



STATE OF NEVADA
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March 27, 2015

OPINION NO. 2015-01

EDUCATION; SCHOOL DISTRICT;
SUPERINTENDENT OF PUBLIC
INSTRUCTION: Nevada does not
provide explicit ability for pupils to opt
out of or explicitly require participation
in CRTs, nor mandate participation in
end of course examinations. If the
agency requires mandatory CRT
participation, individual districts will
need to determine consequences for
failure to participate.

Dale A.R. Erquiaga
Superintendent of Public Instruction
State of Nevada Department of Education
700 E. Fifth Street
Carson City, Nevada 89701

Dear Superintendent Erquiaga:

You have requested an opinion from this office regarding issues related to parents in Nevada asking to "opt-out" of criterion-referenced tests (CRTs), end-of-course examinations (EOCs), and the options available to schools should a student refuse to participate in testing.

BACKGROUND

NRS 389.550 entitled "Administration of criterion-referenced examinations" was originally added to the Nevada Revised Statutes (NRS) in 1999 with the passage of

Senate Bill 466. NRS 389.550 requires the State Board of Education (State Board), in consultation with the Council of Academic Standards, to prescribe examinations that comply with 20 U.S.C. § 6311(b)(3) and that measure the achievement and proficiency of pupils.

NRS 389.805, enacted in 2007, requires the State Board to adopt regulations requiring pupils to pass four “end-of-course” examinations to receive a standard high school diploma. Regulation R061-14 was adopted and became effective on January 1, 2015. Regulation R061-14 specifies the courses required for pupils in the graduating cohort¹ of 2017 and beyond. For pupils graduating prior to 2017, the Nevada High School Proficiency Examination is still the test required for graduation. NAC 389.655.

QUESTION ONE

May a student opt out of the CRTs required in this state?

ANALYSIS

Nevada state law is silent as to whether the CRTs are mandatory for all students. Where a statute is not explicit, the Nevada Supreme Court has repeatedly recognized the discretion of agencies to interpret the language of the statute that they are charged with administering. *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006) (citations omitted). As long as the agency’s “interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts.” *Id.* The State Board, having been vested by NRS 389.550 with the authority and requirement to prescribe the CRTs, has the discretion to determine whether those examinations are mandatory or optional, or to leave that determination to the local districts. Because the statute is silent on whether the CRTs are mandatory or not, any of these interpretations by the State Board would be “consistent with the language of the statute” and thus entitled to judicial deference. *Id.*

NRS 389.550 states that the State Board shall prescribe examinations that comply with 20 U.S.C. § 6311(b)(3) and which measure the achievement and proficiency of pupils. The Board prescribed tests from the Smarter Balanced Assessment Consortium at its September 25, 2014 meeting.² Although some form of

¹ Graduating Cohort is defined by R061-14 as “a group of pupils who, as of the date on which they begin high school, are scheduled to graduate from high school at the end of a specified school year.” Using the anticipated graduation date of students at the time they enter high school prevents students from being subjected to differing graduation requirements if their graduation date changes after they have entered high school.

² The Council of Academic Standards officially recommended the selection of the Smarter Balanced Assessment Consortium tests at its September 16, 2014 meeting.

standardized testing for students has been in place since the passage of S.B. 466 in 1999, there have been no prior requests for this office to opine on whether or not parents are allowed to opt their children out of these statutory tests.

Where the language of a statute is plain and unambiguous, there is no need to look for its meaning beyond the statute itself. *State, Div. of Ins. v. State Farm*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). Where a statute has no plain meaning, or is ambiguous, the meaning may be examined through legislative history to determine the Legislature's intent. *Chanos v. Nevada Tax Comm'n*, 124 Nev. 232, 240, 181 P.3d 675, 681 (2008). However, courts have been "unwilling to read an unstated element into a silent statute." *Phillips v. State*, 99 Nev. 693, 695, 669 P.2d 706, 707 (1983) (per curiam); see also *Young Inv. Co. v. Reno Club, Inc.*, 66 Nev. 216, 223, 208 P.2d 297, 300 (1949) ("We are not authorized to read into the act by judicial construction terms or provisions concerning which the act is silent.").

The current NRS say nothing about whether the CRTs are mandatory or optional.³ Silence is not necessarily ambiguity, especially where an agency has been expressly authorized to interpret and apply a statute. Instead, statutory silence in this context means that the statute itself does not require one result over another, and any agency interpretation will receive deference "as long as that interpretation is reasonably consistent with the language of the statute." *Int'l Game Technology, Inc.*, 122 Nev. at 157, 127 P.3d at 1106. Here, the relevant Nevada statute is not ambiguous as to whether CRTs must be mandatory or optional; it simply does not address the issue either way. Because the relevant statute is clear in not addressing opt-outs at all, there is no need to look to legislative history to try to read into the statute a limitation on the State Board's discretion that simply does not exist in any statutory text.

Even if one was inclined to look to the legislative history, it does not clearly compel any conclusion regarding the Legislature's intent. When S.B. 466 was passed, Section 11 included the language that would become NRS 389.550, requiring the administration of CRTs. The next section—Section 12—required the Board to adopt

³ NRS 389.550, which prescribes CRTs, makes reference to examinations that comply with 20 U.S.C. § 6311(b)(3). The academic assessments described in this federal law do not specifically require full participation. Rather, this federal law strongly *encourages* that 95 percent of each group of students to whom the test is administered must take the assessments. If less than 95 percent take the tests, the school will be deemed not to have made Adequate Yearly Progress ("AYP") as defined by 20 U.S.C. § 6311(b)(2)(C), which can have significant and severe consequences for the school—including the possibility of eventually replacing all or most of the school staff. See 20 U.S.C. § 6316(b)(8)(B)(ii). While near universal participation appears to be a goal of the federal statute, federal law does not attempt to attain that goal by mandating participation. NRS 389.550's reference to compliance with 20 U.S.C. § 6311(b)(3) therefore cannot be read as requiring that the tests be mandatory.

regulations compelling the reporting of those examination results. That Section 12 language was included as NRS 389.560 when S.B. 466 was codified:

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 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 388.440 to 388.520, inclusive, and his program of special education specifies that he is exempt from taking the examinations.

NRS 389.560, *repealed* by Senate Bill 442, Act of July 1, 2013, ch. 379, 2013 Nev. Stat. 2042.

Arguably, NRS 389.560 could be read as intending that all enrolled pupils take the tests (with the exception of the two specific categories of students identified in the provision). The superintendent of each district was tasked with certifying full participation. There was no statutory exception for voluntary non-participation or conscientious objection by students or their parents.

But NRS 389.560 was repealed in 2013. While NRS 389.550 remains in effect, local superintendents are no longer required to certify that the number of students taking the CRTs is equal to those enrolled in school. The reason for the repeal of NRS 389.560 is not clear. One of the advocates of the repeal testified that it was “designed to eliminate nonessential reports and *mandates*.” Testimony of Joyce Haldeman, Associate Superintendent, Clark County School District, *Hearing on S.B. 442 Before the Senate Committee on Education*, 2013 Leg., 77th Sess. 32 (April 8, 2013) (emphasis added). It is not clear from the record whether the term “mandate” was meant to include only reports or was meant more broadly—perhaps giving the discretion to relax the nature of the previously mandatory CRTs. The relatively sparse legislative record on S.B. 442 underscores the difficulty in interpreting legislative intent when the text of the statute is silent on the question at hand. Even assuming that the

CRTs were intended to be mandatory when NRS 398.560 was enacted, its repeal in 2013 leaves the legislative intent unclear.

As Nevada law currently has no explicit provision making CRTs mandatory or optional, and federal law only encourages substantial but not universal participation in these CRTs, the decision to make the CRTs mandatory, optional, or to give that discretion to individual school districts is within the agency tasked with administering the statute. See *Int'l Game Technology, Inc.*, 122 Nev. at 157, 127 P.3d at 1106; *Cable v. State ex rel. Emp'rs, Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006); *Meridian Gold Co. v. State*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003). Any of the above interpretations made by the agency would be lawful and entitled to deference from the courts.

QUESTION TWO

May a student opt out of the end-of-course examinations required by state law which, while not developed by Smarter Balanced Assessment Consortium, are based on the Nevada Academic Content Standards derived from the Common Core?

ANALYSIS

End-of-course examinations are a recent addition to Nevada, having been added to NRS 389.805 by Assembly Bill 288 in 2013. The EOCs have a number of differences from the previously discussed CRTs. First, the statutes creating the EOCs make no reference to federal law. Second, the EOCs have a different and more recent legislative history. Third, the EOCs have a different purpose, serving as a graduation requirement for students, while the CRTs are examinations that measure "the achievement and proficiency" of pupils in grades 3 through 8. Thus, the CRTs and EOCs may require a different factual and legal analysis.

Just as the current Nevada Revised Statutes do not explicitly state whether CRTs are mandatory or optional for students, they are similarly silent as to whether the EOCs are mandatory or optional. Thus, as with the CRTs, interpreting the statutes governing EOCs as constraining the State Board's discretion with regard to opt-outs would impermissibly "read an unstated element into a silent statute." *Phillips*, 99 Nev. at 695, 669 P.2d at 707. Because NRS 389.805 does not address opt-outs at all, there is again no need to look to legislative history to try to read into the statute a limitation on the State Board's discretion that does not exist in any statutory text.

The legislative history of the EOCs is, if anything, even less illuminating than the history of the CRTs in any event. The history of Assembly Bill 288 consists primarily of evidence showing the Legislature's desire to move away from the Nevada High School Proficiency Exam and move to the EOCs in an effort to test students

closer in time to when students actually receive instruction on the content of the tests and to enhance college and career readiness of students. *Hearing on A.B. 288 Before the Senate Committee on Education*, 2013 Leg., 77th Sess. 15 (April 5, 2013). There are no requirements for local education officials to certify anything regarding the numbers of pupils taking the test.

NRS 389.805(2)(a)(3) is clear that failure to take and pass the EOCs will preclude a child from obtaining a high school diploma, but it says nothing about whether students are *required* to take the EOCs. As passage of EOCs is a graduation requirement, statutory language is focused not on making sure that all students are evaluated, but rather on limiting access to the test. NRS 385.805(2)(c) expressly grants to the State Board the authority to adopt a regulation to limit the number of times that a pupil *may* take an EOC.⁴ But the statute is silent on the question of whether the State Board of Education must set a minimum number of times a student *must* take an EOC. Because nothing in Nevada law addresses that question, the decision whether EOCs are mandatory or not (or whether that decision can be left to local districts) is again left to the sound discretion of the administering agency. See *Int'l Game Technology, Inc.*, 122 Nev. at 157, 127 P.3d at 1106.

QUESTION THREE

If no opt out provision exists, what options are available to schools should a student be present at school on the testing day but refuse to participate in testing?

ANALYSIS

Just as Nevada law contains no explicit provisions regarding a pupil's mandatory or optional participation in the CRTs, it also contains no explicit provisions regarding consequences for failure to participate.⁵ NRS 392.463(2) requires each local district to prescribe written rules of behavior for pupils attending school and appropriate punishments for violations of those rules.⁶ When pupils violate school rules, the districts may take action consistent with their rules and punishments validly adopted pursuant to NRS 392.463.

⁴ The State Board has not yet exercised this authority and there is currently no regulation limiting the number of times a pupil may take the EOCs.

⁵ NRS 389.805(2)(a)(3), as well as the newly adopted R061-14 regulations, do state that a student who fails to pass the required end-of-course examinations shall not receive a high school diploma.

⁶ Some disciplinary actions are only available in certain situations according to NRS 392.463. For example, even if authorized by the School District's written rules a student may not be suspended or expelled unless the provisions of NRS 392.467 are followed and a student may not be retained in the same grade rather than promoted unless the requirements of NRS 392.125 are met.

Dale A.R. Erquiaga
March 27, 2015
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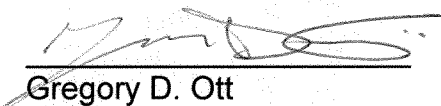
CONCLUSION

As explained, Nevada's statutes are simply silent as to whether students may opt-out of criterion-referenced tests or end-of-course examinations. Consistent with established rules of statutory interpretation, this statutory silence provides discretion to the administering agency to make the tests mandatory, optional, or to allow that choice to be made by individual school districts. Should the agency in its discretion require mandatory participation in the tests, the consequences of a student's failure or refusal to participate are left for individual districts to determine pursuant to valid rules adopted under NRS 392.463(2).

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:


Gregory D. Ott
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GDO:htc



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Chief of Staff

April 21, 2015

OPINION NO. 2015-02

INVESTMENTS; TREASURER; FUNDS:

A demand deposit bank account is not a permitted investment vehicle for the Local Government Pooled Investment Fund. A demand deposit bank account, if approved by the State Board of Finance, is a permitted location for monies in the Local Government Pooled Investment Fund while such monies await investment or distribution.

The Honorable Dan Schwartz
Treasurer of the State of Nevada
State Capitol Building
Carson City, Nevada 89701

Dear Mr. Schwartz:

You have requested an opinion from the Office of the Attorney General concerning whether (1) a demand deposit bank account is a permitted investment vehicle for monies in the Local Government Pooled Investment Fund (the Fund); or (2) a demand deposit bank account is a permitted temporary deposit location for monies in the Fund pending investment or distribution thereof.

QUESTION ONE

Is a demand deposit bank account a permitted investment vehicle for monies in the Local Government Pooled Investment Fund?

SUMMARY CONCLUSION TO QUESTION ONE

A demand deposit bank account is not a permitted investment vehicle for the Local Government Pooled Investment Fund.

ANALYSIS

Your office administers the Local Government Pooled Investment Fund, which consists of pooled monies from local governments deposited for investment purposes. NRS 355.167(1) and (2). In the ordinary course of administering such monies, to meet the liquidity needs of the Fund, your office keeps approximately ten percent of monies on deposit in investments very close to maturity.¹ Such investments currently garner a very small rate of return—as low as one basis point—which is less than that available from a demand deposit account offered by a bank. And unlike a demand deposit account, the very short term investments your office must use for reasons of liquidity are neither insured nor collateralized. Therefore, your office wishes to place monies it may need in the short term in an insured and collateralized demand deposit account. Your question is whether that would be an allowed investment of such monies.

Collateralized demand deposits are not identified as an investment vehicle for the Fund. In fact, the only bank deposit that is a permitted investment vehicle is the timed certificate of deposit (which must be insured or collateralized pursuant to NRS 356.020). NRS 355.167(3)(b). Our office has previously rendered opinions advising the Treasurer's Office that only investment vehicles enumerated in statute are permitted investment vehicles. See, e.g., Letter Opinion to the Honorable Ken Santor, Treasurer of the State of Nevada (June 3, 1988). This advice is supported by the legislative canon of interpretation *expressio unius est exclusio alterius*, which means "the expression of one thing is the exclusion of the other." *In re Estate of Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524 (2006). Because a demand deposit bank account is not among the investment vehicles for the Fund identified in NRS 355.167, it is not a permitted investment vehicle for the Fund.

QUESTION TWO

May monies in the Local Government Pooled Investment Fund that are not invested be placed in a demand deposit account in a bank pending investment or distribution thereof?

¹ The current policy for the Fund calls for the Treasurer to meet the Fund's cash needs by, among other means, "[e]ndeavor[ing] to hold 5% - 10% of the portfolio's total par value in securities with a maturity of one (1) day." See *Office of the State Treasurer Investment Policy, Local Government Pooled Investment Fund (LGIP) (2011)*.

SUMMARY CONCLUSION TO QUESTION TWO

A demand deposit bank account, if approved by the State Board of Finance and if collateralized for any amount deposited not covered by federal insurance limits, is a permitted location for monies in the Local Government Pooled Investment Fund while such monies await investment or distribution.

ANALYSIS

There are various times when local government monies placed for investment in the Fund are not actually currently invested, either because they are awaiting initial investment, are between investments, or are awaiting distribution. NRS Chapter 355 does not specify how such monies are to be held.


NRS 356.005 provides the general authority for public monies to be deposited in bank accounts. Specifically, it provides that "a state agency if approved by the State Board of Finance, may deposit public money in any insured state or national bank, in any insured credit union or in any insured savings and loan association." A condition for such a deposit is that it be collateralized to the extent not federally insured: "[a]ll money deposited by the State Treasurer which is not within the limits of insurance provided by an instrumentality of the United States must be secured by collateral. . . ." NRS 356.020(1).

Therefore, while the Treasurer does not have authority to invest the Fund in demand deposit bank accounts, he may temporarily deposit monies being held pending investment in such an account if approved by the State Board of Finance. To the extent such deposited monies are not within the limits of federal deposit insurance, statutory collateralization requirements must be met.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:



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June 18, 2015

OPINION NO. 2015-03

BOARD OF MEDICAL EXAMINERS;
MEDICAL MARIJUANA; LICENSES: A licensee may be found to have violated the Controlled Substances Act (CSA) if a court concludes that the licensee, in completing a physician statement so that a person may apply for a registry identification card, had specific intent to aid and abet that person in acquiring marijuana. A licensee of the Board violates the CSA by becoming a shareholder, owner, investor, officer, employee or managing member of a medical marijuana dispensary or establishment.

Edward O. Cousineau
Executive Director
Nevada State Board of Medical Examiners
1105 Terminal Way, Suite 301
Reno, Nevada 89502

Dear Mr. Cousineau:

You have requested an opinion from this office regarding issues related to certain activities undertaken by physicians pertaining to medical marijuana, medical marijuana establishments and medical marijuana dispensaries and whether those activities violate the Controlled Substances Act, 21 U.S.C. §§ 801 et seq.

BACKGROUND

In 1998 and 2000 the people of this State voted to amend the Nevada Constitution to authorize the use of marijuana by certain persons. The Nevada Legislature in 2001 adopted the statutory framework to authorize the medical use of marijuana. NRS 453A.010 to 453A.810, inclusive. The Legislature in 2013 revised those statutes to provide the framework to allow for the formation of medical marijuana establishments; for the cultivation of medical marijuana; and the sale of medical marijuana.

QUESTION ONE

Does a licensee of the Board of Medical Examiners (Board) violate the Controlled Substances Act (CSA) (21 U.S.C. §§ 801 et seq.) by providing a person with written documentation, as required by NRS 453A.210, so that the person may apply for a registry identification card for marijuana?¹

SHORT ANSWER

A licensee could be found to violate the CSA if a court concluded that the licensee, in completing a physician statement so that a person may apply for a registry identification card, had specific intent to aid and abet that person in acquiring marijuana.

ANALYSIS

Pursuant to NRS 453A.210, to obtain medical marijuana in this State, a person must receive a registry identification card. In addition to completing an application and providing other information, to obtain a medical marijuana registry identification card, a person must submit valid written documentation from the person's attending physician stating that: (1) the person has been diagnosed with a chronic or debilitating medical condition; (2) the medical use of marijuana may mitigate the symptoms or effects of that condition; and (3) the attending physician has explained the possible risks and benefits of the medical use of marijuana. NRS 453A.210(2). This is commonly known as the physician statement.

The CSA requires every person who manufactures, distributes or dispenses any controlled substance to annually register with Drug Enforcement Administration's Registration Unit. 21 U.S.C. § 822(a)(1) and (2); 21 C.F.R. § 1301.14(a). Once registered, the registrant is authorized to manufacture, distribute or dispense controlled substances to the extent authorized by the registration and in conformance with the

¹ Senate Bill 447 of the 78th Legislative Session amended NRS 453A.210 to authorize the Division of Public and Behavioral Health of the Department of Health and Human Services to issue letters of approval to persons under 10 years of age. The written documentation by a physician is also required to obtain a letter of approval. The analysis set forth in this letter applies equally to a physician who provides the written documentation to a patient so that patient may obtain a letter of approval from the Division.

CSA. 21 U.S.C. § 822(b). The CSA classifies a controlled substance according to its inclusion in one of five different schedules, which are dependent upon certain criteria. 21 U.S.C. § 812. Schedule I controlled substances are drugs or other substances which: (1) have a high potential for abuse; (2) have no currently accepted medical use in treatment; or (3) there is a lack of accepted safety for use of the drug or other substance under medical supervision. 21 U.S.C. § 812(b)(1)(A-C). Marijuana is listed as a Schedule I substance. 21 U.S.C. § 812(c)(d)(1).

Section 829 of the CSA sets forth the requirements for the dispensing of certain controlled substances. Specifically, 21 U.S.C. § 829 provides that Schedule II, III and IV controlled substances must be dispensed pursuant to a written or oral prescription. 21 U.S.C. § 829(a) and (b). Section 829 does not speak to the requirements regarding the dispensing of a Schedule I controlled substance. As such, under the maxim, "expressio unius est exclusio alterius," the expression of one thing is the exclusion of another, a Schedule I controlled substance, such as marijuana, cannot be dispensed by a prescription. See *Department of Taxation v. DaimlerChrysler Services North America, LLC*, 121 Nev. 541, 119 P.3d 135 (2005). A Schedule I controlled substance, however, must be distributed pursuant to a written order. 21 U.S.C. § 828(a). The CSA defines the term "distribute" as the "means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical." 21 U.S.C. § 802(11). The CSA defines the term dispense as the "means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term 'dispenser' means a practitioner who so delivers a controlled substance to an ultimate user or research subject." 21 U.S.C. § 802(10). A registrant who distributes or dispenses a controlled substance without a written or oral prescription as required by section 829 or who distributes or dispenses a controlled substance which is not authorized by the registration, is in violation of the CSA. 21 U.S.C. § 842(a)(1) and (2). Additionally, a registrant who does not distribute a controlled substance classified as a schedule I or II pursuant to a written order of the person to whom the substance is distributed is in violation of the CSA. 21 U.S.C. § 843 (a)(1), 21 U.S.C. § 828. The CSA does not merely prohibit direct violations of its limitations on distribution or dispensing; it also criminalizes activities that aid or abet such violations. Specifically, the CSA provides that that a person "who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

As noted, the CSA does not explicitly authorize the prescribing of marijuana, including for medical use. See 21 U.S.C. § 829 (setting forth the requirements for prescribing controlled substances). A physician who completes a physician statement pursuant to NRS 431A.210 is not prescribing marijuana, but is providing certain statements acknowledging the medical condition a person has and that medical marijuana may mitigate such condition. A patient then takes such a statement and

submits that statement to obtain a registry identification card to use in acquiring medical marijuana. Pursuant to NRS 453A.500, the Board is prohibited from disciplining a physician who completes the physician statement. Such a physician, however, if found to have specific intent to assist a person to obtain marijuana, runs the risk of being found to be aiding and abetting or conspiring in the acquisition of medical marijuana in violation of the CSA.

The Ninth Circuit Court of Appeals in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), recognized that a physician's First Amendment right was central to the doctor-patient relationship and that merely recommending that a patient may benefit from the use of medical marijuana based on the physician's sincere medical judgment could not be criminalized. Thus, such a communication alone would not be a stand-alone reason to initiate proceedings against that physician. *Conant*, 309 F.3d at 636–37. The Court determined that when a doctor merely made a recommendation to a patient regarding the use of medical marijuana, even if the physician anticipated the patient would then use that recommendation to obtain medical marijuana, that alone “does not translate into aiding and abetting, or conspiracy.” *Id.* at 635–36.

But the Court distinguished the mere recommendation to a patient from the circumstances where the physician has provided the patient with *the means* to acquire medical marijuana. *Id.* at 636 (emphasis added). Where the physician has done more than merely make a recommendation to the patient, but has also provided the patient with the means to obtain marijuana, the Court reasoned that the physician could be guilty of “aiding and abetting the violation of federal law.” *Id.* at 635.

The Court identified four factors to assist in determining whether a physician has gone beyond mere recommendation to aiding and abetting the commission of a crime:

- (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense.

Id. at 635. Put differently, to have criminal liability as a conspirator, requires that a physician enter into an “agreement to accomplish an illegal objective” when the physician “knows of the illegal objective and intends to help accomplish it.” *Id.*

Thus, a physician providing a physician's statement to a patient could be found to aid and abet a patient in illegally acquiring marijuana under the CSA if the physician acts with specific intent to provide the patient with the means to acquire the marijuana. *Id.* at 636. Under the test set out in *Conant*, a physician could unlawfully conspire with a patient when the physician: (1) knows that the patient intends to obtain marijuana;

(2) agrees to help the patient acquire marijuana; and (3) specifically intends to help the patient obtain marijuana by providing the physician statement. *Id.*; see also 21 U.S.C. § 846.

QUESTION TWO

Does a licensee of the Board violate the CSA by becoming a shareholder, owner, investor, employee, officer, or managing member of a medical marijuana dispensary or marijuana establishment?

SHORT ANSWER

Yes.

ANALYSIS

While the cultivation, sale and use of medical marijuana is permissible under Nevada law (NRS 453A.320-362; NAC 453A.300-472), it nonetheless remains prohibited under the CSA. The CSA provides that it is unlawful to:

- (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;
- (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

21 U.S.C. § 856(1) and (2).

The CSA also prohibits the use or investment of "income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce." 21 U.S.C. § 854(a).

Thus, if a licensee becomes a shareholder, owner, investor, employee, officer or managing member of a medical marijuana establishment, that licensee would be in violation of the plain language of the CSA.²

² The United States Department of Justice has issued two memoranda concerning the willingness of the Department to enforce the CSA against persons concerning the use of medical marijuana. This Opinion does not analyze the impact of those memoranda nor Section 538 of Public Law No. 113-235

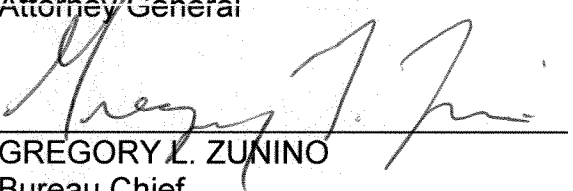
CONCLUSION

Even though the Board is prohibited by Nevada law from taking disciplinary action against a physician who provides a physician statement pursuant to NRS 453A.210 to a patient seeking medical marijuana, that physician could be found to have violated the Controlled Substances Act, 21 U.S.C. §§ 801 et. seq., if a court concluded that the physician completed the physician statement with specific intent to assist the patient obtaining medical marijuana. A physician who becomes a shareholder, owner, investor, employee, officer, or managing member of a medical marijuana establishment also would also be in violation of the plain language of the Controlled Substances Act.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:


GREGORY L. ZUNINO
Bureau Chief
Bureau of Business and State Services
for COLLEEN L. PLATT
Deputy Attorney General

CLP:slg/daw



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NICHOLAS A. TRUTANICH
Chief of Staff

July 28, 2015

OPINION NO. 2015-04

RETIREEES; HEALTH; EMPLOYMENT:

The extension of state retiree health benefits eligibility in section 1 of Senate Bill 513 (2015) to persons returning to State service applies regardless of whether the person was in the Public Employees' Retirement System covered employment with another entity during the break in State service.

Ms. Kateri Carraher
Interim Executive Officer
State of Nevada
Public Employees' Benefits Program
901 S. Stewart Street, Suite 1001
Carson City, Nevada 89701

Dear Ms. Carraher:

You have requested an opinion from the Office of the Attorney General concerning section 1 of Senate Bill (S.B.) 513 (2015). Section 1 of S.B. 513 extends eligibility for retiree health benefits to any person who (1) was employed by the State on or before January 1, 2012, (2) subsequently left State service, and then (3) returned to work for the State, (4) so long as he or she has not withdrawn from the Public Employees' Retirement System ("PERS") and (5) was eligible to participate in PERS before or during his or her break in State service. You ask whether that extension of eligibility applies to a person who was, during the break in State service, employed in PERS-covered employment with another entity (such as a municipality).

QUESTION PRESENTED

Is the extension of state retiree health benefits eligibility in section 1 of S.B. 513 applicable to a person who, during time away from State employment, was in PERS-covered employment with another entity?

SUMMARY ANSWER

The extension of state retiree health benefits eligibility in section 1 of S.B. 513 applies regardless of whether the person was in PERS-covered employment with another entity during the break in State service.

ANALYSIS

The Legislative Counsel's Digest in S.B. 513 prefaces the law prior to its enactment as follows:

Until 2011, existing law provided for a subsidy to be paid on behalf of retirees who continued to participate in the Public Employees' Benefits Program. Existing law creates the State Retirees' Health and Welfare Benefits Fund which was created to set aside financial assets designated to offset the amount paid for such benefits. (NRS 287.0436, 287.04364) In 2011, the Legislature amended provisions of existing law to exclude employees of the State who were initially hired on or after January 1, 2012, from receiving a subsidy . . . By regulation, the Board of the Public Employees' Benefits Program has defined the term "initial date of hire" to mean the first date on which a person who is eligible to participate in the Program earns service credit during the person's last period of continuous employment with a public employer. (NAC 287.059) The term "continuous employment" is defined by regulation as employment that is not interrupted by a break of 1 year or more. (NAC 287.021) Therefore, a person who worked as an employee of the State for many years before January 1, 2012, who has a break in service of longer than 1 year and then returns to work in state government will lose any subsidy that would have otherwise been paid, on behalf of the person when he or she retires, had the person not returned to state government employment.

Act of July 1, 2015, ch. 483, 2015 Nev. Stat. ____.

Under the law before enactment of S.B. 513, a person who worked in State employment but left for a year, returning after January 1, 2012, would not be eligible for a health care subsidy from PEBP.

Against the above backdrop, Section 1 of S.B. 513 made the following changes to NRS 287.046 concerning availability of retiree health benefits for State employees (new language in bold and italics, deleted language bracketed):

1. The Department of Administration shall establish an assessment that is to be used to pay for a portion of the cost of premiums or contributions for the Program for persons who were initially hired before January 1, 2012, and have retired with state service.

2. The money assessed pursuant to subsection 1 must be deposited into the Retirees' Fund and must be based upon a base amount approved by the Legislature each session to pay for a portion of the current and future health and welfare benefits for persons who retired before January 1, 1994, or for persons who retire on or after January 1, 1994, as adjusted by subsection 5.

....

7. **[No] Except as otherwise provided in subsection 8, no** money may be paid by the Retirees' Fund on behalf of a retired person who is initially hired by the State:

(a) On or after January 1, 2010, but before January 1, 2012, and who:

(1) Has not participated in the Program on a continuous basis since retirement from such employment; or

(2) Does not have at least 15 years of service, which must include state service and may include local governmental service, unless the retired person does not have at least 15 years of service as a result of a disability for which disability benefits are received under the Public Employees' Retirement System or a retirement program for professional employees offered by or through the Nevada System of Higher Education, and has participated in the Program on a continuous basis since retirement from such employment.

(b) On or after January 1, 2012. The provisions of this paragraph must not be construed to prohibit a retired person who was hired on or after January 1, 2012, from participating in the Program until the retired person is eligible for coverage under an individual medical plan offered pursuant to the Health Insurance for the Aged Act, 42 U.S.C. §§ 1395 et seq. The retired person shall pay the entire premium or contribution for his or her participation in the Program.

8. *The provisions of subsection 7 do not apply to a person who was employed by the State on or before January 1, 2012, who has a break in service and returns to work for the State at the same or another participating state agency after that date, regardless of the length of the break in service, so long as the person did not withdraw from and was eligible to participate in the Public Employees' Retirement System before or during the break in service.*

....

Act of July 1, 2015, ch. 483, 2015 Nev. Stat. ____.

Applicable Rules of Legislative Interpretation

The Nevada Supreme Court has repeatedly stated the rule that a statute whose meaning is plain on its face requires no construction:

When interpreting a statute, legislative intent "is the controlling factor." The starting point for determining legislative intent is the statute's plain meaning; when a statute "is clear on its face, a court cannot go beyond the statute in determining legislative intent." But when "the statutory language lends itself to two or more reasonable interpretations," the statute is ambiguous, and we may then look beyond the statute in determining legislative intent.

State v. Lucero, 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1228 (2011) (citations omitted).

Under this interpretative rule, the first task is to determine whether NRS 287.046 as amended is clear on its face concerning which classes of persons returning to State service may be eligible for the State retiree health benefit. A person meets the necessary conditions to qualify if he or she (1) was employed by the State on or before January 1, 2012, (2) has a break in service and (3) returns to work for the State at the

same or another participating state agency after that date, and (4) did not withdraw from and (5) was eligible to participate in the Public Employees' Retirement System before or during the break in service.

The question then is whether these five criteria could reasonably be read to exclude from eligibility a person who has a break in State service and goes to work for another PERS-participating employer. The answer turns on the meaning of break in service (criteria 2) and eligibility to participate in PERS during the break (criteria 5).

The ordinary meaning of the term "break in service" from its context in NRS 287.046(8) is a break in employment with the State. "Break in service" is preceded and followed in the same sentence by references to employment with the State. The break in service begins after employment with the State that commenced before January 1, 2012, and ends on resumption of employment with the State after January 1, 2012. It is not contextually related to any other condition or event.

The question is then whether "break in service" as it appears in NRS 287.046(8) could reasonably be read to exclude a "break in service" in which the person takes employment with another PERS-participating entity. The answer is no, for two reasons.

First, in no way is the criterion "break in service" qualified by any limitation on PERS employment with non-State employers during the break. Second, the statutory language anticipates that an eligible person may have been "eligible to participate in the Public Employees' Retirement System before or during the break in service." (Emphasis added.) This clear text forecloses any interpretation that would exclude eligibility merely because a person worked for a PERS-participating employer while on break from State service.

"Eligible to participate in PERS" is not a defined term in either NRS Chapter 286 (the PERS chapter) or 287 (the PEBP chapter). However, examining the possible alternative meanings of that phrase, they are clear and consistent in the essential point at issue herein. Whether the phrase "eligible to participate in [PERS] during the break in service" is interpreted to mean (1) employed in a position covered by PERS,¹ (2) "member" as defined in NRS 286.050,² or (3) "vested,"³ any of these meanings

¹ See NRS 286.520 (referring to a retired employee who "*is employed in a position which is eligible to participate in this System.*" (Emphasis added.)

² "Member" is defined in NRS 286.050 and includes as one of its options current employment with a PERS-participating entity. "Member" means a person: 1. Who *is employed by a participating public employer and who is contributing to the System*; or 2. Who has previously been in the employ of a participating public employer and who has contributed to the System but who subsequently terminates such employment without withdrawing the person's contributions." (Emphasis added.)

Kateri Carraher, Interim Executive Officer
State of Nevada Public Employees' Benefits Program
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would include employment by other PERS-participating employers during the employee's break in State service. Thus, the clear text of Section 1 of S.B. 513 contemplates that a person who holds PERS-covered employment for an entity other than the State during a break in service from the State could be eligible for drawing the retirement health benefit on subsequent retirement from State service. In short, the plain meaning of Section 1 of S.B. 513 is that a person otherwise eligible for the PEBP retiree health benefit may be eligible for that benefit notwithstanding a break in State service during which that person worked for another PERS-participating entity.⁴

CONCLUSION

The Public Employees' Benefits Program provides a retiree health benefit to eligible persons that is not available to persons whose initial date of hire was on or after January 1, 2012. NRS 287.046. Section 1 of S.B. 513 amended NRS 287.046 to provide that a person who was employed in State service on or before January 1, 2012, and experienced a break in State service lasting until on or after January 1, 2012, may be eligible for PEBP's retiree health benefit, regardless of whether such person was employed by another PERS-participating entity during the break in State service.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: 

DENNIS L. BELCOURT
Deputy Attorney General
Government and Natural Resources

DLB/slg

³ Under NRS 286.6793, a PERS member active after July 1, 1989 may vest upon obtaining five years of accredited contributing service. Credit for service may be based on work performed. NRS 286.495. In other words, if "eligible for participation in" PERS equates to "vesting," one way to become eligible for participation in PERS during a break from State service is by performing covered work for another PERS-participating entity.

⁴ As of the writing of this opinion, the minutes of legislative hearings on S.B. 513 have not been published. From the audio recordings of those hearings it appears that testimony before the Senate is consistent with the plain meaning of S.B. 513, but testimony in the Assembly, after Senate passage, by a legislative staff member, contradicts that meaning. As the statute has a plain meaning, the rule, stated in *Lucero, supra*, against looking beyond the unambiguous words of a statute to discern legislative intent precludes any reliance on that testimony.



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OFFICE OF THE ATTORNEY GENERAL
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ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
Assistant Attorney General

NICHOLAS A. TRUTANICH
Chief of Staff

September 21, 2015

OPINION NO. 2015-05

PUBLIC SAFETY; FIREARMS; CIVIL RIGHTS: Felons cannot possess firearms unless and until they have had their right to do so specifically restored by means of a pardon issued in Nevada. If a person is convicted of a felony in any jurisdiction within the United States, their right to possess, control or own a firearm in Nevada is forfeited unless they obtain a pardon that specifically restores that right. Nevada is not bound to honor the restoration of civil rights granted by another state unless that restoration of rights was granted by pardon that specifically addresses the right to bear firearms.

James M. Wright, Director
Department of Public Safety
555 Wright Way
Carson City, Nevada 89711

Dear Mr. Wright:

You have requested an opinion from the Office of the Attorney General regarding the State of Nevada's law requiring a Governor's pardon to restore firearm rights and its

applicability to out-of-state felons who have had their civil rights restored pursuant to another state's statutory scheme or court order. Your particular inquiry focuses on the Arizona statutory scheme which provides for restoration of civil rights under certain circumstances and how that restoration should be interpreted and applied by Nevada when considering applications to purchase or redeem firearms.

BACKGROUND

The State of Nevada is recognized by the Federal Bureau of Investigations National Instant Criminal Background Check System (NICS) Office as a Point of Contact (POC) state for firearms transfers under the federal Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159 ("Brady Act"). The Brady Act requires that a criminal history background check be conducted on any individual wishing to purchase or redeem a firearm to ensure that the individual does not have any disqualifying criminal history that would prohibit firearms ownership pursuant to Title 18 United States Code Sections 922(g) or (n) or state law.

In some states, federal firearms licensees (dealers) contact the FBI's NICS Office directly for a federal criminal history records check of individuals wishing to purchase or redeem a firearm. In POC states, like Nevada, the state conducts a check of its state criminal history records in addition to the FBI NICS check resulting in a more thorough background check. Further, POC states attempt to locate missing court dispositions for the NICS Office's and other POC states' use when making firearms eligibility determinations.

QUESTION ONE

Does either or both of Arizona Revised Statutes (ARS) 13-905 or 13-907, which allow for the restoration of civil rights to convicted felons under certain circumstances, have the authority to restore a person's ability to purchase or redeem a firearm in the State of Nevada where Nevada law requires a pardon that specifically restores that right before such an individual may purchase or redeem firearms here?

ANALYSIS

As relevant to your question, NRS 202.360 provides:

1. A person shall not own or have in his or her possession or under his or her custody or control any firearm if the person:

(a) Has been convicted of a felony in this or any other state, or in any political subdivision thereof, or of a felony in violation of the laws of the United States of America, unless the person has received a pardon and the pardon does not restrict his or her right to bear arms . . .

Under this law, a person convicted of a felony in Nevada loses his or her right to bear arms unless he or she obtains a pardon which specifically restores that right. A person who is convicted in another state that does not provide for a pardon process, but who complies with that state's statutory scheme for restoration of civil rights, may still not regain his or her right to bear arms in Nevada for the reasons set forth below.

A. REASONABLE AND LONGSTANDING PROHIBITIONS ON POSSESSION OF FIREARMS BY EX-FELONS ARE PERMISSIBLE.

The United States Supreme Court has established that certain limitations on the individual's rights under the Second Amendment are permissible. Longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws which prohibit carrying firearms in sensitive places, such as schools or government buildings, and even laws imposing conditions on the commercial sale of firearms have been upheld. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 786 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). These prohibitions are permitted because they do not unduly burden the core principle of the Second Amendment, *Heller*, 544 U.S. at 628, which is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

Once convicted, a felon in Nevada loses many of the rights which are enjoyed by the citizens of the State, including the right to vote, hold public office, hold employment in sensitive positions, and possess firearms. *Pohlabel v. State*, 128 Nev. ___, ___, 268 P.3d 1264, 1270 (Adv. Op. 1, January 26, 2012). The loss of these rights of citizenship is set forth in the State Constitution and various statutes. See e.g., NEV. CONST. art. 2 § 1 and NRS 176A.850 (right to vote); NRS 6.010 (serve on a jury); NRS 254.010 (hold public office); NRS 289.555 and NRS 391.033 (hold employment as peace officer or school teacher); NRS 202.360(1) (possess firearms). The loss of these rights of citizenship has existed in Nevada law for over 150 years. *Pohlabel*, 128 Nev. at ___, 268 P.3d at 1271.

Nevada's limitation on the ownership and possession of firearms by convicted felons under NRS 202.360 does not burden the core principle of the Second Amendment because convicted felons fall outside the category of "law-abiding, responsible citizens." *Heller*, 544 U.S. at 627.

B. FULL FAITH AND CREDIT.

Each state is competent to legislate in furtherance of its own legitimate public policy interests *in that state*. *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 497 (2003); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). Thus, the Full Faith and Credit Clause of the United States Constitution (U.S. CONST. art. IV, § 1), does not govern the interplay between Arizona civil rights restoration orders and Nevada's statutory prohibition on felons' possession or ownership of firearms in the absence of a full pardon. Put differently, while Arizona State statutes may establish how and when firearm rights are restored to ex-felons *in Arizona*, Arizona's statutes may not dictate how and when such rights might be restored in other states. See *Hyatt*, 538 U.S. at 496 ("The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'") (quoting *Pacific Employers Ins. Co.*, 306 U.S. at 501).

Under the Full Faith and Credit Clause, a final judgment entered in a sister state must be respected by the courts of other states. *City of Oakland v. Desert Outdoor Adver., Inc.*, 127 Nev. ___, ___, 267 P.3d 48, 50 (Adv. Op. 46, August 4, 2011) See U.S. CONST. art. IV, § 1; *Rosenstein v. Steele*, 103 Nev. 571, 573, 747 P.2d 230, 231; *Donlan v. State*, 127 Nev. ___, ___ & n. 1, 249 P.3d 1231, 1233 & n. 1 (Adv. Op. 12, April 12, 2011). However, courts have consistently differentiated between the credit owed to laws (legislative and common law) and to judgments. *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998); *Donlan*, 127 Nev. at ___, n.1, 249 P.3d at 1233, n.1.

The Arizona courts derive their authority to grant or deny the restoration of civil rights to persons convicted of felonies in Arizona from Arizona statutes, specifically ARS 13-904 to 912. Arizona courts have acknowledged this fact, noting that the restoration of civil rights is a creature of statute, rather than an inherent power of the court. *State v. Grant*, 537 P.2d 38, 39 (Ariz. 1975). "Without legislative fiat, there is no jurisdiction to grant such applications [for restoration of civil rights] as were granted herein." *Id.*

Under the Arizona statutory scheme, only certain felons can seek to have their rights restored and only under certain circumstances or after particular waiting periods. Nevada has its own statutory scheme for determining the civil rights of convicted felons, including if, when and under what circumstances those rights are lost and restored. *E.g.*, NRS 202.360; NRS 213.090. Thus, it is a legislative act which permits restoration of a felon's civil rights in Arizona, and Nevada need not substitute Arizona's statutory scheme for its own. *Baker*, 522 U.S. at 232-33.

C. PENAL JUDGMENT NOT ENTITLED TO FULL FAITH AND CREDIT.

Even if the order restoring civil rights issued by an Arizona court would be considered a court order for purposes of Full Faith and Credit analysis, the order restoring an ex-felon's rights is one issued in a penal action.

Penal laws are those imposing punishment for an offense committed against the state, and which the executive of the state has the power to pardon. *Huntington v. Attrill*, 146 U.S. 657, 667 (1892). The Full Faith and Credit Clause does not apply to penal judgments. *City of Oakland v. Desert Outdoor Adver., Inc.*, 127 Nev. ___, ___, 267 P.3d 48, 51 (Adv. Op. 46, August 4, 2011); *Huntington*, 146 U.S. at 666, 672-73; *Nelson v. George*, 399 U.S. 224, 229 (1970) (reiterating that "the full faith and credit clause does not require that sister states enforce a foreign penal judgment"). A penal action is one that seeks to impose criminal penalty for violation of law – a crime. BLACK'S LAW DICTIONARY, 1153 (7th ed., 1999) (quoting 3 Norman J. Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 59.01, at 1 (4th ed. 1986) ("The word *penal* connotes some form of punishment imposed on an individual by the authority of the state. Where the primary purpose of a statute is expressly enforceable by fine, imprisonment, or similar punishment, the statute is always construed as penal."))

Under the Arizona statutory scheme, it is the superior court judge who imposed the criminal sentence who is also vested with the discretion to restore, upon proper application, the ex-felon's civil rights. The resulting order, entered in the criminal proceedings pursuant to ARS 13-904 to 917, would, therefore, be an order in a penal proceeding – a penal judgment. See *Huntington*, 146 U.S. at 667-68 (discussing the difference between a penal judgment, a punishment imposed for a crime against the state, and a remedial judgment, where a penalty for an intentional breach of an agreement might be accumulative damages to the aggrieved party).

CONCLUSION TO QUESTION ONE

In sum, in Nevada, felons -- even felons who have had their convictions set aside or their civil rights restored in another state -- cannot possess firearms unless and until they have had their right to do so specifically restored by means of a pardon, which is issued in Nevada pursuant to NRS 213.090. "The Full Faith and Credit Clause cannot be used by one state to interfere impermissibly with the exclusive affairs of another." *Donlan*, 127 Nev. at ___, 249 P.3d at 1233.

QUESTION TWO

On a broader scale, does NRS 202.360's pardon requirement apply to felony convictions entered outside of the State of Nevada?

ANALYSIS

When interpreting a statute, if the statute is clear or unambiguous, courts will not go beyond a statute's plain language to determine legislative intent. *Bacher v. State Engineer*, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006). It is necessary to avoid statutory interpretation that renders language meaningless or superfluous. *Karcher Firestopping v. Meadow Valley Contr.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009).

By the express terms of the statute, any person who "[h]as been convicted of a felony in this or any other state, or in any political subdivision thereof, or of a felony in violation of the laws of the United States of America" is prohibited from owning, possessing or having control over any firearm in Nevada, "unless the person has received a pardon and the pardon does not restrict his or her right to bear arms." NRS 202.360(1)(a) (emphasis added).

The nature of and procedures for obtaining a pardon in Nevada are also clearly and unambiguously defined in the law. See generally NEV. CONST. art. 5 §§ 13-14; NRS 213.005 – 213.100. Therefore, according to the rules of statutory construction, NRS 202.360 applies to felony convictions entered outside of the State of Nevada and a pardon which "does not restrict the right to bear arms" is the only means for any convicted felon to lawfully own, possess or redeem firearms in this state.

CONCLUSION TO QUESTION TWO

If a person is convicted of a felony in any jurisdiction within the United States, his or her right to possess, control or own a firearm in Nevada is forfeited unless he or she obtains a pardon that specifically restores that right.

QUESTION THREE

How does NRS 202.360 interact with 18 U.S.C. § 922(9), where conviction in Nevada for misdemeanor domestic violence does not result in the loss of the right to own, possess, or redeem firearms? How may an individual convicted of this offense in another state regain his or her right to own, possess or redeem firearms in Nevada?

ANALYSIS

This question is rendered moot by passage of Senate Bill (SB) 175 in the 78th Regular Session of the Nevada Legislature. This new statutory provision, which revises NRS 202.360, makes it illegal for anyone convicted of misdemeanor domestic violence (as defined by federal law) in any state to possess, control, or own a firearm in Nevada. The amendment became effective upon the bill's passage, and NRS 202.360(1) now reads:

1. A person shall not own or have in his or her possession or under his or her custody or control any firearm if the person:

(a) *Has been convicted in this State or any other state of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33);*

(b) Has been convicted of a felony in this State or any other state, or in any political subdivision thereof, or of a felony in violation of the laws of the United States of America, unless the person has received a pardon and the pardon does not restrict his or her right to bear arms;

(c) Is a fugitive from justice; or

(d) Is an unlawful user of, or addicted to, any controlled substance.

A person who violates the provisions of this subsection is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than \$5,000.

Act of June 2, 2015, ch. 328, § 3, 2015 Nev. Stat. ____ (emphasis added). The new provision does not provide for a pardon to alleviate the prohibition because NRS 202.360 specifically addresses only felony convictions.

CONCLUSION TO QUESTION THREE

Nevada is not bound to honor the restoration of civil rights granted by another state unless that restoration of rights was granted by pardon. Moreover, the pardon must specifically address the right to bear firearms. Persons convicted of misdemeanor domestic violence, as defined by federal law, are prohibited from possessing,

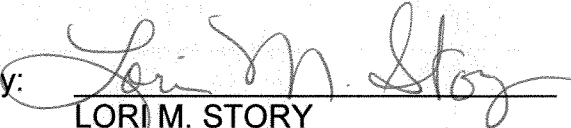
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controlling, or owning any firearm in Nevada. Under the 2015 amendments to the statute, this right is not subject to restoration by any means.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:


LORI M. STORY
Senior Deputy Attorney General

LMS/JMR



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

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ADAM PAUL LAXALT
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NICHOLAS A. TRUTANICH
Chief of Staff

November 12, 2015

OPINION NO. 2015-06

NYE COUNTY; SALES AND USE TAX;
COMMISSIONERS; PUBLIC SAFETY;

The Nye County Sales and Use Tax Act of 2007 (Act) does not prohibit a governing body within the County from using the proceeds of the tax to restore the funding for items of police and fire protection to the amounts funded before October 1, 2007. The governing bodies must determine compliance with section 17(2)(b) and must compare proposed expenditures with the previous year's expenditures; they may reallocate the proceeds of the tax to different uses from year to year; and the proceeds may be pooled and expended on a pro rata basis. The Board may not unilaterally approve expenditures for services provided by the Sheriff.

Angela A. Bello
Nye County District Attorney
Post Office Box 39
Pahrump, Nevada 89041

Dear Ms. Bello:

By letter dated April 6, 2015, you requested an opinion from the Office of the Attorney General regarding the use of proceeds generated by the Nye County Sales and Use Tax Act of 2007 (Act). See Act of June 18, 2007, ch. 545, §§ 1-23, 2007 Nev.

Stat. 3423-29 (A.B. 461). Subsequently, on May 22, 2015, you submitted revised questions to be answered by the opinion.

BACKGROUND

In 2007, the Nevada Legislature passed the Act to address a perceived need for additional spending on public safety in Nye County (County). 2007 Nev. Stat. 3423-24. Section 4 of the Act declared that the County was growing, the danger from fire and crime was increasing, and the number of public safety personnel and facilities had not kept pace with the growth. *Id.* To address these concerns, Section 14(1) of the Act authorized the Board of County Commissioners of the County (Board) to enact an ordinance imposing a sales and use tax to generate additional revenue for public safety. 2007 Nev. Stat. 3427. The Act became effective on October 1, 2007. 2007 Nev. Stat. 3429. The Act's grant of authority to the Board expires by limitation on October 1, 2027. *Id.* Accordingly, the Act gave the Board a period of twenty years in which to adopt an ordinance imposing the tax.

The Board adopted an ordinance imposing the tax, but not until 2013, at which point the funding for various items of police and fire protection had fallen below the level at which the funding existed for those items prior to October 1, 2007. Sections 17 and 17.5 of the Act contain language which implies that the proceeds of the tax must be used to supplement the funding for public safety in reference to the amounts as they existed before October 1, 2007. 2007 Nev. Stat. 3426-27. You have asked, among other things, whether the proceeds of the tax may be used to completely or partially restore the funding for various items of public safety to the amounts at which the funding for those items existed before October 1, 2007.

QUESTION 1

As a preliminary matter, you have asked about the reporting requirement in Section 17.5 of the Act. This provision requires the County to submit expenditure reports to the Director of the Legislative Counsel Bureau (LCB). Section 17.5(3) of the Act states that the reports must include "[a] detailed analysis of the manner in which each expenditure . . . [d]oes not replace or supplant funding which existed before October 1, 2007, for the purposes set forth in subsection 1 of section 14 of [the Act]." 2007 Nev. Stat. 3427. Stated differently, Section 17(3) requires the reports to identify the manner in which the proceeds of the tax have been used to maintain or supplement the level of funding at which it existed before October 1, 2007.

When read in isolation, the reporting requirement in Section 17.5(3) suggests that the County is prohibited from using the proceeds of the tax to replace or supplant a previous level of funding for items of police and fire protection. However, Section 17.5(3) is only a reporting requirement and does not actually purport to limit or restrict

the use of the proceeds of the tax. Section 17(2)(b) is the only provision of the Act that arguably limits or restricts the use of the proceeds of the tax.

Section 17(2)(b) ties proposed expenditures to “existing funding” for police and fire protection, not previous levels of funding for police and fire protection. 2007 Nev. Stat. 3426. Section 17(2)(b) states that a “governing body *must* approve the expenditure of the proceeds *if* it determines that . . . [t]he *proposed use* will not replace or supplant *existing funding* for [police and fire protection].” 2007 Nev. Stat. 3426 (emphasis added). Given the significance of Section 17(2)(b), it is appropriate to restate your question as follows:

Does Section 17(2)(b) of the Act, when read in conjunction with 17.5(3), prohibit the governing bodies within the County from using the proceeds of the tax to restore the funding for various items of police and fire protection to the amounts at which those items were funded prior to October 1, 2007?

SUMMARY CONCLUSION TO QUESTION 1

Section 17(2)(b) of the Act does not prohibit a governing body within the County from using the proceeds of the tax to restore the funding for items of police and fire protection to the amounts at which those items were funded before October 1, 2007. However, the governing body’s aggregate expenditure for qualifying items of police and fire protection must supplement existing funding for those items in the first year after the adoption of the County’s ordinance, and must thereafter remain constant or increase on an annual basis.¹

ANALYSIS

Section 17(2)(b) of the Act is a directive to governing bodies to approve expenditures that maintain or supplement existing levels of funding for police and fire protection. Section 17(2)(b) does not prohibit expenditures that restore some previous level of funding, so long as the funding for all qualifying expenditures supplements the existing funding for qualifying items of police and fire protection in the first year after the adoption of the County’s ordinance. Thereafter, the funding for qualifying items of police and fire protection must remain constant or increase on an annual basis. This condition on annual spending derives from the directive to governing bodies to approve expenditures that “will not replace or supplant *existing funding*.” 2007 Nev. Stat. 3426 (emphasis added). Although Section 17.5(3) of the Act establishes a benchmark of October 1, 2007, for reporting a comparison of expenditures to the LCB, that benchmark

¹ To the extent that this opinion conflicts with the analysis in Op. Nev. Atty. Gen. No. 04 (April 15, 2011), this opinion governs. As used in this opinion, “existing funding” refers not to an absolute amount of funding, but to the level of funding for qualifying items of police and fire protection relative to the funding for all governmental obligations and expenses.

is not a substantive restriction or limitation upon the authority of a governing body to approve expenditures for the purposes outlined in Section 14(1) of the Act.

When the language of a statute is plain on its face, one should not look beyond the text of the statute to ascribe meaning to the statute. *J.E. Dunn Northwest, Inc. v. Corus Constr. Venture, LLC*, __Nev.__, 249 P.3d 501, 505 (2011). Furthermore, “[i]t is a fundamental rule of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301 (2000) (citations and internal quotations omitted). Here, Sections 17(2)(b) and 17.5 of the Act serve two completely different purposes and should not be jointly construed to impose an unspecified limitation upon spending.

In fact, neither Section 17(2)(b) nor Section 17(3) prohibits expenditures. As noted above, Section 17(2)(b) of the Act affirmatively directs governing bodies within the County to approve specified expenditures based upon existing levels of funding. More specifically, it directs governing bodies to approve expenditures which maintain or supplement existing levels of funding for items falling within the statement of general purposes outlined in Section 14(1) of the Act. Section 14(1), in turn, authorizes the Board to “enact an ordinance imposing a local sales and use tax to: (a) Recruit, employ and equip additional firefighters, deputy sheriffs to the Sheriff and other public safety personnel; (b) Improve and equip existing public safety facilities; and (c) Construct and equip new public safety facilities.” 2007 Nev. Stat. 3425.

Section 14(1) of the Act sets forth restrictions on the use of tax proceeds only insofar as expenditures must be made for one or more of the three stated purposes. With respect to each jurisdiction over which a governing body has authority, Section 17(1) of the Act further requires that expenditures be allocated in equal shares between police and fire protection. Aside from this allocation requirement, the Act does not require that expenditures be equally allocated between or prioritized in reference to the three general categories mentioned in Section 14 of the Act. In short, a governing body may approve expenditures for any of the three general purposes enumerated in Section 14 of the Act, subject only to the requirement that expenditures be (1) allocated evenly between police and fire protection, and (2) approved for the purpose of supplementing or maintaining existing levels of funding for qualifying items of police and fire protection.

Indeed, the requirement of Section 17(2)(b) to maintain or supplement existing funding is not a limitation upon the authority of a governing body to spend the proceeds of the tax to partially or completely restore a previous level of funding for items of public safety. The clear purpose of the directive is to insure that the governing body does not redirect existing public safety funds to support governmental functions or operations not mentioned in Section 14(1) of the Act. If this were to occur, the governing body would presumably fill the resulting void in the public safety budget with the proceeds of the tax. Section 17 of the Act addresses this very scenario.

Section 17 of the Act does not, however, prohibit spending to restore the levels of funding for items of public safety to the levels at which they were funded before October 1, 2007. Sections 17(1) and 17(2) read in their entirety as follows:

1. The proceeds received from any sales and use tax imposed pursuant to this act must be expended in each of the areas to which those proceeds are allocated for expenditure pursuant to section 14 of this act in such a manner *that half of those proceeds are expended for the support of the services provided by local fire departments in that area and the remaining half of those proceeds are expended for the support of the services provided by the Sheriff in that area.*

2. No expenditure of those proceeds may be made unless the expenditure has been approved by the governing body of the area to which those proceeds have been allocated for expenditure. The governing body *must approve the expenditure of the proceeds if it determines that:*

(a) The proposed use of the money conforms to all provisions of this act; and

(b) The proposed use will not replace or supplant *existing funding* for the purposes set forth in subsection 1 of section 14 of this act for the support of the services provided by local fire departments and the Sheriff in that area.

2007 Nev. Stat. 3426 (emphasis added).

In summary, the above provisions set forth the process by which a governing body must approve prospective expenditures relative to the existing level of funding for public safety. Furthermore, according to Section 17(3) of the Act, the existing level of funding is that which exists in the fiscal year immediately preceding the fiscal year for which the governing body intends to approve a new cycle of expenditures. Section 17(3) reads as follows:

In determining whether a proposed use meets the requirement set forth in [Section 17(2)(b) of the Act], the governing body shall determine whether the amount approved for expenditure for the fiscal year for the purposes set forth in subsection 1 of section 14 of this act for the support of the services of local fire departments and the Sheriff in that area, not including any money received or expended pursuant to this act, is equal to or greater than the amount approved for expenditure *in the immediately*

preceding fiscal year for the purposes set forth in subsection 1 of section 14 of this act for the support of the services of local fire departments and the Sheriff in that area.

2007 Nev. Stat. 3426 (emphasis added).

As to the reporting requirements in Section 17.5 of the Act, these provisions require only that the Board report the manner in which the Board has prioritized expenditures relative to the funding for public safety as it existed before October 1, 2007. Section 17.5 does not contain a prohibition on spending and should not be construed to modify the plain language of Section 17(2)(b) of the Act. On its face, Section 17.5 simply requires each governing body within the County to provide the LCB with accurate and detailed information about how the governing body has prioritized and allocated expenditures in accordance with Sections 14 and 17 of the Act.

As a practical matter, the reporting requirement of Section 17.5 allows the LCB to evaluate how fluctuations in revenue since September 30, 2007, have impacted expenditures on an annual basis. While the reporting requirement of Section 17.5 may provide the LCB with guidance in making future decisions about tax matters within the County, it does not impose restrictions on the use of sales and use tax proceeds. As noted above, the Act requires only that expenditures be allocated equally between police and fire protection in accordance with Section 17(1) of the Act, and approved in the manner described in Sections 17(2) and (3) of the Act.

QUESTION 2

As discussed above, Section 17(2)(b) of the Act requires that each governing body within the County approve expenditures that will supplement or maintain the existing funding for any use to which the proceeds of the tax will be expended in the current year. You have asked whether the governing body must perform an item-by-item analysis in determining whether expenditures comply with the provisions of Section 17(2)(b) of the Act.

SUMMARY CONCLUSION TO QUESTION 2

In determining whether proposed expenditures for the current year will conform to the requirements of Section 17(2)(b) of the Act, the governing body must compare proposed expenditures in the aggregate with the previous year's expenditures in the aggregate.

ANALYSIS

The Act authorizes governing bodies within the County to spend the proceeds of the tax for any or all of the purposes outlined in Section 14(1) of the Act. As discussed

above, Section 17(2)(b) requires the governing bodies to approve expenditures which maintain or supplement the existing funding for the stated purposes. Section 17(2)(b) insures that governing bodies will not redirect existing funds for police and fire protection to governmental purposes or functions not described in Section 14(1) of the Act.

In other words, once the tax is imposed and first applied to maintain or supplement the existing level of funding for any or all of the purposes outlined in Section 14(1) of the Act, the governing bodies must thereafter ensure that expenditures in future years conform to the same criteria. In determining whether expenditures meet these criteria, the governing bodies must compare expenditures in the aggregate. In short, Section 17 of the Act does not direct the governing bodies of the County to perform an item-by-item analysis of expense items. So long as spending in the aggregate is made for the purposes outlined in Section 14(1) of the Act, the governing bodies may reallocate the proceeds of the tax to different uses from year to year.

Regarding the approval of expenditures, Section 17(3) of the Act directs the governing body to make a comparison between “the *amount* approved for expenditure for the fiscal year *for the purposes* set forth in [Section 14(1) of the Act]” and “the *amount* approved for expenditure in the immediately preceding fiscal year *for the purposes* set forth in [Section 14(1) of the Act].” 2007 Nev. Stat. 3426 (emphasis added). As illustrated by the preceding text, the word “amount” as expressed in the singular is modified by the term “purposes” as expressed in the plural. The structure of the sentence indicates that the required comparison is between the aggregate expenditure for the preceding year and the proposed aggregate expenditure for the current year.

As a practical matter, this affords the governing body the discretion to reallocate specific expenditures within the general framework provided by Section 14(1) of the Act. In other words, the governing body will be in compliance with Section 17(2) so long as it uses the proceeds of the tax to maintain or supplement, on an annual basis, the aggregate funding that it expends for the various purposes described in Section 14(1) of the Act.

QUESTION 3

You have asked whether a new position initially funded with the proceeds of the tax must continue to be funded in future years with the proceeds of the tax.

SUMMARY CONCLUSION TO QUESTION 3

As discussed above in response to your second question, the governing bodies may reallocate the proceeds of the tax to different uses from year to year, provided that

they maintain or supplement the aggregate level of funding for the purposes described in Section 14(1) of the Act.

QUESTION 4

If a proposed expenditure of the proceeds of the tax imposed pursuant to the Act would benefit multiple areas within the county, may the proceeds available to each benefitted area be pooled and expended on a pro-rata basis by population?

SUMMARY CONCLUSION TO QUESTION 4

The proceeds available to each area may be pooled and expended on a pro rata basis, as long as the requirements of Section 14(3) are met and each governing body agrees and approves the expenditure relative to its area. Section 14(3) of the Act states that the proceeds of the tax must be allocated "for expenditure . . . [i]n the areas . . . on a pro rata basis in each of those areas . . . or . . . [i]n any other manner that the Board and the governing body of each of those areas agree to be appropriate." 2007 Nev. Stat. 3425.

QUESTION 5

May the Board unilaterally approve expenditures related to the provision of services by the Sheriff of the County in separate individual areas when the statute requires approval by the governing bodies of the areas?

SUMMARY CONCLUSION TO QUESTION 5

The Board may not unilaterally approve expenditures related to services provided by the Sheriff because the statute requires approval of area expenditures by the governing bodies of each of the areas.

ANALYSIS

Section 14(3) of the Act requires that tax proceeds be "[a]llocated for expenditure" in the listed "areas." 2007 Nev. Stat. 3425. In addition, Section 17(2) of the Act states, "[n]o expenditure of those proceeds may be made unless the expenditure has been approved by the governing body of the *area* to which those proceeds have been allocated for expenditure." 2007 Nev. Stat. 3426 (emphasis added).

Question 5 suggests that the Board may act as the governing body for purposes of approving all Sheriff-related expenditures throughout the county. This is problematic because some of the areas in the county have their own governing bodies. Section 14(3)(a)(1) defines "area" by reference to enumerated towns and cities, as well as "any

Angela A. Bello
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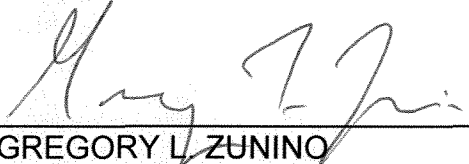
other town or city created in Nye County." 2007 Nev. Stat. 3425. Therefore, references to the "governing body of the area" mean the governing body of a specific town or city. The term "governing body" has also been defined elsewhere to mean "that body which has ultimate power to determine its policies and control its activities." BLACK'S LAW DICTIONARY, 695 (6th Ed. 1990). When an area is controlled by a governing body, the Board may not act on the governing body's behalf. To the contrary, the governing body must approve expenditures allocated for use within the area controlled by the governing body.

Although county sheriffs have county-wide responsibilities pursuant to NRS 248.090, Section 17(2) of the Act requires that a proposed expenditure be approved by the governing body of the area to which the proceeds have been allocated. 2007 Nev. Stat. 3426. This affords the governing body of each area the right to determine how to spend the proceeds of the tax relative to services provided by the Nye County Sheriff within that area.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:



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November 19, 2015

OPINION NO. 2015-07

HEALTH; PUBLIC EMPLOYEES'
BENEFITS PROGRAM (PEBP);
MEDICAL DIRECTOR: PEBP
does not fall within the definition
of "managed care organization,"
and therefore the requirement in
NRS 695G.110 that managed
care organizations retain medical
directors is not applicable to
PEBP.

Mr. Damon Haycock
Executive Officer
State of Nevada
Public Employees' Benefits Program
901 S. Stewart Street, Suite 1001
Carson City, Nevada 89701

Dear Mr. Haycock:

You have requested an opinion from the Office of the Attorney General whether the Public Employees' Benefits Program of the State of Nevada (PEBP) is a "managed care organization" or otherwise subject to NRS 695G.110, and therefore required to retain a medical director.

QUESTION PRESENTED

Is PEBP a managed care organization within the meaning of NRS Chapter 695G, or is it otherwise subject to NRS 695G.110, such that it is required to retain a medical director?

SUMMARY CONCLUSION TO QUESTION

PEPB does not fall within the definition of "managed care organization," and the requirement in NRS 695G.110 that managed care organizations retain medical directors is not made specifically applicable to PEBP. Therefore PEBP is not required to retain a medical director.

ANALYSIS

Under Nevada law, managed care organizations are required to retain medical directors. NRS 695G.110. NRS 695G.050 provides that "[m]anaged care organization" means any insurer or organization *authorized pursuant to this title* to conduct business in this State that provides or arranges for the provision of health care services through managed care." (Emphasis added.) That definition governs the whole of NRS Chapter 695G. NRS 695G.010. "[T]his title" refers to the insurance title of the Nevada revised statutes, i.e., Title 57, consisting of NRS chapters 679A through 697. See e.g. *MGM Mirage v. Nevada Ins. Guar. Ass'n*, 125 Nev. 223, 209 P3d 766 *passim* (2009). In contrast, PEBP derives its authority to procure insurance for public employees from NRS Chapter 287, specifically NRS 287.043. NRS chapter 287 is found in Title 23 of the Nevada Revised Statutes.

When a statute is clear on its face, a court is required to apply its plain meaning. *State v. Lucero*, 127 Nev. ___, ___, 249 P.3d 1226, 1228 (Adv. Op. 7, Mar. 17, 2011). NRS 695G.050 is clear on its face in applying only to entities operating under NRS Title 57 and in not applying to PEBP, which derives its authority under NRS chapter 287, in Title 23. PEBP is therefore not a managed care organization as defined in NRS 695G.050, and NRS 695G.110 is not directly applicable to PEBP under NRS chapter 695G.

While PEBP is not a managed care organization, certain specific provisions of NRS Chapter 695G that are applicable to managed care organizations are also made applicable to PEBP by PEBP's own statute, insofar as PEBP provides health insurance through a plan of self-insurance:

If the Board provides health insurance through a plan of self-insurance, it shall comply with the provisions of NRS 689B.255, 695G.150, 695G.160, 695G.164, 695G.1645, 695G.167, 695G.170, 695G.171, 695G.173, 695G.177, 695G.200 to 695G.230, inclusive, 695G.241 to 695G.310, inclusive, and 695G.405, in the same manner as an insurer

Damon Haycock, Executive Officer
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November 19, 2015
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that is licensed pursuant to title 57 of NRS is required to
comply with those provisions.

NRS 287.04335.

The enumerated provisions in NRS 287.04335 do not include NRS 695G.110, which requires a managed care organization to retain medical directors. The Legislature's failure to do so is instructive of legislative intent not to subject PEBP to the requirement. *Department of Taxation v. DaimlerChrysler Services North America, LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) (applying the canon of construction *expressio unius est exclusio alterius*; "Nevada law . . . provides that omissions of subject matters from statutory provisions are presumed to have been intentional"). The omission of any reference in NRS 287.04335 to NRS 695G.110, which requires a managed care organization to retain medical directors, thus supports a conclusion that PEBP is not subject to that requirement.

CONCLUSION

The Public Employees' Benefits Program is neither managed care organization as defined in NRS chapter 695G, nor is it otherwise subject to the requirement of NRS 695G.110 to retain a medical director.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:



DENNIS L. BELCOURT
Deputy Attorney General
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November 19, 2015

OPINION NO. 2015-07

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Damon Haycock, Executive Officer
State of Nevada Public Employees' Benefits Program
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