STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

March 16, 2016

OPINION NO. 2016-01

LOCAL GOVERNMENT EMPLOYEES' HEALTH INSURANCE; RETIREES; PREMIUM RATES; Local governmental employers may not offer a health plan option only available to retirees. County contracts with another Nevada state agency to provide benefits to active employees through the County's self-funded plan, per NRS 287.025(1)(b); retirees from other agency would be eligible per NRS 287.0205. Local government employer required to commingle claims experience of active employees and retirees in determining premium rates for retirees; not required to do so for determining premium rates of active employees; premium rates of two groups not required to be the same. Commingling for purposes of determining retiree rates required for plans created pursuant to NRS 287.010 and 287.015.

Mr. Steven B. Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Dear Mr. Wolfson:

You have requested an opinion from the Office of the Attorney General on various questions concerning local governments' programs of health insurance for their retirees.

QUESTION ONE

May a public employer provide a health plan option to retirees, which option is not available to active employees, if the election of that alternative retiree coverage is optional to the retiree? Can the employer mandate that retirees move to the retiree health plan option?

SUMMARY CONCLUSION TO QUESTION ONE

Local government employers may only offer to retirees coverage that is also available to active employees.

ANALYSIS

Under Nevada law, local government employers may offer group health insurance coverage or health or medical benefits to their active employees by, *inter alia,* (1) adopting, purchasing, or funding group insurance, NRS 287.010; (2) establishing a trust fund for medical, hospital and dental benefits through collective bargaining with a local government employer, NRS 287.015; (3) adopting a system of medical or hospital services, NRS 287.020; or (4) contracting with Public Employees' Benefits Program (PEBP) or other local governments for group insurance, or entering into arrangements with nonprofit co-ops to facilitate provision of medical services, NRS 287.025.

An employee of a local government providing such benefits pursuant to NRS 287.010, 287.015, 287.020, and 287.025 may, on retirement, "continue any such coverage" to the extent such coverage is not available to such person through Medicare. NRS 287.023(1) states as follows:

> Whenever an officer or employee of the governing body of any county, school district, municipal corporation, political subdivision, public corporation or other local governmental agency of the State of Nevada retires under the conditions set forth in NRS 1A.350 or 1A.480, or 286.510 or 286.620 and, during the period in which the person served as an officer or employee, was eligible to be covered or had dependents who were eligible to be covered by any group insurance, plan of benefits or medical and hospital service established pursuant to NRS 287.010, 287.015, 287.020 or paragraph (b), (c) or (d) of subsection 1 of NRS 287.025 or under the Public Employees' Benefits Program pursuant to paragraph (a) of subsection 1 of NRS 287.025, the officer or employee has the option upon retirement to cancel or continue any such coverage to the extent that such coverage is not provided to the officer or employee or a dependent by

> the Health Insurance for the Aged Act, 42 U.S.C. §§ 1395 et seq.

A retired officer or employee, or his or her surviving spouse, may, in any even-numbered year, reinstate insurance available from the former public employer pursuant to NRS 287.010, 287.015, 287.020, and 287.025. NRS 287.0205(1) states as follows:

> 1. A public officer or employee of any county, school district, municipal corporation, political subdivision, public corporation or other local governmental agency of the State of Nevada who has retired pursuant to NRS 1A.350 or 1A.480, or 286.510 or 286.620, or is enrolled in a retirement program provided pursuant to NRS 286.802, or the surviving spouse of such a retired public officer or employee who is deceased, may, except as otherwise provided in NRS 287.0475, in any even-numbered year, reinstate any insurance, except life insurance, that, at the time of reinstatement, is provided by the last public employer of the retired public officer or employee to the active officers and employees and their dependents of that public employer:
>
> (a) Pursuant to NRS 287.010, 287.015, 287.020 or paragraph (b), (c) or (d) of subsection 1 of NRS 287.025; or
>
> (b) Under the Public Employees' Benefits Program, if the last public employer of the retired officer or employee participates in the Public Employees' Benefits Program pursuant to paragraph (a) of subsection 1 of NRS 287.025.

The retiree or survivor must accept "the public employer's current program or plan of insurance and any subsequent changes thereto . . . ." NRS 287.0205(2).

When a statute is clear on its face, a court is required to apply its plain meaning. *Public Employees' Benefits Program v. Las Vegas Metropolitan Police Department*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008). The provisions that (1) retirees or dependents have "the option to . . . cancel or continue such coverage" and (2) retirees or their surviving spouses "may . . . reinstate coverage" within the confines of the last "public employer's current program or plan of insurance" unambiguously restrict the availability of coverage to that which is available to active employees. The use of the words "option" and "may" in NRS 287.023 and 287.0205 means only that the retiree, dependent, or survivor has the option of obtaining the coverage that is extended to the active employees of his or her last employer. Neither NRS 287.023 nor 287.0205 grants to local government employers the power to offer health benefits to retirees that they do not currently make available to active members. The lack of a grant of authority

for local government employers to make available to retirees health benefits other than as specified in NRS 287.023 or 287.0205 suggests that local government employers have no such authority outside of those two provisions. *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").

This conclusion is supported by the commingling requirements in NRS 287.023 and 287.0205. Pursuant to NRS 287.023(5) and 287.0205(5), actuarial determination of retiree premium rates must be based on commingled active employee and retiree claims experience. Such commingling is not possible unless there are both active employees and retirees in the plan or program. The commingling requirement presupposes a potential class of active employees with the same benefit.

QUESTION TWO

If, after a non-Clark County public employee becomes a retiree, the retiree's last public employer changes health coverage providers and joins the Clark County Self-Funded Plan (CCSF Plan), does the non-Clark County retiree have a right under NRS 287.0205 to join the Clark County Self-Funded plan in an even numbered year?

SUMMARY CONCLUSION TO QUESTION TWO

If Clark County and another local governmental entity enter into an agreement pursuant to NRS 287.010(1)(b) whereby active employees of the other local government of the State of Nevada may participate in the CCSF Plan, retirees of that other local government entity may participate in the CCSF Plan pursuant to NRS 287.0205.

DISCUSSION

An agreement between Clark County and another local government for that other local government's active employees to participate in the CCSF Plan may occur under the authority of NRS 287.025. NRS 287.025 provides in pertinent part as follows:

> (1) The governing body of any county, school district, municipal corporation, political subdivision, public corporation or other local governmental agency of the State of Nevada may, in addition to the other powers granted in NRS 287.010, 287.015 and 287.020:
> (b) Negotiate and contract with another county, school district, municipal corporation, political subdivision, public corporation or other local governmental agency of the State

> of Nevada to secure group insurance for its officers and employees and their dependents by participation in any group insurance plan established or to be established by the other local governmental agency.

As provided in NRS 287.0205, a retiree of one of the local governments enumerated therein who seeks to reinstate health insurance offered by the entity may enroll in:

> [A]ny insurance, except life insurance, that, at the time of reinstatement, is provided by the last public employer of the retired public officer or employee to the active officers and employees and their dependents of that public employer:
> (a) Pursuant to NRS 287.010, 287.015, 287.020 or paragraph (b), (c) or (d) of subsection 1 of NRS 287.025. . . .

NRS 287.0205(1).

Therefore, by the express terms of NRS 287.0205, if a person retires from another entity that subsequently enters into an agreement to have that other entity's active employees participate in the CCSF plan, that person must be allowed to reinstate health insurance by signing on to the CCSF plan.

QUESTION THREE

Do the NRS 287.0205(5)[1] and NRS 287.023(5) requirements that claims experience of active and retired health benefit plan members be commingled for purposes of establishing actuarial data also require blending of premium rates for active employees and retirees, such that a retiree premium rate must be the same as the premium rate for active employees? Does that requirement apply to both NRS 287.010 (Local Government Plans) and NRS 287.015 (Employee Organization Plans)?

SUMMARY CONCLUSION TO QUESTION THREE

NRS 287.0205(5) and NRS 287.023(5) only require that rates and coverage for local government *retirees*, including those receiving health benefits through plans or programs under NRS 287.010 and NRS 287.015, be based on the commingled claims experience of both active members and retirees. The commingling requirements of NRS 287.0205(5) and NRS 287.023(5) do not legally require the same rates for retirees as active employees. The mandates in NRS 287.0205(5) and NRS 287.023(5) for basing premiums of retirees on a commingling of their claims experience with active

[1] NRS 287.0205(5) becomes subsection (4) when the Affordable Care Act ceases to allow grandfathered plans to exclude preexisting conditions. *See* Act of June 16, 2011, chapter 453, § 15, 2011 Nev. Stat. 2746.

employees is applicable to NRS 287.010 and NRS 287.015 plans alike.

DISCUSSION

NRS 287.023(5) provides in pertinent part that local governments offering coverage pursuant to NRS 287.010, 287.015, 287.020 or paragraph (b), (c) or (d) of subsection 1 of NRS 287.025:

> [S]hall, for the purpose of establishing actuarial data to determine rates and coverage for persons who continue coverage for group insurance, a plan of benefits or medical and hospital service with the governing body pursuant to subsection 1, commingle the claims experience of those persons with the claims experience of active officers and employees and their dependents who participate in the group insurance, a plan of benefits or medical and hospital service.

Similarly, NRS 287.0205 provides in pertinent part that local governments providing benefits pursuant to NRS 287.010, 287.015, 287.020 or paragraph (b), (c) or (d) of subsection 1 of NRS 287.025:

> [S]hall, for the purpose of establishing actuarial data to determine rates and coverage for [persons reinstating coverage], commingle the claims experience of such persons with the claims experience of active and retired officers and employees and their dependents who participate in that group insurance, plan of benefits or medical and hospital service.

These two provisions apply only to persons continuing coverage upon, or reinstating coverage after, retirement. They thus only require that *retiree* premium rates be determined by using the combined experience of both active employees and retirees.[2] These provisions do not prescribe how *active employee* premium rates are to

---

[2] NRS 287.043(2)(a), in comparison, provides that, with respect to active employees and nonmedicare retirees under PEBP, the rates for both groups be determined according to the combined data from both groups:

> 2. In establishing and carrying out the Program, the Board shall:
> (a) For the purpose of establishing actuarial data to determine rates and coverage for active and retired state officers and employees and their dependents, commingle the claims experience of such active and retired officers and employees and their dependents for whom the Program provides primary health insurance coverage into a single risk pool.

be determined,[3] leaving the decision to the local government on whether to base active employee premium rates (1) solely on the active employees' experience or (2) on the combined experience of retirees and active employees, *inter alia*. Only the second option would necessarily result in identical premium rates for active employees and retirees.

The requirements of commingling claims experience in NRS 287.0205 and NRS 287.023 apply by their terms to plans under NRS 287.010 and 287.015, both. NRS 287.0205(5), NRS 287.023(1) and (5).

CONCLUSION

Local governments may not offer a health plan option that is only available to retirees. If Clark County contracts with another local government of the state of Nevada to provide benefits to the other local government's active employees through Clark County's self-funded plan, pursuant to NRS 287.025(1)(b), retirees from that other local government would be eligible to become participants of that plan through the reinstatement process of NRS 287.0205. A local government employer is required to commingle claims experience of active employees and retirees for purposes of determining premium rates for retirees, but is not so required for determining premium rates of active employees; therefore the premium rates of the two groups are not required to be the same. Commingling for purposes of determining retiree rates is required for plans created pursuant to both NRS 287.010 and 287.015.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
DENNIS L. BELCOURT
Deputy Attorney General
Government and Natural Resources
Tele: (775) 684-1206

DLB/bdc

[3] If the active employee premiums are determined solely on their experience and the claims experience of retirees is more expensive than that of active employees, commingling of the two groups only for setting retiree rates but not for active rates will of course result in premiums below what is necessary to fund the two groups' total claims experience. Any such shortfall would have to be offset with a subsidy, a charge, or another funding mechanism compatible with the county's existing obligations to its employees.

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT
Attorney General

WESLEY DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

March 31, 2016

OPINION NO. 2016-02

TOBACCO; LICENSES; TAXATION: When transferred to a consumer in exchange for some form of consideration, cigarettes manufactured with a cigarette rolling machine must be affixed with a Nevada cigarette revenue stamp pursuant to NRS 370.170. The owner of the machine may not transfer the cigarettes, or cause them to come into the possession of a consumer, unless the owner of the machine has precollected the excise tax described in NRS 370.165, and has satisfied all applicable federal and state licensing and regulatory requirements, including the requirements of NRS 370.385.

Deonne Contine
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Dear Ms. Contine:

On behalf of the Nevada Department of Taxation (Department), you have requested an opinion from the Office of the Attorney General as to whether Assembly Bill No. 83 (A.B. 83), enacted during the 78th Session of the Nevada Legislature (2015),

regulates the activity of persons who own and operate, or allow others to operate, cigarette rolling machines within the State of Nevada. *See* Act of June 9, 2015, ch. 488, §§ 1-2, 4-9, 11, 2015 Nev. Stat. 2957-2960. More specifically, you have asked whether, or under what circumstances the owner of a cigarette rolling machine must secure a manufacturer's license from the Department before using, or permitting others to use, the machine to produce cigarettes for the personal consumption of a person other than the owner of the machine. Additionally, you have asked whether the owner of the machine must precollect cigarette excise taxes on cigarettes produced in this manner.

In your request letter dated August 24, 2015, you described several situations in which the owner of a cigarette rolling machine might use the machine to produce cigarettes for sale to, or consumption by others. In this regard, you have asked about (1) licensing and (2) tax precollection in situations in which the consumer of the cigarettes pays no charge for the final, rolled cigarettes; supplies the raw materials for the production of the cigarettes; provides his own labor to operate the machine; or operates the machine and takes possession of the cigarettes at a location not open to the general public.

QUESTION ONE

When a person owns and operates, or allows others to operate a cigarette rolling machine for the purpose of producing cigarettes within the state of Nevada, must that person be licensed by the Department as a tobacco manufacturer? If so, must the person be licensed even if the person: (a) levies no charge for the production of the final, rolled cigarette; (b) furnishes no employees or contract labor for the purpose of loading the machine with tobacco and tubes; (c) supplies no raw materials for the production of the cigarettes; or (d) operates or allows others to operate the machine at a non-retail location, including private property?

SUMMARY CONCLUSION TO QUESTION ONE

When the owner of a cigarette rolling machine operates, or allows others to operate, the machine to produce cigarettes for sale to, or consumption by someone other than the owner of the machine, the owner of the machine must be licensed as a tobacco manufacturer regardless of who loads the machine or furnishes the raw materials, whether or not there is a charge to the consumer for the final, rolled cigarette, and whether or not the machine is located on private property.

ANALYSIS

Chapter 370 of the Nevada Revised Statutes (NRS) governs the manufacture, possession and distribution of cigarettes. Under NRS 370.010, a "cigarette" includes "all rolled tobacco or substitutes therefor wrapped in paper or any substitute other than

tobacco, irrespective of size or shape and whether or not the tobacco is flavored, adulterated or mixed with any other ingredient."

Effective June 9, 2015, A.B. 83 amended chapter 370 of NRS to add provisions governing the possession and operation of cigarette rolling machines. 2015 Nev. Stat. 2957-2960. Section 2 of A.B. 83 adopts the following definition:

> 1. "Cigarette rolling machine" means any machine that:
> (a) May be loaded with loose tobacco, cigarette tubes, cigarette papers or any other component related to the production of cigarettes;
> (b) Is designed to automatically or mechanically produce, roll, fill, dispense or otherwise manufacture cigarettes;
> (c) Is of a commercial grade or otherwise designed or suitable for commercial use; and
> (d) Is designed to be powered or operated by a primary source of power other than human power.
> 2. The term does not include any handheld or manually operated machine or device if the machine or device is:
> (a) Used to make cigarettes for the personal consumption of the owner of the machine or device; or
> (b) Held by a retail establishment solely for sale to a consumer for the purpose of making cigarettes off the premises of the retail establishment and for personal consumption

2015 Nev. Stat. 2957.

Additionally, NRS 370.0315 defines a "manufacturer" as anyone "who . . . [m]anufactures, fabricates, assembles, processes or labels a finished cigarette . . . ." Section 5 of A.B. 83 supplements this definition to include "any person who . . . [o]wns, maintains, operates or permits any other person to operate a cigarette rolling machine for the purpose of producing, filling, rolling, dispensing or otherwise manufacturing cigarettes." 2015 Nev. Stat. 2957 (amending NRS 370.0315).

As indicated above, a cigarette rolling machine does not include a "handheld or manually operated machine or device . . . [u]sed to make cigarettes for the personal consumption of the owner of the machine or device. . . ." 2015 Nev. Stat. 2957. Likewise, it does not include a machine or device held by a seller in the seller's inventory and not used by the seller to produce cigarettes. *Id*. Consequently, the owner of a handheld or manually operated device is not a manufacturer if the owner uses the device to roll cigarettes for the owner's personal consumption, or possesses the device only for purposes of selling the device in the ordinary course of business.

"When a statute's language is plain and unambiguous and the statute's meaning [is] clear and unmistakable, the courts are not permitted to look beyond the statute for a different or expansive meaning or construction." *See DeStefano v. Berkus*, 121 Nev. 627, 629, 119 P.3d 1238, 1239, 1240 (2005). As it pertains to the owner of a cigarette rolling machine, the language of A.B. 83 is plain and unambiguous. If the owner of the machine uses the machine, or permits another person to use the machine, to produce cigarettes for sale to, or consumption by someone other than the owner of the machine, the owner of the machine is a manufacturer. 2015 Nev. Stat. 2957. As a manufacturer, the owner of the machine must secure a manufacturer's license from the Department. 2015 Nev. Stat. 2958. The requirement to secure a manufacturer's license under these circumstances is unconditional. There are no exceptions for machines operated on private property or by consumers who supply their own labor, tobacco, or rolling materials.

QUESTION TWO

When the owner of a cigarette rolling machine uses the machine, or allows others to use the machine, to produce cigarettes for sale to, or consumption by a consumer who is not the owner of the machine, must the owner of the machine precollect cigarette taxes on the sale or consumption of the final, rolled cigarettes?

SUMMARY CONCLUSION TO QUESTION TWO

Under the circumstances as described above, the owner of a cigarette rolling machine must precollect cigarette taxes if he collects from the consumer a charge or fee for: (a) the final, rolled cigarettes; (b) the privilege of using the machine to produce the cigarettes; (c) the raw materials used in the production of the cigarettes; or (d) some comparable aspect of the production cycle. This is true regardless of whether the owner of the machine furnishes the labor or the materials for the production of the cigarettes, or places the machine at a location not open to the general public.

ANALYSIS

Nevada imposes an excise tax "upon the purchase or possession of cigarettes *by a consumer* in the State of Nevada at the rate of 40 mills per cigarette." NRS 370.165 (emphasis added). "The tax must be precollected by the wholesale or retail dealer, and must be recovered from the consumer by adding the amount of the tax to the selling price." *Id*. Although the tax must be precollected by the wholesale or retail dealer, the tax itself is imposed "upon the consumer and is precollected for convenience only." NRS 370.077.

The precollection of the tax is represented by a Nevada cigarette revenue stamp purchased from the Department and affixed to any package of cigarettes held for sale or

distribution within the State. NRS 370.165. Except as otherwise provided by law, it is unlawful for a wholesale or retail dealer to distribute cigarettes within the State unless the cigarettes have been properly packaged with a revenue stamp affixed. NRS 370.170.

A "wholesale dealer" includes "[a]ny person who manufactures or produces cigarettes within this State *and* who *sells* or *distributes* them within the State." NRS 370.055 (emphasis added). Similarly, a "retail dealer" includes anyone "who *sells* or *distributes* cigarettes to a consumer within the State." NRS 370.033 (emphasis added). Under the circumstances as described above, the owner of a cigarette rolling machine is a manufacturer of cigarettes and must secure a manufacturer's license from the Department. As to the obligation to precollect the excise tax, the owner of the machine functions simultaneously as the wholesale and retail dealer of the cigarettes if the owner collects a charge or fee for the cigarettes or some aspect of their production cycle. In other words, if the owner of the machine collects such a charge or fee, the owner is reasonably characterized as having "sold" or "distributed" cigarettes to the consumer.

Chapter 370 of NRS does not provide a statutory definition of "distribute" but does provide a definition of the terms "sale" and "to sell." As they pertain to transactions between a manufacturer and a consumer of cigarettes, these terms mean: "[t]o exchange, barter, possess or traffic in; . . . [to] deliver *for value*; . . . [t]o peddle; . . . [t]o traffic in for *any consideration*, promised or obtained directly or indirectly; or . . . [t]o procure or allow to be procured for any reason." NRS 370.035 (emphasis added). The terms "value" and "consideration" indicate that a transfer of cigarettes between a manufacturer and consumer is not to be considered a sale unless the transfer is supported by consideration. Likewise, the terms "peddle," "traffic" and "procure" all connote a transfer for consideration.

NRS 370.077 further supports the proposition that a transfer of cigarettes between a manufacturer and consumer must be supported by consideration in order to be characterized as a sale. This provision states that after the excise tax has been precollected by the wholesale or retail dealer, it "shall be added to the selling *price* of the cigarettes." NRS 370.077 (emphasis added). This obligation to add the tax to the "price" presupposes that the cigarettes have been transferred for quantifiable value.

When interpreting statutes, a court should view related statutory provisions as a whole. *International Game Technology, Inc. v. Second Judicial District Court*, 122 Nev. 132, 152, 127 P.3d 1088, 1102 (2006). When viewed in its entirety, the language of NRS 370.035 and 370.077 indicates that the term "sale" means a transfer for consideration. While not statutorily defined, the term "distribute" appears in the same context as does the term "sale." Moreover, terms not statutorily defined "should be given their plain meaning unless it would violate the spirit of the act." *In re Petition of*

Phillip A.C., 122 Nev. 1284, 1293, 149 P.3d 51, 57 (2006). In a commercial setting, "distribute" refers to a transfer of goods between different points in the supply chain, namely between "stores and other businesses that sell to consumers." NEW OXFORD AMERICAN DICTIONARY 505 (3d ed. 2010). The distribution of goods between different points in the supply chain most commonly involves an exchange of value or consideration. As a person who transfers cigarettes to another, the owner of cigarette rolling machine has no obligation to precollect tax pursuant to NRS 370.165 unless the owner has sold or distributed them to the consumer. Accordingly, the owner has no obligation to precollect tax unless the owner has transferred the cigarettes, or otherwise caused their transfer for consideration.

Aside from the issue of consideration, however, there remains a question whether the owner of the cigarette rolling machine must precollect tax in the absence of a specific charge to the consumer for the final, rolled cigarettes. In other words, there remains a question as to whether the owner of the machine must precollect tax if the owner purportedly charges the consumer only for the privilege of using the machine, or only for the raw materials used in the production of the cigarettes.

Given the circumstances described in Question Two, the true object of the transaction between the owner of the machine and the consumer is the transfer and acquisition of the final, rolled cigarettes produced by the machine. Although the owner of the machine may purport to levy a charge or fee only for the privilege of using the machine, or only for the cost of the raw materials used in the production of the cigarettes, that charge or fee is properly recharacterized as a charge for the final, rolled cigarettes. *See, e.g., Federated Dept. Stores, Inc., F & R Lazarus Co. Div. v. Lindley*, 456 N.E.2d 1209, 1210 (Ohio 1983) (in evaluating applicability of sales tax, one must draw "a distinction . . . as to the true object of the transaction contract; that is, is the real object sought by the buyer the service per se or the property produced by the service"); *Quotron Systems, Inc. v. Comptroller of Treasury*, 411 A.2d 439, 443 (Md.1980) (an analysis of the "dominant purpose of the contract . . . is applicable when characterizing the overall function of a company which provides both a service and related equipment"); *Dechert LLP v. Commonwealth*, 942 A.2d 210, 212 (Pa. Cmwlth. Ct. 2007) (holding that the purpose of a sale of canned computer software was the acquisition of the software, not the acquisition of the license to use the software).

Although the courts have applied this true object rationale to questions involving the applicability of sales tax, the rationale is equally persuasive as it applies to Nevada's cigarette excise tax. Indeed, the Legislature has deemed the owner of a cigarette rolling machine to be a "manufacturer" of the cigarettes produced by the machine. 2015 Nev. Stat. 2957. This holds true regardless of who supplies the labor or the raw materials used for the production of the cigarettes. Accordingly, the owner of the machine is properly characterized as a seller of cigarettes, not a seller of services or materials associated with the production of cigarettes.

In summary, when transferred to a consumer in exchange for some form of consideration, cigarettes manufactured with a cigarette rolling machine must be affixed with a Nevada cigarette revenue stamp pursuant to NRS 370.170. It follows that the owner of the machine may not transfer the cigarettes, or otherwise cause them to come into the possession of a consumer, unless the owner of the machine has precollected the excise tax in the manner described in NRS 370.165, and has satisfied all applicable federal and state licensing and regulatory requirements, including the requirements of NRS 370.385.[1]

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
GREGORY L. ZUNINO
Bureau Chief
Bureau of Business and State Service
(775) 684-1237

GLZ/GLZ

[1] NRS 370.385 sets forth packaging and labeling requirements, among others, and incorporates certain federal requirements and restrictions by reference to various provisions of the U.S. Code. Except as it pertains to the manufacturer's license required by NRS 370.080 (as amended by A.B. 83), this opinion does not address licensing, packaging or labeling requirements.

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT
Attorney General

WESLEY DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

June 10, 2016

OPINION NO. 2016-03

ELKO COUNTY DISTRICT ATTORNEY'S OFFICE; JUSTICE OF THE PEACE SALARIES: NRS 4.040(1) mandates that a board of county commissioners, at its regular July meeting held in the election year for any justice of the peace in its township, fix the minimum compensation for each justice of the peace who will run for office in the upcoming election. During the term that follows the election, the board may increase the compensation of the persons elected to those positions or change the source and payment schedule of their compensation. However, the board may not, during their current term, reduce their compensation below the minimum previously established.

Kristin A. McQueary
Chief Civil Deputy
Elko County District Attorney's Office
540 Court Street, Second Floor
Elko, Nevada 89801-3315

Dear Ms. McQueary:

You have asked whether the Board of Elko County Commissioners ("Board") may, pursuant to NRS 4.040(1), fix the compensation of a new justice of the peace below the amount paid to an existing justice of peace. Additionally, you have asked whether the compensation of an existing justice of the peace may be reduced prior to the expiration of his or her current term of office.

QUESTION ONE

Under NRS 4.040(1), does the Board's authority to "change" the compensation of a justice of the peace encompass the right to reduce his or her compensation prior to the expiration of his or her current term of office?

SHORT ANSWER

As used in NRS 4.040(1), the word "change" refers to the Board's authority to adjust the source of fixed compensation paid to a justice of the peace ("JP") from a stated salary to fees retained by the JP as provided by law, or to a combination of both. The word "change" in NRS 4.040(1) also means the authority of the Board to adjust the payment schedule of a stated salary, which can be made payable "monthly, semi-monthly, or at regular 2-week intervals" to a JP. As limited by the context of NRS 4.040(1), "change" cannot mean that the Board may reduce the compensation of a JP prior to the expiration of his or her current term.

ANALYSIS

NRS 4.040(1) states:

> The several boards of county commissioners of each county, at the regular meeting in July of any year in which an election of justices of the peace is held, shall fix the minimum compensation of the justices of the peace within their respective townships for the ensuing term, either by stated salaries, payable monthly, semimonthly or at regular 2-week intervals, or by fees, as provided by law, or both, and they may thereafter increase or *change* such compensation during the term but shall not reduce it below the *minimum so established*.

NRS 4.040(1) (emphasis added).

Unless limited by the context in which it appears, the word "change" is broadly defined as follows: "to cause to be different; alter." THE AMERICAN HERITAGE DICTIONARY 258 (2nd ed. 1982). In this case, however, the broad meaning of "change" is limited by the context in which the word appears.

NRS 4.040(1) authorizes Boards to fix the minimum compensation of JPs for an upcoming term by one of three options: "stated salaries . . . or by fees, as provided by law, or by both." Further, NRS 4.040(1) identifies three methods by which the Board may fix the payment schedule for the stated salaries, if any, that it has established for

JPs within the township. In this regard, stated salaries may be made "payable monthly, semi-monthly or at regular 2-week intervals." NRS 4.040(1).

Although NRS 4.040(1) authorizes the Board to increase or change a JP's compensation during a term, it further states that the Board "shall not reduce it below the minimum [previously] established." The foundation of statutory construction requires that "[w]hen the language of a statute is plain and unambiguous, [an interpreting body] should give that language its ordinary meaning and not go beyond it." *Nevada Power Co. v. Pub. Util. Comm'n*, 122 Nev. 821, 837, 138 P.3d 487, 495 (2006). Here, by using the word "change," but also expressly stating that a JP's compensation may not be "reduce[d]," the Legislature granted the Board the authority to change the attributes of a previously fixed level of minimum compensation, including attributes such as the source of the compensation and the schedule of payments, but it simultaneously prohibited the Board from reducing the compensation below the amount previously established. *See* Op. Nev. Att'y Gen. No. 152 (July 15, 1964).

QUESTION TWO

Insofar as NRS 4.040(1) prohibits the Board from reducing an existing JP's compensation below the "minimum so established" before that JP's term, must the Board fix a new JP's compensation at or above this same threshold? Similarly, does NRS 4.040(1) authorize the Board to compensate a new JP on a part-time basis?

SHORT ANSWER

As used in NRS 4.040(1), the phrase "minimum so established" refers to the amount of compensation established by the Board with respect to any JP whose term of office will commence at the conclusion of the upcoming election. The phrase does not refer to the compensation of a JP who may be elected to a term that will commence at some point thereafter. Accordingly, the Board may fix the minimum compensation for a new JP, serving a staggered term, at a value less than the minimum compensation it previously established for an existing JP. Additionally, nothing in NRS Chapter 4 precludes the Board from fixing the minimum compensation of a new JP to reflect a part-time or half-time case load.

ANALYSIS

The plain language of NRS 4.040(1) contains two separate provisions. The first provision of NRS 4.040(1) states that Boards, "at the regular meeting in July of any year in which an election of justices of the peace is held, *shall fix the minimum compensation* of [JPs] within their respective townships *for the ensuing term*[.]" NRS 4.040(1) (emphasis added). The use of the word "shall" in the first provision of NRS 4.040(1) mandates that the Board fix the minimum compensation for the upcoming term of a JP at the regular July meeting of any year in which an election of a JP is to be held. This

mandate does not restrict the Board from fixing the minimum compensation for the upcoming term of a JP above or below the minimum compensation earlier fixed by the Board for a term that commenced previously.

The second provision of NRS 4.040(1) states: "and they may *thereafter increase or change* such compensation *during the term* but shall not reduce it below the minimum so established." NRS 4.040(1) (emphasis added). The words "and they may thereafter increase or change" contained in the second provision of NRS 4.040(1) reflect the Legislature's intention to grant Boards the authority to increase or otherwise adjust (without reducing) the compensation of a midterm JP. The second provision of NRS 4.040(1) also contains a limitation that prevents reduction of a midterm JP's compensation below the amount set by the Board prior to the JP's election. NRS 4.040(1).

The authority vested in Boards by NRS Chapter 4 to fix the compensation of JPs within their respective townships is exclusive. Article 4, Section 20, of the Nevada Constitution was amended in 1926, to among other things, reserve plenary authority to "[r]egulat[e] the jurisdiction of and duties of justices of the peace and of constables, and [to] fix[] their compensation." NEV. CONST. art. 4, § 20. NRS 4.040(1) unquestionably grants this reserved plenary authority to fix the compensation of JPs to Boards. Based upon the absence of other limiting language within NRS Chapter 4, the plenary authority of Boards to fix the compensation of JPs includes the authority to pay JPs on either a part-time or full-time basis. NRS 4.040(1).

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
PETER K. KEEGAN
Deputy Attorney General

PKK/SAD

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT
Attorney General

WESLEY DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

July 5, 2016

OPINION NO. 2016-04

DISTRICT ATTORNEYS; CITIES AND TOWNS; LEGAL SERVICES: If the town board chooses to appoint a town attorney, the district attorney is relieved of duties to the town board. The duties of a district attorney to an unincorporated town operating under the Unincorporated Town Government Law parallel the duties owed to the county commissioners. The district attorney owes those duties specified in NRS 269.145(1) and NRS 269.145(2) to the board of county commissioners. The county is prohibited from receiving any compensation from the town for the performance of the district attorney's duties.

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

Dear Ms. Bello:

By letter dated March 22, 2016, you requested an opinion from the Office of the Attorney General regarding the duties owed by a district attorney to unincorporated towns in Nevada, and whether the district attorney may charge for services performed on behalf of an unincorporated town.

QUESTION ONE

What duties does a district attorney owe to a town board that is governed pursuant to the elected town board form of government?

SUMMARY CONCLUSION TO QUESTION ONE

If the town board chooses to appoint a town attorney, then the district attorney is relieved of any duties to the town board. In the absence of a town attorney, however, the district attorney owes those duties established by NRS 269.145 to the town board.

ANALYSIS

Unincorporated towns in Nevada have the option of being governed by the board of county commissioners or by an elected town board. If a town chooses not to elect a town board for its governance (or chooses to dissolve such a board), then the board of county commissioners is the governing body for the town.

An unincorporated town may choose to govern itself via an elected town board pursuant to NRS 269.016 through NRS 269.022. As you correctly note in your request, a town officer is not a "county, township or district officer" for purposes of NRS 252.160, which defines the duties of the district attorney to the county. The demarcation between unincorporated towns, incorporated towns, and townships is clear under any reasonable reading of the Nevada Revised Statutes. Absent further revision of the NRS by the legislature, it is clear that the term "county, township or district officer" does not apply to members of elected town boards, and hence the district attorney owes no duties to such town board members under NRS 252.160.

The duties of the district attorney to an unincorporated town are specified in NRS 269.145. That statute contains three subsections. The first subsection provides, in relevant part, as follows: "All prosecutions arising under the provisions of this chapter shall be conducted by the district attorney of the county. . . ." NRS 269.145(1). This section is unambiguous and hence requires no additional discussion.

The second subsection provides: "The district attorney shall also prosecute and defend all suits brought by or against the town board or board of county commissioners under the provisions of this chapter." NRS 269.145(2). The inclusion of both "town board" and "board of county commissioners" in the statute suggests that the intent of the law is for the district attorney to act on behalf of the governing body of the town. Where the town is governed by a town board, the district attorney's duty is to "prosecute and defend all suits brought by or against the town board. . . ." *Id.* Where a town is instead governed by the board of county commissioners, the duty is owed to the commission.

The third subsection reinforces this interpretation. It provides: "The town board may appoint a town attorney to act in lieu of the district attorney, in which case the town attorney shall act exclusively in behalf of the town in all civil matters." NRS 269.145(3). *See also* 40 Mont. Op. Atty. Gen. 104 (1983) (the district attorney is not required to represent rural improvement districts where that duty is not specified by statute) and 43 Mont. Op. Atty. Gen. 46 (1989) (likewise with respect to hospital districts).

QUESTION TWO

What duties does a district attorney owe to an unincorporated town that operates under the Unincorporated Town Government Law (UTGL)?

SUMMARY CONCLUSION TO QUESTION TWO

The duties of a district attorney to an unincorporated town operating under the UTGL parallel the duties owed to the county commissioners.

ANALYSIS

As you correctly note in your request, the duties of the district attorney to the county are specified in chapter 252 of NRS. In addition to his or her role as a public prosecutor, the district attorney must defend civil lawsuits brought against the county; prosecute "all recognizances forfeited in the district court" and all actions for recovery of funds from debts, fines, penalties, and forfeitures in the county; provide advice and draw the necessary legal documents regarding the school district, if the school district has not outsourced private counsel for that purpose; represent the county in nuisance actions; and any other duties required by law. NRS 252.110.

The Nevada legislature has codified additional duties owed by district attorneys at NRS 252.160 and NRS 252.170. In addition to the requirements of NRS 252.110, the district attorney must "give his or her legal opinion to any assessor, collector, auditor or county treasurer, and to all other county, township or district officers within his or her county, in any matter relating to the duties of their respective offices." NRS 252.160(1).

Also of significance to this question is NRS 252.170(2)(e). This section includes "[d]rawing all legal papers on behalf of the board of county commissioners . . ." among the additional duties of the district attorney. *Id.* The remaining subsections of NRS 252.170 require the district attorney to attend meetings of the county commission; review contracts being considered by the county; provide legal advice to the county on the impact of ordinances, state law, and federal law on the county; and give advice to the county commissioners upon matters relating to their duties. *Id.*

To provide uniformity across the state to towns without elected boards, the Nevada legislature enacted the Unincorporated Town Government Law. Counties

adopting the UTGL, or counties in which the UTGL automatically applies, govern unincorporated towns through the county board. The UTGL is codified in Nevada law at NRS 269.500 to 269.625. The legislature was clear that "the purposes of the Unincorporated Town Government Law are to provide for the formation of unincorporated towns and their government according to a uniform plan within the framework of county administration of the unincorporated town." NRS 269.525(5). Significantly, the legislature also specifically declared that "unincorporated town government is an adjunct of county government." NRS 269.525(3).

The UTGL does not specifically reference the district attorney. *See* NRS 269.500 *et seq.* It is clear, however, that the board of county commissioners is the governing body of any town operating under the UTGL. Because any such town is run by the board of county commissioners, the duties of the district attorney to the county commissioners when acting for the town pursuant to the UTGL parallel the duties of the district attorney to the county and its officials as specified in Chapter 252 of NRS.

QUESTION THREE

What duties does a district attorney owe to an unincorporated town that has dissolved its elected town board and has not adopted the UTGL?[1]

SUMMARY CONCLUSION TO QUESTION THREE

The district attorney owes those duties specified in NRS 269.145(1) and NRS 269.145(2) to the board of county commissioners, in addition to the duties specified in chapter 252 of the NRS.

ANALYSIS

Chapter 269 of the NRS is not clear on this specific issue, but when read as a whole, Chapter 269 provides for only two forms of unincorporated town government: town board or county board. By dissolving their elected town board, the people of Pahrump rejected the elected town board form of government. Because Pahrump claims to be an unincorporated town, the only form of government available upon rejection of the elected town board is government by the board of county commissioners.

As discussed in response to your second question, because Pahrump is governed by the board of county commissioners, the district attorney's duties to the commissioners when acting for the town parallel the duties to the commissioners when acting for the county. That the board of county commissioners enacted an ordinance

[1] We take no position as to whether the town board form of government survived the dissolution of the elected town board, or whether the UTGL is applicable to the facts as you have represented them.

purporting to exempt the town from the UTGL does not change the analysis. As you correctly note, the district attorney also owes duties to the town pursuant to NRS 269.145. Since there is no longer a town board, a town attorney cannot be appointed, and the provisions of NRS 269.145(3) do not apply.

QUESTION FOUR

May the county charge an unincorporated town for services rendered by the district attorney, when such services benefit only the unincorporated town?

SUMMARY CONCLUSION TO QUESTION FOUR

Where, as here, the district attorney performs duties owed to the county commission, the county is prohibited from receiving any compensation from the town for the performance of the district attorney's duties under Chapter 269 of NRS.

ANALYSIS

As noted above, the circumstances here indicate that the district attorney's duties are owed to the county commission. It is of course accurate that NRS 269.105 provides that the "salaries of officers" and "expenses incurred in carrying on any government herein provided for" are to be paid from "the general fund of the town or city, to the affairs of which the government relates." NRS 269.105(1). Your question asks, essentially, whether NRS 269.105(1) authorizes the district attorney to charge unincorporated towns for such salaries and expenses.[2]

Where, as here, the district attorney's duties are owed to the county commission overseeing the unincorporated town, the appropriate statute to resolve this question is NRS 269.040. That statute contains three subsections. The first provides that "[t]he district attorney [and other county officers] . . . shall perform the duties required or authorized to be performed by them, under and by virtue of the provisions of this chapter, and shall be held liable . . . for the faithful performance thereof." No mention is made in the statute of legal fees or other compensation. Under circumstances in which Chapter 269 applies, then, the district attorney must perform his or her duties to the county commission without additional compensation, just as the district attorney provides other services to the county commission without additional compensation.

Furthermore, NRS 269.040(2) states that "[a]ll such officers shall pay all fees or moneys by them received, under any law or ordinance touching the provisions of this chapter, in the time and manner as provided by general law, to the county treasurer of their respective counties, to be distributed to the fund of the proper town or city." *Id.*

---

[2] Your question acknowledges that the district attorney may not be compensated personally. *State ex rel. Norcross v. Shearer* 23 Nev. 76, 42 P. 582 (1895).

Even assuming *arguendo* that NRS 269.105(1) allows for the collection of funds from the town for legal services, NRS 269.040(2) mandates that any such funds must be turned over to the county treasurer, before being "distributed" back to the town.

Finally, the third subsection of NRS 269.040 states that "[n]o officer performing any duty under this chapter . . . shall demand or receive any compensation therefor." NRS 269.040(3). As discussed above, the circumstances here indicate that when it is governed by a county board, an unincorporated town is entitled to be represented by the district attorney in the same manner as is the county, and without any additional cost or charge to the town.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: 
DANIEL WESTMEYER
Senior Deputy Attorney General

DEW/LJA

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT
Attorney General

WESLEY DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

July 26, 2016

OPINION NO. 2016-05

HEALTH AND HUMAN SERVICES; MEDICAL MARIJUANA PROGRAM; IDENTIFICATION CARD: A patient cannot use a copy of a completed application at a Nevada dispensary to obtain medical marijuana. A recommendation from a California physician and a driver's license from another state cannot be used to obtain medical marijuana from a Nevada dispensary.

Richard Whitley, Director
Department of Health and Human Services
4126 Technology Way, Suite 100
Carson City, NV 89706

Dear Mr. Whitley,

On behalf of the Department of Health and Human Services, you have requested an opinion from the Office of the Attorney General on two issues related to the medical marijuana program. First, you have asked whether a copy of a pending application for a registry identification card under NRS 453A.210(8) is deemed to be a card for purposes of purchasing medical marijuana at a dispensary. Additionally, you have asked whether NRS 453A.364(3) allows a dispensary to sell medical marijuana to a non-resident purchaser when the purchaser presents to the dispensary a physician's recommendation for medical marijuana along with government issued identification.

Your second inquiry appears to describe the process recognized in California which allows patients to use a recommendation from a physician to obtain medical marijuana without a government issued card specific to that purpose. You have

explained that the Division of Public and Behavioral Health interprets NRS 453A.364(3) to require that a non-resident purchaser present to the Nevada dispensary a government-issued card or similar document specifically authorizing the purchaser's lawful use of medical marijuana in another state or local jurisdiction. In your letter, you express that the intent of the Division of Public and Behavioral Health is to meet the needs of the patient in an expedited fashion while complying with the registry laws which provide safeguards for marijuana use in our society.

QUESTION ONE

Does NRS 453A.210(8) state or imply that an applicant for a registry identification card may use a copy of the completed registry application to purchase medical marijuana at a Nevada dispensary before the application has been processed by the Division of Public and Behavioral Health (Division)?

SUMMARY CONCLUSION TO QUESTION ONE

A patient cannot use a copy of a completed application at a Nevada dispensary to obtain medical marijuana. Under NRS 453A.210(8), a registry applicant is deemed to hold a registry identification card *upon presentation to a law enforcement officer* of a copy of the application. Accordingly, a copy of the application is authorized for official use only in connection with interactions between the applicant and law enforcement officers.

ANALYSIS

NRS 453A.210(8) provides the following:

> Except as otherwise provided in this subsection, if a person has applied for a registry identification card pursuant to this section and the Division has not yet approved or denied the application, the person, and the person's designated primary caregiver, if any, shall be deemed to hold a registry identification card upon the presentation to a law enforcement officer of the copy of the application provided to him or her pursuant to subsection 4.

This provision attributes a registered status to a person who has applied for but has yet to receive a registry identification card. However, the attribution is limited in its scope to criminal justice matters, namely situations in which the applicant presents a copy of his or her application to a law enforcement officer. In this regard, NRS 453A.210(8) allows a user of medical marijuana to avoid arrest for using or possessing marijuana while the user's registry application is pending with the Division, but only if the user waives the confidentiality of the registry application afforded by NRS 453A.700 and presents a copy

of the application to a law enforcement officer. If charged with a crime, any user of medical marijuana who does not have a registration identity card may also assert an affirmative defense concerning use of medical marijuana according to NRS 453A.310. By treating a pending registry application as a registry identification card in this limited context, NRS 453A.210(8) minimizes the time and expense devoted to criminal enforcement action against persons who will likely be issued registry identification cards on the basis of their applications, or who may otherwise have a valid affirmative defense to criminal prosecution.

Indeed, the language of the statute establishes that a copy of the registry application is to be deemed a registry identification card only *upon presentation to a law enforcement officer.* Although the language is plain on its face, some have argued that it implicitly governs transactions between medical marijuana users and dispensaries. To interpret the statute in this manner is to render part of it meaningless or superfluous. The Nevada Supreme Court has ruled that statutes should be interpreted to avoid a reading which would render part of the statute meaningless or superfluous when a substantive interpretation can be given. *Board of County Comm'rs Clark County v. White,* 102 Nev. 587, 590, 729 P.2d 1347, 1350 (1986). If a copy of the application is deemed to be a registry identification card for all purposes and under all circumstances, there is no reason that the language of the statute should expressly confine its application to situations in which the applicant presents a copy of his or her application to a law enforcement officer. In short, the statute's attribution of a registered status to an applicant is qualified by the phrase "upon the presentation to a law enforcement officer." If the attribution is unqualified, the qualifier is meaningless. To give it meaning, the application of the statute must be limited accordingly.

QUESTION TWO

May the language of NRS 453A.364(3) be interpreted to allow a dispensary to sell medical marijuana to a non-resident based upon the non-resident's presentation of a physician's recommendation for medical marijuana along with a government issued identification card (e.g., driver's license)?

SUMMARY CONCLUSION TO QUESTION TWO

A recommendation from a California physician and a driver's license from another state cannot be used to obtain medical marijuana from a Nevada dispensary. According to NRS 453A.364(3), a dispensary may only recognize a non-resident card or other identification if the card or other identification is *issued* by a state or jurisdiction other than Nevada *and* that identification is the functional equivalent of a Nevada registry identification card.

ANALYSIS

When the voters of Nevada approved a constitutional initiative in 2000, they not only directed the Legislature to provide for the use of medical marijuana, but also to provide for "[a] registry of patients, and their attendants who are authorized to use the plant for a medical purpose, to which law enforcement officers may resort to verify a claim of authorization and which is otherwise confidential." Nev. Const. art. 4, § 38. The voters balanced the needs of patients with the concerns about marijuana use by placing a constitutional provision for patient registry on equal footing with a constitutional provision for a patient's right to use medical marijuana. "The Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision." *Nevadans for Nev. v. Beers,* 122 Nev. 930, 944, 142 P.3d 339, 348 (2006). The patient registry was a significant component of the initiative because when the voters authorized a patient to use medical marijuana, they expressly made that use subject to a patient registry.

The Nevada Legislature acted in accordance with the registry provision of the Nevada Constitution in its legislation to extend recognition to non-residents who travel from another jurisdiction with a similar registry and desire access to medical marijuana in Nevada. NRS 453A.364 provides the following:

> 1. The State of Nevada and the medical marijuana dispensaries in this State which hold valid medical marijuana establishment registration certificates will recognize a nonresident card only under the following circumstances:
> (a) The state or jurisdiction from which the holder or bearer obtained the nonresident card grants an exemption from criminal prosecution for the medical use of marijuana;
> (b) The state or jurisdiction from which the holder or bearer obtained the nonresident card requires, as a prerequisite to the issuance of such a card, that a physician advise the person that the medical use of marijuana may mitigate the symptoms or effects of the person's medical condition;
> (c) The nonresident card has an expiration date and has not yet expired;
> (d) The holder or bearer of the nonresident card signs an affidavit in a form prescribed by the Division which sets forth that the holder or bearer is entitled to engage in the medical use of marijuana in his or her state or jurisdiction of residence; and
> (e) The holder or bearer of the nonresident card agrees to abide by, and does abide by, the legal limits on the possession of marijuana for medical purposes in this State, as set forth in NRS 453A.200.

> 2. For the purposes of the reciprocity described in this section:
> (a) The amount of medical marijuana that the holder or bearer of a nonresident card is entitled to possess in his or her state or jurisdiction of residence is not relevant; and
> (b) Under no circumstances, while in this State, may the holder or bearer of a nonresident card possess marijuana for medical purposes in excess of the limits set forth in NRS 453A.200.
> 3. As used in this section, "nonresident card" means a card or other identification that:
> (a) Is issued by a state or jurisdiction other than Nevada; and
> (b) Is the functional equivalent of a registry identification card, as determined by the Division.

NRS 453A.364 authorizes the recognition of a "nonresident card" under specified circumstances. As quoted above, subsection 3 of NRS 453A.364 defines a "nonresident card" as a card or identification issued by a state or local jurisdiction other than or outside of Nevada. The definition thus contrasts the term "nonresident card" with the term "registry identification card." Given the Legislature's use of contrasting terminology, the term "registry identification card" necessarily refers to a card issued by the state of Nevada pursuant to the provisions of Chapter 453A of the NRS. Furthermore, since a nonresident card must be the functional equivalent of a registry identification card, the nonresident card must serve the same purpose or function in another state or jurisdiction as does the Nevada registry card within Nevada. Otherwise, the card or identification does not meet the definition of "nonresident card" as set forth at NRS 453A.364(3).

When interpreting statutory language, the Nevada Supreme Court follows the "plain meaning rule." According to the plain meaning rule, when "the words of the statute have a definite and ordinary meaning," the plain language of the statute governs "unless it is clear that this meaning was not intended." *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 641-642, 81 P.3d 532, 534 (2003). In other words, when the statute is plain on its face, it is inappropriate to look beyond the language of the statute in an effort to ascertain the intent or understanding of the individual legislators who voted to enact the statute.

In enacting the provisions of Chapter 453A of NRS, the Nevada Legislature expressly and unambiguously declined to adopt the California model of making a registry identification card optional and allowing the patient to deal directly with the dispensary using only documents provided by the patient's physician. Furthermore, in enacting the provisions of NRS 453A.364, the Legislature specifically declined to adhere to the California model as it may have otherwise pertained to nonresident

purchasers of medical marijuana. While a physician's recommendation may allow for the purchase of marijuana in California, the physician's recommendation is not issued by a governmental entity This holds true even if the recommendation is accompanied by a California driver's license. Although issued by the state, a California driver's license does not provide immunity from arrest or prosecution for the use or possession of marijuana, does not incorporate background checks to ensure legitimacy, and does not itself allow for the purchase of medical marijuana. Therefore, it is not the functional equivalent of Nevada's registry identification card.

In summary, the Division of Public and Behavioral Health has correctly interpreted NRS 453A.364 to require that a nonresident desiring access to medical marijuana in Nevada present a card or other identification which is specific to the lawful use of medical marijuana and issued by a state or local jurisdiction. Even when accompanied by a driver's license, a recommendation by a California physician does not satisfy these requirements.

Sincerely,
ADAM PAUL LAXALT
Attorney General

By Linda C. Anderson
Linda C. Anderson
Chief Deputy Attorney General

LCA/LLA

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT
Attorney General

WESLEY DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

August 15, 2016

OPINION NO. 2016-06

DISTRICT ATTORNEY; CITATIONS; MISDEMEANORS; COURTS; NRS 171.1776 does not appear to have been intended to abrogate prosecutorial discretion, however, the statute does require that citations be filed with the court at the time they are issued. Prosecutors are the proper authority to negotiate the resolution of charges brought by citation; however, due to the requirements of NRS 171.1776, the final disposition must involve judicial action and, if a dismissal is contemplated, leave of court is required.

Steven B. Wolfson
Clark County District Attorney
Attn: Christopher Lalli
Assistant District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Dear Mr. Wolfson and Mr. Lalli:

You have requested a formal opinion from the Office of the Attorney General pursuant to NRS 228.150 regarding the authority of prosecutors with respect to the disposition of non-traffic misdemeanor citations under NRS 171.1776.

QUESTION ONE

Do Nevada prosecutors have the discretion to determine which citations they will proceed upon in light of NRS 171.1776, which provides that such citations be filed with the court having jurisdiction over the matter and may be disposed of only by trial or other official action by a judge of such court?

SUMMARY CONCLUSION TO QUESTION ONE

NRS 171.1776 does not appear to have been intended to abrogate prosecutorial discretion; however, the language of the statute does require that all citations be filed with the court at the time they are issued and that the prosecutor obtain leave of court in order to dismiss.

ANALYSIS

Nevada first implemented citations for traffic violations in 1967. Codified as NRS 484.910 et seq. (now NRS 484A.600 et seq.), the procedural language was taken directly from the Uniform Vehicle Code, prepared by the National Committee on Uniform Traffic Laws and Ordinances. Hearing on S.B. 438 Before the Assembly Judiciary Committee, 1967 Leg., 54th Sess. 5 (April 3, 1967). In 1973, law enforcement sought to have the power to issue a citation in lieu of arrest extended to non-traffic related misdemeanors to increase efficiency and improve public relations. Hearing on A.B. 68 Before the Assembly Judiciary Committee, 1973 Leg., 57th Sess. 1 (February 5, 1973). The bill language mirrored that of the traffic citation statutes, including the "may be disposed of only by trial in such court or other official action by a judge" provision.

In reviewing A.B. 68, members of the Senate Judiciary Committee expressed concern that the citations were not reviewed by a district attorney or city attorney before becoming complaints. Hearing on A.B. 68 Before the Senate Judiciary Committee, 1973 Leg., 57th Sess. 1 (March 5, 1973). The bill's sponsor, Assemblyman Torvinen, informed the Committee that at that time in some jurisdictions misdemeanor complaints were reviewed by prosecutors in advance of filing, but that in others they were reviewed only "when the case comes up." *Id.* No further discussion was had on this issue. Senators also questioned whether a citation would appear on an individual's criminal record "if the case were dropped." *Id.* Assemblyman Torvinen indicated that the result would be essentially the same as with an arrest, except that the record would reflect a citation with no arrest. *Id.*

There is no support in the legislative history for a reading of NRS 171.1776 that removes prosecutors from the process until the time of trial. Rather, it appears that the Legislature intended for misdemeanor citations to be treated procedurally like misdemeanor arrests and be subject to the same prosecutorial scrutiny.

Statutorily, this procedure is as follows: "Upon issuing a misdemeanor citation," the officer is to file the citation with the court having jurisdiction over the alleged offense. NRS 171.1776(1). Once filed with the proper court, the citation is "deemed to be a lawful complaint for purpose of prosecution." NRS 171.1778. NRS 252.090(2) directs that, in justice court, the district attorney is to "conduct all prosecutions on behalf of the people for public offenses." Thus, when a citation is filed and becomes a complaint, it falls to the district attorney to prosecute the complaint.

NRS 178.554 permits a prosecutor to file for dismissal of a misdemeanor complaint "by leave of court," resulting in the termination of prosecution.[1] Provided the judge accepts and enters the dismissal, the requirement of NRS 171.1776(3) that the citation be disposed of by "official action by a judge" would then be satisfied.

While Nevada lacks case law with regard to the specific circumstances under which the court should grant leave to dismiss, NRS 178.554 is substantively identical to Federal Rule of Criminal Procedure 48(a). With respect to the federal rule, the United States Supreme Court has held that a court may withhold leave only where the prosecutor's decision to dismiss "clearly disserved the public interest." *Rinaldi v. United States*, 434 U.S. 22, 29 (1977). "It is presumed that the prosecutor is the best judge of whether a prosecution should be terminated." *United States v. Doe*, 61 F.3d 913 (9th Cir. 1995). Under this line of case law, the court does not substitute its judgment for that of the prosecutor with respect to the merits of the case, but rather acts as a balancing agent to ensure that the power to dismiss is not used for an improper purpose, such as prosecutorial harassment or personal gain.

The court does not have the power to *sua sponte* dismiss charges "in furtherance of justice"; rather, the legislature has provided that the prosecutor must initiate dismissal. *State v. Second Judicial Dist. Court*, 85 Nev. 381, 384, 455 P.2d 923, 925 (1969). Prosecutors are subject to an ethical duty not to proceed on charges not supported by probable cause, Nevada Rules of Professional Conduct 3.8(a), but are not required to prosecute even where there is sufficient evidence of guilt. *United States v. Lovasco*, 431 U.S. 783, 794 (1977). The prosecutor may also consider, for instance, the severity of the harm caused, the proportionality of the potential punishment to the offense, and the cooperation of the defendant in other prosecutions. *Id*. at n. 15. Prosecutorial discretion must therefore be exercised in order to avoid miscarriages of justice.

[1] NRS 174.085(5), which permits a prosecutor before trial to dismiss without prejudice a misdemeanor complaint "that the prosecuting attorney has initiated" and does not require judicial approval, would not be applicable in the context of misdemeanor citations.

QUESTION TWO

Are Nevada prosecutors vested with the authority to negotiate citations in light of NRS 171.1776, which provides that such citations be filed with the court having jurisdiction over the matter and may be disposed of only by trial or other official action by a judge of such court?

SUMMARY CONCLUSION TO QUESTION TWO

Prosecutors are the proper authority to negotiate resolution of charges brought by citation; however, due to the requirements of NRS 171.1776, the final disposition must involve judicial action and, if a dismissal is contemplated, leave of court is required.

ANALYSIS

Based on the legislative history, the language "may be disposed of only by trial in such court or other official action by a judge" comes originally from the Uniform Vehicle Code and thus was not intended to address a specific situation within the Nevada courts. It is therefore distinguishable from statutes such as NRS 200.485(8), which expressly limits prosecutorial authority to reduce or dismiss domestic battery charges, and NRS 484C.420, which expressly limits prosecutorial authority to reduce or dismiss driving under the influence charges, where a specific public interest is identified and served by the zealous prosecution of these offenses.

Prosecutors have broad discretion in the resolution of their cases, including the authority to permit an individual to complete a diversion program in lieu of prosecution. *Salaiscooper v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 117 Nev. 892, 902, 34 P.3d 509, 516 (2001). "[T]he decision to prosecute, including the offer of a plea bargain, is a complex decision involving multiple considerations, including prior criminal history, the gravity of the offense, the need to punish, the possibility of rehabilitation, and the goal to deter future crime." *Id*. at 906, 34 P.3d at 518. The district attorney is in the best position to weigh these factors and reach a decision as to the most appropriate resolution of the case, up to and including dismissal of charges.

Moreover, because the statutes providing for traffic citations and non-traffic misdemeanor citations are identical, to the extent that it is inappropriate for a judge to engage in substantive negotiation of a traffic citation, the same would be equally true with respect to the negotiation of a non-traffic misdemeanor citation. *See Propriety of a Judge Participating in Ex Parte Resolution of Misdemeanor Traffic Citations*, Standing Comm. Judicial Ethics Op. JE15-003 (2015).

As discussed in response to Question One, NRS 171.1776 requires, procedurally, that an officer file the citation with the court having jurisdiction when it is issued. Thereupon, it becomes a complaint and may only be disposed of through trial or other judicial action. Thus, while the prosecutor possesses authority to resolve a pending citation, if diversion is contemplated in the negotiations, it is incumbent upon the prosecutor to seek leave of the court and ensure that the dismissal is officially entered on the record.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
AMY K. STEELMAN
Deputy Attorney General

AKS/JCB

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

August 15, 2016

OPINION NO. 2016-07

DISTRICT ATTORNEY; COUNTY HOSPITAL DISTRICT; BOARD OF COMMISSIONERS; HOSPITALS: Subject to the approval, ratification or authorization of the Board of County Commissioners, the Hospital District may contract with a privately owned company or public agency to provide medical services of the nature provided in a hospital.

Angela A. Bello
Nye County District Attorney
P.O. Box 39
Pahrump, Nevada 89041

Dear Ms. Bello:

You have requested a formal opinion from the Office of the Attorney General pursuant to NRS 228.150 concerning the powers of a hospital district created by Chapter 450 of the Nevada Revised Statutes (NRS).

Pursuant to NRS 450.550 to 450.760, inclusive, the board of county commissioners of a county may enact a property tax to fund the provision of medical services to the residents of an area within the county that is underserved by medical professionals. Such an area is referred to as a "hospital district." NRS 450.560. Once a tax is enacted, the management of the district must be entrusted to a board of trustees. NRS 450.630—450.720. You have asked whether the board of trustees may,

in lieu of funding the operation of a full-service hospital, contract with a private health care provider to offer medical services of the type that would ordinarily be available at an acute care facility, or offered by medical professionals from a remote site using telephone or internet communications (e.g., telemedicine).

You have posed the question because the Board of County Commissioners of Nye County (the Board) has created a hospital district, the Northern Nye County Hospital District (the District), which levied property taxes for fiscal year 2016. In August 2015, two months into that fiscal year, the hospital in Tonopah closed after the entity operating it filed bankruptcy. Thereafter, Nye County, the owner of the hospital grounds, building and equipment, leased them to Renown Health (Renown), a domestic non-profit entity that operates a private hospital in Reno. It is anticipated that Renown will provide certain medical services in Tonopah that are not otherwise available in the District, including telemedicine and an urgent care facility.

QUESTION PRESENTED

Although Renown will not operate a full-service hospital, may the District contract with Renown, through the District's board of trustees, to provide medical services to residents of the District?

SUMMARY CONCLUSION

When authorized by an ordinance or resolution of the Board, the District's board of trustees may contract with Renown to provide the "services of a hospital" to the residents of the District. The contract need not be contingent upon a commitment by Renown to operate a full-service hospital. Since the provision of medical services within the District is a matter of local concern, the scope of the services to be provided by Renown is a matter committed to the discretion of the Board pursuant to NRS 244.146.

DISCUSSION

Renown owns and operates a full-service hospital in Washoe County. It has leased from Nye County the equipment and real property previously operated as a hospital, but will not continue to operate a "hospital" as defined in NRS 449.012.[1] Notably, it will not provide 24-hour care. While the services it intends to provide to residents of the District are medical services—diagnosis, treatment and care—those services will be offered on an outpatient basis, including through telemedicine.

[1] NRS 449.012 provides a definition of "hospital" for purposes of Chapter 449 of NRS. Chapter 449 provides for the licensing, inspection and regulation of hospitals generally. Although the statutory definition comports with a common understanding of the term "hospital," it has no specific application to the duties and responsibilities of a hospital district created pursuant to Chapter 450 of NRS.

Agency Powers Generally

A hospital district constitutes a local government. Op. Nev. Att'y Gen. No. 95-23 (Dec. 31, 1995), citing NRS 354.474. Historically, the Nevada Supreme Court has adopted and applied a common-law limitation of local government power known as Dillon's Rule. *See Ronnow v. City of Las Vegas*, 57 Nev. 332, 342, 65 P.2d 133, 136 (1937). Under that general rule, a local government is authorized to exercise only those powers which are expressly granted, which are necessarily implied to carry out powers expressly granted, or essential to the accomplishment of the declared objects and purposes of the local government. "Any fair [or] reasonable . . . doubt concerning the existence of power" is resolved against a local government entity seeking to exercise it, and it "is denied. . . . All acts beyond the scope of the powers granted are void." *Id.* at 343, 65 P.2d at 136. Dillon's Rule is a rule of construction, serving as an aid in determining legislative intent. BLACK'S LAW DICTIONARY 412 (5th ed. 1979).

With the passage of Senate Bill 29 in 2015 (S.B. 29), the Nevada Legislature modified the historical Dillon's Rule to grant to boards of county commissioners, in the absence of a constitutional or statutory provision requiring a power to be exercised in a specific manner, "[a]ll other powers necessary or proper to address matters of local concern for the effective operation of county government, whether or not the powers are expressly granted to the board." NRS 244.146(1). In the face of "any fair or reasonable doubt concerning the existence of a power of the board to address a matter of local concern … it must be presumed that the board has the power unless it is rebutted by evidence of a contrary intent by the Legislature." *Id*. S.B. 29 did not modify Dillon's Rule with regard to "(a) Any local governing body other than a board of county commissioners; or (b) Any powers other than those necessary or proper to address matters of local concern for the effective operation of county government." NRS 244.137(7).

Therefore, aside from the powers of a board of county commissioners to address matters of local concern for the effective operation of county government, S.B. 29 does not modify Dillon's Rule.

Hospital District Powers

The board of trustees[2] of a hospital district is required to "[c]arry out the spirit and intent of NRS 450.550 to 450.750, inclusive, in establishing and maintaining a hospital in each district created pursuant to" those provisions, and "[m]ake and adopt bylaws,

[2] "'Board of trustees' means . . . (a) A board of hospital trustees . . . or (b) A board of county commissioners . . . ." NRS 450.550(1).

rules and regulations . . . [f]or its own guidance and the government of any such hospital . . . ." NRS 450.630.

A hospital district may be formed in an area where there is no existing hospital district "for the sole purpose of contracting with a public agency or a privately owned hospital to provide services of a hospital to the residents of the district," provided, *inter alia*, "the district constitutes a geographic area of the county that is not served by adequate medical services." NRS 450.710.

A hospital district has the express power to:

> [C]ontract with a public agency or a privately owned hospital to provide the services of a hospital to the residents of the hospital district if it determines that:
> 1. There is a need to provide medical services to the residents of the district which are not being provided by the district; or
> 2. It is less costly or more efficient to provide the services of a hospital to the residents of the district by contracting with a public agency or a privately owned hospital.

NRS 450.715.

A hospital district has the additional express duties or powers, *inter alia*, to (1) prepare a budget (NRS 450.650); (2) levy a tax (NRS 450.660); (3) accept donations (NRS 450.690); (4) determine medical indigency (NRS 450.700); and (5) borrow money and incur or assume indebtedness (NRS 450.665). The power to levy a tax includes a requirement that the taxes thus collected must be "(a) [p]laced in the treasury of the county in which the district hospital is located; (b) [c]redited to the current expense fund of the district: and (c) [u]sed only for the purpose for which it was raised." NRS 450.660(3).

A hospital district may also "contract with a company which manages hospitals for the rendering of management services in a district hospital."[3] NRS 450.720(1).

ANALYSIS

Under NRS 450.715, in order for the District to contract with Renown for the provision of medical services, those services must be needed services not provided by the hospital district and must be services of a hospital. The question of need is not at

[3] "'District hospital' means a hospital constructed, maintained and governed pursuant to NRS 450.550 to 450.760." NRS 450.550(2).

issue, so what remains is whether the services to be provided by Renown are those of a hospital.

As used in NRS 450.710 and 450.715, the word "hospital" is not defined. It is, however, defined at NRS 449.012, which supplements the provisions of Chapter 449 governing the licensure and regulation of hospitals generally. To the extent that Chapters 449 and 450 address related subjects, the term "hospital" as used in Chapter 450 should be harmonized with the statutory definition at NRS 449.012. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000).

"Hospital" is defined in NRS 449.012 to mean "an establishment for the diagnosis, care and treatment of human illness, including care available 24 hours each day from persons licensed to practice professional nursing who are under the direction of a physician, services of a medical laboratory and medical, radiological, dietary and pharmaceutical services."

NRS 450.710 and 450.715 do not use the word "hospital" in isolation, but instead refer to the "services of a hospital." The phrase "services of a hospital" is unaccompanied by any modifier. As such, it fails to address whether any specific quantum of services described in NRS 449.012 must be provided. With that ambiguity, a court will look to the statutory scheme as a whole and its evident purpose to resolve questions concerning the meaning of the specific provisions in question. *Thomas v. State*, 88 Nev. 382, 384, 498 P.2d 1314, 1315 (1972) ("[I]t is always the first great object of the courts in interpreting statutes, to place such construction upon them as will carry out the manifest purpose of the legislature, and this has been done in opposition to the very words of an act. A statute must be construed in the light of its purpose. [A]nd it must be construed as a whole.") (citations omitted).

The purpose of Chapter 450 may be gleaned, in part, from its authorization to the county to contract for the services of a hospital under either of two conditions:

> 1. There is a need to provide medical services to the residents of the district which are not being provided by the district; or
> 2. It is less costly or more efficient to provide the services of a hospital to the residents of the district by contracting with a public agency or a privately owned hospital.

NRS 450.715.

These conditions indicate that the purpose of the statutory scheme is to provide for affordable medical services in areas that are underserved by medical professionals. Although it has been urged that a hospital district must maintain a hospital, and that the

contracts contemplated by NRS 450.710 and 450.715 may only be executed by a hospital district that maintains a hospital, NRS 450.630 speaks to a general duty on the part of the hospital district board of trustees to "[c]arry out the spirit and intent of NRS 450.550 to 450.750, inclusive, in establishing and maintaining a hospital in each district created pursuant to" those provisions. Additionally, NRS 450.660(3)(b) requires that the taxes collected pursuant to a levy of the hospital district be "[p]laced in the treasury of the county in which the district hospital is located."

Accordingly, the provisions of NRS Chapter 450 manifest an overriding legislative intent to provide for the medical needs of persons who reside in rural areas that are underserved by medical professionals. Moreover, NRS 450.710 states that a hospital district may be formed "for the sole purpose" of contracting with privately owned hospitals or public agencies to provide the services of a hospital, as opposed to the operation or management of a hospital. Since Chapter 450 contains no express limitations upon the authority of a county to define the scope of needed services or the manner in which those services will be rendered, whether through a public agency or a private contractor, its provisions are reasonably construed to encompass a matter of local concern, namely a matter concerning the "[p]ublic health, safety and welfare in the county." See NRS 244.143(2)(a). As a matter of local concern, the scope of services to be provided under any contract with Renown is committed to the discretion of the Board pursuant to NRS 244.146.[4] In this context, questions concerning the interpretation and application of NRS 450.710 and 450.715 are likewise committed to the discretion of the Board.

CONCLUSION

Subject to the approval, ratification or authorization of the Board, the District may contract with a privately owned company or public agency to provide medical services of the nature provided in a hospital, as defined in NRS 449.012. Since there are no express statutory limitations upon the county's authority to define the scope of services to be rendered by Renown, the Board may authorize, approve or ratify a contract for the provision of medical services within the District regardless of any commitment by Renown to operate a full-service hospital. As they relate to the management of the District and the expenditure of tax revenue for medical services, questions concerning

[4] The District is wholly within Nye County. This opinion does not address whether the provision of medical services contracted for by a district that serves more than one county would be a "matter of local concern" as used in NRS 244.146.

the proper interpretation and application of NRS 450.710 and 450.715 are committed to the discretion of the Board pursuant to NRS 244.146.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
DENNIS L. BELCOURT
Deputy Attorney General
Business and State Services
Tele: (775) 684-1206

DLB:DAW

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701

October 12, 2016

OPINION NO. 2016-08

PSYCHOLOGICAL EXAMINERS; CHILD ABUSE AND NEGLECT: NRS 432B.220, read in its entirety, establishes that mandatory reporting of child abuse by psychologists is limited to reporting abuse of children who are still minors at the time of the disclosure, or, if the child is still in school, until the child graduates from high school.

Morgan Alldredge, Executive Director
Board of Psychological Examiners
4600 Kietzke Lane, Building B–116
Reno, Nevada 89502

Dear Ms. Alldredge:

You have requested an opinion from the Office of the Attorney General regarding whether NRS 432B.220(1) requires psychologists to report previous child abuse of adult clients.

QUESTION ONE

Does NRS 432B.220(1) require psychologists to report previous child abuse of adult clients to law enforcement?

SUMMARY CONCLUSION TO QUESTION ONE

NRS 432B.220, read in its entirety, establishes that mandatory reporting of child abuse by psychologists is limited to reporting abuse of children who are still minors at the time of the disclosure, or, if the child is still in school, until the child graduates from high school.

ANALYSIS

NRS Chapter 432B provides for the protection of children from abuse and neglect. As part of the Nevada Legislature's aim to protect children from abuse and neglect, the Chapter mandates that a person described in NRS 432B.220(4) report the abuse or neglect of a child, if in his or her professional or occupational capacity, the person knows or has reasonable cause to believe that such abuse or neglect has occurred or is occurring. NRS 432B.220(1). The Chapter provides definitions for "abuse or neglect of a child," *see* NRS 432B.020, and "reasonable cause to believe," *see* NRS 432B.121, but does not specify whether the reporting requirement applies when the abused or neglected person first discloses an act of abuse or neglect after the person has reached adulthood.

While NRS 432B.040 defines child as "a person under the age of 18 years or, if in school, until graduation from high school," this definition, by itself, does not make it clear whether the person's status as a child is determined only in reference to the date of the alleged abuse or neglect, or in reference to both the date of the alleged abuse or neglect and the date of its disclosure. Therefore, there are some psychologists who believe that a report is required only when the abused or neglected person remains a child as of the date of the disclosure, while others believe that a report is required even when the abused or neglected person is an adult as of the date of the disclosure. A proper understanding of the mandatory reporting required by NRS 432B.220 is important to the Board because the failure of a psychologist to report child abuse or neglect according to the terms of the provision may result in criminal penalties pursuant to NRS 432B.240 and/or be grounds for disciplinary action against the psychologist pursuant to NRS 641.230.

The provisions of NRS 432B.220(1) indicate that the reporting requirement applies only when the abused or neglected person remains a child as of the date of the disclosure. In this regard, when a person acting in his or her professional capacity

"knows or has reasonable cause to believe that *a child* has been abused or neglected. . . [that person must] make a report as soon as reasonably practicable but not later than 24 hours after the person knows or has reasonable cause to believe that *the child* has been abused or neglected." NRS 432B.220(1)(b) (emphasis added). The first reference to "a child" leaves the time frame for mandatory reporting unclear because it speaks in general terms of any child who has suffered an act of abuse or neglect. However, the subsequent reference to "the child" indicates that the reporting obligation arises only in temporal proximity to the acquisition of knowledge about a specified child's abuse or neglect. In short, it arises precisely because the child has recently disclosed an act of abuse or neglect. If the abused or neglected person is not a child as of the date of the disclosure, the reporting obligation is inapplicable because the pertinent information, when acquired, concerns an adult and not **the child** who has been contemporaneously identified as the subject of the disclosure.

"When construing a specific portion of a statute, the statute should be read as a whole, and, where possible, the statute should be read to give plain meaning to all of its parts." *Bldg. & Constr. Trades Council of N. Nev. v. Pub. Works Bd.*, 108 Nev. 605, 610, 836 P.2d 633, 636 (1992) (citing *Sheriff v. Morris*, 99 Nev. 109, 117, 659 P.2d 852, 858 (1983)). *See also Harris Assoc. v. Clark County Sch. Dist.*, 119 Nev. 638, 641–42, 81 P.3d 532, 534 (2003) ("When 'the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended.'" (quoting *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001)); *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 633, 81 P.3d 516, 518 (2003) ("We have stated that 'words in a statute will generally be given their plain meaning, unless such a reading violates the spirit of the act. . . .'" (quoting *Pellegrini v. State*, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001)).

This is consistent with an Opinion issued by the South Carolina Attorney General. S.C. Att'y Gen. Op. June 30, 2014. In that Opinion, the South Carolina Attorney General stated "this Office believes a court will find that a mandatory reporter would not have to report [under the South Carolina statute] when an adult discloses being abused in the past as a child." *Id.* While there are some differences in the South Carolina statutes requiring mandatory reporting, the underlying purpose and principles behind the law remain the same.

Reading NRS 432B.220 in its entirety and reviewing the plain language of all of its parts, the best interpretation is that mandatory reporting of child abuse or neglect is required only when psychologists and other persons described in NRS 432B.220(4) know or have reasonable cause to believe that a child meeting the definition contained in NRS 432B.040 at the time of the report has been abused or neglected. If a psychologist learns that an adult client was abused or neglected as a child, part of the therapeutic goal of the client's therapy may involve the adult client reporting his or her abuse or neglect,

but the psychologist is not required to report such abuse or neglect pursuant to NRS 432B.220(1). Of course, an adult victim is free to report, at any time, abuse he or she suffered as a child to the appropriate authorities.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: Sarah A. Bradley
Sarah A. Bradley
Senior Deputy Attorney General

SAB/klr

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701

November 29, 2016

OPINION NO. 2016-09

PUBLIC SAFETY; WEAPONS; PERMITS: NRS 202.3689 states the criteria that must be satisfied for the State of Nevada to recognize a carry concealed weapon (CCW) permit issued by another state to a nonresident. In determining whether such a permit qualifies for recognition in Nevada, the Department of Public Safety may not import the additional requirements of NRS 202.3657 governing the process by which a Nevada resident may obtain a CCW permit under Nevada law.

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

Dear Mr. Wright:

You have requested a formal opinion from the Office of the Attorney General pursuant to NRS 228.150 concerning the criteria that the Department of Public Safety (Department) may consider when determining whether to recognize a concealed carry weapons (CCW) permit issued by a state other than Nevada.

QUESTION

Did the Nevada Legislature intend for the Department to consider the minimum age criteria in Nevada for issuance of a Nevada CCW when determining which out-of-state CCW permits may be recognized in Nevada? Is the Department under any legal obligation to look at the minimum age criteria for out-of-state permits in accordance with NRS 202.3688?

SUMMARY CONCLUSION

No. NRS 202.3689 delineates the requirements that the holder of a CCW permit issued by another state must satisfy in order to establish that he or she is authorized to carry a concealed weapon in Nevada. The Department has not been empowered by the Legislature to add to that list the requirements for Nevada residents to obtain a CCW.

ANALYSIS

Prior to the 2015 Legislative Session, NRS 202.3689 required the Department to analyze each state's CCW laws to determine whether they were "substantially similar to or more stringent than" Nevada's CCW permit laws, thus providing for recognition of other states' CCW permits. Specifically, NRS 202.3689 provided that the Department shall on a yearly basis prepare a list of states whose "requirements for the issuance of a permit to carry a concealed firearm ... are substantially similar to or more stringent than the [Nevada] requirements" and have "an electronic database which identifies each individual who possesses a valid permit to carry a concealed firearm issued by that state and which a law enforcement officer in this State may access at all times through a national law enforcement telecommunications system." NRS 202.3689 (2007).

The Department delegated to the General Services Division (GSD) responsibility for annually preparing the list required by NRS 202.3689. As part of its analysis under the previous version of the statute, GSD staff examined three factors to determine whether another state's CCW permit laws were "substantially similar to or more stringent than" Nevada's CCW permit laws. Specifically, GSD staff looked at whether: (1) the minimum age to hold a valid permit in the issuing state is 21 years of age; (2) training, including a live-firing component, is required; and (3) the State has an electronic permit validation capability such that Nevada law enforcement could automatically determine the status of the permit at all times.

But the Legislature in 2015 amended the statute, altering the process for recognizing out-of-state CCW permits. NRS 202.3689, as amended by Senate Bill 175 and Assembly Bill 488 from the 2015 Legislative Session, requires that:

> 1. On or before July 1 of each year, the Department shall:
> (a) Determine whether each state requires a person to complete any training, class or program before the issuance of a permit to carry a concealed firearm in that state.
> (b) Determine whether each state has an electronic database which identifies each individual who possesses a valid permit to carry a concealed firearm issued by that state and which a

> law enforcement officer in this State may access at all times through a national law enforcement telecommunications system.
>
> (c) Prepare a list of states that meet the requirements of paragraphs (a) and (b).
>
> (d) Provide a copy of the list prepared pursuant to paragraph (c) to each law enforcement agency in this state.
>
> 2. The Department shall, upon request, make the list prepared pursuant to subsection 1 available to the public.

NRS 202.3689. Based on this change to the law, the Department is currently authorized to look only for training requirements and electronic verification capability when determining out-of-state CCW permit recognition.

A companion statute, NRS 202.3688, directly addresses the circumstances under which a holder of a CCW permit issued in another state may carry a concealed firearm in Nevada. Specifically, NRS 202.3688 provides that except in limited circumstances,[1] "a person who possesses a permit to carry a concealed firearm that was issued by a state included in the list prepared pursuant to NRS 202.3689 may carry a concealed firearm in this State in accordance with the requirements set forth in NRS 202.3653 to 202.369, inclusive." Therefore, according to NRS 202.3688, a person who holds a CCW permit issued by a state that meets the training and electronic database requirements of NRS 202.3689 may "*carry* a concealed firearm in this State in accordance with the requirements set forth in NRS 202.3653 to 202.369, inclusive." NRS 202.3688 (emphasis added).

The phrase "in accordance with the requirements set forth in NRS 202.3653 to 202.369, inclusive" incorporates the entirety of the concealed firearms section of NRS Chapter 202, including the statutes that govern the process for obtaining and renewing a CCW permit in Nevada. *See* NRS 202.3657, NRS 202.366, NRS 202.3662, NRS 202.3663, and NRS 202.3677. The specific requirements governing the application for and issuance of CCW permits, if applied to out-of-state visitors from approved states, would conflict with the limited requirements expressed in NRS 202.3689.

Because "in accordance with" modifies the verb "carry," the key interpretive issue is whether the verb so modified refers solely to the applicable restrictions on the method and manner of *carrying* a concealed weapon in Nevada, or also to the applicable

---

[1] NRS 202.3688 does not apply as follows: "[a] person who possesses a permit to carry a concealed firearm that was issued by a state included in the list prepared pursuant to NRS 202.3689 may not carry a concealed firearm in this State if the person: (a) Becomes a resident of this State; and (b) Has not been issued a permit from the sheriff of the county in which he or she resides within 60 days after becoming a resident of this State." NRS 202.3688(2).

restrictions governing the *issuance* of the permit to a Nevada resident. In short, the phrase is arguably subject to two mutually exclusive interpretations. One interpretation is that Nevada's statutory "requirements" governing how, when, and where a permittee may carry a concealed weapon in Nevada apply to Nevada-recognized out-of-state CCW permit holders whenever they "carry" a concealed weapon in Nevada. Another interpretation is that NRS 202.3688(1) not only addresses the method or manner of carry, but further incorporates all of Nevada's "requirements" for obtaining a Nevada CCW permit as additional "requirements" for securing the Department's recognition of a permit issued by another state.

The application of Nevada's rules of statutory interpretation resolves the apparent tension between NRS 202.3688(1) and NRS 202.3689. In construing a statute, the courts must give effect to the legislature's intent as expressed by the plain language of the statute. *A.F. Const. Co. v. Virgin River Casino Corp.*, 118 Nev. 699, 703, 56 P.3d 887, 890 (2002). Here, the plain language of NRS 202.3688(1) governs the method or manner of carrying a concealed weapon under the authority of a CCW permit issued by a state other than Nevada. In this regard, the statute incorporates applicable provisions of NRS Chapter 202 only insofar as they pertain to a nonresident who already possesses a CCW permit described in NRS 202.3689. To import additional requirements from NRS 202.3657 (which governs the application process for residents to obtain a CCW permit) is to ignore that NRS 202.3689 unambiguously establishes an entirely separate process governing the recognition of nonresident permits. If the Legislature had intended to subject recognition of out-of-state CCWs to additional limitations or restrictions, it would have expressed that intention in NRS 202.3689. *See Dept. of Taxation v. DaimlerChrysler Services N.A., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("Nevada law ... provides that omissions of subject matters from statutory provisions are presumed to have been intentional.").

To the extent that there is tension between NRS 202.3688(1) and NRS 202.3689, the two statutes must be construed "harmoniously with one another to avoid an unreasonable or absurd result." *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. ___, ___, 373 P.3d 66, 70 (2016) (quotation omitted). As noted above, the "requirements" language of NRS 202.3688(1) relates to the conditions under which an out-of-state CCW holder on the list may "carry" a concealed weapon in Nevada. Those requirements cannot be read out of the statutory scheme without undermining the manifest intent of the regulatory provisions of NRS Chapter 202 as they pertain to concealed weapons. For instance, the Legislature clearly meant to apply to nonresidents the same rules that govern residents with respect to how, when, and where residents may carry a concealed weapon under the authority of a Nevada CCW permit. For example, NRS 202.3667 provides that the permittee must carry the CCW permit along with proper identification when in possession of the concealed firearm. In addition, the Legislature has enacted limitations on a permittee's authority to carry a concealed weapon while on the premises of certain public buildings including airports and child care facilities. NRS 202.3673.

Furthermore, if NRS 202.3688(1) was construed to effectively import Nevada's requirements for obtaining a Nevada CCW into NRS 202.3689's minimal requirements for the recognition of out-of-state CCWs, the resulting policy outcomes would be arbitrary, if not absurd. The Department would be forced to decide whether to disapprove a CCW from any state that: does not issue CCWs via sheriffs (for instance, both Texas and Utah issue CCWs through central government agencies), NRS 202.3657; does not require fees to be deposited with the county treasurer, NRS 202.368; or does not provide immunity for state and local governments from civil liability, NRS 202.3683. It would be absurd to incorporate every requirement "set forth in NRS 202.3653 to 202.369, inclusive" to the recognition of out-of-state CCWs. It would likewise be arbitrary for the Department to select some requirements and not others based upon a subjective assessment of their relative importance.

Finally, the legislative history of NRS 202.3689 is consistent with the clear text interpretation that the statute as amended in 2015 requires two, and only two, criteria to be met for another state's CCW to be recognized in Nevada. A reading of the statutes that would add to these two requirements would conflict with the intention of the Nevada Legislature as expressed not merely in the text of the statute, but in the legislative history.[2]

According to the legislative history of NRS 202.3689 as originally enacted in 2007, the purpose of the statute was, in part, to allow a nonresident to carry a concealed weapon in Nevada provided that the nonresident possessed a permit issued by a state with CCW laws comparable to those of Nevada. *See Hearing on S.B. 237 Before the* Senate Committee on Judiciary, 2007 Leg., 74th Sess. 2 (March 21, 2007); *Hearing on S.B. 237 Before the Assembly Committee on Judiciary,* 2007 Leg., 74th Sess. 22 (May 9, 2007). In supporting the 2015 amendment to the statute, Senator Greg Brower explained that "[r]ather than requiring [the Department] to engage in a quite laborious effort to analyze the [CCW] requirements of every other state and make a reciprocity determination, the bill simplifies the process and requires DPS to determine which states require a training course, and those states have reciprocity under this bill." *Hearing on S.B. 175 Before the Assembly Committee on Judiciary,* 2007 Leg., 78th Sess. 23 (April 23, 2015). Further, Robert Roshak, the Executive Director of Nevada Sheriffs' and Chiefs' Association, explained that the statute was altered to remove the "substantially similar or more stringent" requirement and explained that "[a]s long as there is a training standard and there is 24/7 access to a database, that is all that is required." *Hearing on S.B. 175 Before the Assembly Committee on Judiciary,* 2007 Leg., 78th Sess. 27 (April 23, 2015).

---

[2] Assuming there is any ambiguity in NRS 202.3689, it is appropriate to review the legislative history of that statute for guidance. *See In re Orpheus Trust,* 124 Nev. 170, 175, 179 P.3d 562, 565 (2008) ("When construing an ambiguous statute, legislative intent is controlling, and we look to legislative history for guidance.").

The Department may not refuse to recognize a CCW permit from another state simply because the nonresident holder of that permit fails to meet the statutory requirements for obtaining a CCW in this State. The 2015 amendment to the statute eliminated the Department's authority to make reciprocity determinations in reference to criteria other than those described in NRS 202.3689. Consequently, the Department may not impose a minimum age requirement or insist that out-of-state firearms training include a live fire component.[3]

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
KATHLEEN M. BRADY
Deputy Attorney General
Bureau of Litigation
Department of Motor Vehicles
Department of Public Safety

KMB/JLC

[3] The Department also asked whether its staff is under any legal obligation to provide notice to out-of-state permit holders that they must comply with the provisions of NRS 202.3653 to NRS 202.369 as they relate to the method or manner of carrying a concealed weapon in Nevada. The Legislature has not expressly tasked the Department with informing CCW permit holders from other states of their obligations under Nevada CCW laws.

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701

December 2, 2016

OPINION NO. 2016-10

PHARMACY BOARD; CONTROLLED SUBSTANCES; VETERINARIANS: The Nevada Legislature granted the Pharmacy Board specific authority to enact NAC 639.742 to require all "practitioners" – including veterinarians – who wish to dispense controlled substances or dangerous drugs to register with the Pharmacy Board. All practitioners need to register.

Leo Basch, Board President
Nevada State Board of Pharmacy
431 W. Plumb Lane
Reno, Nevada 89509

Dear Mr. Basch:

On behalf of the Nevada State Board of Pharmacy, you have requested a formal opinion from the Office of the Attorney General pursuant to Nevada Revised Statute (NRS) 228.150. Specifically, whether Nevada veterinarians are subject to the registration and dispensing requirements found in Chapter 639 of the Nevada Administrative Code (NAC).

BACKGROUND

The Nevada Legislature has granted the Nevada State Board of Pharmacy (Pharmacy Board) authority to "regulate the sale and dispensing of poisons, drugs, chemicals and medicines." NRS 639.070(1)(f). To implement its regulatory authority, the Pharmacy Board may "adopt regulations governing the dispensing of poisons, drugs, chemicals and medicines." NRS 639.070(1)(d). "Dispense" is defined by statute to include

delivery of "a controlled substance or dangerous drug by an ultimate user . . . or pursuant to the lawful order of a practitioner . . . ." NRS 639.0065(1). The statutory definition of "practitioner" includes veterinarians. NRS 639.0125. Consistent with this statutory authority, the Pharmacy Board has enacted a regulation requiring that "[a] practitioner who wishes to dispense controlled substances or dangerous drugs must apply to the Board on an application provided by the Board for a certificate of registration to dispense controlled substances or dangerous drugs." NAC 639.742. The Pharmacy Board's regulations set forth additional requirements that each registered dispensing practitioner must follow when obtaining, storing, handling and dispensing prescription medication to their patients. *See* NAC 639.742 through 639.745.

Although the registration requirement in NAC 639.742 applies to all practitioners who wish to dispense to their patients, it has not been the practice of the Pharmacy Board or the Nevada State Board of Veterinary Medical Examiners (Veterinary Board) to require all veterinarians to register with the Pharmacy Board before dispensing prescription medication to their patients.

Additionally, the Pharmacy Board and each practitioner's primary licensing board require that the practitioner strictly adhere to the Pharmacy Board's dispensing regulations when dispensing to the practitioner's patients. Despite the adoption by the Pharmacy Board of dispensing regulations governing veterinarians, the Veterinary Board has separately enacted dispensing regulations found at NAC 638.0628 and NAC 638.0629.

QUESTION ONE

Are Nevada veterinarians subject to the registration requirements of NAC 639.742, such that a veterinarian who wishes to dispense controlled substances or dangerous drugs is required to first apply to the Board of Pharmacy for a certificate of registration to dispense prescription medications?

SUMMARY ANSWER TO QUESTION ONE

Yes. Administrative agencies possess only those powers expressly granted by the Nevada Legislature or those necessarily incidental to carrying out those powers. The Nevada Legislature granted the Pharmacy Board specific authority to enact NAC 639.742 which requires that all "practitioners," including "veterinarians," who are included in the statutory definition of "practitioner," who wish to dispense controlled substances or dangerous drugs register with the Pharmacy Board. While the Veterinary Board has general statutory authority under NRS 638.070(2)(a) to adopt regulations implementing the provisions of NRS Chapter 638 as they relate to the practice of veterinary medicine, the Veterinary Board has no specific authority to enact regulations governing the use or administration of controlled substances or dangerous drugs, nor does such authority appear to be necessarily incidental to carrying out the Veterinary Board's general powers.

Therefore, as to dispensing controlled substances or dangerous drugs, the Pharmacy Board's authority supersedes the Veterinary Board's authority.

ANALYSIS

The Pharmacy Board is a state administrative agency created by the Nevada Legislature pursuant to NRS Chapter 639. NRS Chapter 639 governs the practice of pharmacy. As an administrative agency, the Board does not have general or common law powers, but only such powers as have been conferred by law expressly or by statute, or which are necessary to the performance by the agency of its statutory duties. *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006); *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961); *L. & A. Constr. Co. v. McCharen*, 198 So.2d 240 (Miss. 1967), cert. denied, 389 U.S. 945 (1967). The power to regulate controlled substances and dangerous drugs has been expressly conferred by statute upon the Pharmacy Board.

Regarding controlled substances, NRS Chapter 453 governs the use of controlled substances and NRS 453.146(1) specifically grants the Pharmacy Board the power to administer the provisions of NRS 453.011 to 453.552, inclusive.[1] Regarding dangerous drugs, NRS Chapter 454 governs the use of dangerous drugs and NRS 454.366 again specifically grants the Pharmacy Board the power to administer and enforce NRS 454.181 to 454.371, inclusive.[2] Within its own chapter, NRS 639.070(1)(f) specifically grants the Pharmacy Board the authority to "regulate the sale and dispensing of poisons, drugs, chemicals and medicines." The power conferred by law is clear: under NRS 453.146, NRS 454.366 and NRS 639.070, the Pharmacy Board possesses authority to regulate practitioners who dispense controlled substances and dangerous drugs.

As a preliminary matter, the Pharmacy Board has the authority to "adopt regulations governing the *dispensing* of poisons, drugs, chemicals and medicines." NRS 639.070(1)(d) (emphasis added). Pursuant to NRS 639.0065(1), "dispense" means "to deliver a controlled substance or dangerous drug to an ultimate user, patient or subject of research by or pursuant to the lawful order of a practitioner, including the prescribing by a practitioner, administering, packaging, labeling or compounding necessary to prepare the substance for that delivery." NRS 639.0065(1). In general, a practitioner who delivers controlled substances or dangerous drugs, or anyone who does so at the direction of a practitioner is subject to the regulatory authority of the Pharmacy Board.

Pursuant to its statutory authority, the Pharmacy Board has promulgated regulations that impose specific obligations upon practitioners who wish to dispense controlled substances or dangerous drugs. With regard to registration requirements, the Board enacted

---

[1] NRS 453.031 states: "Board" means the State Board of Pharmacy.
[2] NRS 454.003 states: "Board" means the State Board of Pharmacy.

NAC 639.742 which states: "A practitioner who wishes to dispense controlled substances or dangerous drugs must apply to the Board on an application provided by the Board for a certificate of registration to dispense controlled substances or dangerous drugs." NAC 639.742(1). Since NRS 639.0125(1) defines "practitioner" to include veterinarians among others, a veterinarian must secure a certificate of registration from the Pharmacy Board in order to dispense controlled substances or dangerous drugs.[3]

When 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). The statutory provisions of NRS Chapter 639 unambiguously confer upon the Pharmacy Board authority to regulate veterinarians who dispense controlled substances and dangerous drugs. Through NAC 639.742, the Pharmacy Board has, in turn, clearly imposed a registration requirement upon veterinarians who wish to dispense controlled substances or dangerous drugs. Notably, the Pharmacy Board did not provide for any exceptions to the registration requirement – it applies to any "practitioner."[4]

The Veterinary Board has enacted a conflicting regulation that allows for a veterinarian to avoid the Pharmacy Board's registration requirement if that veterinarian is employed by and works at a facility with another veterinarian who is registered with the Pharmacy Board. Subsection 1 of NAC 638.0629 states:

> A veterinary facility at which controlled substances are possessed, administered, prescribed or dispensed shall ensure that *one or more veterinarians* who practice at that veterinary facility register and maintain a registration with the Drug Enforcement Administration of the United States Department of Justice and the State Board of Pharmacy.

---

[3] NRS Chapter 453 (Controlled Substances) also includes veterinarians in the definition of practitioner. *See* NRS 453.126(1). NRS Chapter 454 (Dangerous Drugs) also includes veterinarians in the definition of practitioner. *See* NRS 454.00958(1).

[4] The Veterinary Board has stated that veterinarians are exempted by NRS 639.23505 from the Pharmacy Board's registration requirement because veterinarians are practitioners who do not dispense for human consumption. However, NRS 639.23505 does not grant a blanket exemption from the Pharmacy Board's regulatory authority. Rather, it sets forth a statutory prohibition against the issuance of a written prescription by a practitioner who (1) is not registered with the Pharmacy Board, (2) dispenses for human consumption, *and* (3) charges a patient for the substance or drug. In other words, it applies to the issuance of written prescriptions by licensed practitioners who would otherwise be authorized to issue written prescriptions under NRS 639.235. Given its narrow application, NRS 639.2305 does not speak to the more general issue of who may "dispense" controlled substances or dangerous drugs in Nevada.

NAC 638.0629(1) (Emphasis added). Subsection 2 of the regulation further provides that:

> A veterinarian who is not registered with the Drug Enforcement Administration of the United States Department of Justice and the State Board of Pharmacy as described in subsection 1 may possess, administer, prescribe or dispense a controlled substance at a veterinary facility if the veterinarian:
> (a) Is an employee or agent of the veterinarian who is registered pursuant to subsection 1;
> (b) Practices in the same veterinary facility as the veterinarian who is registered pursuant to subsection 1;
> (c) Possesses, administers, prescribes or dispenses the controlled substance in the normal course of his or her employment; and
> (d) Complies with all the requirements and duties prescribed by law relating to the possession, administration, prescribing and dispensing of a prescription drug.

NAC 638.0628(2).

According to NAC 638.0628, not all veterinarians who dispense controlled substances or dangerous drugs are subject to the registration requirement set forth by the Pharmacy Board. But, "the powers of an administrative agency are limited to those powers specifically set forth by statute" or those necessary to carry such powers into effect. *Kilgore*, 122 Nev. at 334, 131 P.3d at 13 (citing *Clark Co. School Dist. V. Teachers Ass'n*, 115 Nev. 98, 102, 977 P.2d 1008, 1010 (1999); *see also, Andrews v. Nev. St. Bd. of Cosmetology*, 86 Nev. 207, 467 P.2d 96 (1970). Here, unlike the Pharmacy Board, the Veterinary Board has no express statutory authority to regulate practitioners who dispense controlled substances or dangerous drugs, or to exempt veterinarians from the Pharmacy Board's statutorily conferred power to regulate dispensing practitioners.

"Rules of statutory construction provide that a specific statute takes precedence over a general statute." *State Indus. Ins. System v. Miller*, 112 Nev. 1112, 1118, 923 P.2d 577, 580 (1996) (internal citations and quotations omitted). Although the provisions of NRS Chapter 638 do not preclude the Veterinary Board from regulating in the same field as the Pharmacy Board, neither do they authorize the Veterinary Board to adopt regulations that govern the dispensing of controlled substances and dangerous drugs by veterinarians. By contrast, the provisions of NRS Chapter 639 specifically authorize the Pharmacy Board to adopt regulations. It follows that the Veterinary Board has no authority to adopt regulations that are less restrictive than those of the Pharmacy Board as they relate to the dispensing of controlled substances and dangerous drugs. *See Ronnow v. City of Las Vegas*, 57 Nev. 332, 365, 65 P.2d 133, 146 (1937) ("Where one statute deals with a subject in general and

comprehensive terms, and another deals with another part of the same subject in a minute and definite way, the special statute, to the extent of any necessary repugnancy, will prevail over the general one.") Therefore, insofar as the Pharmacy Board has a specific statutory mandate to regulate controlled substances and dangerous drugs used in the practice of veterinary medicine, its authority to impose registration requirements upon veterinarians who dispense controlled substances and dangerous drugs supersede that of the Veterinary Board. Consequently, NAC 639.742 prevails over NAC 638.0628.[5]

QUESTION TWO

Is a Nevada veterinarian who is registered with the Board of Pharmacy to dispense controlled substances or dangerous drugs subject to the additional requirements of NAC 639.742 through 639.745, which regulate the purchasing, storage, handling and dispensing of prescription medications?

SUMMARY ANSWER TO QUESTION TWO

Yes. Any veterinarian who wishes to dispense controlled substances or dangerous drugs is subject to the Pharmacy Board's regulations governing the purchasing, storage, handling and dispensing of prescription medications as set forth at NAC 639.742 through 639.745.

ANALYSIS

Discussed above, NRS 453.146(1), NRS 454.366, and NRS 639.070(1)(f) grant the Pharmacy Board authority to regulate controlled substances and dangerous drugs used in the practice of veterinary medicine. Further, NRS 639.070(1)(g) expressly grants the Pharmacy Board authority to "regulate the means of recordkeeping and storage, handling, sanitation and security of drugs, poisons, medicines, chemicals and devices." To implement its regulatory powers in this area, the Pharmacy Board has enacted NAC 639.742 through 639.745. These regulations set forth requirements that registered practitioners must follow when obtaining, storing, handling and dispensing prescription medication to their patients. Therefore, in addition to registering with the Pharmacy Board, any veterinarian who wishes to dispense controlled substances or dangerous drugs in Nevada must comply with all of the other requirements of NAC 639.742 through 639.745.

---

[5] While this opinion concludes that the Pharmacy Board has the authority to require that veterinarians comply with the Pharmacy Board's regulations governing the dispensing of controlled substances or dangerous drugs, nothing in this opinion should be construed as preventing the Pharmacy Board from enacting regulations that would ratify the longstanding practice described in the Pharmacy Board's letter requesting this opinion.

Finally, it should be noted that the Veterinary Board has its own set of dispensing regulations as set forth at NAC 638.0628 and 638.0629. As noted above, these regulations may not be less restrictive than those enacted by the Pharmacy Board as they pertain to the dispensing of controlled substances and dangerous drugs. Consequently, they may not be construed to relieve veterinarians of any of their obligations to the Pharmacy Board as set forth at NAC 639.742 through 639.745.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
SOPHIA G. LONG
Deputy Attorney General
Division of Boards and
Open Government

SGL/MAM

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701

December 12, 2016

OPINION NO. 2016-11

DISTRICT ATTORNEY; DNA; PRISONER; FELONY: NRS 176.0913 requires a biological specimen to be collected from any prisoner convicted of a felony offense who is presently in the custody of the Nevada Department of Corrections

Christopher J. Hicks
District Attorney
Washoe County
P.O. Box 11130
Reno, Nevada 89520

Dear Mr. Hicks:

You have requested a formal opinion from the Office of the Attorney General pursuant to Nevada Revised Statute (NRS) 228.150 on the following question:

QUESTION

Does NRS 176.0913 allow a biological specimen for DNA analysis to be collected from any prisoner convicted of a felony offense who is presently in the custody of the Nevada Department of Corrections, regardless of the date of conviction?

SUMMARY CONLUSION TO QUESTION

NRS 176.0913 requires a biological specimen to be collected from any prisoner convicted of a felony offense who is presently in the custody of the Nevada Department of Corrections, regardless of the date of conviction.

BACKGROUND

In 2013 the Nevada Legislature enacted Senate Bill 243 (SB 243). Act of May 29, 2013, ch. 252, § 11. 2013 Nev. Stat. 1056-83. Section 11 of the bill established the State DNA Database, which is to be overseen, managed and administered by the Forensic Science Division of the Washoe County Sheriff's Office. Section 13 of the bill amended existing provisions of NRS 176.0911-.0917 to require that a biological specimen be obtained if a person is arrested for a felony. If the person is convicted of the felony, the biological specimen must be kept, but if the person is not convicted, the biological specimen must be destroyed and all records relating thereto must be purged from all databases.

Prior to the enactment of SB 243, NRS 176.0913 required that a biological specimen be obtained upon conviction of a felony. NRS 176.0913 replaced NRS 176.111 in 1997. Act of July 16, 1997, ch. 451, § 84, 1997 Nev. Stat. 1669. This office previously opined in correspondence to the Nevada Division of Parole and Probation dated July 12, 1996, that, in the absence of any clear statement of legislative intent that NRS 176.111 apply retroactively, the statute had prospective application only.

ANALYSIS

SB 243, which amended NRS 176.0913, contains the following provisions not included in the Nevada Revised Statutes:

> **Sec. 33.** 1. If a person is convicted of an offense listed in subsection 4 of NRS 176.0913, regardless of the date upon which the conviction is entered, and the person has not previously submitted a biological specimen, the Department of Corrections shall arrange for a biological specimen to be obtained before the person is released from custody, if the person is in the custody of the Department of Corrections.
>
> . . . .
>
> **Sec. 34.** . . . .
>
> 2. The provisions of:
>
> . . . .
>
> (b) Section 33 of this act apply to a person who is convicted of an offense listed in subsection 4 of NRS 176.0913 before, on or after July 1, 2014.

Act of July 1, 2013, ch. 252, §§ 33-34, 2013 Nev. Stat. 1083.

"[W]hen statutory language is clear on its face, its intention must be deduced from such language." *Worldcorp. v. State, Dept. of Taxation*, 113 Nev. 1032, 1035-36, 944 P.2d 824, 826 (1997). The provisions of Sections 33 and 34 express a clear legislative intent that a biological specimen be collected from any prisoner convicted of a felony offense who is presently in the custody of the Nevada Department of Corrections, regardless of the date of conviction.

CONCLUSION

Based upon the express language of Senate Bill 243, NRS 176.0913 requires a biological specimen to be collected from any prisoner convicted of a felony offense who is presently in the custody of the Nevada Department of Corrections, regardless of the date of conviction.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
BRETT KANDT
Chief Deputy Attorney General
Bureau of Gaming & Government Affairs
Boards & Open Government

WBK/KLR

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701

December 28, 2016

OPINION NO. 2016-12

CRIMES AGAINST PUBLIC HEALTH AND SAFETY: NRS 202.254, as amended by the Background Check Act, makes it a crime to engage in private sales or transfers of firearms (with certain exceptions) unless a federally licensed dealer conducts a federal background check on the potential buyer or transferee. Because the Act specifically directs the dealer to run checks directly through the FBI's NICS system, the Nevada Department of Public Safety has no authority to perform the private-party background checks required by the Act.

James M. Wright
Director
Nevada Department of Public Safety
555 Wright Way
Carson City, Nevada 89711-0525

Dear Director Wright:

By letter dated December 19, 2016, you requested a formal opinion from the Office of the Attorney General, under Nevada Revised Statute 228.150, on two questions:

QUESTIONS

First, does the Background Check Act ("Act") allow the Nevada "Point of Contact" program to perform background checks for private-party sales or transfers of

firearms conducted by federal firearms licensees? Second, if the Department is legally authorized to perform these checks, may it charge fees for doing so?

SUMMARY CONCLUSION TO QUESTIONS

The Act grants the Nevada Department of Public Safety (the "Department") no authority to perform the private-party background checks required by the Act. Instead, it specifically and unambiguously directs the licensed dealers who act as intermediaries for such checks to "contact the National Instant Criminal Background Check System" administered by the FBI, and "not the Central Repository" administered by the Department.

However, the FBI, by letter dated December 14, 2016, has informed the Department that it will not allow intermediaries to run background checks directly through the FBI as required by the Act, but will only allow them to be "conducted as any other background check for firearms" in Nevada: "through the Nevada DPS as the POC." Thus, the Act expressly requires what the FBI, at least at present, does not allow. Because the Act requires, under criminal penalty, what is currently impossible to perform in light of the FBI's position, citizens may not be prosecuted for their inability to comply with the Act unless and until the FBI changes its public position and agrees to conduct the background checks consistent with the Act.

BACKGROUND

In November 2016, Nevada voters approved State Question No. 1, a ballot initiative that, with certain exceptions, criminalizes the private sale or transfer of firearms unless a federally licensed dealer conducts a federal background check on the potential buyer or transferee. Previously, unlike firearms purchases from licensed dealers, a background check was generally not required for sales or transfers by a private party. The provisions of the Act take effect on January 1, 2017, and largely amend NRS 202.254.

Federal law generally requires background checks for firearms sold by licensed dealers to help prevent their possession by "prohibited" individuals, such persons convicted of a felony or misdemeanor domestic violence. In particular, the Brady Handgun Violence Prevention Act of 1993 requires the FBI to check prospective purchasers from a licensed dealer against its National Instant Criminal Background Check System ("NICS"). In the mid-1990s, the FBI developed a program by which it outsourced this function to States that agreed to serve as a so-called "Point of Contact," or "POC." Nevada is one of twelve "Point of Contact" states; a role the State assumed in 1998.[1]

---

[1] *See* https://www.atf.gov/rules-and-regulations/permanent-brady-state-lists.

Under this program, the Department—the Point of Contact for Nevada—conducts background checks using NICS (to which it has special law-enforcement access), as well as Nevada state records. The Nevada state records are housed in what is called the "Central Repository,"[2] and background checks run through Nevada as the Point of Contact are commonly referred to in shorthand as running a check through the "Central Repository."[3] Because background checks run through Nevada as the Point of Contact incorporate data from both NICS and Nevada's own state records, the process as currently administered by the Department ensures that persons legally barred from firearms possession do not circumvent the bar simply because the FBI may lack records that Nevada possesses, like mental-health records, records of domestic violence, misdemeanor criminal records, arrest reports, and restraining orders. By having Nevada serve as the Point of Contact, a wider net is cast. The FBI recently suggested, for instance, that the lack of a Point of Contact program in South Carolina played a role in Dylann Roof acquiring a gun before murdering nine congregants at a church in Charleston, South Carolina.[4]

ANALYSIS

The Background Check Act does not attempt merely to extend to private party transfers the background check procedures already followed for sales from licensed firearm dealers. For individuals who purchase firearms from licensed dealers, background checks must run through the Department's Central Repository. This requirement remains unaffected by the Act. But for transfers between private parties, the Act now affirmatively requires that the private parties use a licensed dealer as an intermediary who must "first conduct[] a background check on the buyer or transferee."[5] To conduct the required check in the manner specifically required by the Act, "the licensed dealer *must* contact the National Instant Criminal Background Check System, ... and *not* the Central Repository, to determine whether the buyer or transferee is eligible to purchase and possess firearms under state and federal law."[6] The Act is very specific that the only background check it authorizes for a private sale or transfer is directly through the FBI. Indeed, lest there be any doubt, the Act explicitly directs that licensed dealers

---

[2] NRS 179A.045 (defining "Central Repository").

[3] *See, e.g.*, NRS 202.254(3)(a); *see also* December 19, 2016, DPS letter requesting Attorney General Opinion, at 1 (referring to the "State Point of Contract (POC) program housed in the Central Repository for Nevada Records (Central Repository)").

[4] Federal Bureau of Investigation, "Statement by FBI Director James Comey Regarding Dylann Roof Gun Purchase," July 10, 2015, *available at* https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-comey-regarding-dylann-roof-gun-purchase (last accessed Dec. 27, 2016).

[5] NRS 202.254(1).

[6] NRS 202.254 (3)(a) (emphases added).

not contact the Department's Central Repository to conduct such checks. Because the plain text of Section 5(3)(a) expressly forbids licensed dealers from contacting the Central Repository to conduct the private party background checks required by the Act, it necessarily forbids the Department from facilitating non-compliance with the Act by performing such checks through the Central Repository. And because the Department lacks authority to perform such background checks, it therefore cannot charge fees for doing them.

With your letter dated December 19, 2016, you included correspondence dated December 14, 2016, in which the Section Chief of the FBI's NICS Section informed the Department that the FBI will *not* perform NICS checks directly requested by Nevada firearms dealers as required by the Act. Explaining that "the recent passage of the Nevada legislation regarding background checks for private sales cannot dictate how federal resources are applied," the FBI stated that private-party background checks are the "responsibility of Nevada to be conducted as any other background check for firearms, through the Nevada DPS as the POC."[7] The FBI added:

> Nevada can provide a more comprehensive NICS check that is accomplished when a POC accesses state-held databases that are not available to the FBI. The Nevada DPS is also in a better position for understanding and applying state laws. It is for these reasons, the POC for the state of Nevada will be best suited to conduct the NICS checks for private sales as provided for in the recent legislation that was just passed, the Background Check Act, as opposed to the FBI conducting these checks.

The FBI's refusal to carry out the central function required by the Act effectuates an unconditional ban, at present, on all private firearm sales or transfers in Nevada. Criminal conviction, the only method by which the Act may be enforced according to its terms, is the ostensible penalty for selling or transferring a firearm in violation of this unintended ban. As a matter of due process, this makes the Act unenforceable as a criminal law. The Nevada Supreme Court long ago adopted the doctrine that the law does not require impossible acts.[8] When a law imposes a requirement that cannot be performed, a party is relieved of compliance until the obstacle to performance is lifted.

---

[7] Letter from Kimberly J. Del Greco to Ms. Julie Butler, Dec. 14, 2016.

[8] *Tarsey v. Dunes Hotel, Inc.*, 75 Nev. 364, 367–68, 343 P.2d 910, 911 (1959) (holding that the "Legislature did not intend to require the performance of an impossible act" and excusing compliance with plain terms of statute) (quotations omitted); *S. End Min. Co. v. Tinney*, 22 Nev. 19, 29 35 P. 89, 91 (1894) (holding that "the law does not require impossibilities" and so declining to enforce certain mining law); *Eureka Min. & Smelting Co. v. Way*, 11 Nev. 171, 177–78 (1876) (observing that the "law does not require a vain

For instance, in *Tarsey v. Dunes Hotel*, a civil case in which criminal penalties were not even at issue, the Nevada Supreme Court relieved a party of an obligation under Nevada law to move for the disqualification of the judge at least 10 days before trial. In that case, the judge, *five* days before trial, had reassigned the case to a colleague whom the plaintiff found objectionable.[9] The Court found that the 10-day procedure, despite its plain terms, could not be enforced against the movant, since doing so would "require the performance of an impossible act."[10] Enforcement, moreover, would "absolutely defeat the obvious intent" of the law's framers—which was to *allow* disqualifications—and deprive a party of a right.[11]

Here, similarly, while the Act imposes a duty on every Nevadan who seeks to privately sell or transfer a firearm, the Act has also created an obstacle—wholly beyond their control or that of the State itself—that currently prevents them from meeting that duty. As a consequence, a law that the voters clearly intended to impose mere conditions upon the private sale or transfer of a firearm now operates as a total ban, clearly at odds with the intent of the voters. When criminal penalties are threatened, the doctrine against requiring impossibilities is strengthened by due process and other constitutional guaranties.[12] It is manifestly unjust to criminally penalize someone for failing to perform an act that is impossible to perform. Despite its intent to merely regulate the transfer or sale of firearms between private parties, because it is impossible to perform the background checks as required by the Act, the Act now unconditionally prohibits such transactions under the threat of criminal prosecution for conduct that was formerly lawful and routine.[13]

---

and useless thing to be done .... *Lex non cogit ad impossibilia*" and applying the principle in interpreting the law); 1 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 3.3(c) at 291 (1986) ("[O]ne cannot be criminally liable for failing to do an act which he is physically incapable of performing"); *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996) ("[W]e hold that Congress did not intend (surely could not have intended) for the zero discharge standard to apply when ... compliance with such a standard is factually impossible .... The law does not compel the doing of impossibilities").

[9] *Tarsey*, 75 Nev. at 367–68, 343 P.2d at 911.

[10] *Id.*

[11] *Id.* at 367, 343 P.2d at 911.

[12] *Doe v. Snyder*, 101 F. Supp. 3d 722, 724 (E.D. Mich. 2015) ("Holding an individual criminally liable for failing to comply with a duty imposed by statute, with which it is legally impossible to comply, deprives that person of his due process rights."); *Ashcraft v. State*, 215 S.W. 688, 689 (Ark. 1919) ("[N]o man could be judged a criminal and punished by a fine for the violation of a law which it would be physically impossible for him to obey.").

The California Court of Appeal in a decision this month offers an illustration of the doctrine of impossibility, especially when criminal sanctions are threatened. A statute criminalized the manufacture of certain guns without a "microstamping" feature. When members of the firearms industry alleged that microstamping was, as a matter of existing technology, impossible,[14] the Court reasoned that it "would be illogical to uphold a requirement that is currently impossible to accomplish," since this would make the law "arbitrary or irrational."[15] The Court suggested that if microstamping was, in fact, impossible, the law would be invalid. Holding otherwise would essentially abolish an entire industry despite the law's intent to merely regulate the industry.

Because the FBI will not perform the background checks required by the Act, enforcement of its criminal penalties will have the unintended consequence of punishing conduct that is widely and reasonably perceived by Nevadans to be lawful. This would create an unintended Catch-22. If there is any overarching principle of statutory interpretation in Nevada, it is that Nevada's laws will not be read or applied to conflict with the drafters' intent, or to require absurdities.[16] According to its plain text, the Act preserves a preexisting right in Nevada to transfer or sell firearms between private parties. The Act's background check requirement was intended to be a mere condition precedent to the sale or transfer of a firearm, not a complete ban on all private sales and transfers of firearms in Nevada.[17] In fact, the proponents of the Act articulated this position in their "Rebuttal to Argument against Passage," when they wrote: "Background checks are quick and easy ... over 90% of FBI background checks are completed on the spot."

Because the Act expressly and centrally relies on this error and forbids the Department from being contacted to run background checks, it requires and criminalizes the impossible. Under longstanding legal principles, Nevadans are not required to

---

[14] *Nat'l Shooting Sports Found., Inc. v. State*, No. F072310, 2016 WL 7010026, at *4 (Cal. Ct. App. Dec. 1, 2016) (selected for publication); *see also Broderick v. Rosner*, 294 U.S. 629, 639 (1935) (Brandeis, J.) (invalidating a statute, in part, because it "imposes a condition which, as here applied, is legally impossible of fulfillment").

[15] *Nat'l Shooting Sports Found.*, 2016 WL 7010026, at *4.

[16] *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001); *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 451, 25 P.3d 175, 180 (2001); *NL Indus. Inc. v. Eisenman Chem. Co.*, 98 Nev. 253, 260, 645 P.2d 976, 981 (1982) ("We will not construe statutes in a manner which will bring about an unreasonable result, or a result contrary to the legislature's purpose."); *Hanley v. Sheet Metal Workers Int'l Ass'n*, 72 Nev. 52, 55, 293 P.2d 544, 545 (1956) (explaining that the Nevada Supreme Court will not "construe the statute ... to give to it an effect so absurdly unrealistic as to be of doubtful due process.").

[17] *See, e.g.*, Act § 2(5) (stating that the "background check process is quick and convenient").

perform the impossible, and are therefore excused from compliance with the Act's background check requirement unless and until the FBI changes its position set forth in its December 14, 2016, letter.[18]

CONCLUSION

The text of State Question 1, amending NRS 202.254, does not authorize the Department to conduct, under Nevada's "Point of Contact" program, background checks for private-party transfers of firearms requested by federal firearms licensees. Consequently, the Department may not charge fees for such a purported service.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: Gregory L. Zunino
Gregory L. Zunino
Bureau Chief

GLZ/JLC

[18] Additional concerns about the Act include its strict-liability mental state, potentially vague terms, and its apparent allowance for selective prosecution. These and any other additional concerns about the constitutionality or validity of the Act are not addressed here, because of the limited scope of the Department's Attorney General Opinion request and because the conclusion that the law is unenforceable in light of the FBI's position moots, at least for now, such concerns.

Brian Sandoval
Governor

Nevada Department of Public Safety

James M. Wright
Director

Jackie Muth
Deputy Director

Director's Office

555 Wright Way
Carson City, Nevada 89711-0525
Telephone (775) 684-4808 • Fax (775) 684-4809

December 19, 2016

Adam P. Laxalt, Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

Re: Request for Opinion on the 2016 Initiative Petition # 1: *The Background Check Act*

Dear Attorney General Laxalt:

As a result of the passage of the Background Check Act, the Nevada Department of Public Safety, General Services Division, is requesting a formal opinion from your office regarding the legal authority of the State Point of Contact (POC) program housed in the Central Repository for Nevada Records (Central Repository) to perform and charge fees for background checks in conjunction with private party transfers of firearms.

The Background Check Initiative Petition (Question # 1 on Statewide Ballot, 2016)

On November 8, 2016, Nevada voters passed Initiative Petition Question # 1, The Background Check Act. The Background Check Act requires a Federal Bureau of Investigation (FBI) National Instant Criminal Background Checks System (NICS) check to be conducted by an FFL for the transfer of a firearm between private parties. Exceptions are allowed for law enforcement, antique firearms, immediate family members, administrators of estates or trusts, in cases of imminent harm or danger, for hunting or trapping, and for shooting competitions at gun ranges.

Section 5 of The Background Check Act amends NRS 202.254 to require the following:

1. *Except as otherwise provided in section 6 of this act, an unlicensed person shall not sell or transfer a firearm to another unlicensed person unless a licensed dealer first conducts a background check on the buyer or transferee in compliance with this section.*
2. *The seller or transferor and buyer or transferee shall appear jointly with the firearm and request that a licensed dealer conduct a background check on the buyer or transferee.*

3. *A licensed dealer who agrees to conduct a background check pursuant to this section shall take possession of the firearm and comply with all requirements of federal and state law as though the licensed dealer were selling or transferring the firearm from his or her own inventory, except that:*

a. *The licensed dealer must contact the National Instant Criminal Background Check System, as described in 18 U.S.C. 922(t),* ***and not the Central Repository****, to determine whether the buyer or transferee is eligible to purchase and possess firearms under state and federal law; and*
b. *The seller or transferor may remove the firearm from the business premises while the background check is being conducted, provided that before the seller or transferor sells or transfers the firearm to the buyer or transferee, the seller or transferor and the buyer or transferee shall return to the licensed dealer who shall again take possession of the firearm prior to the completion of the sale or transfer.*

4. *A licensed dealer who agrees to conduct a background check pursuant to this section shall inform the seller or transferor and the buyer or transferee of the response from the National Instant Criminal Background Check System. If the response indicates that the buyer or transferee is ineligible to purchase or possess the firearm, the licensed dealer shall return the firearm to the seller or transferor and the seller or transferor shall not sell or transfer the firearm to the buyer or transferee.*
5. *A licensed dealer may charge a reasonable fee for conducting a background check and facilitating a firearm sale or transfer between unlicensed persons.*

(Emphasis added).

Since the passage of The Background Check Act, the FBI has drafted a letter indicating that it will not perform private party background checks for Nevadans and the POC now requests clarification on its legal authority.

Opinion Request

The Department of Public Safety is seeking an opinion from your office regarding the following.

1. Does The Background Check Act prohibit the POC program from having legal authority to perform background checks for private party transfers of firearms conducted by federal firearms licensees (FFLs)?

2. If legally authorized to perform background checks for private party transfers of firearms, does the POC program have legal authority to charge a fee for these background checks?

The Department respectfully requests an expedited response to this opinion request as the effective date of The Background Check Act is January 1, 2017.

Sincerely,

James M. Wright, Director
Nevada Department of Public Safety

JMW/jb
Attachments
cc: Jackie Muth, Deputy Director DPS
Julie Butler, Administrator, DPS GSD
Mindy McKay, Records Bureau Chief, DPS GSD

Clarksburg, WV 26306

December 14, 2016

Ms. Julie Butler
General Services Division Adminstrator
Nevada Department of Public Safety
Suite 100
333 West Nye Lane
Carson City, NV 89706

Dear Ms. Butler:

In accordance with the Brady Handgun Violence Prevention Act of 1993 (Brady Act), the U.S. Attorney General was charged with establishing a system, the National Instant Criminal Background Check System (NICS), in which Federal Firearms Licensees (FFL) must contact for a background check (NICS check) prior to transferring a firearm to a non-licensee to determine if the transferee is prohibited under state or federal law from receiving or possessing a firearm. The Brady Act required the U.S. Attorney General to establish the NICS on or before November 30, 1998.

Under Title 28, Code of Federal Regulations, Section 25.6(b) and (d), NICS checks may be conducted by either the FBI Criminal Justice Information Services (CJIS) Division's NICS Section or a local or state law enforcement agency serving as an intermediary between an FFL and the FBI. These intermediaries are referred to as Points of Contact (POC). In this capacity, the POC agrees to receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from receiving or possessing a firearm under state or federal law, and respond to FFLs with the results of a NICS background check. A POC is the agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order. Nevada FFLs are required to contact the state POC, the Nevada Department of Public Safety (DPS), for a background check prior to the transfer of any long gun or handgun to a non-licensee since the state of Nevada has opted to serve as a POC.

State and local authorities serving as POCs are likely to have readier access to more detailed information for processing background checks than the FBI, thus resulting in fewer system misses of disqualified persons and enhancing system responsiveness for non-disqualified persons. The POCs have access to more current criminal history records and more data sources (particularly regarding noncriminal disqualifiers such as mental hospital

commitments) from their own state than does the FBI, and have a better understanding of their own state laws and disqualifying factors. Specifically, the POC for Nevada checks additional databases to include state protection orders, state warrants, state driver's licenses, parole and probation, and SCOPE (which is Clark County, Las Vegas area records). Also, most of Nevada's protection orders are not in the National Crime Information Center File, which is important to note since only the POC has access to these protections orders and if the FBI were processing background checks on private sales of firearms for Nevada, these protection orders would not be part of the NICS check.

The state of Nevada can provide a more comprehensive NICS check that is accomplished when a POC accesses state-held databases that are not available to the FBI. The Nevada DPS is also in a better position for understanding and applying state laws. It is for these reasons, the POC for the state of Nevada will be best suited to conduct the NICS checks for private sales as provided for in the recent legislation that was passed, the Background Check Act, as opposed to the FBI conducting these checks.

In conclusion, the recent passage of the Nevada legislation regarding background checks for private sales cannot dictate how federal resources are applied. The position of the NICS Section is that these background checks are the responsibility of the state of Nevada to be conducted as any other background check for firearms, through the Nevada DPS as the POC.

Thank you in advance for your cooperation.

Sincerely yours,

Kimberly J. Del Greco
Section Chief
NICS Section
CJIS Division