevada Legislature also provided for an exception to the significant liability that arises as a result of these presumptions. Specifically, NRS 617.455(6) and 617.457(6) both provide that, "Failure to correct predisposing conditions which lead to [lung or heart] disease when so ordered in writing by the examining physician subsequent to the annual examination excludes the employee from the benefits of this section if the correction is within the ability of the employee."

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such position, or the position last held by the firefighter or police officer when he leaves such public service, whichever is later. Thus the conclusive presumption of occupation heart disease attaches the moment five years is completed, with the attendant liability for occupational disease attaching to the then-current employer and that employer's workers' compensation insurance carrier, or the carrier that provided insurance on behalf of the public employer at the time the firefighter or police officer discontinued such employment.

B. Date upon which disability benefits are calculated

In a typical case involving an occupational disease, benefits are calculated based upon the employee's wages earned immediately preceding the date of disability. *Mirage v. State, Dep't of Administration*, 110 Nev. 257, 871 P.2d 317 (1994). There are no reported Nevada cases that address the calculation of wages and benefits owed to an employee for a disability that arises due to a conclusively presumed heart disease associated with a former firefighter's or police officer's previous employment, and the Court in *Gallagher* was silent on this issue.

The Nevada Legislature, however, has deemed it appropriate to presume conclusively that an occupational heart disease arose as a result of employment as a firefighter or police officer, notwithstanding the fact that such employment may have significantly predated the actual date of diagnosis and disability. As we have concluded, liability for such conclusively presumed occupational disease properly lies with the former public employer. Logically then, and although the Nevada statutes do not specifically address the question, it appears that the Legislature also intended that disability benefits for a presumed occupational heart disease would be based upon the wages earned prior to the covered employee's separation from public service as a firefighter or police officer.

Such a conclusion affords some measure of predictability for employees covered under the conclusive lung and heart disease provisions of NRS 617.455(5) and 617.457(1), as well as for their former employers and the employers' insurance carriers. To conclude otherwise would leave open the possibility that a retired firefighter or police officer who later earned a significantly higher, or lower, salary in another occupation could claim a

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dramatically higher, or be left with a dramatically lower, disability benefit. We do not believe that the Nevada Supreme Court would endorse such an absurd result if presented with the question. *See, e.g., Moody v. Manny's Auto Repair*, 110 Nev. 320, 325, 871 P.2d 935, 938 (1994) (statutory interpretations should be in line with what reason and public policy would indicate the legislature intended, and should avoid absurd results).

CONCLUSION

A retired firefighter's or police officer's claim for coverage under NRS 617.455 or 617.457, which provide conclusive presumptions of occupational disease coverage for lung or heart diseases of firefighters or police officers, belongs to the insurance carrier under contract with the public police or fire employer at the conclusively presumed time of injury. The presumed time of injury will be either at the completion of the statutorily required minimum five years of full-time continuous, uninterrupted and salaried service, or at the time the firefighter or police officer separates from such public service in cases where separation occurs beyond the five-year minimum period. In no event does the claim belong to the insurance carrier for the current private employer of a former firefighter or police officer.

The former firefighter's or police officer's date of separation from service in such capacity and wages earned immediately prior to such date of separation form the basis upon which disability benefits are to be calculated.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: THOMAS M. PATTON
First Assistant Attorney General

GEORGE G. CAMPBELL
Deputy Attorney General

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AGO 2002-29 ECONOMIC DEVELOPMENT; LOCAL GOVERNMENT; ADMINISTRATIVE REGULATIONS: In the context of the Regulation of the Commission on Economic Development contained in Legislative Counsel Bureau File No. R078-02, the term “governing body of the local government” includes only governing bodies of the county and city or town, if any, in which a business applying for a partial abatement intends to locate or expand.

Carson City, August 15, 2002

Bob Shriver, Executive Director, Nevada Commission on Economic Development, 108 East Proctor Street, Carson City, Nevada 89701

Dear Mr. Shriver:

You have asked this office for an opinion on the following question:

QUESTION

What is the definition of “local government” as used in the Regulation of the Commission on Economic Development, Legislative Counsel Bureau (LCB) File No. R078-02?

ANALYSIS

NRS 360.750 allows a business to apply to the Commission on Economic Development (CED) for a partial abatement of one or more of the taxes imposed pursuant to chapter 361, 364A or 374 of the Nevada Revised Statutes. CED must approve an application for a partial abatement if it determines that all of the requirements have been satisfied. NRS 360.750(2). CED is required to provide notice of an application for a partial abatement to the governing body of the county and the city or town, if any, in which the person intends to locate or expand a business.

NRS 361.0685 and NRS 361.0687 provide conditions for certain partial abatements and, where applicable, provide that the duration of a partial abatement must be at least one year but not more than ten years.

On June 12, 2002, CED adopted and repealed regulations as contained in LCB File No. R078-02. CED amended chapter 360 of the Nevada Administrative Code (NAC) by adding a new section to it. CED also repealed NAC 231.010, 231.030, 231.040, and 231.050. These regulation changes were effective on July 18, 2002.

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Section 1(1)(b) of LCB File No. R078-02 provides that, except as otherwise provided in NRS 361.0685 or NRS 361.0687, CED may not approve a partial abatement of longer duration than the shorter of ten years or a “duration agreed upon in writing by the business receiving the partial abatement and the governing body of the local government whose tax revenue will be affected by the partial abatement.” Section 1(2) of LCB File No. R078-02 provides for a partial abatement to apply on the later of a certain date or a date “agreed upon in writing by the business receiving the partial abatement and the governing body of the local government whose tax revenue will be affected by the partial abatement.” NAC 231.050, which was repealed, contained similar provisions referencing agreements between the business and the governing body of the local government whose tax revenue will be affected. Neither the regulations of CED nor the statutes governing CED define “governing body of the local government.”

It is our understanding, from staff of CED, that CED has historically interpreted the phrase “governing body of the local government whose tax revenue will be affected” in its regulations, consistent with NRS 360.750(4), to mean the governing body of the county and city or town, if any, in which the business proposes to locate or expand. In addition, from the comments made during the hearing to adopt LCB File No. R078-02, it is clear that CED intended this phrase in the regulation to refer to the governing bodies of the county, and the city or town, if any, in which the business intends to locate or expand. Given that CED is the administrative body that adopted the language in question and it has been administering similar regulations for some time, its construction of the language should be given great deference.¹ See *Oliver v. Spitz*, 76 Nev. 5, 10, 348 P.2d 158 (1960) (“construction which is within the language of a statute and the rules promulgated thereunder should not be lightly disturbed by the courts, particularly a construction by the agency charged with its administration when such construction is intended to advance the purposes of a statute.”) (citations omitted); see also *State v. State Engineer*, 104 Nev. 709, 712, 766 P.2d 263 (1988) (agency interpretation of statute it administers given great deference).

¹ Of course, CED has the ability to amend the language of its regulations in accordance with NRS chapter 233B and its statutory grant of authority.

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CED's interpretation of this phrase in its regulation is reasonable and, more importantly, is consistent with its grant of authority under NRS 360.750, 361.0685, and 361.0687. It is reasonable to interpret the phrase "governing body of the local government whose tax revenue will be affected" to mean the body with the general legislative and fiscal powers of the particular locality in which the applicant business will be locating or expanding. This would be limited to the governing body of the county and the city or town, if any, where the business intends to locate or expand. The regulation would be too cumbersome, if not impossible, to administer if "local government" in the context of the phrase in question were interpreted to include each and every political subdivision of the State which could potentially be impacted by a partial abatement. The language of the regulation does not support such an interpretation. The context of the regulation refers to an agreement between the business and the governing body of the local government.

The reasonableness of this interpretation is bolstered by the language of NRS 361.750(4), which requires that notice of a hearing on an application for partial abatement be provided to the governing body of the county and city or town in which the business will be locating or expanding. Given the language of NRS 360.750(4), the language in question in the regulation necessarily means that only one, or possibly two, bodies could be involved.

Clearly, the Legislature intended that the bodies to be specifically encouraged to participate in the partial abatement process are the governing bodies of the county and city or town in which the business intends to locate or expand, but not each and every political subdivision or branch of government operating in those locations. Given that the Legislature has given CED some discretion in the duration of the partial abatement in NRS 361.0685 and 361.0687, and required CED to give specific notice only to the governing bodies of the county and city or town in which a business seeking a partial abatement intends to locate or expand, we believe that in the context of CED's regulations, CED's current interpretation of the phrase in question is appropriate. We also believe that this interpretation follows from the plain language of the regulation and, therefore, no change in the language of the regulation is necessary to effectuate the intent of CED in adopting this regulation. However, subject to applicable law, CED may always adopt a specific definition of terms used in its regulations.

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CONCLUSION

In the context of the Regulation of the Commission on Economic Development contained in Legislative Counsel Bureau File No. R078-02, the term “governing body of the local government” includes only governing bodies of the county and city or town, if any, in which a business applying for a partial abatement intends to locate or expand.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: TINA M. LEISS
Senior Deputy Attorney General

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AGO 2002-30 PUBLIC EMPLOYEES RETIREMENT BOARD; JUDGES:

Judges who do not stand for reelection until November 2004 or later may not become members of the Judicial Retirement Plan (JRP) or elect to receive benefits under the JRP at the same time as those judges who are elected, reelected, or appointed on or after November 5, 2002. Judges who will be eligible to opt into the JRP pursuant to NRS 1A.305 after January 1, 2003. However, judges whose effective date of membership in Public Employees Retirement System (PERS), with service as a judge, predates January 1, 2003, and who do not become eligible to opt into the JRP should be given the opportunity to take advantage of NRS 286.305(3), even after effective January 1, 2003. A judge who opts into the JRP from PERS may not purchase the higher benefit accrual rate of 3.4091 percent for his prior PERS service. Under the current language of NRS 1A.440(1), a judge in the JRP ceases to accrue service credit at 22 years, even if he has not reached the maximum benefit level of 75 percent of his average compensation. Judges in the JRP may not repay a refund of PERS contributions for service credit in the JRP.

Carson City, August 21, 2002

George Pyne, Executive Officer, Public Employees' Retirement System, 693
West Nye Lane, Carson City, Nevada 89703

Dear Mr. Pyne:

You have asked this office for an opinion on the following questions:

QUESTION ONE

May judges who will not run for reelection until November 2004 or later elect to participate in the Judicial Retirement Plan at the same time as judges elected or reelected in November 2002?

ANALYSIS

Assembly Bill 4 (A.B. 4) of the Seventeenth Special Session (June 14-15, 2001) establishes a judicial retirement system that certain supreme court justices and district court judges may participate in beginning January 1, 2003. The membership provisions of the Judicial Retirement Plan (JRP) are contained in NRS 1A.270–1A.300, inclusive. The provisions of the JRP were adopted by the Nevada Legislature on June 14, 2001, and each of these sections is effective January 1, 2003.

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NRS 1A.300 establishes the JRP and defines who is a member of the JRP. NRS 1A.300(1) provides as follows:

A plan under which all justices of the supreme court and district judges who are elected or appointed for the first time as either a justice of the supreme court or district judge on or after November 5, 2002, and who take office on or after January 1, 2003, and who do not elect to remain in the public employees' retirement system, if eligible to do so, must receive benefits for retirement, disability and death is hereby established and must be known as the judicial retirement plan.

NRS 1A.300(2) sets forth who will be a member of the JRP. It provides as follows:

Each justice of the supreme court or district judge elected or appointed for the first time as either a justice of the supreme court or district court judge on or after November 5, 2002, and who takes office on or after January 1, 2003, and who does not elect pursuant to NRS 1A.280 to remain in the public employees' retirement system, if eligible to do so, is a member of the judicial retirement plan.

Therefore, pursuant to NRS 1A.300, supreme court justices and district court judges who are elected or appointed for the first time on or after November 5, 2002, and who take office on or after January 1, 2003, must be members of the JRP unless they were members of the Public Employees' Retirement System (PERS) prior to their election and choose to remain members of PERS, if so eligible.

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NRS 1A.280 allows certain supreme court justices and district court judges (collectively referred to as judges) who are PERS members to elect to participate in the JRP. NRS 1A.280(1) provides as follows:

A person who is elected or appointed as a justice of the supreme court or district judge on or after November 5, 2002, and takes office on or after January 1, 2003, and who is a member of the public employees' retirement system established pursuant to chapter 286 of NRS on the date that he is elected or appointed may withdraw from the public employees' retirement system and become a member of the judicial retirement plan if he gives written notice to the board of his intention to withdraw from the public employees' retirement system and to become a member of the judicial retirement plan. Such notice must be given to the board within the time set forth in subsection 3 and must be given the first time that the justice or judge is elected or appointed while he is a member of the public employees' retirement system.

Pursuant to the unambiguous terms of NRS 1A.280(1), a judge who is a member of PERS on the date of his election or appointment does not have a right to become a member of the JRP unless and until he is elected or appointed to his office on or after November 5, 2002, and unless and until he takes that office on or after January 1, 2003. Therefore, a judge who does not stand for reelection until November, 2004, or later, cannot elect to become a member of the JRP at the same time as those judges who are elected or reelected on November 5, 2002. NRS 1A.280 makes it clear that *a judge must be elected or appointed to office on or after November 5, 2002, before a judge who is a member of PERS may opt to become a member of the JRP. Because not all current judges stand for reelection in*

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2002, *judges* elected or reelected on November 5, 2002, have the opportunity to opt to move into the JRP two or more years before other judges are afforded that option.

We recognize that the legislative subcommittee that studied the issue of a new judicial retirement plan may have intended that all judges who are members of PERS be given the option to join the JRP at the same time, regardless of when they were elected or reelected. However, the language of the statute is clear and unambiguous and results in different timing based upon when the judge stands for reelection. The different timing for when current judges are given an option to participate in the JRP, based on the date of election or reelection, was included in the bill because of constitutional concerns with allowing a judge to opt into the JRP during his term of office. Article 6, Section 15 of the Nevada Constitution prohibits an increase in a judge's compensation during the term for which he has been elected.

Pursuant to NRS 1A.270, certain judges who are not members of PERS will also have an option regarding the JRP. NRS 1A.270(2) provides as follows:

2. Each justice of the supreme court or district judge who is elected or appointed as a justice of the supreme court or district judge on or after November 5, 2002, and who previously has served as either a justice of the supreme court or a district judge must receive benefits for retirement, benefits for disability and survivor benefits pursuant to either:

(a) NRS 2.060 to 2.083, inclusive, or 3.090 to 3.099, inclusive, as those sections existed on November 5, 2002, if eligible to receive such benefits under such provisions; or

(b) The judicial retirement plan, if eligible to receive such benefits under the judicial retirement plan, whichever is most beneficial to the justice or judge or his survivor, as determined by the justice

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or judge at the time of his retirement or at the time at which he becomes disabled, or as determined by his survivor at the time of his death, unless he is a member of the public employees' retirement system and elects to remain a member pursuant to NRS 1A.280 if eligible to do so. A survivor may not change a determination that affects the survivor and which was made by a justice or judge pursuant to this section while the justice or judge was alive.

Under NRS 1A.270(2), certain judges may elect, at the time of retirement, between the JRP and the previously existing judicial retirement benefits. However, in order to be eligible for this election, the judge must have been elected or appointed on or after November 5, 2002, and must have previously been a judge. Therefore, if a judge retires after the JRP is established but was not elected or appointed on or after November 5, 2002, he will not have the option of electing to receive benefits under the JRP. As with the PERS judges, there must be an election or appointment of that particular judge on or after November 5, 2002, in order for the judge to be eligible for the JRP. This provision may have been included in the legislation because of Article 6, Section 15 of the Nevada Constitution.

CONCLUSION TO QUESTION ONE

Judges who do not stand for reelection until November 2004 or later may not become members of the JRP or elect to receive benefits under the JRP at the same time as those judges who are elected or reelected or appointed on or after November 5, 2002.

QUESTION TWO

May a judge who presently participates in PERS pursuant to NRS chapter 286 withdraw from PERS, as set forth in NRS 286.305, and receive

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benefits under NRS 2.060 or NRS 3.090 after the Judicial Retirement System (JRS)¹ becomes effective January 1, 2003?

ANALYSIS

Section 95 of A.B. 4 repeals NRS 286.305 effective January 1, 2003. NRS 286.305(3) provides as follows:

Any justice of the supreme court and any district judge who is a member of the system and who qualifies for a pension under the provisions of NRS 2.060 or 3.090 may withdraw from the public employees' retirement fund the amount credited to him in the account. No justice or judge may receive benefits under both this chapter and under NRS 2.060 or 3.090.

Pursuant to NRS 286.305(3), a judge may withdraw from the PERS fund if he "qualifies for a pension" under NRS 2.060 or NRS 3.090.

NRS 2.060(3) sets forth the pension that a supreme court justice is entitled to if the justice "qualifies for a pension under the provisions of subsection 2" and has served as a justice for more than five years. To determine whether a person qualifies for a pension under NRS 2.060, the person must meet the requirements set forth in NRS 2.060(2).

NRS 2.060(2) provides, in pertinent part, as follows:

Any justice of the supreme court who has served as a justice or judge of a district court in any one or more of those courts for a period or periods aggregating

¹ JRS refers to the system as a whole, including both the JRP and the provisions set forth in NRS 2.060–2.083, inclusive, and NRS 3.090–3.099, inclusive. NRS 1A.100(2). The JRP is the plan for benefits that is created by A.B. 4 and set forth in NRS 1A.300. A judge is a member of the JRS if he is not a member of PERS.

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5 years and has ended such service is, after reaching the age of 60 years, entitled to receive annually from the State of Nevada, as a pension . . .

NRS 3.090(3) sets forth the pension that a district court judge is entitled to if the judge “qualifies for a pension under the provisions of subsection 2” and has served as a judge for more than five years. To determine whether a person qualifies for a pension under NRS 3.090, the person must meet the requirements set forth in NRS 3.090(2).

NRS 3.090(2) provides, in pertinent part, as follows:

Any judge of the district court who has served as a justice of the supreme court or judge of a district court in any one or more of those courts for a period or periods aggregating 5 years and has ended such service is, after reaching the age of 60 years, entitled to receive annually from the State of Nevada, as a pension . . .

Pursuant to NRS 2.060(2) and NRS 3.090(2), judges do not qualify for pensions unless they have five years of service and have reached the age of 60. Therefore, a judge who is currently a member of PERS may withdraw from the fund pursuant to NRS 286.305(3), and thus terminate membership, if he has five years of service and has reached the age of 60. Letter Opinion to Vernon Bennett, Executive Officer of PERS, February 2, 1979.

The repeal of NRS 286.305 appears to remove the ability of PERS judges to choose between receiving benefits under NRS chapter 286 or under NRS 2.060 or 3.090. The Nevada Supreme Court has adopted the limited vesting theory which is premised on the principle that a pension is an element of compensation and thus part of the employment contract. *Public Emp. Ret. v. Washoe Co.*, 96 Nev. 718, 722 (1980).

A pension right may not be destroyed without impairing the contractual

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obligation of the public employer. However, prior to absolute vesting, pension rights are subject to reasonable modification in order to keep the system flexible to meet changing conditions, and to maintain the actuarial soundness of the system. To be sustained as reasonable, the modification must bear some material relationship to the purpose of the pension system and its successful operation; and any disadvantage to employees must be accompanied by comparable new advantages.

Id. (citations omitted). Therefore, a benefit may be reduced or eliminated if it is replaced by a commensurate benefit. Id. at 721, n. 6.

A.B. 4 was enacted in order to create a judicial retirement system that is funded through employer contributions on an actuarial reserve basis, as opposed to the previous judicial plans which are “pay as you go” plans funded by direct legislative appropriations. NRS 1A.100(1). The creation of the new system is clearly a reasonable and necessary step in order to maintain the soundness and viability of judicial pensions. Therefore, we must determine whether A.B. 4 adequately replaced the advantage set forth in NRS 286.305, which allowed a judge to withdraw from PERS and to receive benefits under NRS 2.060 or 3.090.

NRS 1A.280 gives judges who are members of PERS an opportunity to become members of the JRP if they are elected or appointed on or after November 5, 2002, and take office on or after January 1, 2003. These judges may transfer their PERS service credit to the JRP at the annual service credit multiplier of PERS, either 2.5 or 2.67 percent. NRS 1A.280(4). Thereafter, the judge would accrue service credit at the multiplier of the JRP, which is 3.4091 percent. NRS 1A.440(1). Once the judge has exercised his option to become a member of the JRP, he then will have a further option at the time of retirement to elect the benefit provided under the JRP or the benefit under NRS 2.060 or NRS 3.090, whichever is more beneficial to the judge, if he has served as a judge prior to November 5, 2002. NRS 1A.270(2). This

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election is essentially the same option as that contained in NRS 286.305, except that an intermediary step of moving into the JRP has been added. Therefore, for PERS judges who are elected or appointed on or after November 5, 2002, take office on or after January 1, 2003, and who have served as a judge prior to November 5, 2002, NRS 1A.270 and 1A.280 provides a benefit commensurate to that which was taken away by the repeal of NRS 286.305. The only difference is that the judge will be required to give notice of his withdrawal from PERS to the Retirement Board within the time frame set forth in NRS 1A.280(3) in order to be entitled, at the time of retirement, to choose between the JRP and the pensions set forth in NRS 2.060 and 3.090, as provided for in NRS 1A.270(2).²

The issue then becomes the benefit rights of those judges who are members of PERS and who retire after the effective date of the repeal of NRS 286.305, January 1, 2003, without having been reelected on or after November 5, 2002. With the repeal of NRS 286.305, these judges would seemingly not have the option to receive the potentially higher benefit provided for in NRS 2.060 or NRS 3.090 because they would not be eligible under NRS 1A.280 to move into the JRP. Thus, they would not be eligible, under NRS 1A.270, to make the election between the plan set forth in NRS chapter 286 or the plan set forth in NRS 2.060 and 3.090 at the time of retirement. As to these judges, the repeal of NRS 286.305 would be taking away a benefit without providing a commensurate benefit in its place. We believe this result would be contrary to the court's holding in *Public Employees' Retirement Board v. Washoe County*. Therefore, the repeal of NRS 286.305 should not be effective for those judges whose effective date of membership in PERS, with service as a judge, is prior to January 1, 2003, and who will not be eligible to opt into the JRP because they were not reelected on or after November 5, 2002. These judges should be given the opportunity to take advantage of the option set forth in NRS 286.305(3), even after January 1, 2003.

CONCLUSION TO QUESTION TWO

² It should be noted that with the repeal of NRS 286.305, all judges who take office for the first time on or after January 1, 2003, have no ability to elect to receive benefits pursuant to NRS 2.060 or NRS 3.090, even if they have previously been members of, or remain members of, PERS.

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The PERS judges who will be eligible to opt into the JRP, pursuant to NRS 1A.280, will no longer be able to take advantage of the option contained in NRS 286.305 because NRS chapter 1A provides these judges with a benefit commensurate with NRS 286.305(3). However, judges whose effective date of membership in PERS, with service as a judge, predates January 1, 2003, and who do not become eligible to opt into the JRP should be given the opportunity to take advantage of NRS 286.305(3), even after its repeal effective January 1, 2003, because otherwise, the contractual rights of these judges would be unlawfully abridged.

QUESTION THREE

May a judge who transfers from PERS to the new judicial retirement plan purchase the higher benefit accrual of 3.4091 percent for his prior PERS service?

ANALYSIS

When a PERS judge opts into the JRP, pursuant to NRS 1A.280, the prior PERS service must be transferred at the rate of its accrual in PERS. NRS 1A.280(4). Therefore, the transferred service will be credited in the JRP at either 2.5 percent, if accrued prior to July 1, 2001, or at 2.67 percent, if accrued on or after July 1, 2001. NRS 286.551.

NRS chapter 1A does have provisions regarding the purchase of service credit. Subject to certain conditions, a member of the JRP who has five years of creditable service may purchase up to five years of service. NRS 1A.310(1). However, there is no provision in NRS chapter 1A or elsewhere that would allow a judge in the JRP to pay to have his prior PERS service credit increased from 2.5 or 2.67 percent to the JRP rate of 3.4091 percent. Because the Legislature did not provide for judges to purchase the difference between the 2.5 or 2.67 percent accrual rate and the 3.4091 percent accrual rate, the Retirement Board has no authority to allow such a purchase.

CONCLUSION TO QUESTION THREE

A judge who opts into the JRP from PERS may not purchase the higher benefit accrual rate of 3.4091 percent for his prior PERS service.

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QUESTION FOUR

May a judge who transfers from PERS to the JRP accrue up to 75 percent of pay at retirement even if the total years worked under both PERS and the JRP exceeds 22 years?

ANALYSIS

NRS 1A.440(1) provides as follows:

Except as otherwise provided in this subsection, a monthly service retirement allowance must be determined by multiplying a member of the judicial retirement plan's average compensation by 3.4091 percent for each year of service, except that a member of the plan is entitled to a benefit of not more than 75 percent of his average compensation with his eligibility for service credit ceasing at 22 years of service.

Pursuant to the clear language of NRS 1A.440(1), the member's eligibility for service credit ceases at 22 years of service. If all of a judge's service credit is accrued under the JRP, he will reach 75 percent at 22 years of service. Likewise, under NRS 2.060 and NRS 3.090, a judge reaches a benefit of 75 percent at 22 years of service. However, because of the lower PERS multiplier, a judge in the JRP who has transferred service credit from PERS will not be able to reach a benefit of 75 percent at 22 years of service. For instance, a judge who transfers to the JRP with 21 years of PERS service would be limited to approximately 56 percent of his salary as a benefit under the JRP because he would cease accruing service credit at 22 years.³ This same judge could reach 75 percent if he remained in the PERS plan, but he would be required to work a total of almost thirty years to do so. This judge might also be eligible to receive a benefit of 75 percent if he elected, under

³ Depending on the effective date of his membership in PERS, a PERS judge may be able to reach a maximum benefit of 90 percent if he remains a member of PERS.

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NRS 1A.270(2), to receive the benefit as provided in NRS 2.060 or 3.090, if so eligible, if he had 22 years of service as a judge.

We do not believe that it was the intention of the Legislature to cease the accrual of a judge's service credit if he has not reached the maximum of 75 percent, even if he has attained 22 years of service. However, that is the result under the clear language of the current statute. Therefore, we suggest the Retirement Board seek a legislative change to this statute to simply provide that a member ceases accruing service credit once he has attained the benefit level of 75 percent of his average compensation.

CONCLUSION TO QUESTION FOUR

Under the current language of NRS 1A.440(1), a judge in the JRP ceases to accrue service credit at 22 years, even if he has not reached the maximum benefit level of 75 percent of his average compensation. We recommend that the Retirement Board seek a legislative change in order to allow all judges, even those with service credit earned as a PERS member, to reach the maximum benefit level of 75 percent of their average compensation.

QUESTION FIVE

May judges participating in the JRP who had previously taken a PERS refund repay that refund for credit in the JRP?

ANALYSIS

NRS chapter 286 gives members of PERS the ability to take a refund of employee contributions if certain conditions are met. NRS 286.430. The withdrawal of employee contributions cancels all membership rights and active service credits in PERS. NRS 286.430(8). If a member of PERS returns to the service of a public employer participating in PERS and remains a contributing member of PERS for six months, he may repay the withdrawn contributions with interest in order to restore his service credit. NRS 286.440.

In order to become a member of the JRP, a judge must withdraw from PERS. If a judge elects to withdraw from PERS, he will no longer be a

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member of PERS. Therefore, he will not be able to meet the requirements of NRS 286.440 for the repayment of withdrawn contributions in order to restore his service credit. NRS chapter 1A does not have any provision for the repayment of withdrawn contributions for former PERS members, or otherwise, for service credit in the JRP. Therefore, the Retirement Board does not have the ability to allow for the repayment of withdrawn PERS contributions by members of the JRP for service credit in the JRP. We believe a legislative change is required in order for a judge to be able to repay a PERS refund for credit in the JRP.

CONCLUSION TO QUESTION FIVE

Judges participating in the JRP may not repay a refund of PERS contributions for service credit in the JRP.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: TINA M. LEISS
Senior Deputy Attorney General

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AGO 2002-31 OPEN MEETING LAW: The calculation of three working days for the minimum notice required under the Open Meeting Law is done by including the first day of the time period and excluding the day of the meeting. The term “working day” is interpreted as being a 25-hour period, and includes every day of the week except Saturday, Sunday, and holidays declared by law or proclamation of the President.

Carson City, August 21, 2002

O. Kent Maher, Winnemucca City Attorney, Post Office Box 351,
Winnemucca, Nevada 89446

Dear Mr. Maher:

You have requested an opinion from this office regarding the application of the Open Meeting Law to a meeting scheduled at a time other than normal working hours between 8:00 a.m. and 5:00 p.m.

QUESTION

Whether the term “working day” as used in the Nevada Open Meeting Law context encompasses the entire twenty-four (24) hour period of the calendar day, or whether the term only encompasses the normal daytime working hours between 8:00 a.m. and 5:00 p.m.

ANALYSIS

NRS 241.020(3) sets forth the minimum public notice required for a meeting of a public body.

3. Minimum public notice is:

(a) Posting a copy of the notice at the principal office of the public body, or if there is no principal office, at the building in which the meeting is to be held, and at not less than three other separate, prominent places within the jurisdiction of the public body not later than 9 a.m. of the third working day before the meeting; . . .

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The Attorney General's Office has historically taken the position that when calculating the three working days, the day of the meeting should not be included. *See* OMLO 99-05 (March 19, 1999); OMLO 96-04 (April 3, 1996). This interpretation is in accordance with Nevada case law that applies NRCP 6(a) to computing periods of time prescribed in a statute. NRCP 6(a) provides:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included,

Traditionally, this rule has been applied to other statutory time requirements. *See Rogers v. State of Nevada*, 85 Nev. 361, 364, 455 P.2d 172, 173 (1969); *Watson v. Koontz*, 74 Nev. 254, 255-256, 328 P.2d 173, 174 (1958); *McCulloch v. Bianchini*, 53 Nev. 101, 110, 292 P. 617, 620 (1930). Accordingly, the general rule is that a meeting set for Thursday would need to have the notice posted on the preceding Monday, prior to 9:00 a.m.

In the case of a meeting held after 5:00 p.m. on Thursday, further interpretation of the phrase "working day" is necessary. The term "working day" is not defined under the Open Meeting Law, nor is it elsewhere defined in another statute. No Nevada case law was found defining the term. However, this office has taken the position that "[t]he term working day, while not defined in the statutes, is given a common meaning. Thus working days include everyday [sic] of the week except for Saturdays, Sundays and holidays declared by law or by proclamation of the President." OMLO 96-04 (April 3, 1996). Further support for this office's opinion is found in the dictionary definition of the term "working day." In RANDOM HOUSE AMERICAN COLLEGE DICTIONARY, the term is defined as: "1. the amount of time that a worker must work for an agreed daily wage. 2. a day ordinarily given to working (opposed to holiday). 3.

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the daily period of hours for working.” RANDOM HOUSE AMERICAN COLLEGE DICTIONARY (1963).

This definition indicates that a working day, in certain contexts, merely means a day given to working, as opposed to a holiday such as a Saturday, Sunday, or other legal holiday.

Additionally, in the context of a business day as related to banking, the court in another jurisdiction found that the term “business day” was used in contrast to Sundays and holidays. *Rock Finance Co. v. Central Nat’l Bank of Sterling*, 89 N.E.2d 828, 830 (Ill. App. Ct. 1950). The court refused to find that the term limited the business day to only those hours during which a bank may be open to the public. *Id.* Other jurisdictions defining the term “working days” have defined the term as the running of calendar days on which law permits work to be done, excluding Sundays and legal holidays. *See Sherwood v. American Sugar Refining Co.*, 8 F.2d 586, 588 (2d Cir. 1925); *The Olaf, Mikkelsen v. A Cargo of Sugar*, 248 F. 807, 810 (E.D. Penn. 1918).

Accordingly, the term “working day,” as used in the context of the Open Meeting Law, encompasses the entire 24-hour period, from midnight to midnight, and is not limited to the hours between 8:00 a.m. and 5:00 p.m.

CONCLUSION

The minimum notice required for a meeting of a public body pursuant to the Open Meeting Law is three working days. The calculation of the three working days is done by including the first day and excluding the day of the meeting. The time of the meeting is not relevant, as “working day” is interpreted as being a 24-hour period, from midnight to midnight, and the term “working day” is used to distinguish such a day from a Saturday, Sunday, or legal holiday. Therefore, the notice for a meeting on a Thursday at 5:30 p.m. must be posted no later than 9:00 a.m. on the preceding Monday.

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Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ELAINE S. GUENAGA
Senior Deputy Attorney General

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AGO 2002-32 PUBLIC RECORDS; CONFIDENTIALITY COUNTIES:

An ordinance is not a “law” for purposes of declaring a governmental record to be confidential pursuant to NRS 239.010(1). Washoe County may establish written standards to charge for the extraordinary use of personnel or technological resources necessitated by an unusually burdensome request for copies of public records. Those standards may include a reasonable time threshold to define “extraordinary use of personnel” and a definition of actual cost based on the hourly rate of pay of the staff member performing the retrieval and copying of a record.

Carson City, August 27, 2002

Richard A. Gammick, District Attorney, Office of the Washoe County
District Attorney, Washoe County Courthouse, Post Office Box
30083, Reno, Nevada 89520-3083

Dear Mr. Gammick:

You have requested an opinion from this office regarding public records and the fees that may be charged by Washoe County for the copying of public records.

QUESTION ONE

Is an ordinance a “law” for purposes of declaring a governmental record to be confidential pursuant to NRS 239.010(1)?

ANALYSIS

NRS 239.010(1) provides, “[a]ll public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person” [Emphasis added.]

A. The Donrey Balancing Test — “Public Record”

In determining whether a governmental record is “public” for purposes of NRS 239.010, the Nevada Supreme Court has recognized a common law limitation on the provisions of NRS 239.010. *In Donrey of Nevada, Inc. v.*

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Bradshaw, 106 Nev. 630, 798 P.2d 144 (1990), the court balanced the public interest in disclosure against the public interest served by nondisclosure to determine whether a police investigative report was a confidential record. This office has on several occasions applied the *Donrey* test to determine whether a record is public for purposes of NRS 239.010. Op. Nev. Att’y Gen. No. 90-15 (Oct. 15, 1990) (file of licensee kept by the State Board of Nursing); Op. Nev. Att’y Gen. No. 94-06 (April 7, 1994) (bid packets generated by the State Purchasing Division); Op. Nev. Att’y Gen. No. 97-06 (Feb. 11, 1997) (information concerning permit holder contained on permit to carry concealed weapon); and Op. Nev. Att’y Gen. No. 99-33 (Oct. 12, 1999) (information in file of person licensed by the Nevada Board of Psychological Examiners). Under the *Donrey* balancing test, a governmental record will be deemed to be public unless the public interest in disclosure is outweighed by the public interest in nondisclosure.

B. Defining “Law” for purposes of NRS 239.010

Pursuant to NRS 239.010(1), a public record may be deemed a confidential record if declared so by law. The term “law” is not defined in either NRS 239 or NAC 239. Your request has identified three possible governmental actions that might be considered “law” for purposes of NRS 239.010. These actions are legislative in nature and are enacted or adopted by various governmental entities as statutes, regulations, or ordinances.

1. Statutes

It is beyond argument that the term “law” includes a statute enacted by the Legislature. *Hardgrave v. State ex rel. Highway Dept.*, 80 Nev. 74, 389 P.2d 249 (1964). There are many provisions in the Nevada Revised Statutes where records have been made confidential by statute. See, e.g., NRS 284.4068(1) (results of drug screening test performed on State employee are confidential); NRS 353.205(3) (certain parts of the proposed State budget are confidential until the budget is submitted to the Legislature). Accordingly, it is clear that a governmental record made confidential by statute is made confidential by law, as the term is used in NRS 239.010.

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2. Regulations

Regulations are adopted by the State executive branch under authority of NRS 233B.0395–.120, inclusive. Your request notes that this office has opined that a regulation is a “law” for purposes of NRS 239.010. In Op. Nev. Att’y Gen. No. 2002-02 (Jan. 22, 2002), we referred to NAC 284.718, a regulation adopted by the Nevada Personnel Commission that declares certain records in the service jacket of classified State employees to be confidential, and stated that, “[p]ersonnel files are clearly not public records open to anyone who requests inspection because they are declared to be confidential by law.” The statutory authority for the adoption of NAC 284.718 is found in the broad language of NRS 284.155(1), which provides: “The director shall adopt a code of regulations for the classified service which must be approved by the [personnel] commission.”

Support is found in NRS 233B for the proposition that a properly adopted regulation should be considered a “law” for purposes of NRS 239.010. NRS 233B.040(1) provides, “[i]f adopted and filed in accordance with the provisions of this chapter, the following regulations have the force of law and must be enforced by all peace officers: (a) The Nevada Administrative Code;” [Emphasis added.]

In *City of Las Cruces v. Pub. Employee Labor Relations Bd.*, 917 P.2d 451, 452 (N.M. 1996), the New Mexico Supreme Court considered a provision in New Mexico’s Inspection of Public Records Act that provided: “[e]very person has a right to inspect any public records of this state except . . . as otherwise provided by law.” (Emphasis in original.) An employee’s labor group requested disclosure of certain records pertaining to a representation election conducted pursuant to New Mexico’s Public Employee Bargaining Act and was denied access by the Las Cruces Labor Management Relations Board (Board). The Board’s denial was based on a regulation (Section 1.17), which declared certain Board records relating to representative petitions to be confidential. The City of Las Cruces sought inspection of these records on the theory that the regulation did not constitute a “law” for purposes of the statutory exception. The court held:

Although Section 1.17 is a “regulation” promulgated by an administrative board,

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its status as a regulation in no way diminishes the legal force of its provision. “If not in conflict with legislative policy, legislatively authorized rules and regulations have the force of law.” We hold that “as otherwise provided by law” as used in [the Inspection of Public Records Act] contemplates a regulation properly promulgated to further the legislative intent behind the PEBA. (Citations omitted.)

Id. at 453.

We note that NRS 233B provides a measure of legislative oversight to assure that a regulation does not thwart legislative policy before the regulation is adopted. NRS 233B.067(1) provides in relevant part:

After adopting a permanent regulation, the agency shall submit . . . one copy of each regulation adopted to the legislative counsel for review by the legislative commission, . . . to determine whether the regulation conforms to the statutory authority pursuant to which it was adopted and whether the regulation carries out the intent of the legislature in granting that authority.

If the legislative commission finds that the regulation does not carry out legislative intent, the legislative commission may suspend the filing of the regulation and ultimately submit it to the next regular session of the Legislature for further review. NRS 233B.067(4)(b)–(c); NRS 233B.0675(3).

For these reasons, we believe that a properly adopted regulation, which carries out legislative intent and is within the agency’s statutory authority to adopt, constitutes a “law” for purposes of NRS 239.010.

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3. Ordinances

Whether an ordinance is considered a law is subject to some dispute. Professor McQuillan's comments show the lack of consistency of interpretation of the term "ordinance":

Strictly speaking, however, ordinances are not, in the constitutional sense, public laws but are merely local regulations or bylaws operating in a particular locality. Moreover, an "ordinance," unless the context is to the contrary, is not, technically speaking, an "act" or a "local law."

Nevertheless, although an ordinance is not a law in every sense, it is the equivalent of legislative action, and hence its employment in a constitution, statute, or charter may carry with it by natural, if not necessary, implication the usual incidents of such action. Accordingly, an ordinance may be a law in the sense in which the term "law" is used in a particular constitutional, statutory, or contractual provision. (Footnotes omitted.)

5 EUGENE MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 15.01 (3d ed. 1996).

This office has only rarely considered whether an ordinance is a law. In 1923, we had occasion to determine whether a city ordinance was a "law" under a statute that exempted corporations from payment of a license tax if the corporation was already required by law to pay a license tax. We stated:

The word "law" does not ordinarily include a "municipal ordinance." It is

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my opinion, therefore, where a corporation pays an annual license tax under or by virtue of any city or county ordinance, that it would be compelled to pay the license tax as provided for in section 1 of this Act, for the reason that the words “required by law” do not include ordinances enacted by a city or a county government. (Citations omitted, emphasis added.)

Op. Nev. Att’y Gen. No. 69 (June 8, 1923).

In 1982, this office considered whether autopsy protocols are confidential governmental records. Our analysis stopped short of holding an ordinance to be a “law” for purposes of NRS 239.010, but did recognize that an ordinance should be given some consideration in determining the public or confidential status of a record:

First, if a public record is declared confidential by law access may be properly denied to the public. NRS 239.010. Autopsy protocols have not been expressly declared confidential by law but confidentiality of the protocol, or detailed findings of the autopsy, does appear to be implicitly, if not explicitly, required by the county code. . . .

The coroners of the Counties of Clark, Douglas and Washoe, all governed by substantially similar ordinances, have consistently held that the medical information in their files, including autopsy reports, to be of a confidential nature with restricted release. The construction of an ordinance by officials entrusted with its administration, while

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not controlling, is entitled to great weight.

Op. Nev. Att’y Gen. No. 82-12 (June 15, 1982). The remainder of the opinion was dedicated to a discussion of the balancing of public policy issues, an analysis similar to but predating the analysis in the *Donrey* case. We concluded as follows:

An autopsy protocol is a public record, but is not open to public inspection upon demand, because disclosure would be contrary to a strong public policy; the Coroner Register is open to public inspection. Furthermore, maintaining the confidentiality of the medical information contained in the protocol accords with the intent of the governing ordinances and the administrative interpretation thereof.

Id.

Therefore, while we did not treat the subject ordinance as “law” for purposes of NRS 239.010, we did give weight to the ordinance and to the county’s application of it in balancing public policy considerations to determine the confidentiality of the subject medical information.

You have directed our attention to *Univ. and Cmty. Coll. Sys. of Nevada v. DR Partners*, 117 Nev. 195, 18 P.3d 1042 (March 9, 2001). The court analyzed NRS 281.005, which defines “public officer” in relevant part as, “[a] person elected or appointed to a position which: (a) Is established by the constitution or a statute of this state, or by a charter or ordinance of a political subdivision or this state; . . .” In holding that the System was not a political subdivision for purposes of NRS 281.005, the court stated:

The statute simply identifies different kinds of laws, which are enacted by different governmental bodies. It seems plain that political subdivisions within the

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meaning of NRS 281.005(1)(a) are local government entities such as counties or cities or towns. This interpretation of the phrase fits best with the statute's use of the terms "constitution," "statute," "charter" and "ordinance," which are laws enacted by state and local government entities for their own government.

DR Partners, 117 Nev. 204. The court did not hold that an ordinance (or a charter) is a "law" for all purposes. The court's reference in dicta indicates that an ordinance may be a form of law only for the purpose of the appointment of a public officer. Accordingly, we do not believe that the court's reference to an ordinance being a "law" for the limited purposes of NRS 281.005 necessarily requires a conclusion that the Nevada Supreme Court would also hold that an ordinance is "law" for purposes of declaring a governmental record confidential pursuant to NRS 239.010.

The weight of authority cited above leads us to conclude that an ordinance should not be considered a "law" as the term is used in NRS 239.010. A clearer statement by the Legislature as to what the term "law" encompasses would certainly be welcomed. In this regard, we note that the Legislature on previous occasions has considered a clarification of what is, and what is not, a public record. The following bills were introduced, but did not pass, in recent legislative sessions:

1. During the 1997 Legislative Session, Assembly Bill 289 provided at Section 9(1)–(2) for a definition of "public record" by providing specific examples and provided at Section 9(3) for specific examples of what the term "public record" does not include. We note that Section 9(2) is prefaced with, "[e]xcept as otherwise provided by specific statute or regulation, 'public record' includes" [Emphasis added.] Therefore had the bill passed and been signed into law in that form, an ordinance would not have sufficed to declare a governmental record confidential.

2. During the 1999 Legislative Session, Assembly Bill 102 provided at Section 11(1)–(2) for a definition of "public record" by again providing specific examples. Like the 1997 attempt, this bill, at Section 11(3), also provided for specific examples of what records are confidential. Had this bill

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passed, it also would have excluded certain records from the definition of “public record” if made confidential by “specific statute or regulation,” excluding the term “ordinance.”

3. Also during the 1999 Legislative Session, Assembly Bill 625 would have removed the “declared by law to be confidential” language from NRS 239.010 and would have replaced in part with the language set out in Section 10(2)(a):

Except as otherwise provided in subsection 3 and 8 of this act, a person may not inspect, copy or prepare an abstract or memorandum from a public record if:

(a) Access to the record is restricted or the record is declared to be confidential by a specific:

- (1) Federal statute or regulation;
- (2) Statute of this state or a regulation authorized by a statute of this state; or
- (3) Rule of evidence.

The proposed language of this bill, like the two others cited, would have clarified that a governmental record may not be made confidential by ordinance pursuant to NRS 239.010. We draw attention to these failed legislative amendments only to show that the Legislature has grappled with the issue of what governmental records should be confidential and not to fathom any legislative intent from the Legislature’s failure to enact these bills. “[T]he light shed by such unadopted proposals is too dim to pierce statutory obscurities.” *Tahoe Reg’l Planning Agency v. McKay*, 769 F.2d 534, 539 (9th Cir. 1985) (citation omitted).

Finally, you have advised that Washoe County by ordinance has already declared numerous kinds of governmental records to be confidential. Absent clear authority set forth in statute or regulation, whether or not the records are properly deemed confidential would depend on a case-by-case application of the *Donrey* balancing test.

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CONCLUSION TO QUESTION ONE

An ordinance is not a “law” for purposes of declaring a governmental record to be confidential pursuant to NRS 239.010(1). Whether or not a record that an ordinance declares to be confidential must be produced as a public record depends on a case-by-case application of the *Donrey* balancing test.

QUESTION TWO

May Washoe County establish written standards to charge for the extraordinary staff time necessitated by an unusually burdensome request for copies of public records?

ANALYSIS

You have described two situations where a governmental agency may be required to devote extraordinary staff time to retrieve and copy public records in response to a request made pursuant to NRS 239.010. Your question is whether the county may establish written standards to charge the requester for the value of the staff time expended in complying with the request.

NRS 239.055(1) provides in relevant part:

[I]f a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may . . . charge a fee for such extraordinary use The fee charged by the governmental entity must be reasonable and must be based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources.

The term “extraordinary use of personnel or technological resources” is not defined in the statute and is susceptible to several interpretations. Our charge is to ascertain the legislative intent as to the scope of the term.

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Cleghorn v. Hess, 109 Nev. 544, 548, 853 P.2d 1260, 1260 (1993). A review of extrinsic aids, such as the legislative history of the bill that created the term, is helpful in learning the Legislature's intent in the use of the term. *Del Papa v. Bd. of Regents of the Univ. and Cmty. Coll. Sys. of Nevada*, 114 Nev. 388, 394, 956 P.2d 770, 774 (1998). NRS 239.055 was enacted through the passage of Assembly Bill 214 of the 1997 Legislative Session. The bill's history does shed light on the Legislature's purpose in using the term. Dale Erquiaga, Deputy Secretary of State, described an example of an extraordinary use of a governmental entity's technological resources:

As an example, Mr. Erquiaga said if a person came into the Secretary of State's office and wanted a list of all corporations which had filed pursuant to Nevada Revised Statutes (NRS), Chapter 82, a program would have to be written to pull the information out of the database – which was extraordinary use of that office's technology.

Hearing on A.B. 214 Before the Assembly Committee on Government Affairs, 1997 Legislative Session, 7 (March 20, 1997). The legislative record therefore supports a conclusion that the term "extraordinary use," as it relates to technological resources, would include the necessity of having to write a computer program for purposes of information retrieval.

Some guidance as to the intended scope of the term "extraordinary use" as it relates to an agency's personnel is found in an exchange between Senator Raggio and Kent Lauer, Executive Director, Nevada Press Association:

Senator Raggio asked how Mr. Lauer would reply to Mr. Glover's concern regarding low costs of public records opening a door for nuisance behavior and tying up government. Noting although one could stop productivity of an office, the senator maintained, he did not agree with creating a disincentive to provide

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public information. Mr. Lauer replied a provision in the bill would provide for this situation. He recognized language stipulates requests requiring “extraordinary use of personnel” would provide the right to charge fees to cover “extraordinary use of personnel.”

Hearing on A.B. 214 Before the Senate Committee on Government Affairs, 1997 Legislative Session, 14 (May 28, 1997). It therefore appears that the authority granted to a governmental agency to recover actual costs for the “extraordinary use” of personnel in retrieving and copying public records may have at least in part been intended to make the agency whole in responding to nuisance inquiries or any inquiry that takes up an unusual amount of staff time.

You have asked us to review a proposed resolution for its compliance with NRS 239.055. We make the following observations. The resolution would define “extraordinary use of personnel” as being any public records request that would take an estimated use of staff time of more than 30 minutes to retrieve and copy the request.¹ The statute and its legislative history are silent on what length of time might constitute “extraordinary use,” but the history’s reference to nuisance requests and “tying up government” supports a conclusion that some time limit might reasonably be set to define “extraordinary use” of staff. The vast majority of public records requests are surely handled in under 30 minutes and requests of over 30 minutes are more likely to be of a nuisance type or to hinder governmental operations, so we believe that this 30 minute limitation reasonably relates to the purpose expressed in the statute’s legislative history.

NRS 239.055(1) requires that the fee for extraordinary use of staff must be reasonable and based on the cost the governmental agency “actually

¹ From the context of your question it is clear that any request taking less than 30 minutes would not be “extraordinary use” subject to the charges for staff time. Logically, Washoe County would therefore only begin charging for staff time after 30 minutes and not for the entire time it takes to comply with the request.

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incurs.”² The proposed resolution provides for the calculation of costs of the extraordinary use of personnel based on the actual hourly wage of the lowest compensated individual reasonably available and qualified to respond to the public records request. We believe that this standard comports with the definition of “actual costs” in chapter 239 of NRS as being: “the direct cost related to the reproduction of a public record.” NRS 239.005(1).

Finally, the proposed resolution provides that a requester be given an estimated fee in advance of the retrieving and copying of records involving the extraordinary use of staff time. We point out that NRS 239.055 requires that a governmental entity “shall inform the requester of the amount of the fee” before preparation of the requested material. The statute therefore requires the requester to be given a firm price for the project, and we suggest the proposed resolution be amended before adoption to comport with the statutory requirement.

CONCLUSION TO QUESTION TWO

Washoe County may establish written standards to charge for the extraordinary use of personnel or technological resources necessitated by an unusually burdensome request for copies of public records. Those standards may include a reasonable time threshold to define “extraordinary use of personnel” and a definition of actual cost based on the hourly rate of pay of the staff member performing the retrieval and copying of a record.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

² If an alternate method of copying records is faster or less expensive, such as a commercial printer, the use of governmental staff may not be reasonable under the statute.

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AGO 2002-33 CITIES AND TOWNS; ELECTIONS; INITIATIVE: In light of recent Nevada Supreme Court decisions with substantially similar issues, the ballot initiative dealing with the real property sales policy for the City of Mesquite appears to be administrative in nature. The Supreme Court has said that the electorate does not have the power to enact administrative acts through the initiative process. However, because no pre-election court intervention has taken place to address the legality of this particular initiative, neither the Mesquite City Attorney nor the Mesquite City Council has the authority to remove this duly qualified initiative petition from the ballot.

Carson City, September 11, 2002

Terrance P. Marren, City Attorney, City of Mesquite, 10 East Mesquite Boulevard, Nevada 89027

Dear Mr. Marren:

In a letter received August 27, 2002, you have requested an opinion from this office regarding a proposed ballot initiative on public land sales.

QUESTION

In light of recent Nevada Supreme Court decisions, may the ballot initiative dealing with the real property sales policy appear on the General Election ballot on November 5, 2002, in the City of Mesquite?

ANALYSIS

In the Nevada Constitution, the people of the State reserved to themselves “the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this constitution, and to enact or reject them at the polls.” Nev. Const. art. 19, § 2, ¶ 1. This power extends to cities. “The initiative and referendum powers provided for in this article [19] are further reserved to the registered voters of each county and each municipality as to all local, special and municipal legislation of every kind in or for such county or municipality.” Nev. Const. art. 19, § 4.

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In recent weeks, the Nevada Supreme Court has issued two opinions dealing with city initiatives, *Glover v. Concerned Citizens for Fuji Park*, 118 Nev. ___, 50 P.3d 546 (2002) and *Citizens for Train Trench Vote v. Reno*, 118 Nev. Adv. Op. No. 60 (Sept. 6, 2002). These cases provide guidance as to the question you raised.

“The initiative power applies only to legislation . . . it does not extend to administrative acts.” 118 Nev. Adv. Op. No. 60, at 9, *Forman v. Eagle Thrifty Drugs & Markets*, 89 Nev. 533, 537, 516 P.2d 1234, 1236 (1973). In determining which acts are legislative, and therefore the proper subject of an initiative petition, and which are administrative, and are not subject to initiative, the Court in the Reno Train Trench case stated the test it had discussed in the Fuji Park case.

[A] permissible legislative ordinance is one that creates a permanent law or lays down a rule of conduct or course of policy for the guidance of the citizens or their officers. . . . [A]n impermissible administrative ordinance is one that simply puts into execution previously-declared policies or previously-enacted laws, or directs a decision that has been delegated to the local government.

118 Nev. Adv. Op. No. 60 at 10. The Court further states, “regardless whether an initiative proposes enactment of a new statute or ordinance, or a new provision in a constitution or city charter, or an amendment to any of these types of laws, it must propose policy – it may not dictate administrative details.” *Id.*

In applying this test in the Fuji Park case, the Court concluded that the initiative, which proposed the enactment of an ordinance to preserve Fuji Park and the Carson City Fairgrounds in perpetuity, constituted an administrative act and was not subject to the initiative power of the people. 118 Nev. ___, 50 P.3d at 553. The Court stated, “Carson City’s decisions regarding its land are administrative, to be made in accordance with existing state statutes governing zoning, planning, redevelopment, preservation and

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sale of county property.” *Id.* at 550. The Court also stated, “the initiative does not set forth a new course of policy to guide citizens or their officers and agents regarding the way in which Carson City makes decisions about its real property.” *Id.*

The Court reached the same conclusion in the Reno Train Trench case, “the initiative prohibiting construction of a train trench within the existing right of way through downtown Reno exceeds the electorate’s initiative power because it concerns an administrative rather than a legislative act.” 118 Nev. Adv. Op. No. 60 at 16.

According to information you supplied, the proposed initiative you have asked this office to examine would mandate that all public land sales by the City of Mesquite be conducted through a properly noticed public auction or open bid process. If this proposed initiative is legislative in nature, then the initiative may appear as a ballot question on the November 5, 2002, General Election Ballot. If it is administrative, it may not.

The City of Mesquite is a general law city governed by the provisions of chapter 266 of the Nevada Revised Statutes (NRS). The powers of a general law city council are enumerated in NRS 266.260 - 266.335. Among these powers is a section entitled “Requirements for sale, lease or exchange of real property owned by city.” NRS 266.267. This scheme for land sales does not include either a public bid process or a public auction.

NRS 266.267(1) requires that property be appraised by a disinterested appraiser employed by the city before a city council can enter into a lease or contract for sale or exchange. The lease, sale or exchange must be at or above the current appraised value of the property, unless a public hearing is held and specific criteria is met. NRS 266.267(2) states when a city council may sell, lease or exchange real property for less than its appraised value.

It is this office’s opinion that, applying the test from the Reno Train Trench case, the proposed initiative is administrative in nature, not legislative, and therefore not properly subject to the initiative power. In our opinion the proposed initiative dictates administrative procedural details, it does not propose policy. We agree with your analysis that NRS 266.267(1) sets forth the legislative scheme for land sales in general law cities. It

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establishes a comprehensive procedure for the sale of public lands and certain notice requirements. The proposed initiative attempts to amend the procedures set forth in NRS 266.267, which is beyond the purview of the initiative process.

Finally, we note that no pre-election court intervention has taken place to address the legality of this particular initiative, as occurred in Fuji Park and the Reno Train Trench cases. Consequently, neither the Mesquite City Attorney nor the Mesquite City Council has the authority to remove this duly qualified initiative petition from the ballot.

CONCLUSION

In light of recent Nevada Supreme Court decisions with substantially similar issues, the ballot initiative dealing with the real property sales policy for the City of Mesquite appears to be administrative in nature. The Supreme Court has said that the electorate does not have the power to enact administrative acts through the initiative process. However, because no pre-election court intervention has taken place to address the legality of this particular initiative, neither the Mesquite City Attorney nor the Mesquite City Council has the authority to remove this duly qualified initiative petition from the ballot.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Senior Deputy Attorney General

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AGO 2002-34 PROPERTY; TAXATION; INDIANS; ASSESSORS: In the instance of a transfer of real property attached to tribal trust lands, the underlying property is exempt from taxation. Because the property itself is exempt from taxation, the county does not have the authority to impose a transfer tax on the transfer of that property. Additionally, the county may not tax any leasehold interest, possessory interest, beneficial interest or beneficial use of the land or buildings and improvements attached to the tribal trust land.

Carson City, October 2, 2002

Leon Aberasturi, Lyon County District Attorney, 31 South Main Street,
Yerington, Nevada 89447

Dear Mr. Aberasturi:

You have requested an opinion from this office on issues regarding real estate transactions involving the Yerington Paiute Tribe, which may impact the transfer tax pursuant to NRS chapter 375 and property taxes pursuant to NRS chapter 361.

FACTUAL BACKGROUND

The questions arose in relation to the attempt to record a document with the Lyon County Recorder involving a transaction between the Yerington Paiute Tribal Housing Authority (YPTHA) and two private individuals. The document sought to be recorded was entitled "Grant, Bargain and Sale Deed." The document stated it evidenced a conveyance to Richard Bailey and Rita Bailey of a single-family residence and improvements located above ground on real property situated in the Yerington Paiute Tribal Colony and Reservation. The conveyance of the single-family residence and improvements is subject to the 40-year leasehold estate held by the Baileys as lessees of the land from the YPTHA.

The Yerington Paiute Tribe (Tribe) is the owner of the lands held in trust from the United States by the Tribe. The Tribe has leased the land to the YPTHA. The YPTHA has then subleased the land to the individuals, the Baileys, and also sold to the Baileys the single-family residence and improvements above the ground on the property.

QUESTION ONE

Is the transfer tax, pursuant to NRS chapter 375, due on the recordation of the Grant, Bargain and Sale Deed?

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ANALYSIS

NRS 375.020 imposes a transfer tax on each deed by which lands, tenements, or other realty is conveyed to another person if the consideration or value of the interest or property conveyed exceeds \$100. A “deed” is defined as:

. . . every instrument in writing, except a last will and testament, whatever its form, and by whatever name it is known in law, by which title to any estate or present interest in real property, including a water right, permit, certificate or application, is conveyed or transferred to, and vested in, another person, but does not include a lease for any term of years, an easement, a deed of trust or common law mortgage instrument that encumbers real property, an affidavit of surviving tenant or a conveyance of a right of way.

NRS 375.010(1)(b).

The Grant, Bargain, and Sale Deed evidences the conveyance of an interest in real property, the real property being the single-family residence and improvements above the ground. While the document controlling the possession of the land is a lease between the parties, the transfer of the house and other improvements above ground appears to be a conveyance of real property, and thus would be subject to the transfer tax, unless an exemption applies.

In the documents submitted with your opinion request are copies of correspondence between your office and the attorney for the Tribe. It is claimed by the Tribe’s attorney that there is an exemption that applies to the transaction that would exempt the recordation of the Grant, Bargain, and Sale Deed from the transfer tax. There is an exemption for transfers to the United States. NRS 375.090(2). The statute formerly also exempted transfers from

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the United States. However, in 2001 that section was amended to remove the exemption for transfers from the United States.

Because the transfer is from a tribal entity to individuals, even if tribal members, it appears at first blush that no express statutory provision appears to exempt this transaction from the transfer tax. However, the issue of tribal sovereignty arises in dealing with transactions involving tribes, tribal entities, and tribal members, and case law indicates that the transfer would be exempt from taxation, as the property is still held by the United States. The United States Supreme Court has held that a state may not impose a tax on Indian tribal or trust land, whether the beneficial owner is an Indian or a tribe. *The Kansas Indians*, 72 U.S. 737 (1867); *McCurdy v. United States*, 264 U.S. 484 (1924). Permanent attachments to land, such as a house, a fence, or a well are considered to be part of the land. Therefore, these improvements cannot be taxed when they are attached to trust land. *United States v. Rickert*, 188 U.S. 432 (1903). Accordingly, neither the underlying land nor the single-family residence and improvements located above the ground, even where separately conveyed, are subject to property taxes.

The next element to analyze is whether the transfer tax can still be imposed, as it is not a tax on the property itself but on the transfer. Case law indicates, however, that the transfer tax can only be imposed when the property being transferred is not exempt from taxation. In the case of *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), the United States Supreme Court analyzed whether certain types of property that were part of estates of members of the Five Civilized Tribes resident in Oklahoma were subject to Oklahoma's estate tax. The Court held that lands Congress has exempted from direct taxation by a state are also exempt from estate taxes. *Id.* at 611. By analogy to the estate tax, it is only lawful to impose Nevada's real property transfer tax on the transfer of property if the property itself is not exempt from taxation. In this case, as the property itself is exempt from taxation, then the transfer of the property is also exempt from taxation.

Accordingly, no transfer tax may be imposed based upon the document being recorded with Lyon County, as the County does not have the authority to tax the underlying property, so it does not have the authority to tax the transfer of that property.

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CONCLUSION TO QUESTION ONE

In the instance of a transfer of real property attached to tribal trust lands, the underlying property is exempt from taxation. Because the property itself is exempt from taxation, the county does not have the authority to impose a transfer tax on the transfer of that property.

QUESTION TWO

May the county impose property taxes on leasehold interests, possessory interests, beneficial interests, or beneficial uses of property transferred from a tribal entity to individuals, and on a leasehold estate where the property is owned by the tribe?

ANALYSIS

NRS 361.157 provides, in applicable part:

1. When any real estate or portion of real estate which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a natural person, association, partnership or corporation in connection with a business conducted for profit or as a residence, or both, the leasehold interest, possessory interest, beneficial interest or beneficial use of the lessee or user of the property is subject to taxation to the extent the:

(a) Portion of the property leased or used; and

(b) Percentage of time during the fiscal year that the property is leased by the lessee or used by the user, . . . can be segregated and identified. The taxable value of the interest or use must be determined in the manner provided in

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subsection 3 of NRS 361.227 and in accordance with NRS 361.2275.

2. Subsection 1 does not apply to:

. . . .

(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;

The language of this statute indicates that the leasehold interest, possessory interest, beneficial interest, or beneficial use of property of any Indian or of any Indian tribe, band, or community, where the property is held in trust by the United States or is subject to a restriction against alienation by the United States, may not be taxed by the county. This means that property taxes may not be imposed on any leasehold interest, possessory interest, beneficial interest, or beneficial use of the land at issue here, clearly owned by the tribe, held in trust by the United States.

Regarding the single-family residence and improvements above ground, based upon the analysis above, which indicates that such buildings and improvements, when attached to tribal trust lands, are considered part of such lands and are not subject to property taxes, the prohibition against taxation would also apply to any leasehold interest, possessory interest, beneficial interest, or beneficial use of the buildings and improvements.

CONCLUSION TO QUESTION TWO

Based upon the underlying facts of the subject real estate transaction, Lyon County may not impose property taxes on any leasehold interest, possessory interest, beneficial interest, or beneficial use of land or buildings and improvements attached to land that is owned by a tribe and held in trust by the United States.

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Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ELAINE S. GUENAGA
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-35 ATTORNEYS; CLARK COUNTY; EMPLOYEES: A private attorney or law firm cannot be considered an “employee” or “officer” of the county for the purpose of requiring the county to provide a defense or indemnity for claims or suits for damage filed against the law firm resulting from its assistance to the Clark County Public Guardian in guardianship proceedings. A law firm is not the “official attorney” for the Public Guardian or Clark County. NRS 41.0338(2).

Carson City, October 3, 2002

Stewart L. Bell, Clark County District Attorney, Post Office Box 552215,
Las Vegas, Nevada 89155-2215

Dear Mr. Bell:

You have asked the opinion of this office on the following:

QUESTION

Whether a private attorney or law firm can be considered an “employee” or “officer” of the county for the purpose of requiring the county to provide a defense or indemnity for claims or suits for damages filed against the law firm resulting from its assistance to the Clark County Public Guardian in guardianship proceedings.

ANALYSIS

The Public Guardian has the authority to retain attorneys to assist her in court proceedings pertaining to guardianships. Specifically, NRS 253.215 states:

When necessary for the proper administration of a guardianship, a public guardian may retain an attorney to assist him, rotating this employment in successive guardianships among the attorneys practicing in the county who are qualified by experience and willing to serve. The attorney’s fee must be paid from the assets of the ward.

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Your letter indicates there is no formal agreement for the employment of the attorneys; there is only correspondence directing particular cases to a rotating list of attorneys.¹ As indicated by NRS 253.215, the attorney is paid out of the ward's estate upon approval by the court. You also state that neither Clark County nor the Public Guardian controls the hours and location of employment and that, although the Public Guardian makes decisions affecting the outcome of the case, they are akin to the decisions a client would make when being assisted by counsel. The Public Guardian does not supervise the attorney as to how he or she does the legal work or how it is presented.

One of the firms has been sued in an action arising from its assistance to the Public Guardian in guardianship proceedings. The firm has demanded that Clark County provide for its defense and indemnity. As stated in your letter, the firm contends it is:

- a. An "official attorney" as defined by NRS Chapter 41.0338(2), as it is the authorized legal representatives of the Clark County Public Guardian; or
- b. An "employee" of the County in much the same way as the CASA volunteers were considered district court employees in the Attorney General's Opinion (October 2, 1991)."

The definition of "official attorney" in NRS 41.0338(2) is as follows:

The chief legal officer or other authorized legal representative of a political subdivision, in an action which involves a present or former officer or employee of that political subdivision or a present or former member of a local board or commission.

¹ In the future, it may be in Clark County's best interest to reduce the terms of the agreement with private attorneys or law firms to writing, and specifying that there is no employee/employer relationship.

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The law firm assisting the Public Guardian in guardianship proceedings cannot be considered the “official attorney” under this definition. The law firm was not a legal representative of a political subdivision; rather its assistance was for the proper administration of a guardianship. Further, the definition of “official attorney” included in chapter 41 of the NRS generally deals with tort actions against the state, its political subdivisions, and their respective offices and employees.

NRS 41.0339 specifies the circumstances under which the official attorney provides a defense. It states, in pertinent part, that the official attorney provides a defense “in any civil action brought against that person.” The law firm, in this instance, was not the official attorney, as its task did not include defending the Public Guardian in a civil action brought against her.

The political subdivision in this case is Clark County and the official attorney is the Clark County District Attorney. Were the Public Guardian sued as part of a civil action, it would be the duty of the Clark County District Attorney to provide her defense. The role of the law firm, however, was to provide assistance to the Public Guardian in the administration of a ward’s estate in a guardianship proceeding, not to represent the Public Guardian or Clark County. Accordingly, the law firm is not the official attorney of Clark County as defined under NRS 41.0338(2).

Can the law firm be considered an employee of Clark County? An essential element of the employer/employee relationship is the right of control over the manner or method of doing the work. *Nat’l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 657, 584 P.2d 689, 691 (1978). *See also Martarano v. United States*, 231 F. Supp. 805 (D. Nev. 1964). The issue is grounded in the common law doctrine of respondeat superior, whereby the “master” is responsible for the acts of the “servant” only if the servant is under the control of the master.

A number of factors are routinely employed by the courts to determine whether the employer/employee relationship exists. The common law factors are set forth in RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958), as follows:

In determining whether one acting for
another is a servant or an independent

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contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relationship of master and servant; and
- (j) whether the principal is or is not in business.

Although the other factors are to be considered, the RESTATEMENT provides that the right to control is the determinative factor.

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The Nevada court used similar factors in *Clark County v. SIIS*, 102 Nev. 353, 354, 724 P.2d 201, 202 (1986), to determine whether an employer/employee relationship exists for purposes of workman's compensation. Those factors are:

- (1) the degree of supervision;
- (2) the source of wages;
- (3) the existence of a right to hire and fire;
- (4) the right to control the hours and location of employment; and
- (5) the extent to which the workers' activities further the general business concerns of the alleged employer.

In applying the factors to the facts of this case, it is clear that neither Clark County nor the Public Guardian have the right to control the law firm or its attorneys. Clark County and the Public Guardian do not direct the law firm how to prepare or present a case. Clark County and the Public Guardian do not have any right to control the hours worked by the law firm or its attorneys, and they do not control the location where the work is performed. The work performed by the law firm requires specialized education and knowledge. The Public Guardian is only one of a number of clients assisted by the law firm.

The Nevada Supreme Court, in *SIIS v. E G & G Special Projects*, 103 Nev. 289, 738 P.2d 1311 (1987),² examined the claim by an attorney that he was the employee of a client for workman's compensation purposes. The Court wrote: ". . . an attorney should not be considered the statutory employee of each of his occasional clients because clients generally do not control the hours the attorney works or the attorney's performance." *E G & G Special Projects*, 103 Nev. at 292, 738 P.2d at 1313.

Further, the statute giving the Public Guardian the authority to retain an attorney to assist in a guardianship proceeding does not authorize her to hire and fire an attorney. The guardian must rotate employment of attorneys in successive guardianships among the attorneys practicing in the county who

² When Shepardized on LEXIS, LEXIS indicates the publisher withdrew this decision. However, the Nevada Supreme Court recently cited the case. A telephone call to the Nevada Supreme Court Clerk's Office revealed that the Court has not withdrawn the decision and the notation on LEXIS appears to have been in error.

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are qualified by experience and willing to serve. The law firm is paid for its services out of the estate of the guardianship. The law firm is not paid by Clark County or the Public Guardian. If there is no money in the estate of the ward, the law firm does not get paid.

These facts are easily distinguishable from the facts involving Court Appointed Special Advocates (CASA) volunteers that were the subject of Op. Nev. Att’y Gen. No. 91-7 (October 2, 1991). In the first instance, CASA are volunteers, while the law firm was paid for its services out of the estate of the ward. The CASA volunteers’ activities are controlled and directed by the district court. The law firm’s activities were not controlled or directed by Clark County or the Public Guardian. The CASA volunteers were appointed to cases by the court and, when their work was finished, they were relieved by the court. The law firm was part of a rotating list of attorneys assigned to assist the Public Guardian. The CASA volunteers are not engaged in a distinct occupation or business, the law firm is.

Based on the above analysis, the law firm cannot be considered the employee of Clark County or the Public Guardian. Since the law firm is not an employee, Clark County cannot be required to provide a defense or indemnification for damages resulting from the law firm’s assistance in guardianship proceedings.

CONCLUSION

Any law firm selected in rotation by the Public Guardian assists the Public Guardian with guardianship proceedings. The law firm does not represent the Public Guardian in defense of a civil action brought against her. The law firm, therefore, is not the “official attorney” for the Public Guardian or Clark County. Neither Clark County nor the Public Guardian exercise sufficient control over the law firm for the law firm or its attorneys to be considered an employee. A private attorney or law firm cannot be considered an “employee” or “officer” of the county for the purpose of requiring the county to provide a defense or indemnity for claims or suits for damages filed against the law firm resulting from its assistance to the Clark County Public Guardian in guardianship proceedings.

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: GINA C. SESSION
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-36 CANDIDATES; EMPLOYEES; ATTORNEYS GENERAL:

The Attorney General is the legal advisor on all matters arising within the executive department of state government, and is not statutorily authorized to render an opinion to members of the Nevada State Legislature. Such duty falls upon the Legislative Counsel. Cases involving possible application of the Hatch Act are very fact specific, and a state or local employee's reliance upon the advice of their legal counsel generally does not excuse a violation of the Hatch Act. An employee must resolve any doubt concerning application of the Hatch Act by requesting an opinion from the United States Office of Special Counsel.

Carson City, October 4, 2002

Assemblywoman Kathy McClain, 107 Greenbriar Townhouse Way, Las Vegas, Nevada 89121-2456

Dear Assemblywoman McClain:

You recently inquired as to this office's opinion concerning possible application of the Hatch Political Activity Act ("Hatch Act") in light of the fact that you are employed by Clark County and are a candidate for the Nevada State Legislature.

QUESTION

Does a violation of the Hatch Act arise based upon your employment with Clark County and your candidacy for the Nevada State Legislature?

ANALYSIS

Initially, we note that this office is the legal advisor on all matters arising within the executive department of state government, and is not statutorily authorized to render an opinion to a member of the Nevada State Legislature. NRS 228.110. The duty to provide a legal opinion to a member of the State Legislature falls upon the Legislative Counsel. NRS 218.695.

In that regard, we have been provided with a copy of legal memorandum that provides a general overview of the Hatch Act, which was prepared January 2, 2001, by Senior Deputy Legislative Counsel Kevin Powers and addressed to Legislative Counsel Brenda Erdoes. That memo is enclosed and notes at page 2 that cases involving the Hatch Act are very fact specific, and that a state or local employee's reliance upon

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the advice of their legal counsel generally does not excuse a violation of the Hatch Act. The memo further notes that, instead, an employee must resolve any doubt by requesting an opinion from the United States Office of Special Counsel, the federal agency that investigates and charges alleged violations of the Hatch Act, and that the failure of an employee to request such an advisory opinion from the U.S. Office of Special Counsel is an aggravating factor weighed by the United States Merit Systems Protection Board to determine whether a violation of the Hatch Act warrants removal of the employee from his or her employment.

CONCLUSION

It is not appropriate for this office to provide an opinion on this topic, as it is not statutorily authorized to render an opinion to members of the Nevada State Legislature. Moreover, cases involving possible application of the Hatch Act are very fact specific, and a state or local employee's reliance upon the advice of their legal counsel generally does not excuse a violation of the Hatch Act. An employee must resolve any doubt concerning application of the Hatch Act by requesting an opinion from the United States Office of Special Counsel.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By : THOMAS M. PATTON
First Assistant Attorney General

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MEMORANDUM

DATE: January 2, 2001

TO: Brenda J. Erdoes, Legislative Counsel

FROM: Kevin C. Powers, Senior Deputy Legislative Counsel

SUBJECT: Hatch Political Activity Act

INTRODUCTION

This memorandum is intended to provide a general overview of the Hatch Political Activity Act, which is commonly known as the Hatch Act. 5 U.S.C.A. §§ 1501-1508 (West 1996). The Hatch Act prohibits certain employees of the executive branch of state or local government from engaging in certain partisan political activity, such as being a candidate for the state legislature.¹ Because the Nevada Legislature is a citizen-legislature, it is possible that the principal employment of some members of the Legislature may be as employees of the executive branch of state or local government. Therefore, it is possible that some members of the Legislature may be subject to the Hatch Act.

The first part of this memorandum contains a brief discussion of the general legal principles that guide federal enforcement of the Hatch Act. The second part of this memorandum contains a series of questions which are intended to elicit preliminary information that would be relevant to determine whether a state or local employee is subject to the Hatch Act. Following each question, there is further discussion of additional legal principles that guided the drafting of each question. The third part of this memorandum contains additional information concerning recent enforcement of the Hatch Act. Finally, enclosed is a copy of Political Activity and the State and Local Employee, a publication from the United States Office of Special Counsel which summarizes the laws, regulations and policies that guide federal enforcement of the Hatch Act.

¹ The Hatch Act uses the term "state or local officer or employee." 5 U.S.C.A. § 1501(4) (West 1996). In this memorandum, the term "employee" will be used to mean "state or local officer or employee."

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GENERAL LEGAL PRINCIPLES

The United States Office of Special Counsel (“Special Counsel”) is the federal agency that investigates and charges alleged violations of the Hatch Act. 5 U.S.C.A. §§ 1212(a)(5), 1216(a)(2), 1504 (West 1996). If Special Counsel charges a state or local employee with a violation of the Hatch Act, those charges are adjudicated by the United States Merit Systems Protection Board (“MSPB”).² 5 U.S.C.A. §§ 1504-1508 (West 1996).

The decisions of the MSPB are reported in the Merit Systems Protection Board Reporter (“M.S.P.R.”). The decisions of the MSPB are not binding authority on federal courts. Williams v. United States Merit Sys. Prot. Bd., 55 F.3d 917, 920 n.3 (4th Cir. 1995). However, because the MSPB is the federal agency charged with interpreting and enforcing the Hatch Act, the decisions of the MSPB are treated as persuasive authority, and they will be upheld by the federal courts if they are in accordance with the law. Id.; Alexander v. Merit Sys. Prot. Bd., 165 F.3d 474, 480 (6th Cir. 1999).

Because Hatch Act cases are so fact-specific, the series of questions contained in the second part of this memorandum should be used only as an aid to obtain important preliminary information. Once such preliminary information is obtained, a more specific inquiry may be necessary before this office is able to give an opinion as to whether a particular state or local employee is subject to the Hatch Act. However, because Hatch Act cases are so fact-specific, it may be extremely difficult in certain situations for this office to draw firm conclusions as to whether a particular employee is subject to the Hatch Act.

Furthermore, it should be noted that a state or local employee’s reliance upon the advice of legal counsel generally does not excuse a violation of the Hatch Act. See Special Counsel v. Tracy, 39 M.S.P.R. 95, 101-03 (1988); Special Counsel v. Suso, 26 M.S.P.R. 673, 679 (1985);

² Before January 1, 1979, the United States Civil Service Commission adjudicated violations of the Hatch Act. On January 1, 1979, the functions of the Civil Service Commission under the Hatch Act were transferred to the Merit Systems Protection Board. See In re Grindle, 1 M.S.P.R. 34, 35 n.2 (1979).

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Special Counsel v. Hayes, 16 M.S.P.R. 166, 173-74 (1983), *overruled in part on other grounds by* Special Counsel v. Purnell, 37 M.S.P.R. 184, 199-200 (1988); *see also* In re Ramshaw, 266 F. Supp. 73, 75 (D. Idaho 1967) (holding that mistake or misapprehension of the law does not constitute a defense to a violation of the Hatch Act). Thus, an employee may not blindly rely upon the advice of legal counsel to determine whether he is subject to the Hatch Act. Instead, the employee must resolve any doubt by requesting an advisory opinion from Special Counsel, who is authorized by federal statute to issue advisory opinions concerning application of the Hatch Act. 5 U.S.C.A. § 1212(f) (West 1996). The failure of an employee to request an advisory opinion from Special Counsel is an aggravating factor that is weighed by the MSPB to determine whether a violation of the Hatch Act warrants removal of the employee. *See In re Grindle*, 1 M.S.P.R. 34, 40 (1979).

Congress enacted the Hatch Act in 1940 to remedy political party corruption and coercion that was prevalent in federally-funded programs. Bauers v. Cornett, 865 F.2d 1517, 1520-21 (8th Cir. 1989). As observed by the United States Supreme Court, “[t]he end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship.” Oklahoma v. United States Civil Serv. Comm’n, 67 S. Ct. 544, 553 (1947). Thus, the Hatch Act is intended to eliminate actual or perceived corruption, impropriety and partisanship in federally-funded activities. The Hatch Act also is intended to promote efficiency in the operation of federally-funded activities by eliminating certain partisan political behavior that often can have a divisive and disruptive influence in the workplace. Finally, the Hatch Act is intended to protect employees who perform federally-funded activities from being intimidated or coerced into supporting or participating in certain partisan political causes.

On several occasions, the Supreme Court has rejected constitutional challenges to the Hatch Act and to similar state laws. Broadrick v. Oklahoma, 93 S. Ct. 2908, 2913-14, 2918 (1973) (rejecting First Amendment, due process and equal protection challenges to Oklahoma’s version of the Hatch Act); Oklahoma v. United States Civil Serv. Comm’n, 67 S. Ct. 544, 553-54 (1947) (rejecting Tenth Amendment challenge to the Hatch Act). Lower federal courts also have rejected constitutional challenges to the Hatch Act. Alexander

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v. Merit Sys. Prot. Bd., 165 F.3d 474, 484-86 (6th Cir. 1999) (equal protection); Williams v. United States Merit Sys. Prot. Bd., 55 F.3d 917, 921 n.7 (4th Cir. 1995) (First Amendment); Fela v. United States Merit Sys. Prot. Bd., 730 F. Supp. 779, 783-84 (N.D. Ohio 1989) (due process); Connecticut v. United States Merit Sys. Prot. Bd., 718 F. Supp. 125, 129-32 (D. Conn. 1989) (First Amendment, Tenth Amendment and equal protection). Thus, the constitutionality of the Hatch Act is not in doubt.

With very few exceptions, the Hatch Act applies to employees of the executive branch of state or local government “whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency.” 5 U.S.C.A. § 1501(4) (West 1996). Based upon this statutory definition, the MSPB has determined that an employee of the executive branch of state or local government is subject to the Hatch Act if, as a normal and foreseeable incident of his principal position or job, the employee performs duties in connection with an activity that is financed in whole or in part by federal funds. Williams v. United States Merit Sys. Prot. Bd., 55 F.3d 917, 920 (4th Cir. 1995). If an employee is subject to the Hatch Act, he is typically referred to as a “covered employee.”

The Hatch Act prohibits a covered employee from engaging in certain political activity. Specifically, a covered employee may not use his official authority or influence for the purpose of interfering with or affecting the results of an election or a nomination for office. 5 U.S.C.A. § 1502(a)(1) (West 1996). In addition, a covered employee may not directly or indirectly coerce, attempt to coerce, command or advise another covered employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes. 5 U.S.C.A. § 1502(a)(2) (West 1996). Finally, with very few exceptions, a covered employee may not be a candidate in a partisan election. 5 U.S.C.A. §§ 1502(a)(3), 1502(c), 1503 (West 1996).

If the MSPB finds that a covered employee violated the Hatch Act, the MSPB must determine whether the violation warrants removal of the employee. 5 U.S.C.A. §§ 1505, 1506 (West 1996). Because removal is the only penalty provided by the Hatch Act, the MSPB has only two choices when a violation is found: it may decide that removal is warranted or it may

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impose no penalty at all. *See* Special Counsel v. Tracy, 39 M.S.P.R. 95, 101 (1988). Thus, if the MSPB finds that the violation does not warrant removal, no penalty is imposed. If the MSPB finds that the violation warrants removal, the employee must be dismissed by the employing agency, and no agency of state or local government within that state may hire the dismissed employee for 18 months. 5 U.S.C.A. § 1505, 1506 (West 1996). If the employing agency fails to dismiss the employee, the MSPB must order the withholding of federal funds from the employing agency in an amount equal to 2 times the annual salary or pay that the employee was receiving at the time of the violation. *Id.* If the employee is dismissed by the employing agency and then hired by another agency of state or local government during the 18-month period, the MSPB must order the withholding of federal funds from the new employing agency or, if the new employing agency does not receive federal funds, from the former employing agency. *Id.*; Special Counsel v. Purnell, 37 M.S.P.R. 184, 193 (1988), *aff'd sub nom. Fela v. United States Merit Sys. Prot. Bd.*, 730 F. Supp. 779 (N.D. Ohio 1989).

The MSPB has determined that “candidacy for partisan political office is a per se violation of section 1502(a)(3) of the Hatch Act and is one of the most conspicuous and unequivocal violations of the Hatch Act.” Special Counsel v. Brondyk, 42 M.S.P.R. 333, 337 (1989); *accord* Williams v. United States Merit Sys. Prot. Bd., 55 F.3d 917, 920-22 (4th Cir. 1995). Thus, the Hatch Act is intended to prohibit candidacy in a partisan election by any covered employee who has not resigned from his public employment. Minnesota v. Merit Sys. Prot. Bd., 875 F.2d 179, 183 (8th Cir. 1989). Anything short of resignation fails to satisfy the statutory requirements. As a result, a covered employee remains subject to the Hatch Act even if he takes a leave of absence without pay. *Id.*; Special Counsel v. Carter, 45 M.S.P.R. 447, 451 (1990); Special Counsel v. Gallagher, 44 M.S.P.R. 57, 84 (1990).

A partisan election is any primary election, general election or special election where at least one of the candidates for the office represents a major political party, such as the Democratic party or the Republican party. *See* 5 U.S.C.A. § 1503 (West 1996); 5 C.F.R. § 151.101 (2000); Connecticut v. United States Merit Sys. Prot. Bd., 718 F. Supp. 125, 133 (D. Conn. 1989); In re Pizzutello, 1 M.S.P.R. 261, 264 (1979); In re Murphy, 1 M.S.P.R. 45, 48 (1979). Thus, if any candidate for the office is identified with a major political party, then the election is a partisan election, even if the covered employee

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runs as an independent. See Brandon v. S.W. Miss. Senior Servs., Inc., 834 F.2d 536, 537 (5th Cir. 1987).

Candidacy under the Hatch Act is not limited to the period between the formal announcement of candidacy and the election. Rather, candidacy occurs during any period in which action is taken in furtherance of candidacy. Thus, a covered employee may be considered a candidate in a partisan election even if the covered employee has not formally announced or declared his candidacy. Special Counsel v. Hayes, 16 M.S.P.R. 166, 172 (1983), *overruled in part on other grounds by* Special Counsel v. Purnell, 37 M.S.P.R. 184, 199-200 (1988). As explained by Special Counsel:

Candidacy for purposes of the Hatch Act has been interpreted to extend not merely to the formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy. As the statute has been interpreted to prohibit preliminary activities regarding candidacy, any action which can reasonably be construed as evidence that an individual is seeking support for or undertaking an initial “campaign” to secure nomination or election to office would be viewed as candidacy for purposes of 5 U.S.C. § 1502(a)(3).

Advisory Op. U.S. Off. Special Counsel, at 1-2 (Mar. 10, 1998).

If a covered employee becomes a candidate in a partisan election, it may be possible for the covered employee to cure his violation of the Hatch Act before the election by withdrawing from the election or by publicly disavowing his candidacy through a formal announcement that he cannot be a candidate because of the Hatch Act. See Special Counsel v. Brondyk, 42 M.S.P.R. 333, 343 (1989); Special Counsel v. Suso, 26 M.S.P.R. 673, 674 (1985); Special Counsel v. Mahone, 21 M.S.P.R. 499, 503 (1984). It also may be possible for the covered employee to cure his violation by resigning from his public employment before the election. Id.

If a covered employee does not cure his violation of the Hatch Act before the election, there is very little that the employee can do to cure the violation after the election. For example, voluntary resignation by a covered

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employee after the election does not divest the MSPB of its jurisdiction to determine whether the employee violated the Hatch Act and whether removal is warranted. *See* Neustein v. Mitchell, 52 F. Supp. 531, 532 (S.D.N.Y. 1943); Special Counsel v. Tracy, 39 M.S.P.R. 95, 97 (1988); Special Counsel v. Purnell, 37 M.S.P.R. 184, 193 (1988), *aff'd sub nom. Fela v. United States Merit Sys. Prot. Bd.*, 730 F. Supp. 779 (N.D. Ohio 1989); In re Grandison, 1 M.S.P.R. 18, 21 (1979). Under such circumstances, if the MSPB finds that the resigned employee violated the Hatch Act and that removal is warranted, the employee “cannot be reemployed in a state or local agency within the same state for eighteen months without the new or former agency incurring the sanction of a withholding of federal funds.” Special Counsel v. Purnell, 37 M.S.P.R. 184, 205 (1988), *aff'd sub nom. Fela v. United States Merit Sys. Prot. Bd.*, 730 F. Supp. 779 (N.D. Ohio 1989).

Furthermore, the 18-month period commences on the date of the MSPB’s order finding that removal is warranted, not on the date of the employee’s voluntary resignation. Id. Thus, even if a covered employee resigns voluntarily and thereafter does not work for a state or local agency for 18 months, the covered employee has not cured a prior violation of the Hatch Act. Special Counsel still may investigate and charge the employee with the prior violation because there is no statute of limitations for a violation of the Hatch Act. Id. at 191-94. If the MSPB finds that the violation occurred, it may order removal of the employee, even if the employee now works for a different state or local agency. Id. In addition to removal, if any, the employee would be barred from public employment in the state for 18 months after the date of the MSPB’s order, regardless of when the violation occurred and when the employee resigned. Id.

In such a situation, the employee may claim the equitable defense of laches. To prove laches, the employee must establish that: (1) there has been an unexcused or unreasonable lapse of time between the violation and the charges; and (2) the lapse of time has prejudiced the employee. Fela v. United States Merit Sys. Prot. Bd., 730 F. Supp. 779, 782-83 (N.D. Ohio 1989). However, because the Hatch Act is designed to enforce a public right and to protect the public interest, the equities of the case will likely favor the public interest, thereby making the equitable defense of laches difficult to prove. Id. (holding that the doctrine of laches did not bar Special Counsel from charging a covered employee with violations of the Hatch Act more than 3 years after

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the violations had occurred and more than 2 years after the employee had resigned).

QUESTIONS TO AID IN DETERMINING WHETHER A STATE OR LOCAL EMPLOYEE IS SUBJECT TO THE HATCH ACT

1. Are you employed by a private entity, such as a private nonprofit corporation or organization?

Note: Under the Hatch Act, employees of private entities receiving federal funds are not subject to the Act. *See* Advisory Op. U.S. Off. Special Counsel (Aug. 9, 1996). However, in some instances, such employees may be subject to the Hatch Act if the federal statutory scheme appropriating the funds contains a provision which states that employees of private entities receiving the funds are deemed to be state or local employees for purposes of the Hatch Act. *Id.* For example, pursuant to 42 U.S.C.A. § 9851 (West 1995), employees of private nonprofit entities that plan, develop and coordinate federal Head Start programs are subject to the Hatch Act. *See also Political Activity and the State and Local Employee*, at 7; *Dingess v. Hampton*, 305 F. Supp. 169, 170 (D.D.C. 1969). Therefore, to determine whether employees of private entities receiving federal funds are subject to the Hatch Act, it would be necessary to examine the federal statutory scheme appropriating the federal funds.

2. Are you employed by a public entity? If so, in your position of public employment:

- (a) Are you employed by a department, agency, bureau, division, authority or other entity within the executive branch of state or local government, other than the University of Nevada, a community college or a school district?

- (b) Are you employed by a public nonprofit corporation or organization that is considered to be within the executive branch of state or local government, such as a public housing authority or a public transportation authority?

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Note: As a general rule, to determine whether a department, agency, bureau, division, authority or other entity is part of the executive branch, the MSPB examines state and local law to identify which branch of government controls the department, agency, bureau, division, authority or other entity, or which branch is considered to be the proper place in government for the department, agency, bureau, division, authority or other entity. Special Counsel v. Bissell, 61 M.S.P.R. 637, 643-45 (1994); *see also* Ohio v. United States Civil Serv. Comm'n, 65 F. Supp. 776, 777-79 (S.D. Ohio 1946); Special Counsel v. Suso, 26 M.S.P.R. 673, 676-78 (1985); Advisory Op. U.S. Off. Special Counsel (July 11, 1996).

Note: As a general rule, a public nonprofit corporation or organization is a “state or local agency” for purposes of the Hatch Act. *See* Brandon v. S.W. Miss. Senior Servs., Inc., 834 F.2d 536, 536-37 (5th Cir. 1987); Special Counsel v. Purnell, 37 M.S.P.R. 184, 207 (1988), *aff’d sub nom. Fela v. United States Merit Sys. Prot. Bd.*, 730 F. Supp. 779 (N.D. Ohio 1989); Special Counsel v. Hayes, 16 M.S.P.R. 166, 170 (1983), *overruled in part on other grounds by* Special Counsel v. Purnell, 37 M.S.P.R. 184, 199-200 (1988).

Note: The Hatch Act does not apply to a person who is employed by an educational or research institution that is supported in whole or in part by a state or local government or by a recognized religious, philanthropic or cultural organization. 5 U.S.C.A. § 1501(4)(B) (West 1996); Special Counsel v. Suso, 26 M.S.P.R. 673, 678-79 (1985). Based upon this exemption, employees of public school districts and the University and Community College System of Nevada are not subject to the Hatch Act. *See In re Grindle*, 1 M.S.P.R. 34, 38 (1979) (explaining that the exemption “was not limited to classroom teachers; the exemption applies to other employees of educational institutions and systems as well.”).

3. *Is your position of public employment your only income-earning job? If not, is your position of public employment the income-earning job that accounts for your most work time and your most earned income?*

Note: The Hatch Act applies only to employees “whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency.” 5 U.S.C.A. § 1501(4) (West 1996) (emphasis added). Principal

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employment is that employment to which a person devotes the most work time and from which the person derives the most income. See Matturi v. United States Civil Serv. Comm'n, 130 F. Supp. 15 (D.N.J. 1955); Anderson v. United States Civil Serv. Comm'n, 119 F. Supp. 567 (D. Mont. 1954); Special Counsel v. Carter, 45 M.S.P.R. 447, 449 (1990); Advisory Op. U.S. Off. Special Counsel (June 5, 1996). For example, in Matturi and Anderson, the courts held that two attorneys who devoted most of their work time to and derived most of their income from the private practice of law were not subject to the Hatch Act even though they were also employed by state or local agencies and performed duties in connection with federally-funded activities. It is important to note that the deciding factor was not that the attorneys worked for state or local agencies on a part-time basis. Rather, the deciding factor was that the attorneys had other, non-Hatch Act employment to which they devoted the most work time and from which they derived the most income. Employees who work only on a part-time time basis for state or local government still may be subject to the Hatch Act if they devote most of their work time to and derive most of their income from that part-time employment. See Smyth v. United States Civil Serv. Comm'n, 291 F. Supp. 568, 572-73 (E.D. Wis. 1968).

4. *Does the department, agency, bureau, division, authority or other entity that employs you receive federal funds for any activity that it performs?*

Note: A department, agency, bureau, division, authority or other entity is deemed to receive federal funds for purposes of the Hatch Act if it: (1) receives federal funds directly from the federal government; (2) receives federal funds through a conduit such as the state or another department, agency, bureau, division, authority or other entity; or (3) acts as the conduit, administrator or coordinator for federal funds. See Williams v. United States Merit Sys. Prot. Bd., 55 F.3d 917, 921 (4th Cir. 1995).

Note: According to the Hatch Act publication prepared by Special Counsel, “[t]he following list offers examples of the types of programs which frequently receive financial assistance from the federal government: public health, public welfare, housing, urban renewal and area redevelopment, employment security, labor and industry training, public

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works, conservation, agricultural, civil defense, transportation, anti-poverty, and law enforcement programs.” Political Activity and the State and Local Employee, at 3.

5. *Does the department, agency, bureau, division, authority or other entity that employs you deposit any federal funds in its general operating fund, general expense account or general payroll account or in some other similar fund or account?*

Note: In one decision, the MSPB found that an employee was subject to the Hatch Act where his employer, a housing authority, deposited all funds that it received, including federal funds, in a single account from which salaries and expenses were paid. Special Counsel v. Carter, 45 M.S.P.R. 447, 451-52 (1990). The decision emphasized the fact that “all funds supporting NHA are fungible, including salaries.” Id. at 452. In another decision, the MSPB found that most, if not all, employees of a housing authority were subject to the Hatch Act because one-third of the operating budget for the authority was derived from federal funds, and the operating budget was used to pay for administrative costs and salaries. Special Counsel v. Purnell, 37 M.S.P.R. 184, 208 (1988). Thus, if a department, agency, bureau, division, authority or other entity deposits or commingles its federal funds with other money in a general fund or general account from which salaries or expenses are paid, it is possible that all employees of the department, agency, bureau, division, authority or other entity will be subject to the Hatch Act.

6. *In your position of public employment:*

(a) Is any part of your compensation or salary paid by federal funds?

(b) What types of duties do you perform?

(c) Do you know if any of those duties are in connection with an activity that is financed in whole or in part by federal funds? For example and without limitation:

(1) Do you supervise any employees who perform duties in connection with an activity that is financed in whole or in part by federal funds, or do you supervise, advise or assist someone who has such supervisory responsibilities?

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(2) Do you review, sign, process, administer, coordinate or otherwise work with any application or other paperwork that relates to federal funds, or do you supervise, advise or assist someone who performs such duties?

(3) Do you perform any duties that relate to fiscal, budgetary or monetary affairs, or do you supervise, advise or assist someone who performs such duties?

(4) Do you perform any duties that relate to disbursing or loaning money, or do you supervise, advise or assist someone who performs such duties?

(5) Do you perform any duties that relate to purchasing or spending, or do you supervise, advise or assist someone who performs such duties?

(6) Do you perform any duties that relate to salaries or payroll, or do you supervise, advise or assist someone who performs such duties?

(7) Do you perform any duties that relate to accounting or auditing, or do you supervise, advise or assist someone who performs such duties?

(8) Do you perform any duties in which you use any item or equipment that is financed in whole or in part by federal funds, or do you supervise, advise or assist someone who performs such duties?

Note: The restrictions imposed by the Hatch Act extend to every tier of public employment, from entry-level employees to some of the highest officials in state and local government. Thus, the restrictions imposed by the Hatch Act are not limited in scope to high-level employees who exercise supervisory or discretionary control over an activity that is financed in whole or in part by federal funds. The restrictions also extend to entry-level employees who perform the most basic manual, clerical or ministerial tasks.

In determining whether an employee is subject to the Hatch Act, the MSPB does not focus on any particular type of employee or on any particular type of duty. Rather, the MSPB asks whether the employee, as a normal and foreseeable incident of his principal position or job, performs duties in connection with an activity that is financed in whole or in part by federal funds. Williams v. United States Merit Sys. Prot. Bd., 55 F.3d 917, 920 (4th Cir. 1995); Special Counsel v. Gallagher, 44 M.S.P.R. 57, 61 (1990). If the employee performs such duties, no matter how simple or basic, the employee is subject to the Hatch Act. As explained in Williams:

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The district court went beyond the plain language of the Act, and the decisions interpreting that language, when it determined that the actual exercise of supervisory or discretionary control over federally-funded activity was the requisite connection necessary for Williams to be subject to the Act. This narrow interpretation of the scope of the Hatch Act has not been expressed in any published decision nor has it been adopted by the MSPB, the agency charged with enforcement of the Act. . . . [N]either Carter nor the other decisions relied upon by the district court expressly state that the exercise of discretionary authority in connection with federally-funded activity is required to hold a state employee subject to the Act. Hatch Act cases are fact specific, and the mere fact that several state employees found in violation of the Act also held or exercised such discretionary authority does not indicate that the exercise of discretionary authority is a necessary requirement to being covered under the Act.

Id. at 920-21 (footnotes omitted); *see also* Special Counsel v. Dunton, 5 M.S.P.R. 207 (1981) (“Contrary to Dunton’s contentions, whether he was an ‘administrator’ or ‘manager’ was immaterial if his employment was in connection with administering the federally financed program.”).

Moreover, “[i]f the employee’s duties meet [the] test, it is irrelevant whether federal funds were used to contribute directly to the employee’s salary.” Special Counsel v. Gallagher, 44 M.S.P.R. 57, 61 (1990). Thus, questions concerning the source of an employee’s salary and his influence over federal funds are not dispositive of whether the employee is subject to the Hatch Act. In re Pizzutello, 1 M.S.P.R. 261, 264 (1979).

Based upon the decisions of the MSPB and the federal courts, it is certainly true that state and local employees who are in a supervisory or managerial position are more likely, as a normal and foreseeable incident of the position or job, to perform duties in connection with an activity that is financed in whole or in part by federal funds. *See, e.g.,* Special Counsel v. Brondyk, 42 M.S.P.R. 333, 342 (1989) (finding that the Executive Director’s “connection to federal funds is established simply by virtue of his directorship of a department which received federal funds.”). Thus, chiefs, deputy chiefs, directors, deputy directors, supervisors and managers

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are almost always covered employees under the Hatch Act. *See, e.g., N. Va. Reg'l Park Auth. v. United States Civil Serv. Comm'n*, 437 F.2d 1346 (4th Cir. 1971) (executive director); *Jarvis v. United States Civil Serv. Comm'n*, 382 F.2d 339 (6th Cir. 1967) (office manager); *Palmer v. United States Civil Serv. Comm'n*, 297 F.2d 450 (7th Cir. 1962) (director); *Worden v. Louisville and Jefferson County Metro. Sewer Dist.*, 847 F. Supp. 75, 78 (W.D. Ky. 1994) (supervisor); *Connecticut v. United States Merit Sys. Prot. Bd.*, 718 F. Supp. 125 (D. Conn. 1989) (chief and acting chief); *McKechnie v. McDermott*, 595 F. Supp. 672 (N.D. Ind. 1984) (transportation coordinator involved in making applications for federal and state funding); *Engelhardt v. United States Civil Serv. Comm'n*, 197 F. Supp. 806 (M.D. Ala. 1961) (director); *Special Counsel v. Carter*, 45 M.S.P.R. 447 (1990) (executive director); *Special Counsel v. Fergus*, 44 M.S.P.R. 440 (1990) (executive director); *Special Counsel v. Termini*, 44 M.S.P.R. 102 (1990) (manager of purchasing); *Special Counsel v. Downing*, 44 M.S.P.R. 99 (1990) (executive director); *Special Counsel v. Gallagher*, 44 M.S.P.R. 57, 61 (1990) (chairman, director of administration and finance, director of revenue development and director of operations); *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 193 (1988) (executive director, personnel management administrator and labor relations coordinator), *aff'd sub nom. Fela v. United States Merit Sys. Prot. Bd.*, 730 F. Supp. 779 (N.D. Ohio 1989); *Special Counsel v. Davis*, 8 M.S.P.R. 266 (1981) (director).

However, in numerous cases, state and local employees who performed more basic or ministerial duties, without significant supervisory or discretionary authority, were also found to be covered employees under the Hatch Act. For example, covered employees under the Hatch Act have included: an executive assistant who "rubberstamped" approval of invoices and payment request forms on behalf of the director of the department, *Williams v. United States Merit Sys. Prot. Bd.*, 55 F.3d 917 (4th Cir. 1995); an executive secretary who reviewed and signed requests for federal funds, *Special Counsel v. Hayes*, 16 M.S.P.R. 166 (1983), *overruled in part on other grounds by Special Counsel v. Purnell*, 37 M.S.P.R. 184, 199-200 (1988); an account clerk whose duties included verifying and processing invoices for purchases made with federal funds, *Special Counsel v. Marsteller*, 44 M.S.P.R. 111 (1990); a comptroller, assistant comptroller and their staff who performed accounting functions concerning an agency's

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fiscal affairs, Special Counsel v. Dracup, 44 M.S.P.R. 107 (1990); a housing counselor in a rental subsidy program, Special Counsel v. Hendricks, 39 M.S.P.R. 9 (1988); a plumber for a local housing authority, Special Counsel v. Purnell, 37 M.S.P.R. 184 (1988), *aff'd sub nom. Fela v. United States Merit Sys. Prot. Bd.*, 730 F. Supp. 779 (N.D. Ohio 1989); an administrative analyst whose job was to arrange for office space, desks and telephones to be used by social workers, Fishkin v. United States Civil Serv. Comm'n, 309 F. Supp. 40 (N.D. Cal. 1969); an administrative assistant, Lee v. L.A. County Civil Serv. Comm'n, 180 Cal. Rptr. 822 (Cal. Ct. App. 1982); and a junior administrative assistant trainee, In re Pizzutello, 1 M.S.P.R. 261 (1979).

By its plain terms, the Hatch Act provides that a state or local employee is not subject to the Hatch Act if the employee exercises “no functions” in connection with an activity that is financed in whole or in part by federal funds. 5 U.S.C.A. § 1501(4)(A) (West 1996). Both the MSPB and the federal courts have recognized that “[t]he Act does not cover state [or local] employees whose connection with federally-funded activities is merely a casual or accidental occurrence of employment, because such a *de minimis* connection does not justify application of the Act.” Williams v. United States Merit Sys. Prot. Bd., 55 F.3d 917, 920 (4th Cir. 1995) (citations, footnotes and internal quotation marks omitted). The *de minimis* exception is difficult to prove. Id.; Engelhardt v. United States Civil Serv. Comm'n, 197 F. Supp. 806 (M.D. Ala. 1961). The *de minimis* exception is not satisfied merely by “the delegation of duties respecting particular projects to particular subordinates.” Palmer v. United States Civil Serv. Comm'n, 297 F.2d 450, 452 (7th Cir. 1962). Instead, the employee must prove that, as a normal and foreseeable incident of his position or job, he has no connection with a federally-funded activity. See Williams v. United States Merit Sys. Prot. Bd., 55 F.3d 917, 920-21 (4th Cir. 1995); Brooks v. Nacrelli, 331 F. Supp. 1350, 1354 (E.D. Pa. 1971).

In sum, each case under the Hatch Act will turn on its particular facts and circumstances. In some close cases, it may be extremely difficult for this office to draw firm conclusions as to whether a particular employee is subject to the Hatch Act. In those cases, the only effective way for an employee to resolve any doubt under the Hatch Act would be to request an advisory opinion from Special Counsel.

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RECENT ENFORCEMENT OF THE HATCH ACT

On January 18, 2000, Special Counsel issued a press release in which it announced the withholding of \$67,592 in federal Medicaid funds as part of a voluntary settlement of a Hatch Act case involving a Connecticut state employee who became a candidate in a partisan election. As part of the settlement, the State of Connecticut conceded that the covered employee had violated the Hatch Act and that the penalty was warranted. Under state law, however, the state was prohibited from removing the covered employee for engaging in political activities. As a result, the state agreed to forfeit \$67,592 in federal Medicaid funds that would have otherwise gone to the state agency where the covered employee worked. With regard to the settlement, Special Counsel praised the State of Connecticut for “its cooperation in quickly resolving this clear-cut violation of the law.” Special Counsel also noted that “due to their unique state law, Connecticut will bear the cost of this violation.” Special Counsel also stated that “[w]hile I’d rather have it the other way around, with the penalty falling on the individual who violates the Act, I do intend to aggressively enforce the provisions of the Hatch Act.”

KP:dtm

Encl:

Ref No. Erdoes010102223638

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AGO 2002-37 CONTRACTORS' BOARD; ARCHITECTURE; ENGINEERS; LICENSES: In the context of NRS 624.020(4), a registered architect or licensed professional engineer who also performs construction management services must be cautious to ensure that the construction management functions are permitted within the scope of his primary professional license under NRS chapters 623 or 625, or are appropriately incidental to his performance as a registered architect or licensed professional engineer. If the Contractors' Board desires to further define the term "construction manager," the Board should do so in accordance with NRS chapter 233B or seek statutory clarification from the Nevada Legislature. If the construction management functions performed are outside the scope of the architect's or engineer's professional license, and not incidentally related thereto, the Contractors' Board may have jurisdiction over any complaint that arises under the provisions of NRS chapter 624.

Carson City, October 7, 2002

Margi Grein, Executive Officer, Nevada State Contractors Board,, 2310
Corporate Circle, Suite 200, Henderson, NV 89074

Dear Ms. Grein:

The Nevada State Contractors' Board (Contractors' Board) has requested an opinion from this office involving eight questions concerning the scope of practice of contractors, architects, and professional engineers under their respective statutory licensing provisions. In large part, the Contractors' Board's inquiries focus on the consequences attending overlapping functions between the disciplines involving the performance of construction management services. For the purposes of this opinion, the Contractors' Board's eight questions have been consolidated and restated into three general areas of inquiry.

QUESTION ONE

Is a registered architect or a licensed professional engineer who performs construction management services also a "contractor" as defined under NRS 624.020(2) or NRS 624.020(4) and thus subject to the licensure requirements and jurisdiction of the Nevada State Contractors' Board under Nevada Revised Statutes (NRS) chapter 624?

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ANALYSIS

Unless otherwise exempt under NRS 624.031,¹ “it is unlawful for any person or combination of persons to . . . engage in the business or act in the capacity of a contractor . . . or submit a bid on a job . . . without having an active license” as required by chapter 624. NRS 624.700. The definition of a “contractor” is set forth in NRS 624.020 and, in part, is defined as:

2. A contractor is any person, except a registered architect or a licensed professional engineer, acting solely in his professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to, offers to undertake to, purports to have the capacity to undertake to, or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. . . .

. . . .

4. A contractor includes a construction manager who performs management and counseling services on a construction project for a professional fee. [Emphasis added.]

A. NRS 624.020(2)

The definition of a “contractor” under NRS 624.020(2) specifically excludes registered architects and licensed engineers. The issue concerning whether an architect is exempt from licensure under NRS chapter 624 when

¹ Registered architects and licensed professional engineers are not expressly exempt under NRS 624.031.

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acting as a contractor has been addressed in a previous Attorney General Opinion. In Op. Nev. Att'y Gen. No. 108 (October 28, 1959), this office opined that "although a licensed architect may be a contractor, he is not a builder and is, therefore, exempt from the application of the Contractors' Law. See Op. Nev. Att'y Gen. No. 781 (July 22, 1949)." The opinion concluded that,

In the absence of a preponderance of evidence showing that an architect is, in fact, engaged in the business of a "contractor" or "builder," or performing such functions in excess of services authorized as a duly licensed architect, or agent, acting for and on behalf of an owner, issuance of a building permit cannot be denied a licensed architect on an owner's behalf, merely because the architect does not have a contractor's license."

Id. at 447 (first emphasis added).

Accordingly, registered architects and licensed engineers acting in their professional capacities as such are not "contractors" as defined under NRS 624.020(2).

B. NRS 624.020(4)

The definition of a "contractor" also includes a "construction manager who performs management and counseling services . . . for a professional fee." NRS 624.020(4). Thus we must also examine whether a registered architect or licensed engineer who performs construction manager services is subject to the Contractors' Board's jurisdiction and licensure requirements under NRS chapter 624.

The scope of practice of both registered architects and licensed engineers generally includes construction management functions as part of their respective disciplines. The practice of architecture is defined in NRS 623.023 as follows:

The "practice of architecture" consists of rendering services embracing the scientific,

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esthetic and orderly coordination of processes which enter into the production of a completed structure which has as its principal purpose human habitation or occupancy, or the utilization of space within and surrounding the structure, performed through the medium of plans, specifications, administration of construction, preliminary studies, consultations, evaluations, investigations, contract documents and advice and direction. [Emphasis added.]

Additionally, the practice of professional engineering is defined in NRS 625.050 as follows:

1. "The practice of professional engineering" includes, but is not limited to:

(a) Any professional service which involves the application of engineering principles and data, such as surveying, consultation, investigation, evaluation, planning and design, or responsible supervision of construction or operation in connection with any public or private utility, structure, building, machine, equipment, process, work or project, wherein the public welfare or the safeguarding of life, health or property is concerned or involved.

(b) Such other services as are necessary to the planning, progress and completion of any engineering project or to the performance of any engineering service.

2. The practice of engineering does not include land surveying or the work ordinarily performed by persons who operate or maintain machinery or equipment. [Emphasis added.]

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The issue concerning whether an architect is subject to licensure under NRS chapter 624 when acting as a construction manager has been addressed in a previous Attorney General Opinion dated May 4, 1995, for Johnnie B. Rawlinson, Assistant District Attorney, Civil Division, by Jonathan L. Andrews, Chief Deputy Attorney General. The opinion specifically addressed whether a joint venture, comprised of two members with unlimited contractors' licenses under chapter 624 and an architect member not licensed under chapter 624, needed a separate license pursuant to NRS 624.290² to perform construction management services. The members who had unlimited licenses under chapter 624 were not at issue in that opinion because with their unlimited licenses they could perform construction management services without any further licensure. The issue was whether the architect member was required to be licensed under NRS 624 to provide construction management services.

The analysis of the opinion began with the definition of the practice of architecture, as provided in NRS 623.023, with emphasis on the services of an architect in the coordination of processes.³ The opinion explained as follows:

Most jurisdictions require design professional (architects and engineers) licensure for construction management. Construction and Design Law, vol. 1, sec. 5.6b (1994). *In Attlin Construction Inc. v. Muncie Community Schools*, 413 N.E.2d 281 (Ind. App. 1980), the court held that public bid statutes do not apply to construction management contracts because they more closely resemble contracts for architectural services than construction contracts. It has been suggested that many architectural licensing statutes could be interpreted to prohibit anyone but an architect from acting as a construction manager, and that some courts might require a construction manager to be licensed as an architect or engineer. 46 Law and Contemporary Problems 25,

² NRS 624.290 no longer exists.

³ NRS 623.023 was amended in 1995, but the amendments to the statute were largely technical in nature and are not relevant for the purposes of this opinion.

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27 (Winter, 1983). Therefore, licensure as an architect in Nevada certainly appears sufficient to perform services as a construction manager.

Id. at 4.

The opinion concluded that an architect performing services as a construction manager did not require licensure under NRS chapter 624.

Moreover, in analyzing whether a license is required under NRS chapter 624, it is also necessary to examine the specific functions performed by an architect or engineer:

Some jurisdictions have determined that a licensed professional engineer must also have an architectural license when he or she performs work that might lawfully be done by an architect, but only when the functions he or she has performed are outside the scope of his or her engineering license. See, 82 A.L.R. 2d 1004, 1018-19. Other jurisdictions have concluded that when a licensed professional is performing services “which could properly be regarded as within the reach of both the statutes governing the licensing of the two professions, the architect or engineer is considered to perform under the statute under which he or she was licensed and is not affected by the fact that the services came incidentally within the purview of the other licensing statute.”

Schmidt v. Kansas State Bd. of Technical Professions, 21 P.3d 542, 551 (Kan. 2001) (emphasis added).

The *Schmidt* case further underscores the need for specific facts for meaningful analysis in determining whether an architect or engineer who performs construction management services is acting outside the scope of his respective professional licenses. The Contractors’ Board must carefully examine whether the construction management services performed are

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outside the scope of the professional engineering or architectural license or are incidental to the functions performed as a licensed engineer or registered architect. The Contractors' Board must make its determinations on a case-by-case basis when evaluating whether an architect (licensed under NRS chapter 623) or an engineer (licensed under NRS chapter 625) who also performs construction management services is acting as a contractor as defined under NRS 624.020(4).

CONCLUSION TO QUESTION ONE

A registered architect or a licensed professional engineer acting within the scope of his professional license is not a "contractor" as defined under NRS 624.020(2). In the context of NRS 624.020(4), a registered architect or licensed professional engineer who also performs construction management services must be cautious to ensure that the construction management functions are permitted within the scope of his primary professional license under NRS chapters 623 or 625, or are appropriately incidental to his performance as a registered architect or licensed professional engineer. Otherwise, under NRS 624.020(4), the Contractors' Board may find factual support for a determination that the performance of construction management services which are outside the scope of the architect's or engineer's professional license constitute acts of a "contractor" under NRS chapter 624.

QUESTION TWO

May the Contractors' Board clarify the definition of the term "construction manager" as used in NRS 624.020(4)?

ANALYSIS

If an agency desires to make a rule or statement of general applicability, which interprets law or policy, such rule or statement of interpretation would be considered a regulation pursuant to NRS 233B.038(1). The Contractors' Board is specifically authorized to adopt regulations for the purpose of carrying out its duties as set forth in NRS chapter 624. NRS 624.100. To date, however, the Contractors' Board has not adopted any regulations with respect to the definition of the term "construction management." See Nevada Administrative Code (NAC) chapter 624. Consequently, the Contractors' Board should consider

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adopting regulations pursuant to NRS chapter 233B for the purpose of defining the term “construction manager.”

In doing so, however, the Contractors’ Board’s adoption of such regulations must not be “inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts or impairs, limits or restricts the statute” to be administered by the agency. 1 AM.JUR.2d Administrative Law § 132; *Carmen v. Sims*, 115 S.E.2d 140, 144 (W. Va. 1960). An administrative agency may only carry into effect the intent of the legislature as expressed by the statute. *Id.* “An agency may not legislate under the guise of rule making power. Rules must be written within the framework and policy of the applicable statutes. They may not amend or change enactments of the legislature.” *Kitsap-Mason Dairymen’s Assoc. v. Washington Tax Comm.*, 467 P.2d 312, 315 (Wash. 1970) (citations omitted).

Although the legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend. . . . In doing so the legislature vests the agency with mere fact finding authority and not the authority to legislate. The agency is only authorized to determine facts which will make the statute effective.

Sheriff, Clark County v. Luqman, 101 Nev. 149, 153, 697 P. 2d 107, 110 (1985) (citations omitted)..

The use of the term "construction manager," as set forth in NRS 624.020(4) (definition of "contractor"), is not specifically defined by statute or regulation. NRS chapter 624 also does not define the terms “management” or “counseling services.” Harris & Associates (Harris), an engineering firm that performs construction management services, argues that the definition of “construction manager” must distinguish between an “At-Risk” construction manager and an “Agency” construction manager. Such a distinction has not been addressed in Nevada law; however, Harris argues that an “At-Risk” construction manager is a contractor subject to the licensure requirements of NRS chapter 624, but an “Agency” construction manager is not. Harris & Associates, Position Statement to the Attorney General (June 27, 2002) at 1-2, 7. The distinction is that an “At-Risk”

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construction manager commits to delivering the project at a guaranteed maximum price and acts as a consultant to the owner in the development and design phases, and as a general contractor during the construction phase. Id. at 4, Ex. A. An “Agency” construction manager has been described as providing a fee-based service in which the construction manager is responsible exclusively to the owner and acts in the owner’s interests at every stage of the project. Id. The “Agency” construction manager is involved in comprehensive management of every stage of the project, beginning with the original concept. Id.

Harris raises these concerns regarding the definition of construction manager. The Board’s statutes and regulations, however, do not address or provide for the “At-Risk” and “Agency” distinctions. Moreover, the legislative history is not helpful in rendering an accurate interpretation and creates more uncertainty as to the definition of construction manager. See Assembly Bill 172, Hearing Before the Assembly Committee on Government Affairs, 1975 Legislative Session 3-4 (February 11, 1975) and Hearing Before the Senate Committee on Government Affairs Committee, 1975 Legislative Session 18 (April 30, 1975). See also Senate Bill 342, Hearing Before the Assembly Committee on Ways and Means, 1981 Legislative Session 20 (May 14, 1981).

In summary, the legislative history indicates that in 1975 the State Public Works Board had a need to define the term “contractor” to include “construction manager.” In 1981, however, when the role of a “construction manager” was expanding to apply to all projects, not just federally funded projects, the term “construction manager” was no longer necessary and was removed from the statutes governing Public Works’ projects under NRS chapter 341. However, the term “construction manager” was not removed from NRS chapter 624 in 1981. Accordingly, the legislative history concerning the term “construction manager,” as defined by NRS 624.020(4), does not prove to be helpful in determining its meaning.

The Contractors’ Board is charged with the responsibility of carrying out the provisions of NRS chapter 624. That responsibility necessarily may include determining whether an individual is acting as a construction manager, and thus a contractor, as defined in NRS 624.020(4). In such circumstances, and in the absence of a regulation or statute further clarifying the term “construction manager,” the Contractors’ Board would be required to apply a given set of facts and, based upon its reasonable

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interpretation of the phrase as it is commonly understood, determine whether an individual was engaged in construction management. However, given the lack of a regulatory or statutory definition of the phrase “construction manager,” and given the differences that may exist as to what constitutes a reasonable and commonly understood definition, it is recommended that the Contractors’ Board seek to define the term by way of a duly adopted regulation or by way of statutory clarification.

CONCLUSION TO QUESTION TWO

The Contractors’ Board’s interpretation of a statute, in this case NRS 624.020(4), must be consistent with the statutory framework established by the Legislature. Since the legislative history does not provide any guidance and the Contractors’ Board has not adopted any regulations to further define the term “construction manager,” any desire by the Contractors’ Board to further clarify the term “construction manager” should be carried out in accordance with NRS chapter 233B. Should the Contractors’ Board desire statutory clarification, action by the Nevada Legislature would be required.

QUESTION THREE

Does the State Board of Architecture, Interior Design and Residential Design and the State Board of Professional Engineers and Land Surveyors have disciplinary authority over its licensees when those licensees perform construction manager services?

ANALYSIS

As addressed in the analysis of Question One, above, the functions of performing construction management services may be viewed in appropriate circumstances as functions that are also performed within the scope of an architect’s or engineer’s practice. If a complaint were to arise against a registered architect or licensed engineer who also performed construction management functions within the scope of his primary license, the respective licensing board would have authority to discipline the architect or engineer depending on the violation. NRS 623.150; 623.270; 625.152; and 625.410. Otherwise, if the construction management functions performed and at issue are outside the scope of the architect’s or engineer’s practice, and not incidentally related thereto, the Contractors’ Board may have jurisdiction over the complaint under the provisions of NRS chapter 624. See NRS 624.700 and 624.020(4).

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A licensing board does not have authority to enforce another board's statutes or regulations. Such boards possess only that authority specifically granted to them by the Legislature. Consequently, the Board of Architecture, Interior Design and Residential Design and the State Board of Professional Engineers and Land Surveyors could not bring disciplinary action for a violation of NRS chapter 624.⁴

CONCLUSION TO QUESTION THREE

Neither the State Board of Architecture, Interior Design and Residential Design nor the State Board of Professional Engineers and Land Surveyors has authority to bring disciplinary action for violations of NRS chapter 624. Architects and engineers acting in their professional capacities and performing construction management functions are subject to disciplinary actions under NRS chapters 623 and 625, respectively. Moreover, if the construction management functions performed and at issue are outside the scope of the architect's or engineer's practice, and not incidentally related thereto, the Contractors' Board may have jurisdiction over the complaint under the provisions of NRS chapter 624.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ANN P. WILKINSON
Acting Chief Deputy Attorney General

CHARLOTTE MATANANE BIBLE
Assistant Chief Deputy Attorney General

⁴ Contractors are provided an exemption to the architect licensing statutes, pursuant to NRS 623.330, to allow contractors to provide their own drawings for their own construction activities. However, NRS 624 provides no grounds for disciplinary action for falling below the standard of care in the design of the plans or for plans prepared by someone other than the contractor.

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AGO 2002-38 PERSONNEL; EMPLOYEES; STATE OFFICERS: NRS 197.230 requires the forfeiture of an unclassified, at-will State employee's job when he is convicted of a federal felony even though the crime does not stem from or relate to his job.

Carson City, October 28, 2002

John P. Comeaux, Director, Department of Administration, 209 E. Musser Street, Suite 200, Carson City, Nevada 89710-4298

Dear Mr. Comeaux:

You have requested an opinion of this office as to the effect that an unclassified, at-will State employee's federal felony conviction may have on his position in State service.

QUESTION

Does NRS 197.230 require the forfeiture of an unclassified, at-will State employee's job when he is convicted of a federal felony that does not stem from or relate to his job?

ANALYSIS

An employee of the Department of Administration was convicted of filing a false official statement, a violation of 18 U.S.C. § 1001. The employee serves at the will of the Director and is in the unclassified service of the State. NRS 232.2165.⁵ He was sentenced to three years probation and ordered to pay a fine of \$2,000. The maximum term of imprisonment for violating 18 U.S.C. § 1001 is "not more than 5 years." 18 U.S.C. § 1001(a)(3). 18 U.S.C. § 3559 delineates the various categories of federal crimes, providing in relevant part:

(a) Classification. –

An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is –

....

(5) less than five years but more than one year, as a Class E felony;

⁵ Accordingly, our opinion is limited to the facts of this case as they relate to an at-will employee. No opinion is offered as to whether a similar outcome would result if the employee was a permanent, classified employee who is entitled to the due process protections of NRS 284.385 and 284.390 and NAC 284.650.

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NRS 197.230 provides, “The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterward holding any public office in this state.” NRS 197.230 clearly applies to a public officer convicted of a federal felony. *Potter v. Board of County Comm’rs*, 92 Nev. 153, 547 P.2d 681 (1976) (position of Justice of the Peace declared vacant when he was convicted under 26 U.S.C. § 7206(1), subscribing a false income tax form).

We note that NRS chapters 193 and 197 are contained within Title 15 of NRS, entitled “Crimes and Punishments.” Certain terms used throughout Title 15 are defined in chapter 193 as follows. NRS 193.010 provides: “As used in this Title, unless the context otherwise requires, the words and terms defined in NRS 193.011 to 193.0245, inclusive, have the meanings ascribed to them in those sections.”

NRS 193.019 defines the term “public officer” in relevant part as follows: “‘Officer’ and ‘public officer’ include all officers, members and employees of: 1. The State of Nevada.” [Emphasis added.] See also *Walker v. State*, 102 Nev. 290, 294, 720 P.2d 700 (1986): “A prison guard is an employee of the State of Nevada and therefore a public officer as defined by NRS 193.019.” We note that for purposes of Title 15, the Nevada Legislature has broadened the scope of the term “public officer” beyond its ordinary meaning to specifically include State employees within the term. Compare with NRS 281.005, which defines the term “public officer” to include only certain persons elected or appointed pursuant to the constitution, a statute, or charter or ordinance. That section further specifies that the definition is limited for purposes of chapter 281. Accordingly, NRS 197.230 does apply to State employees and provides that a State employee forfeits his position upon conviction of any felony.

The penalty of forfeiture of office for a criminal conviction is a harsh result, but it certainly is not unique to the jurisprudence of Nevada.

Under state statutes, an office variously becomes vacant upon an officer’s conviction for a felony or for offenses involving a violation of the officer’s official duties or oath of office, or misconduct or the commission of a misdemeanor in office. In some jurisdictions, a public officer’s conviction

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of a federal offense is a conviction that vacates the nonfederal public office held by such officer.

63C AM. JUR. 2D Public Officers and Employees § 118 (1997).

We note that where some states may require that the conviction be one “involving a violation of the officer’s official duties” (63C AM. JUR. 2D Public Officers and Employees, *supra*), NRS 197.230 does not contain the job-related requirement. We therefore must conclude that NRS 197.230 does require the forfeiture of the subject employee’s job due to the fact that he was convicted of a felony, even though the crime was not related to his job. *Accord*, *Potter*, 92 Nev. at 155.

Finally, we note that a vacancy in the subject employee’s position was arguably created immediately upon conviction.

A conviction under the terms of a state statutory provision that a public office will become vacant upon the officer’s conviction of specified crimes is not affected by the filing of an appeal, as the vacancy of office apparently occurs automatically, or by operation of law, at the point of conviction.

63C AM. JUR. 2D Public Officers and Employees § 119 (1997).

However, neither this office nor the Nevada Supreme Court has heretofore considered this precise issue, and we are aware that the subject employee has dutifully performed the functions of his position since the date of his conviction, unaware of the requirements of NRS 197.230. Accordingly, on the facts of this case, we opine that the subject employee’s position becomes vacant upon the date of the issuance of this opinion. If confronted with the issue of the timing of an NRS 197.230 vacancy of a position in the future, we would adopt the position expressed above: that the position becomes vacant by operation of law at the time of the conviction of the employee convicted of a felony offense.

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CONCLUSION

NRS 197.230 requires the forfeiture of an unclassified, at-will State employee's job when he is convicted of a federal felony even though the crime does not stem from or relate to his job.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

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AGO 2002-39 CRIMINAL LAW; TRAFFIC: Notwithstanding compliance with other specific statutes, such as speed limits, NRS 484.363 both eliminates an affirmative defense and creates a citable misdemeanor offense for failure to exercise due care when speed-related caution should be exercised.

Carson City, October 28, 2002

Bradford R. Jerbic, Las Vegas Attorney, 400 Stewart Avenue, Ninth Floor, Las Vegas, Nevada 89101-2986

Dear Mr. Jerbic:

You have requested that the Office of the Attorney General provide an opinion regarding the enforceability of Nevada Revised Statute 484.363, commonly referred to as the “due care” statute.

QUESTION

Whether NRS 484.363 creates a citable offense for failure to exercise due care or merely serves to eliminate an affirmative defense.

ANALYSIS

NRS 484.363 provides in full as follows:

Duty of driver to decrease speed under certain circumstances. The fact that the speed of a vehicle is lower than the prescribed limits does not relieve a driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding highway, or when special hazards exist or may exist with respect to pedestrians or other traffic, or by reason of weather or other highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering a highway in

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compliance with legal requirements and
the duty of all persons to use due care.

A plain reading of the text of NRS 484.363 indicates that the Nevada statute is comprised of two parts and serves two purposes: 1) To eliminate an affirmative defense, and 2) to create a separate duty of due care, violation of which is a citable offense.

On the one hand, NRS 484.363 eliminates an affirmative defense by providing that:

The fact that the speed of a vehicle is
lower than the prescribed limits does not
relieve a driver from the duty to decrease
speed when . . . [Emphasis added.]

In this respect, Nevada's statute resembles a Washington statute that was the subject of *State v. MacRae*, 676 P.2d 463 (Wash. 1984). Washington's statute reads, in its entirety: "Compliance with speed requirements of this chapter under the circumstances hereinabove set forth shall not relieve the operator of any vehicle from the further exercise of due care and caution as further circumstances shall require."¹ In *MacRae*, the Supreme Court of Washington held that this statute served only to eliminate an affirmative defense: "The section merely eliminated a 'compliance with speed limit' defense to a charge of failure to drive carefully and prudently." *Id.* at 465.

NRS 484.363, however, also contains declarative language that we conclude distinguishes the Nevada statute from the Washington statute at issue in *MacRae* and imposes an enforceable duty to act. Specifically, NRS 484.363 provides in pertinent part that:

[S]peed shall be decreased as may be
necessary to avoid colliding with any
person, vehicle or other conveyance on or
entering a highway in compliance with
legal requirements and the duty of all

¹ RCW 46.61.445

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persons to use due care. [Emphasis added.]

A plain reading of NRS 484.363 thus indicates that the statute imposes a duty to 1) decrease speed, 2) as necessary to avoid collisions, and 3) in compliance with an implied duty to exercise “due care.”

Unlike Nevada’s law, the Washington statute contains no declaratory language and imposes no additional duty beyond that already contained in other parts of its statutory system. Additionally, as the Supreme Court of Washington pointed out in *MacRae*, the Washington “due care” statute refers to the “further exercise of due care.” *Id.* at 464. This statute was placed at the end of a section concerning specific speed limits and was intended to reference relevant citable offense statutes already in existence. Washington’s “due care” statute, therefore, was intended merely to eliminate the defense that compliance with existing statutes, such as speed limits, did not absolve the driver of his obligation to drive “carefully and prudently.” *Id.* at 465. Nevada’s statute does not refer to the “further” exercise of due care, but rather to the “duty of all persons to exercise due care.”

You also ask whether NRS 484.363 is invalid because it lacks the element of criminal intent. We conclude that NRS 484.363 does contain an element of intent sufficient to satisfy due process and the requirements of NRS 193.190.²

In criminal law, the element of mental culpability can be satisfied by ordinary negligence. Indeed, the Nevada Revised Statutes contain a number of laws in which criminal liability can be imposed based upon a finding of ordinary negligence. For example, NRS 202.280 provides in pertinent part:

1. Unless a greater penalty is provided in NRS 202.287, a person, whether under the influence of liquor, a controlled substance or otherwise, who maliciously, wantonly or negligently discharges or causes to be discharged any pistol, gun or any other

² NRS 193.190 provides, in its entirety, “In every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence.”

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kind of firearm, in or upon any public street or thoroughfare, or in any theatre, hall, store, hotel, saloon or any other place of public resort, or throws any deadly missile in a public place or in any place where any person might be endangered thereby, although no injury results, is guilty of a misdemeanor. [Emphasis added.]

Similarly, NRS 475.010 provides that:

Every person who willfully or negligently sets or fails to guard carefully or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another is endangered is guilty of a misdemeanor. [Emphasis added.]

NRS 475.020 provides:

Every person who, upon departing from camp or from any fire started by him in the open, willfully or negligently leaves the fire or fires burning or unexhausted, or fails to extinguish them thoroughly, is guilty of a misdemeanor. [Emphasis added.]

Finally, NRS 476.030 provides:

Every person who, by careless, negligent or unauthorized use or management of any explosive or combustible substance, injures or causes injury to the person or property of another is guilty of a misdemeanor. [Emphases added.]

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We note also the following cases, from various jurisdictions in the United States, that have upheld criminal laws based on ordinary negligence: *State v. Hazelwood*, 946 P.2d 875, 879 (Alaska 1997) (“it is firmly established in our jurisprudence that a mental state of simple or ordinary negligence can support a criminal conviction”); *People v. Olson*, 448 N.W.2d 845 (Mich. Ct. App. 1989) (holding that due process is not violated by imposing criminal penalties for acts of ordinary negligence); *State v. Smith*, 368 S.E.2d 33 (N.C. Ct. App. 1988) cert. denied, 483 S.E.2d 189 (N.C. 1997) (upholding conviction for death by vehicle based on ordinary negligence); *Commonwealth v. Burke*, 383 N.E.2d 76 (Mass. 1978) (vehicular homicide statute based on ordinary negligence satisfies due process and withstands vagueness challenge); *State v. Labonte*, 144 A.2d 792 (Vt. 1958) (“the power of a legislature to define a crime based upon ordinary negligence has been recognized in numerous jurisdictions”); *State v. Hedges*, 113 P.2d 530 (Wash. 1941) (whether to use negligence or gross negligence is a “matter within the province of the legislature”).³

CONCLUSION

In conjunction with NRS 484.999, the “General Rule” statute⁴ that makes it a misdemeanor to fail to perform any act within chapter 484, we conclude that NRS 484.363, in addition to eliminating an affirmative defense, creates a citable misdemeanor offense for failure to exercise due care in cases where speed-related caution should be exercised notwithstanding compliance with other specific statutes, such as speed-limits.

We further conclude that the legislature did not intend NRS 484.363 to be applied as a “catch-all” traffic citation, but rather intended the statute to impose a duty of greater caution relating to speed in situations where mere compliance with the legal speed limit is not enough to constitute prudent driving. Prosecutors and law enforcement agents should therefore avoid using the due care statute as a “catch-all” offense for incidents where it appears that a driver

³ In Nevada, a charge of involuntary manslaughter cannot be supported by mere ordinary negligence. See, e.g., *Bielling v. Sheriff*, 89 Nev. 112 (1973). There is no authority, however, to suggest that a standard of ordinary negligence cannot support a finding of guilt in a misdemeanor traffic offense.

⁴ NRS 484.999(1): “It is unlawful and, unless otherwise declared in this chapter with respect to a particular offense, it is a misdemeanor for any person to do any act forbidden or fail to perform any act required in this chapter.”

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should have been “more careful” but where it may be unclear what, if any, specific traffic violation was committed.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: GERALD J. GARDNER
Chief Deputy Attorney General

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AGO 2002-40 INSURANCE; BURIAL; CONTRACTS; INTEREST: NRS chapter 689 does not require that funeral or burial prepaid contract funds be invested in interest bearing trust fund accounts. Further, if a buyer cancels a prepaid contract for funeral and/or burial services after October 1, 2001, the seller or trustee is required to refund all interest earned on the trust fund account.

Carson City, November 5, 2002

Alice A. Molasky-Arman Commissioner, Insurance Department, of Business and Industry Division of Insurance, 788 Fairview Drive, Suite 300, Carson City, NV 89701-5491

Dear Commissioner Molasky-Arman:

You have requested an opinion of this office on the changes to NRS 689.065 implemented by the 2001 Legislature in Assembly Bill 618. Specifically, you ask:

QUESTION ONE

Whether NRS 689.065, as amended in section 138 of Assembly Bill 618, creates an affirmative duty upon a seller of funeral or burial services in accordance with a prepaid contract to invest funds in interest bearing trust fund accounts.

BACKGROUND

NRS 689.065 defines “net purchase price” and was amended under section 138 of Assembly Bill 618 (A.B. 618) during the 2001 legislative session to read “‘Net purchase price’ means the [~~net amount of the~~] purchase price, *including interest earned on the trust funds attributable to the buyer*, remaining after deduction of the sales commission.” See A.B. 618 (Act of March 26, 2001, ch. 446, 2001 Nev. Stat. 2216).

NRS 689.135 defines a “trust fund” to mean a fund containing any money deposited with a trustee by a seller with respect to a prepaid contract. The seller is statutorily required to establish a trust fund as set forth in NRS 689.315 (funeral services) and/or NRS 689.560 (burial services). The trust fund is utilized to hold the funds received by the buyer of a prepaid contract until the funeral or burial services are needed. The trustee, usually a state or national bank, trust company, federally insured savings and loan association, or credit union, shall maintain the fund for the benefit of the buyer until such time as the funds are needed for funeral or burial services. NRS 689.145.

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A prepaid contract is defined in NRS 689.150(3) as follows:

“Prepaid contract” means any contract under which, for a specified consideration paid in advance in a lump sum or by installments, a person promises either before or upon the death of a beneficiary named in or otherwise ascertainable from the contract to furnish funeral services and merchandise. The term does not include a contract of insurance or any instrument in writing whereby any charitable, religious, benevolent or fraternal benefit society, corporation, association, institution or organization, not having its object or purpose pecuniary profit, promises or agrees to embalm, inter or otherwise dispose of the remains of any person, or to procure or pay the expenses, or any part thereof, of embalming, interring or otherwise disposing of the remains of any person.

Prepaid contracts for funeral services are addressed in NRS 689.275 through NRS 689.365. Prepaid contracts for burial and cemetery services are addressed in NRS 689.540 through NRS 689.580. These provisions, as well as the remaining provisions of this chapter, pertain to agreements approved by the Commissioner of Insurance for the purpose of prepaying the costs of funeral or burial expenses.

ANALYSIS

A review of NRS chapter 689, pertaining to funeral and burial services, all statutory changes to that chapter, including section 138 of A.B. 618 (pertaining to NRS 689.065 specifically), as well as the legislative history of A.B. 618, does not indicate any legislative intent to require that trust funds be invested in interest bearing accounts.

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A review of the statutory changes to NRS chapter 689 found in A.B. 618, which consist of sections 138 through 147 of A.B. 618, demonstrates that in several sections the Legislature added “earned interest” to the definition of money in trust funds. (See sections 138, 141, 142, 145, and 146). The statutory changes require that interest earned on trust funds be returned to the consumer upon cancellation of a prepaid contract; however, there does not appear to be any language that would suggest that the funeral or burial entities must invest trust funds in interest bearing accounts.

“Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.” *State of Nevada, et al. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. Adv. Op. 27, 995 P.2d 482 (2000), quoting *State v. Jepsen*, 46 Nev. 193, 196, 209 P. 501, 502 (1922); see also, *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 503, 797 P.2d 946, 949 (1990). If a statute has no plain meaning, then other sources, such as legislative history, legislative intent, and analogous statutory provisions, should be consulted. *State Farm*, 995 P.2d at 486. See also *Moody v. Manny’s Auto Repair*, 110 Nev. 320, 325, 871 P.2d 935, 938-39 (1994).

There is nothing in the language of sections 138 through 147 of A.B. 618 to indicate that there is any affirmative duty to invest the trust funds in interest bearing accounts, only that any interest accrued in a trust fund be given to the buyer of a prepaid contract when and if the buyer terminates the contract. Further, if one were to determine that the statutes are ambiguous as to whether an affirmative duty is required to invest trust funds in interest bearing accounts, there is nothing in the legislative history to indicate that the Legislature wanted to add this duty or requirement; therefore, we should not add or impose such a duty or obligation.

CONCLUSION TO QUESTION ONE

There is no affirmative duty to invest trust funds in interest bearing accounts. Therefore, additional analysis of the remaining questions regarding (a) whether that duty is applied retrospectively to all trust funds requiring said funds be rolled into interest bearing accounts, or (b) whether the duty applies only prospectively to new trust funds is not required.

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QUESTION TWO

Does NRS 689.065 require trust funds of prepaid contracts established by a seller for funeral and/or burial services and held in interest bearing accounts at the effective date of the statutory amendments to credit the interest earned before the statutory amendment was in effect to the buyer; or does it require that only the interest earned after the effective date of the statutory amendment be returned to the buyer?

ANALYSIS

A review of NRS chapter 689 and the amendatory changes made pursuant to A.B. 618, including section 244, indicates that after October 1, 2001, any and all interest earned in a trust fund established in accordance with a prepaid contract established by the seller for funeral or burial services shall be credited to the buyer upon cancellation of a prepaid contract. In more specific terms, if a buyer cancelled a contract prior to October 1, 2001, the entity would not now be required to return earned interest on the trust fund; however, if a buyer cancelled a contract after October 1, 2001, then the entity is now required to return all interest earned on a trust fund to the buyer.

The Nevada Supreme Court has stated in a number of cases that there is a general presumption in favor of the prospective application of statutes unless the Legislature clearly manifests a contrary intent or unless the intent of the Legislature cannot otherwise be satisfied. *See McKellar v. McKellar*, 110 Nev. 200, 871 P.2d 296 (1994). Some cases state that a statute must be construed to have only prospective effect, unless a contrary legislative intent is clearly indicated in the language of the statute itself. *See Murphy v. State*, 110 Nev. 194, 871 P.2d 916 (1994); *State v. Merolla*, 100 Nev. 461, 686 P.2d 244 (1984).

In the present matter, A.B. 618, specifically section 244 of the act, states: “The amendatory provisions of this act do not apply to offenses committed before October 1, 2001.” A reasonable interpretation of this provision is that if a funeral or burial entity failed to return interest on a contract cancelled by a buyer prior to October 1, 2001, then even though, under the current amended statutes, that would be an “offense,” the entity is not required to return or credit any interest earned on that trust fund. Further, however, after October 1, 2001,

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if a buyer cancels a contract under NRS chapter 689, then the statutes require that the trust funds, including earned interest, be returned to the buyer.

The statutes do not specifically state or express that only interest earned after October 1, 2001, shall be returned but that all earned interest shall be returned to the buyer. In fact, NRS 689.575 provides in relevant part that the seller or trustee “shall refund to the buyer *all* money, including earned interest, in the trust fund held for the buyer's account.” [Emphasis added.] What is prospective and, therefore, not retroactive, is the application of the amendatory changes to contracts cancelled prior to October 1, 2001, wherein earned interest was not and will not be required to be returned to the buyer.

The most comprehensive description of the purpose of the amendatory changes to NRS chapter 689 and pre-need contracts was stated by you and reflected in the Minutes of the Senate Committee on Commerce and Labor, Seventy-First Session on May 24, 2001, wherein you stated:

I think it is important to point out sections 138 and 147 amend the chapter on funeral and burial contracts. We have been identified as having very poor consumer protection laws for purchasers of pre-need, or burial contracts. We have received many complaints about the inadequacy of refunds where those contracts have to be cancelled. What these provisions do is enable the purchasers to receive interest on trust funds if they must cancel those.

Minutes of the Senate Committee on Commerce and Labor, Seventy-First Session on May 24, 2001. See also Hearing on A.B. 618 before the Assembly Committee on Commerce and Labor, 71st Sess., 13-14 (April 11, 2001).

An opposing argument could be that the only interest required to be returned to the buyer is any interest earned *after* the statutory amendments came into effect on October 1, 2001. In this regard, if a buyer cancels a contract on or after October 1, 2001, then the seller or trustee of the prepaid contract must only return interest earned on or after October 1, 2001; however,

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this is not specifically stated in the amendatory provisions of the statutes nor is it identified or addressed in the legislative history of A.B. 618. In addition, one could also argue that paying all interest earned on a trust account before and after October 1, 2001, is an undue burden on the seller or trustee, who may have already utilized or spent interest which is no longer available or within the trust fund.

As the statutes do not specifically provide for return of only the interest earned after a specified date, but that "all" earned interest be returned to the buyer upon cancellation on or after October 1, 2001, then it is the opinion of this office that all earned interest shall be returned to the buyer. This is consistent with the purpose of the amendatory changes to NRS chapter 689 to further protect the consumer, who, in this case, would have been able to earn interest on those funds had they not been in the possession of the seller or trustee.

CONCLUSION TO QUESTION TWO

If a buyer cancels a prepaid contract for funeral and/or burial services on or after October 1, 2001, then the seller or trustee is statutorily required to return *all* interest earned on the trust fund established for such purpose to the buyer. The statutes and the legislative history of Assembly Bill 618 do not indicate otherwise. Further, if a buyer cancelled a contract prior to October 1, 2001, then the seller or trustee is not now required to return any earned interest to the buyer (i.e., the statutes are not retroactive in this regard).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: GABRIELLE J. CARR
Deputy Attorney General

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AGO 2002-41 MOTORCYCLES: Helmets that comply with the National Highway Traffic Safety Administration standards can be identified through examination of the mandatory stickers and the construction of the helmet. The Office of the Attorney General recommends that a change be made to the current statutes to make enforcement easier through a graduated system of fines and education to the motorcycle riding public. This change will provide the motorcycle riding public with incentives to ensure that they purchase a helmet that conforms to the safety standards set forth in Nevada and Federal law.

Carson City, November 5, 2002

Colonel David Hosmer, Chief, Nevada Highway Patrol, Department of Public Safety, 555 Wright Way, Carson City, NV 89711

Dear Colonel Hosmer:

You have requested an opinion from this office to assist both Nevada Highway Patrol troopers and the motorcycle riding public in recognizing motorcycle helmets that are legal for use in the State of Nevada.

QUESTION

How can Nevada Highway Patrol troopers recognize a motorcycle helmet that does not comply with the standards set for the State of Nevada?

ANALYSIS

First, Nevada Revised Statute (NRS) 486.231 requires motorcycle riders and passengers to wear helmets that comply with the standards set by the Department of Public Safety (Department). The Department has adopted by reference the standards set by the National Highway Traffic Safety Administration (NHTSA) in 49 C.F.R. § 571.218. Nevada Administrative Code (NAC) 486.015. Violations of the helmet law are misdemeanor crimes under NRS 486.381.

Statistics concerning the use of proper motorcycle helmets indicate that riders are forty percent more likely to have a fatal accident without a helmet

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than with the helmet.¹ In addition, in the most traumatic accidents involving head injuries, “it has been shown that the public at large bears a major portion” of the costs of treatment.²

The NHTSA standards require the manufacturer of a helmet to perform certain technical tests to determine the ability of the helmet’s shell to withstand puncture and penetration. Additionally, the NHTSA standards require testing to determine whether the chinstrap will remain attached to the helmet and how much of the energy of an impact will be attenuated by the helmet. These tests are required to be performed by the manufacturer, who then self-certifies the helmet by placing a sticker of contrasting color with the letters “DOT” on the back of the helmet. 49 C.F.R. § 571.218(S5.6.1)(e).

The absence of the “DOT” sticker is an indicator that the helmet does not comply with the safety standards set out in the regulation. However, a helmet that is missing the “DOT” sticker, but meets the NHTSA standards, may still be legally worn. On the other hand, information provided by the NHTSA indicates that some persons who sell novelty helmets also provide a “DOT” sticker for the purchaser to apply to the nonconforming helmet themselves. These stickers alone do not make the helmet “legal.”

Other stickers that may appear on a legal helmet show that the helmet has passed additional scrutiny and has been found to comply with the standards. Private foundations, such as Snell Memorial Foundation (SNELL) and American National Standards Institute (ANSI), test helmets and certify that these helmets pass the standards. Legitimate stickers from these bodies can be relied upon to determine that the helmet is in compliance.

The federal standards also require manufacturers of conforming helmets to place a notice on the inside of the helmet, in a place that can be viewed without removing the inside padding. 49 C.F.R. § 571.218(S5.6.1)(f). This notice sticker must include information on substances that can compromise the helmet’s integrity, such as paints and solvents, and to warn purchasers not to modify the helmet. *Id.* The name of the manufacturer of the helmet must also

¹ “How to Identify Unsafe Motorcycle Helmets” published by the U.S. Department of Transportation, National Highway Transportation Safety Administration, DOT HS 807 880 (reprinted February 2001).

² Position Statement of the American Academy of Orthopedic Surgeons, December 1985.

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appear, along with the model designation, size, and month and year of manufacture. 49 C.F.R. § 571.218(S5.6.1)(a-d). The absence of these stickers is a good indication that the helmet does not comply, as they are almost universally inside the helmet and thus less likely to fall off.

Helmets that comply with the NHTSA standards are constructed of a plastic or fiberglass shell to achieve proper protection from penetration and a polystyrene inner liner to absorb the energy of an impact to the head. 49 C.F.R. § 571.218(S5.1)(S5.2). The best way to differentiate between a helmet that complies and one that does not is the presence, or absence, of the material used to attenuate impact in the event of a crash. According to my research, no helmet has passed the required testing without at least a one-inch thickness of polystyrene foam or other impact resistant material.³ Novelty helmets will usually have only an outer shell and some comfort padding. These helmets without the impact absorbing materials do not meet NHTSA standards.

Helmets may not have any rigid projections that extend more than 0.20 inches or 5 millimeters. This allows the helmet to have snap fasteners on the outside, but very little else. 49 C.F.R. § 571.218(S5.5).

The final indicator of compliance is the chinstrap used to hold the helmet on the head. The “retention system” must be able to handle certain loads without separating from the helmet. The fastening system must be easy to engage, but must also stand up to certain loads, as specified in the regulation. 49 C.F.R. § 571.218(S5.3). Retention systems that comply with the standards will have secure rivets that are firmly attached to the helmet. Novelty helmets will have rivets that are loose and do not appear to be secure.

The above stated guidelines, however, only allow troopers and riders to make a preliminary assessment of the helmets. To determine with certainty whether a helmet complies with federal and state safety standards, one must contact the manufacturer of the helmet listed on the sticker inside the helmet and the National Highway Transportation Safety Administration.

³ The standards listed in this opinion come from a variety of sources, but are summarized in “How to Identify Unsafe Motorcycle Helmets” published by the U.S. Department of Transportation, National Highway Transportation Safety Administration, DOT HS 807 880 (reprinted February 2001).

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The current state of the law makes enforcement and compliance somewhat confusing. Therefore, we suggest that a change to Nevada law be requested to include the following provisions:

1. A rider wearing a helmet that does not conform to the law will be subject to a small fine.
2. A rider cited a second time for wearing a non-conforming helmet will be subject to a higher fine.
3. A rider cited a third time for wearing a non-conforming helmet will be subject to misdemeanor charges. Establish a presumption of non-conformance if a helmet lacks either of the two stickers required by 49 C.F.R. § 571.218, which may be rebutted by a showing that the helmet conforms to the standards.
4. Establish a presumption of non-conformance if the helmet lacks impact-absorbing material between the shell and the comfort lining of the helmet as required by 49 C.F.R. § 571.218, which may be rebutted by a showing that the helmet conforms to the standards.

These provisions would provide financial incentives to motorcyclists to ensure that their helmets are in compliance with the laws of this State. They will also put the burden of purchasing a legitimate helmet on the rider, where it belongs. In conjunction with the change in the law, the Nevada Highway Patrol could sponsor some sort of advertising of the requirements of safe helmets as outlined in pamphlets issued by the NHTSA.

CONCLUSION

Helmets that comply with the National Highway Traffic Safety Administration standards can be identified through examination of the mandatory stickers and the construction of the helmet. Furthermore, as more fully explained above, the best way to differentiate between a helmet that complies and one that does not is the presence, or absence, of the material used to attenuate impact in the event of a crash, including a chinstrap. However, the Office of the Attorney General recommends that a change be made to the current statutes through a graduated system of fines and education of the motorcycle riding public, which would also serve to make enforcement easier. These changes will provide the motorcycle riding public with incentives to

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ensure that they purchase helmets that conform to the safety standards set forth in Nevada and Federal law.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: BRYAN L. STOCKTON
Deputy Attorney General

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AGO 2002-42 ELECTED OFFICIALS; FELONS; LANDER COUNTY:

Conviction of a felony in federal court is sufficient to invoke the disability of a person to continue to hold elected public office in Nevada. A person is considered convicted of a felony so as to suffer the consequential legal disabilities at and from the time the court enters and files its written judgment of conviction on the verdict.

Carson City, November 7, 2002

Hy Forgeron, Lander County District Attorney, Post Office Box 187, Battle Mountain, Nevada 89820

Dear Mr. Forgeron:

You have requested an opinion from this office regarding whether a public officer who has been convicted of a felony offence may continue to hold public office and, if not, when the inability to hold public office becomes effective.

QUESTION ONE

Is conviction of a felony in federal court sufficient to invoke the disability of a person to continue to hold elected public office in Nevada?

ANALYSIS

According to the facts you supplied to this office, a Lander County elected official was found guilty of two felony counts by a jury in federal court on October 25, 2002. This elected official did not seek reelection this year and the current term of office expires on January 6, 2003. You have provided an accurate analysis of the requirement that a public officer be a qualified elector pursuant to Section 3 of Article 15 of the Nevada Constitution, which provides in pertinent part: "No person shall be eligible to any office who is not a qualified elector under this constitution." "Qualified elector" is described in Section 1 of Article 2 of the Nevada Constitution: "All citizens of the United States (not laboring under the disabilities named in this constitution) . . . shall be entitled to vote . . . provided, that no person who has been . . . convicted of treason or felony . . . shall be entitled to the privilege of an elector."

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After examining several attorney general opinions in conjunction with the above referenced constitutional provision, you concluded in your opinion request “that conviction of a felony in the federal system constitutes a conviction sufficient to deny or revoke a person’s qualification as an elector in Nevada.” We agree.

In addition, on October 28, 2002, this office issued an opinion addressing a similar issue. An unclassified, at-will state employee was convicted of a federal felony and the question was whether his job was forfeited. After a thorough analysis, this office concluded: “NRS 197.230 requires the forfeiture of an unclassified, at-will State employee’s job when he is convicted of a federal felony even though the crime does not stem from or relate to his job.” Op. Nev. Att’y Gen. No. 2002-38 (October 28, 2002).

NRS 197.230 provides: “The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterward holding any public office in this state.” “Public officer” is defined in NRS 193.019 as including all officers of any political subdivision of this state.

Attorney General Opinion No. 2002-38 supports the previous argument you put forward regarding the effect of the conviction of a public officer of a felony.

Finally, NRS 283.040(1) provides in pertinent part: “Every office becomes vacant upon the occurring of any of the following events before the expiration of the term: . . . (d) A conviction of the incumbent of any felony” The Nevada Supreme Court examined this provision in *Potter v. Board of County Comm’rs*, 92 Nev. 153, 547 P.2d 681 (1976). Citing several of the same laws as analyzed here, the Court upheld the lower court’s ruling which declined to review the action by the county commissioners. In that case a justice of the peace had entered a nolo contendere plea in federal court and was convicted. As a result of the conviction, the county clerk certified the vacancy to the county commissioners and the board declared the office vacant. *Id.*

From the above analysis, it is clear that if an elected public official is convicted of a felony, the public official may no longer hold office.

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CONCLUSION TO QUESTION ONE

Conviction of a felony in federal court is sufficient to invoke the disability of a person to continue to hold elected public office in Nevada.

QUESTION TWO

When is a person considered convicted of a felony so as to suffer the legal disabilities attendant upon that circumstance?

ANALYSIS

Again, we agree with your analysis of both Nevada case law and attorney general opinions that conviction does not occur until the entry of judgment on the verdict occurs. No proof of the conviction exists until the judgment of conviction, or its equivalent, has been filed.

In *Fairman v. State*, 83 Nev. 287, 429 P.2d 63 (1967), Mr. Fairman testified that he had not been previously convicted of a felony. The court stated, “A verdict of the jury is not a judgment of the court, nor is it the final determination. It follows that *Fairman’s* answer of “No” to the question was the truth, because the entry of judgment on the verdict and sentencing had been postponed past this present trial.” *Id.* at 289 (citations omitted). Also, no official document exists to prove the conviction until the entry of judgment on the verdict has been entered. The Court stated, “It is true that without a properly authenticated copy of *Fairman’s* conviction of the week before, no proof could otherwise be made of it.” *Id.*

An attorney general opinion issued in 1943 also deals with the eligibility of a person convicted of a felony in federal court to hold public office. *Op. Nev. Att’y Gen. No. 62* (July 29, 1943). The question in this opinion was whether a person had been convicted of a felony within the meaning of the Nevada Constitution and laws, thereby denying him the right to hold public office. The opinion states:

The depriving of a person of his rights and privileges as an elector is not to be lightly accomplished and, we think, it must affirmatively appear beyond question that a

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conviction of a felony is in fact shown by the record of the court in which such conviction is alleged to have been had.

Id.

The opinion concluded: “There has been no judgment of the court adjudging ‘T’ guilty of any offense. There has in fact been no conviction of ‘T’ of a felony within the meaning of that term as contained in section 1 of article II of the Nevada Constitution.” Id.

In the facts you have presented to this office, you have not indicated whether an entry of judgment on the verdict has been entered against this elected official. You have indicated that sentencing has been set for February 2003. As soon as an entry of judgment on the verdict has been entered against this person, the person will be considered to be convicted of a felony and will no longer be entitled to hold public office. If that occurs prior to January 6, 2003, the office will be considered vacant.

CONCLUSION TO QUESTION TWO

A person is considered convicted of a felony so as to suffer the consequential legal disabilities, at and from the time the court enters and files its written judgment of conviction on the verdict.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Senior Deputy Attorney General

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AGO 2002-43 CITIES AND TOWNS; CHARTERS: The amendment to the Boulder City Charter that resulted from the passage of Boulder City Question No. 1 on September 3, 2002, does not cause the incumbent mayor or council members to immediately lose a monthly health insurance benefit and monthly automobile allowance. The entitlement to that benefit and allowance will terminate upon the completion of their respective term of office. Any future salary increase would be applicable only upon election or reelection, as applicable.

Carson City, November 8, 2002

Dave Olsen, City Attorney, Office of the Boulder City Attorney, Post Office
Box 61450, Boulder City, Nevada 89006-1350

Dear Mr. Olsen:

You have asked a question as to whether certain provisions within an amendment to the Boulder City Charter immediately reduce certain benefits the incumbent mayor and incumbent city council currently enjoy as emoluments of their respective offices.

QUESTION

Does the amendment to the Boulder City Charter, which resulted from the passage of Boulder City Question No. 1 on September 3, 2002, cause the incumbent mayor and city council to immediately lose a monthly insurance benefit and monthly automobile allowance?

ANALYSIS

The following facts are taken from your letter requesting this opinion and also from the arguments for and against passage of Boulder City Question No. 1.

Prior to September 3, 2002, Section 6 of the Boulder City Charter (Charter) provided:

The Council may determine the annual
salaries of the Mayor and Councilmen by

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ordinance, however, no Mayor or Council member considering or voting for such salary increase or decrease shall receive the same during the term for which that Mayor or Council member was elected. [Emphasis added.]

The provision allowed a council member's salary to be adjusted during his term, so long as the member did not participate in voting for the increase.

On September 3, 2002, the voters of Boulder City considered an initiative, "Boulder City Question 1," (Question 1) to amend the Charter. Question 1 passed overwhelmingly and resulted in the removal of the "considering or voting" language from Section 6 of the Charter and added new language that addresses certain benefits. Section 6 of the Charter now reads as follows:

1. The Council may determine the annual salaries of the Mayor and Councilmen by ordinance, but no ordinance increasing such salaries shall become effective during the term for which the Mayor or Councilman was elected or appointed.
2. The Mayor and Councilmen shall be reimbursed for their personal expenses when conducting or traveling on City business. Reimbursement for use of their personal automobiles shall be at the rate per mile established by the IRS rules.
3. The Mayor and Councilmen shall receive no additional compensation or benefit other than that mandated by State or Federal law.

At the time of the passage of Question 1, the mayor and council members earned annual salaries previously fixed by ordinance. In addition to salary, the mayor and council members were allowed a \$450 per month automobile allowance and a \$500 per month health insurance benefit. Your question is whether the passage of Question 1 caused the incumbent mayor and council

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members to immediately lose the automobile allowance and health insurance benefit, or whether Question 1 will only affect future mayors or council members as they are appointed or elected.

Section 1 of Question 1 now makes clear that ordinance-based salary adjustments may only be made effective upon election or appointment of the mayor or a council member. We note that section 1 of Question 1 reflects the requirements of NRS 266.450, which provides in relevant part:

All elected officers of any city are entitled to receive such compensation as may be fixed by ordinance, but, except as otherwise provided in NRS 266.041, the compensation of any elected officers must not be increased or diminished to take effect during the term for which the officer was elected.

This office has consistently interpreted the term “compensation,” as used in NRS 266.450, to mean “salary.” Op. Nev. Att’y Gen. No. S-6 (Sept. 25, 1962); Op. Nev. Att’y Gen. No. 49 (July 1, 1963); Op. Nev. Att’y Gen. No. 99-27 (Aug. 5, 1999). We have not had occasion to consider whether the term properly includes the sort of benefit and allowance that is the subject of this opinion so that the statute would also prevent the adjustment of such a benefit and allowance as “compensation” during the term of an elected officer. Also, the “Arguments for Passage” portion of Question 1 indicates that the subject benefit and allowance are subject to modification merely by resolution and not necessarily by ordinance. Therefore, it is not at all clear that NRS 266.450 has any bearing on the question presented. However, the approach we will take in analyzing your question will obviate the need to further consider NRS 266.450.

The initiative power is legislative in nature. *Citizens for a Public Train Trench Vote v. City of Reno*, 118 Nev. Adv. Op. No. 60 (Sept. 6, 2002), 53 P.3d 387 (2002). We may apply rules of statutory construction to construe unclear provisions in a referendum or initiative. *County of Pershing v. Sixth Judicial Dist. Court*, 43 Nev. 78, 181 P. 960, 183 P. 314 (1919). “The stated purpose of legislation is a factor considered by courts in interpreting a given statute.” *Sheriff v. Smith*, 91 Nev. 729, 734, 542 P.2d 440, 443 (1975). The proponents of Question 1 expressed the purpose of the initiative’s amendments

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in the “Arguments for Passage” section of Question 1. In discussing the automobile and health insurance benefits, the purpose of Question 1 was explained to the voters on the sample ballot as follows:

Currently, Council salaries are reported as \$11,026 per year. While this figure is technically correct, it is misleading as over the years the Council has also given itself an automobile allowance (\$450 per month) and a health insurance benefit (\$500 per month). These two benefits add up to an additional \$11,200 per year, in effect, doubling the Council’s compensation. Under the present processes, the benefit portion of the Council’s compensation can be modified at any time by a simple resolution of the Council and is not tied to the reelection process. This proposed amendment to the Charter eliminates the benefits and ties all compensation to the reelection process. It does not prevent the Council from setting a higher salary to offset the loss of these benefits, but it will result in full disclosure of the actual compensation the Council member receives and make the Council members justify all of their compensation to the voters as they stand for reelection. [Emphasis added.]

The clear purpose behind the initiative, as expressed by its proponents, was to tie all “compensation” (formerly benefits and salary, now only salary) to the reelection process. We therefore conclude that the current mayor and council members may continue to enjoy the health insurance benefit and automobile allowance until the time of their reelection, at which point the proscriptions against the insurance benefit and the flat monthly automobile allowance come into play. Presumably, before that time comes, the council will adopt an ordinance that will set the salary of the mayor and the council

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members higher to provide at least a partial offset for the value of the lost benefits. If approved by the council, such a salary increase would be applicable only to the mayor and council members upon their election or reelection, as applicable.

CONCLUSION

The amendment to the Boulder City Charter that resulted from the passage of Boulder City Question No. 1 on September 3, 2002, does not cause the incumbent mayor or council members to immediately lose a monthly health insurance benefit and monthly automobile allowance. The entitlement to that benefit and allowance will terminate upon the completion of their respective term of office. Any future salary increase would be applicable only upon election or reelection, as applicable.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

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AGO 2002-44 PAROLE AND PROBATION; STATUTES: NRS 212.187 criminalizes voluntary sexual contact between prisoners and employees of the facilities in which they are confined. NRS 212.187 does not apply to parole and probation officers supervising inmates, parolees, and the probationers in the community.

Carson City, November 12, 2002

R. Warren Lutzow, Chief, Department of Public Safety, Division of Parole and Probation, 1445 Hot Springs Road, Suite 104 West, Carson, Nevada 89706

Dear Chief Lutzow:

You have requested an opinion from this office regarding whether NRS 212.187 applies to parole and probation officers supervising inmates, parolees, and probationers in the community.

QUESTION

Does NRS 212.187 apply to parole and probation officers supervising inmates, parolees, and probationers in the community?

ANALYSIS

NRS 212.187 criminalizes voluntary sexual contact between prisoners and employees of the facilities in which they are confined. The legislative history of NRS 212.187 establishes that it was intended and is designed to deal with incarcerated prisoners and employees of correctional institutions or jails and not with non-incarcerated prisoners such as residential confinement inmates or prisoners, parolees and probationers, or parole and probation officers. It was the Nevada Department of Prisons (NDOP), now known as Nevada Department of Corrections (NDOC), that sought enactment of legislation that made voluntary sexual conduct unlawful between a prisoner and a person who either has custody of the prisoner or who is an employee of an institution in which the prisoner is confined. *Hearing on A.B. 87 Before the Assembly Committee on Judiciary*, 1981 Legislative Session, 270-272 (February 10, 1981). The minutes clearly establish that the circumstances sought to be addressed involved prisoners incarcerated within the NDOP and NDOP employees. *Id.* at 270-272.

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Assembly Vice Chairman Sader questioned NDOP Director Charles Wolff regarding “the problem of an *employee* engaging in sexual conduct with a prisoner.” *Id.* at 271 (emphasis added).

Director Wolff testified “that the major concern was with the *employees*.” *Id.* at 271 (emphasis added).

Deputy Attorney General Brooke Nielsen testified the bill “criminalized both the act of [the] prisoner and the *employee*.” *Id.* at 271 (emphasis added).

It is clear both Director Wolff and Deputy Attorney General Nielsen were referring to incarcerated prisoners within the NDOP and NDOP employees. No mention was made of parolees, probationers, or parole and probation officers.

The original proposed legislation referred to prisoners “confined in an institution of the department.” *Hearing on A.B. 87 Before the Assembly Committee on Judiciary*, 1981 Legislative Session, 527, 549 (February 26, 1981). Deputy Attorney General Nielsen later proposed an amendment changing that language to “assigned to the Nevada Department of Prisons,” which had the effect of including NDOP prisoners incarcerated in restitution centers and honor camps. *Id.* at 527, 549. NDOP prisoners in restitution centers and honor camps are deemed incarcerated prisoners and Ms. Nielsen clearly sought to have the legislation also apply to them.

The “assigned to the Nevada Department of Prisons” language was further amended to “lawful custody or confinement,” which would include “jails on the local level,” further establishing an intent to deal with incarcerated prisoners. *Id.* at 527. At this hearing, there was no mention of non-incarcerated individuals such as parolees or probationers. There also was no mention of any applicability to parole and probation officers.

The summary of A.B. 87, Committee on Judiciary, Jan. 30, in the Assembly History of the Sixty-first Session (1981), indicates in pertinent part: “prohibits sexual conduct between prisoners and *employees of department of prisons*.” [Emphasis added.] The summary of A.B. 87 in the Index of All Measures In and Referred to Senate Committee on Judiciary indicates in pertinent part: “prohibits sexual conduct between prisoners and *employees of*

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department of prisons.” [Emphasis added.] No entry mentions employees of the Division of Parole and Probation.

The focus on incarcerated prisoners within the NDOP and NDOP employees continued in the Senate Committee on Judiciary. *Hearing on A.B. 87 Before the Senate Committee on Judiciary*, 1981 Legislative Session, 1000-1003 (March 23, 1981). NDOP Director Wolff testified that while NDOP “procedures and rules prohibit sexual conduct between *employees* and prisoners . . . there are no penalties assessed.” *Id.* at 1000-1001 (emphasis added).

Deputy Attorney General Nielsen testified, “The purpose of A.B. No. 87 is to give the administration some control over this type of activity between staff members and prisoners.” *Id.* at 1002. It is clear she was referring to prison administration and prison staff. Director Wolff subsequently testified that “he felt sexual acts between *employees* and prisoners should not be condoned in a *prison* setting.” *Id.* at 1003 (emphasis added). Again, no mention was made of any intended applicability to parolees, probationers, or parole and probation officers.

A.B. 87 was enacted and codified at NRS 212.187 as follows:

1. It is unlawful for:

(a) A prisoner who is in lawful custody or confinement to engage voluntarily in sexual conduct with a person who has custody of him or an employee of the institution in which he is confined; or

(b) A person who has custody of a prisoner or who is an employee of an institution in which a prisoner is confined, to engage voluntarily in sexual conduct with a prisoner.

2. As used in this section, sexual conduct means acts of masturbation, homosexuality, sexual intercourse or physical contact with another’s unclothed genitals or pubic area.

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Accordingly, it is very clear that NRS 212.187, at its enactment, applied only to prisoners who were physically incarcerated in an institution, NDOP employees, and employees of an institution in which a prisoner is confined. It did not apply to parolees or probationers who are not physically incarcerated and did not apply to parole and probation officers who do not work as employees in a correctional institution.

NRS 212.187 was next amended by the sixty-ninth (1997) Nevada Legislature pursuant to Senate Bill 113 (S.B. 113),¹ which proposed to make changes to “provisions governing certain offenders in custody or confinement.” S.B. 113, as introduced, proposed the following amendment in italics:

It is unlawful for:

(a) A prisoner who is in lawful custody or confinement to engage voluntarily in sexual conduct with a person who has custody of him or an employee of the institution in which he is confined; or

(b) A person who has custody of a prisoner or who is an employee of an institution in which a prisoner is confined, to engage voluntarily in sexual conduct with a prisoner.

2. A prisoner, person who has custody of a prisoner or an employee of an institution in which a prisoner is confined who violates the provisions of subsection 1 is guilty of a category D felony and shall be punished pursuant to NRS 193.130.

3. As used in this section, “sexual conduct” means acts of masturbation, homosexuality, sexual intercourse or physical contact with another's unclothed genitals or pubic area.

¹ S.B. 113 arose from Bill Draft Request (BDR) 16-73, which was introduced in the Senate Committee on Judiciary on February 3, 1997. *Hearing on S.B. 113 Before the Senate Committee on Judiciary*, 1997 Legislative Session, 79 (February 3, 1997).

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This amendment, as introduced, clearly showed the intent that NRS 212.187 apply to prisoners confined to an institution and employees of an institution in which a prisoner was confined. The first hearing on S.B. 113 at which testimony was taken occurred on February 6, 1997, before the Senate Committee on Judiciary. *Hearing on S.B. 113 Before the Senate Committee on Judiciary*, 1997 Legislative Session, 101-112 (February 6, 1997). The First Reprint of S.B. 113 occurred on March 18, 1997. History of S.B. 113.

The First Reprint had the following deletions in brackets and additions in italics:

1. [It is unlawful for:

(a)] A prisoner who is in lawful custody or confinement [to engage voluntarily], *other than residential confinement, who voluntarily engages* in sexual conduct with [a person who has custody of him or an employee of the institution in which he is confined; or

(b)] *another person is guilty of a category D felony and shall be punished as provided in NRS 193.130.*

2. A person who [has custody of a prisoner or who is an employee of an institution in which a prisoner is confined, to engage] voluntarily *engages* in sexual conduct with a prisoner [.

2.] *who is in lawful custody or confinement, other than residential confinement, is guilty of a category D felony and shall be punished as provided in NRS 193.130.*

3. As used in this section, “sexual [conduct means] *conduct*”:

(a) *Includes* acts of masturbation, homosexuality, sexual intercourse or physical contact with [another's] *another person's clothed or unclothed* genitals or

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public area [...] to arouse, appeal to or gratify the sexual desires of a person.

(b) Does not include acts of a person who has custody of a prisoner or an employee of the institution in which the prisoner is confined that are performed to carry out the necessary duties of such a person or employee.

S.B. 113, 69th Leg. (Nev. 1997) (reprinted with adopted amendments) First Reprint. The minutes of the February 6, 1997 hearing on S.B. 113 before the Senate Committee on Judiciary do not reveal any discussion or explanation as to why S.B. 113, as introduced, was amended to add the “*other than residential confinement*” language to the First Reprint. *Hearing on S.B. 113 Before the Senate Committee on Judiciary*, 1997 Legislative Session, 101-112 (February 6, 1997).

Senator Mark A. James presented an overview to and answered questions regarding S.B. 113 from the Senate Committee on Finance and, particularly relevant herein, he indicated S.B. 113 was originally intended to create a felony for sexual conduct between prisoners. *Hearing on S.B. 113 Before the Senate Committee on Finance*, 1997 Legislative Session, 4071 (May 5, 1997). However, he was informed the prison system staff wanted the provision to extend to sexual conduct between prisoners “*and those persons working as prison employees.*” *Id.* at 4071 (emphasis added). Again, the focus was on prison employees.

The “*other than residential confinement*” language remained in subsequent reprints, and was included in the final reprint and enacted into law. A realistic explanation for the “*other than residential confinement*” amendment is revealed in the Assembly Committee on Judiciary hearing on S.B. 113 on June 18, 1997. The Washoe County Chief Administrative Deputy Public Defender testified he was concerned that innocent people would not know the status of prisoners who live in restitution centers and could unwittingly engage in prohibited [sexual] conduct with them. *Hearing on S.B. 113 Before the Assembly Committee on Judiciary*, 1997 Legislative Session, 4376-77 (June 18, 1997). Vice Chairman Buckley pointed out that the proposed legislation

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applied to prisoners “other than [in] residential confinement.” *Id.* at 4377.

Mr. Morrow replied there was a distinction between people [prisoners] living in a custodial facility, such as a restitution center, and those in residential home confinement.² *Id.* at 4377. That distinction was undoubtedly recognized by those who proposed the “*other than residential confinement*” addition to and enactment of S.B. 113 and served as the basis for the exemption of prisoners in residential confinement from the prohibitions of NRS 212.187.

The 1999 Nevada Legislature developed another non-incarceration alternative and pilot program for prisoners of the NDOP, to wit: a program of treatment for the abuse of alcohol and drugs supervised by a judge. S.B. 184 was codified in NRS 209.4311-209.4317, effective July 1, 1999, to expire by limitation on July 1, 2002. A prisoner whom the Director of the NDOP believed could successfully participate in and benefit from a program of treatment for the abuse of alcohol or drugs supervised by a judge could be assigned to the custody of the Division of Parole and Probation. The prisoner would retain the status of an inmate but be in a “residential confinement-type program.” *Hearing on S.B. 184 Before the Senate Committee on Finance*, 1999 Legislative Session, 5643 (May 21, 1999). Accordingly, and unquestionably in recognition of the distinction between incarceration in a custodial facility and a residential confinement-type program, the 1999 Nevada Legislature amended NRS 212.187 to exempt prisoners “in the custody of the division of parole and probation of the department of motor vehicles and public safety pursuant to NRS 209.4314 or residential confinement” from the prohibitions of NRS 212.187. The “in the custody of the division of parole and probation of the department of motor vehicles and public safety pursuant to NRS 209.4314” language was to expire by limitation at midnight on June 30, 2001, and NRS 212.187 would then revert back to the “other than residential confinement” language on July 1, 2001.

² Residential confinement first became available to felony DUI prisoners of the NDOP, who met multiple requirements with the enactment of NRS 209.429 by the 1991 Nevada Legislature. It also became available to prisoners who were within 18 months of parole eligibility or sentence expiration and who met multiple other requirements with the enactment of NRS 209.392 by the 1995 Nevada Legislature. It also became available to physically incapacitated or terminally ill prisoners who met multiple other requirements with the enactment of NRS 209.3925 by the 1997 Nevada Legislature.

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The 2001 Nevada Legislature extended to July 30, 2003 the S.B. 184 program of treatment for the abuse of alcohol and drugs supervised by a judge. *See* Act of June 5, 2001, ch. 403, § 3, 2001 Nev. Stat. 1937. In addition, the 2001 Nevada Legislature developed another non-incarceration alternative and pilot program for prisoners of the NDOP, to wit: a referral of a prisoner to a reentry court. S.B. 519 was codified in NRS 209.4871-209.4889, effective July 1, 2001. A prisoner whom the Director of the NDOP believed could successfully participate in and benefit from a reentry program would be assigned to the custody of the Division of Parole and Probation. The prisoner would retain the status of an inmate but be responsible for his own housing. *Hearing on S.B. 519 Before the Senate Committee on Finance*, 2001 Legislative Session, 3997 (April 12, 2001). Accordingly, and unquestionably in recognition of the distinction between incarceration in a custodial facility and being responsible for one's own housing, the 2001 Nevada Legislature amended NRS 212.187 to exempt prisoners "in the custody of the division of parole and probation of the department of public safety pursuant to NRS 209.4314 or 209.4886 or residential confinement" from the prohibitions of NRS 212.187. The "in the custody of the division of parole and probation of the department of public safety pursuant to NRS 209.4314" language will expire by limitation at midnight on June 30, 2003, and NRS 212.187 will then have only "in the custody of the division of parole and probation of the department of public safety pursuant to NRS 209.4886 or residential confinement" on and after July 1, 2003.

NRS 212.187 currently provides:

1. A prisoner who is in lawful custody or confinement, other than in the custody of the division of parole and probation of the department of public safety pursuant to NRS 209.4314 or 209.4886 or residential confinement, and who voluntarily engages in sexual conduct with another person is guilty of a category D felony and shall be punished as provided in NRS 193.130.
2. A person who voluntarily engages in sexual conduct with a prisoner who is in lawful custody or confinement, other than

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in the custody of the division of parole and probation of the department of public safety pursuant to NRS 209.4314 or 209.4886 or residential confinement, is guilty of a category D felony and shall be punished as provided in NRS 193.130.

3. As used in this section, "sexual conduct":

(a) Includes acts of masturbation, homosexuality, sexual intercourse or physical contact with another person's clothed or unclothed genitals or pubic area to arouse, appeal to or gratify the sexual desires of a person.

(b) Does not include acts of a person who has custody of a prisoner or an employee of the institution in which the prisoner is confined that are performed to carry out the necessary duties of such a person or employee.

The legislative history discussed above, as well as the following factors, establish that NRS 212.187 was not intended or designed to apply to parole and probation officers supervising inmates, parolees, and probationers in the community: (1) the legislation was sought by the NDOP, and its concern and focus was the conduct of its correctional employees and incarcerated prisoners; (2) the Nevada Legislature specifically exempted prisoners who were in residential confinement, i.e., that did not live in a custodial facility, from the prohibitions of NRS 212.187; (3) the Nevada Legislature specifically exempted prisoners who were in residential confinement-type programs, i.e., that did not live in a custodial facility, from the prohibitions of NRS 212.187; and (4) prisoners eligible for alternative incarceration programs who would live in residential confinement or be responsible for their own housing, i.e., that did not live in a custodial facility and who would come under the custody of the Division of Parole and Probation, were specifically exempted from NRS 212.187. There is no evidence the Nevada Legislature ever intended NRS 212.187 to apply to parole and probation officers and parolees and probationers. Indeed, when it became possible for prisoners to be in the

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custody of parole and probation officers pursuant to NRS 209.4314 and NRS 209.4886, the Nevada Legislature specifically exempted those prisoners and those who may come into sexual contact with them from the prohibitions of NRS 212.187.

CONCLUSION

NRS 212.187 criminalizes voluntary sexual contact between prisoners and employees of the facilities in which they are confined. The legislative history of its adoption and amendments clearly demonstrates it was intended to apply only to prisoners and employees of correctional and jail facilities and not to parole and probation officers. NRS 212.187 does not apply to parole and probation officers supervising inmates, parolees, and probationers in the community. It is noted that this opinion does not address the application and validity of the Division of Parole and Probation's personnel regulations, which clearly prohibit sexual contact between Division of Parole and Probation employees and the parolees and probationers whom they supervise.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: DANIEL WONG
Deputy Attorney General

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AGO 2002-45 EMPLOYMENT; MINORS; ENTERTAINMENT; LIQUOR:
NRS 202.030 AND 202.060 prohibits Clark County from adopting an ordinance allowing young adults ages 18 through 20 to be employed as dancers in adult entertainment establishments where alcohol is served for on-site consumption.

Carson City, November 13, 2002

Stewart L. Bell, District Attorney, Office of the Clark County District Attorney, Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Mr. Bell:

You have requested an opinion from this office regarding the employment of young adults under the age of 21 by adult entertainment establishments where alcohol is served. The question as presented to this office is set forth below, and our analysis follows.

QUESTION

May Clark County adopt an ordinance that allows underage dancers to provide services to customers and solicit additional business in adult entertainment establishments where alcohol is served?

ANALYSIS

After telephone inquiry with your office, the term “underage” in the question was clarified as referring only to young adults aged 18 through 20 (young adults). Your office also clarified that such young adults would be employed by “adult entertainment establishments” where alcoholic beverages are both served and consumed on the premises. The employment activities of the young adults would include soliciting business and providing “lap dances” to patrons of the establishments. As referred to in this analysis, “lap dancing” involves a partially nude young adult dancing for patrons of the establishment, either at a table or in a private room, wherein some physical touching may occur. In “soliciting business,” the young adults circulate throughout the establishment seeking out patrons to purchase lap dances. The young adults may also dance on a stage or platform at a distance from the patrons.

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It should be noted that the adult establishments are partial nudity establishments, which require young adults to have some clothing over their pubic region. The question presented does not encompass, and this opinion does not address, the employment of young adults in full nudity establishments where alcohol is not sold or consumed.

Chapter 202 of the Nevada Revised Statutes addresses the presence of persons under the age of 21 in places where alcohol is sold and consumed. Specifically, NRS 202.030 prohibits persons under 21 years of age from “loitering” or “remaining” in a saloon,³ and provides in full as follows:

Any person under 21 years of age who shall loiter or remain on the premises of any saloon where spirituous, malt or fermented liquors or wines are sold shall be punished by a fine of not more than \$500. Nothing in this section shall apply to:

1. Establishments wherein spirituous, malt or fermented liquors or wines are served only in conjunction with regular meals and where dining tables or booths are provided separate from the bar; or
2. Any grocery store or drugstore where spirituous, malt or fermented liquors or wines are not sold by the drink for consumption on the premises.

In addition, NRS 202.060 prohibits any saloonkeeper from allowing any person under the age of 21 from “remaining” in a place where alcohol is served and consumed. NRS 202.060 provides in full as follows:

³ We note here that BLACK’S LAW DICTIONARY defines the term “saloon” as: “In common parlance, a place where intoxicating liquors are sold and consumed.” BLACK’S LAW DICTIONARY, 1340 (6th ed. 1990). Your office clarified that the adult entertainment establishments referred to in your question are issued a liquor license and are places where intoxicating liquors are sold and consumed. Therefore, these adult entertainment establishments are considered saloons for purposes of the analysis of NRS 202.030 and NRS 202.060.

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Any proprietor, keeper or manager of a saloon or resort where spirituous, malt or fermented liquors or wines are sold, who shall, knowingly, allow or permit any person under the age of 21 years to remain therein shall be punished by a fine of not more than \$500. Nothing in this section shall apply to:

1. Establishments wherein spirituous, malt or fermented liquors or wines are served only in conjunction with regular meals and where dining tables or booths are provided separate from the bar; or
2. Any grocery store or drugstore where spirituous, malt or fermented liquors or wines are not sold by the drink for consumption on the premises.

This office has issued three opinions regarding the application of one or both of these statutes to persons under the age of 21. In Op. Nev. Att’y Gen. No. 57-337 (December 19, 1957), this office concluded that it is permissible for a minor employed as a repair person to enter the premises of an establishment where alcohol is sold and consumed, in order to repair a machine in the establishment, provided that the minor leaves upon completion of the task. The opinion reasoned that if a minor is performing a business task in an establishment where alcohol is sold and consumed, the minor is neither “loitering” nor “remaining” in the establishment since he is there to perform a specific business task and departs once the task is accomplished. Therefore, the minor’s activities violated neither the letter nor spirit of NRS 202.030 and NRS 202.060.

In Op. Nev. Att’y Gen. No. 58-368 (March 28, 1958), this office addressed whether it was lawful for a minor between the ages of 18 and 20 to be employed as a waiter and serve both food and alcohol in an establishment with a bar and gaming room if the employee’s services would be confined to the restaurant portion of the establishment or the employee’s exposure to the public bar and gaming areas of the establishment were otherwise minimized.

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This office reviewed the provisions of NRS 202.020 (prohibiting the purchase or consumption of alcohol by persons under 21), NRS 202.060 (as set forth above), and NRS 463.350 (prohibiting persons under age 21 from loitering in a room or establishment where licensed gaming activity is conducted) and opined that such employment was not permitted by the above statutes.

Finally, in Op. Nev. Att’y Gen. No. 65-260 (September 8, 1965), this office concluded that an establishment where alcohol is sold and consumed may employ a minor as an entertainer, performing in a lounge show or theater restaurant, without violating NRS 202.030 or NRS 202.060, provided that the young adult departs upon completion of his or her act. In each of these prior attorney general opinions (AGOs), this office noted that the intent of the Legislature was to protect the health and morals of persons under the age of 21 by prohibiting them from frequenting establishments where alcoholic beverages are sold and consumed. The Legislature has specified two exceptions in the above statutes, permitting persons under 21 to be present in the restaurant portion of an establishment where alcohol is sold and consumed and permitting persons under 21 to be present in a retail store where alcohol is not sold for consumption on site.

As noted, focusing on either or both of the terms “loiter” or “remain,” this office has previously concluded that NRS 202.030 and 202.060 do not prohibit the temporary presence of a minor, working as an equipment repair person in an establishment that serves alcohol for on-site consumption, provided that the minor leaves the premises when the business task is completed. This office has also concluded that these statutes do not prohibit the employment of minors, as entertainers who perform in lounge shows or theater restaurants where alcohol is sold and consumed, provided that they depart the premises upon the conclusion of their act. In our opinion, however, the presence of young adults employed as dancers engaged in the activities described above in establishments that serve alcoholic beverages for on-site consumption violates both the letter and intent of NRS 202.030 and 202.060. A comparison of the circumstances at issue in AGOs 57-337 and 65-260 reveals significant differences in the employment activities at issue and leads us to conclude that NRS 202.030 and 202.060 do not permit such employment activities as are encompassed in the current question.

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AGO 57-337 addressed a minor working for a local business as an equipment repair person who might enter another business establishment where alcohol was sold and consumed. Under such circumstances, the minor's presence in the establishment is temporary and limited only to that amount of time needed to perform a specific business task. Further, the minor's task is confined to repairing a mechanical device, and interaction with patrons of the establishment is either non-existent or at least minimized, as such interaction would serve no apparent business purpose. Similarly, a minor performing in a lounge act or restaurant theater show, as contemplated in AGO 65-260, is presumably provided some measure of physical separation from the patrons of the establishment, is present temporarily solely in order to perform an act, and such performance does not rely primarily upon direct personal and physical interaction with the patrons of the establishment.

Unlike the above-described circumstances, a dancer's employment in an establishment where alcohol is served and consumed requires the dancer's ongoing, rather than temporary, presence in the establishment. Moreover, the dancer's employment activities reportedly require continuous and direct personal and physical interaction with the establishment's patrons. Indeed, such continuous and direct personal and physical interaction is described as the specific business purpose to be accomplished through the dancer's presence in the establishment.

We do not believe the Nevada Legislature intended to permit persons under 21 to engage in such employment activities in establishments where alcohol is served for on-site consumption. Certainly neither NRS 202.030 nor 202.060 expressly provide an exception that would permit such activity, and we are unwilling to read one into the statutes. Moreover, the Nevada Supreme Court has held that statutes regulating the sale of alcohol are legally analogous to statutes regulating gaming and, given the special class of industry and the privileges that are at issue, such statutes should be strictly construed against the licensee. *Carson City v. Lepire*, 112 Nev. 363, 365-366, 914 P.2d 631 (1996) (quoting *West Indies v. First National Bank*, 67 Nev. 13, 34, 214 P.2d 144, 154 (1950)). Accordingly, it is this office's conclusion that Clark County may not legally adopt an ordinance that allows young adults to be employed as dancers in establishments where alcohol is serve for on-site consumption.

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CONCLUSION

Through the adoption of NRS 202.030 and 202.060, the Nevada Legislature has evidenced its intent to prohibit persons under 21 from frequenting establishments where alcohol is served for on-site consumption. The described activities to be performed by a person employed as a dancer require the dancer's continuous and direct physical and personal interaction with the patrons of the establishment. A young adult's presence for purposes of engaging in such employment activities in an establishment that serves alcohol for on-site consumption is not permitted under NRS 202.030 and 202.060. Accordingly, Clark County may not adopt an ordinance allowing young adults aged 18 through 20 to be employed as dancers in adult entertainment establishments where alcohol is served for on-site consumption.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: GEORGE G. CAMPBELL
Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-46 SECRETARY OF STATE; CANDIDATES; FEES: As provided in NAC 294A.097, the Secretary of State may waive a civil penalty imposed for a violation of certain filing requirements under NRS 294A.420 in cases of “extreme financial hardship.” “Extreme financial hardship” exists when the individual’s payment of the fine or penalty would result in the individual’s loss of or inability to obtain minimal necessities of food, medicine, and shelter. The burden of proving entitlement of such a waiver lies with the candidate-applicant, who may fill out and submit a form that currently exists for use by a candidate requesting to file without paying the filing fee.

Carson City, December 2, 2002

Dean Heller, Secretary of State, Office of the Secretary of State, 101 N. Carson Street, Suite 3, Carson City Nevada 89701

Dear Secretary of State Heller:

You have asked for our opinion as to what constitutes an “extreme financial hardship” as that term is used in NAC 294A.097.

QUESTION

What constitutes an “extreme financial hardship” as that term is used in NAC 294A.097?

ANALYSIS

In May 2002, the Secretary of State (Secretary) adopted a regulation that allows the Secretary to waive a civil penalty imposed for a violation of certain filing requirements under NRS 294A.420. NAC 294A.097 provides, in relevant part:

The secretary of state may waive a civil penalty for good cause pursuant to subsection 4 of NRS 294A.420, if the person or entity that is subject to a civil penalty pursuant to subsection 2 of NRS 294A.420:

....

(3) Establishes that:

....

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(b) The candidate is experiencing extreme financial hardship.

The term “extreme financial hardship” is not defined in chapter 294A of either the Nevada Revised Statutes (NRS) or the Nevada Administrative Code (NAC). Your concern is that the Secretary have a standard that may be uniformly applied to candidates who apply for waiver due to a claimed extreme financial hardship.

We have searched for analogous laws that define the term “extreme financial hardship” and have found some assistance in 20 C.F.R. 617.55, a provision which requires repayment to a state agency of certain overpayments made by that agency to an individual. The regulation allows a waiver of the repayment under certain circumstances, including circumstances where the repayment would cause the person to suffer “extraordinary financial hardship.” 20 C.F.R. 617.55(a). The term is defined, in relevant part, as: “[A]n extraordinary financial hardship shall exist if recovery of the overpayment would result directly in the person’s . . . *loss of or inability to obtain minimal necessities of food, medicine, and shelter*” 20 C.F.R. 617.55(a)(2)(ii)(C)(1) (emphasis added).

Lacking any other and more specific definition, it is the opinion of this office that the Secretary’s adoption of the above standard would be reasonable and that its uniform application to requests for waiver under the “extreme financial hardship” requirement of NAC 294A.097 would be fair and appropriate.

The burden of proving entitlement to a waiver under the subject standard lies with the candidate-applicant. Finally, the Secretary may wish to consider the codification of the standard, or a variation thereof, in NAC chapter 294A.

If the Secretary chooses to codify this standard, he may want to consider what other agencies in the state have adopted. For example, codified in Nevada’s tax regulations, NAC 360.400 permits the Department of Taxation to waive certain penalties and interest where there is “extreme financial hardship on the taxpayer.” Under that provision, “extreme financial hardship” means “the person who owes the tax has the present ability to pay the tax, but payment of the penalties and interest will render the person insolvent and unable to continue in business.” NAC 360.400(8). Similarly, NAC 361.800(6) provides that “extreme financial hardship” means “the taxpayer who owes the

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tax has the present ability to pay the tax but payment of the penalties and interest will render the taxpayer insolvent.”

Moreover, NRS 118B.215 provides that the Administrator of the Manufactured Housing Division may waive certain eligibility requirements as a result of “extreme financial hardship,” which is based upon a showing of “a significant reduction of income, when considering the applicant’s current financial circumstances.” NRS 118B.215(5)(c). In addition, the Manufactured Housing Division adopted regulations defining income (NAC 118B.320); adopting a formula for determining the monthly income of an applicant (NAC 118B.350); establishing guidelines for eligibility for assistance (NAC 118B.370); and creating contents of the application for assistance (NAC 118B.380).

As the Secretary is already aware, a form currently exists for an indigent candidate to be allowed to file without paying the filing fee. Letter Attorney General Opinion dated July 18, 1974. This form is based upon the court form for a party to proceed in forma pauperis. Form 4, Rules of Appellate Procedure.

CONCLUSION

As provided in NAC 294A.097, the Secretary of State may waive a civil penalty imposed for a violation of certain filing requirements under NRS 294A.420 in cases of “extreme financial hardship.” “Extreme financial hardship” exists when the individual’s payment of the fine or penalty would result in the individual’s loss of or inability to obtain minimal necessities of food, medicine, and shelter. The burden of proving entitlement of such a waiver lies with the candidate-applicant, who may fill out and submit a form that currently exists for use by a candidate requesting to file without paying the filing fee.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-47 JUVENILES; SEX OFFENDERS; PAROLE AND PROBATION: The Nevada Department of Public safety's Division of Parole and probation (Division) should defer to the juvenile courts and NRS chapter 62. The Division is not prohibited from disseminating unsealed juvenile record information related to a violent crime or sex offense to a third party such as an employer, spouse, or potential victim provided: (1) there has been a prior adjudication that a child has committed an offense resulting in death or serious bodily injury which could be a felony if committed by an adult; or (2) there have been two prior adjudications that a child has committed offenses which would be felonies if committed by an adult, and the child is charged under NRS chapter 62 with another such offense. In such a situation, the Division can provide the name of the child and the nature of the charges against him to a third party. See NRS 62.355(2)(a)-(b).

Carson City, December 31, 2002

R. Warren Lutzow, Chief, Nevada Department of Public , Carson City Nevada
89701

Dear Chief Lutzow:

You have asked this office to provide you with an opinion addressing the following question.

QUESTION

Is the Nevada Department of Public Safety's Division of Parole & Probation (Division) prohibited from disseminating unsealed juvenile record information, related to a violent crime or sex offense, to a third party such as an employer, spouse, or potential victim?¹

ANALYSIS

Nevada Revised Statute (NRS) 213.1075 contains an important premise, which reads as follows:

¹ You use the word "unsealed" in your request. If the juvenile records are sealed "all proceedings recounted in the records are deemed never to have occurred" NRS 62.370(9). Sealed juvenile records are "not accessible to the general public." NRS 62.370(15).

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*Except as otherwise provided by specific statute, all information obtained in the discharge of official duty by a parole and probation officer or employee of the board is privileged and may not be disclosed directly or indirectly to anyone other than the board, the judge, district attorney or others entitled to receive such information, unless otherwise ordered by the board or judge or necessary to perform the duties of the division.*² [Emphasis added.]

The Nevada Supreme Court provides some guidance with respect to dissemination “necessary to perform the duties of the division.” In *Junior v. State*, 107 Nev. 72, 801 P.2d 205 (1991), the Court dealt with a situation where Junior tried to claim that an officer with the Division violated NRS 213.1098 (now NRS 213.1075) by disseminating drug test information obtained in the discharge of the Division’s duties. Junior argued that the only persons entitled to receive the information were those involved in the administration of his parole. *Id.* at 76. The Court noted that a Division officer was also a peace officer with duties that included the “detection and prevention of crime.” *Id.* Focusing on NRS 213.1075 (formerly NRS 213.1098), the Court concluded as follows:

NRS 213.1098 [now NRS 213.1075] creates no privilege between a parolee and a parole officer. Instead, NRS 213.1098 [NRS 213.1075] simply requires a parole officer to respect the privacy interests of the parolee *except where it is necessary to the completion of the officer’s duty to disclose the information obtained from a parolee. A parole officer is a peace officer, and has a duty to prevent the commission of crime.*

Id. (Emphasis Added).

² The counter-part of this statute for county juvenile probation officers is NRS 62.1266.

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Therefore if a Division officer disseminates information obtained in the discharge of his official duty for the purpose of preventing the commission of a crime, he will not be in violation of NRS 213.1075. The *Junior* case, however, did not involve the dissemination of juvenile record information. Thus given the “except as otherwise provided by specific statute” language in NRS 213.1075, the question presented compels a reading of statutes that specifically address the subject of juvenile record information dissemination.

According to NRS 179A.030(2), the Division is an agency of criminal justice. Absent a court order, only certain records of criminal history may be disseminated by the Division to third parties. However, specifically exempted from the definition of “record of criminal history” is “information concerning juveniles.” NRS 179A.070(2)(b). A juvenile is referred to as a “child” in NRS chapter 62. Other than when a child is certified and tried as an adult, a child adjudicated pursuant to NRS chapter 62 “is not a criminal and any adjudication is not a conviction.” NRS 62.295(1); *see also* NRS 62.193. With respect to juvenile record information the Division submits to the central repository for Nevada records of criminal history (Central Repository), such information may be disseminated by the Central Repository “to any other agency of criminal justice; . . .” NRS 179A.075(5)(a).³ The Central Repository may also, “[a]t the recommendation of the advisory committee and in the manner prescribed by the director of the department, disseminate compilations of statistical data and publish statistical reports relating to crime or the delinquency of children.” NRS 179A.075(7)(a).⁴ Sex offense information pertinent to the delinquency of children, which is acquired pursuant to NRS 179A.290, “is confidential and must be used only for the purpose of research. The data and findings generated pursuant to this section must not contain information that may reveal the identity of a juvenile sex offender or the identity of an individual victim of a crime.” NRS 179A.290(4). Only if the child was certified to stand trial as an adult can the Division “disclose to victims of a crime, members of their families or their guardians the identity of persons suspected of being responsible for the crime, . . . together with information which may be of assistance to the victim in obtaining civil redress. . . .” *See* NRS 179A.120(1). The restrictive language in NRS 179A.075, NRS 179A.290, and NRS

³ The Nevada Department of Public Safety’s central repository for Nevada records of criminal history is within that department’s Highway Patrol Division. *See* NRS 179A.075(1).

⁴ The “advisory committee” is a committee established by the director of the Department of Public Safety pursuant to NRS 179A.078.

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179A.120 pertinent to juvenile record data shows that the Legislature heavily weighed the importance of keeping juvenile record information confidential.

Shifting focus now to the juvenile courts and determining their function with respect to making and keeping juvenile records, NRS chapter 62 must be read. The Legislature was careful in its treatment of juvenile records, which are not records of criminal history. Consider its treatment of juveniles' fingerprints and photographs. A juvenile's fingerprints, taken pursuant to NRS 62.350, may be retained in a local file or local system "under special security measures that limit inspection of the fingerprints to law enforcement officers who are conducting criminal investigations." NRS 62.350(3)(a). If the child is adjudicated a delinquent for an act that, if committed by an adult, would be a felony or sexual offense, the fingerprints must be submitted to the Central Repository. The Central Repository must retain them under "special security measures that limit inspection." NRS 62.350(3)(b). They cannot even be submitted to "the Federal Bureau of Investigation unless the child is adjudicated delinquent for an act that, if committed by an adult, would be a felony or a sexual offense." NRS 62.350(c). Juveniles in custody "must be photographed for the purpose of identification." NRS 62.350(4). Special security measures must be taken with respect to keeping such photographs and they may be inspected only to conduct criminal investigations and photographic lineups. They are to be destroyed if a court determines that the child is not a delinquent. *Id.*

The Division is controlled by NRS 213.1075, which begins with the words "except as otherwise provided by specific statute." By specific statute, juvenile courts are required to "make and keep records of all cases brought before it." NRS 62.360(1).⁵ As for publishing the name or race of the juvenile and the nature of the charges, NRS 62.355 provides as follows:

⁵ As used in NRS chapter 62, "'Court' means the juvenile division of the district court." NRS 62.020(2). "Juvenile court" means: "(a) In any judicial district that includes a county whose population is 100,000 or more, the family division of the district court; or (b) In any other judicial district, the juvenile division of the district court." NRS 62.020(6). Nevada's "district courts shall have and exercise jurisdiction in all cases under this chapter (NRS chapter 62), and, in the exercise of such jurisdiction, shall hold juvenile sessions and shall then be termed juvenile courts." NRS 62.036. Accordingly, the simple term "juvenile court" will be used in this regard throughout this opinion.

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1. Except as otherwise provided in this section, unless the proceedings are opened to the general public pursuant to subsection 1 of NRS 62.193, the name or race of any child connected with any proceedings under this chapter may not be published in or broadcasted or aired by any news medium without a written order of the court.

2. If there: (a) Has been a prior adjudication that a child has committed an offense resulting in death or serious bodily injury which would be a felony if committed by an adult; or (b) Have been two prior adjudications that a child has committed offenses which would be felonies if committed by an adult, and the child is charged under this chapter with another such offense, the name of the child and the nature of the charges against him may be released and made available for publication and broadcast.

3. The court may release for publication and broadcast the names of and nature of the charges against children who are adjudicated to be serious or chronic offenders.

Also with respect to the dissemination of juvenile record information, NRS 62.360(2)–(4) provides as follows:

2. The records may be opened to inspection only by order of the court to persons having a legitimate interest therein except that a release without a court order may be made of any:

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(a) Records of traffic violations which are being forwarded to the department of motor vehicles;

(b) Records which have not been sealed and which are required by the division of parole and probation of the department of public safety for preparation of presentence investigations and reports pursuant to NRS 176.135 or general investigations and reports pursuant to NRS 176.151;⁶

(c) Information maintained in the standardized system established pursuant to NRS 62.910;

(d) Records which have not been sealed and which are to be used, pursuant to chapter 179D of NRS, by:

(1) The central repository for Nevada records of criminal history;

(2) The division of parole and probation of the department of public safety; or

(3) A person who is conducting an assessment of the risk of recidivism of an adult or juvenile sex offender; and

(e) Information that must be collected by the division of child and family services of the department of human resources pursuant to NRS 62.920.

3. The clerk of the court shall prepare and cause to be printed forms for social and legal records and other papers as may be required.

4. Whenever the conduct of a child with respect to whom the jurisdiction of the

⁶ As for the unsealed juvenile records required by the Division for preparing presentence investigations and reports pursuant to NRS 176.135 or general investigations and reports pursuant to NRS 176.151, except for disclosures allowed by NRS 176.156(1)–(4), the Division must consider such information confidential and it must not be made part of any public record. NRS 176.156(5).

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juvenile court has been invoked may be the basis of a civil action, any party to the civil action may petition the court for release of the child's name, and upon satisfactory showing to the court that the purpose in obtaining the information is for use in a civil action brought or to be brought in good faith, the court shall order the release of the child's name and authorize its use in the civil action.

The Legislature has specifically addressed the dissemination of juvenile record information by the juvenile courts, which make and keep such records. *See* NRS 62.360.⁷ Although NRS 62.360 (formerly NRS 62.270) has been expanded over the last 30 years, an opinion from this office published in 1972 bolsters this opinion. In Op. Nev. Att'y Gen. No. 68 (March 22, 1972), this office answered a similar question about the dissemination of a juvenile's records. We recognized that such records are generally confidential with respect to the general public, but noted that the juvenile court could open them for inspection by a "person having a legitimate interest therein." *Id. quoting* NRS 62.270. According to the 1972 Attorney General opinion, the dissemination of juvenile record information is covered in NRS chapter 62 and decisions in this regard are made by juvenile courts with a view toward "crime prevention and delinquency rehabilitation." *Id. quoting Thomas v. United States*, 121 F.2d 905 (1941). *See also* NRS 62.031. The Division should render assistance to and cooperate with the juvenile courts in furthering the objectives of NRS chapter 62. *See* NRS 62.033.

CONCLUSION

The Legislature has specifically addressed the dissemination of juvenile record information by the juvenile courts, which make and keep such records. *See* NRS 62.360. The Nevada Department of Public Safety's Division of Parole & Probation (Division) should defer to the juvenile courts and NRS chapter 62. The Division is not prohibited from disseminating unsealed

⁷ The prosecuting attorney in juvenile court is responsible for disclosing to the victim of an act committed by a child the disposition of the child's case, provided there is a proper request. *See* NRS 62.193(12).

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juvenile record information related to a violent crime or sex offense to a third party such as an employer, spouse, or potential victim provided: (1) there has been a prior adjudication that a child has committed an offense resulting in death or serious bodily injury which would be a felony if committed by an adult; or (2) there have been two prior adjudications that a child has committed offenses which would be felonies if committed by an adult, and the child is charged under NRS chapter 62 with another such offense. In such a situation, the Division can provide the name of the child and the nature of the charges against him to a third party. *See* NRS 62.355(2)(a)–(b). With respect to juveniles subject to sex offender community notification, the Division can express its concern and defer to the local law enforcement agency responsible for effecting community notification. Otherwise, the Division should refer the third party to the appropriate juvenile court. If a person can show a “legitimate interest,” the juvenile court can order that the pertinent records be opened for inspection. Without the requirement of showing a “legitimate interest,” the juvenile court “may” release to such person the following: (1) records of traffic violations which are being forwarded to the Department of Motor Vehicles; (2) records which have not been sealed and which are required by the Division for preparation of presentence investigations and reports pursuant to NRS 176.135 or general investigations and reports pursuant to NRS 176.151; (3) information maintained in the standardized system established pursuant to NRS 62.910; (4) records which have not been sealed and which are to be used pursuant to NRS 179D by the central repository for Nevada records of criminal history, by the Division, or by a person conducting an assessment of the risk of recidivism; and (5) information that must be collected by the Division of Child and Family Services of the Department of Human Resources pursuant to NRS 62.920. *See* NRS 62.360(2)(a)–(e).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JOE WARD, JR.
Senior Deputy Attorney General

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AGO 2002-48 RETIREMENT; COMPENSATION; OVERTIME Lump sum payments of call-back pay are subject to contribution and must be reported, and the appropriate contributions remitted to the Public Employees' Retirement System (PERS) for the months in which the call-back pay was earned. A public employer may not include payments for accumulated, unused sick leave as part of an employee's compensation for purposes of reporting and remitting contributions to PERS. When an employee works an additional shift in order to fill in for an employee on annual leave, the payment for this duty is not payment for an extra duty assignment, but rather it is appropriately classified as either call-back pay or overtime pay, depending upon the notice that was given to the employee to return to work and whether the employee had been off-duty for any period of time.

Carson City, December 31, 2002

George Pyne, Executive Officer, Public Employees' Retirement System, 693 West Nye Lane, Carson City, NV 89703

Dear Mr. Pyne:

You have asked this office for an opinion on the following questions:

QUESTION ONE

Is pay for returning to duty after one's regular working hours (commonly known as call-back pay) subject to retirement contribution when it is received as a periodic lump sum payment or accumulated and received as part of terminal leave pay at retirement or upon separation from employment?

BACKGROUND

You have informed us that certain local public employers allow their employees to choose not to receive call-back pay during the pay period in which it is earned. If the employee elects not to receive call-back pay during the pay period in which it is earned, the employee receives a lump sum payment either at year-end or at termination of employment. Your concern is that if an employee receives several years of accumulated call-back pay at termination, then the member's average compensation may be significantly impacted, contrary to the Legislature's intent to prevent benefit spiking.

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ANALYSIS

Contributions are made to the Public Employees' Retirement System (System) based on the member's compensation. Call-back pay is included in the definition of compensation and is subject to contribution. NRS 286.025(2)(b). However, if the call-back pay is paid to the employee in a lump sum payment at termination of employment, contribution on this payment would appear to conflict with the Legislature's intent to prevent benefit spiking through large terminal payments. *See* NRS 286.025(3). Therefore, the pertinent inquiry is the proper reporting to the System of the call-back payments.

NRS 286.460 sets forth the mechanism for reporting compensation and remitting contributions to the System. All public employers who are required to make contributions must file payroll reports not later than 15 days after the end of the reporting period, together with the remittance of the amount due to the System. NRS 286.460(3). Payroll reports must contain accurate information and must be filed on a form prescribed by the Public Employees' Retirement Board (Retirement Board). NRS 286.460(4). "Reporting period" is defined as "the calendar month for which members' compensation and service credits are reported and certified by participating public employers." NRS 286.460(7).

The Retirement Board may, subject to The Retirement Act, NRS chapter 286, establish rules and regulations for the administration of the System. NRS 286.200, Op. Nev. Att'y Gen. No. 2001-39 (December 31, 2001). The official policies of the Retirement Board are adopted after notice and public hearing, and are the regulations which govern the administration of the System. *Id.* The Retirement Board has adopted policies concerning monthly retirement reports. Official Policies of the Public Employees' Retirement System of Nevada, Section 4.1-4.21 (2002). The Retirement Board has enacted a policy regarding reporting adjustments to compensation. "Retroactive adjustments must be submitted for the month in which the compensation is applicable." Official Policies of the Public Employees' Retirement System of Nevada, Section 4.12 (2002).

As set forth above, NRS 286.460 requires the public employer to submit accurate monthly reports concerning compensation and contributions. In order for the reports to be accurate, the call-back pay must be reported and the applicable contributions remitted for the month in which the call-back pay is earned. Pursuant to the Retirement Board's policies, the employer may make retroactive adjustments, but the adjustments must be made for the appropriate

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month. Otherwise, the member's average compensation would be artificially inflated, contrary to NRS 286.025, NRS 286.460, and NRS 286.551(2), because the member's compensation for the month in which the lump sum payment was received would include compensation that was actually earned in months dating back for a number of years and could result in impermissible benefit spiking.

CONCLUSION TO QUESTION ONE

Lump sum payments of call-back pay are subject to contribution, but the compensation must be reported and the appropriate contributions remitted to the Public Employees' Retirement System for the months in which the call-back pay was earned.

QUESTION TWO

May a public employer include accumulated, unused sick leave as part of an employee's compensation for purposes of reporting retirement contributions to Public Employees' Retirement System?

BACKGROUND

You have informed us that a local public employer has included "sick leave pay" as part of an employee's "compensation agreement." This particular employee is to receive a base salary, including any approved raises, plus a yearly payout for sick leave for a three-year period. The System believes that the "compensation agreement" was structured in this manner in an attempt to artificially increase the employee's compensation over the next three years and thus artificially increase the member's average compensation upon which the member's retirement benefit is based.

ANALYSIS

Payments made to employees by public employers are only subject to contribution if that payment is included within the definition of "compensation." "Compensation" is defined by NRS 286.025, which provides as follows:

1. Except as otherwise provided by specific statute, "compensation" is the salary paid to a member by his principal public employer.
2. The term includes:

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(a) Base pay, which is the monthly rate of pay excluding all fringe benefits.

(b) Additional payment for longevity, shift differential, hazardous duty, work performed on a holiday if it does not exceed the working hours of the normal work week or pay period for that employee, holding oneself ready for duty while off duty and returning to duty after one's regular working hours.

(c) Payment for extra duty assignments if it is the standard practice of the public employer to include such pay in the employment contract or official job description for the calendar or academic year in which it is paid and such pay is specifically included in the member's employment contract or official job description.

(d) The aggregate compensation paid by two separate public employers if one member is employed half time or more by one, and half time or less by the other, if the total does not exceed full-time employment, if the duties of both positions are similar and if the employment is pursuant to a continuing relationship between the employers.

3. The term does not include any type of payment not specifically described in subsection 2.

Payments for unused sick leave are not specifically included within the definition of compensation. Thus these payments are not compensation subject to contribution. NRS 286.025(3), Attorney General letter opinion from Scott Doyle to Larry Grissom, Assistant Executive Officer, Public Employees Retirement System (July 26, 1983) (on file at the Office of the Attorney General). Therefore, payments for unused sick leave designated as "sick leave pay" in the employee's "compensation agreement" are not subject to contribution.

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CONCLUSION TO QUESTION TWO

A public employer may not include payments for accumulated, unused sick leave as part of an employee's compensation for purposes of reporting and remitting contributions to the Public Employees' Retirement System.

QUESTION THREE

Does the term "extra duty assignments" found in NRS 286.025(2)(c) include payment for duty assigned to an employee who is filling in for another employee who is on annual leave?

BACKGROUND

You have informed us that battalion chiefs with a local public employer have a provision in their contract regarding "annual leave standin." Under this provision, if a battalion chief is on annual leave, an extra duty assignment will be made on a rank-for-rank basis and shall be paid at the rate of time and one-half, except that no battalion chief may work more than three consecutive 24-hour shifts. This provision also provides for extra shift assignments when there are vacant positions.

ANALYSIS

The definition of "compensation" includes payment for extra duty assignments "if it is the standard practice of the public employer to include such pay in the employment contract or official job description for the calendar or academic year in which it is paid and such pay is specifically included in the member's employment contract or official job description." NRS 286.025(2)(c).¹ Although the local public employer in question has chosen to designate the annual leave standin as an "extra duty assignment," it is the nature of the payment, not the employer's designation of the payment, that is determinative of whether the payment falls within the definition of compensation contained in NRS 286.025.

¹ The term "extra duty assignments" is not defined in either NRS chapter 286 or the official policies adopted by the Retirement Board. Extra duty assignment is typically associated with teachers coaching or supervising extracurricular activities. See *Cal. Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist.*, 927 P.2d 1175 (Cal. 1997).

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The contract provision regarding annual leave standin provides for extra shifts to be assigned, when necessary, because an employee in the same position is on annual leave or a position is vacant. The type of work to be performed during the extra shift appears to be identical to the work performed *during the employee's regularly scheduled shift and thus does not appear to be* an extra duty assignment. In essence, the employee is returning to work, or remaining at work after his regular shift has ended, and working an additional shift because there is not adequate staffing for the shifts due to the annual leave taken by an employee in the same position or because of a vacant position. The employee is performing the same job but is working beyond his regularly scheduled hours. Therefore, pursuant to NRS 286.025 and the Retirement Board's policies, payment for this duty is actually either call-back pay or overtime pay, depending upon the notice that was given to the employee to return to work and whether the employee had been off-duty for any period of time.²

"Call-back pay" is defined as follows:

Except as it may conflict with the Nevada Administrative Code at 284.214, call-back pay is defined as compensation earned for returning to duty after a member has completed his regular shift, is off duty for any period of time, and is requested to return to duty with less than 12 hours notice.

Official Policies of the Public Employees' Retirement System of Nevada, Section 1.10, (2002).

"Overtime pay" is defined as follows:

Except as it may conflict with the Nevada Revised Statutes at 284.180 and the Nevada Administrative Code at 284.250, overtime pay is defined as additional compensation earned by a member who is held over on his regular shift or is

² Because the duty in question is either call-back or overtime duty, we do not reach the issue of the interpretation of extra-duty assignments in NRS 286.025(2)(c).

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requested to return to duty at a time that is more than 12 hours after notice is given.

Official Policies of the Public Employees' Retirement System of Nevada, Section 1.35, (2002).

Call-back pay is included in the definition of compensation. NRS 286.025(2)(b). However, overtime pay is excluded from the definition of compensation. NRS 286.025; Op. Nev. Att'y Gen. No. 2001-39 (December 31, 2002). Therefore, call-back pay is subject to contribution, whereas overtime pay is not subject to contribution.

When an employee works an additional shift pursuant to the annual leave stand in provision, the payment for this work is call-back pay if the employee is released from his regular shift, is off-duty for any period of time, and then is called back to work the additional shift with less than 12 hours notice. If the pay is call-back pay, then it must be reported as compensation and appropriate contributions must be remitted to the System. *Id.* However, the payment for an additional shift is overtime pay if the employee is held over on his regular shift or if he returns to work with more than 12 hours notice. *Id.* If the pay is overtime pay, then it is not compensation subject to contribution. *Id.*

CONCLUSION TO QUESTION THREE

When an employee works an additional shift in order to fill in for an employee on annual leave, the payment for this duty is not payment for an extra duty assignment, but rather it is appropriately classified as either call-back pay or overtime pay, depending upon the notice that was given to the employee to return to work and whether the employee had been off-duty for any period of time. The payment is call-back pay if the employee is released from his regular shift, is off-duty for any period of time, and then is called back to work the additional shift with less than 12 hours notice. The payment is overtime pay if the employee is held over on his regular shift or if he returns to work with more than 12 hours notice.

Sincerely,

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