

1968 AGOs

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1968

OPINION NO. 1968-476 NEVADA TAX COMMISSION; SALES AND U...

OPINION NO. 1968-476 Nevada Tax Commission; Sales and Use Tax; Multistate Tax Compact—The Legislature may not amend, annul, repeal, set aside, suspend, nor make inoperative a referred law; the Multistate Tax Compact is not constitutionally infirm.

Carson City, January 8, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

STATEMENT OF FACTS

Dear Mr. Nickson: By letter dated November 9, 1967, you requested from this office an opinion concerning the constitutionality of Chapter 376, 1967 Statutes of Nevada. That chapter is known as the Multistate Tax Compact, which was approved April 15, 1967. There are, at this time, ten states, including Nevada, which are members of the Compact. Three other states have made application to become members, but as of yet have not been accepted.

Article 1 of the Compact sets forth its purposes. Briefly stated, they are:

1. Facilitate proper determination of state and local tax liability of multistate taxpayers.
2. Promote uniformity in tax systems.
3. Facilitate taxpayer convenience in the filing of tax returns.
4. Avoid duplicative taxation.

The Compact, in Article 5, Section 1, provides for certain tax credits. That section of the Compact reads:

Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

You advised us that a Consent Bill for the Compact has been introduced in both houses of the United States Congress, but that passage of this bill is not anticipated in the immediate future.

QUESTIONS

1. May the Tax Commission recognize and approve use tax credits to purchasers from member states of the Multistate Tax Compact, as specified in NRS 376, Article 5, Section 1?
2. Is there any legal conflict between the provisions of the Multistate Tax Compact and the Sales and Use Tax Act or the Local School Support Tax Act?
3. If the answer to Question 2 above is affirmative, would passage of the Consent Bill by the United State Congress eliminate such conflict?

ANALYSIS

The Sales and Use Tax Act, that is, Chapter 372, Nevada Revised Statutes, became effective July 1, 1955. The Sales and Use Tax Act was enacted as a result of a referendum and was sustained by the voters of this State in 1956. The Legislature of the State of Nevada is prohibited by Article 19, Section 2, from amending, annulling, repealing, setting aside, suspending, or in any way making inoperative, except by a direct vote of the people, a referred law.

Any doubt as to the validity of this statement may be resolved by reading *Matthews v. State ex rel. Nevada Tax Commission*, 83 Nev. _____. Chief Justice Thompson wrote that opinion, and for a first sentence stated:

The Nevada Constitution provides that a proposal which has become law by referendum of the voters shall not be amended except by the direct vote of the people.

Justice Collins, in a separate opinion dissenting on different grounds, stated in reference to the Sales and Use Tax Act:

Because it was a legislative enactment referred to the people for their approval, the statute when approved by them stood as the law of the state.

If then, the Multistate Tax Compact in any way amends, annuls, repeals, sets aside, suspends, or in any way makes inoperative the Sales and Use Tax Act, it must to that extent be held unconstitutional.

You and members of your staff inform this office that at the present time Nevada residents often times purchase tangible personal property in a sister state, and at the time of the purchase pay to that retailer a sales tax. Upon return to Nevada, the purchaser then is informed that a use tax is due the State of Nevada (automobiles being frequently the items of tangible personal property). At this time, no credit is allowed the purchaser for the sales tax paid in the other state. Under the Multistate Tax Compact such credit would be allowed. If we were to explore the problem no further, we would be inclined to hold that the tax credit mentioned would be beyond the scope of the Sales and Use Tax Act and constitutionally defective.

You inform us, however, that to your knowledge you know of no state, which has a Sales and Use Tax Act, that will not accept an affidavit or some other form of proof from a Nevada resident that it is his intent to return to Nevada and use or consume the property here, or else deliver the property to the purchaser within Nevada; and, in that event, refrain from collecting the sales tax. From this, then, it appears to us that even prior to the Multistate Tax Compact, the residents of Nevada had a remedy of which they could avail themselves and thus avoid paying both a sales tax in a sister state and use tax in Nevada. While it may well be many purchasers were not aware of this remedy, it did exist. Such being the case, we conclude the Multistate Tax Compact does not create an exemption which was absent under the Sales and Use Tax Act in this situation, and therefore is not constitutionally infirm.

We realize that one or more of the thirty-seven states (based on 1965 figures) which have a sales or gross receipts tax may reject any and all proof offered by a Nevada resident that the property will be consumed in Nevada and thereby insist upon a sales tax. But that situation is at best speculative.

Unless the statute is clearly contrary to constitutional provisions, this office will not declare it unconstitutional. See Attorney General Opinion No. 26-235 dated April 29, 1926, and Attorney General Opinion No. 50-868 dated February 10, 1950. The answer to Question No. 1 is yes.

The Local School Support Tax reads as does the Sales and Use Tax Act, and our conclusions above reached apply equally to both. Based on the analysis of Question No. 1, we answer Question No. 2, no. Such being the case, Question No. 3 need not be considered.

CONCLUSION

The Multistate Tax Compact does not unconstitutionally amend, annul, repeal, set aside, suspend, nor make inoperative the Sales and Use Tax Act.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

OPINION NO. 1968-477 PUBLIC EMPLOYEES RETIREMENT SYSTEM...

OPINION NO. 1968-477 Public Employees Retirement System—Public employee cannot contribute to the Public Employees Retirement Fund, either for himself or for his employer, during leave of absence without pay, nor can the employer make such contribution.

Carson City, January 8, 1968

Robert C. Petroni, Esq., Legal Counsel, Clark County School District, 2832 E. Flamingo Road, Las Vegas, Nevada 89701

Dear Mr. Petroni: You have referred to this office an inquiry which has statewide implications, and have set forth facts which indicate that the Board of Trustees of the Clark County School District granted leave of absence to an assistant administrator for the purpose of securing his doctoral degree.

Your question is as follows:

May an employee who is presently contributing to the Public Employees Retirement System continue to make retirement contributions of both employer and employee during the time the employee is on approved leave of absence without pay?

ANALYSIS

NRS 286.410, as amended by the 1967 Legislature, provides: Each employee who is a member of the system shall contribute 6 percent of the gross compensation earned by him after July 1, 1967, as a member of the system. (Italics provided).

We call particular attention to the word "earned," inasmuch as one cannot earn compensation while on leave without pay.

NRS 286.450, amended by the 1967 Legislature, provides: Each public employer shall pay into the Public Employees Retirement Fund 6 percent of all gross compensation payable on or after July 1, 1967 * *

The 6 percent payable by the employer is based on payrolls showing compensation for actual work performed—work which could not be performed during a leave of absence without pay.

Persons within the retirement system are forbidden to buy time without rendering service for the reason that benefits accruing under the system exceed the contributions of both employee and employer, plus accumulated interest.

To allow a person within the purview of the statute governing retirement to buy time without the contribution of compensable time would amount to a grant to such person from retirement funds without legal authority to do so.

CONCLUSION

It is therefore the opinion of this office that an employee entitled to benefits under the Public Employees Retirement System cannot pay contributions to such system, either for himself or for his employer, during leave of absence from employment without pay, nor can the employer make such contribution.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-478 NEVADA TAX COMMISSION; SALES AND U...

OPINION NO. 1968-478 Nevada Tax Commission; Sales and Use Tax; Collection Discounts—Under NRS 372.370 only retailers are allowed a 2 percent collection deduction as reimbursement for the cost of collecting taxes otherwise due from them.

Carson City, January 8, 1968

Mr. Roy Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: You have propounded to this office the following questions:

QUESTIONS

1. Do the provisions of NRS 372.370 apply equally to the collection of both the sales tax and the use tax?
2. If the answer to the above question, No. 1, is negative, what tax is excluded?
3. Are the answers to the questions contained in this request equally applicable to Chap. 322, Advance Sheets of Nevada Statutes 1967, Sec. 88, the local school support tax?

ANALYSIS

NRS 372.370 provides:

The taxpayer shall deduct and withhold from the taxes otherwise due from him 2 percent thereof to reimburse himself for the cost of collecting the tax.

Many states wherein a sales and use tax is in effect have a similar statute. Such statutes are based on the fact that certain costs are incurred in the collection of sales and use taxes, and to relieve the taxpayer of this financial hardship the collection discount is allowed. The amount of the discount varies from 1 to 5 percent in our sister states.

In the past, the Nevada Tax Commission has allowed the retailer the 2 percent collection discount on all taxes paid, but does not allow such discount by users when a use tax return is filed.

We feel this to be a proper interpretation of NRS 372.370, *supra*.

Unfortunately the courts of this State, and research indicates the courts of sister states, have not judicially interpreted this particular statute. Hence we have only the wording of NRS 372.370 and other statutes in Chap. 372 to rely upon when determining legislative intent.

We feel the key words to be "cost of collecting." We feel the 2 percent collection deduction is solely for the purpose of reimbursing the taxpayer for the "cost of collecting" the tax. Now we must determine if the word "taxpayer" encompasses both the retailer and the user or consumer. We think not. To reach this conclusion, we look to the other statutes in Chap. 372 of NRS. Nowhere do we find language which requires a user or consumer to "collect" the use tax. We do, however, find language in NRS 372.110, 372.190, 372.195, 372.200, and 372.210 which requires the retailer to "collect" taxes. In some of these statutes (NRS 372.190, 372.195, and 372.366) the retailer is required to collect a use tax. Because only a retailer has the burden of actually collecting a tax, the retailer is the only person who should be allowed a collection deduction.

Considering what has been said heretofore, it is our opinion that only retailers are allowed the 2 percent collection discount provided in NRS 372.370. The discount should be computed on all taxes collected by the retailer pursuant to Chap. 372 of NRS.

From what has been said, it follows that Question No. 2 is answered by saying the use tax due from consumers or users is excluded.

The appropriate statutes found in Chap. 374 of NRS, that being the Local School Support Tax Act, read the same as those above cited and hence our conclusions reached above apply equally to Chap. 374 of NRS.

CONCLUSION

The 2 percent collection discount provided for in NRS 372.370 applies only to retailers and not to users or consumers.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

OPINION NO. 1968-479 UNIVERSITY OF NEVADA, BOARD OF REG...

OPINION NO. 1968-479 University of Nevada, Board of Regents; Responsibility For Tax-Supported Higher Education—The control of all tax-supported education on a college level has been entrusted to the Board of Regents of the University of Nevada by the Constitution of this State. The establishment of other such tax-supported institutions of higher education by the Legislature that would not be under the control of the Board of Regents in all executive and administrative matters would be an unconstitutional legislative invasion and usurpation of the authority of the Board of Regents of the University of Nevada.

Carson City, January 10, 1968

Mr. Neil D. Humphrey, Acting President, University of Nevada, Reno, Nevada 89507

STATEMENT OF FACTS

Dear Mr. Humphrey: The Constitution of the State of Nevada created a tax-supported State University in order to provide for the need of higher education in this State. The control of this institution in all executive and administrative matters was entrusted to a Board of Regents elected by the people specifically for this purpose. Within this area of control, the Supreme Court of Nevada has determined that the Board is a ruler of an independent province beyond the law-making authority of the Legislature. *King v. Board of Regents*, 65 Nev. 533. In other words, the Legislature cannot interfere directly or indirectly with the Board of Regents' control or its fulfillment of this responsibility to tax-supported higher education in this State.

At the present time, there are proposals for the Legislature to establish tax-supported educational institutions throughout the State that may be designed to offer college-level courses along with other courses in the nature of vocational-technical training. These institutions would not be under the control of the Board of Regents. In this opinion, we are only concerned with institutions that would function in whole or in part in the area of higher education.

The Board of Regents has sought the opinion of this office concerning the University's responsibility over college-level tax-supported education in Nevada.

QUESTION

What is the Board of Regents' legal responsibility for tax-supported education on a college level?

ANALYSIS

This office has been persistent in its advice that the Legislature is precluded by virtue of Article XI, Sec. 5 of the Nevada Constitution from establishing tax-supported college-level institutions governed by a body other than the Board of Regents of the University of Nevada. This board is one of only eight in the United States constitutionally endowed with a sphere of independence from the legislature in governing higher education. The reason exhibited by the delegates to the Constitutional Convention was the thought that a governing board of laymen, elected exclusively for the task, is more likely to give continuous study and devotion in order to understand the problems of higher education and deal with them more effectively than a legislature convening at short and crowded sessions.

We do not intend to discuss the merits of this philosophy. Even if we should disagree, we cannot alter the mandates of the Constitution. Article XI, Sec. 4, provides for the establishment of a state university

to be controlled by the Board of Regents. The mandate of primary concern in this analysis is Article XI, Sec. 5, which reads as follows:

The Legislature shall have the power to establish Normal schools, and such different grades of schools, from the primary department to the University, as in their discretion they may deem necessary * * *.

We have not found an identical constitutional provision in any other state which purports to limit the area within which the legislature may act. We feel the restrictive import of Article XI, Sec. 5 is obvious. The Legislature has the power to establish different grades of schools from the grades to the University, but it does not have the authority to establish grades or institutions on a university level.

In 1951, Attorney General W.T. Mathews touched on this problem in Attorney General's Opinion No. 51-89, dated August 5, as follows:

The Constitution in Section 5, Article XI, which gives the legislature power to establish normal schools and such different grades of schools from the primary department to the University, indicates approach and arrival. Its governed word "university" denotes the terminous, thus leaving the legislature without authority to establish grades within departments embraced by the University.

On June 8, 1964, this office again reached this subject, in Attorney General's Opinion No. 64-146, and determined that the authority to establish a technical institute program offering courses primarily on a college level was in the Board of Regents of the University of Nevada, as this was primarily a function of higher education..

We recognize the difficulties in determining where one area of education ends and another begins, and the fact that there may be certain kinds of educational overlapping. We also stated in this last noted opinion that:

The Constitution announces certain basic principles to serve as a perpetual foundation of the state. We do not believe it was intended to be an obstruction to the healthy development of programs necessitated by changing conditions of society. We believe it is proper to assume that the Constitution is intended to meet and be applied to new conditions and circumstances as they arise in the course of progress.

In our present analysis, however, the lines of demarcation from secondary education to university level are clear. If college level courses are taught, the school is functioning on a university level and, if tax supported, should be established and controlled by the Board of Regents through the University facilities. The faculty should be hired and paid through the Board of Regents. The institution should be financed by legislative appropriation to the Board for that purpose.

There are many forms of education that are a product of the 20th Century and not specifically outlined in the Constitution. Some of these, although past high school, have been properly provided by the Legislature because they do not reach the university level. One excellent example is the Vocational-Technical and Adult education established under the State Department of Education. This meets a definite need, but no college level courses are offered.

We are aware of two legal opinions issued by the Legislative Counsel Bureau to the Governor's Committee on Education and the Superintendent of Public Instruction. They concluded first that community colleges may be established and funded by the Legislature and would embrace 2 years of instruction beyond the high school level comparable to a junior college. We assume that these opinions consider the standard definition of a "college" and "junior college" and thereby are referring to 2 years of college-level instruction. The second conclusion was that community colleges established under the State Board of Education could grant "associate degrees" provided they are worded to preclude confusion with degrees or diplomas issued under the authority of the Board of Regents. Not only do we feel that these opinions are legally unsound, but that the Legislative Counsel Bureau is acting outside the scope of its authority in giving legal advice to the executive branch of the government. The four cases referred to in support of their conclusions are as follows, and in our opinion do not support the conclusions reached.

1. Pollitt v. Lewis, 108 S.W.2d 671 (Ky. 1937). In this case, a statute authorized boards of education to establish junior colleges and required the legislative body of the cities wherein they were located to levy a tax when requested to so do by the Board of Education for support purposes. No provision was made for

submission of the question of taxation to the electorate. This was found to be contrary to Section 184 of the Kentucky Constitution, which provided that "No sum shall be raised or collected for education other than in common schools, until the question is submitted to the legal voters * * *."

In reaching this conclusion, the court had to determine that junior colleges were not a part of the common school system, but the case is not support for the proposition for which it is advanced. The constitutional provision considered by the Kentucky court did not remotely resemble the ones with which are concerned in Nevada. The following quotation from the text of the opinion does shed some light on the overall problem, but not on the specific question in our State.

The words "common schools" have in themselves no ascertained and definite signification.

It is only by looking into the history of the common-school system in Kentucky that we are enabled to understand what was meant by those words. If we look to the legislation on the subject prior to the adoption of the present constitution we find that a common school was a school taught in a district laid out by authority of the school laws, under the control of trustees elected under those laws, by a teacher qualified according to law to teach. (Secs. 18, 19, and 22 Act 16th of February, 1838, 3 Stat. Laws, 528; Sec. 3 Act 1st of March, 1842; *Ibid*, 541; Secs. 7 and 11 Act. 10th of March, 1843, Sess. Acts, 73). And all the legislation on the subject since the adoption of the constitution has recognized this definition as being correct as far as it goes.

In the case of *City of Louisville v. Commonwealth*, 134 Ky. 488, 121 S.W. 411, 412, Judge O'Rear in delivering the opinion said:

The city schools, including high schools, are part of the state's common school system. Their trustees are officers of the state. Such is the effect of the decision in *City of Henderson v. Lamber*, 8 Bush, [607] 610, and in *Combs v. Bonnell*, 109 S.W. [898] 899, 33 Ky. Law Rep. 219.

Similarly, the Legislature, itself, has recognized the settled construction placed on these words in section 4363-2 of the Statutes (Acts 1934, c. 65) where it is stated (in part):

A "common school" shall be interpreted as meaning an elementary and/or secondary school of the Commonwealth supported in whole or in part by public taxation.

In the case of *Agricultural & Mechanical College v. Hager*, 121 Ky. 1, 87 S.W. 1125, 1126, 27 Ky. Law Rep. 1178, the Legislature had undertaken to make an appropriation of \$15,000 for the benefit of the college. In sustaining the appropriation under the proviso contained in section 184 of the Constitution, the court reviewed the Debates of the Constitutional Convention of 1890 and said:

The common school system of this state is defined by statute (chapter 113, p. 1524, Ky. St. 1903). It is a uniform series of district schools, each local in its district, but all of general or equal grade throughout the state, varying only according to the population of the districts, and whether the districts have or have not adopted the graded or high school system in addition. They afford free tuition for certain parts of the year to all resident children within the statutory age. They are sustained, in the main, by the income provided by Section 184 of the Constitution, by certain taxes levied directly for their benefit, and certain fines and forfeitures. They may be aided, however, by local taxation in addition. Neither the *Agricultural & Mechanical College*, nor any other institution, is now or was then comprised within the system. No part of the appropriation now in question was derived from the bonds, stock, and income mentioned in Section 184 of the Constitution, and inviolably set apart for the common schools. Nor was the question of this appropriation submitted to or passed upon by the voters of the state. If it is upheld, it is because it has been made under a power vested in, or, rather, not withheld from, the Legislature by the Constitution, the evidence of which is to be found within the proviso above quoted.

In the face of the foregoing authorities, to say nothing of others too numerous to be incorporated here, it can scarcely be disputed that the term "common" schools had and has a fairly definite signification and, whatever else it may include, it does not include a college. Neither the ipse dixit of this court nor the pronouncements of the Legislature can make an institution a part of the common school system contrary to the mandate of the Constitution. (*Italics added.*)

The Pollitt case raises another interesting question. Under Article XI, Sec. 2 of the Nevada Constitution, the Legislature is obligated to provide for a uniform system of common schools. Article XI, Sec. 6 provides:

In addition to other means provided for the support and maintenance of said University and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund * * *.

If college-level institutions are not a part of the common school system or a part of the University system as indicated in the Pollitt case, could not it be argued that this section prohibits direct legislative appropriation for the support and maintenance of such schools. The specific inclusion of common schools and universities for this type of support might very well imply the exclusion of all other educational institutions. If the Legislature could otherwise make direct appropriations, there may have been no need to make this provision in the Constitution.

2. In *Lynch v. Commissioner of Education*, 56 N.E.2d 896 (Mass. 1944), it was held that constitutional provisions providing support of "common schools" did not require the state to furnish free education in state teachers' colleges, since "common schools" or "public schools" embrace only grade schools, and high schools. Again, this case is not a precedent for the establishment of college-level institutions with public funds in Nevada that would not be under the Board of Regents. The court does relate some of the history of education in Massachusetts which is helpful in considering the problem in its entirety. This is found at page 899:

Articles of Amendment 18 and 46 deal with the expenditure of moneys for the support of "common schools." No provision is to be found in the Constitution with respect to free education in the higher institutions of learning. "Common schools" or "public schools" embrace only the grade schools and high schools. These terms "are never applied to the higher seminaries of learning, such as incorporated academies and colleges." *Merrick v. Amherst*, 12 Allen 500, 508, 509. In *Jenkins v. Andover*, 103 Mass. 94, 98, the court, quoting *Cushing v. Newburyport*, 10 Metc. 508, 511, said: "The establishment of schools for the education, to some extent at least, of all the children of the whole people, is not the result of any recent enactment; it is not the growth even of our present constitutional government, or the provincial government which preceded it, but extends back two hundred years, to the early settlement of the colony. Indeed, the establishment of popular schools is understood to have been one of the objects for which powers were conferred on certain associations of persons living together in townships, enabling them to regulate and manage certain prudential concerns in which they had a common interest." And in the *Jenkins* case, the court referring to the Constitution of the Commonwealth, Part II, c. 5, §2, requiring "the legislature and the magistrates, among other things, to 'cherish' 'public schools and grammar schools in the towns' said, 'Public schools,' as those words are used in the Constitution and laws of Massachusetts are not limited to schools of the lowest grade. * * * In the general laws of the Commonwealth, for years before the adoption of the eighteenth amendment of the Constitution, the words "public schools" were used as including all schools, from those lower than grammar schools to those commonly known as high schools, established and maintained in the several cities and towns as part of the general system of popular education. * * * The words "public schools" are synonymous with "common schools," in the broadest sense, as used in this constitutional amendment, and in the statutes concerning the board of education and the distributions of the school fund." 103 Mass. at pages 97, 98. In opinion of the Justices, 214 Mass. 599, 601, 102 N.E. 464, it was said, "Article 18 of the amendments to the Constitution was adopted because of a deep-seated conviction of the imperative necessity of preserving the public school system in its integrity and of guarding it from attack or change by explicit mandate. Public schools never have been understood to include higher institutions of learning like colleges and universities. (Italics added.)

3. In *Goshen County Com. Col. Dist. v. School Dist. No. 2*, 399 P.2d 64 (Wyo. 1965), the question was whether the plaintiff community college was entitled to a 2 percent bonded indebtedness above a 10 percent limitation imposed by the Wyoming Constitution for school districts. In deciding the question it was necessary to determine whether a community college district was separate and apart from a school district and thereby authorized to exceed the 10 percent.

The Wyoming Supreme Court, under a constitutional proviso dissimilar to Nevada's, held in the affirmative, concluding that community colleges come under the category of "such other institutions as may be necessary" as found in Article VII, Sec. 1 of the Wyoming Constitution, which provides:

The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the State allow, and such other institutions as may be necessary. (*Italics added.*)

We have no such language in the Nevada Constitution, nor does the Wyoming Constitution contain the legislative limitation found in Nevada, providing that our Legislature may only establish different grades of schools from the primary department to the University. We do not feel this case is relevant to the instant legal problem. In fact, the court in the Goshen case, at page 65, said:

In most cases where the question has arisen, universities, colleges and junior colleges have been held not to be a part of the common school or public school system within the meaning of constitutional and statutory provisions pertaining to schools in general.

Daniel v. Watson, 410 P.2d 193 (N.M. 1963), does cite the Goshen case, but we again fail to see the relevance of the decision as it is applied to Nevada. The constitutionality of the New Mexico Junior College Act was attacked on various grounds, including the issue raised in the Goshen case, but generally concerning questions of residency of board members and eligibility of petition signers. The act was sustained, but that court was not faced with the present question.

CONCLUSION

It is our opinion that the control of all tax-supported education on a college level has been entrusted to the Board of Regents of the University of Nevada by the Constitution of this State. The establishment of other such tax-supported institutions of higher education by the Legislature that would not be under the control of the Board of Regents in all executive and administrative matters would be an unconstitutional legislative invasion and usurpation of the authority of the Board of Regents of the University of Nevada.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Daniel R. Walsh, Chief Deputy Attorney General

OPINION NO. 1968-480 JUDGMENT AND EXECUTION; NRS 176.15...

OPINION NO. 1968-480 Judgment and Execution; NRS 176.150 Construed—Whenever a person under sentence of imprisonment shall commit another crime and be sentenced to another term of imprisonment, such latter term shall not begin until the expiration of all prior terms.

Carson City, January 19, 1968

Mr. Carl G. Hocker, Warden, Nevada State Prison, Carson City, Nevada 89701

STATEMENT OF FACTS

Dear Mr. Hocker: Mr. Pierce Spillers was convicted of the crime of rape and after a trial by jury was sentenced to death. Upon appeal to the Nevada Supreme Court it was held that the statute involved was unconstitutional and a new sentence was imposed.

Justice Zenoff, writing for the majority, stated: "Consequently, in the case at hand, the new sentence shall be imprisonment for a term of not less than 20 years which may extend to life.

When the crime of rape was committed Spillers was serving two concurrent sentences for Burglary, Second Degree.

QUESTION

Should the amended sentence of not less than 20 years nor more than life be served concurrently with, or consecutive to, the original sentences for Burglary?

ANALYSIS

The question is easily answered by reading NRS 176.150. That statute reads:

Conviction of two or more offenses:
Concurrent and consecutive sentences.

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

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

Clearly, Spillers' situation comes within the italicized language of this statute and we conclude the sentence of not less than 20 year nor more than life shall not begin until the expiration of all prior terms—those being the concurrent sentences for the two Burglary convictions.

CONCLUSION

It is, therefore, the opinion of this office that whenever a person under sentence of imprisonment shall commit another crime and be sentenced to another term of imprisonment, such latter term shall not begin until the expiration of all prior terms.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

OPINION NO. 1968-481 CITY AND COUNTY ORDINANCES—A city ...

OPINION NO. 1968-481 City and County Ordinances—A city or county ordinance which in any way alters, changes or amends the provisions of a general law enacted by the Legislature would be inoperative, and if enacted prior to the general law would be preempted.

Carson City, January 18, 1968

The Honorable Sidney Whitmore, City Attorney, Las Vegas, Nevada

Attention: George F. Ogilvie, Jr. Chief Deputy City Attorney

Dear Mr. Whitmore: You have inquired as to whether the State Legislature in the enactment of NRS 465.080, has preempted the field with respect to legislation governing slot machine cheaters.

ANALYSIS

NRS 465.080(2) reads as follows:

It shall be unlawful for any person, in playing or using any slot machine, lawful vending machine, coin box, telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America in furtherance of or in connection with the sale, use or enjoyment of property or service:

(a) To use other than lawful coin, legal tender of the United States of America, not of the same denomination as the coin intended to be used in such device, except that in the playing of any slot machine, it shall be lawful for any such person to use tokens or similar objects therein which are approved by the state gaming control board; or

(b) To use or have on his person any cheating or thieving device to facilitate removing from any slot machine, lawful vending machine, coin box, telephone or other receptacle any part of the contents thereof.

The subject of the statute applies to and affects the people of every political subdivision of the State and is therefore a law of general nature.

Article 4, section 21 of the Nevada Constitution provides:

In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state.

Therefore, any ordinance in pari materia to the state statute must conform both as to form and as to penalty to the state statute, and any material alteration or amendment giving rise to a conflict with the general law of the State would be inoperative.

CONCLUSION

It is therefore the opinion of this office that a city or county ordinance, which in any way alters, changes or amends the provisions of a general law enacted by the Legislature, would be inoperative, and if enacted prior to the general law, would be preempted.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-482 EDUCATION; SCHOOL DISTRICTS—Formul...

OPINION NO. 1968-482 Education; School Districts—Formula for apportionment of distributive school fund established pending legislative amendment.

Carson City, January 19, 1968

Hon. Burnell Larson, Superintendent of Public Instruction, Carson City, Nevada 89701

Dear Mr. Larson: You have requested this office to interpret subsection (a) of paragraph 2 of Section 5, Chapter 322 of the 1967 Statutes of Nevada. Said subsection reads as follows:

(a) Basic support of each school district shall be computed by multiplying the average daily attendance by the basic support guarantee per pupil established in section 3 of this act, except that in any year when the average daily attendance of a school district is less than the average daily attendance during the prior year, and such lesser average daily attendance was not anticipated at the time estimates were made by the superintendent of the county or joint school district in June of the preceding school year, the superintendent of public instruction may authorize additional apportionments in an amount such that the total apportionment for the year does not exceed the total apportionment for the prior year. As a condition

precedent to such authorization, the superintendent of the county or joint school district shall deliver to the superintendent of public instruction a request setting forth the reasons why the additional apportionment is necessary to the financial support of the school district, and the superintendent of public instruction shall review such request.

You then ask the following questions:

1. Under that statute, would it be permissible to compute basic support of a school district for a current school year by using as a multiplier of basic support guarantee per pupil established in section 3 of the act, a number of average daily attendance that is greater than the current year average daily attendance, but not greater than the average daily attendance during the prior year?

2. In the case that a school district does, in fact, have a lesser average daily attendance during a current school year than during the prior school year, what number of average daily attendance, or other factors, must be used as the multiplier(s) of what other factor(s) in order to compute the basic support for the school district for the current year from which to subtract availability of local funds as required in subsection (b), so that an apportionment can be computed as required in subsection (c)?

ANALYSIS

It will be noted that the language of subsection (a) of paragraph 2 of Section 5 of Chapter 322 of the 1967 Statutes, after setting forth the formula to be followed to determine basic support for each school district when average daily attendance equals or exceeds the average daily attendance of the preceding year, empowers the superintendent of public instruction to authorize additional apportionments for those school districts which have less daily average attendance than during the preceding year. The only restriction on this power is that the total apportionment for the year shall not exceed the total apportionment for the prior year.

It would therefore be the opinion of this office, in light of the fact that the Legislature has not set out clear guidelines as it had previously done in NRS 387.125, that the basic support guarantee for the school district affected by a smaller average daily attendance, should be multiplied by the factual daily average attendance. That from the figure arrived at by this procedure should be deducted the local funds prescribed and allocated by subsection (b), paragraph 2 of Section 5, and that there should be added to this result that amount which will bring the total amount available up to, but not to exceed, the prior year's apportionment.

CONCLUSION

It is therefore the opinion of this office that Question No. 1 should be answered in the negative; that the formula heretofore described in this opinion should be followed until such time as the Legislature establishes by amendment a set procedure.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-483 CITIES; CONTRACTS; CONFLICT OF INT...

OPINION NO. 1968-483 Cities; Contracts; Conflict of Interest—(1) Cities have the power to negotiate a lease purchase contract for equipment. (2) The mere fact that a lease purchase contract for equipment extends beyond the term of office of some members of a city council does not make such a contract invalid. (3) A city which has a water system can use its own regular employees to construct a water line incident to its water system. (4) City council members are precluded from having an interest, directly or indirectly, in contracts made in behalf of the city.

Carson City, January 24, 1968

The Honorable Joseph E. Dini, Jr., Assemblyman, Lyon County, P.O. Box 968, Yerington, Nevada 89447

Dear Mr. Dini: You have submitted several questions to this office concerning the Local Government Purchasing Act, which became effective July 1, 1967 (1967 Statutes of Nevada, Chapter 459, p. 1234). Your questions are as follows:

1. Can the City of Yerington negotiate a lease purchase contract for equipment?
2. Can the City of Yerington negotiate a lease purchase contract for a period of time which exceeds the terms of office of some council members?
3. Can the City of Yerington construct a new water line, using its own regular employees?
4. Can a member of the city council, who is a consignee of a major oil company, legally be involved in the sale of oil products to the city, when the bill is from the parent company? In this connection, you state that all major oil companies rotate sales, one month each.

ANALYSIS

Your first question is answered in the affirmative. Section 2 of Yerington's city charter provides in part:

*** and may purchase, receive, hold and enjoy real and personal property *** (Chapter 72, 1907 Statutes, p. 151.)

McQuillan on Corporations, Vol. 10, § 28.10, p. 22, provides:

Power to acquire property implies the power to lease, or enter into a contract to purchase, or to lease with an option to purchase.

There is nothing in the Local Government Purchasing Act which would preclude the exercise of the power to lease equipment by the City of Yerington. Thus, we conclude that a lease purchase contract for equipment is within the powers of the City of Yerington.

Your second question presents many problems. In our analysis and opinion, we will assume that your question concerns a lease purchase contract for the purchase of equipment or personal property. Further, we assume that the contract does not exceed \$2,500.

In McQuillan on Corporations, Vol. 10, § 29.101, p. 492, it is stated that a clear distinction exists between governmental powers and business or proprietary functions of government.

With respect to the former, their exercise is so limited that no action taken by the governmental body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in such a way that it will be binding upon the municipality after the board exercising the power has ceased to exist. (10 McQuillan 29.101, p. 492.)

Nevada has no statutory provisions on this subject for cities, as it does for county government. Nor can we find an applicable provision in Yerington's city charter.

In our opinion, a contract which appears to be fair, just and reasonable at the time of its execution and prompted by necessity, or which is advantageous to the municipality at the time it was entered into, is prima facie valid and not void or voidable merely because it extends beyond the term of office of those who made the contract. See 149 A.L.R. 320, 128 A.L.R. 159, 38 Am.Jur. § 498, p. 174. It would be our conclusion, then, that a lease purchase contract for equipment would not be invalid merely because some executory features extend beyond the term of office of some members of the city council.

Your third question is whether the city can use its own employees to construct a water line. We assume that the city owns a water system, and has properly acquired the same through construction or some other lawful means. That this is within the city's power is found in the following sections of the Yerington city charter:

Section 2. * * * and may purchase, receive, hold and enjoy real and personal property, including any sewage, light, or water system, that may be constructed or partially constructed within or without the city; * * * (Chapter 72, 1907 Stats., p. 151.)

Section 53. The city shall have the power to acquire and purchase water, light, sewer, gas and power systems or any other public utility, and to hold, manage and operate the same when acquired, for the public use and benefit of the people of the city. The Council, when deemed advisable, shall submit a proper resolution, and the same may be voted upon by the people in all respects as provided herein for special elections. (Chapter 72, 1907 Stats., p. 172.)

In answer to your fourth question, Section 16 of the Local Government Purchasing Act provides:

1. No member of any governing body may be interested, directly or indirectly, in any contract entered into by the governing body; but the governing body may purchase supplies, not to exceed \$30 in the aggregate in any 1 month, from such a member, when not to do so would be of great inconvenience.
2. A member who supplies pursuant to subsection 1 shall not vote on the allowance of the claim 1 herefore.
3. A violation of this section is a misdemeanor and cause for removal from office.

This section makes it clear that the answer to your fourth question is, "No." There is no doubt that the situation you have presented fails to meet the requirements of the exception mentioned in this section. NRS 268.330 would also preclude such a contract, and a similar prohibitive provision is found in Section 44 of the Yerington city charter. The reasoning and extent of this particular prohibition against public officials being interested in contracts which effect, directly or indirectly, a transaction such as that set forth in your letter, under Question No. 4, is set forth in Attorney General's Opinion No. 57-257 dated April 24, 1957.

CONCLUSION

We conclude, therefore, that:

1. Cities have the power to negotiate a lease purchase contract for equipment.
2. The mere fact that a lease purchase contract for equipment extends beyond the term of office of some members of a city council does not make such a contract invalid.
3. A city which has a water system is not precluded from using its own regular employees to construct a water line incident to its water system.
4. City council members are precluded from having an interest, directly or indirectly, in contracts made in behalf of the city.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Peter I. Breen, Deputy Attorney General

OPINION NO. 1968-484 BARBERS-COSMETOLOGICAL ESTABLISHME...

OPINION NO. 1968-484 Barbers—Cosmetological Establishments—Children as defined in NRS 644.020(b) confined to women, and to males 15 years of age or under.

Carson City, January 24, 1968

Mr. Kenneth R. Shaddy, President, Nevada State Barbers Health and Sanitation Board, 4509 Mayflower Lane, Las Vegas, Nevada 89107

Dear mr. Shaddy: You have requested this office to clarify NRS 644.020(b) which authorizes a cosmetological establishment to cut, trim, or shape the hair of women and children.

ANALYSIS

The law has long distinguished between those who are in the twilight zone of their teens and those approaching adulthood, and those defined as children.

In many attractive nuisance cases courts have weighed the age of the young persons involved in being attracted to an instrumentality of a dangerous nature and as a result being injured, and as far as this office can determine the word "children" refers to those 15 years of age and under.

Black in his law dictionary (4th) edition limits the definition of children to those 15 years of age or less. See also Barnhill's Administrator v. Morgan Coal Company, 215 F. 608, 610 and Paulk and Fossil v. Lee, 121 S.E. 845.

We do not believe that the Legislature intended by NRS 644.020(b) to include boys over the age of 15 years in the definition of children. Had they intended to do so they would have been specific. By common usage boys approaching maturity within a 5-year period are not considered as a "child" or as "children."

CONCLUSION

It is therefore the opinion of this office that, based on case law and common usage, cosmetological establishments are limited in cutting, trimming, or shaping the hair, to women and children; male children being those 15 years of age or less. If the Legislature disagrees they may amend the law.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-485 SALES AND USE TAX; EXEMPTIONS—Sale...

OPINION NO. 1968-485 Sales and Use Tax; Exemptions—Sales of tangible personal property by one corporation to another are taxable under Chapter 372 of NRS notwithstanding the fact such corporations have common directors. Unless tangible personal property becomes an actual ingredient or component part of a newspaper, the sale, storage, use, or other consumption of such tangible personal property is not exempt from sales tax under NRS 372.315.

Carson City, January 26, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

STATEMENT OF FACTS

Dear Mr. Nickson: You advised this office that a large advertising and newspaper concern in the State of Nevada has seen fit to divide its operation into several separate and distinct corporations. Each such corporation is closely linked to the other in that they have interlocking boards of directors and also perform interrelated activities. Specifically, you inform us that one such corporation sells photographs to another and that the purchasing corporation sells engravings to a third corporation which actually publishes the newspaper. On the original books of account of each corporation such transactions are recorded as sales, however no sales tax is being charged or collected. The corporations take the position that there has not been a sale within the contemplation of the Nevada Sales and Use Tax Act, apparently based upon the theory that each corporation is the alter ego of the other.

You further inform us that each one of the corporations performs a function, the finished result of which is a newspaper published and circulated in the State of Nevada. The process as we understand it is as follows: From the pictures or photographs a metal plate is made which is then used to make an imprint of the

actual newspaper. Both the photographs and the metal plates are then discarded as they have no further use or value to the corporations. It is the contention of the corporations that the photographs and the metal plates become an ingredient or component part of the newspaper and therefore enjoy the exemption from sales or use tax afforded by NRS 372.315.

QUESTIONS

You ask the following questions:

1. Are sales from one company to a second company that is related to the first company through interlocking boards of directors taxable sales?
2. If the answer to 1 is in the affirmative, are the sales of photographs to an engraver whose sole use of such photographs is to make an engraving for use in a newspaper or periodical as defined in Nevada Revised Statutes 372.315 taxable?
3. When used solely for reproduction in a newspaper or periodical, do the engraving and the photograph from which it is made become "an ingredient or component part" of such newspaper or periodical and, thus, become exempt from the sales and use tax under the provisions of Nevada Revised Statutes 372.315?

ANALYSIS

Question 1 is answered in the affirmative.

Question 2 is answered in the affirmative.

Question 3 is answered in the negative.

The statutes with which we are here concerned are NRS 372.070 which reads as follows:

"Seller." "Seller" includes every person engaged in the business of selling tangible personal property of a kind, the gross receipts from the retail sale of which are required to be included in the measure of the sales tax.

NRS 372.060 reads, in part, as follows:

Sale

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

* * * * *

"Sale" includes:

(a) The producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish, either directly or indirectly, the materials used in the producing, fabricating, processing, printing or imprinting.

NRS 372.085 reads as follows:

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

From a reading of the above quoted statutes we conclude that each separate and distinct corporation is in fact a seller. The fact that the purposes and functions of each corporation are interrelated and the fact that there are interrelated and common directors of each corporation does not persuade this office to hold there has been no transfer of title or possession of tangible personal property. Because the officers of the several corporations have seen fit to make each corporation a separate and distinct legal entity, we do not think that for the purpose of avoiding sales tax they can logically contend that there is but

one corporation and that there is no transfer of title or possession of tangible personal property by and between themselves. Therefore, Question 1 is answered "Yes."

In answering Question 2 we do not have the benefit of a judicial interpretation of NRS 372.315. Such being the case we must look to interpretations given similar statutes by the courts in our sister states. It would appear that the courts have followed the general rule that tax exemption statutes must be strictly construed in favor of the taxing authority and against the taxpayer. The enunciation of this rule may be found in volume 3 section 6702 of Sutherland, Statutory Construction.

The Supreme Court of Alabama held in *State v. Advertiser Company*, 59 So.2d 576 (Ala. 1952) that "ink" used in the printing of a newspaper became absorbed in and was an ingredient or component part of the newspaper itself and thus subject to tax exemption. In *State v. Southern Kraft Corp.*, 8 So.2d 886 (Ala. 1942) the court held that sale cake, sulphur, lime, starch, hydrate of lime, and chlorine which was used in the manufacture of paper was subject to tax exemption because they did, in fact, become a substantial ingredient or component part of the finished product. The court in the *Advertiser* case, *supra*, also held that assessment on such as labels, paste, and tying wire was proper since these items did not become an ingredient or a component part of the newspaper.

We agree with the conclusions reached in the above two cases. NRS 372.315, we feel, requires that before a tax exemption may be allowed, the tangible personal property must become an actual ingredient or component part of the newspaper. We do not feel that the photographs of the engraving become an actual ingredient or component part of the newspaper. While we were unable to find a case directly in point we do call to your attention the case of *State v. Olan Mills*, 63 So.2d 796 (Ala. 1953). On rehearing, the court stated, in admitted dicta: "Conceding, without deciding, such to be the case, we do not think the evidence supports the finding that the film became an ingredient or component part of the finished product." Relying upon a strict construction of NRS 372.315 together with cases above cited, we answer Question 2 in the affirmative and Question 3 in the negative.

CONCLUSION

It is therefore the opinion of this office that sales of tangible personal property by one corporation to another are taxable under Chapter 372 of NRS notwithstanding the fact such corporations have common directors.

Unless tangible personal property becomes an actual ingredient or component part of a newspaper, the sale, storage, use, or other consumption of such tangible personal property is not exempt from sales tax under NRS 372.315.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

OPINION NO. 1968-486 PUBLIC SERVICE COMMISSION; PUBLIC ...

OPINION NO. 1968-486 Public Service Commission; Public Utility—The owner-landlord of a shopping center is not a public utility within Chapter 704 NRS by merely furnishing air-conditioning services to tenants.

Carson City, January 31, 1968

Mr. Reese H. Taylor, Jr., Chairman, Public Service Commission, Nye Building, Carson City, Nevada 89701

STATEMENT OF FACTS

Dear Mr. Taylor: You informed this office of the following factual situation:

A large investment corporation is in the process of financing the construction of a shopping center in Las Vegas, Nevada. The plans, as they now read, provide that the landlord will obtain electrical energy from the Nevada Power Company and will use a part of this electrical energy for the purpose of chilling water which will then be circulated through a system of coils. By the use of fans, air will be blown over the coils and chilled before being delivered by means of conduits to the various tenants. No water is transferred to the tenants, but is used exclusively for the purpose of chilling the coils. It is contemplated that the landlord will charge each tenant individually for the air-conditioning service according to a mathematical formula which takes into account the square footage of the leased area, the height of the ceiling, the amount of glass frontage or exposure, the presence of escalators, etc.

The investment corporation in question seeks a determination by your office as to whether or not the landlord in such a situation would be considered a public utility by furnishing the air conditioning and therefore required to obtain a certificate of public convenience and necessity from the Public Service Commission.

ANALYSIS

Public utilities are defined by NRS 704.020, which reads in part as follows:

2. "Public utility" shall embrace:

(b) Any plant or equipment, or any part of a plant or equipment, within the state for the production, delivery or furnishing for or to other persons, firms, associations, or corporations, private or municipal, heat, gas, coal slurry, light, power in any form or by any agency, water for business, manufacturing, agricultural or household use, or sewerage service, whether within the limits of municipalities, towns or villages, or elsewhere.

The commission is hereby invested with full power of supervision, regulation and control of all such utilities, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village, unless otherwise provided by law.

The above-quoted statute specifically mentions the furnishing of heat, gas, coal slurry, light, power, water, or sewerage service. There is no mention in this statute of the word or words "air," "chilled air," "air conditioning" or any other words which we think would embrace the furnishing of chilled air as outlined in the above statement of facts. Such being the case, we do not think it appropriate at this time to expand this statute to include or incorporate anything which is not specifically mentioned therein. This is in accord with the general rule that the delegation of powers by a legislature to an administrative agency must be strictly interpreted, and that only those powers expressly granted may be claimed by the administrative agency. An elaboration of this rule may be found in Volume 3, Section 6603 of Sutherland, Statutory Construction. Another reason why we feel that the furnishing of air conditioning to tenants is not to be considered as a public utility is the fact that we have been unable to find any mention in either judicial opinions, legislative enactments, treatises, or texts that the furnishing of air conditioning is the performance of an activity associated with a public utility.

In considering your question, we have not overlooked our prior Attorney General Opinion No. 67-371, dated January 3, 1967. That opinion was also concerned with a landlord of a shopping center. In that opinion, we held that a landlord organization which generated and sold electricity to its tenants was subject to regulation by the Nevada Public Service Commission. We concur with the conclusions reached in that opinion at this time. However, we feel it is perfectly logical to come to the conclusion in this opinion that for the purposes of supplying chilled air, the landlord is not subject to regulation by the Nevada Public Service Commission. The differentiating factor is that the statute specifically mentions the furnishing of power (electricity), but the statute does not mention the furnishing of chilled air.

We feel it proper to rely on the case of *Sierra Pacific Power Co. v. Nye*, 80 Nev. 88, 1964. In that case, the owner and operator of a trailer park purchased electrical power from a utility and resold it to the renters of trailer spaces. The court held that the owner of the trailer park did not qualify as a public utility. We feel that the landlord of the shopping center in question can be likened to the trailer park operator in the *Sierra Pacific Power Company* case.

Relying then on a strict interpretation of NRS 704.020, together with the above-cited Attorney General Opinion and the announcement by the Nevada Supreme Court in the *Sierra Pacific Power Company*

case, we conclude that the furnishing of chilled air by the landlord to its various tenants, as set forth above, does not come within the confines of Chapter 704 of the Nevada Revised Statutes and, therefore, the Public Service Commission has no jurisdiction to regulate and control the same.

One additional reason for not concluding to the contrary is because of the fear that if we did so our opinion could be interpreted as meaning every landlord supplying air conditioning to his tenants would be a public utility, and we feel certain the Legislature did not intend this result.

CONCLUSION

The furnishing of chilled air by the landlord of a shopping center to the tenants is not the performance of an activity which would require a certificate of public convenience and necessity from the Public Service Commission.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

OPINION NO. 1968-487 BLOOD ALCOHOL TESTS; ADMINISTRATIO...

OPINION NO. 1968-487 Blood Alcohol Tests; Administration to Persons Suspected of Driving While Intoxicated—(1) The subject must be placed under lawful arrest prior to or contemporaneously with a police officer's demand that such a test be performed. (2) Cooperating physicians or hospital personnel need not question the existence of reasonable cause to believe a crime was committed, but may rely on the representations by an officer that the subject is under arrest. (3) A county hospital may not furnish police with a person's independent medical records, without his consent. (4) The principle of *Schmerber v. California*, 86 S.Ct. 1826 (1966) applies equally to breath and urine analyses. (This opinion supplements A.G.O. 67-470 of 12-11-67.)

Carson City, February 2, 1968

The Honorable Robert List, District Attorney of Ormsby County, Carson City, Nevada 89701

Attention: Peter D. Laxalt, Esq., Deputy District Attorney

Dear Mr. List: By your letter of January 18, 1968, you have sought a clarification of certain terms contained in Attorney General's Opinion No. 67-470 of December 11, 1967, and have requested that the opinion be supplemented by answers to the following questions:

1. What is the meaning of "incident to lawful arrest," that is, must arrest precede a blood alcohol test?
2. Is it sufficient, for cooperation of physicians, that officers having jurisdiction declare that reasonable cause exists to believe the person suspected was driving under the influence of intoxicants?
3. Would a county incur liability if, after taking blood for some independent medical or surgical necessity, it were to furnish analysis thereof to a police officer?
4. What modifications of Attorney General's Opinion No. 67-470 of December 11, 1967, if any, would be appropriate where breath analysis or urine analysis occur, rather than blood alcohol tests?

ANALYSIS

We affirm the basis of Attorney General's Opinion No. 67-470 of December 11, 1967, namely, that the decision of the U.S. Supreme Court in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, should be confined strictly to its facts. Except as specifically qualified herein, the facts of *Schmerber* dictate the

requisites under which consent to a blood alcohol test is immaterial and its necessity obviated. Upon the foregoing premise, we shall consider the inquiries posed in your letter.

1. In *Schmerber*, the court found that a blood alcohol test was incidental to lawful arrest. Factually, the defendant therein was placed under arrest prior to the administration of the test at the direction of police officers. It is settled that a search or seizure cannot be justified by what it discloses.

It will not do to justify an arrest by a search, and the search by the arrest. *State v. Davis* (N.H., 1967), 226 A.2d 873.

Davis held that the results of a blood alcohol test should have been excluded because the defendant was not arrested until after the test was administered. There, the arrest was not in any sense contemporaneous. We therefore conclude that the arrest must be made prior to or contemporaneously with the police officer's demand that a test be performed.

2. The matter of reasonable grounds to believe that a crime has been committed is one which has been exhaustively litigated. The existence or nonexistence of facts sufficient to give a peace officer reasonable cause to believe a person drove while intoxicated, is a question of concern to the courts and not to cooperating physicians and hospital personnel. It is a question which must be resolved to determine admissibility of the results of a blood alcohol test.

The existence of reasonable cause validates an arrest. For purposes of this analysis, if lacking, the test is not incidental to a lawful arrest within the meaning of *Schmerber*. Physicians and hospital personnel need not concern themselves with this question. Rather, it is one which is always open to inquiry and review by courts in every case.

Physicians and hospital personnel may understandably be concerned about whether tests which police officers direct to be administered are in fact lawful; and if unlawful, whether civil liability would attach. They also can and should be concerned about reluctance to cooperate with peace officers in proper cases. A simple and workable solution to this problem lies in the use of written forms. Such forms provide a means for police to request in writing that a test be performed. The form could contain a certification or representation that the subject is or has been placed under lawful arrest. It would then be signed by the officer. If a policeman is not willing to sign such a statement, the physician should freely decline to administer a test unless the subject consents. On the other hand, if officers so request a test in writing, they are entitled to the cooperation of hospital personnel.

3. Where a person is hospitalized or treated and blood samples are taken for medical or surgical reasons not in any way associated with suspicion of crime, the medical records are generally regarded as the property of the patient in the privileged custody of the hospital. We believe that information so gathered by a treating physician is privileged and confidential within the meaning of NRS 48.080. *Schmerber* is not authority for a custodian of such medical records to furnish their contents to a police officer, regardless of his jurisdiction. We therefore conclude that if such records were released without the consent of the patient, civil liability would ensue.

4. The principles enunciated in *Schmerber* regarding the use of blood samples to determine intoxication have been held to be equally applicable to testing by means of breath analysis or the use of so-called "breathalyzer." *People v. Sudduth* (Calif. 1966), 55 Cal.Rptr. 393, 421 P.2d 401; *State v. Swiderski* (N.J. 1967), 226 A.2d 728. It has been stated that by analogy this reasoning is also applicable to testing of urine for alcoholic residue. *State v. Bell* (S.C. 1967), 156 S.E.2d 313.

CONCLUSION

It is therefore the opinion of this office, in elaboration of Attorney General's Opinion No. 67-470 of December 11, 1967, concerning the administration of blood alcohol tests to persons without their consent when they are suspected of driving while intoxicated, that:

1. The subject must be placed under lawful arrest prior to or contemporaneously with a police officer's demand that such test be performed.

2. Cooperating physicians or hospital personnel need not question the existence of reasonable cause to believe a crime was committed, but may rely on the representations by an officer that the subject is under arrest.

3. A county hospital may not furnish police with a person's independent medical records, without his consent.
4. The principle of *Schmerber v. California*, supra, applies equally to breath and urine analyses.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

OPINION NO. 1968-488 NEVADA TAX COMMISSION; CLAIM FOR R...

OPINION NO. 1968-488 Nevada Tax Commission; Claim For Refund; Public Hearing—The remedy of a taxpayer claiming a refund of sales and use taxes is a suit for refund. Nevada Tax Commission need not conduct a public hearing based upon a claim for refund.

Carson City, February 5, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

STATEMENT OF FACTS AND QUESTIONS

Dear Mr. Nickson: You have requested from this office an answer to the following questions:

1. Following an adverse redetermination, made pursuant to NRS 372.490 (redetermination), does an unsatisfied taxpayer without new evidence have the right to a second hearing of the matter before the Nevada Tax Commission through a claim for refund submitted in accordance with NRS 372.635?
2. If the answer to Question 1 above is negative, is the Nevada Tax Commission, under the same circumstances, authorized to issue an automatic denial of the claim for refund on the finality of the redetermination?

ANALYSIS

We are dealing with two separate procedures within the jurisdiction of the commission. The first encompasses deficiency determinations, determinations when no return is made, jeopardy determinations, and redeterminations. The appropriate statutes are NRS 372.400 to NRS 372.500 inclusive. The second procedure deals with overpayments and refunds. The appropriate statutes are NRS 372.630 to NRS 372.720 inclusive.

In the first of the two procedures, the commission takes the initiative to start the proceedings. That is, the commission staff audits the books of the taxpayer to verify the accuracy of the amount of the taxes paid or else makes an estimate if no return is filed by the taxpayer. In the second procedure, the taxpayer initiates action by filing a claim for refund based upon an alleged overpayment. In the statutes relating to the first procedure, there is a detailed explanation of how a hearing may be demanded by the taxpayer. (See NRS 372.475 and NRS 372.480.) These statutes, by their own language, limit their application to matters concerned with determinations. However, when speaking of overpayments or refunds, there is no mention of a hearing in the statutes. The remedy of the taxpayer who is denied a refund is found in NRS 372.675 and NRS 372.680 which read:

No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed.

1. Within 90 days after the mailing of the notice of the tax commission's action upon a claim filed pursuant to this chapter, the claimant may bring an action against the tax commission on the grounds set forth in the claim in a court of competent jurisdiction in Ormsby County for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
2. Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

These two statutes require the taxpayer to file a claim for refund as a condition precedent to bringing an action in the district court. The commission must act on that claim but the statutes do not provide for a public hearing on the merits of the claim.

The statutes provide that the Nevada Tax Commission must grant a hearing if the taxpayer demands one regarding deficiency and other determinations, but not when the disputed matter is a claimed refund.

There is authority to support this interpretation. In *Marchica v. State Board of Equalization*, 237 P.2d 725 (Calif. 1951), the court, when discussing statutes almost identical to Nevada law, stated:

The entire tenor of the sales tax act contemplates that a taxpayer may raise such defenses as he has in a suit for refund. Such a suit is his only legal remedy. * * * On the other hand, in a suit for refund the statute does not give any finality to the determination of the board. The board does not exercise judicial power, in administering the sales tax act and the act, in effect, in a suit for refund authorizes a hearing de novo.

We think the California court correctly interpreted the California statutes and apply this interpretation to the Nevada statutes dealing with overpayments and refunds of sales and use taxes. If we were to conclude contrary, the result may well be a flood of demands by taxpayers for refunds and public hearings. By limiting the taxpayer to the filing of a claim for a refund and then a suit in the district court, the possibility of frivolous claims is avoided. This is recognized by text writers on the subject. In *Cooper*, *State Administrative Law*, it is stated that the reasons for denying a public hearing involving disputed taxes are:

(1) there is the overpowering necessity for prompt collection of the necessary public revenues; (2) the large number of cases to be disposed of requires the use of summary procedures; (3) many of the issues involved, such as the question of valuation of property, can be better determined by inspection, investigation, and the exercise of the assessor's informed judgment, than by a judicial hearing at which the contradictory estimates of opposing expert witnesses on the question of valuation would be of little practical help; and (4) the fact that judicial review is usually available for issues affecting jurisdiction, construction of the statute, uniformity of the levy, and claims of fraud—that there may thus be a hearing after the event—is often thought to excuse a failure to give notice and hearing at the administrative stage.

The result has been that requirements of notice and hearing in the tax field are rather attenuated.

Additionally, we note that by your questions you stated the taxpayers have already aired their contentions in one public hearing when a deficiency or other determination had been made. Such being the case, we do not think the taxpayer should be able to restate his contentions merely by filing a claim pursuant to the overpayment and refund statutes.

CONCLUSION

If the controversy before the commission is based upon NRS 372.400 to NRS 372.500 inclusive, and a public hearing is timely requested by the taxpayer, the commission must grant such request. If the controversy before the commission is based upon NRS 372.630 to NRS 372.720 inclusive, the commission must act upon the filed claim but need not grant a request for a public hearing. The remedy of the taxpayer is a suit for a refund.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

OPINION NO. 1968-489 Parole and Probation, Eligibility For—NRS 207.010(2), NRS 209.280, and NRS 213.120 interpreted.

Carson City, February 8, 1968

Mr. Carl G. Hocker, Warden, Nevada State Prison, Carson City, Nevada 89701

Attention: Lt. Wiley F. Peebles, Records and Identification

Dear Sir: You have posed the following questions to this office:

1. Where various statutes defining criminal offenses and penalties therefor contain provisions limiting parole eligibility, must an inmate serve the entire time specified to become eligible for parole, or may such time be reduced by the credits allowed by NRS 209.280?

2. By reason of the 1967 amendment of NRS 213.120, deleting the former subsection 2 thereof, are persons imprisoned as habitual criminals under NRS 207.010, subsection 2, deemed to be under sentence of life imprisonment without possibility of parole?

ANALYSIS

Prior to the 1967 amendments, NRS 213.120, subsection 1-3, read as follows:

1. No prisoner imprisoned under a verdict or judgment and sentence of life imprisonment without possibility of parole shall be eligible for parole.

2. No prisoner imprisoned under a verdict or judgment and sentence of life imprisonment shall be paroled until he has served a least 7 calendar years.

3. No prisoner imprisoned under a verdict or judgment and sentence of imprisonment for a term less than life pursuant to a statute which provides that the sentence shall be served without possibility of parole shall be eligible for parole.

These provisions were not specifically carried over, in their previous form, into the new statutory plan. However, under the present law, a simplified formula for parole eligibility appears in NRS 213.120. It reads as follows:

Except as otherwise limited by statute for certain specified offenses, a prisoner may be paroled when he has served:

1. One-fourth of the definite period of time for which he has been sentenced pursuant to NRS 176.033, less good time credits; or

2. One year,
whichever is longer.

The good time credits referred to are found in subsections 1 and 3 of NRS 209.280:

1. Every convict who shall have no infraction of the rules and regulations of the prison, or laws of the state, recorded against him, and who performs in a faithful, orderly and peaceable manner the duties assigned to him, shall be allowed for his term a deduction of 2 months in each of the first 2 years, 4 months in each of the next 2 years, and 5 months in each of the remaining years of the term, and pro rata for any part of a year where the sentence is for more or less than a year.

3. In addition to the credits for good behavior provided for in subsection 1, the board may adopt regulations allowing credits for convicts whose diligence in labor or study surpasses the general average and for convicts who donate their blood for charitable purposes.

Illustrative of statutes containing specific limitations on parole eligibility are those prescribing penalties for murder, forcible rape, assault with intent to commit a crime, and kidnapping in the first degree. The foregoing read respectively as follows:

NRS 200.030, subsections 3 and 4:

3. If the jury shall find the defendant guilty of murder in the first degree, then the jury by its verdict shall fix the penalty at death or imprisonment in the state prison for life with or without possibility of parole, except that if the murder was committed by a convict in the state prison serving a sentence of life imprisonment, the jury shall fix the penalty at death or imprisonment in the state prison for life without possibility of parole. If the penalty is fixed at life imprisonment with possibility of parole, eligibility for parole begins when a minimum of 10 years has been served.

4. Every person convicted of murder of the second degree shall be punished by imprisonment in the state prison for life or for a definite term of not less than 5 years. Under either sentence, eligibility for parole begins when a minimum of 5 years has been served.

NRS 200.363, subsection 1:

1. Forcible rape is the carnal knowledge of a female against her will. A person convicted of forcible rape shall be punished:

(a) If substantial bodily harm results:

(1) By death; or

(2) By imprisonment for life without possibility of parole; or

(3) By imprisonment for life with the possibility of parole, eligibility for which begins when a minimum of 10 years has been served.

(b) If no substantial bodily harm results:

(1) By imprisonment for life; or

(2) By imprisonment for a definite term of not less than 5 years.

Under either sentence eligibility for parole begins when a minimum of 5 years has been served.

NRS 200.400, subsection 1:

1. An assault with intent to kill, commit rape, the infamous crime against nature, mayhem, robbery or grand larceny shall subject the offender to imprisonment in the state prison for a term not less than 1 year nor more than 10 years; but if an assault with intent to commit rape be made, and if such crime is accompanied with acts of violence and substantial bodily harm results, the person guilty thereof shall be punished by imprisonment in the state prison for life, with or without possibility of parole, or he shall suffer death, if the jury by their verdict affix the death penalty. If the penalty is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served.

NRS 200.320:

Every person convicted of kidnapping in the first degree shall be punished:

1. When the kidnapped person shall suffer substantial bodily harm during the act of kidnapping or the subsequent detention and confinement or in attempted escape or escape therefrom, with death or by imprisonment in the state prison for life without possibility of parole, or by life imprisonment in the state prison with the possibility of parole, eligibility for which begins when a minimum of 10 years has been served, such sentence to be determined by the jury convicting the person so found guilty.

2. Where the kidnapped person shall have suffered no substantial bodily harm by reason of such kidnapping, the person found guilty of such kidnapping shall be punished by imprisonment in the state prison for life or for a definite term of not less than 5 years. Under either sentence, eligibility for parole begins when a minimum of 5 years has been served.

1. Your first question asks whether the minimum terms which must be served by inmates to be eligible for parole when sentenced under statutes such as the foregoing, are subject to being further reduced by good time credits available under NRS 209.280. We have concluded that this question must be answered in the negative.

The strongest, and in fact the only argument to the contrary, is based on use of the words "[e]very convict" in the opening sentence of NRS 209.280. At first impression, one is tempted to conclude that by these words the Legislature intended to make the good time credits available and applicable to every sentence imposed and to every instance wherein applications for parole are contemplated. This argument must fail for several reasons. Review and analysis of the entire statutory plan clearly demonstrates why.

These statutes, being penal in nature, must be strictly construed. See Attorney General's Opinion No. 65-254 of August 11, 1965. The language of NRS 213.120 is abundantly clear. Several important principles are embodied in it. The most striking of these is that it is expressly applicable "except as limited by statute for certain specified offenses." Another is that its formula for ascertaining when a prisoner may be paroled contains two alternatives, only one of which allows good time credits to be applied. Finally, its entire language dictates that in no case can parole be granted sooner than 1 year.

The above-mentioned argument to the contrary cannot be sustained in the light of such clear statutory mandate, nor in the light of reason. The good time credits, in cases where they can be applied by law, cannot be made available to some inmates and not others. Such would be arbitrary and unreasonable. Therefore, the credits are available to "every convict." But this does not mean that credits, even if earned, may be used in every case. Stated differently, such credits may shorten the total sentence itself, but this is distinct from effectuating early release from prison on parole, which does not of itself shorten the underlying sentence.

For example, if a person is convicted of assault with intent to commit grand larceny, he is subject to being sentenced to imprisonment for a term of 1 to 10 years. A determinate sentence is required by NRS 176.033. If the court imposed a sentence of 1 year, the prisoner could not be paroled earlier under the express language of NRS 213.120. He is entitled to have his prison record reflect behavior that would entitle him to good time credits, had he not received a minimum sentence; but he is not thereby entitled to use them to shorten a sentence below the minimum term expressly specified by law.

Similarly, if a person is convicted of murder in the second degree, he is subject to being sentenced to a term ranging from 5 years to life. Suppose that the court imposed a determinate sentence of 10 years imprisonment, and that his behavior merited good time credits in accordance with the schedule appearing in NRS 209.280, subsection 2. He would earn credits totaling 3 years, 6 months, and be required to serve a total of 6 years, 5 months. He has a right to earn these good time credits. But he has no such absolute right to parole, whether after 5 years imprisonment or at any time thereafter until discharged. Rather, parole is a matter of discretion with the state board of parole commissioners. NRS 213.1099. Under NRS 200.030(4), he is not eligible for parole until he has served 5 years of his term. After the 5 years, he has a right to apply for parole, but it may or may not be granted to him. Clearly, he cannot, by his own conduct, alter the express provisions of the last mentioned statute. See Attorney General's Opinion No. 67-453 of October 26, 1967.

The good time credits may be used under NRS 213.120 to obtain earlier eligibility for parole only where there is no specific statutory limitation applicable to punishment for certain offenses. It follows that where a specific statute limits the time within which the prisoner is eligible for parole, such limitation may not be further reduced by good time credits, even though such credits may be available to him under NRS 209.280 for other purposes.

2. Your second question relates to eligibility for parole of habitual criminals sentenced to life imprisonment under NRS 207.010(2); i.e., whether such recidivists are so sentenced to life imprisonment without possibility of parole. We have concluded that this question must be answered in the affirmative.

It has been noted that subsection 2 of NRS 213.120, as it existed prior to the 1967 amendment, enabled those sentenced to life imprisonment to be eligible for parole after serving at least 7 years. No similar general provision for parole in life sentences (where possibility of parole was not specifically foreclosed) appears in the new NRS 213.120.

It would seem at first glance through Chapter 213 on Pardons and Paroles, that the Legislature has failed to provide a plan for parole eligibility in cases of inmates serving life sentences where possibility of parole has not been excluded in the verdict or judgment. Such, however, is not the case.

Where specific statutes define crimes for which a sentence of life imprisonment may be imposed, they also contain specific provisions governing the period after which the inmate becomes eligible for parole. Examples of such instances have been quoted above, i.e., murder, rape, kidnapping, etc.

NRS 207.010, subsection 2, reads as follows:

2. Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who shall previously have been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state prison for life.

Both before and after the 1967 amendment, there has been no mention of parole eligibility in the recidivist statute. Therefore, one is tempted to conclude that by reason of the amendment to NRS 213.120, deleting the old subsection 2, persons sentenced as habitual criminals to life imprisonment no longer have the possibility of parole.

Our conclusion here is not based on this premise, however, but upon NRS 213.110, subsection 1. It provides:

1. Subject to the provisions of NRS 213.120, the board shall have power to establish rules and regulations under which any prisoner who is now or hereafter may be imprisoned in the state prison and who has not previously been more than three times convicted of a felony and served a term in a penal institution, or who is imprisoned in a county jail, may be allowed to go upon parole outside of the buildings or inclosures, but to remain, while on parole, in the legal custody and under the control of the board and subject at any time to be taken within the inclosure of the state prison or county jail.

Although this statute was amended in 1967, the amendment was not material to this analysis. This statute does clearly and expressly state that the privilege of parole shall be available only to those persons who have not previously been thrice convicted felons. In so denying the privilege of parole to such habitual criminals, the statute is unchanged from its earlier form.

It follows that persons sentenced to life imprisonment under NRS 207.010(2) are to be regarded as serving a sentence of life without possibility of parole.

CONCLUSION

It is the opinion of this office that:

1. Question No. 1 is answered in the negative; and
2. Question No. 2 is answered in the affirmative.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Graves, Deputy Attorney General

OPINION NO. 1968-490 SOIL CONSERVATION DISTRICTS; TAXAT...

OPINION NO. 1968-490 Soil Conservation Districts; Taxation—Soil Conservation District is a governmental subdivision, and sales to it of tangible personal property are exempt from sales tax.

Carson City, February 23, 1968

Mr. William U. Schofield, Chairman, Pahrnagat Valley Soil Conservation District, Alamo, Nevada 89001

Dear Sir: In your letter of February 14, 1968, you have requested an opinion from this office on the question of whether sales of tangible personal property to the district are exempt from the imposition of sales tax. Your letter states that the district acts as vendor in the application of soil and water conservation practices such as drainage projects, installation of ditch linings and pipelines, land leveling and the like. All

such endeavors take place within the district boundaries. In so doing, the district purchases supplies and materials such as headgates, pipe, and cement. We assume, for purposes of this opinion, that the district is organized and existing under and by virtue of Chapter 548 of Nevada Revised Statutes.

ANALYSIS

Statutory exemptions from the operation of the Sales and Use Tax Act, appear in part at NRS 372.325, as follows:

Sales tax: United States; state; political subdivisions; religious, eleemosynary organizations. There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to:

* * * * *

3. The State of Nevada, its unincorporated agencies and instrumentalities.
4. Any county, city, district or other political subdivision of this state.

Soil conservation districts are state agencies as well as districts and political subdivisions within the meaning of the foregoing statutory exemption. Such districts are created under and exist by virtue of Chapter 548 of Nevada Revised Statutes. NRS 548.035, 548.070 and 548.340 respectively provide:

548.035 "District" means a governmental subdivision of this state, and a public body corporate and politic, organized in accordance with the provisions of this chapter for the purposes, with the powers, and subject to the restrictions set forth in this chapter.

548.070 "Soil conservation district" means a governmental subdivision of this state, and a public body corporate and politic, organized in accordance with the provisions of this chapter, for the purposes, with the powers, and subject to the restrictions set forth in this chapter.

548.340 A soil conservation district organized under the provisions of this chapter shall constitute a governmental subdivision of this state and a public body corporate and politic, exercising public powers.

It follows that by express legislative enactment, such districts are governmental subdivisions and therefore are entitled to the exemption.

CONCLUSION

It is the opinion of this office that soil conservation districts are political and governmental subdivisions of the State of Nevada. The gross receipts of sales of tangible personal property to such districts are exempt from the imposition of sales tax.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

OPINION NO. 1968-491 TAXICAB MOTOR CARRIERS; POWER OF C...

OPINION NO. 1968-491 Taxicab Motor Carriers; Power of City to Regulate—The City of Las Vegas has no jurisdiction to supervise or regulate taxicabs except for the purpose of imposing and collecting a license tax for revenue purposes.

Carson City, February 23, 1968

The Honorable Sidney R. Whitmore, City Attorney, City of Las Vegas, Las Vegas, Nevada 89101

Dear Mr. Whitmore: By your letter of February 22, 1968, you have requested an opinion of this office on the interpretation of NRS 286.097. Specifically, the issue is whether or not the City of Las Vegas retains any jurisdiction over taxicabs except for the purpose of collecting a license tax.

ANALYSIS

NRS 268.097 reads as follows:

1. Notwithstanding the provisions of any local, special or general law, after July 1, 1963, the governing body of any incorporated city in this state, whether incorporated by general or special act, or otherwise, shall have no power or authority to supervise or regulate any taxicab motor carrier as defined in NRS 706.120 who is under the supervision and regulation of the public service commission of Nevada pursuant to law.

2. Nothing contained in subsection 1 shall be construed to prohibit the governing body of any incorporated city in this state, whether incorporated by general or special act, or otherwise, from fixing, imposing and collecting a license tax on and from such taxicab motor carrier for revenue purposes only. (Italics supplied.)

The language of this statute is mandatory, explicit and concise. It leaves no room for discretion or interpretation, and the introductory clause of subsection 1 shows the intent of the Legislature that no other laws, local, special, or general, shall be operative in the area governed by this statute. We construe this statute as reflecting the intent of the Legislature to preempt entirely the scope of regulation governed by its terms. Subsection 2 of the statute provides the only area in which it is not operative, namely, it permits incorporated cities to exercise the right of imposing a license tax. However, by reason of the subsequent language, the Legislature has further dictated that such tax may not be used in any manner to regulate the operational activities of taxicabs, but is intended solely as a revenue measure.

We therefore conclude that the City of Las Vegas is limited in its jurisdiction over taxicabs to the imposition and collection of a license tax solely for purposes of revenue, and has no other jurisdiction over taxicabs for any purpose whatsoever.

CONCLUSION

It is therefore the opinion of this office that the City of Las Vegas has no jurisdiction to supervise or regulate taxicabs except for the purpose of imposing and collecting a license tax for revenue purposes.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

OPINION NO. 1968-492 NEVADA TAX COMMISSION; ASSESSMENT ...

OPINION NO. 1968-492 Nevada Tax Commission; Assessment of Penalties—Penalties imposed because of violation of NRS 362.230 should be distributed to the recipient of the taxes collected under Chapter 362, 1967 Statutes of Nevada. Modified by Attorney General Opinion No. 68-495 dated March 13, 1968.

Carson City, February 26, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: By letter dated February 20, 1968, you inquired of this office as follows:
Should the penalty imposed pursuant to NRS 362.230 be remitted by the taxpayer to the State of Nevada or the county in which the mine is located?

ANALYSIS

NRS 362.230 provides as follows:

Every person, association or corporation operating any mine or mines in this state who shall fail to file with the Nevada tax commission the statements provided for in NRS 362.100 to 362.240, inclusive, during the time and in the manner provided for in NRS 362.100 to 362.240, inclusive, shall be liable to a penalty of not less than \$100 nor more than \$5,000, and if any mine operator shall so fail to file such statement, the Nevada tax commission may ascertain and certify the net proceeds of such mine or mines from all data and information obtainable.

Because we have no judicial interpretation of this statute, we must turn to court decisions interpreting similar statutes for guidelines. The Nevada Supreme Court in *State v. Huffaker*, 11 Nev. 300, at page 303, stated:

* * * The law makes no disposition of the penalty, and it becomes a question of construction what disposition of it the Legislature intended. We think the penalty is to be regarded not only as a punishment to the delinquent, but also, and principally, as a compensation to the State and county for the delay of payment, and the consequent derangement to their finances. So regarded, the obvious conclusion is, that the penalty follows the tax, in this case five-thirteenths to the State and eight-thirteenths to the county. * * *

Although the type of tax and penalty in the *Huffaker* case was not based upon net proceeds of mines, we feel the rule announced to be applicable to the disposition of the penalties imposed under NRS 362.230.

Because the amount of not less than \$100 nor more than \$5,000 is in the nature of a penalty, and for the additional reason that the Legislature did not expressly delegate the penalizing power to the Nevada Tax Commission, we feel the courts of this State should impose the proper financial penalty.

CONCLUSION

It is therefore the opinion of this office that penalties imposed because of violation of NRS 362.230 should be distributed to the recipient of the taxes collected under Chapter 362, 1967 Statutes of Nevada.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

OPINION NO. 1968-493 STATE PERMANENT SCHOOL FUND—State ...

OPINION NO. 1968-493 State Permanent School Fund—State Board of Finance is charged with all investments of moneys of the State Permanent School Fund; county boards of school trustees are charged with payment of moneys received to proper county school district funds. Supplemented by AGO 501, dated 4-11-68.

Carson City, February 27, 1968

The Honorable Merlyn H. Hoyt, District Attorney, White Pine County, White Pine County Courthouse, Ely, Nevada 89301

Dear Mr. Hoyt: By your letter of February 15, 1968, you have posed certain questions to this office regarding primary legal responsibility for directing investment of school funds and for designating approximate accounts to be credited with interest earned. You have specifically advised that the White Pine County Board of County Commissioners is continuing actively to receive school funds, and is continuing to designate accounts to be credited with such interest payments. You have asked the following questions:

1. Is it the primary responsibility of boards of county commissioners to direct investment of school funds and to designate an account to be credited with interest earned? Incidental to this question you have asked whether the issue is affected by the 1967 amendment to NRS 355.170.

2. Should the appropriate board fail to so act, in the alternative may another board so act?

3. Must the directive to invest come from the governing board, or may it come from a clerk for the county commissioners or from the superintendent for the board of school trustees?

ANALYSIS

The solution to the questions posed is premised upon an initial distinction between authority to invest the permanent school fund, on the one hand, and the authority to receive interest earned by such investment and credit it to the proper fund, on the other hand.

The investment of the State Permanent School Fund is governed by NRS 355.050 through 355.110 inclusive. Such investment is placed exclusively in the hands of the State Board of Finance. NRS 355.050. No county governmental body, nor any school district has jurisdiction or authority to direct investment of the Permanent School Fund.

The procedure for such investment may be summarized as follows:

1. Quarterly, the State Controller notifies the board of finance regarding funds available for investment. NRS 355.060.

2. The board of finance determines how the fund should be invested, directs the State Controller to draw a warrant in favor of the State Treasurer, and the treasurer purchases securities as authorized by the board of finance. NRS 355.070.

NRS 355.170 is not involved in the investment of school funds. It relates to and governs investment of city and county funds. This statute confers no authority upon the governing bodies of cities or counties to act in any manner with respect to investment of school funds or credit of interest therefrom. The balance of NRS Chapter 355, except for NRS 355.050 through 355.110, specifically relates to investment of moneys other than those in the State Permanent School Fund. NRS 355.120.

Once interest is earned upon investment of school funds in accordance with the foregoing procedure, the disposition and ultimate credit thereof to various accounts is governed by NRS Chapter 387. The State Treasurer is the exclusive custodian of securities purchased by such investments. NRS 387.015. The interest earned by such investments is ultimately paid by the treasurer, upon the order of the superintendent of public instruction, into the State Distributive School Fund. This fund in turn is apportioned to the various school districts, by the State Board of Education, in accordance with the provisions of Chapter 322, Statutes of Nevada 1967. See NRS 387.030(2).

It is to be noted that, under NRS 387.040, the State Treasurer can only pay out school fund moneys in either of two ways:

1. To invest them through the board of finance as aforesaid; or

2. To the respective county treasurers for placement in the distributive school fund, as referred to above and more fully discussed below.

After interest has been earned by investment of the permanent school fund, it is paid by the State Treasurer to various county treasurers in accordance with the apportionment made by and upon the order of the superintendent of public instruction. The Legislature has created two specific funds on the county level for moneys used for school purposes. One is the county school district fund. NRS 387.170. The other is the county school district buildings and sites fund. NRS 387.177. The composition of the former fund is designated in NRS 387.175, as amended; and the latter in NRS 387.177. The composition of each of these funds is mutually exclusive.

The key provision governing credit of school moneys (including interest earned on investment of the State Permanent School Fund) is NRS 387.180. It reads as follows:

The board of trustees of each county school district shall pay all moneys received by it for school purposes into the county treasury at the end of each month to be placed to the credit of the county school district fund or the county school district buildings and sites fund as provided for in this chapter.

The county boards of school trustees have exclusive authority to determine the source of all school moneys and to direct the county treasurers to credit them to the proper accounts or funds. See NRS 387.210. Because the two funds depend on mutually exclusive sources, no element of discretion is involved. The duties of the various county treasurers and various county boards of school trustees are mandatory. No authority exists for any other agency to perform these specific functions if, for any reason, the proper boards fail to act. Should this be the case, however, appropriate remedies exist.

CONCLUSION

It is therefore the opinion of this office that:

1. Question No. 1 is answered in the negative.
2. Question No. 2 is answered in the negative.
3. The directive to invest permanent school fund moneys can come only from the State Board of Finance acting by majority vote.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

OPINION NO. 1968-494 PUBLIC EMPLOYEES; UNIONS; COLLECTI...

OPINION NO. 1968-494 Public Employees; Unions; Collective Bargaining—Collective bargaining and strikes by public employees are illegal in the State of Nevada. Public employers may adopt regulations prohibiting public employees from belonging to an organization which seeks to represent the employees for collective bargaining purposes.

Carson City, March 4, 1968

Mr. Neil Humphrey, Chancellor, University of Nevada, Reno, Nevada 89507

Dear Chancellor Humphrey: The Board of Regents of the University of Nevada has requested the opinion of this office concerning the legality of union organization and collective bargaining within the University system.

Within the past 2 months, Nevada Southern University officials have been advised by certain professors that they had organized a chapter of the American Federation of Teachers on that campus with 21 initial members. The president of this group immediately sought acceptance by the Board of Regents, and requested that the matter be placed on the agenda of the February 9, 1968, regents meeting. This office was informed of the request, and we instructed University officials not to consider it, nor to recognize any group carrying on union organizational activities, until we could investigate the matter and make our determination as to its legality.

Accordingly, we requested a meeting with the officers of the chapter, to determine the nature of their activities. Three officers voluntarily met with us and confirmed the fact that they had been chartered by the American Federation of Teachers, AFL-CIO, and that their desired purpose was to become the exclusive bargaining agent for the university professors at Nevada Southern, for purposes of collective bargaining with the university administration. We were provided a sample contract which was proposed to the Board of

Trustees of the State College System of California, along with a reprint of an issue of the Journal of the American Federation of Teachers.

It was mutually agreed that it would be advisable for their attorney to contact us so that we could discuss the legality of the situation. We were not contacted by their attorney, but rather received a letter from the regional vice-president of the A.F.T., wherein he expressed his displeasure that we questioned officers of A.F.T. Local 1818 at the Nevada Southern campus. It appeared to us, from the tenor of the letter, that a working line of communication would not be practical, and he was advised of our intention to make an independent study and determination.

It is obvious from the literature we received from the officers and other sources, that the objective of the A.F.T. is engage in collective bargaining with public institutions within this State, with the ultimate threat of strike. On page 11 of the reprint of the Journal of the American Federation of Teachers, in the article "Which Way for the Professors" by Dr. Israel Kugler, it is stated that the A.F.T. fully endorses a policy statement which included the following:

Freedom to Organize. Like any other professional or nonprofessional person, the teachers should be free to organize with others to protect group interests, or to join existing unions or other organizations for such purposes, including the right to strike. An administration that seeks to prevent the establishment of such an organization, hamper its activities, or discriminate against the members, infringes on the freedom of teachers. (Italics added.)

The sample contract we received provides, in part, the following:

1. A.F.T. would be the sole bargaining agent for academic employees.
2. A 20 percent salary increase.
3. Employer to pay the full cost of insurance for each academic employee and his dependents, covering hospitalization, sickness, medical, life, accident, disability, dental, and burial benefits.
4. Employer to pay the full cost of retirement benefits and when the employee terminates his employment, he may withdraw the entire accumulated amount, plus interest.
5. Five hundred dollars per year for verified expenses for research and travel to professional meetings.
6. Employer pays travel expense of prospective academic employees for interviews on campus.
7. A maximum of \$500 for moving expenses for new employees.
8. The maximum teaching load for undergraduate courses shall be nine semester or eight quarter units. Each two units of graduate teaching shall be considered the equivalent of three units of undergraduate teaching. All laboratory contact shall be equal to classroom contact hours. We understand this to mean that they will not work more than 9 teaching hours a week.
9. A student-teacher ratio of 15 to 1 shall not be exceeded.
10. The academic year under either the semester or quarter plan shall not exceed 150 instructional days, less state holidays which fall within the weeks of instruction.
11. The employer shall provide each full-time academic employee with a one-man office adequate (e.g., air conditioned) to facilitate research, study, and student consultation.
12. The employer shall provide at no charge to each academic employee a year-around automobile parking space.
13. After each 6 years of service, each academic employee shall receive a 1-year sabbatical leave with full salary, or after 3 years of service, each academic employee shall receive either a one-semester sabbatical leave with full salary or a full-year sabbatical leave with half-salary.
14. Any academic employee who has been employed for 1 year or more may be granted a leave of absence without pay, during which the employee shall be granted normal advancement in step for salary purposes and shall be eligible for promotion and tenure, but shall not be subject to non-retention.
15. Academic employees under medical care shall be granted whatever sick leave time with pay as may be required for recuperation.
16. No restraints other than those imposed by statute law shall be placed on an academic employee regarding the content of his teaching or conduct of his classes.

Grievance procedure and arbitration are also provided. As we attempt to show in this opinion, any such negotiated contract with the Board of Regents of the University of Nevada would be illegal and void.

ISSUES

1. Whether a strike by public employees would be illegal within the State of Nevada.
2. Whether public employees may engage in collective bargaining.
3. May public employers prohibit union activities by public employees?

ANALYSIS

Most periodical writers and many courts have cited the position of Franklin D. Roosevelt in laying the basis for legal discussion and decision concerning union organization, collective bargaining, and strikes by public employees. Since our former President was an ardent advocate of the labor movement during a crucial period of its development, we see no reason to deviate from this precedent. The following statement is pertinent to the present problem:

Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employees. * * * A strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it, is unthinkable and intolerable. (Italics supplied.) Quoted in *City of Alcoa v. International Brotherhood of Electrical Workers, Local Union, AFL-CIO*, 308 S.W.2d 476.

We attempt to show in this opinion that the concept of government and the privileged status of public employees has not changed to a great degree in the State of Nevada since President Roosevelt made this statement. We feel it has been eroded in other states through compromise with militancy, with the result apparent today in New York, Florida, San Francisco, and elsewhere. The rationale and the maintenance of this concept, we feel, is crucial to the maintenance of law and order in a democratic society. If law and order are not obeyed by those whose obligation it is to maintain government, the ultimate threat of anarchy is in sight. Teachers, policemen, firemen, garbage men, welfare workers, and other crucial public employees have struck, in violation of law, in other states. We wonder what the ultimate horror could be if a substantial part of government were subject to strike. The individual status of the public employee is not significant in this analysis. The important thing is that teachers and professors are public employees in this State. The unavailability of a health official to check a possible epidemic can be no less serious than allowing contamination of a city by refusing to collect garbage. The unavailability of firemen to prevent a city from burning is no less serious than the refusal of policemen to perform the duties imposed upon them by law to protect the public. The maintenance of guards at the state prison and doctors and nurses at the state hospital are of vital public concern. And who is to say that the maintenance of our educational system is any less important than other governmental functions, and that a strike by teachers and professors in our schools and university would be any less harmful to the public welfare? We do not.

We seek briefly to trace the evolution of the law on this subject, in order to arrive at a conclusion under our present day status.

A. Right to Strike.

In 1919, during the Boston police strike, Governor Calvin Coolidge declared that there is no right to strike against the public at any time, at any place, for any reason. At that date, this rule had long been accepted by government employers, government workers, and the public at large. 53 ABA Journal, p. 808. President Wilson characterized this same strike as "an intolerable crime against civilization." 31 ALR2d, at 1138.

The strike is the most formidable weapon that employees can utilize to enforce their requests of the employer. In private enterprise, the strike serves the employees as a means of balancing power between themselves and their own employers. Public employees are in a different position. To a certain extent they are their own employers, as taxpayers and voters. Public employees can express their grievances to their supervisors, to the public, and to the Legislature elected by the public, which is generally the final authority for determining conditions of public employment. They can do so without joining organizations whose ultimate purpose is to engage in illegal activities. We consider this to be the demonstrated objective of the AFT-AFL-CIO.

It is one thing to seek to improve one's already good financial and social condition in a proper manner; it is quite another to seek to accomplish this objective to the detriment of society.

In every case reported, the right of public employees to strike is denied unless otherwise authorized by statute. We have no such statutory authorization in Nevada. Some states have enacted laws providing for fine and/or imprisonment as a deterrent to such strikes. Some of the reasons for the rule are cited in *Norwalk Teachers' Assoc. v. Board of Education*, 83 A.2d 482, 31 ALR2d 1133 (Conn. 1951):

In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare.

Nevada Revised Statute 1.030 provides:

The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and the laws of this state, shall be the rule of decision in all the courts of this state. (*Italics added.*)

Under the common law, public employees did not have the right to strike, and this is the adopted law of Nevada. The Supreme Court of Michigan, in *City of Detroit v. Division 26, Street, Electric Railway and Motor Coach Employees*, 51 N.W.2d 228, 233 (1952), quoted the following:

The question is whether or not public employees do not have the right to strike. Under the common law, and there is no question about it as far as this court is concerned, there is no right to strike on behalf of public employees, for many reasons, some of which at least, might be paraphrased in the language of several of the decisions, that it is a means of coercing the delegation of the discretion which a public board or public body must exercise in its fulfillment of its duties.

It has been repeatedly stated that it is against public policy for public employees to strike. Many courts have held that a strike by public employees is against public policy, is unlawful, illegal, and may be restrained and enjoined.

There can be no doubt that the American Federation of Teachers, AFL-CIO, has as its objective within public and university school systems in the State of Nevada, the organization of teachers for collective bargaining purposes, with ultimate strike if they do not get their wishes. This group is organizing for an illegal purpose. It has done so and has been tolerated in other states on the premise that they could only collectively bargain, but could not strike. However, it has repeatedly advocated disobedience of the law, and has called illegal strikes that have paralyzed some of the largest school systems in the nation. We do not feel that an organization that openly calls for and demands disobedience of law and order should be tolerated within the framework of public institutions in the State of Nevada. We also express deep concern for those who by solemn oath have sworn to protect and defend the government of the State of Nevada, and who would advocate violation of its laws.

B. Collective Bargaining by Public Employees.

Although the law in the State of Nevada on this subject has not changed, some states in recent years have adopted specific legislation authorizing public employees to organize for the purpose of collective bargaining. However, most of these states also specifically prohibit strikes. It is quite apparent from what we see throughout the country today, that anti-strike legislation is worthless when labor organizations have no intent to obey the law. From the day public employees are organized and collective bargaining is at issue, the strike question is kept at the combustible stage. Jerry Wurf, President of the American Federation, State, County and Municipal Employees, was quoted in the March 19, 1966 AFL-CIO News as stating; "Without the right to strike, there can be no true collective bargaining for public employees."

An article in 18 Labor Law Journal 406 (July, 1967) contains the following relevant statements:

Once public policy has declared that public employees have the right to engage in collective bargaining, I believe that the question of public employees' striking has already been answered, particularly if legislation and public sentiment provide no remedy for the illegal action. Granting the right to engage in collective bargaining by public employees, and then denying them the right to strike is like inviting a child to a candy parlor without allowing the child to taste the candy. The right to engage in collective bargaining assumes by tradition of even the least sophisticated the right to fight to support one's demands.

A very real distinction between collective bargaining in the public and private sector is explained by the chairman of the American Bar Association's Committee on Law and Government Employee Relations in 15, *Labor Law Journal* 8 (1964):

One of the essentials of bargaining in private industry is that management have power to make binding commitments in respect to economic and other matters affecting the terms and conditions of employment, and, having made such commitments, the ability to make them good.

The management of governmental enterprise frequently lack such authority. Its financial resources are determined by some other organ of government, and, since it is not marketing a service or producing a product the price of which it may adjust in order to increase revenues, bargaining over many matters may be an illusory exercise. Can there be meaningful negotiations on salaries (or any other emolument of value), hours of work, or terms and conditions which have budgetary implications with public management that neither knows nor decides the amount of money which it will have during the next fiscal year? And what meaning does public management's agreement to an improvement in employee welfare have if necessary funds are not appropriated?

We may look again to a statement by President Roosevelt reflecting the established law:

All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. (Letter to Luther Steward, President of National Federation of Federal Employees, August, 16, 1937).

At this point, we must stress that public employees have the unquestioned right to associate and present their views and demands to public officials and the Legislature, under the first amendment of the United States Constitution and Article 1, Section 10 of the Nevada Constitution. However, the rights of petition, peaceable assembly, and free speech should not be confused with collective bargaining with a labor union. The following authorities relate to picketing and collective bargaining:

When public employees do attempt to picket, their actions are usually interpreted by the courts as an attempt to force their employer into a collective bargain contract. In most jurisdictions, courts hold that governmental employers do not have the authority to enter into collective bargaining agreements in the absence of specific statutory authority. Thus where the specific statutory authority is not available, the picket is considered to be promoting an "illegal purpose" and therefore is not regarded as a constitutionally protected exercise of freedom of speech. (46 *Nebraska Law Review* at page 888 (1967)). (Italics added.)

In *Local 507, I.B.E.W. v. Hastings*, 138 N.W.2d 822 (Nev. 1965), the court said:

The generally accepted rule established in other jurisdictions on the issue, which we adopt, is that a public agency or governmental employer has no legal authority to bargain with a labor union in the absence of express statutory authority.

Public employers cannot abdicate or bargain away their continuing legislative discretion and are therefore not authorized to enter into collective bargaining agreements with public employee labor unions. Constitutional and statutory provisions granting the right of private industry to bargain collectively do not confer such right on public employers and employees. 31 A.L.R.2d at 1170.

An agreement by a board of education to hire only union members would clearly be an illegal discrimination. *Norwalk Teachers' Assoc. v. Board of Education*, 83 A.2d 482 (Conn. 1951).

Some laws and authorities, in addition to denying the right to collective bargaining, also deny the right to join a union. Others qualify this position in such ways as denying right to collective bargaining but permitting a representative or spokesman of public employees to present grievances. *Mugford v. Mayor and City Council of Baltimore*, 44 A.2d 745 (Md. 1945); denying right of municipal employees to collective bargaining, while recognizing their right to join a union, *Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947); recognizing right of mail clerks to organize for collective action but not for collective bargaining, *Railway Mail Assoc. v. Corsi*, 56 N.E.2d 721 (N.Y. 1944).

Many of the authorities and the various legislatures which have allowed collective bargaining on the basis that strikes were illegal and would not result if collective bargaining failed, have found that such hopes and beliefs were illusory, and that strikes, in fact, have been called despite the law. An excellent example of this is manifest in *Norwalk Teachers' Assoc. v. Board of Education*, supra, wherein the court recognized the right of teachers to organize for limited purposes. Questions presented in the case included the right of teachers to strike and bargain collectively, which were answered as follows:

1. "Under our system, the government is established by and run for all of the people, not for the benefit of any person or group. The profit motive, inherent in the principle of free enterprise, is absent. It should be the aim of every employee of the government to do his or her part to make it function as efficiently and economically as possible. The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle."

2. Questions (c) and (d) in effect ask whether collective bargaining between plaintiff and defendant is permissible. The statutes and private acts give broad powers to the defendant with reference to educational matters in Norwalk. If it chooses to negotiate with the plaintiff with regard to the employment, salaries, grievance procedure and working conditions of its members, there is no statute, public or private, which forbids such negotiations. It is a matter of common knowledge that this is the method pursued in most school systems large enough to support a teachers' association in some form. It would seem to make no difference theoretically whether the negotiations are with a committee of the whole association or with individuals or small related groups, so long as any agreement made with the committee is confined to members of the association. If the threat of strike is absent and the defendant prefers to handle the matters through negotiation with the plaintiff, no reason exists why it should not do so." (Italics supplied.)

There might not be a theoretical difference between negotiating with unions or other teacher groups, but there certainly is a practical difference. The strike threat is present from the day unions seek to organize public employees. The reasons advanced to justify limited collective bargaining in the Norwalk case are no longer valid.

We are of the opinion that collective bargaining with public employees in the State of Nevada would be illegal. Collective bargaining in its very essence contemplates the strike as a weapon to enforce the demands of employees.

C. Right of Public Employees to Belong to a Union in the State of Nevada.

It is one thing to say that public employees have the right to associate and express their views, but the crucial question arises concerning their association with an outside labor union. It has been said that:

Unionization of the public service diverts the loyalty, allegiance and obligations of the employees from the people and their government which are entitled to them, to the union * * * Such is intolerable situation is utterly incompatible with sound and orderly government. It constitutes a threat to state sovereignty. 16 Labor Law Journal at 687 (1965).

The first amendment right of association is a limited right, and some courts have held that the limitations include a prohibition of governmental employees' associating with labor unions. Under this view, association with organized labor is considered antagonistic to the duties entrusted to public employees and the overriding public welfare justifies limiting the employees' right of association.

Chief among the reasons advanced by the courts in denying the right of public employees to engage in union activities are the sovereignty of the public employer; the fact that the government is established by and run for all of the people and not for the benefit of any person or group; that the profit system is missing in public employment; that public employees owe undivided allegiance to the public employer; and that the continued operation of public employment is indispensable in the public interest. 31 A.L.R.2d 1152.

In *Percy v. Board of Police Commissioners*, 178 P.2d 537 (Cal.1947), the California Supreme Court held that the board could, by rule, prevent police officers from joining a labor organization, and stated:

It should be emphasized that the scheme of government basically is created by the constitution; it is the source of government. Offices and agencies are established; powers are authorized; duties are imposed on individuals and governmental agencies, all for the purpose of carrying out the will of the people. All public officials, whether national or state, executive, administrative, or judicial, and all public employees, are public servants. There is but one master, the people. Hence, the common expression that, "This is a government of laws and not of men." The allegiance of all public servants is to the people; obviously there can be neither alienation nor division of this allegiance if constitutional government is to continue. The police commission, therefore, not only had the power, but it was the manifest duty, to adopt and enforce the resolution herein considered. The failure to do so in effect would have amounted to a surrender of power, a dereliction of duty, and a relinquishment of supervision and control over public servants it was their sworn duty to supervise and direct.

We do not feel that there exists a legitimate legal distinction between uniformed police and teachers' rights to organize. We believe the rule expressed in the *Percy* case is a good one, and the reasoning excellent, and that it could be applied in Nevada.

Regulations and statutes have been adopted in other states applicable to teachers. *Seattle High School Chapter v. Sharples*, 293 P. 994 (Wash. 1930), concerned the adoption of a resolution by the directors of a school district that no person shall thereafter be employed as a teacher while a member of the American Federation of Teachers, or any local thereof, and requiring a declaration from the proposed teacher, as a condition of employment, that he or she is not a member of the Federation and will not become a member thereof during the term of contract. The court held that this was within the authority of the board, to adopt and enforce rules and regulations as may be deemed essential to the well-being of the school.

Public employees who refuse to obey the resolution of public employers prohibiting them from joining unions, or orders of public employers requiring employees who have joined unions to resign, have been held validly discharged on the theory of insubordination. 31 A.L.R.2d 1162.

It is our opinion that collective bargaining and strikes by public employees are illegal within the State of Nevada. The Board of Regents and school districts can adopt regulations prohibiting teachers from belonging to an organization or union which has as its demonstrated objective, collective bargaining with public institutions.

If such a regulation is feasible and adopted, then the question can be met, if there is a question, as to what can be done effectively to channel the protests of public employees over their conditions of employment into workable, peaceful, dispute settlement machinery, in order to assure the continuity of public service.

CONCLUSION

Collective bargaining and strikes by public employees are illegal in the State of Nevada. Public employers may adopt regulations prohibiting public employees from belonging to an organization which seeks to represent the employees for collective bargaining purposes.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Daniel R. Walsh, Chief Deputy Attorney General

March 6, 1968—Blood Alcohol Tests—Memorandum Opinion—Blood may be extracted by a nurse or technician, as well as by physician, if all other requirements of Schmerber are met. Supplements AGO 470 and 487.

OPINION NO. 1968-495 MODIFIES ATTORNEY GENERAL OPINION ...

OPINION NO. 1968-495 Modifies Attorney General Opinion 68-492, Nevada Tax Commission; Assessment of Penalties—Penalties imposed because of violation of NRS 362.230 should be paid into State Treasury.

Carson City, March 13, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: In a letter dated February 20, 1968, you inquired of this office as follows:
Should the penalty imposed by NRS 362.230 be remitted by the taxpayer to the State of Nevada or to the county in which the mine is located?

ANALYSIS

Under NRS 362.150 it is provided that every tax levied on the proceeds of mines is made a lien on the mines or mining claims from which the ores or minerals are extracted for sale or reduction. The lien remains until all taxes are paid.

Thus the county in which said taxes have been assessed and in which said mine is operated is protected by the lien.

The penalties imposed by NRS 362.230 relate strictly to a failure to file semi-annual statements as required by NRS 362.110. This is completely different from a penalty for failure to pay a tax as set forth in NRS 361.483. The penalties assessed for failure to pay taxes are added to the original tax and go to the county, but here we have a violation of a state law enacted to enable a state agency to fulfill its obligation in arriving at the amount of taxes to be paid on the net proceeds of mines. Thus the penalty helps to defray the added expense attendant upon arriving at the tax to be paid.

The case of *State v. Huffaker*, 11 Nev. 300, cited in our earlier opinion, relates strictly to penalties invoked for non-payment of taxes, and thus is not in point where penalties are invoked for failure to file a statement with a branch of state government.

In the case of an indebtedness owed the State the procedure for the collection of such indebtedness is set forth with clarity, (NRS 227.230-240) Upon notification by the State Tax Commission that penalties for failure to file the statements required by law have been assessed against mine owners or operators, the State Controller should notify those penalized of the amount of penalty due the State of Nevada and requesting payment to the State Treasurer by a specified date of the amount owed. If such sums are not paid the Attorney General should be directed by the State Controller to institute suit in the court having jurisdiction.

CONCLUSION

It is therefore the opinion of this office that the penalty imposed by NRS 362.230 should be remitted to the State Treasurer and not to the county.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-496 EDUCATIONAL COMMUNICATIONS COMMISS...

OPINION NO. 1968-496 Educational Communications Commission, Powers of—Commission has power to modify lease agreement so as to include an option to purchase. The commission may also exercise the option and subsequently transfer title of ownership at cost to the participating school districts.

Carson City, March 14, 1968

Mr. Hugh J. Smith, Executive Director, Educational Communications Commission, Carson City, Nevada 89701

Dear Mr. Smith: You have inquired of this office as to the power of your commission to modify a lease arrangement covering the lease of television equipment to school districts, so as to include an option to purchase said equipment, and to transfer said equipment at cost to participating school districts.

ANALYSIS

You have advised us that the procedural steps taken were as follows:

1. The school districts of the State committed their ESEA III funds to a cooperative statewide ETV planning and evaluation project.
2. A contract for leasing 25 teletrainer units (video tape recorder, camera, tripod, microphone, television monitor, and roll-around steel cabinet) was entered into by Clark County, the applying agency for the project.
3. The equipment in question is now in use in the school districts.
4. The lease agreement was made only after receiving bid proposals.

On June 30, 1967, a lease agreement was entered into by and between the Clark County School District and Audio Visual of Redlands, California, for the lease of 25 television units.

On April 27, 1967, the Legislature enacted Chapter 475 of the 1967 Statutes of Nevada, creating an Educational Communications Commission and delineating the duties and powers of said commission. The purpose, of course, was to provide education through the public schools by means of open and closed circuit television, instructional television fixed services, educational radio, two-way radio, microwave, TWY facsimile, and all other electronic communications devices.

Among the powers given to the commission were the powers to: (1) enter into agreements with federal, state, public or private agencies, departments, institutions, firms, corporations, organizations, or persons for the production or transmission, or both, of all systems of programming used on a statewide educational communications network; (2) to serve as the central agency to acquire and contract for the production and distribution for all systems of educational programming; (3) to serve as the central agency to acquire and contract for the production and distribution of all systems of educational programming.

On the first of July, 1967, an agreement between Clark County School District and the Educational Communications Commission became effective. This agreement provided for the assumption by the commission of the functions, obligations, and duties of the school district, under the terms of a grant from the U.S. Department of Health, Education, and Welfare (Grant OEG 4-6-001643-0070). This agreement was ratified by the approval of the Attorney General.

CONCLUSION

In view of the broad powers given to the commission it is the opinion of this office that (1) the current lease may be amended so as to include an option to purchase, and (2) that the commission may exercise the option and subsequently transfer title of ownership at cost to the participating school districts.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-497 PRESENTENCE INVESTIGATION AND PROB...

OPINION NO. 1968-497 Presentence Investigation and Probation—When a presentence report has been rendered in accordance with NRS 176.135, NRS 176.185 neither requires nor authorizes a subsequent probation investigation and report as a condition for granting probation.

Carson City, March 15, 1968

Mr. Paul R. Toland, Director, Department of Parole and Probation, Carson City, Nevada 89701

Dear Mr. Toland: By your letter of March 7, 1968, you have sought a clarification of the provisions of NRS 176.135 and 176.185, governing presentence investigations and reports, and reports incident to granting of probation, respectively. NRS 176.135 is contained in that portion of Chapter 176 entitled "Presentence Investigation"; and NRS 176.185 appears in that portion of the same chapter entitled "Probation."

You have posed the following question: After a presentence investigation is made and the report thereon considered by the court, may the defendant or his counsel then ask for a probation investigation and report which the probation has 30 days to complete?

ANALYSIS

The question posed is whether the respective statutes contemplate a single investigation and report or separate and distinct investigations and reports to be rendered.

NRS 176.135 provides:

The probation service of the district court shall make a presentence investigation and report to the court upon each defendant who pleads guilty or nolo contendere or is found guilty before the imposition of sentence or the granting of probation unless the court otherwise directs. (*Italics added.*)

NRS 176.145, in subsections 1 and 2 thereof, provides:

The report of the presentence investigation shall contain:

1. Any prior criminal record of the defendant;
2. Such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant; * * * (*Italics added.*)

NRS 176.185, at subsection 2 thereof, provides:

2. The district judge shall not grant probation until a written report is received by him from the chief parole and probation officer. The chief parole and probation officer shall submit a written report not later than 30 days following a request for a probation investigation from the county clerk, and if no report is submitted by the chief parole and probation officer within 30 days the district judge may grant probation without the written report.

The foregoing statutory provisions come from different sources. NRS 176.185 is merely a reenactment of earlier Nevada law found in former NRS 176.300. However, NRS 176.135 and 176.145 have their source in Rules 32 (c)(1) and (c)(2), respectively, of the Federal Rules of Criminal Procedure.

The purpose of the federal counterpart of NRS 176.135 is to assist judges in the exercise of discretion in fixing the kind and extent of punishment. It gives judges the benefit of information beyond the scope of what could have been received in trial. See 4 Fed. Prac. & Proc. (Rules Ed.) § 2265. Although such information is and was important as an aid in indeterminate sentencing, it is even more important in determinate sentencing, now the rule in Nevada. This, at least in part, suggests why NRS 176.135 was enacted in 1967.

The language of NRS 176.135 and 176.145 as emphasized above, shows clearly that the Legislature contemplated use of the presentence report not only for the purpose of assistance in imposing sentence, but also for assistance in granting probation.

There is nothing in the language of either part of the statute which requires more than one report. The contents of the presentence report, defined above, and of the probation report as defined in NRS 176.195 are substantially the same. The presentence report is not necessarily required in every case, although it will be rendered unless the court directs otherwise. The court may be adequately informed without it, and may have a conviction not subject to probation.

However, where a proper presentence report has already been rendered, a distinct probation report saying the same thing would amount to needless duplication of effort and expense, as well as a waste of time to the court, to the department, and to the defendant. We do not believe this was intended by the Legislature. The law merely requires a report prior to granting probation, unless such is not rendered within 30 days, in which case probation can be granted without it. Such report may be either a presentence report or a probation report. It need not be both of these. Accordingly, we conclude that the question posed must be answered in the negative.

CONCLUSION

It is therefore the opinion of this office that when a presentence report has been rendered in accordance with NRS 176.135, NRS 176.185 neither requires nor authorizes a subsequent probation investigation and report as a condition for granting probation.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

OPINION NO. 1968-498 TAXES; NET PROCEEDS OF MINES—Deduc...

OPINION NO. 1968-498 Taxes; Net Proceeds of Mines—Deduction allowed under NRS 362.120(2h) applies to industrial insurance covering employees under Nevada Industrial Commission requirements.

Carson City, March 27, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: In answer to your letter of March 20, 1968, requesting an interpretation of NRS 362.120(2h), this office feels that the Legislature did not intend to go beyond protection of workers in allowing industrial insurance as a deduction from the tax on the gross proceeds of mines.

This section reads as follows:

All moneys expended for premiums for industrial insurance, and the actual cost of hospital and medical attention and accident benefits and group insurance for all employees.

This is indicated, for example, by NRS 362.120(2f) where the actual cost of fire insurance is allowed. In arriving at a decision as to the interpretation of NRS 362.120(2h) the entire paragraph must be read together. It will be noted that a comma follows the words "industrial insurance," and further allowances for deductions are made where moneys are expended for hospital and medical attention, accident benefits, and group insurance for all employees.

We feel the paragraph should be interpreted so as to provide deductions for all moneys expended * * * for all employees—with the deductible items between these designations.

CONCLUSION

It is the opinion of this office that the deduction from the gross proceeds of mines allowed by NRS 362.120(2h) applies to industrial insurance premiums arising by reason of participation in the insurance required by the Nevada Industrial Commission.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-499 WOMEN, EMPLOYMENT OF—One-half hour...

OPINION NO. 1968-499 Women, Employment of—One-half hour lunch breaks provided by law for each 8-hour day are not on company time and are not to be computed as a part of the 8-hour work period.

Carson City, April 1, 1968

Mr. Stanley P. Jones, Labor Commissioner, Carson City, Nevada 89701

Dear Mr. Jones: You have asked this office to review an opinion (Attorney General Opinion No. 47-47, dated May 1, 1947) which holds that the half hour meal period allowed female employees was on company time and included in the 8-hour work period provided by law.

ANALYSIS

With this opinion of our distinguished predecessor we disagree. Twenty-one years have elapsed since the opinion was written, and the trend of labor-management negotiation has advanced to the point where this edict is completely at variance with present practice.

The law as first enacted (Chapter 208 of the 1937 Statutes of Nevada) provided as follows:

No employer shall employ a female for a period of more than eight hours of continuous labor unless such period is broken by a meal period of at least one-half hour * * *.

In 1947, this section was amended by Chapter 68 of the 1947 Statutes of Nevada, by changing the above-cited provision as follows:

No employer shall employ a female for a period of more than eight hours of continuous labor unless such period is broken by a meal period of at least one-half hour, after the end of the third hour and before the sixth hour of work * * *. (Italics indicates the amendment.)

This amendment was to cure the ambiguity in the law as enacted, so as to clearly define the time during which a female employee was entitled to have her meal break.

We agree with the law that the health and welfare of the female workers of this State are of concern to the State, and that reasonable hours should be restricted to not more than 8 hours in any 1 day and not more than 6 days in any calendar week. But these hours of restriction are related to hours of service (NRS 609.030.1).

Black's Law Dictionary defines "service" as "duty or labor to be rendered by one person to another, the former being bound to submit his will to the direction and control of the latter."

There is no labor to be rendered during meal periods, at which time an employee has retired from labor to refreshment. The burden sought to be relieved by the Legislature is, for the period of the meal, no longer carried by the employee. The employee still "works" only 8 hours during the day.

CONCLUSION

It is therefore the opinion of this office that meal periods, referred to in the statute as lunch periods, are not on company time and are not included as a part of the 8-hour work period per day required by the law.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-500 TAXATION; FIRE PROTECTION DISTRICT...
OPINION NO. 1968-500 Taxation; Fire Protection District—NRS 474.190.2, 474.190.3, and 474.200 interpreted.

Carson City, April 2, 1968

Mr. Roy E. Nickson, Secretary, Nevada State Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: You have requested an opinion of this office as to an interpretation of NRS 474.190.2 which reads as follows:

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

The money to be raised is based upon the annual budget prepared by the Fire Protection District. (NRS 474.190.1)

NRS 474.190.3 clearly indicates that, in determining the tax to be raised for both establishing and equipping the district with firefighting facilities, and for maintaining the district, both real property to the extent of 20 percent of the assessed value and personal property and improvements to the extent of 80 percent are to be considered in establishing the tax formula.

The 1967 session of the Legislature amended NRS 474.200 by providing that, at the time of making the levy of county taxes for that year, the county commissioners shall levy the tax certified upon all property, both real and personal, subject to taxation within the boundaries of the district, including the net proceeds of mines. This conforms to our interpretation of NRS 474.190.3.

In interpreting the statute it is to be noted that it is not the amount of money to be expended that shall not exceed 1 percent of the assessable property in the district, but the amount of money to be raised. The same is true of the one-half of 1 percent allotted to maintaining the district. In preparing the budget, however, the district must take into consideration the carryover, if any, of unused funds. The taxpayer, not the district, is to be given the break arising by reason of surplus funds, so that it might be possible that a tax of 1 percent in one instance, and one-half of 1 percent in the other, might not be necessary.

The term "money to be raised" of course refers to tax revenues and does not refer to contributions, gifts, grants, etc.

The district has been established, so we need no longer consider that phase of the statute. The word "equipping" means only one thing—providing the materials and equipment necessary to operate as a fire protection district. We find no ambiguity or circuitous meaning in this word. Therefore, the 1 percent limitation does not, and cannot, refer to firefighters' salaries.

With regard to the one-half of 1 percent limitation for maintenance, we feel that maintenance is not limited to moneys obtained by a tax levy, and that revenues received outside the tax limitation could be used for that purpose.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-501 NRS 355.170 CONSTRUED; INVESTMENT ...
OPINION NO. 1968-501 NRS 355.170 Construed; Investment of County School Funds—Supplements
Opinion No. 68-493, dated February 27, 1968.

Carson City, April 11, 1968

The Honorable Merlyn H. Hoyt, District Attorney, White Pine County, White Pine County Courthouse, Ely,
Nevada 89301

Dear Mr. Hoyt: By your letter of April 5, 1968, you sought an enlargement and clarification of our earlier Opinion No. 68-493, issued February 27, 1968. The earlier opinion was issued in response to your letter of February 13, 1968. In that earlier letter you requested, in general terms, advice regarding the authority to receive and invest school funds.

In the opinion heretofore issued, we traced the authority for investment of school funds from the state level at which the State Permanent School Fund was managed and invested, and the resulting income therefrom was processed through the State Distributive School Fund and disbursed to the various counties in accordance with the formula for apportionment provided by statute. The opinion then dealt with the mechanics of crediting moneys so received by each county to the respective operative school funds at the county level. These funds are the county school district fund and the buildings and sites fund.

By your letter of April 5, 1968, you indicated that your inquiry was intended to be directed to the county distributive school fund. We conclude this inquiry to address itself to the authority for investment of funds at the county level, more specifically, the funds contained in the county school district fund and the buildings and sites fund. Your letter of April 5, 1968, so advises that the White Pine County superintendent of schools and his counterparts in other counties are presently investing such county funds in short-term obligations and that such investment is based on the 1967 amendment to NRS 365.170.

In this connection, you have posed the following questions:

1. Pursuant to NRS 355.170, as amended, is it the primary legal responsibility of the board of county commissioners to order the investment of school funds and to designate an account to be credited with interest earned?
2. In the event the appropriate board which has the legal responsibility to make investments and credit interest does not act, then in the alternative may another board so act?
3. Finally, regardless of the body which is authorized to direct the investments, must the directive itself come from the governing body or may it come from the county clerk for the county commissioners or the superintendent for the school trustees?

ANALYSIS

Initially, we distinguish between the State Distributive School Fund and the reference in your letters to the distributive county school funds. This analysis is based upon the assumption that by the latter term you intend to refer to the county school district fund and to the county school district buildings and sites fund. The State Distributive School Fund is not a fund available for investment either at the county level or elsewhere. Rather, it is a fund through which is processed and transmitted to the respective counties the income realized from investment of the State Permanent School Fund. It is administered by the State Treasurer.

With respect to investment of the county school district fund and the county school district buildings and sites fund, the governing legislation appears in Statutes of Nevada, 1967, Ch. 149, p. 275. Section 1 of this act amends NRS 355.170 and subsection 2 of the act adds to Ch. 355 of Nevada Revised Statutes a new section.

NRS 355.170, subsection 4, as so amended, reads as follows:

The board of county commissioners or governing body of an incorporated city may invest any moneys apportioned into funds and not invested pursuant to subsection 2 of this section and any moneys not apportioned into funds in bills and notes of the United States Treasury, the maturity date of which shall not be more than 1 year from the date of investment. Such investments shall be considered as cash for accounting purposes, and all the interest earned thereon shall be credited to the general fund of the county or incorporated city.

The new section of Chapter 355 of Nevada Revised Statutes added by section 2 of the act at subsections 1 and 2 thereof reads as follows:

The governing body of any local government agency, whether or not it is included in the provisions of Chapter 354 of NRS, may direct its treasurer or other appropriate officer to invest its moneys or any part thereof in any investment which is lawful for a county or incorporated city pursuant to NRS 355.170.

In case of conflict, any order made pursuant to subsection 1 of this section shall take precedence over any other order concerning the same moneys or funds pursuant to subsection 4 of NRS 355.170.

It will be noted that under NRS 355.170, subsection 4, the board of county commissioners or the governing body is vested with authority to invest moneys in various county funds available for the purpose. The introductory language of subsection 1 of the new section refers to the governing body of any local government or agency. At first impression, one is tempted to conclude that this terminology could refer either to the county board of school trustees or the county commissioners. We believe that this was not the intention of the Legislature, and that belief is based upon the closing portion of that subsection which refers to, "any investment which is lawful for a county or incorporated city pursuant to NRS 355.170." We take this language to mean that the authority conferred by said section is intended to supplement the authority conferred by NRS 355.170, subsection 4. There is thus created legislative authority conferring the power of investment of school funds at the county level not only upon the county commissioners or governing body of an incorporated city within that county, but also upon the governing body of any local governmental agency, such as a board of school trustees or the governing body of an unincorporated city.

Subsection 2 of the new section added by the act provides a basis to resolve conflict in orders for investment by specifying that investments made under the new section take precedence over investments made pursuant to NRS 355.170, subsection 4. We construe this section to mean that conflict may be resolved by specific preferences if conflicts exist. We do not believe that this section is intended to confer primary responsibility to make investments or credit interest. We believe that the Legislature intended to confer authority upon either type of governmental body but did not intend to dictate primary and secondary responsibility. Had the Legislature chosen to do so, it would have used specific language delineating primary and secondary responsibility. However, it did not adopt such language but merely provided a basis to resolve conflicts should they arise. We, therefore, conclude that it is not the primary legal responsibility of the board of county commissioners to order investment of school funds at the county level.

It will be seen from the foregoing analysis that, since these two new statutes confer not only upon the county commissioners but also upon any local government or agency the authority to make investments and credit interest, in the event one board or agency does not so act, the other or others are authorized and free to do so.

There is nothing in either section which indicates that the directive for investments, whatever body, agency or commission intends to make them, may come from either with county clerk of the county or from the superintendent for the school trustees. The statute directs that the board of county commissioners or the governing body of an incorporated city must be the initiating agency. The same is true of the governing body of any local agency or government. These bodies can act only as bodies and not through other designated or desired agents. We, therefore, conclude that the directive for the investment must come from the governing body and not from an individual officer or agent.

CONCLUSION

It is therefore the opinion of this office that Question No. 1 must be answered in the negative; that Question No. 2 must be answered in the affirmative; and, that in respect to Question No. 3 the directive must come from the governing body.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

OPINION NO. 1968-502 PUBLIC EMPLOYEES RETIREMENT ACT—Em...
OPINION NO. 1968-502 Public Employees Retirement Act—Employees of the Nevada Municipal Association, who are not officials or employees of municipalities covered by the Public Employees Retirement Act, are not eligible to receive benefits under the act.

Carson City, April 16, 1968

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada 89701

Dear Mr. Buck: You have inquired as to whether the Nevada Municipal Association qualifies as a public employer under NRS 286.070.

ANALYSIS

NRS 286.070 reads as follows:

“Public employer” defined.

1. As used in this chapter, “public employer” means the state, one of its agencies or one of its political subdivisions, irrigation districts created under the Laws of the State of Nevada, and the Las Vegas Valley Water District, created pursuant to Chapter 167, Statutes of Nevada, 1947, as amended.
2. State agencies are those agencies subject to state control and supervision, including those whose employees are governed by Chapter 284 of NRS, unless specifically exempted therefrom, and those which deposit funds with the state treasurer.

The Nevada Municipal Association is composed of a group of municipalities whose aim is the advancement of the causes of such municipalities as are in the public interest.

It is not an agency of the State nor of one of its political subdivisions. It is not an agency subject to state control nor to state supervision and does not include employees who are governed by Chapter 284 of the Nevada Revised Statutes, or exempted therefrom, nor does it deposit funds with the State Treasurer. The employees are not in every instance public officers of the State of Nevada as defined by NRS 286.040(1).

According to the bylaws of the association all duly accredited officers and employees of member cities shall be members of the association. Of course, if the cities they serve are members of the retirement system, they are already covered, but this does not apply to those employees who are not city employees or officials.

CONCLUSION

In view of the fact that the Nevada Municipal Association and its employees who are not officials or employees of cities covered by the act do not meet any requirement of law which would entitle them to benefits arising out of the Public Employees Retirement Act, it is the opinion of this office that your question must be answered in the negative.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-503 COLORADO RIVER COMMISSION; LAS VEG...

OPINION NO. 1968-503 Colorado River Commission; Las Vegas Valley Water District; Conflict of Interest—
A person cannot at one and the same time serve under contract as counsel to the Colorado River
Commission and under separate contract as manager of the Las Vegas Valley Water District. Conflict of
interest arises as a result of such dual employment.
Carson City, April 24, 1968

Mr. Leonard R. Fayle, President, Las Vegas Valley Water District, Box 4427 P.O. Annex, Las Vegas, Nevada
89102

Dear President Fayle: You have inquired as to whether an administrator of the Colorado River
Commission, whose appointment terminates April 30, 1968, may act after that date as an employee of that
commission, at a fixed compensation, to consult with the commission and its staff at all reasonable times and
hours on all phases of the commission's work wherein the commission may need or desire his advice and
counsel, and at the same time act under separate contract as full time manager of the Las Vegas Valley
Water District.

ANALYSIS

NRS 281.230, as amended by the 1967 Legislature, reads as follows:

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

- (a) State, county, municipal, district and township officers of the State of Nevada;
- (b) Deputies and employees of state, county, municipal, district and township officers; and
- (c) Officers and employees of quasi-municipal corporations.

2. Any contract or transaction prohibited by this section entered into with any of the persons
designated in subsection 1, with the knowledge of the party so entering into the same, shall be void.

The question thus arises as to whether the acceptance by the administrator of the Colorado River
Commission of employment as general manager of the Las Vegas Valley Water District would give rise to a
conflict of interest incompatible with the welfare of the citizens of this State, should he, subsequent to his
appointment as such manager, serve as counsel to the commission.

In Opinion No. 55-8 dated February 7, 1955, and again in Opinion No. 123 dated October 26, 1955,
this office held that the act of 1947 as amended in 1949 and 1951 was so far reaching as to create an
autonomy insofar as the Las Vegas Valley Water District was concerned, and insofar as its powers with
regard to water were concerned. We held that all cities within the district, and all boards and commissions,
including the Public Service Commission, had powers subordinate to those of the district, once the district
had acquired works or property in accordance with law.

The Colorado River Commission is authorized by law to receive, protect, safeguard, and hold in trust
all water and water rights, and all other rights, interests or benefits in and to the waters of the Colorado River
and to the power generated thereon now held by or which may hereafter accrue to the State of Nevada
under and by virtue of any act of Congress of the United States or any compacts or treaties between states
to which the State of Nevada may become a party, or otherwise (NRS 538.170).

Under NRS 538.180, the commission is empowered to sell water on such terms as the commission
shall determine.

Under Public Law 89-292 of the 89th Congress, the Secretary of the Interior was authorized to
construct, operate, and maintain the Southern Nevada Water Project, with facilities required to provide water

from Lake Mead on the Colorado River for distribution to municipalities and industrial centers within Clark County, Nevada.

Under Section 3 of this act, the Secretary was authorized to enter into a contract with the Colorado River Commission of Nevada, or other duly authorized state agency, for the delivery of water and for repayment of the reimbursable construction costs.

The Las Vegas Valley Water District and Colorado River Commission now carry on substantial contractual relations with each other, and this contractual association will be enlarged in scope and size upon completion of the water project authorized by Congress.

It stands to reason, then, that should the present administrator of the Colorado River Commission be retained on a contractual basis to advise the commission on matters such as the sale or distribution of water, and at the same time act under separate contract as manager of the Las Vegas Valley Water District, there would have to be, under certain circumstances involving these two entities in the sale or distribution of water by one to the other, a conflict of interest.

The mere fact that one so appointed agrees to withdraw his advice should such a conflict arise, does not cure the statutory prohibition. The law is not aimed at any certain individual, but at an overall relationship that is contrary to public policy.

CONCLUSION

It is therefore the opinion of this office that one cannot serve as counsel on a contractual basis to the Colorado River Commission, and at the same time serve as manager of the Las Vegas Valley Water District.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-504 EMPLOYMENT AGENCIES—Agencies may c...

OPINION NO. 1968-504 Employment Agencies—Agencies may charge fee in accordance with statute for placement of employee in a position or job lasting less than 7 days.

Carson City, April 29, 1968

Mr. Stanley P. Jones, Labor Commissioner, State of Nevada, Carson City, Nevada 89701

Dear Mr. Jones: You have asked this office to interpret NRS 611.260(2) which reads as follows:

2. Where the applicant is employed and the employment lasts less than 7 days by reason of the discharge of the applicant, the employment agency shall return to the applicant the fee paid by him to the employment agency.

ANALYSIS

It will be noted that the language of this statute is not if the employment lasts for less than 7 days, but if the employment lasts less than 7 days due to the discharge of the applicant. In the latter case only the fee paid the employment agency is to be returned.

This is substantiated by NRS 611.220 where the commission of the employment agency is set at a maximum of 15 percent of the first month's salary or compensation received or paid for such employment.

This latter phrase contemplates situations where less than a month is worked.

CONCLUSION

An employment agency is not precluded from charging a fee when the applicant accepts a temporary placement for less than 7 days.

Similarly an employment agency charging a fee which does not exceed 15 percent of the amount of wages or salary received from a placement of less than 7 days, does not violate NRS 611.260(2).

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-505 TAXATION; UNPATENTED MINING CLAIMS...

OPINION NO. 1968-505 Taxation; Unpatented Mining Claims—Transfer or conveyance of possessory interest in unpatented mining claim subject to taxation in accordance with NRS 375.

Carson City, April 30, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: You have inquired of this office requesting an opinion as to whether the transfer or conveyance of the possessory interest in an unpatented mining claim is subject to tax imposed by Chapter 375 of the Nevada Revised Statutes.

ANALYSIS

Chapter 375 NRS imposes a tax on the transfer of an interest in real property by a deed or other instrument in writing, whatever may be its form, and by whatever name it may be known in law, by which title to any estate or present interest in real property is conveyed or transferred to, and vested in, another person. A will, a lease for any term of years, or an easement are excepted.

We must first determine whether the transfer of a possessory interest in an unpatented mining claim is such an interest as falls within the realm of taxation imposed by Chapter 375 NRS, despite the fact that the unpatented mining claim itself is exempt from tax. (NRS 361.075).

Prior to the issuance of a patent, the locator cannot be said to own a fee simple title. The fee resides in the general government, yet as between the locator and everyone else save the paramount proprietor, the estate acquired by a perfected mining claim possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee. (See *Hale & Norcross G.&S. Min. Co. v. Storey Co.*, 1 Nev. 104.)

A mining claim perfected under the law is property in the highest sense of the term, which may be bought, sold, and conveyed, and will pass by descent. Although the locator may obtain a patent, the patent adds but little to his security and the owner of such a location is entitled to the exclusive possession and enjoyment, against everyone, including the United States itself. (See *Wilbur v. U.S. ex rel. Krushnic*, 280 U.S. 306; *South End Min. Co. v. Tinney*, 22 Nev. 19; *Nygaard v. Dickinson*, 97 F.2d 53; *U.S. v. Deasy*, 24 F.2d 108.)

It is clear then from voluminous authority that the possessory interest in an unpatented mining claim is property, and that a transfer of that possessory interest by document is the type of transfer designated by Chapter 375 of NRS. The tax rests upon the transfer and not on the unpatented mining claim, and thus does not run afoul of NRS 361.075.

CONCLUSION

It is therefore the opinion of this office that the transfer or conveyance of the possessory interest in an unpatented mining claim should be taxed in accordance with NRS 375.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-506 CORPORATIONS; NONRESIDENT CORPORAT...

OPINION NO. 1968-506 Corporations; Nonresident Corporate Insurance Brokers "Doing Business" in State; Requirement to Qualify—The "minimum contacts" doctrine may validly be invoked to satisfy "due process" and to determine whether a foreign corporation is "doing business" requiring it to qualify as prescribed in NRS 80.010; state jurisdiction and regulation of foreign corporations having sufficient contacts with it, as respects such required compliance, and when the public interest is involved, cannot be simply determined on a mechanical or quantitative basis. (AGO 54-343 dated August 2, 1954, so modified.) Present Nevada law does not authorize or empower Insurance Commissioner to grant or sanction a "discriminatory" or "preferential" exception from generally applicable requirement that foreign corporations qualify as prescribed in NRS 80.010, a presently necessary prerequisite for renewal of nonresident broker insurance licenses.

Carson City, May 7, 1968

Mr. Louis T. Mastos. Commissioner, Insurance Division, Nevada Department of Commerce, Carson City, Nevada 89701

Dear Mr. Mastos: Based upon certain correspondence had by you relative thereto, you have requested our legal opinion respecting NRS 80.010, as applicable to, and requiring that nonresident corporate insurance brokers qualify with the office of the Secretary of State of the State of Nevada, a prerequisite set forth in your directive dated March 1, 1967, for renewal by them of their insurance licenses.

Suggested elimination by you of such general requirement that all nonresident corporate insurance brokers so qualify is sought to be justified on the ground that only occasionally or casually do officers or employees of some such nonresident corporate brokers ever actually set foot in Nevada for solicitation or negotiation of insurance contracts on behalf of an assured (NRS 684.020, para. 5); however, they nevertheless do obtain such licenses since, unless they do hold a Nevada license, it would be illegal for an insurer admitted in Nevada or any other producer who holds a Nevada license to pay them all or any part of a commission on property or risks located in Nevada.

Reference has additionally been made to California Insurance Code Sections 1659 and 1660 which, in like circumstances, apparently authorize the filing with the Insurance Commissioner of consents for the service of process instead of exacting compliance with the relatively more expensive and otherwise more onerous requirement of formal qualification for "doing business" in that state. In such connection, it is suggested that you, as Nevada Insurance Commissioner, instead also authorize and accept similar filings of consents for service of process as sufficient "compliance" by nonresident corporate insurance brokers, when appropriate or proper, with the requirements of NRS 80.010. Such suggested alternate "compliance" is submitted as entirely proper and supported on the basis of certain legal precedents cited to you 1 herefore, namely, *Pacific States Securities Company v. District Court* (Nev. 1924), 226 P. 1106, and Attorney General Opinion No. 54-343 dated August 2, 1954. Such precedents are mentioned as pointing up the inherent problem and difficulty involved in the making of any legal determination as to what constitutes "doing business" in a state for purposes of such laws as NRS 80.010.

QUESTIONS

1. May the doctrine of "minimum contracts" validly be invoked to satisfy "due process," and to determine whether a foreign corporation is "doing business" requiring it to so qualify in Nevada pursuant to NRS 80.010?

2. May the Insurance Commissioner, under existing Nevada law, authorize and accept filings by nonresident corporate insurance brokers with him of consents for service of process as sufficient "compliance" by some of them, when appropriate or proper, with the requirements of NRS 80.010?

ANSWERS

To Question No. 1—Yes
To Question No. 2—No

ANALYSIS

While it may be true that it is not always a simple matter to make a legal determination as to what constitutes “doing business” in a state for purposes of such laws as NRS 80.010, the decisions of the courts in recent years have certainly expanded the concept involved, particularly for jurisdictional purposes in respect to effecting service of process, as well as respects the existence of a proper basis for taxation or exercise of regulatory powers by the states wherein “doing business” occurs or is determined to exist.

Preliminarily, it is our considered opinion that the legal precedents submitted as making the provisions of NRS 80.010 inapplicable to nonresident corporate insurance brokers in the circumstances as described must not only be considered in the light of the particular facts there involved, but also in light of the expanded concept of “due process” as reflected in recent decisional law. Preponderantly, applicable present law rejects the rather narrow and conceptualistic rationale reflected in the above-cited Nevada Supreme Court case and Attorney General Opinion, along with many other cases or legal precedents in other jurisdictions. It must here suffice to state that the Pacific States Case, *supra*, on the basis of the facts as therein construed, merely followed *Pennoyer v. Neff*, 95 U.S. 714 (1877), holding that jurisdiction under the due process clause of the Fourteenth Amendment had not been sufficiently established or shown to sustain the rendition of a valid personal judgment. The result and legal conclusion reached in the cited Attorney General Opinion was essentially predicated on conceptualistic “due process” requirements then still supported and warranted under applicable decisional law at that time, and the obiter dicta views contained in the Nevada Pacific States Case, *supra*.

As indicated, the concept of “due process” and related “doing business,” at least in service of process cases, has been greatly expanded in numerous considered decisions of the United States Supreme Court rendered during the past two decades. The prevailing standard as to “due process” requirements was established in the case of *International Shoe Company v. Washington*, 326 U.S. 310 (1945). If a defendant (e.g., a nonresident corporate insurance broker) has those “minimum contacts” within the state to make it reasonable to subject him or it to service of process, “due process” is not violated. What constitutes such “minimum contacts” depends upon the circumstances of each given case. As stated by the court in said *International Shoe Case*, *supra*, at page 319:

(T)he boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. (Emphasis supplied)

And, again, in *Travelers Health Association v. Virginia*, 339 U.S. 643, 647-648, the court stated:

But where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional “consent” in order to sustain the jurisdiction of regulatory agencies in the latter state. And in considering what constitutes “doing business” sufficiently to justify regulation in the state where the effects of the business are felt, the narrow grounds relied on by the Court in the *Benn* case (ed., *Minnesota Commercial Men's Association v. Benn*, 261 U.S. 140 (1923) cannot be controlling. In *Osborn v. Ozlin* (ed., 310 U.S. 53 (1940)) * * * we recognize that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the “state action may have repercussions beyond state lines * * *.” And in *Hoopston Canning Co. v. Cullen* (ed., 318 U.S. 313 (1943)) * * * we rejected the contention based on the *Benn* case, among others, that a state’s power to regulate must be determined by a “conceptualistic discussion of theories of the place of contracting or of performance.” Instead we accorded “great weight” to the “consequences” of the obligations in the state where the insured resided and the “degree of interest” that state had in seeing that those obligations were faithfully carried out. And in *International Shoe Co. v. Washington* (ed., *supra*), * * * this court, after reviewing past cases, concluded: “due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”

Unauthorized insurers and insurance agents/brokers pose a potential threat to the effectiveness of the state regulatory systems. Not having to comply with the strict regulatory standards imposed on licensed insurers, agents/brokers which are enacted for the public's protection, may provide them with an artificial competitive advantage. Substantial diversion of business from regulated to unregulated insurers and agents/brokers would further weaken state control and lessen policyholder protection. The Wisconsin Insurance Commissioner envisioned this possibility when, as respects unauthorized insurers, he said:

If we do not battle with the forces promoting the existence of unauthorized insurance then we will experience a breakdown in insurance regulation and supervision and there will be little reason for a company to become licensed and our statutes would be without meaning. (attributed to Wis. Ins. Comm'r. Manson, in a memorandum on Bill No. 245 S, included in Amicus Curiae Brief and Supplemental Appendix at 119, *Ministers Life and Casualty Union v. Haase*, 30 Wis.2d 339, 141 N.W. 2d 287 (1966), a mail order insurer case, appeal dismissed by U.S. Supreme Court Dec. 5th, 1966, Case No. 634.) In Accord: *People v. United National Life Ins. Co. et al.* (4 consolidated mail order cases), 58 Cal.Rep 599, 427 P.2d 199 (1967) wherein, among other views, the court ruled as follows:

Within framework of McCarran Act and in accordance with principles of due process prior thereto, interstate insurance transactions may properly be regulated when they have sufficient contacts with regulatory state so as to give regulating state a substantial interest in the transactions.

See also, *Scripto v. Carson*, 362 U.S. 207 (1960); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957)

The foregoing excerpts and references from presently applicable decisional law sufficiently indicate that the United States Supreme Court has clearly done away with the extraterritorial objection to state regulation or taxation if the state possesses sufficient interest in what it seeks to control, as regards "foreign" transaction or conduct of insurance business. It is also manifestly clear that the court has changed its basic philosophy of "due process;" that rationale of considering the place of contract to be determinative and resort thereto for use of the "due process" clause to strike down state regulation of business and trade, is no longer effective, or prevails. Following the doctrinal breakthrough in the *Osborn and Hoopston Cases*, supra, the last two and one-half decades have witnessed an increasingly realistic and sophisticated approach to jurisdictional questions.

Nevertheless, state interest alone apparently will not suffice to meet or satisfy "due process;" there must also be at least "minimum contacts" with the state seeking to exercise its regulatory jurisdiction. Apparently, too, the greater the state interest, the less the number of contacts necessary to meet "due process." (*Ministers Life and Peo. v. United Nat'l Life Ins. Co. Cases*, supra; see 141 N.W.2d 287, at page 295.)

The legitimacy of state interest in the effects on the totality of its regulatory system was highlighted by the United States Supreme Court in the *Osborn Case*, supra, wherein it found a "definable interest" present; and in the *McGee Case*, supra, it found "a manifest interest" upon which to bottom a state's right to regulate the insurance business within its borders, pointing out the "special relation" that government has always had to insurance, and the necessity, therefore, of providing effective redress for citizens who may be injured by nonresidents engaged in an activity that the state treats as exceptional and subjects to special regulation. The *Ministers Life* and the *United National Life Insurance Cases*, supra, (mail order cases) are only the latest and broadest confirmations of said principle and presently applicable rule of law. Perhaps more informatively, the basis for such rule of law is set forth in a labor case decided by the United States Supreme Court, namely, *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525 (1949). Concerning the present importance of state interest as respects jurisdictional and regulatory "due process," the court's opinion states as follows:

The *Allgeyer-Lochher-Adair-Coppage* constitutional doctrine was for some years followed by this court. It was used to strike down laws regulating business activities. (*Italics supplied; id.* at p. 535.)

The court in its opinion (*id.* at p. 536) further went on to say:

This court * * * has steadily rejected due process philosophy enunciated in the Adair-Coppage line of cases. In doing so, it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law * * * Under this constitutional doctrine, the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a straight jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

We have not overlooked some expressed opinion that a distinction exists between due process cases concerning state jurisdiction for purposes of service of process, or for regulation, or for taxation. Thus:

The inquiry as to whether a corporation is "doing business" has three significant aspects. It may determine (1) the power of the state to impose local taxation, (2) whether the corporation falls within the state's regulatory power, or (3) whether jurisdiction exists for service of process * * * The degree of activity or contact which is required varies according to the purpose for which the foreign corporation is sought to be subjected to local laws * * *. Thus, a state may have jurisdiction over a foreign corporation by virtue of its local activities for the purpose of service of process, whilst lacking power to tax or regulate the same corporation. (Citation omitted; *Jeter v. Austin Trailer Equipment Co.*, 122 C.A.2d 376, 265 P.2d 130, 133-134 (1954); see also, *Liquid Veneer Corp. v. Smuckler*, 90 F.2d 196 (1937); Isaacs, "An Analysis of Doing Business," 25 Colum.L.Rev. 1018, 1024-25 (1925); Hartman, "State Taxation of Interstate Commerce: A Survey and an Appraisal" 46 Va.L.Rev. 1051, 1065 (1960)).

Apparently, on occasion, the United States Supreme Court has distinguished standards for exercise of state jurisdiction and application of "due process" for the different purposes of service of process, or for regulation, or for taxation. (Cf., *Freeman v. Hewitt*, 329 U.S. 249, 253 (1946); however, in other decisions the court has applied the same standards of due process as respects all three said areas for exercise of state jurisdiction, and this is the apparent trend in the more recent cases. (See, *International Shoe Co. v. Washington*, supra; *Travelers Health Association v. Virginia*, supra; Foster, "Personal Jurisdiction Based on Local Causes of Action," 1956 Wis.L.Rev. 522, 567.)

It is our considered opinion that the foregoing sufficiently warrants the conclusion that the conceptualistic theory of exercise of state jurisdiction, as respects the involvement of "due process," epitomized in the three main cases commonly resorted to in order to overturn state insurance statutes, is no longer effective. (The three cases are: *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922); *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938).) Said analysis, in our opinion, also warrants the conclusion that what constitutes "doing business" must be determined on the basis of the particular facts in each instance; and that neither the decision in the Nevada Pacific Case, supra, nor the result or conclusion reached in Attorney General Opinion No. 54-343 dated August 2, 1954, presently should, or properly can, be deemed absolutely and unqualifiedly applicable and controlling in every instance. Conceivably, at least, presently applicable decisional law, as above shown, might well have justified contrary results or conclusions in both said Nevada case and Attorney General Opinion.

Admittedly, main concern of the insurance cases relied upon in the foregoing analysis has been with the insurer or other producer. However, the relevancy of the views and decisional law therein, as respects insurance agents/brokers, who play so large and essential function and role in the negotiation and consummation of insurance transactions and business, is certainly evident and hardly open to reasonable question. Manifestly, the function and role played by agents and brokers, whether resident or nonresident, in the totality of a state's insurance regulatory system, is both substantial and important. Recognition and confirmation of such fact, as respects nonresident corporate insurance brokers also, must be presumed since the states generally have provided for and require that they obtain certificates of authority or be licensed for lawful conduct of interstate insurance transactions.

Additionally, because the nature and degree of interstate activity as among nonresident corporate insurance brokers will normally greatly vary, establishment of a quantitative standard, or other reasonable and proper guidelines, relative to interstate activities for purposes of determining whether NRS 80.010 is, or is not, applicable, is administratively unfeasible and impractical, insofar as the Nevada Insurance Division and your functions and powers, as Nevada Insurance Commissioner, are concerned.

In any event, even assuming the possibility of any such quantitative standard, or other proper and reasonable guidelines, there still would undoubtedly be serious legal question of its validity in application, if nonresident corporate insurance brokers (or only some of them, or any other special category) were, "discriminatorily," to be exempted from the general application of such standard or guidelines.

We note that while NRS 683.050 provides for designation of the Nevada Insurance Commissioner for service of process relative to foreign or alien insurers, authorized and transacting insurance business in Nevada, we have found no corresponding statutory provision respecting such designation of the commissioner relative to nonresident corporate insurance brokers. It is our understanding that the proposed revision of the Nevada Insurance Code (now in process) will include statutory provision and authorization, as now apparently contained in California's Insurance Code Sections 1659 and 1660, for filing of consents with you by nonresident corporate insurance brokers for service of process. Some such equivalent or corresponding statutory provision, having as its ultimate purpose and object the designation of the Insurance Commissioner for service of process, and which would comprehend all principal or important participants involved in insurance contracts purchased by, or affecting, Nevada residents, is certainly indicated and, on the basis of the present matter, evidently necessary.

Pending enactment of such an enabling statute, or legal base, however, the remaining specific question requiring our opinion and advice is, whether you, as Nevada Insurance Commissioner, are empowered presently to authorize or sanction an exception from the application of the provisions of NRS 80.010 of any nonresident corporate insurance brokers, absent express provision and authority therefore in Nevada law. (Cf., NRS 80.240)

Our further analysis assumes that nonresident corporate insurance brokers hold Nevada licenses (or certificates of authority) and, therefore, that they are lawfully otherwise entitled to negotiate or effectuate insurance contracts pertaining to property or risks located in Nevada through a duly licensed resident agent, or nonresident agent of company authorized to transact business in this State. (NRS 684.340) Does this not legally suffice and afford a proper basis for authorization and acceptance of filings of consents or designation of yourself, as Nevada Insurance Commissioner, for service of process in lieu of exacting compliance, relatively expensive, onerous, and (at least in some cases) "apparently needless," with the provisions of NRS 80.010 to qualify with the office of the Secretary of the State of Nevada?

First: We note that sanction of any exceptions of nonresident brokers from the application of NRS 80.010 must, pro tanto, detract from or impair the effectiveness or "totality of (the) state's insurance regulatory system" for protection of purchasers of insurance covering property or risks located in Nevada. Conversely, continued, generally required compliance by them with NRS 80.010 maintains and provides further assistance as to this State's unquestionable jurisdiction and regulatory authority and powers (as conferred by the Legislature, and proper or presently necessary) relative to all or any such insurance transactions. The "minimum contracts" doctrine may validly be invoked to satisfy "due process" and to determine whether a foreign corporation is "doing business" requiring it to qualify as prescribed in NRS 80.010; "doing business" meeting "due process," and requiring such compliance, especially if the public interest is substantially involved, cannot be simply determined on a mechanical or quantitative basis.

Second: NRS 80.010 has general application to all foreign corporations, except as otherwise expressly provided in statute. (Cf., NRS 80.240) The requested exception (suggested acceptance of substituted consents for service of process as "compliance" with NRS 80.010) as respects nonresident brokers, or any of them, is not authorized in NRS 80.240 and would, therefore, be improper and invalid, if allowed or sanctioned. ("Inclusio unius, exclusio alterius") The State would be deprived of revenue presently so derived from presently exacted compliance with NRS 80.010.

Third: As a state official (Insurance Commissioner), it is elementary and well-established Nevada law that you have no other authority or power than that expressly provided in statute by the Legislature. All of your jurisdiction and power, and the nature and extent of the same, either in express terms or by necessary or reasonable intendment, must be found within the four corners of the statutes creating and establishing the Insurance Division and your office, charging or imposing upon you certain defined duties and responsibilities, and vesting in you the requisite regulatory authority and powers for proper performance and discharge of the same.

We find in present Nevada law no sufficient legal basis or authority for exercise by you of your existing powers in any such manner or for the particular purpose which has herein been requested.

CONCLUSION

Absent proper enabling statutory provision in Nevada (equivalent to or corresponding with California Insurance Code Sections 1659 and 1660, a sufficient legal basis 1herefore in said state), grant or sanction of the requested exception of nonresident brokers, or any of them, from the application of NRS 80.010, would be "discriminatory" or "preferential," excessive of your present authority and powers, in derogation of the Legislature's province and function, and wholly ineffectual and invalid.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John A. Porter, Deputy Attorney General

OPINION NO. 1968-507 NEVADA TAX COMMISSION; LOCAL BUDGE...

OPINION NO. 1968-507 Nevada Tax Commission; Local Budgets—The Nevada Tax Commission has authority to audit and examine all local government budgets and from the information obtained thereby assure itself the revenues received are only of an amount necessary for the conduct of local government. In order to perform this function, the commission has the right to inquire of local governments why there exist substantial differences in projected revenues and expenses from past actual experience, and the governing boards of local governments have the duty to respond. The commission should certify no budget if the combined rate exceeds the \$5 constitutional limitation.

Carson City, May 7, 1968

Mr. Roy Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

STATEMENT OF FACTS

Dear Mr. Nickson: You advise us that pursuant to Chapter 354 of Nevada Revised Statutes, local government bodies throughout the State of Nevada submitted to the Nevada Tax Commission their tentative budgets. While you were reviewing these tentative budgets, questions regarding increases or decreases in certain projected expenditures and revenues occurred to you. Accordingly, you sent inquiring letters to responsible people in the local government entities, requesting explanations and reasons for the variations from their past experience. None of your letters directed that a change be made in the budgetary figures, but requested only an explanation. Most of your questions related to the manner in which balances from the preceding year were accounted for, and substantial variances in amounts of revenues requested and actual expenditures.

While most of the local governing bodies complied with your letters of inquiry, and satisfactorily answered your questions, some members of local government bodies and members of the Local Government Budget Advisory Committee questioned your authority to so inquire. At an informal conference attended by you and representatives of some of the local governmental agencies, an agreement could not be reached as to the authority of the Tax Commission to inquire into local budgetary matters. The committee is of the opinion that the authority of the Tax Commission is limited to (1) mathematical accuracy, (2) submission on proper forms, and (3) determining that the individual entity's tax rate is within its own charter or statutory limitation, without regard to the combined tax rate. Some members of local governing bodies are of the opinion even this authority is lacking.

Such being the case, you have forwarded to this office a request for an opinion on the following questions:

QUESTION

1. Is the Nevada Tax Commission charged by statute to audit and examine all local governmental budgets?
2. If the answer to No. 1 above is affirmative, is it within the authority of the commission to use such audits and examinations to insure that the tax rate to be certified is neither more nor less than that required for the conduct of the local government?
3. If the answer to No. 2 above is affirmative, does the Tax Commission have authority to require local governments to explain variations from normal past experience in all budgets in such detail as may be necessary to permit an objective evaluation of the budget and determination as to whether action under NRS 360.220(2) is required?
4. If the answer to No. 3 above is affirmative, is the certification required by NRS 354.596 dependent upon receipt of such explanatory information from the local governments?
5. Is the certification required by NRS 354.596 dependent upon the combined tax rate's being under the \$5 constitutional limitation?

ANALYSIS

Before answering your specific questions, I believe it would be helpful to trace legislative enactments relating to budgets on the local level in Nevada.

Prior to 1965, we did not have the Local Government Budget Act as we know it today. Authority of the Nevada Tax Commission to inquire into local budgetary matters prior to the enactment of the Local Government Budget Act was found for the most part in Chapters 360 and 361 of Nevada Revised Statutes.

Two statutes dealing with such authority of the Commission are:
NRS 360.220:

The Nevada Tax Commission shall have the power:

1. To require governing bodies of local governments, as defined in NRS 354.474, to submit a budget estimate of the local government expenses and income for the current year, and for the budget year, and a compilation of the actual local government expenses and income for the last completed year, in such detail and form as may be required by the Nevada tax commission.
2. To require such governing bodies to increase or decrease the tax rate of their respective local governments to produce the net revenue estimated as necessary for the conduct of the local government, as appears from the budget.

NRS 361.455:

1. Subsequent to the approval of the budgets for the various local governments as defined in NRS 354.474 and their submission to the Nevada tax commission for auditing and approval as required by law, the Nevada tax commission shall certify to the board of county commissioners of each of the several counties the combined tax rate necessary to produce the amount of revenue required by the approved budgets, and shall certify such combined rate, broken down as to the budgetary funds, to each of the boards of county commissioners.

2. If the combined rate, together with the state tax rate theretofore approved, shall exceed the constitutional tax rate limit, the Nevada tax commission is authorized and directed to call together the governing bodies of the respective local governments concerned, and to hold the governing bodies in session until such time as the budgeted requirements have been reduced to such amount as may be produced by a combined tax rate which will not exceed the constitutional limitation. After the budgeted requirements have been so reduced, the Nevada tax commission shall proceed as provided in subsection 1 to certify the combined tax rate. If the governing body of any local government shall refuse or neglect to participate in the meeting of all governing bodies, the Nevada tax commission is authorized and directed to adjust the budget of the local government as the exigencies of the situation may require.

3. Any local government affected by a rate adjustment, made in accordance with the provisions of this section, which necessitates a budget revision shall file a copy of its revised budget within 20 days after the approval and certification of the rate by the Nevada tax commission.

4. A copy of the certificate of the Nevada tax commission sent to the board of county commissioners shall be forwarded to the county auditor.

In 1965, the Nevada Legislature enacted the Local Government Budget Act (NRS 354.470 through NRS 354.626). At this time, specific existing statutes were amended or repealed. Neither NRS 360.220 nor 361.455 was repealed or amended in any substantial manner. Because these statutes relate to the same subject matter, were considered by the same legislative body that enacted the Local Government Budget Act, and in fact internally refer to the Local Government Budget Act, all of these statutes are considered to be in pari materia. Such being the case, we shall consider NRS 360.220 and 361.455 when interpreting the Budget Act. To assist us in this effort, we have language authored by the Nevada Supreme Court. In *Las Vegas ex rel. v. Clark County*, 58 Nev. 469 (1938), it was stated:

We think the provision of said subdivision 7 (NRS 360.220) considered in connection with the other provisions of the act heretofore set out, and its spirit and purpose, manifest an intention to bring the county revenue system, as well as the revenue system of cities, towns, municipalities, and school districts, under review and final adjustment by the tax commission; and this applies to rates as well as to valuations and other matters connected with the machinery of raising revenue for their support.

The tax commission is well adapted to that end, and the constitutional provision limiting the total tax levy for all purposes, including levies and bonds, within the state, or any subdivision thereof, to not exceed 5 cents on \$1.00 of existing valuation, makes the duty of adjustment all the more imperative. If this should prove inequitable in practical operation, the legislature will doubtless devise some method of refinancing the political body which may be affected.

The language of this Supreme Court opinion convinces this office that even prior to the Local Government Budget Act, the Nevada Tax Commission possessed power of inquisition relating to contents of local budgets beyond that which is now suggested by the Local Government Budget Advisory Committee.

With this background, we shall now answer your particular questions:

Question No. 1. This question involves two disputed functions, i.e., auditing and examining. Clearly, the commission has the statutory duty to examine tentative budgets. NRS 354.578 reads:

“Tentative budget” means the budget that is prepared initially, published and recorded by each local government for an ensuing fiscal year prior to its approval by the Nevada Tax Commission and such other supervisory bodies as are charged by law with the examination of tentative budgets, and prior to its subsequent adoption. (Italics added.)

We feel that the legislative grant of authority to examine tentative budgets implies the power to examine fiscal budgets. To conclude to the contrary would be to give the commission meaningless authority, for the commission would be powerless to determine whether the final budget complied with statutory and constitutional mandates which will be discussed below.

Auditing is a broader function than examining. See *Judith Basin County v. Livingston*, 298 P. 356 (Mont. 1931), wherein it is stated:

It is true that an audit is more comprehensive, yet an audit includes an examination.

There is authority for the commission to audit the approved budgets of the various local governments in NRS 361.455:

Subsequent to the approval of the budgets for the various local governments as defined in NRS 354.474, and their submission to the Nevada tax commission for auditing and approval as required by law, * * * (Italics added.)

The scope of the contemplated audit is delineated in NRS 354.486. Within the limits therein contained, the Nevada Tax Commission has the authority to audit the approved budgets. One of the statutory purposes of such audits is to determine the “propriety” of proposed or consummated transactions. Certainly in order to satisfy itself as to the propriety of a transaction, the commission must exercise functions beyond those deemed appropriate by some local governmental agencies.

Question No. 2. It having been determined that the commission has authority to audit and examine budgets of local governments, you inquire as to the use the results of such audits and examinations may be put. The authority of the commission in this regard is found in NRS 360.220, supra.

This office has previously held that the commission has authority and supervision over the detail items in local budgets relating to the individual rates involved. See Attorney General's Opinion No. 46-355 of August 30, 1946. With the conclusions therein reached, we concur. The question now before us goes one step further, in that it deals with the authority of the commission to concern itself with amounts needed to conduct local government. Subsection 2 of NRS 360.220 specifically vests in the commission the power "to require such governing bodies to increase or decrease the tax rate * * * to produce the net revenue estimated as necessary for the conduct of the local government * * *" If the tax rate is more or less than that needed for the conduct of local government, the commission may rely on this statute to adjust the same.

Question No. 3. In order for the commission to take any meaningful action pursuant to NRS 360.220, some inquiry into specific items contained in local budgets is appropriate. Most states have some type of law authorizing the investigation of the condition of municipal revenue (by courts, independent city or county officials, or state officials). Such laws are intended to protect the public funds and to enable the members of the public to obtain information about the collection and disbursement of such funds. The Legislature has seen fit to authorize the Nevada Tax Commission to examine and audit local budgets, to approve and certify the budget, and to design the form the budget is to take. We feel that it is necessarily implied from these expressly delegated powers, that the commission may inquire of local officials why variations in projected revenues and expenditures from past actual experience appear in the current budget. If the commission were to pass unquestioned substantial increases in projected expenses or decreases in projected revenues, one of the purposes of the Local Government Budget Act would be ignored, that is, "to provide for the control of revenues and expenditures in order to promote prudence and efficiency in the expenditure of public funds." See NRS 354.472 (d).

Question No. 4. Because the commission has the authority to inquire into local budgets, the local governments have the duty to respond. if no response is made, the commission has no way of assuring itself that laws and regulations have been complied with. Without such assurance the commission could not issue a certificate of compliance pursuant to NRS 354.596(4), but must issue a written notice of lack of compliance, and such notice must be read at the public hearing as provided by that subsection.

Question No. 5. Article X, Section 2 of the Nevada Constitution provides:

The total tax levy for all public purposes, including levies for bonds, within the state or any subdivision thereof, shall not exceed five cents on one dollar of assessed valuation.

This constitutional provision is certainly the law of Nevada, and NRS 354.596 places on the commission the duty to determine, before certification, if the budget complies with the law. If the constitutional limitation is not adhered to by the local government, the commission should not certify compliance.

It is worthy of note that some representatives of local governments hinted at the propositions that the commission could not certify a combined rate lower than \$5. With this we disagree. The constitutional provision is a maximum limitation, not a minimum limitation, and does not operate as a guarantee that \$5 on each \$100 of assessed valuation is available in tax revenue. If the needs of the local government do not justify a combined rate of \$5, the taxpayers of Nevada are entitled to reap the benefit; the local government is not entitled to acquire surplus funds.

CONCLUSION

The Nevada Tax Commission has authority to audit and examine all local government budgets and from the information obtained thereby assure itself the revenues received are only of an amount necessary for the conduct of local government. In order to perform this function the commission has the right to inquire of local governments why there exist substantial differences in projected revenues and expenses from past actual experience, and the governing boards of local governments have the duty to respond. The commission should certify no budget if the combined rate exceeds the \$5 constitutional limitation.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

OPINION NO. 1968-508 NEVADA TAX COMMISSION; NET PROCEED...

OPINION NO. 1968-508 Nevada Tax Commission; Net Proceeds of Mines Taxation; Penalties—The provision of NRS 361.483 control the imposition of penalties due to delinquent payment of net proceeds of mines taxes.

Carson City, May 8, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

STATEMENT OF FACTS

Dear Mr. Nickson: An accounting firm has questioned the manner of computing penalties assessed due to delinquent payment of net proceeds of mining taxes. In an effort to clarify the matter, you inquire of this office as follows:

QUESTION

Pursuant to NRS 362.160, what penalty, if any, should be county assessor levy in those instances where the net proceeds of mines tax is not paid within 30 days after the filing of the certificate of assessment with the secretary of the Nevada Tax Commission and the county assessor?

ANALYSIS

The net proceeds of mines are taxed at the same rate ad valorem as other property. The actual dollar amount of the tax is determined by the Nevada tax commission pursuant to a statutory formula found in NRS 362.120. After the amount is determined, the same is certified by the commission, with copies of the certificate filed with the county assessor and secretary of the Nevada Tax Commission. NRS 362.130 provides, “* * * taxes thereon at the rate established shall be immediately due and payable * * *.”

NRS 362.160 reads:

If the amount of the tax is not paid within 30 days after the filing of the certificate of assessment with the secretary of the Nevada tax commission and the county assessor, the same shall be thereupon delinquent and shall be collected as other delinquent taxes are collected by law, together with the penalties provided for the collection of delinquent taxes.

NRS 362.220 reads:

Except as is in conflict with the provisions of NRS 362.100 to 362.240, inclusive, all laws relative to the collection and enforcement of taxes, and penalties for nonpayment of the same, are continued in full force and effect, and shall be applicable insofar as may be to the provisions of NRS 362.100 to 362.240, inclusive, and to the assessment and taxation of the net proceeds of mines and to the levying and collection thereof.

By virtue of these statutes, we must look beyond Chapter 362 of NRS to determine appropriate penalties, for the reason that the statutes in this chapter are silent. We feel it appropriate to look to Chapter 361 of NRS entitled “Property Tax.” There we find NRS 361.483, which provides the manner in which penalties for failure to pay taxes should be computed. In part, it reads:

3. If any person charged with taxes which are a lien on real property fails to pay:
- (a) Any one quarter of such taxes on or before the day such taxes become due and payable, there shall be added thereto a penalty of 2 percent.
 - (b) Any two quarters of such taxes, together with accumulated penalties, on or before the day the later of such quarters of taxes becomes due, there shall be added thereto a penalty of 3 percent of the two quarters due.
 - (c) Any three quarters of such taxes, together with accumulated penalties, on or before the day the latest of such quarters of taxes become due, there shall be added thereto a penalty of 4 percent of the three quarters due.
 - (d) The full amount of such taxes, together with accumulated penalties, on or before the 1st Monday of March, there shall be added thereto a penalty of 5 percent of the full amount of such taxes. (Italics added.)

Notwithstanding this statute provides for increasing or progressive penalties based on quarter year or 3-month periods, while net proceeds of mine taxes are due semiannually or annually, depending upon gross proceeds, we feel it applies, the reasons being: first, taxes upon net proceeds of mines create a lien upon the mine or mining claim; second, the statute does not conflict with any statute found in Chapter 362 of NRS; and third, a quarterly penalty is appropriate because the taxes are due and owing the taxing authorities, and the semiannual or annual provisions of Chapter 362 relate only to times when the taxes should be computed. They do not relate to appropriate penalties. Once the taxes have been computed, you need not further consider the semiannual or annual provisions of Chapter 362. The taxes are delinquent, a penalty by statute is to be imposed, and the penalizing statutes of Chapter 361 of NRS apply. Because these statutes provide for quarterly progressive payments, the same should be applied.

CONCLUSION

Because Chapter 362 of Nevada Revised Statutes is silent regarding penalties for delinquent taxes, but does refer to penalizing statutes in other chapters of Nevada Revised Statutes, these statutes control. Hence, the penalty provided in NRS 361.483 should apply.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John Sheehan, Deputy Attorney General

OPINION NO. 1968-509 NEVADA TAX COMMISSION; SCHOOL DIST...

OPINION NO. 1968-509 Nevada Tax Commission; School District Budgets—Attorney General Opinion No. 56-161, April 18, 1956, must be deemed modified by superseding legislation; governing bodies of school districts may be required by the Nevada Tax Commission to meet with other governing bodies when necessary to effect the provisions of NRS 361.455; the Nevada Tax Commission has authority to examine and audit the budgets of school districts and to adjust the same where necessary.

Carson City, May 9, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Blasdel Building, Carson City, Nevada 89701

Dear Mr. Nickson: By your letter dated April 22, 1968, you have advised us that a school district superintendent has questioned the legality of the practice by the Nevada Tax Commission of requiring the governing board of a school district to participate in a special session of governing bodies, called in compliance with NRS 361.455, subsection 2. You have further advised that in the past the school district's

governing board either has not been present at such sessions or, though present, has not participated in such sessions for the following reasons:

1. That the county commissioners and not the governing board of the school district is the body which levies the school district tax.
2. That the provisions of NRS 387.195 guarantee the school districts an ad valorem tax levy at the rate of \$1.50 per \$100 of assessed valuation, provided the board of trustees so recommends.
3. That a prior opinion rendered by this office, designated Attorney General Opinion No. 56-161 of April 18, 1956, holds that the \$1.50 levy is not subject to negotiation with other competing entities, and that the Nevada Tax Commission has no authority to reduce this rate if it is based upon a budget.
4. That NRS 361.455 specifies that only governing bodies of representative local governments "concerned" are required to appear at such sessions and the board of trustees of the school district is not "concerned" over the tax rate apportionment.

You have inquired of this office whether legislation enacted subsequent to Attorney General Opinion No. 56-161, April 18, 1956, in any way modifies Attorney General Opinion No. 56-161 to the extent that the school district's optional 80-cent ad valorem levy is subject to either negotiation or reduction. You have further inquired whether the governing body of a school district is required to meet with other governing bodies in special sessions to effectuate the provisions of NRS 361.455. Finally, you have inquired if, based upon reasonable evidence, the known property tax revenues are improperly stated in the school district budget, does the Nevada Tax Commission have authority under NRS 360.220 to adjust these estimates. We have concluded that each of those questions must be answered in the affirmative.

ANALYSIS

The tax levy in question to set the mandatory tax for the support of county school districts exists by virtue of the provisions of NRS 387.195. This statute was enacted in 1956 and became effective March 2 of that year. It has not been amended from the time of its original enactment. It reads as follows:

1. At the time of levying county taxes, the board of county commissioners of each county shall levy a county school district tax.
2. In 1956 and in each year thereafter when the board of county commissioners levies county taxes:
 - (a) It shall be mandatory for each board of county commissioners to levy a 70-cent tax on each \$100 of assessed valuation of taxable property within the county, which taxes shall be used by the county school district for the maintenance and operation of the public schools within the county school district; and
 - (b) When recommended by the board of trustees of the county school district, in addition to the mandatory levy of taxes provided in paragraph (a), each board of county commissioners shall levy a tax of not to exceed 80 cents on each \$100 of assessed valuation of taxable property within the county for the support of the public schools within the county school district.
 - (c) In addition to the taxes levied in accordance with the provisions of paragraphs (a) and (b), each board of county commissioners shall levy a tax for the payment of interest and redemption of outstanding bonds of the county school district.

The statute was construed in Attorney General Opinion No. 56-161. In turn, that opinion was based in substantial part upon the authority of the State of Nevada *ex rel. City of Las Vegas v. County of Clark, et al.*, 58 Nev. 469, 83 P.2d 1050 (1938).

Since the enactment of the school tax law and the rendition of Attorney General Opinion No. 56-161, a comprehensive scheme of legislation necessarily affecting school taxation has come into existence by virtue of amendments to existing laws and by enactment of the Local Government Budget Act. These new and amended statutes must be viewed and considered as a whole to determine their effect upon the school tax law here in question.

The first such statute is NRS 360.220. This statute was originally enacted in 1917 and was amended in 1957 in matters material to the question presented, and in 1965 in matters not material to the question presented. NRS 360.220 reads as follows:

The Nevada tax commission shall have the power:

1. To require governing bodies of local governments, as defined in NRS 354.474, to submit a budget estimate of the local government expenses and income for the current year, and for the budget year, and a compilation of the actual local government expenses and income for the last completed year, in such detail and form as may be required by the Nevada tax commission.

2. To require such governing bodies to increase or decrease the tax rate of their respective local governments to produce the net revenue estimated as necessary for the conduct of the local government, as appears from the budget. (Italics supplied.)

Prior to the 1957 amendment (Statutes of Nevada 1957, Chapter 341, page 574) this statute required boards of trustees of school districts to submit budgets estimating expenses for which the tax would be levied. It also required the governing board of the municipalities, cities or towns to increase or decrease their tax rates to produce the net revenue estimates needed for their operations. The 1957 amendment increased the scope of that requirement specifically to include school districts. It is reasonable to assume that this change was a direct result of the position stated in Attorney General Opinion No. 56-161, rendered the previous year.

The next statute in NRS 361.455 which governs the levy of property tax and delineates the functions of the Nevada Tax Commission in connection therewith. It was enacted in 1953. It was amended in matters not material hereto in 1955 and in 1965. It was also amended in 1963, at which time the present subsection 3 was added. It reads as follows:

1. Subsequent to the approval of the budgets for the various local governments as defined in NRS 354.474 and their submission to the Nevada tax commission for auditing and approval as required by law, the Nevada tax commission shall certify to the board of county commissioners of each of the several counties the combined tax rate necessary to produce the amount of revenue required by the approved budgets, and shall certify such combined rate, broken down as to the budgetary funds, to each of the boards of county commissioners.

2. If the combined rate, together with the state tax rate theretofore approved, shall exceed the constitutional tax rate limit, the Nevada tax commission is authorized and directed to call together the governing bodies of the respective local governments concerned, and to hold the governing bodies in session until such time as the budgeted requirements have been reduced to such amount as may be produced by a combined tax rate which will not exceed the constitutional limitation. After the budgeted requirements have been so reduced, the Nevada tax commission shall proceed as provided in subsection 1 to certify the combined tax rate. If the governing body of any local government shall refuse or neglect to participate in the meeting of all governing bodies, the Nevada tax commission is authorized and directed to adjust the budget of the local government as the exigencies of the situation may require.

3. Any local government affected by a rate adjustment, made in accordance with the provisions of this section, which necessitates a budget revision shall file a copy of its revised budget within 20 days after the approval and certification of the rate by the Nevada tax commission.

4. A copy of the certificate of the Nevada tax commission sent to the board of county commissioners shall be forwarded to the county auditor. (Italics supplied.)

The next statute essential to this consideration is the Local Government Budget Act. It appears at NRS 354.470 to NRS 354.626, inclusive. It was enacted in 1965. Significant insight is gained by reviewing the purpose of the act, set forth in NRS 354.472, which reads as follows:

1. The purposes of NRS 354.470 to 354.626, inclusive, are:
 - (a) To establish standard methods and procedures for the preparation, presentation, adoption, administration and appraisal of budgets of all local governments.
 - (b) To enable local governments to make financial plans for both current and capital expenditure programs and to formulate fiscal policies to accomplish these programs.
 - (c) To provide for estimation and determination of revenues, expenditures and tax levies.
 - (d) To provide for the control of revenues and expenditures in order to promote prudence and efficiency in the expenditure of public funds.
 - (e) To enable local governments to borrow money to meet emergency expenditures.

(f) To provide specific methods enabling the public, taxpayers and investors to be apprised of the financial preparations, plans, policies and administration of all local governments.

2. For the accomplishment of these purposes the provisions of NRS 354.470 to 354.626, inclusive, shall be broadly and liberally construed. (Italics supplied.)

The scope and applicability of the act appears at NRS 354.474, which reads as follows:

1. Except as otherwise provided in subsection 2, the provisions of NRS 354.470 to 354.626, inclusive, shall apply to all local governments. For the purpose of NRS 354.470 to 354.626, inclusive, "local government" means every political subdivision or other entity which has the right to levy or receive moneys from ad valorem or other taxes or any mandatory assessments, and includes without limitation counties, cities, towns, boards, school districts and other districts organized pursuant to Chapters 244, 309, 318, 379, 473, 474, 540, 541, 542, 543 and 555 of NRS and any agency or department of a county or city which prepares a budget separate from that of the parent political subdivision.

2. An irrigation district organized pursuant to Chapter 539 of NRS shall fix rates and levy assessments as provided in NRS 539.667 to 539.683, inclusive. The levy of such assessments and the posting and publication of claims and annual financial statements as required by Chapter 539 of NRS shall be deemed compliance with the budgeting, filing and publication requirements of NRS 354.470 to 354.626, inclusive, but any such irrigation district which levies an ad valorem tax is required to comply with the filing and publication requirements of NRS 354.470 to 354.626, inclusive, in addition to the requirements of Chapter 539 of NRS. (Italics supplied.)

It is to be noted that the term "local government" as defined in subsection 1 thereof, includes not only every entity which is a recipient of money from ad valorem taxes, but also specifically includes school districts. It is further to be noted that this definition is specifically made a part of NRS 360.220 and of NRS 361.455. Although it was amended in 1967, that amendment in no way narrowed its scope or applicability. It is further to be noted that it specifically refers to entities receiving moneys from mandatory assessments.

Finally, the provisions of NRS 360.200 cannot be overlooked. That section reads as follows:

In addition to the specific powers enumerated in this chapter, the Nevada tax commission shall have the power to exercise general supervision and control over the entire revenue system of the state.

Attorney General Opinion No. 56-161 determined that the optional 80-cent ad valorem tax had to be supported by a budget submitted to the Nevada Tax Commission on behalf of the school district in question. That opinion reasoned from the decision in *Las Vegas v. Clark County*, supra, that there would otherwise be no point in the provision of the 1956 school law requiring the budget to be submitted in such detail as the Tax Commission prescribes. The opinion went on to conclude that, if the 80-cent portion of the ad valorem tax was supported by a budget, the Tax Commission had no authority to reduce the tax to bring the combined tax rate within the constitutional limit or to go beyond the budget. We believe that this conclusion must now be cautiously reviewed in the light of the intervening legislation which we have delineated in some detail above. Attorney General Opinion No. 56-161, in effect, concluded that the Legislature, in enacting the 1956 school law, intended to place the schools and their needs in a somewhat preferred position over other local governmental bodies.

We conclude that this preferred position was seriously weakened, if in fact it remained at all, as a result of the 1957 amendment to NRS 360.220, making that statute specifically applicable to school districts.

Any preferred positions as school districts thereafter continued to enjoy, were, we believe, completely eliminated by the enactment of the Local Government Budget Act of 1965. This act applies to the governing bodies of all local governmental entities expressly including school districts and any other entities which are recipients of moneys from ad valorem taxes from any form of mandatory assessments. The Local Government Budget Act must be read together with the provisions of Chapter 360 and Chapter 361 which delineate the functions of the Nevada Tax Commission in connection with the type of taxes here in question. See Attorney General Opinion No. 68-507, dated May 7, 1968.

There is thus clearly conferred upon the Nevada Tax Commission the direct authority and responsibility not only to audit and approve the budgets of all local governmental entities as defined in NRS 354.474; but also to require all such governing bodies to be held in session until such time as their combined

budgeted requirements are set within the constitutional tax limitation in accordance with NRS 361.455. Unless this is the case, and unless the Tax Commission has authority to require school districts, as well as all other local governmental bodies defined in NRS 354.474, to increase and decrease their tax rates to produce the net revenue estimated as necessary for the conduct of their affairs, the clear language of NRS 360.220 is completely meaningless. Furthermore, this is the only interpretation that is clearly consistent with the general power of supervision and control over the entire revenue system of the State, which is vested in the Nevada Tax Commission by NRS 360.200. If any single governmental body, such as a school district, enjoys a preferred position completely beyond the scrutiny of the Tax Commission and beyond its powers to require adjustments where necessary, the Nevada Tax Commission is effectively deprived of its general supervision and control over the entire revenue system of the State.

It has been suggested that the governing bodies of school districts need not attend special sessions pursuant to NRS 361.455 because the county commissioners levy the school tax. This suggestion is not consistent with the definition of a local government as the recipient of moneys from taxes. We are therefore compelled to conclude that the governing bodies of school districts are required to meet with other governing bodies and to participate fully in such special sessions when it becomes necessary to effect the provisions of NRS 361.455.

It is also suggested that the provisions of NRS 387.195 guarantee a tax rate of \$1.50 to school districts if they ask for it regardless of actual need. This assertion is inconsistent with the intent and purpose of the Local Government Budget Act because that act applies to entities receiving moneys from mandatory assessments, as well other taxes. The most that can be said for the position so asserted by the school districts is that NRS 387.195 refers to mandatory assessments with respect to the 70-cent tax authorized in subsection 2(a) of that statute. This position does not withstand the foregoing analysis.

Either the provisions of NRS 387.195 are consistent with the powers and functions of the Nevada Tax Commission as set forth in the foregoing analysis, or they are inconsistent. If they are consistent, the Nevada Tax Commission must have the authority to audit, reduce and supervise school district budgets and rates of taxation. If they are inconsistent, then the latter enactments must control. Either way, the result is the same.

CONCLUSION

It is therefore the opinion of this office that Attorney General Opinion No. 56-161, April 18, 1956, must be deemed modified by superseding legislation; that the governing bodies of school districts may be required by the Nevada Tax Commission to meet with other governing bodies when necessary to effect the provisions of NRS 361.455, and that the Nevada Tax Commission has authority to examine and audit the budgets of school districts and to adjust the same where necessary.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: Robert A. Groves
Deputy Attorney General

OPINION NO. 1968-510 GENERAL IMPROVEMENT DISTRICTS—Gene...

OPINION NO. 1968-510 General Improvement Districts—General improvement districts created under Chapter 318 of the Nevada Revised Statutes are political subdivisions of the State of Nevada.

Carson City, May 14, 1968

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, 110 W. Telegraph Street,
Carson City, Nevada 89701

Dear Mr. Buck: You have requested an opinion from this office as to whether a general improvement district, created under Chapter 318 of the Nevada Revised Statutes, is a political subdivision of the State.

ANALYSIS

The character of general improvement districts may be established by reference to other chapters of the Nevada Revised Statutes, which are referred to in Chapter 318 by cross-reference.

Chapter 277 of the Nevada Revised Statutes, referred to by cross-reference, is the statute governing cooperative agreements between political subdivisions of the State for the performance of governmental functions, and defines such political subdivisions as including without limitation counties, incorporated cities and towns, unincorporated towns, school districts, and special districts. We interpret a general improvement district to be a special district.

Under NRS 239.010, the records of such districts, cross-referenced in Chapter 318, are open to public inspection.

But if any doubt should remain, we feel that Chapter 318 itself provides unanswerable grounds for determining that general improvement districts are political subdivisions of the State.

The Legislature in its legislative declaration made it very clear that the establishment of such districts was in the public interest and for the general welfare of the State. The legislative declaration in Chapter 318 (NRS 318.015) states:

It is hereby declared as a matter of legislative determination that the organization of districts having the purposes, powers, rights, privileges and immunities provided in this chapter will serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants thereof and of the State of Nevada; that the acquisition, improvement, maintenance and operation of any project authorized in this chapter is in the public interest and constitutes a part of the established and permanent policy of the State of Nevada; and that each district organized pursuant to the provisions of this chapter shall be a body corporate and politic and quasi-municipal corporation. For the accomplishment of these purposes the provisions of this chapter shall be broadly construed. (*Italics ours.*)

While the districts are created by county commissioners, the interest of the State in the districts is emphasized by the language used in NRS 318.075(1):

Except as otherwise provided in subsection 2, the adoption of the ordinance creating the district shall finally and conclusively establish the regular organization of the district against all persons, which district shall thenceforth be a governmental subdivision of the State of Nevada, * * *.

CONCLUSION

It is therefore the opinion of this office that general improvement districts, created under Chapter 318 of the Nevada Revised Statutes, are political subdivisions of the State of Nevada.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-511 BANKS; EXAMINATION FEES—Provisions...

OPINION NO. 1968-511 Banks; Examination Fees—Provisions of NRS 658.095 construed; held that bank examination fees are absolutely and mandatorily payable on due dates fixed thereof, irrespective of failure, if any, on part of superintendent of banks to make examination of a state bank "at least once every 6 months." This duty regarded as merely a directory provision of NRS 665.020.

Carson City, May 15, 1968

Mr. Preston E. Tidvall, Superintendent, Banking Division, Nevada Division of Commerce, Carson City, Nevada 89701

Dear Mr. Tidvall: You have referred to us for our legal opinion and advice the refusal of a state bank to pay examination fees as scheduled and prescribed in NRS 658.095 which were due and payable on December 31, 1967.

Such refusal is sought to be justified on the alleged ground that, since said bank did not have the benefit of a bank examination as specifically provided or directed in NRS 665.020, there exists no legal obligation or liability on the part of said bank to make payment of the claimed bank examination fees which were due and payable on December 31, 1967, as prescribed by NRS 658.095.

The Banking Division denies that it did not make examination of the involved state bank, or that it has, in any respect, neglected or failed to make full compliance with the provisions of NRS 665.020. There is thus presented a question of fact on such particular point. However, it is our considered opinion that the more fundamental and controlling question is one of law.

QUESTION

Is application of NRS 658.095, as respects required payment of bank examination fees therein scheduled, conditional upon completion of any particular bank examination by the superintendent of banks as precisely directed in NRS 665.020?

ANALYSIS

As relevant hereto, NRS 658.095 provides as follows:

1. The superintendent of banks shall charge and collect the following examination and survey fees in connection with his official duties:

(a) For examination of state banks:

(1) A fee of \$100 for each parent bank, payable on June 30 and December 31 of each year.

(2) A fee of \$25 for each branch bank, payable on June 30 and December 31 of each year.

(3) A fee of 4 cents per \$1,000 of the total assets of all banks, payable semi-annually on the basis of the call report of condition as of June 30 and December 31 of each year. * * *

2. All moneys collected under this section shall be paid into the general fund in the state treasury.

As relevant hereto, NRS 665.020 provides as follows:

1. The superintendent of banks, or one of his deputies, at least once every 6 months * * * shall make, or cause to be made, a full and careful examination and inquiry into the condition of each bank subject to the provisions of this Title * * *.

2. The superintendent of banks may adopt as his report of an examination the written report of an examination made by any federal agency having jurisdiction of and making an examination of state banks.

Based upon the foregoing statutory provisions, it is quite evident that payment of bank examination fees as scheduled and provided in NRS 658.095 is unconditional and mandatorily required, without any reference whatsoever to, and irrespective of, the provisions of NRS 665.020.

The bank examination scheduled fees, as imposed and collectible under the provisions of 658.095, become absolutely payable into the general fund in the State Treasury on June 30 and December 31 of each year, the due dates fixed therefor, in some measure to defray the general costs of bank examination services performed and rendered by the Banking Division in the public interest and for the benefit of state banks and state banking system. Consequently, the legal obligation and liability of each and every state bank to make payment of examination fees as prescribed by NRS 658.095 does NOT assume or pre-suppose that the superintendent of banks has, in actual fact, previously undertaken or completed an examination of any

particular bank as precisely directed by the provisions of NRS 665.020, prior to either of the fixed semi-annual due dates for payment of the state-imposed bank examination fees as scheduled.

The absurdity of any such argument or contention should be manifest, since a bank, in such case, could reasonably and properly claim that it was absolved or exempted from such fee-payment requirement, if the examination were still in process and uncompleted on either June 30 or December 31 of the year, when such examination was the only one undertaken in either the first or second 6-month period.

While such is stated NOT to be the present case, failure, if any, on the part of the superintendent of banks to perform or discharge statutorily imposed official responsibilities (e.g., such as the directory provisions of NRS 665.020) may, or could, constitute dereliction or neglect of such duties warranting appropriate administrative or personnel action, but any such dereliction or neglect of such duties may certainly NOT properly be invoked to legally justify or absolve a bank from prescribed compliance with absolute and unconditional state imposed scheduled fees for bank examinations. As set forth in 10 Am.Jur.2d, Sect. 18, p. 44: A state's regulatory functions and powers relative to banks under its police power are not constitutionally impaired by enactment of legislation providing for reasonable examinations and reports by duly authorized officers of the state banking department created by such legislation, and for enforced annual contribution to the expenses for such department of a reasonable percent of a bank's total assets, citing *Bank of Oxford v. Love*, 250 U.S. 603, 63 L.Ed. 1165, 40 S.Ct. 22, affg. 111 Miss 699, 72 So. 133, Annotation, 8 ALR 894; also *Blaker v. Hood*, 53 Kan. 499, 36 P. 1115.

If any additional support for such conclusion were at all necessary, it certainly can be found in NRS 665.020 itself, which additionally provides that the superintendent of banks, in proper circumstances, may entirely dispense with any bank examination, whether on his part personally or on the part of one of his deputies, adopting “* * * as his report of an examination the written report of an examination made by any federal agency having jurisdiction of and making an examination of state banks.” (NRS 665.020, paragraph 2) Such provision conclusively shows that undertaking and/or completion of a bank examination by the superintendent of banks is NOT a necessary or indispensable condition to the application of NRS 658.095, and compliance by all state banks with the mandatory requirement for payment of scheduled bank examination fees.

CONCLUSION

The provision in NRS 665.020 that the superintendent of banks make an examination of state banks “* * * at least once every 6 months” must be construed as directory only and does NOT qualify, limit, or condition the application of NRS 658.095, as respects mandatory payment of state imposed scheduled bank examination fees by all state banks on June 30 and December 31 of each year.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John A. Porter, Deputy Attorney General

OPINION NO. 1968-512 PROPERTY TAX; EXEMPT ORGANIZATIONS...

OPINION NO. 1968-512 Property Tax; Exempt Organizations—Nevada Safety Council is exempt from property taxation as a nonprofit educational corporation.

Carson City, May 15, 1968

Mr. Howard Hill, Managing Director, Nevada Safety Council, 208 Las Vegas Blvd. South, Las Vegas, Nevada 89101

Dear Mr. Hill: You have requested an opinion from this office on the question of whether the Nevada Safety Council enjoys a tax exempt status as a nonprofit educational corporation. You have advised us that

the purposes of the corporation are primarily educational and deal with all facets of safety throughout the State of Nevada. The council derives its financial support through public donations and contributions, coming primarily from businesses. You have also furnished a copy of the council's annual report for 1967. The Nevada Safety Council is incorporated in the State of Nevada as a nonprofit corporation.

ANALYSIS

Exemption from property taxation is afforded municipal, charitable, religious or educational corporations by the Nevada Constitution and by the laws governing property taxation. Nevada Constitution, Article 8, Section 2, provides:

All real property, and possessory rights to the same, as well as personal property in this State, belonging to corporations now existing or hereafter created shall be subject to taxation, the same as property of individuals; Provided, that the property of corporations formed for Municipal, Charitable, Religious, or Educational purposes may be exempted by law.

NRS 361.140, in part, provides:

Exemptions of certain charitable corporations.

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

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

(b) * * *

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

The Nevada Safety Council clearly meets the requirements set forth in the foregoing constitutional and statutory provisions for tax exempt status. We, therefore, conclude that your question must be answered in the affirmative.

CONCLUSION

It is therefore the opinion of this office that the Nevada Safety Council is exempt from property taxation as a nonprofit educational corporation.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

OPINION NO. 1968-513 REAL PROPERTY TRANSFER TAX—Conveya...

OPINION NO. 1968-513 Real Property Transfer Tax—Conveyances to Federal Housing Administration, in lieu of foreclosure, not subject to tax; other conveyances in lieu of foreclosure, or in rehabilitation of properties thereafter, taxable to the extent of consideration given therefor.

Carson City, May 16, 1968

Mr. Robert F. Hollister, Chief, Home Mortgage Section, Office of the General Counsel, Department of Housing and Urban Development, Federal Housing Administration, Washington, D.C. 20411

Dear Mr. Hollister: You have requested an opinion from this office regarding the applicability of the recently enacted real property transfer tax to certain transactions involving the Secretary of Housing and Urban Development. You have advised that deeds in lieu of foreclosure are commonly exchanged, and that thereafter, properties so acquired are conveyed to individuals or corporations in a program of rehabilitation.

Your inquiry relates to the following types of transactions:

1. Deed by mortgagor to the secretary in lieu of foreclosure.
2. Deeds in lieu of foreclosure:
 - (a) mortgagor to mortgagee, followed by
 - (b) mortgagee to the secretary.
3. Deed from mortgagee to secretary, following acquisition by mortgagee in foreclosure sale.
4. Deed by secretary to an individual or corporation conveying property previously acquired as aforesaid.

ANALYSIS

The tax on real property transfers is imposed by NRS 375.020, subsection 1. It provides:

A tax, at the rate of 55 cents for each \$500 of value or fraction thereof, is hereby imposed on each deed by which any lands, tenements or other realty is granted, assigned, transferred or otherwise conveyed to, or vested in, another person, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds \$100.

It is noted that this statute is in language substantially the same as that found in the federal act, which it replaces. The federal act became inapplicable January 1, 1968, at which time the Nevada act became effective. See 26 U.S.C. 4361. We are therefore aided by decisions construing the federal act, for the purposes of this opinion.

Specific exemptions from the tax imposed by NRS 375.020 are provided in NRS 375.090. Subsection 2 thereof excepts:

A transfer of title to the United States, any territory or state or any agency, department, instrumentality or political subdivision thereof.

By reason of this specific exemption, any conveyance to the secretary, i.e., in which the secretary is made transferee or grantee, is not subject to taxation. Therefore, the transfers listed above in examples 1, 2(b), and 3 are not taxable.

All transfers not exempted are taxable to the extent of value. NRS 375.020. Value is defined in NRS 375.010, subsection 4(a), as follows:

In the case of any deed not a gift, the amount of the full, actual consideration therefor, paid or to be paid, excluding the amount of any lien or liens assumed.

It follows that a conveyance by the secretary to a private individual or corporation as outlined in example 4 above is taxable to the extent of value received within the foregoing definition.

The situation wherein a non-exempt mortgagee acquires lands by deed in lieu of foreclosure or at foreclosure sale is less clear. It would appear that such transfers do not involve the exchange of value, but cases which interpret the federal act hold otherwise. A mortgagee was held liable for the stamp tax in that, by its acceptance of deeds in lieu of foreclosure, it gave up rights which presumptively were worth the amount of mortgage indebtedness and which would otherwise remain secured. *Railroad Federal Savings and Loan Assn. v. United States*, (C.C.A. N.Y. 1943) 135 F.2d 290, 153 A.L.R. 581. In that case it was further held to be immaterial that the mortgagee intended to accept the conveyance in full satisfaction and seek no additional recovery from the mortgagor. The same case also established mortgagee liability for the tax where it bid in the property at foreclosure sale, the consideration being the bid price together with the expenses of

foreclosure and cost of clearing tax liens. See also, *Mutual Life Ins. Co. of New York v. United States*, 110 F.Supp. 606 (Ct.Cl. 1953).

CONCLUSION

It is therefore the opinion of this office that:

1. Any conveyance of title to the Secretary of Housing and Urban Development is not subject to the Nevada real property transfer tax.
2. Conveyances in lieu of foreclosure to mortgages not specifically exempted by the act are subject to tax to the extent of value.
3. Conveyances by the secretary to private individuals or corporations in rehabilitation of properties are subject to tax to the extent of value.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

OPINION NO. 1968-514 COSMETOLOGY—One permitted to give ...

OPINION NO. 1968-514 Cosmetology—One permitted to give demonstration or exhibitions to cosmetologists, or others, under NRS 644.420-644.425, cannot secure successive permits extending beyond the 10-day limitation imposed by the Legislature.

Carson City, May 20, 1968

Mrs. Bernice Randall, Secretary, Nevada State Board of Cosmetology, P.O. Box 1814, Reno, Nevada 89507

Dear Mrs. Randall: You have requested an opinion of this office as to whether a person engaged in the business of a demonstrator as defined in NRS 644.420-644.425, may be granted a second successive permit after the expiration of the 10-day period provided by the law.

ANALYSIS

It will be noted that the Legislature used the word "temporarily," which is adverse to continued permits.

The Legislature had in mind the traveling expert who does not intend to remain in Nevada, but who comes to this State to give a demonstration in some phase of cosmetology primarily for educational purposes. (See NRS 644.425.)

Under NRS 644.425(3b) the applicant for such a permit must demonstrate to the satisfaction of the Board of Cosmetology that the permit is sought primarily for educational purposes. This does not refer to the applicant's educational requirements, but to the educational benefit to be derived from his or her demonstration or exhibition by others engaged in cosmetology.

A continued granting of permits would obviously avoid the clear intent of the law by allowing the applicant permission to practice cosmetology without a license.

CONCLUSION

It is the opinion of this office that the permit to be granted under NRS 644.420-644.425 is for demonstration purposes, and is not to be granted for an additional period beyond the 10-day limitation imposed by the Legislature.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-515 SCHOOL DISTRICTS; POWER OF TRUSTEE...

OPINION NO. 1968-515 School Districts; Power of Trustees—Members of boards of school trustees are not precluded by law from voting on contracts which extend beyond their terms of office.

Carson City, May 21, 1968

The Honorable William J. Raggio, District Attorney, Washoe County Courthouse, Reno, Nevada 89505

Attention: Willbur H. Sprinkel, Esq., Deputy District Attorney

Dear Mr. Raggio: You have requested an opinion of this office on behalf of the Washoe County School District on a problem having statewide implications.

STATEMENT OF FACTS

The Washoe County School District has an opportunity to and desires to purchase 17 acres of federal land adjacent to the Stead Air Force Base Elementary School. The transaction is offered by the United States government through the Department of Health, Education, and Welfare on a "deferred use plan." Under this purchase plan, the school district would pay 5 percent of the fair market value of the property annually for a period of 8 years, together with interest at the rate of 5 1/4 percent annually upon the unpaid balance. The plan further provides that if, at the end of the 8-year period the property has been put into use by the school district for school purposes, then the district will own the property in fee, without obligation to make further payments on the original purchase price. Consequently, the district has the opportunity to acquire school properties at approximately 40 percent of their actual cash value. The terms of office of five of the present seven members of the Washoe County Board of School Trustees will expire on December 31, 1968.

QUESTION

The question presented is whether the members of the Washoe County Board of School Trustees are precluded from voting on the proposed purchase by reason of the fact that the contract extends beyond the terms of office of the trustees who must vote upon it.

ANALYSIS

Your letter suggests a possible analogy, in that the Washoe County School District is a political subdivision, and that NRS 244.320 prohibits county commissioners from voting on contracts for periods which extend beyond their terms of office.

The Board of School Trustees and not the Board of County Commissioners is the governing body of a county school district. NRS 386.140. It follows that the disabilities imposed on county commissioners against voting on contracts which extend beyond their terms of office do not limit the powers of school trustees, unless a similar prohibition exists in the laws creating such boards and defining their powers. Our research has disclosed no such prohibition precluding school trustees from voting on contracts which must of necessity be performed after the expiration of the trustees' respective terms of office.

The existence of such disabilities is not to be inferred from the presence of other prohibitions regarding contracts which also affect county commissioners. An example is found in the provisions of NRS 386.400, which prohibits school trustees from being financially interested in any contract made by the board of trustees of which they are members. In this connection, see Attorney General's Opinion No. 50-B996 of November 8, 1950. That opinion reasoned that school trustees may vote on contracts for services which extend beyond their terms of office.

School trustees are vested by law with general powers enabling them to do whatever is reasonable and necessary to attain the purpose for which public schools are established and to promote the welfare of school children, except where such would conflict with the laws or constitution of the State of Nevada. NRS 386.350. In addition, the trustees are empowered specifically to accept certain forms of assistance from the United States government. NRS 386.355. We can find nothing in such a broad grant of power to indicate a limitation with respect to terms of office.

We are strengthened in this conclusion by a review of the statutes which specify the uses of moneys held in the County School District Fund and the County School District Buildings and Sites Fund. The former fund, when moneys therein are available, may be used for the purchase of sites for school facilities. NRS 387.205, subsection 2(a). The latter fund may be expended only in the manner and for the purposes specified in NRS 387.335. NRS 387.177. NRS 387.335, subsection 1(c), authorizes the use of such funds for the acquisition of new school building sites or real estate for school purposes. It is significant that this chapter of Nevada Revised Statutes is cross-referenced to Chapter 393 of Nevada Revised Statutes governing the use and acquisition of school property. NRS 393.140 empowers the boards of school trustees to exchange, purchase, lease or otherwise acquire school sites and real estate for school purposes. The specific authorization to lease included in this grant of power was added by amendment in 1957. See Statutes of Nevada 1957, p. 297.

The terms of office of school trustees do not exceed 4 years, and in some instances are limited to 2 years. NRS 386.160-386.210. We are satisfied that leases of school properties for terms not exceeding either 2 or 4 years are totally unworkable and would place county school districts in a grossly disadvantageous position, because they would be continually required to negotiate with real property owners for renewals. The situation would be worse where improved school properties are concerned. If boards of school trustees are not empowered to contract for the lease of school properties on a long term basis, not only would an absurd and unworkable situation result, but also such boards would be precluded from gaining substantial monetary advantages on the long term purchase plans available to them under federal programs such as the one here under consideration. We do not feel that the Legislature intended such a cumbersome situation to exist. A common rule of statutory construction requires courts to avoid interpretations that will result in absurd consequences. *Nye County v. Schmidt*, 39 Nev. 456.

The only indication of a contrary interpretation that we have been able to locate is found in Attorney General's Opinion of April 22, 1955. That opinion concluded that school districts were not authorized to contract for the purchase of school sites other than on a cash basis. In the factual situation there presented, a school district had the opportunity to purchase a school site by making a down payment of approximately 29 percent of the total purchase price, and discharging the balance in three equal annual installments. Those terms of sale were solely for the convenience and tax advantage of the seller. The opinion reasoned that although such terms were afforded the district along with a reduction in purchase price, the district was not authorized to accept them. The reason was not that the contract exceeded the terms of office, but that under then existing law, the district was required to deal only on a cash basis, and had sufficient cash resources to pay the purchase price in full.

Because the language of Attorney General's Opinion No. 55-47 of April 21, 1955, suggests that in the situation now before us the district must purchase for cash or not at all, we deem it deserving of thorough analysis. As stated, the basis of the opinion is found in the 1953 Statutes of Nevada, Chapter 335, § 1, which reads as follows:

The business of every county or other political subdivision in this state on and after the approval of this Act, shall be transacted upon a cash basis in accordance with the terms of this Act.

School districts were designated as agencies within its meaning. However, that act was superseded by the Local Government Budget Act of 1965, contained in NRS 354.470 to 354.626, inclusive. The cash basis requirement prior to enactment of the Local Government Budget Act was found in NRS 354.340. That statute was specifically repealed by the Local Government Budget Act. See 1965 Statutes of Nevada, Chapter 345, p. 750, § 103.

By reason of the fact that Attorney General's Opinion No. 55-47 of April 22, 1955, is based on facts not here present and a fortiori is based on a specific statute now repealed, we regard it as inapplicable to the issue presented here.

We therefore conclude that the question presented must be answered in the negative.

CONCLUSION

It is the opinion of this office that members of boards of school trustees are not precluded by law from voting on contracts which extend beyond their terms of office.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

OPINION NO. 1968-516 SALES TAX; EXEMPTION—Nonprofit cor...

OPINION NO. 1968-516 Sales Tax; Exemption—Nonprofit corporation or association organized to promote and conduct Little League Baseball is exempt as a charitable organization from sales tax under NRS 372.325(5).

Carson City, May 23, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: You have requested an opinion as to whether Little League Baseball comes within the exemption from sales tax afforded by NRS 372.325 (5) which reads as follows:

There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to:

5. Any organization created for religious, charitable or eleemosynary purposes, provided that no part of the net earnings of any such organization inures to the benefit of any private shareholder or individual.

ANALYSIS

You have submitted with the inquiry a copy of the articles of incorporation of a nonprofit corporation formed for the purpose of instituting, promoting and supervising Little League Baseball in a section of Southern Nevada.

These articles set forth as the purposes of the corporation the following:

- (a) To foster programs devoted to the development of baseball as a program of service to youth;
- (b) To provide opportunity and help boys of the community to obtain the ideals of sportsmanship and citizenship under good leadership with a spirit of unity through a supervised program of competitive baseball;
- (c) To promote an exchange of ideas and information on progressive youthful activities through competitive baseball;

all of which shall be accomplished without regard to race, color, or creed.

Before proceeding to determine whether this corporation, and other Little League Baseball associations, are exempt from sales tax under the charitable doctrine exemplified in NRS 372.325(5), it might be well to examine the federal law under which Little League Baseball was chartered.

Congress during the 88th session of that body in 1964 gave mutual recognition to Little League Baseball by a charter which set forth the objects and purposes of the legislation as follows:

(1) To promote, develop, supervise, and voluntarily assist in all lawful ways the interest of boys who will participate in Little League Baseball.

(2) To help and voluntarily assist boys in developing qualities of citizenship, sportsmanship, and manhood.

(3) Using the discipline of the native American Game of baseball, to teach spirit and competitive will to win, physical fitness through individual sacrifice, the value of team play and wholesome well-being through healthful and social association with other youngsters under proper leadership.

It can thus be determined that the object to be secured by the legislation was to insure the opportunity for millions of boys to participate in this great sport regardless of financial or social status. Money received by gift, grant or solicitation is used to purchase equipment, to build stands, to prepare and maintain playing fields, and thus to make available to many boys who could not otherwise participate in our national pastime, the wherewithall to join in the character-building program. This is charity in its truest sense.

CONCLUSION

It is therefore the opinion of this office that a nonprofit corporation or association organized for the purpose of promoting Little League Baseball is exempt as a charitable organization from sales tax under NRS 372.325(5).

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-517 CITY LICENSE TAX—The City of North...

OPINION NO. 1968-517 City License Tax—The City of North Las Vegas may impose a license tax upon the utility owners of telephones, gas meters, water meters or any other similar device for measuring service.

Carson City, May 28, 1968

Mr. Clay Lynch, City Manager, City of North Las Vegas, P.O. Box 4086, North Las Vegas, Nevada 89030

Dear Mr. Lynch: You have asked the question:

May the City of North Las Vegas impose a license tax upon the utility owners of telephones, gas meters, water meters, or any other similar device for measuring service?

ANALYSIS

Chapter II, Section 33, paragraph 10, of the North Las Vegas City Charter grants the city the right to impose a license fee upon telegraph and telephone companies. Chapter II, Section 33, paragraph 36, grants to the city the right to grant franchises for public utilities.

Under authority of the charter, as outlined by Chapter II, Section 33, paragraph 10, the city enacted Chapter 3.68, wherein a license tax is imposed on public utilities operating as a business in the city. Section 3.680.030 specifically exempts from a payment of this tax any public utility that has a franchise from the city.

Under authority of Chapter II, Section 33, paragraph 36 of the charter, the city enacted Chapter 3.70 and 3.72, wherein the Southern Nevada Power Company was granted a franchise for 50 years, and the Southern Nevada Telephone Company was granted a franchise for 50 years. Each franchise charges a revenue tax of 1 percent of the gross revenue of each company, and each franchise exempts each company from payment of any other license fee charged by the city.

In addition to the foregoing powers of the city granted by the charter, there is an additional power of taxation. This is found in Chapter II, Section 33, paragraph 10:

To fix, impose and collect a license tax of street cars, telephones, gas meters, water meters, or any other similar devise for measuring service

** * * such license tax to be exclusive of and in addition to all other lawful taxes upon the property of the holder thereof. (Italics added.)*

It is the opinion of this office this is a separate and additional grant of power to tax from the charter to the city.

It is fundamental that a municipal corporation has no powers which are not delegated by charter or legislative statute. The corporation, owing its existence to the law, is precisely what the law makes it. It has no powers except those expressly conferred, or which are necessary to the exercise of those expressly given, and to enable it to accomplish the purpose of its creation. McQuillan Municipal Corporations, 1966 Edition, Vol. 2, p. 610; Attorney General Opinion No. 49-750 of May 9, 1949; Attorney General Opinion No. 37-249 of October 4, 1937; State ex rel. Rosenstock v. Swift, 11 Nev. 128.

CONCLUSION

It is the opinion of this office, therefore, that although the State has granted the City of North Las Vegas the right to levy a license tax on public utilities and the right to grant franchises to public utilities and levy a tax thereon in lieu of the license fee, additionally it has granted the City of North Las Vegas the right:

To fix, impose and collect a license tax of street cars, telephones, gas meters, electric meters, water meters, or any other similar device for measuring service * * * such license tax to be exclusive of and in addition to all other lawful taxes upon the property of the holder thereof.

The answer to the question you have posed is therefore in the affirmative.

Respectfully submitted,

Harvey Dickerson, Attorney General

By John G. Spann, Deputy Attorney General

OPINION NO. 1968-518 NEVADA TAX COMMISSION; WHOLESALER-...

OPINION NO. 1968-518 Nevada Tax Commission; Wholesaler-Importer; Sales of Intoxicating Liquor By—
No legal permission is given to wholesalers in the liquor industry to sell liquor in containers to employees.

Carson City, May 29, 1968

Mr. Roy E. Nickson: Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson: You have requested this office for an opinion revolving around the following questions:

1. Does Chapter 369 of Nevada Revised Statutes authorize a wholesaler, importer or wholesaler and importer of intoxicating liquor to make sales of such products to other than retail liquor stores, another licensed wholesaler, permissible persons, or instrumentalities of the Armed Forces?

2. If the answer to No. 1 above is affirmative, does such authorization include the sale of intoxicating liquor to the owner or employees of the firm?

3. In the answer to No. 2 above, is there any distinction wherein such sales would be permissible only by an importer or only by a wholesaler?

ANALYSIS

The questions arose as a result of a wholesaler selling intoxicating liquor in containers to employees.

A wholesaler is defined by NRS 369.130 as a person licensed to sell liquor in original packages to retail liquor stores, or to another licensed wholesaler, but not to the consumer or general public.

An importer is defined by NRS 369.030 as any person who, in the case of liquors which are brewed, fermented or produced outside the State, is first in possession thereof within the State after completion of the act of importation.

The importer is restricted by NRS 369.390, which does not authorize the sale or transfer for sale of any type of liquor without first securing the appropriate license or licenses applicable to the class or classes of business in which he is engaged.

The restriction against the sale of liquor in containers to other than retailers or other licensed wholesalers, does not apply to permissible persons or to instrumentalities of the Armed Forces. Permissible persons are defined as being a duly ordained minister who uses liquor for sacramental purposes, any doctor, apothecary, or pharmacist who uses alcohol for in compounding medicine, or the representative of any school, university, hospital, clinic, or industrial concern where liquor is used and needed for industrial purposes and not for concocting beverages for drink. (NRS 369.070)

CONCLUSION

On the basis of the statutes cited it is the opinion of this office that no legal permission is given to wholesalers in the liquor industry to sell liquor in containers to employees. Question No. 1 is therefore answered in the negative. Thus Questions Nos. 2 and 3 need not be answered.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1968-519 NEVADA SAFETY COUNCIL; EXEMPTION S...

OPINION NO. 1968-519 Nevada Safety Council; Exemption Sales and Use Tax—The Nevada Safety Council is not entitled to exemption from the imposition of sales and use tax.

Carson City, May 31, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701
Attention: John Carr

Dear Mr. Nickson: On May 15, 1968, this office issued Attorney General Opinion No. 68-512. That opinion held that the Nevada Safety Council, as a nonprofit educational corporation, was exempt from property taxation. You have now asked that we determine whether the Nevada Safety Council is also entitled to exemption from the imposition of the Nevada sales and use tax.

ANALYSIS

The Nevada Safety Council is essentially an educational institution as distinguished from a charitable one. Its exemption from property tax is based on its educational, nonprofit status. Attorney General Opinion No. 68-512 (5-15-68); Nevada Constitution, Art. 8, Sec. 2; and NRS 361.140, subsection 1(a).

However, the sales tax exemption does not extend to educational institutions merely because they are nonprofit. It includes only organizations created for religious, charitable or eleemosynary purposes. NRS 372.325(5). "Eleemosynary" is synonymous with "charitable." (Nixon v. Brown, 46 Nev. 439); i.e. having relation to or being supported by the giving of alms. (United Community Services v. Omaha National Bank, 164 Neb. 786, 77 N.W.2d 576).

As we read the respective tax exemption statutes, that which sets forth the sales and use tax exemption is narrower in scope. We, therefore, conclude that not every person or organization entitled to property tax exemption is for that reason also necessarily entitled to a sales or use tax exemption.

CONCLUSION

It is the opinion of this office that the Nevada Safety Council is not entitled to exemption from the imposition of sales and use tax.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Robert A. Groves, Deputy Attorney General

OPINION NO. 1968-520 CITIES AND TOWNS; VACATING PROCEDU...

OPINION NO. 1968-520 Cities and Towns; Vacating Procedures—Under NRS 268.060, a petition must be signed by owners of all abutting properties which may be affected by a proposed vacation. The provisions of NRS 268.060 do not apply to streets in which a city owns a mere easement. Under NRS Chapter 116, title to a vacated street reverts to owners of abutting properties. The vacating procedures in Chapter 278 of NRS apply to all streets, including those streets dedicated prior to the effective date of NRS Chapter 278.

Carson City, June 20, 1968

Jack E. Hull, Esq., City Attorney of Elko, 530 Idaho Street, Elko, Nevada 89801

Dear Mr. Hull: You have requested an opinion from this office concerning vacating procedures for streets in the City of Elko.

STATEMENT OF FACTS

The City of Elko is considering the possibility of vacating a strip of River Street in Elko 50 feet long by 7 feet wide. River Street, about 6 blocks long, was laid out by map or plat of the original Town of Elko on March 18, 1870. You have informed us that a dedication occurred. The City of Elko was incorporated by Chapter 84, Nevada Statutes of 1917, as amended, which vested in the city all property formerly belonging to the Town of Elko. The owner of lots 11 and 12 of Block 50 along River Street has requested the city to vacate that portion of River Street.

QUESTIONS

You have asked the following questions:

1. Under NRS 268.060, is a petition to vacate a street or portion thereof sufficient if signed by the property owners in the block in which vacation is contemplated, or must other owners along the street be included in the petition?
2. Does the authority to "buy, sell or exchange city property, including streets, alleys, avenues, or other thoroughfares" apply to streets owned by the city in fee simple or to any dedicated street?
3. Do the procedures for vacating streets under Chapter 116 of NRS apply to maps filed prior to the effective date of Chapter 116?
4. Under Chapter 116 of NRS, does a vacated street revert to the owners of abutting properties?
5. Do the procedures for vacating streets under Chapter 278 of NRS apply to maps filed prior to the effective date of Chapter 278?
6. Can the City of Elko, pursuant to paragraph 12, Section 30 of its charter, pass procedures for vacating streets, which vary or enlarge or change applicable statutory procedures?

ANALYSIS

We believe that the answer to your first question is that all property owners which may be affected by the proposed vacation must sign the petition. NRS 268.060 provides in part:

Whenever a petition signed by all property holders owning or controlling property in any block, lot, area or parcel of land abutting on any street, alley, avenue or other thoroughfare, which may be affected by realignment, change, vacation or adjustment, shall be presented to any city council * * *

In your situation a petition signed by all property owners in Block 50 may or may not be sufficient. The statute does not require signatures from owners in any particular designated location in relation to the proposed vacation, but rather requires that those owners who may be affected must sign the petition. While more specific guidelines may be desirable, the Legislature has seen fit to make the signators to a petition to vacate depend upon the facts and circumstances surrounding the proposed vacation of a street, alley, or other thoroughfare.

Your second question concerns whether or not a city can buy, sell or exchange a dedicated street under the authority of NRS 268.060. This statute provides that in addition to special powers granted by charter, cities can buy, sell or exchange property when deemed necessary to, among other things, vacate a street or portion thereof. After proper procedure, the city has

* * * the power * * * to buy, sell, or exchange city property, including portions of streets, alleys, avenues * * * to carry out any necessary realignment, change, vacation or other adjustment * * *

We must bear in mind that this dedication occurred in 1870. Thus, the dedication was not made pursuant to either Chapter 116 or Chapter 278 of NRS, since those acts became effective long after the dedication occurred. We must also bear in mind the passage date of NRS 268.060, which was 1933.

There is no doubt that had this property been dedicated pursuant to Chapter 116 of NRS, a determinable fee interest would have been created. NRS 116.060; *Peterson v. City of Reno*, 83 Nev. _____, No. 5328-5330, 436 P.2d 417. This may also be true under Chapter 278 of NRS.

Shearer v. City of Reno, 36 Nev. 445, dealt with streets dedicated in 1887. We view that case as holding that a dedication of streets (at least occurring prior to 1905-Chapter 116 NRS) vests an easement in the city. See also Attorney General's Opinion No. 40-B-18 dated November 10, 1940. The power of the city under NRS 268.060 relates to such streets in which it has a fee interest and not those in which it holds a mere easement. *State v. Taylor*, 64 S.W. 766, 18 A.L.R. 1008. Thus, despite the broad language of NRS 268.060, a city cannot dispose of a street in which it owns a mere easement.

We are not inclined to disagree with the holding in *Shearer v. City of Reno*, supra. Thus, we conclude that under the facts with which we have been supplied, the City of Elko has an easement in River Street, and thus it may not sell it.

In answer to your fourth question, we refer you to *Peterson v. City of Reno*, supra, which provides:

A street dedication under NRS 116.060 is "sufficient to vest the fee" for the "public for the uses therein named or intended." (Citing cases.) The "fee" so vested is a determinable fee simple which may continue forever, but is liable to be determined by some future event, such as abandonment or vacation, in which case title shall revert to abutting property owners. (Citing cases.)

This judicial interpretation by our Supreme Court requires us to conclude that owners of abutting property have a reversionary interest in vacated and abandoned streets.

Questions three and five are related, and shall be considered together.

NRS 278.480 provides:

Any person, firm, or corporation desiring the vacation or abandonment of any street or portion thereof shall file a petition in writing, signed by not less than three freeholders owning lands within the area affected by the proposed vacation and abandonment, with the governing body have jurisdiction.

2. If there be a planning commission, the governing body shall refer the petition to the planning commission, which shall report thereon to the governing body as set forth in NRS 278.240.

3. Whenever any streets are proposed to be vacated, the governing body shall cause the streets to be posted with a notice setting forth the extent of the proposed abandonment and setting a date for a public

hearing, which date shall be not less than 30 days and not more than 40 days subsequent to the date of posting of the street.

4. If, upon public hearing, the governing body is satisfied that the public will not be materially injured by the proposed vacation, it shall order the street to be vacated. The governing body may make such order conditional, and the order shall become effective only upon the fulfillment of the conditions prescribed.

5. The order shall be recorded in the office of the county recorder, if all the conditions of the order have been fulfilled, and upon such recordation title to the street shall revert to the abutting property owners.

6. Any easement for light and air adjacent to any vacated street is vacated upon the vacation of the street.

We think that this statute purports to be a complete act on the subject of vacation. It provides that "any person * * * desiring the vacation or abandonment of any street or portion thereof * * *" Because of the use of this broad language, we do not think the Legislature intended the act to be limited as your question five suggests. Thus, we think that the provisions of this chapter may be applied to "any street" and are not merely those in existence subsequent to the effective date of Chapter 278.

We would have a similar view of the procedures for vacating streets under Chapter 116 of NRS. NRS 116.110(1) provides:

If it is desired to vacate a portion only of any plat or a street or alley therein, application in writing may be made for that purpose to the city council of the city where the land is situated, and in all other cases to the board of county commissioners of the county where the land is contained.

We do, however, wish to insert a "caveat" in reference to NRS 116.110. The provisions for vacating streets under Chapter 116 of NRS may well have repealed those of NRS Chapter 278. There is authority for this proposition. See *Rowe v. James*, 128 P. 537. We do not, however, express an opinion on this subject at this time.

Your sixth question concerns the power of the City of Elko to set up its own vacation procedures under paragraph 12, Section 30 of its charter. An opinion has not been expressed on this subject. Before doing so, it will be necessary to know the procedures proposed by the City of Elko for vacating streets.

CONCLUSION

Under NRS 268.060, a petition must be signed by owners of all abutting properties which may be affected by a proposed vacation. The provisions of NRS 268.060 do not apply to streets in which a city owns a mere easement. Under NRS Chapter 116, title to a vacated street reverts to owners of abutting properties. The vacating procedures in Chapter 278 of NRS apply to all streets, including those streets dedicated prior to the effective date of NRS Chapter 278.

Respectfully submitted,

Harvey Dickerson, Attorney General

By Peter I. Breen, Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1968

OPINION NO. 68-521 BOARD OF PAROLE COMMISSIONERS; HEARINGS—The rights afforded alleged parole violators at revocation hearings are not opposed to federal or Nevada law. Pursuant to section D of the Rules of the Board of Parole Commissioners, all applications for parole are entitled to consideration. Makers of initial applications are entitled to a personal appearance.

Carson City, July 1, 1968

Mr. Willard Weaver, Acting Chief Parole and Probation Officer, Department of Parole and Probation, Carson City, Nevada 89701

Dear Mr. Weaver:

You have asked this office two questions:

1. When a psychiatric evaluation panel fails to certify a prospective parolee who falls within the purview of [NRS 201.190](#), is that person nevertheless entitled to a consideration of his application and a hearing before the Board of Parole Commissioners?
2. At a parole violation hearing, what rights does the alleged parole violator have?

ANALYSIS

On the subject of parole violations, our Legislature enacted [NRS 213.150](#), subsection 1 of which provides:

The board shall have full power to make and enforce rules and regulations covering the conduct of paroled prisoners, and to retake or cause to be retaken and imprisoned any prisoner so upon parole.

Pursuant to that authority, the Board of Parole Commissioners permits the alleged violator to be represented by an attorney of his choice at his own expense, to present witnesses at his own expense, to testify in his own behalf, and to present affidavits, letters, and statements. See *Rules of the Nevada Board of Parole Commissioners*, section G “Board Violation Hearings,” paragraph 5.

We have considered your second question in the light of whether the present rights afforded an alleged parole violator at his hearing for revocation affront federal or state law. This question was no doubt prompted in part by the recent decision by the United States Supreme Court in *Mempa v. Rhay*, 19 L.Ed.2d 336, 88 S.Ct. That case dealt with revocation of probation. It held, in the following language, that a lawyer must be afforded when probation is revoked:

All we decide here is that a lawyer must be afforded at this proceedings whether it be labeled a revocation of probation or a deferred sentencing.

Since the decision in that case, several federal circuit courts have had the opportunity to consider the prospects of extending federal constitutional standards to both state and federal parole procedures. Two such cases are, *Rose v. Haskins*, 388 F.2d 91 (1968, 6th Cir. Ohio) and *Williams v. Patterson*, 389 F.2d 374 (1968, 10th Cir. Colo.). In the *Rose* case, the parole board of

Ohio revoked parole without a hearing or notice. In the Williams case, parole was revoked without the opportunity to appear at the hearing with counsel. Each decision held that the U.S. Constitution did not apply to state parole revocation proceedings and that parole was a matter of legislative grace and not of right. *See also Sorenson v. Young*, 282 F.Supp. 1002 (1968 Minn.). We must thus conclude that the present board proceedings for violation hearings do not violate the Federal Constitution.

We are also of the opinion that they do not violate our State Constitution. In *Pinana v. State*, [76 Nev. 274](#), 352 P.2d 824 (1960), our Supreme Court said:

The subject of parole in this state is within the legislative authority given by the constitution to the legislature. Art. 4, Sec. 1, Nevada Constitution. Parole is not a constitutional right, it is a right bestowed by legislative grace. *Zink v. Lear*, 28 N.J. Super. 515, 101 A.2d 72.

Other state courts have recently arrived at the same conclusion. *Whalen v. Gladden*, 436 P.2d 560 (1968 Ore.); *Mallory v. State*, 435 P.2d254 (1967 Idaho).

We thus conclude that the present procedures under which a parole violation hearing is conducted do not affront state or federal law insofar as the rights of the alleged violator are concerned.

[NRS 201.190](#), subsection 3 (a), provides:

No person convicted of violating the provisions of subsection 1 of this section may, if the victim was a child under the age of 14 years, be:

(a) Paroled unless a board consisting of the superintendent of the Nevada state hospital, the warden of the Nevada state prison, and a physician authorized to practice medicine in Nevada who is also a qualified psychiatrist certifies that such person was under observation while confined in the state prison and is not a menace to the health, safety, or morals of others.

Subsection 1 thereof concerns infamous crimes against nature. Your question is should a prospective parolee's case be acted upon and should he be granted a personal appearance before the board, despite the fact that he fails to be certified as required by the statute.

This statute, in our opinion, is a condition precedent to granting parole. We see nothing contained therein which makes certification a condition precedent to considering applications or requiring personal appearances.

[NRS 213.130](#), subsections 1 and 2, provide:

1 Applications for parole from the state prison or county jail shall be made on forms prescribed by the board from time to time, and shall contain such data as will assist the board in determining whether parole should be granted.

2 Meetings for the purposes of considering applications for parole shall be held semiannually or oftener, on such dates as may be fixed by the board.

The Rules of the Nevada Board of Parole Commissioners, section D, paragraphs (a) and (b), provide:

The chairman of the board in concurrence with the secretary will assign Hearing Representatives and Referees to act on panels at scheduled official board hearings. In accordance with the authority of [NRS 213.133](#), it shall be the policy of the Parole Board to:

(a) Hear by full board in personal hearings all murder first and murder second degree cases.

(b) Hear by panels in personal hearings all initial applications for parole. Hear by panels, on record only, all review hearings unless a personal appearance is approved

by the secretary of the board or a member of the board. Further, hear by panels, in personal hearings all parole violation hearings and statutory time hearings.

In these rules and regulations, the Board of Parole Commissioners has announced its policy to hear, by panel, all initial applications for parole. By the use of the term “personal hearings,” the rules indicate that applicant is to be present at these hearings.

It is therefore our opinion that all initial applicants for parole are entitled to consideration of their applications by personal appearance before a panel, in accordance with the announced policy of the Board of Parole Commissioners.

CONCLUSION

We conclude that the rights afforded alleged parole violators at revocation hearings are not opposed to federal or Nevada law. We further conclude that, pursuant to section D of the Rules of the Nevada Board of Parole Commissioners, all applications for parole are entitled to consideration. Makers of initial applications are entitled to a personal appearance.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: Peter I. Breen
Deputy Attorney General

OPINION NO. 68-522 TAXATION; PRINTING AND RELATED INDUSTRIES; TAX COMMISSION RULING NO. 47—(1) Printing or imprinting names and addresses by addressograph, data processing machines or the like is a taxable activity under [NRS 372.060](#). (2) Electrotypes, stereotypes, mats, photoengravings, silk screens, steel dies, cutting dies, lithographic plates, art work, and separation negatives, purchased in the preparation of printed matter, are not for resale in the regular course of business, unless purchased at the request of the customer and title thereto passes to the customer prior to use by the printer.

Carson City, July 2, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson:

You have asked the opinion of this office on the Tax Commission’s Ruling No. 47 and its proposed revision. Pertaining specifically to that ruling, you ask:

1. Is imprinting names and addresses by addressograph, data processing machines, and other mechanical devices a taxable activity?
2. Are the materials, including electrotypes, stereotypes, mats, and separation negatives, used by printers in the preparation of printed matter, items for resale in the regular course of business?

ANALYSIS

Revised Ruling No. 47 provides in part:

Imprinting names and addresses by addressograph, data processing machines or any other mechanical device is a taxable activity. Tax applies whether or not the paper and other materials are furnished by the consumer.

The answer to the first question depends primarily upon whether this activity constitutes a “sale” under [NRS 372.060](#). This statute provides in part:

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

* * * * *

3. “Sale” includes:

(a) The producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish, either directly or indirectly, the materials used in the producing, fabricating, processing, printing or imprinting.

(b) The furnishing and distributing of tangible personal property for a consideration by social clubs and fraternal organizations to their members or others.

(c) The furnishing, preparing, or serving for a consideration of food, meals or drinks.

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

(e) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated or printed to the special order of the customer, or of any publication.

There is no agreement on this subject among the tax commissions of the various states. For example, California apparently excludes this activity, while Washington includes addressing as a taxable activity. Unfortunately, no decisions have been found which are directly in point.

A strong argument can be made that addressing, by the means outlined in the proposed revision to Ruling No. 47, is primarily a service rather than the sale of tangible personal property. In fact, the same argument can be made for any type of printing if the customer supplies the paper, because only a minute quantity of ink is transferred to the customer, and printing has long been regarded as one of the graphic arts.

However, we are not obligated to erode what appears to be the clear meaning of the statute. Despite the argument that the subject activity is primarily a service transaction, we believe the Legislature has seen fit to include printing and imprinting on tangible personal property within the meaning of “sale,” regardless of whether the consumer supplies the materials.

As we view it, the use of addressographs, data processing machines, etc., to affix names and addresses on tangible personal property constitutes printing or imprinting. A case involving the infringement of patents has accepted a definition of printing as “the art of reproducing a design upon a surface by any process.” *See Technograph Printed Circuits, Ltd. v. Bendix Aviation Corporation*, 218 F.Supp. 1 (1963).

Thus we must conclude that the questioned portion of the first paragraph of proposed Ruling No. 47 is proper, and the activity mentioned therein is taxable. While not specifically in point, the discussion and cases cited in 9 *Vanderbilt Law Review* 1955-56, “What is a Sale?” by Clyde L. Bal, and 139 *A.L.R.* 372, are analogous and in our opinion support this conclusion.

In the third paragraph of the proposed ruling, printers are deemed consumers of materials used in the process of printing, provided the printer retains title. An exception is made when these materials are purchased at the request of the customer, and title to the property passes prior to use by the printer. That paragraph provides:

Printers are consumers of electrotypes, stereotypes, mats, photo-engravings, silk screens, steel dies, cutting dies, lithographic plates, art work, single color or multicolor separation negatives, and any other properties purchased for use in the preparation of printed matter to be sold, provided title to such materials is retained by the printer. When printers purchase such properties for use in the preparation of printed matter at the request of the customer, and title to such properties passes to the customer prior to their use by the printer, such properties can properly be purchased for resale, and the tax applies to the printer's charges to the customer for such properties. Such properties must be designated on the printer's invoice to the customer.

Members of the printing industry urge that they purchase these items for sale and that they are sold to the consumer.

[NRS 372.050](#) defines a "sale at retail" as:

* * * a sale for any purpose other than resale in the regular course of business of tangible personal property.

We believe that when one places an order for printed matter, he desires the finished product, the printed matter. It is not usually contemplated by the parties that the customer also acquire the materials used to prepare the finished product. This being the case, the "negatives," as it were, are discarded, because they are no longer of any use. Likewise, the printer, when purchasing these items from a manufacturer, does so for the purpose of producing printed matter for the customers and not to pass them along to the customers. See 2 Opinions of the Attorney General 343 (Cal.); 47 Am.Jur. secs. 25, 29.

The exception stated in the third paragraph of Ruling 47 greatly simplifies this question. It recognizes and makes provision for situations in which materials used by printers are actually purchased for the purpose of resale to customers. We thus see no objection to the validity of these provisions of Ruling No. 47.

CONCLUSION

It is therefore the conclusion of this office that:

1. Printing or imprinting names and addresses by addressograph, data processing machines of the like is a taxable activity under [NRS 372.060](#).
2. Electrotypes, stereotypes, mats, photoengravings, silk screens, steel dies, cutting dies, lithographic plates, art work, and separation negatives, purchased in the preparation of printed matter, are not for resale in the regular course of business, unless purchased at the request of a customer and title thereto passes to the customer prior to use by the printer.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: Peter I. Breen
Deputy Attorney General

OPINION NO. 68-523 PUBLIC EMPLOYEES RETIREMENT—Public employee who enters Armed Forces, and returns to employment with contributing member of the system upon release, must serve with such member, or other contributing member, for a period of

5 years after service in each separate, designated, conflict before being entitled to credits for retirement for such service in such conflict.

Carson City, July 3, 1968

Floyd L. Edsall, B. G., Adjutant General, P.O. Box 1120, Carson City, Nevada 89701

Dear General Edsall:

You have made inquiry as to an interpretation of [NRS 286.500.1b](#) based on the following facts:

A technician in the Air National Guard has worked for the State of Nevada since January 1, 1950. He was called to active service in the Nevada Air National Guard during the Korean War. Upon return from active service he went to work for the Air National Guard and now has 4 years and 6 months of contributing state service. He was activated into services with the Armed Forces on January 25, 1968.

You have asked two questions:

1. Whether or not a state employee as described above, has to put in another full 5 years upon return from the Vietnam conflict in order to obtain credit for the Vietnam time, or does this employee have to only fulfill the remaining 6 months that he was lacking upon return from the Korean War?

2. Whether or not a state employee has to put in 5 years of participating service upon return from active duty no matter how many times that employee is activated or for how long?

In order to more fully comprehend legislative intent it is necessary to set for at length all of the provisions of [NRS 286.500](#). This statute provides:

Absence on military service: Credits.

1. Any employee of an employer participating in the system who enters the Armed Forces and who, within 1 year after being honorably discharged therefrom or within 1 year after release from full-time active duty, returns to the service of a participating public employer shall be entitled, subject to the limitations of this chapter and to the provisions hereinafter set forth, to credit for all his service to the participating public employer prior to his date of entry into the Armed Forces and to credit for all his service in the Armed Forces after September 15, 1940, as if he had been an employee of a participating public employer throughout his service in the Armed Forces after that date; provided:

(a) That service in the Armed Forces, to be credited as service to the employer, and service for retirement must have been performed during the periods of September 15, 1940, to December 31, 1946, inclusive, July 27, 1950, to January 31, 1955, inclusive, or January 1, 1961, to the date proclaimed by the President of the United States as the termination of hostilities in Vietnam.

(b) That service in the Armed Forces in the above-mentioned periods of time shall be credited for retirement only upon the conclusion of 5 years of contributing membership service with a participating public employer or employers following return from the Armed Forces.

(c) That if the position held by the employee at the time of entry into the Armed Forces shall have been abolished between the time of entry into and the time of return from service in the Armed Forces or if the employee shall have applied for reinstatement and was refused such reinstatement then such individual may be granted a period of 18 months prior to reentry into covered service in lieu of 1 year as required in this subsection.

2. No period of service in the Armed Forces, at any time, shall be regarded as an absence from employment which shall operate to nullify or cancel prior service to participating public employers when the member shall have entered the Armed

Forces from employment with a participating public employer and returned to employment with a participating public employer within 1 year after discharge or release from full-time active duty or within 18 months under the circumstances set forth in paragraph (c) of subsection 1.

It will be noted that a participating public employee by [NRS 286.500.1](#) is entitled to credit for all his service in the Armed Forces if he returns within 1 year to work with a contributing public employer, subject to provisions thereafter set forth.

There is no question as to the dates applicable to services in the Armed Forces as they are clearly set forth in [NRS 286.500.1a](#).

We believe that the Legislature, in enacting the statute, contemplated service in one such period, and therefore required 5 years of contributing membership in the system, following return from service, before such service in the Armed Forces would be credited to the employee toward retirement benefits.

This office can foresee where service in the Armed Forces in a series of armed conflicts could impose a heavy burden on a patriotic and sincere state employee who answers the call to arms on each separate occasion that our country enters a war, and then must return to state employment within a year and remain in such employment 5 years before being entitled to service in the last conflict in which he serves.

Nevertheless, under the statute as written ([NRS 286.500.1b](#)) that is exactly the situation that legally arises. One who served in the Korean War and returns to public service under a contributing employer within a year, and accrues 4 years and 6 months as a contributing member, and then answers the call to active service in the Vietnam conflict, can secure the benefit of Korean service only after release from the Vietnam war and return to public service for a period of 6 months.

To secure credit for the time served in the Vietnam conflict he must serve an additional 4 1/2 years in the employ of a contributing employer before being entitled to the benefits of service in that war.

This office feels that the act should be amended, but upon this office falls the burden of interpreting the statute as written.

CONCLUSION

It is therefore the opinion of this office that [NRS 286.500.1b](#) as written imposes upon a contributing member of the Public Employees Retirement System, the burden of an additional 5 years employment with a contributing public employer after return from each term of service in a separate conflict before retirement credit for such service can be awarded.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-524 STATE HOSPITALS; STATE UNIVERSITIES—Employees of the state hospitals and state universities must be paid time and a half for overtime. Executive, administrative, professional, and medical employees excepted.

Carson City, July 11, 1968

Mr. Howard E. Barrett, Director of Administration, Room 205, Blasdel Building, Carson City, Nevada 89701

Dear Mr. Barrett:

In reply to your letter of June 24, 1968, inquiring as to the effect of the U.S. Supreme Court's decision in *Maryland v. Wirtz*, (No. 742 October Term, 1967), please be advised that under that decision employees of state universities and state hospitals may be paid time and a half for overtime, and provision should be made by the Legislature for additional funds to cover such demands.

I may point out that the act, (Fair Labor Standards Act), specifically exempts any employee employed in a bona fide executive, administrative or professional capacity, including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools. Medical personnel are also excluded.

The contention advanced by the State that the act could not be constitutionally applied to state operated institutions because such power must yield to state sovereignty in the performance of governmental functions, was held to be untenable.

The court held that interstate commerce was involved because such institutions, as a whole, obviously purchase a vast range of out-of-state commodities, which are put to a wide variety of uses.

CONCLUSION

It is therefore the opinion of this office that in view of the decision of the United States Supreme Court in the case of *Maryland v. Wirtz*, (No. 742 October Term, 1967), employees of state universities and state hospitals must be paid time and a half for overtime, subject to the exceptions hereinbefore set forth.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-525 COUNTY SCHOOL DISTRICTS; INSURANCE—A county school district may purchase an insurance policy covering death or injury for members of a county school board, the premiums to be deducted from the compensation of the insured, if any, or pay up to one-half of premiums due if funds are budgeted to cover such expenditure, with the board member paying the remainder due from private funds.

Carson City, July 25, 1968

Mr. Robert L. Petroni, Legal Counsel to the School District, 2832 East Flamingo Road, Las Vegas, Nevada 89109

Dear Mr. Petroni:

You have asked this office whether a county school district may purchase travel and/or accidental death insurance for school board members while traveling on official business.

ANALYSIS

[NRS 287.010](#) provides as follows:

The governing body of any county, school district, municipal corporation, political subdivision, public corporation or other public agency of the State of Nevada shall have the power:

1. To adopt and carry into effect a system of group life, accident or health insurance, or any combination thereof, for the benefit of such of their officers and employees, and the dependents of such officers and employees, as shall or may elect to accept the same and who have authorized the governing body to make deductions from their compensation for the payment of premiums on such insurance.

2. To purchase group policies of life, accident or health insurance, or any combination thereof, for the benefit of such officers and employees, and the dependents of such officers and employees, as shall have authorized the purchase, from insurance companies authorized to transact the business of such insurance in the State of Nevada, and to deduct from the compensation of such officers and employees the premiums upon such insurance and pay such deductions upon the premiums.

3. To defray a part, not to exceed 50 percent, of the cost of such premiums by contribution. The funds for such contributions shall be budgeted for in accordance with the laws governing such county, school district, municipal corporation, political subdivision, public corporation or other public agency of the State of Nevada.

The question of payment of the insurance depends upon whether the members of the school board are compensated. If they are, they may adopt the plan proposed by subparagraph 2, or the plan proposed by subparagraph 3. If they are not, only subparagraph 3 would apply. The district could, if funds were budgeted, pay up to 50 percent of the premium, the board member would have to pay the remainder due from private funds.

CONCLUSION

It is therefore the opinion of this office that a county school district may purchase an insurance policy covering death or injury for members of a county school board, the premiums to be deducted from the compensation of the insured, if any, or pay up to one-half of premiums due if funds are budgeted to cover such expenditure, with the Board member paying the remainder due from private funds.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-526 PUBLIC SCHOOLS; SCHOOL PSYCHOLOGISTS—Statutes covering privilege between certified psychologist and patient do not extend to school psychologists who are merely certificated. Parents may not be denied access to medical or psychological school records which pertain to their own children.

Carson City, July 30, 1968

Mr. E. A. Haglund, Supervisor, Area Administration and Certification, Nevada Department of Education, Carson City, Nevada 89701

Dear Mr. Haglund:

You have addressed an inquiry to this office requesting clarification as to whether school psychologists, who are not certified as psychologists, are affected by the law of privilege.

You have stated that such school psychologists will be certified by the State Board of Education beginning in November, 1968.

You further request clarification as to the status of parents where psychological tests administered to school children are concerned.

ANALYSIS

In the case of physicians, it is often necessary for a patient to reveal information which, if made public, would be embarrassing and harmful to the patient if given general circulation. In recognition of this fact, statutes have been enacted throughout the states protecting the patient from compulsory disclosure of confidential communications between patient and physician in judicial proceedings, except where the patient consents thereto or waives the privilege.

Such law is applicable in Nevada under [NRS 48.080](#), and extends to other professions, including psychologists.

[NRS 48.060](#) provides as follows:

An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer or clerk be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in such capacity.

This is cited because the rule as to privilege between a psychologist and a patient reads as follows:

The confidential relations and communications between a psychologist certified under the laws of this state and his client, necessary in rendering psychological services, are placed on the same basis as those provided by law between attorney and client, and nothing in the laws of this state shall be construed to require any such privileged communications to be disclosed. ([NRS 48.085.](#))

[NRS 641.390](#) reads as follows:

1. No person shall represent himself as a psychologist within the meaning of this chapter unless he is certified under the provisions of this chapter, except that any psychological scientist employed by an accredited educational institution or public agency which has set explicit standards may represent himself by the title conferred upon him by such institution or agency.

2. Nothing contained in this section shall be construed as granting approval for any person to offer his services as a psychologist to any other person as a consultant, and to accept remuneration for such psychological services, other than that of his institutional salary, unless he has been certified under the provisions of this chapter.

3. A student of psychology, a psychological intern, and any other person preparing for the profession of psychology under the supervision of a qualified psychologist in training institutions or facilities recognized by the board may be designated by the title "psychology trainee," or any other title which clearly indicates his training status.

This statute is supplemented by [NRS 641.120](#) which is incorporated in our statutes:

The board shall determine which schools in and out of this state do or do not have courses of study for the preparation of psychologists which are sufficient and thorough for certification purposes. Published lists of educational institutions accredited by recognized accrediting organizations may be used in the evaluation of such courses of study.

It thus becomes apparent that the privilege relating to certified psychologists does not carry over to those employed as psychological scientists by an accredited educational institution or public agency, whatever the title bestowed upon such practitioners.

There is nothing in Nevada law which would deny parents access to the medical or psychological school records which apply to their children. While schools act in some situations in such a manner as to be in loco parentis to children entrusted to their care during school hours, yet this authority does not extend to a point where parents may be denied access to records which might be of paramount importance in acquainting them with mental or physical deficiencies which require appropriate treatment outside the school. Of course the records of children other than their own are not available to them.

CONCLUSION

It is therefore the opinion of this office that the statutes covering the privilege between a duly certified psychologist and his patient do not extend to school psychologists who are not certified, but merely certificated, and that parents may not be denied access to medical or psychological reports which are part of school records, and which pertain to their own children.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-527 ELECTIONS; HOSPITAL TRUSTEES—Method of election procedure established where there are only five candidates for hospital trustees, four residing in the city, and one outside the city.

Carson City, August 15, 1968

The Honorable William Beko, District Attorney, Nye County Court House, Tonopah, Nevada
89049

Dear Mr. Beko:

You have advised this office that there are five hospital trustee positions to be filled at the forthcoming general election in Nye County.

The problem which confronts the county clerk is that five persons have filed for those positions, four of whom reside in Tonopah, and that [NRS 450.070.3a](#) provides that not more than three trustees shall be residents of the city or town in which the county hospital is located.

ANALYSIS

How then can the ballots be printed so as to properly reflect the choice of the voter? We feel that there is only one way by which the voters may express their preference in view of two sections of the Nevada Revised Statutes in addition to [NRS 450.070.3a](#); we refer to [NRS 450.080](#) which provides that the offices of hospital trustees are nonpartisan, and that the names of all

candidates for such offices shall be placed on the ballots for all parties in both the primary and general elections, and [NRS 450.110](#) which provides for the filling of vacancies in such offices by the county commissioners.

With five persons running for the five available offices, only one of whom is from outside the city, the primary must be resorted to in order to determine which three of the four candidates from inside the city go into the general election. The candidate from within the city receiving the lowest number of votes in the primary will be eliminated, and the three candidates from within the city who survive the primary will go on the ballot in the general election.

In order to avoid confusion, the primary ballot should show two categories: (1) one candidate running for hospital trustee from outside the city, and (2) the candidates running for hospital trustees from within the city. The ballot for the general election should follow the same directions.

We called attention to [NRS 450.110](#), dealing with vacancies, for the reason that only the names of four trustees will appear on the ballot at the general election, viz: the one candidate from outside the city, and the three candidates from within the city, who survived the primary. This results in a vacancy on the board which must be filled by the county commissioners from applicants who reside outside the city.

CONCLUSION

It is the opinion of this office that the election of hospital trustees, under the circumstances above stated, should be procedurally carried forward in line with the foregoing directive.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-528 PAROLE AND PROBATION—Expenses of returning probation or parole violators are payable from the reserve for statutory contingency fund if returned by extradition for confinement in the Nevada State Prison and within the limitations as to amounts specified by [NRS 281.160](#). A warrant signed by the Governor is not necessary as an internal administrative step in securing such payment.

Carson City, August 16, 1968

Mr. Philip P. Hannifin, Chief Parole and Probation Officer, Department of Parole and Probation,
Carson City, Nevada 89701

Dear Mr. Hannifin:

You have requested an opinion from this office on the question of whether all or part of the expenses of returning parole or probation violators to custody are payable from the reserve for statutory contingency fund. You have posed examples in which parolees and probationers are returned to custody in this State. In addition, you have inquired whether a warrant signed by the Governor is required as a condition for payment from the reserve for statutory contingency fund.

ANALYSIS

[NRS 176.215](#) provides for periods of probation and suspension of sentencing; for arrest of the probationer, if the conditions of his probation are violated; and for his return to custody thereafter. Subsection 4 reads as follows:

The necessary expenses of returning to the State of Nevada a person arrested for violation of probation shall be a charge upon the State of Nevada, and shall be paid by the parole and probation officer under the direction of the board, in the same manner as that in which other claims against the state are paid, from any funds appropriated and set aside for that purpose.

Similar provision is made for payment of expenses of returning parole violators under [NRS 213.153](#). It reads as follows:

The necessary expenses of returning to the State of Nevada a person arrested for violation of parole shall be a charge upon the State of Nevada, and shall be paid by the chief parole and probation officer under the direction of the board, in the same manner as that in which other claims against the state are paid, from any funds appropriated and set aside for that purpose.

The reserve for statutory contingency fund is created and administered pursuant to [NRS 353.264](#), which provides:

1. There is hereby created in the state treasury the reserve for statutory contingency fund.
2. The reserve for statutory contingency fund shall be administered by the state board of examiners, and the moneys in such fund shall be expended *only* for the payment of claims which are obligations of the state under [NRS 7.260](#), [41.037](#), [176.485](#), [177.345](#), [179.225](#), [179.310](#), [212.040](#), [212.050](#), [212.070](#), [214.040](#) and [353.120](#). (Italics added.)

The only statute among those enumerated in the foregoing section which is material to the questions posed is [NRS 179.225](#). It forms a part of the Uniform Criminal Extradition Act. It makes provision for payment of the expenses of extradition, in certain cases, from the reserve for statutory contingency fund.

When the punishment of the crime is the confinement of the criminal in the Nevada state prison, the expenses shall be paid out of the reserve for statutory contingency fund upon approval by the state board of examiners; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose governor the requisition is made, and necessary traveling expenses and subsistence allowances in the amounts authorized by [NRS 281.160](#) incurred in returning such prisoner.

Extradition proceedings are frequently required to be instituted in order to obtain the return to custody of a probation or parole violator who has fled from the State of Nevada and is located or apprehended in another jurisdiction. The use of extradition for this purpose is specifically authorized by the Uniform Criminal Extradition Act. See [NRS 179.221](#).

It will be noted that neither [NRS 176.215](#) subsection 4, nor [NRS 213.153](#) contain authorization for payment of expenses incurred in returning violators to custody from the reserve for statutory contingency fund. Also, neither [NRS 176.215](#) nor [NRS 213.153](#) is mentioned in [NRS 353.264](#) subsection 2, which enumerates and limits the statutory obligations of the State of Nevada payable out of the reserve for statutory contingency fund.

Probation or parole violators may be returned to custody other than in the course of extradition proceedings. Circumstances in which extradition is not involved may include the following:

- A. A violator is apprehended within the State of Nevada and is returned directly to custody.

B. A violator is apprehended in another state and waives extradition at that time or honors a prior waiver of extradition which may be contained in his terms of parole.

C. A violator is apprehended in another state into which he is authorized to go pursuant to interstate compact under the Uniform Act for Out-of-State Parolee Supervision ([NRS 213.180](#) to [213.210](#), inclusive). This act is distinct from any laws relating to extradition.

[NRS 213.210](#) reads:

[NRS 213.180](#) to [213.210](#), inclusive, and compacts made pursuant thereto shall be construed as separate and distinct from any act or acts of this state relating to the extradition of fugitives from justice.

However, when extradition is used to secure the return of a violator, the necessary expenses in connection therewith are payable from the reserve for statutory contingency fund, if the resulting confinement of the violator is to be in the Nevada State Prison. A further limitation is imposed by [NRS 179.225](#) in that the traveling expenses and subsistence allowances so paid from the reserve for statutory contingency fund may not exceed the amounts authorized by [NRS 281.160](#).

Subject to the foregoing limitations, the expenses of returning violators to custody may be paid from the reserve for statutory contingency fund if extradition must be used and if the subsequent confinement is to be in the Nevada State Prison.

In all other cases, the expenses of securing the return of violators must be paid out of some other funds available for that purpose, as follows:

1. Where violators are returned by extradition for confinement other than in the Nevada State Prison, then payment of expenses shall be from the county treasury wherein the crime is alleged to have been committed. See [NRS 179.225](#).

2. Where parole or probation violators are returned to custody other than by extradition, then payment of expenses shall be paid from funds appropriated and set aside for such purposes. [NRS 179.215](#), [213.153](#).

We are not aware of any requirements imposed by statute for the existence of a warrant issued by the Governor as essential for payment from the reserve for statutory contingency fund, except in the sense that such payment can only be made if extradition is used, and a Governor's Warrant is issued in the extradition process. However, as a matter of internal administration by the State Board of Examiners of the reserve for statutory contingency fund, there is no such requirement.

CONCLUSION

It is therefore the opinion of this office that the expenses of returning probation or parole violators are payable from the reserve for statutory contingency fund if returned by extradition for confinement in the Nevada State Prison and within the limitations as to amounts specified by [NRS 281.160](#). A warrant signed by the Governor is not necessary as an internal administrative step in securing such payment.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: Robert A. Groves
Deputy Attorney General

OPINION NO. 68-529 CIVIL AIR PATROL—Civil Air Patrol has no authority under the statutes to sell property without legislative sanction having been first obtained.

Carson City, August 22, 1968

Hon. F. W. Farr, State Senator, 5699 Wedekind Road, Sparks, Nevada 89431

Dear Senator Farr:

You have requested an opinion as to whether the Civil Air Patrol has the authority to sell the 34-acre Vista Airport.

ANALYSIS

Under the State Airports Act (Chapter 494 NRS) the unrefunded balance of all excise taxes collected pursuant to Chapter 365 NRS (Motor Vehicle Fuel Tax Act) which were subject to refund by reason of the use of such taxed fuel as aviation fuel, shall be used to carry out the purposes and provisions of [NRS 494.041](#)-494.046, inclusive.

Under [NRS 494.045](#) the State Treasurer and State Controller are to transfer to the Civil Air Patrol Fund from the State Airport Fund a sum not to exceed \$15,000 or the total amount in the fund whichever is the lesser.

The amount so transferred shall be for the support of Nevada Wing 96 of the Civil Air Patrol, and shall be in addition to and separate from any legislative appropriations made to the Civil Air Patrol Fund.

Moneys in the Civil Air Patrol Fund shall be paid out only upon claims certified by the wing commander and the wing executive officer, and approved by the State Board of Examiners, in the same manner as other claims against the State are paid.

Moneys in the Civil Air Patrol Fund shall be used only by Nevada Wing 96 in carrying out its crash rescue and emergency operations, and organization and training therefor, and in defraying the cost of headquarters rental and purchase, repair and maintenance of emergency and training equipment.

The balance of the remaining moneys in the fund shall be remitted to the counties in proportion to the excise taxes remitted by dealers or users in such county.

Nowhere in the acts governing the financing of the Civil Air Patrol can we find authority for the patrol to sell property.

CONCLUSION

It is the opinion of this office that the Civil Air Patrol, Nevada Wing 96, has no authority to sell property without legislative sanction having been first obtained.

Respectfully submitted.

HARVEY DICKERSON
Attorney General

OPINION NO. 68-530 COUNTY COMMISSIONERS; SHERIFF—While County Commissioners of Storey County can authorize the appointment of additional deputy sheriffs, and set their salaries, they cannot name such deputies, nor exercise authority over them; this is clearly within the province of the duly elected sheriff of the county.

Carson City, August 27, 1968

Hon. Robert L. Schouweiler, District Attorney, Storey County, 1 East First Street, Reno, Nevada 89501

Dear Mr. Schouweiler:

You have requested this office to clarify the statutes which refer to the hiring of sheriff's deputies.

[NRS 248.040](#) reads as follows:

1. Each sheriff shall have power to appoint, in writing signed by him, one or more deputies, who are empowered to perform all the duties devolving on the sheriff of the county.
2. No deputy sheriff shall be qualified to act as such unless:
 - (a) He shall have been a resident of the State of Nevada for at least 6 months prior to the date of his appointment.
 - (b) He has taken an oath to discharge the duties of the office faithfully and impartially. The oath shall be certified on the back of his appointment and filed in the office of the county auditor.
3. The sheriff shall be responsible for all the acts of his deputy or deputies, and may remove such deputy or deputies at pleasure. The sheriff may also require of his deputies such bonds as to him shall seem proper.

It will be noted that the sheriff has the power to appoint his deputies, to be wholly responsible for their acts, and the power to remove them. He also has the power to require bond.

These powers are exclusive, and no conflict with these powers can be found in Chapter 490, Section 3(3) of the 1967 Statutes of Nevada. This statute provides that the Sheriff of Storey County shall be allowed to appoint one deputy at a salary to be fixed by the county commissioners. The act further states that the sheriff may appoint additional deputies with the consent of the board of county commissioners whose compensation shall be fixed by said commissioners. It would appear from the language of the latter statute that the appointment of deputies refers to number and not to named persons, and that if additional deputies are permitted, the authority of the commissioners rests solely in a decision as to their compensation.

This does not give the county commissioners the authority to name the deputies, nor to govern their activities. Such power rests solely with the sheriff. The reason for this is apparent; a divided authority in this field of law enforcement would lead to confusion and would not be in the public welfare.

CONCLUSION

It is therefore the opinion of this office that while the county commissioners can authorize the appointment of additional deputy sheriffs, and set their salaries, they cannot name such deputies, nor exercise authority over them. This is clearly within the province of the duly elected sheriff of the county.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-531 ENDOWMENT CARE CEMETERIES—Interpretation of Chapter 138 of the 1953 Statutes of Nevada as said act concerns endowment care cemeteries.

Carson City, August 29, 1968

Mr. Preston E. Tidvall, Secretary, State Board of Finance, Nye Building, Room 321, Carson City, Nevada 89701

Dear Mr. Tidvall:

You have directed an inquiry to this office requesting clarification of certain provisions of Chapter 138 of the 1953 Statutes of Nevada.

Specifically you are concerned with [NRS 452.120](#), [NRS 452.130](#), and [NRS 452.250](#). [NRS 452.120](#) provides as follows:

“Endowment care cemetery” defined: Deposits required. An “endowment care cemetery” is one which shall hereafter have deposited in its endowment care fund, at the time or not later than completion of the initial sale, not less than the following amounts for plots sold or disposed of:

1. \$1 a square foot for each grave.
2. A sum equal to 15 percent of the sale price of each niche.
3. A sum equal to 15 percent of the sale price of each crypt.

ANALYSIS

The Legislature, by the act, intended to lay down rules which would establish a continuing fund to protect the purchasers of graves, niches, and crypts in endowment care cemeteries. It therefore required that established cemeteries seeking a permit to operate as an endowment care cemetery on, or after, March 19, 1953, should pay for graves, niches, and crypts purchased and disposed of prior to becoming an endowment care cemetery.

Graves, niches, and crypts, sold after the permit is granted, shall be assessed in accordance with [NRS 452.070](#) which reads as follows:

The cemetery authority may from time to time adopt plans for the general care, maintenance and embellishment of its cemetery, and charge and collect from all subsequent purchases of plots such reasonable sum as, in the judgment of the cemetery authority, will aggregate a fund, the reasonable income from which will provide care, maintenance and embellishment.

We do not believe that the phrase “at the time of, or not later than, the initial sale” in [NRS 452.120](#) was meant to prolong the deposit of required sums in the endowment care fund. In short, whether the sale of graves, niches, or crypts is for cash or for extended credit, the protection of purchasers is only established by the deposit of the required funds in the endowment care fund at the time the cash is paid or the time the contract for extended payments is signed.

With reference to [NRS 452.130](#), the \$25,000 deposit in the endowment care fund would not apply to endowment care cemeteries established prior to March 19, 1953.

This office determined in Attorney General’s Opinion No. 408, dated September 24, 1958, that the maintenance fund required for mausoleums was applicable to all cemeteries including endowment care cemeteries.

CONCLUSION

It is therefore the opinion of this office:

1. That established cemeteries seeking a permit to operate as an endowment care cemetery on, or after, March 19, 1953, shall be assessed for graves, niches, and crypts previously sold in accordance with the formula set forth in [NRS 452.120](#).
2. That graves, niches, and crypts sold on, or after, March 19, 1953, shall be assessed in accordance with [NRS 452.070](#).

3. That the deposit of the funds secured by compliance with [NRS 452.120](#) should be deposited in the endowment care fund at the time the permit is granted, whether the contract with the purchaser be for cash or on an extended payment basis.

4. That the \$25,000 deposit to the endowment care fund as required by [NRS 452.130](#) would be inapplicable to endowment care cemeteries established prior to March 19, 1953.

5. That [NRS 452.250](#), providing for a maintenance care fund for mausoleums, applies to all cemeteries.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-532 NET PROCEEDS OF MINES—Chapter 362 of NRS provides no remedy for a taxpayer who, because of circumstances beyond his control, was unable to sell the proceeds from his mining operation. Before the gross yield and net proceeds may be determined for taxation purposes there must have been a sale.

Carson City, August 30, 1968

Mr. Roy E. Nickson, Secretary, State of Nevada Tax Commission, Carson City, Nevada 89701

STATEMENT OF FACTS

Dear Mr. Nickson:

A certain mining operation in the State of Nevada was not involved in the recent copper strike and, therefore, continued to extract ore and produce concentrates. However, because of the strike, the corporation was unable to deliver such concentrates to a smelting and refining company and, therefore, accumulated a large stockpile of ore and concentrates. During the strike the corporation did sell a relatively small amount of its stockpile to foreign countries.

When reporting to the Nevada Tax Commission for the period July to December, 1967, the corporation computed a gross yield which included the stockpile and determined the value of the gross yield by applying the price at which the ore was sold to the foreign countries. When considering the correctness of the computation of the gross yield, two questions occurred to the Nevada Tax Commission and were forwarded to this office for answering. Those questions are:

QUESTIONS

1. Would the fact that a mining operator is prevented from selling his ore or concentrates through no fault of his own be a matter of extenuation in determining the net proceeds of mines under Chapter 362 of NRS?

2. Under [NRS 362.120](#), may the Nevada Tax Commission compute the gross yield and net proceeds in dollars and cents by considering factors other than actual sale of the product of this mine?

ANALYSIS

The members of the Nevada Tax Commission have expressed their sympathy because the strike prevented the taxpayer in question from disposing of his ore and concentrates. This office joins in that expression of sympathy; however, a reading of the appropriate statutes compels the conclusion that there is no legal reason which would justify a departure from the heretofore

established trend of the Nevada Tax Commission and this office which requires an actual sale of the products of the mine before gross yield may be determined.

In Attorney General's Opinion No. 69, dated August 23, 1943, this office had an opportunity to interpret the words "gross yield." We held there and hold now that by the use of the term "gross yield" the Legislature intended that such term was, and is, to be interpreted in its commonly accepted meaning, i.e., the entire product or proceeds of a mine reflected in dollars and cents *received* from the ore extracted during the semiannual period. We went on in that opinion to hold that the statute contemplated the computation of the proceeds of the extracted ore *in dollars and cents*, and held that the proceeds of the mine would be the moneys received from the actual amount of ore *mined and disposed of*. We feel at this time that the stockpiling of ore does not comply with the language above italicized in that the stockpile has not been "disposed of."

The Nevada Tax Commission on May 24, 1967, decided that a company may not use the stockpile inventory in computing the net proceeds of mines.

There is an additional reason why an actual sale of the product of the mine is necessary as a condition precedent to the computation of the gross yield; that is the unavailability of any other standard and sound basis upon which to determine the value of the extracts of a mine. If the sales price were not to be used, there would be a wide variety of opinions as to the value of the stockpile. The values of ore and metals are subject to daily variances, and it would be, we are advised, an insurmountable administrative task for the Tax Commission to attempt to place a value upon stockpiled ores or concentrates. Additionally we can envision, while such is not the case herein, that for one reason or another a mining operator could declare the value of his stockpile during the 6-month taxing period at one figure and hold the same for a future sale when the price of the metal involved increased substantially.

CONCLUSION

Because of the above-mentioned legal and practical reasons, we answer Question No. 1 and Question No. 2 in the negative.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: John Sheehan
Deputy Attorney General

OPINION NO. 68-533 ELECTIONS; ELECTION BOARDS—Voting boards and counting boards comprising an election board, shall not consist of election board officers wholly of one party.

Carson City, September 6, 1968

Hon. John Koontz, Secretary of State, Carson City, Nevada 89701

Dear Mr. Koontz:

You have called to the attention of this office that certain county clerks are taking the position that the requirement that not all of the registered voters appointed as election board officers for any precinct or district shall be of the same political party, does not apply to counting boards.

ANALYSIS

[NRS 293.217](#) reads in part as follows:

The county clerk of each county shall appoint and notify registered voters to act as election board officers for the various precincts and districts in the county as provided in [NRS 293.220](#) to [293.245](#), inclusive, and shall conclude such duties no later than 31 days preceding the election. Not all of the registered voters appointed as election board officers for any precinct or district shall be of the same political party.* * *

It can readily be determined that the legislative purpose in requiring that all of the election board officers not be of the same party, is to provide against any favoritism or error on the part of boards against candidates of the opposite party. It is a fair and just requirement accruing to the benefit of all parties.

The question then arises as to whether a counting board is an election board as defined in [NRS 293.217](#). There can be no doubt that it is so designated by the very language of [NRS 293.233](#), which reads as follows:

In each precinct or district where there are 200 or more registered voters, the county clerk shall appoint two election boards and designate one the voting board and the other the counting board. The officers of the counting board shall count the votes and make the record of the votes. The voting board shall account for the records at the time the polls are closed and deliver to the counting board the ballot box containing the voted ballots and all other books and supplies in their possession. Upon such delivery, the counting board shall perform their duties as required by law. The time of service for the counting board shall be from the closing of the polls through the returning of the supplies and the result of votes cast to the county clerk.

It will be noted that election boards are divided into two categories: voting boards and counting boards.

It would be totally inappropriate and invalid to have the requirement that the voting segment of an election board be required to have representatives thereon from both parties, but that the counting board not be so constituted.

CONCLUSION

It is therefore the opinion of this office that both voting boards and counting boards comprising an election board, shall not consist of election board officers wholly of one party.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-534 NEVADA TAX COMMISSION; AD VALOREM TAX ON THE PERSONAL PROPERTY OF MILITARY PERSONNEL—When Nevada servicemen take their personal property with them to a sister state in which they are stationed, neither that state, nor Nevada, has authority to impose an ad valorem tax upon that property.

Carson City, September 9, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

STATEMENT OF FACTS

Dear Mr. Nickson:

There has arisen a question as to the authority of the State of Nevada to collect an ad valorem tax upon the personal property of persons who are in the military service and, by orders of their commanding officers, reside in states other than Nevada. In order to determine the authority of the Tax Commission to so act, we must concern ourselves with the Soldiers' and Sailors' Civil Relief Act, together with Chapter 361 of the Nevada Revised Statutes.

ANALYSIS

The appropriate section of the Soldiers' and Sailors' Civil Relief Act is 50 U.S.C.A. App. § 574. By the terms of this section, a person is not deemed to have lost either his residence or domicile in any state solely by reason of being absent therefrom in compliance with military or naval orders. Neither is any person deemed to have acquired a residence or domicile in any state merely because he is stationed therein. The owner of the personal property, if once a resident of the State of Nevada, maintains his residency throughout the term of his military service. Section 574 goes on to provide that for the purposes of taxation in respect to personal property, the property is not deemed to be located or present in the state in which the owner is stationed.

It was concluded in *United States v. Arlington County*, Commonwealth of Virginia, 326 F.2d 929 (1964):

Thus we think the Act (Soldiers' and Sailors' Civil Relief Act) makes it clear that the Congress intended to exempt the serviceman from taxation on his personal property exempt by his "home" state.

The court relied on the case of *Dameron v. Brodhead*, 345 U.S. 322 (1953), where the Supreme Court rejected an attempt by the host state to tax a servicemen's personalty because his "home" state did not. In the *Dameron* case the court stated:

It (Congress) saved the sole right of taxation to the state of original residence whether or not that state exercised the right.

In *California v. Buzzard*, 382 U.S. 390 (1966), it was determined that the very purpose of the Soldiers' and Sailors' Civil Relief Act was to relieve the serviceman of the burden of supporting the government of the state where he was present solely in compliance with military orders.

In a companion case, *Snapp v. Neal*, 382 U.S. 398 (1966), the court held that a nonresident serviceman who was present in the State of Mississippi in compliance with military orders was exempt from the Mississippi ad valorem tax.

By the terms of Section 574 and the judicial determinations, *supra*, it is concluded by this office that the property of the military personnel is not deemed to have acquired a taxing situs in the state in which the military personnel are stationed, and, if any tax is due, the appropriate Nevada taxing statutes must be relied on for authority.

The specific Nevada statute with which we are concerned is [NRS 361.045](#), which reads:

Except as otherwise provided by law, all property of every kind and nature whatever *within this state* shall be subject to taxation. (Italics added.)

The Legislature, by this statute, has limited the Nevada Tax Commission's taxing authority to that property which is actually and corporeally located within the State of Nevada. For the

purposes of taxation on personal property, the Tax Commission has no extraterritorial powers. This is in accord with the general rule that personal property may properly be assessed for taxation only in the state in which it has a situs. The situs of the personal property in question is a sister state, that state in which the military personnel are located. Hence, it is concluded that the statute above quoted precludes the taxation of personal property which is situated in a sister state.

If, however, the serviceman left his personal property within the State of Nevada while stationed in another state, it would be subject to Nevada personal property taxation.

CONCLUSION

When Nevada serviceman take their personal property with them to a sister state in which they are stationed, neither that state nor Nevada has authority to impose an ad valorem tax upon that property.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: John Sheehan
Deputy Attorney General

OPINION NO. 68-535 DISTRICT HEALTH BOARDS—The administration of matters directly connected with the carrying out of functions related to public health are properly in the hands of the district health board, and not under the authority of the board of county commissioners.

Carson City, September 9, 1968

James R. Brooke, Esq., City Attorney, 222 12th Street, Sparks, Nevada 89431

Dear Mr. Brooke:

You have asked this office to more clearly define the powers and duties of district boards of health created by Chapter 184 of the 1939 Statutes of Nevada ([NRS 439.370](#)), and the powers and duties of the district health officer.

The original act was amended in 1959 (Chapter 96 of the 1959 Statutes) so as to provide that the board of county commissioners and the governing bodies of any incorporated city or cities, town or towns, in such county, and with the approval of the State Board of Health, could establish a district board of health (Section 5.3).

The act, as amended, goes on to provide that:

When any county and one or more incorporated city or town within such county establish a district board of health, the county board of health, and the board of health of such city or cities, town or towns, shall thereupon be abolished, and the district board of health shall have the same power and duties and authority that such county board of health had prior to the establishment of such district board of health.

It is our understanding that prior to the adoption of the district board of health by Washoe County, Reno, and Sparks, there was a county board of health. The composition of the county board of health consisted of the board of county commissioners, the sheriff, and the county health

officer ([NRS 439.280](#)). Thus, the county commissioners had a great deal to say as to how the duties and powers of the board should be carried forward, including the making of rules and regulations governing health matters ([NRS 439.350](#)).

Under the district board of health statutes, the composition of the board is set at two members from each county, city, or town which participated in establishing the district, to be appointed by the governing body of the county, city, or town wherein they reside, together with one additional member to be chosen by the members so appointed ([NRS 439.390.1](#)).

The county commissioners, in appointing the two county representatives, must appoint as one of such members a physician ([NRS 439.390.2](#)). Thus, we see that the five county commissioners comprising a part of the county board of health are reduced to, at most, one member. This would seem to indicate a belief on the part of the Legislature that the power of a board of health should be charted into channels remote from a full board of county commissioners, when the county health board was abolished and a district health board formed with representative from all political entities involved.

Under [NRS 439.410](#), the powers of the county health board are transferred to the district health board, and the newly created board is awarded jurisdiction over all public health matters in the district. Under [NRS 439.010](#), the provisions of Chapter 439 NRS *shall* be administered by the state health officer and the Health Division of the Department of Health, Welfare, and Rehabilitation, subject to administrative supervision by the director. Thus we have a direct line of authority running from the Director of Health, Welfare, and Rehabilitation to the state health officer to the district health officer.

The local health officers, which includes the district health officer of Washoe County, Reno, Sparks Health District, are subject to the supervisory powers of the Health Division of the Department of Health, Welfare, and Rehabilitation.

The health and welfare of the people is of paramount importance. It outweighs every other requirement of civilized government, and thus those in charge of establishing rules and regulations to perpetuate and preserve the health of the citizenry, are given the broadest possible powers in conformity with the ends to be achieved. Thus, the boards of health established by the Legislature are weighted by the appointment of physicians to membership on such boards.

Thus the administrative power over local health boards is primarily with the State Board of Health. [NRS 439.200.1](#) (e) reads as follows:

To govern and define the powers of local boards of health and health officers.

In giving the State Board of Health the power and authority to adopt rules and regulations to promote and protect the public health generally, the Legislature wisely provided that such rules and regulations would have the force and effect of law, and supersede all local ordinances and regulations inconsistent therewith.

For local administrative agencies to interfere with the administration of district health boards would be inimical to the welfare of the general public, and the divided authority would lead to confusion in the area of direction of procedures directly applicable to the health and welfare of the people.

CONCLUSION

It is therefore the opinion of this office that the administration of matters directly connected with the carrying out of functions related to public health are properly in the hands of the district health board, and not under the authority of the board of county commissioners.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-536 REGIONAL PLANNING COMMISSIONS; STATE PLANNING BOARD—The powers and duties of regional planning commissions do not extend to public buildings situate on state property; authority over such buildings rests with the State Planning Board; the authority of the State Planning Board extends to public school buildings; the State Planning Board should cooperate fully with the regional planning commission.

Carson City, September 12, 1968

Mr. William E. Hancock, Manager, State Planning Board, Carson City, Nevada 89701

Dear Mr. Hancock:

You have asked this office to define and differentiate between the powers and duties of regional planning commissions and those of the State, acting through its State Planning Board.

ANALYSIS

The creation, powers, and duties of regional planning commissions are set forth in [NRS 278.090-278.260](#), as a part of Chapter 278 of the Nevada Revised Statutes entitled: “City, County and Regional Planning and Zoning.” It will be noted that participation by the State is restricted by [NRS 341.180.2](#) to cooperation with municipal, county, or other local planning commissions for the purpose of coordination between the State and the local plans and developments.

[NRS 278.020](#) provides that for the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land and to control the location and soundness of structures. This applies, of course, to all planning commissions established according to law, but just as the governing bodies of these communities cannot exert authority over the State, neither can the planning commissions established by such governing bodies. The authority is restricted to the area over which the governing bodies have control, and does not extend to property owned by the State.

State representatives are not included on membership of regional planning commissions established under [NRS 278.090](#). Under [NRS 278.150](#), the regional planning commission is authorized to prepare and adopt a master plan for the development of the city, county, or region. This does not refer to, nor does it include, state owned property.

One of the subject matters of a master plan is stated in [NRS 278.160.1\(f\)](#), indicating the master plan shall show the locations and arrangement of *civic centers* and all other public buildings, including the architecture thereof and the landscape treatment of the grounds thereof. This, of course, refers to the public buildings within the jurisdiction of the regional planning commission, and cannot, under any stretch of the imagination, be extended to include buildings planned by, and sitting on land owned by the State.

[NRS 278.180](#) provides for notification by the commission to the governing school boards in the regional planning district of the formulated plans, in order to aid the boards in adopting school sites which will fall within the requirements of such plans.

The Legislature has selected the State Planning Board to oversee the planning, designing, and architecture of capital improvements on state property, [NRS 341.150](#). [NRS 341.153.2](#) provides:

The legislature therefore declares it to be the policy of this state that all construction of public building upon property of the state or held in trust for any division of state government be supervised by, and final authority for its completion and acceptance vested in, the state planning board as provided in [NRS 341.150](#).

The question then arises as to the powers of the State Planning Board as to school buildings within a regional zoning area. Under [NRS 393.110](#), a board of trustees of any school district, before letting contracts for the erection of any school building, shall submit plans therefor to, and obtain the written approval of the same by, the State Planning Board. We see no difficulty in this arrangement in view of [NRS 341.180](#), which calls for cooperation between the State and the regional planning commission. Every effort should be made in the interest of the public to resolve any differences that might arise between the State and the regional planning commission.

CONCLUSION

It is therefore the opinion of this office that the powers and duties of regional planning commissions do not extend to public buildings situate on state property; that authority over such buildings rests with the State Planning Board; that the authority of the State Planning Board extends to public school buildings; and that with reference to public school buildings the State Planning Board should cooperate fully with the regional planning commission.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-537 INSURANCE; PREMIUM TAX—Installment payment plan fees collected from Nevada policyholders held inclusively to constitute taxable premium under [NRS 686.010](#), since not different in character from other expenses included in “premiums,” the entire cost for issuance and performance of contracts of insurance. An action for any such tax liability, created by statute, must be brought within 3 years after accrual, under [NRS 11.190](#). Apparently, there presently is no statutory provision relative to applicable interest and/or penalty for failure and omission to report and pay premium tax on any such installment payment plan fees collected from Nevada policyholders.

Carson City, September 16, 1968

Mr. Louis T. Mastos, Commissioner of Insurance, Department of Commerce, State of Nevada,
Carson City, Nevada 89701

Dear Mr. Mastos:

You have requested our legal opinion and advice respecting certain questions, hereinafter stated, submitted to you for reply and arising as the result of a current examination of Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, and Mid-Century Insurance Company being made by the California Department of Insurance in association with examiners from the states of Georgia, Idaho, Indiana, and Wyoming.

It is reported that said companies have charged and are charging Nevada policyholders installment fees, in the amount of \$1.50 or \$2, depending on the company and the policy, for the privilege of paying one-half of their premium at the due date and the remaining one-half of their premium 60 days later. Further, that said companies have not been reporting these collected installment fees from Nevada policyholders on their premium tax returns or in their annual statements filed in Nevada. There is also submitted the total amounts of installment fees collected from Nevada policyholders for the years 1960-67 inclusive by Farmers Insurance Exchange, Truck Insurance Exchange, and Mid-Century Insurance Company.

QUESTIONS

1. Are the installment payment plan fees collected from Nevada policyholders subject to premium taxes as provided under [NRS 686.010](#)?
2. If so, what is the tax rate that will be used to determine the premium taxes due to the State of Nevada?
3. Will any penalty or interest charges be imposed?
4. What is the Nevada statute of limitations applicable to actions for the recovery or collection of back taxes?
5. Are insurance companies which are subject to the premium tax as provided in [NRS 686.010](#) required to report such installment payment plan fees in their filed annual statements or tax returns?

ANSWERS

- To Question No. 1: Yes
To Question No. 2: Two (2%) percent
To Question No. 3: No, since statutory provision therefor is, apparently, presently lacking.
To Question No. 4: Three (3) years ([NRS 11.190, 3\(a\)](#))
To Question No. 5: Yes

ANALYSIS

The fundamental question is whether the installment payment plan fee is a wholly separate and distinct matter, or in fact, nothing more than a “splitting of premium.”

It will probably be contended or argued that such installment payment plan fee does not entitle an insured to any insurance; that all insurance protection afforded is in consideration of the separate “premium” paid. In this connection, it is of parenthetic interest that a more persuasive and similar argument was made relative to the includability of “membership fees” in “premiums” for the purpose of determining the amount of required or maintained reserves, in the *Duel Cases* (*Duel, Commissioner of Insurance v. State Farm Mutual Automobile Insurance Company*, 1 N.W.2d 887; 2 N.W.2d 871, 324 U.S. 154, decided in 1942 by the Wisconsin Supreme Court and affirmed on appeal by the United States Supreme Court) wherein the courts ruled that the involved “membership fee” was a part of “premium” and, therefore, that the exaction of such fee constituted a “splitting of premium” in violation of statutory requirements. (See Nevada Attorney General’s Opinion No. 358, dated December 29, 1954, analogizing from the reasoning of the courts in those cases for support of the conclusion that “Membership fees exacted by mutual insurance company are premiums and subject to state total premium income tax.” Chapter 232, 1955 Statutes of Nevada, through amendment of then-existing law, explicitly confirmed such legal opinion and conclusion.)

Decisional law presently and generally supports the view that both legislative intent and statutory purpose include in the term “premium” the entire and all costs connected with or incident to the issuance and performance of contracts of insurance; in other words, all sums which must be paid before insurance protection will be afforded or granted. It cannot be statutory intent to permit insurance companies, on some wholly-conceptual and arbitrary basis, nominally to categorize and except some type of *insurance business income* from other and the rest of their *insurance business income*, and themselves to specify and denominate what does and what does not constitute “premium.” To permit insurance companies to apportion *insurance business income*, no matter how classified or denominated, and to allocate the expenses of doing business to some and not all *insurance business income*, would put it within the sole power of insurers to set their own reserve requirements by or through their own re-definition of “premium.”

Thus, citing *Allstate Ins. Co. v. State Bd. Of Equalization*, 336 P.2d 961, 169 Cal.App.2d 165, Appelman, “Insurance Law And Practice,” Vol. 19, p. 106, 1968 Supplement, Section 10578, states as follows:

Determination of whether a particular payment to an insurer is a premium within section of Constitution providing for a tax on gross premiums is a question of law.

The premium tax law of California (Section 12221, Revenue and Taxation Code) is similar to that of Nevada ([NRS 686.010](#)) with the term “gross premium” corresponding to the term “total premium income.” The above-cited California case is also reported authority for the following ruling:

The expense incident to the installment payment plan does not differ in character from other expenses included in premium. The entire cost to the policyholder arising out of the issuance and performance of the contract of insurance constitutes the taxable premium.

It is further reported that since the decision in said California case in 1959 (rehearing by the California Supreme Court denied May 20, 1959), the companies in the Farmers Insurance Group have agreed to pay premium taxes on such installment payment plan fees to the fifteen following states: Arizona, California, Colorado, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Nebraska, New Mexico, Oregon, South Dakota, Washington, and Wisconsin.

Appleman, “Insurance Law and Practice,” as cited *supra*, (Vol. 19, 1968 Supplement, p. 106, Section 10587), additionally states:

A 25 cent fee charged when premium on casualty policy was paid in installments was taxable as part of the “gross amount of premiums” received by insurer. (Citing *State, ex rel. Earle v. Allstate Ins. Co.*, 351 P.2d 433, 221 Or. 371 (ORS 736.225).)

CONCLUSION

It is our considered opinion and advice, therefore, that the submitted inquiry and questions be answered as hereinbefore set forth, and that the named insurers be suitably advised of their responsibility for accounting and reporting, properly and fully, “total premium income,” and making payment of the Nevada premium tax as provided and required by the provisions of [NRS 686.010](#), as clarified and supported by applicable decisional law.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 68-538 EDUCATION; STATE BOARD OF EDUCATION—Rules for calculating average daily attendance are within the discretion granted to the board of education by [NRS 387.123](#).

Carson City, September 16, 1968

Mr. Burnell Larson, Superintendent of Public Instruction, Department of Education, Carson City, Nevada 89701

Attention: Mr. Lincoln W. Liston, Associate Superintendent

Dear Mr. Larson:

In 1967, the Department of Education established a new method for calculating average daily attendance of students for the purpose of apportioning moneys from the State Distributive School Fund. You have described these rules as follows:

1. The name of every enrollee of a school shall be entered on a line of a school attendance register page.
2. All names on any one register page shall be identified as belonging to a single category of pupils. Categories are as follows:
 - (a) kindergarten pupils,
 - (b) elementary pupils,
 - (c) secondary pupils,
 - (d) handicapped pupils, and
 - (e) children detained in a detention home.
3. One each line of the attendance register there are spaces in which are to be entered the enrollment date, the days present, the days absent, and the withdrawal date of each and every pupil.
4. At the end of each school month the attendance and absence records of the pupils on an attendance register page are combined to total days present, total days absent, and total days not belonging. The average daily attendance for the group of pupils is calculated to be the quotient obtained by dividing the total days present by the number of days school was taught during the month.
5. At the end of each month the attendance records of all categories of pupils in each school are entered on a school attendance report and submitted to the state department.
6. Data shown on those reports are put into punched cards, which are sorted and tabulated by the State's computer to produce various reports of enrollment and attendance.
7. During the year there were accumulated ten monthly average daily attendance quotients for each of the categories of pupils in each of the 250 schools of the State. Quotients so obtained from attendance data of kindergarten pupils are reduced by four-tenths.
8. At the end of the school year, the computer determined the six highest of each set of ten quotients of calculated monthly average daily attendance.
9. The total number of days present and the total number of days taught that had been used to calculate the six highest quotients above were used as divisor and dividend, respectively, to calculate a new quotient. This quotient is described as the "six months of highest average daily attendance" of the category of pupils for which it is calculated.
10. The sum of all such quotients calculated for the various categories of pupils in attendance in the various schools of a district is declared to be the average daily attendance for that district in determination of its basic support in accordance with [NRS 387.124](#).

QUESTION

You have asked the following question: Is the set of rules and procedures described above in conformance with the subsections of [NRS 387.123](#) as they relate to calculating the 6 months of highest average daily attendance for a school year of the categories of pupils whose average daily attendance must be calculated?

ANALYSIS

Your letter indicates that the foregoing procedure is different from that followed in years previous to the 1967-68 school year. Formerly, average daily attendance was determined according to "attendance areas" in a school district. The 6 highest months to average daily attendance was determined by observing one set of ten quotients for each category of pupils in the attendance area. You now propose to observe the six highest of ten quotients in each of the

schools of a school district, and to average these quotients to determine average daily attendance for the school district.

Before proceeding further, we should set forth our understanding of an attendance area. [NRS 388.040](#) and [NRS 388.050](#) deal with zoning and attendance areas. These statutes basically empower a school district, with approval of the board of education, to determine the schools which children shall attend when there is more than one of a class of schools in a school district.

[NRS 387.123](#) provides in part:

1. For making the apportionments of the state distributive school fund authorized and directed to be made under the provisions of Title 34 of NRS, “average daily attendance” means the 6 months of highest average daily attendance for the current school year of:

(a) Pupils in grades 1 to 12, inclusive, of the public schools plus six-tenths of the pupils in the kindergarten department of the public schools.

(b) Physically or mentally handicapped minors receiving special education pursuant to the provisions of [NRS 388.400](#) to [388.540](#), inclusive.

(c) Children detained in detention homes and juvenile forestry camps receiving instruction pursuant to the provisions of [NRS 388.550](#) to [388.580](#), inclusive.

2. The state board of education shall establish uniform rules to be used in calculating the average daily attendance of pupils. In calculating average daily attendance of pupils, no pupil specified in paragraphs (a), (b) and (c) of subsection 1 shall be counted more than once.

Subsection 2 empowers the board of education to establish rules for calculating average daily attendance. The only limitation is that the pupils noted in the foregoing subsection shall not be counted more than once, and that the rules must be uniform.

The former [NRS 387.125](#) (repealed, 1967 Stats. 890) contained a similar provision, insofar as average daily attendance of pupils was concerned. Attorney General’s Opinion No. B-82 of February 25, 1942, concluded that this language provided ample authority for the board of education to exercise its discretion in determining the method of calculating average daily attendance. We agree with that opinion, and believe that the conclusion reached applies as well to the present [NRS 387.123](#).

The difference between the present rules and the former method lies in the nature and makeup of an attendance area. If there is more than one school of a class (for example, two elementary schools) in an attendance area, the average daily attendance will be affected. Under the former rules, only one set of quotients would be averaged, regardless of the number of schools in an attendance area. The present rules provide for a set of quotients from each school to be averaged.

In Nevada, some attendance areas contain one school of a class, while others contain more than one. Furthermore, [NRS 388.020](#) does not require any uniformity in the creation of an attendance area. The matter is left to the discretion of a school district with, of course, the approval of the board of education.

[NRS 387.123](#)(1) defines “average daily attendance” as the 6 months of highest average daily attendance for the current school year of * * * pupils * * * of public schools * * *.” This extremely broad definition makes no reference to “attendance areas” or, for that matter, to school districts. We see nothing in this definition which limits this new method of calculating average daily attendance. Furthermore, we do not believe that a school “attendance area” is necessarily the solution for adding uniformity in determining average daily attendance. The school itself seems the more suitable unit to use as a basis for computation.

CONCLUSION

It is our conclusion, therefore, that the rules for calculating average daily attendance described above are within the discretion granted to the board of education by [NRS 387.123](#).

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: Peter I. Breen
Deputy Attorney General

OPINION NO. 68-539 POLITICAL SUBDIVISIONS; COLLECTIVE BARGAINING—

Political subdivisions cannot lawfully enter into collective bargaining agreements. Such agreements are void as violative of public policy, and contributions paid thereunder not judicially recoverable.

Carson City, September 17, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

STATEMENT OF FACTS

Dear Mr. Nickson:

Under date of March 29, 1968, the Incline Village General Improvement District, hereafter called District, and the Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO, hereafter called Union, executed a document designated "Agreement." The Agreement purports to govern the relationship and conditions of employment between the District and its employees. It recites numerous provisions, among other things, which may be summarized as follows: Union is designated as the sole agent of District's employees for collective bargaining; it relates to all of District's employees within specified job classifications; hiring practices, wage scales, hourly and overtime rates, and working conditions are recited; holidays, vacations, and fringe benefits paid for through deposits made by District into two separately administered trust funds are set forth; and provision is made for arbitration and disposition of grievances.

District was organized and formed pursuant to Chapter 318 of NRS as a general improvement district. In your letter of September 11, 1968, you have advised this office that the District's independent auditors have posed certain questions to the Nevada Tax Commission regarding the District's authority to enter into such an agreement, and, if the agreement is invalid, what disposition is to be made of moneys paid by the District pursuant to it.

You have in turn requested an opinion from this office on the following questions:

QUESTIONS

1. May District validly enter into a collective bargaining agreement?
2. If the agreement is invalid, is District entitled to recover moneys for fringe benefits, paid pursuant to the agreement into a trust fund, which are either:
 - (a) held in such trust fund, or
 - (b) paid out in claims or insurance premiums?

ANALYSIS

It is not open to question that the Incline Village General Improvement District is, like all general improvement districts created under Chapter 318 of NRS, a political subdivision of the

State of Nevada. Not only has this office previously so ruled (Attorney General's Opinion No. 510, dated May 14, 1968), but Chapter 318 of NRS expressly so provides.

[NRS 318.015](#), subsection 1, reads:

It is hereby declared as a matter of legislative determination that the organization of districts having the purposes, powers, rights, privileges and immunities provided in this chapter will serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants thereof and of the State of Nevada; that the acquisition, improvement, maintenance and operation of any project authorized in this chapter is in the public interest and constitutes a part of the established and permanent policy of the State of Nevada; and that each district organized pursuant to the provisions of this chapter shall be a body corporate and politic and a quasi-municipal corporation. For the accomplishment of these purposes the provisions of this chapter shall be broadly construed.

In addition, [NRS 318.075](#), subsection 1, states:

Except as otherwise provided in subsection 2, the adoption of the ordinance creating the district shall finally and conclusively establish the regular organization of the district against all persons, which district shall thenceforth be a governmental subdivision of the State of Nevada, a body corporate and politic and a quasi-municipal corporation.

The agreement in question is not an agreement of employment between District and any of its various individual employees, but is a trade agreement which purports to control all aspects of the employer-employee relationship between the District and its employees. In other words, it is an accord between the District and the Union as a bargaining representative, dealing with all aspects of hiring, hours, pay, work, and benefits. As such it is a collective bargaining agreement. *NLRB v. Wooster Division of Borg-Warner Corp.*, CA 6, 236 F.2d 894, 904; *McNeil v. Peoples Life Ins. Co.*, 43 A.2d 293, 294.

This office has previously held that a political subdivision of the State of Nevada cannot enter into a collective bargaining agreement affecting its employees. Attorney General's Opinion No. 233, dated June 1, 1965. For the reasons therein stated, collective bargaining agreements with political subdivisions are contrary to public policy and do not serve the public welfare. We reaffirm this holding as correct. Accordingly, the purported collective bargaining agreement is invalid unless District is granted specific statutory authority to enter into such contracts.

[NRS 318.180](#) authorizes general improvement districts to hire agents, employees, servants, engineers, attorneys, and other persons as necessary to accomplish the purposes of the chapter. However, such does not constitute authority for districts to bargain collectively or enter into collective bargaining agreements otherwise held to be in contravention of public policy.

It is well settled that any agreement against public policy is illegal and void. An agreement made in violation of established public policy is not binding and will not be enforced. Under the principles relating to the doctrine of public policy as applied to the law of contracts, courts will not recognize or uphold any transaction which in its object, operation or tendency is prejudicial to the public welfare. It is not necessary to have a statute prohibiting such contracts, because public policy itself prohibits them. See 17 Am.Jur.2d 532, 533, "Contracts" § 174, and the exhaustive collection of authorities therein contained.

The inquiry made to you by District's independent auditors posed a number of other questions which presuppose that the collective bargaining agreement is valid and authorized. In view of our conclusion that the agreement was not authorized and is therefore invalid, we need not consider such additional questions. However, because the agreement provides for payment of specified sums by District into the Nevada Construction and Industrial Workers Health and Welfare Trust Fund and into the Operating Engineers Pension Trust Fund, we must consider the effect of invalidity of the agreement upon such contributions.

It is the general rule that when an agreement is void for illegality, the courts will not recognize rights as springing therefrom or enforce such agreements, but will leave the parties where it finds them. 17 Am.Jur.2d 584, "Contracts" § 216; and cases therein cited.

The agreement, at § XII, recites that the trust funds are set up by the parties and that the District is bound by the trust agreements. It follows that contributions to the trust funds for fringe benefits are inseparably a part of performance of the agreement. Therefore, such contributions, whether or not expended from the trust funds, are not recoverable.

The underlying principle is that no judgment can have its foundation in an illegal contract, and such policy is effectuated by discouraging such agreements by refusing any form of judicial aid to the parties thereto. 17 Am.Jur.2d 586, "Contracts" § 216.

CONCLUSION

It is therefore the opinion of this office that the collective bargaining agreement dated March 29, 1968, between Incline Village General Improvement District and Operating Engineers Local Union No. 3 is contrary to public policy and therefore illegal and void. Contributions for fringe benefits paid by the District are not recoverable by judicial proceedings.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: Robert A. Groves
Deputy Attorney General

OPINION NO. 68-540 SALES AND USE TAX; NATIONAL BANKS—National banks exempt from sales and use tax under Supreme Court decision in *First Agricultural National Bank v. State Tax Commission*, 88 S.Ct. 2173. (Supersedes AGO 447 dated 10-5-67.)

Carson City, September 18, 1968

Mr. Roy E. Nickson, Executive Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson:

This office held in Attorney General's Opinion No. 447, dated October 5, 1967, that sales of tangible personal property to a national bank are subject to a state sales tax.

In view of the decision of the United States Supreme Court in the case of *First Agricultural National Bank v. State Tax Commission*, 88 S.Ct. 2173, this position must be relinquished. The Supreme Court there held in ruling on the Massachusetts sales and use tax law that the bank was immune from the tax. It further held that if a change is to be made in state taxation of national banks, it must come from the Congress, which has established the present limits.

ANALYSIS

The national banks in Nevada fall within the category of firms which would ordinarily be subject to the use tax, a tax imposed on the entity which stores, uses, or otherwise consumes tangible personal property which is not purchased for resale. Thus the tax falls directly on the purchaser and not on the vendor in such cases. The sales made by such banks of tangible personal property are de minimus. "Use" in [NRS 372.100](#) is defined as including the exercise of any right

or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business.

In view of the Supreme Court's position [NRS 372.265](#) must govern this State. The statute in question reads, "There are exempted from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or consumption in this state of, tangible personal property the gross receipts from the sale of which, this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State." (*M'Culloch v. Maryland*, 4 L.Ed. 579, Act of June 3, 1864, 12 U.S.C. § 548.)

It has been clearly demonstrated that if a retailer selling commodities to a bank for resale (printed checks, etc.) is prohibited from collecting a sales tax from the national banks, and yet is held responsible for such tax, that the retailer increases his selling price to the national bank to cover the deficiency. But the incidence of the tax falls on the exempt national bank, contrary to the rule in *First Agricultural Bank (supra)*, and compels the bank to purchase outside the State of Nevada.

CONCLUSION

This office is therefore of the opinion that national banks are exempted from the computation and the amount of use taxes imposed and from payment thereof, and that retailers selling to national banks are likewise exempted.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-541 SCHOOLS; PHYSICALLY OR MENTALLY HANDICAPPED CHILDREN—If approved by the State Board of Education, tuition for children assigned to classes conducted by Clark County Association for Retarded Children could be paid from available educational funds.

Carson City, September 26, 1968

Robert L. Petroni, Esq., Legal Counsel, Clark County School District, 2832 East Flamingo Road,
Las Vegas, Nevada 89109

Dear Mr. Petroni:

You advise by letter that in the group of mentally retarded children between 6 and 18 years of age, are some whose mental and/or emotional impairment is so severe that they cannot be accommodated in the public school Special Education program. Some of the children are attending a special program operated by the Clark County Association for Retarded Children.

You then ask three questions:

1. May the school district pay tuition to this private school for such children?
2. Does the law permit the school district to count the attendance of these children and pay the allotment received from this ADA to the association operated school?
3. Does the State have authority to directly pay or support such a program operated by the Clark County Association for Retarded Children?

ANALYSIS

The answers to all these questions are dependent on factors to be determined by the provisions of [NRS 388.440](#) to [388.540](#).

For the Clark County Association of Retarded Children to hold classes which could be paid for with state funds, such association would have to meet minimum standards prescribed by the State Department of Education. ([NRS 388.520](#).)

[NRS 388.450](#) reads as follows:

1. Subject to provisions of [NRS 388.440](#) to [388.540](#), inclusive, the board of trustees of a school district may make such special provisions as in its judgment may be necessary for the education of physically or mentally handicapped minors.
2. The board of trustees of a school district may establish uniform rules of eligibility for instruction under the special education programs provided for by [NRS 388.440](#) to [388.540](#), inclusive. The rules and regulations shall be subject to such standards as may be prescribe by the state department of education.

Thus we can see that if the Clark County Association for Retarded Children could provide instruction in suitable places, with the consent of the State Board of Education, the Clark County Board of School Trustees could make special provision for such instruction. Within limits of funds available, we see no barrier to the use of such funds for the desired purpose.

If the proposed instruction meets with the consent of, and under the standards demanded by, the State Board of Education, we feel that the computation of average daily attendance would apply.

The answer to your Question No. 3 is dependent on following the guidelines delineated in answers to Questions Nos. 1 and 2.

CONCLUSION

It is therefore the opinion of this office that a school district may pay tuition to the Clark County Association for Retarded Children if approved by the State Board of Education, and that retarded children attending such classes would be computed on the basis of average daily attendance as provided in [NRS 388.530](#).

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-542 INSURANCE; TAX ON ANNUITY PAYMENTS—[NRS 686.010](#)
construed; held present provisions require collection and payment of 2 percent levy on “payments on annuities” income “in the next preceding calendar year,” and not when such accumulated funds are applied to purchase of specific individual annuities.

Carson City, October 1, 1968

Mr. Louis T. Mastos, Commissioner of Insurance, Department of Commerce, State of Nevada,
Carson City, Nevada 89701

Dear Mr. Mastos:

You have requested our legal opinion and advice on the questions stated as follows relating to the applicability of the tax provisions of [NRS 686.010](#) to remittances or payments received and deposited in Administration and Special Accounts, and intended for purchase of annuities:

QUESTIONS

1. Are such “payments on annuities” taxable at time of receipt, in the same manner as insurance “total premium income?”
2. If the answer to the foregoing question is in the affirmative, may payment and collection of such tax, alternatively, be properly and validly deferred to the time of allocation and purchase of specific individual annuities?

ANSWERS

To Question No. 1: Yes
To Question No. 2: No

ANALYSIS

The results of a mid-1965 general survey made by your office on such questions, as set forth in the following tabulation for thirty-three (33) states, certainly shows considerable diversity of opinion on the subject:

Taxable at date of deposit.....	7 states
Taxable at date of deposit if annuities were subject to tax.....	2 states
Taxable at date of allocation to individual annuities.....	3 states
Would be taxable at date of allocation if annuities were taxable	1 state
Optional.....	5 states
Annuities not taxable.....	12 states
No opinion.....	2 states
Attorney General opinion being sought.....	1 state

The radical difference which exists in tax treatment of annuity considerations or payments among the states is graphically illustrated by the practice in the three states of New York, Illinois, and California.

New York, in defining “premium” (Section 550, Insurance Law) for the purpose of “taxable gross premium income,” includes in such definition “* * * all amounts received * * * other than for annuity contracts * * *.” Thus, New York exempts received remittances or payments for deposit in Annuity Administration and Special Accounts Funds from any taxation, both at the time of their receipt and at the time of allocation to individual annuities.

The Illinois Insurance Department has advised that remittances or payments received for application to the purchase of annuities are, for tax purposes, treated in accordance with the treatment made under the applicable California statute, i.e., optional alternatives available, however, not on the basis of a similar or corresponding Illinois statute, but solely on the basis of an Attorney General legal opinion respecting when such remittances or payments shall be considered a “premium” within the meaning of Section 409 of the Illinois Insurance Code. (Parenthetically, it may be noted that the Illinois levy is on “net taxable premium income.”)

Finally, California (Revenue & Taxation Code, Section 12222), as here relevant, has statutorily authorized optional tax treatment of remittances or payments received for application to the purchase of annuities, as follows:

Funds accepted by a life insurer under an agreement which provides for an accumulation of funds to purchase annuities at future dates may be considered as “gross premiums received” either upon receipt or upon the actual application of such funds to the purchase of annuities. However, any interest credited to funds accumulated while under the latter alternative shall also be included in “gross premium received;” and any funds taxed upon receipt, including any interest later

credited thereto, shall not be subject to taxation upon the purchase of annuities. Each life insurer shall signify on its premium tax return covering premiums * * * its election between such two alternatives. Thereafter an insurer shall not change such election without the consent of the commissioner. Any such funds taxed as “gross premiums” shall, in the event of withdrawal of the funds before their actual application to the purchase of annuities, be eligible to be included as “return premiums” if eligible therefor under the provisions of Section 14 4/5 of Article XIII of the Constitution. (Effective January 1, 1962) (*Note*: Apparently, Maryland is the only other state presently having a substantially equivalent statutory optional provision—Chapter 726, Laws 1965, effective May 4, 1965.)

Such diversity or difference in tax treatment of annuity payments among the states can at least be partially explained on the basis of certain notable distinctions as between “annuity” and “insurance” contracts, and their nature or purpose. One such claimed distinction is that “insurance” contracts provide against the contingency of death, while “annuity” contracts make provision for life with no indemnity feature. Another distinction noted is that while “insurance” looks to longevity, “annuities” look to transiency. Also, “Annuity contracts must * * * be recognized as investments rather than as insurance” since the recipient under an annuity contract is generally the person making the payments while still alive, instead of another person, named as beneficiary (in an insurance policy), to whom the insurer makes payment of the benefits after the insured’s death. Because of such fundamental differences, there still is much question whether an annuity contract should properly be considered an “insurance” contract at all, and also, whether payments made or received for ultimate application to the purchase of annuities should even be deemed “premiums” and so treated for tax purposes, prior to such purchase application. (See Appleman, “Insurance Law and Practice” Vol. 1, Chapter 4, Sections 81-83, and footnote citations.)

It should not be surprising, therefore, that review of the legislative history of applicable Nevada law should show that Attorney General’s Opinion No. 578, dated March 2, 1948, advised against levy of the “premium” tax to annuity considerations because the then-existing statute did not, in sufficiently explicit language, make such tax applicable thereto; and said Attorney General Opinion further concluded that the then Nevada statute required amendatory clarification in such respect, just as had similar pre-existing statutes in many other states, after litigation had made apparent the same ambiguity. Some 4 years later, Attorney General’s Opinion No. 222, dated December 4, 1952, on the basis of the statute as then applicable, answered the identical question now again before us, as follows:

We feel that said Opinion No. 578 should not only be affirmed, but that any doubt expressed in said opinion should be resolved at this time. It is, therefore, the considered opinion of this office that the considerations received by life insurance companies for annuities are not premiums and are not taxable under the provisions of Section 59 of the Nevada Insurance Act. (Ed., presently [NRS 686.010](#), par. 1) To reiterate a portion of Opinion No. 578, we feel that if it is deemed advisable to tax insurance companies on considerations received for annuities, then such must, and can only, be accomplished by legislative action.

Even if some 9 years later, said Attorney General legal opinions (inferentially at least) possibly contributed to the enactment of Chapter 362, 1961 Statutes of Nevada, which amended [NRS 686.010](#), paragraph 1, so that it now reads as follows:

Every insurance or *annuity* company or association of whatever description * * * doing an insurance *or annuity* business in this state, shall annually pay to the commissioner a tax of 2 percent upon the total premium income * * * including * * * *payments on annuities* or policy writing fees, from all classes of business covering property or risks located in this state during the next preceding calendar

year, less return premiums and premiums received for reinsurance on such property or risks. (Emphasis in accordance with 1961 amendatory act.)

We are thus brought back to the fundamental question of the legislative intent of said 1961 amendatory act, and the fundamental issue and question as to whether such amendments, in fact, presently do make [NRS 686.010](#) legally effective as to such tax application of “payments on annuities.”

Preliminarily, it should be noted that though rules applicable to life insurance do not always or necessarily govern an annuity contract, it has usually been held that insurance companies may issue such annuity contracts; at least, such annuity contracts will not be avoided by reason of failure to file them with the insurance commissioner. (Appleman, *ibid*, at pp. 115-116.)

Also, as regards tax liability, it is, of course, well-settled law that exemption is the exception, not the rule; that while tax exemption provisions may not be given a distorted or unreasonable construction, they are, nevertheless, construed against those claiming any such benefit. There is, however, a limiting qualification to this rule, namely, ambiguities in tax statutes are construed in favor of the taxpayer. Stated otherwise: “Whatever doubt exists in a tax measure must be resolved against the Government.” (See 17 A.L.R. 1027, 1029; 108 A.L.R. 284, 286 and footnote citations; *Shwab v. Doyle*, 258 U.S. 529, 42 S.Ct. 391, 26 A.L.R. 1454; *United States v. Field*, 255 U.S. 257, 41 S.Ct. 256, 18 A.L.R. 1461; *Reinecke v. Northern Trust Co.*, 278 U.S. 339, 49 S.Ct. 123, 66 A.L.R. 397.)

Moreover, as Appleman, *ibid*, Vol. 19, Section 10587, 1968 Supplement, p. 106, writes: “Determination of whether a particular payment to an insurer is a premium within section of Constitution providing for a tax on gross premiums is a question of law,” citing *Allstate Ins. Co. v. State Board of Equalization*, 326 P.2d 961, 169 Cal.App.2d 165. And, under statutes imposing a tax upon gross premiums, considerations paid for annuity contracts have been held to be in the category of premiums, and required to be so reported. (Appleman, *ibid*, Section 10591, p. 305, citing *State ex rel. Holt v. New York Life Ins. Co.*, 131 S.W.2d 639, 198 Ark. 820; *Northwestern Mut. Life Ins. Co. v. Murphy*, 271 N.W. 899, 223 Iowa 333, 109 A.L.R. 1054; *Equitable Life Assur. Soc. of U.S. v. Hobbs*, 114 P.2d 871, 154 Kan. 1, 135 A.L.R. 1234; *State ex rel. Gully v. Mutual Life Ins. Co. of New York*, 196 So. 796, overruled in part 198 So. 763, 189 Miss. 830.)

On the other hand, either on the basis that the price paid for an annuity contract is not a “premium” (such as the consideration paid for a contract of insurance), and/or that annuities are not policies or contracts of insurance, Appleman, *ibid*, Vol. 19, Section 10591, p. 305 and Vol. 1, Section 81, p. 107, however, also notes that entirely contrary results were reached in *People ex rel. Metropolitan Life Ins. Co. v. Knapp*, 132 N.E. 916, 231 N.Y. 630, affirming 184 N.Y.S. 345, 193 App.Div. 413; *State ex rel. Equitable Life Assur. Soc. of U.S. v. Ham*, 88 P.2d 484, 54 Wyo. 148 (but indicated as subsequently invalidated on the basis of amendment of applicable statute, Section 39-205 W.S. 1957, and Section 26-4-3 W.S. 1967, in *Equitable Life Assur. Soc. of U.S. v. Thulemeyer*, 49 Wyo. 63, 52 P.2d 1223, rehearing denied 54 P.2d 896, *Ham v. Equitable Life Assur. Soc. of U.S.*, 57 S.Ct. 24, 299 U.S. 505, 81 L.Ed 375); *Bronson v. Glander*, 77 N.E.2d 471, 149 Ohio St. 57; *Corporation Commission v. Equitable Life Assur. Soc. of U.S.*, 239 P.2d 360, 73 Ariz. 171.

It should be abundantly clear from the foregoing background analysis that the diversity in both statutory and decisional law in other states, at best, is a poor substitute for statutory construction of the specific provisions of [NRS 686.010](#), alone pertinent and determinative of the principal questions herein.

Before addressing ourselves to this aspect of the matter, it seems proper at this point to contemplate certain practical considerations, excerpted from a letter to your office in 1964 from counsel for Equitable Life Assurance Society of the United States wherein, among other things, and in justification of a proposed change in method of reporting considerations under deposit administration contracts from date of receipt to date of allocation to specific individual annuities, he wrote as follows:

* * * The effect of this change in accounting from the practice heretofore followed by the Society is * * * that these considerations will not be journalized as “premiums received” until applied to the purchase of annuities. Consequently, they will not be carried into premium income until such time as they are so applied.

The relevant Nevada statute ([NRS 686.010](#), as amended by Chapter 362 of the Laws of 1961) provides in relevant part that “Every insurance * * * company * * * doing an insurance or annuity business in this state shall annually pay to the Commissioner a tax of 2 percent upon the total premium income * * * from all classes of business covering property or risks located in this state during the next preceding calendar year * * *. It will be observed that the tax is imposed upon the ‘total premium.’” Accordingly whether or not the tax is payable with respect to an item depends upon whether or not the item is included in premium income. As above indicated, the methods of accounting and preparation of the annual statement under the new treatment will be such that the items under discussion will be included in premium income only when and as applied to the purchase of annuities for specific employees. There will therefore be entire consistency between the annual statement * * * and the premium tax return. There will also be consistency between the premium tax return and the Nevada statute.

Indicating the existence of an apparent analogy between “premiums paid in advance” and tax treatment of same, to “payments on annuities” said letter argues for like tax treatment, as follows:

Similarly, there are two alternatives for handling deposit administration * * * considerations. The one which the Society has been following is comparable to the first alternative method of treatment of premiums paid in advance. It picks up as premium income the amount received when it is placed in the deposit administration fund and, of course, no further receipt is reported when amounts are applied out of the fund to the purchase of annuities for specific employees. The other method, comparable to the second alternative method of handling premiums paid in advance, reports no premium income at the time of receipt but does report the full amount applied to the purchase of the annuity at the time of the employee’s retirement, which, of course, includes an interest element upon the original amount placed in the fund. It is this latter alternative method which the Society plans to adopt.

In both cases, i.e., premiums paid in advance and deposit administration considerations, the second alternative method described above results in deferment of the payment of tax, not its avoidance. At the time of payment of tax the amount included in premium income is larger by reason of the interest element than the amount of the original receipt on which the tax is based under the first alternative.

We do not contend in either instance that either alternative is exclusively right or that either is wrong. They are both proper and that method is correct for premium tax purposes which agrees with the company’s annual statement and accounting practices, particularly as they relate to inclusion of items in premium income. As above indicated, the measure of the tax base under the Nevada statute is “total premium income * * * during the next preceding calendar year.”

We may add that the method of treatment of these items for premium tax purposes which the Society proposes to adopt is by no means new in the life insurance industry. We are aware of the fact that a number of the leading group annuity writing companies are using it, as examination of their annual statements in comparison with the Society’s * * * will indicate. One leading company has informed us that it has been using this method generally since at least 1951.

Industry’s position and views are additionally reflected in the following excerpt from a written communication dated January 18, 1968, received from counsel for Life Insurance Association of

America, of whom information and clarification as to existing practice was sought for purposes of this opinion:

As we discussed, the universal practice of the companies is to report the funds plus interest when they are applied to purchase the annuity contract, rather than when received by the insurer. This avoids the tax refund complications which would otherwise occur if the contract is terminated either because it is transferred to another insurer or because the employer goes self-insured. As you can see, the state receives the equivalent tax dollar under either system of reporting.

If only a few states, however, were to require that the funds be reported when first received rather than when applied to purchase the annuity contract, this could create unnecessary but serious problems for the insurer and the master policyholder. Many, perhaps most deposit administration contracts, are sold to large interstate employers who transfer employees from one state to another wherever these facilities may be located. Think of just the accounting problems that will result over the life of the contract as employees are shifted in and out of these states.

Moreover, it is “inconveniences” such as these accounting problems which lead employer-policyholders to give serious consideration to the tax-free status of non-insured plans, to the detriment of all concerned.

Contrariwise, by written memorandum, your office points out that present provisions of [NRS 686.010](#) would appear to raise serious question as to the propriety of deferring the tax on deposit administration and special account funds until allocation to individual annuities, particularly in view of counter equally-reasonable and practical considerations, summarized as follows:

Such funds are subject to commission and expense adjustment at the time received, and the annual contract administration charge. The insurance department’s cost of approval of forms, licensing of agents and annual accounting is incurred during the accrual period as well as after allocation, the same as company expense. Such funds may be paid in cash at retirement rather than used to purchase an annuity, or may be transferred to an alternative funding agency prior to allocation to the individual annuity, or the covered member may move to another state, in any of which cases no tax would be received to compensate for the expense the insurance department has incurred. In any case the tax is received somewhat later although it is based on the original deposits plus income earned on them.

Clearly, the above views and arguments of both industry and the State have considerable merit, and neither can properly be minimized; simply put, they are manifestly irreconcilable, permitting neither substantial or satisfactory accommodation of involved practical interests.

We have already noted insurance companies presently may, and do, issue annuity contracts. (Appleman, *ibid*, Vol. 1, Sec. 83, pp. 115-116.) Moreover, because of the probably-continuing inflationary trend and the diminishing purchasing power of the dollar, it may reasonably be assumed that insurance companies will be increasingly involved in the marketing of annuity and variable annuity contracts, whether deemed “investments” or “insurance.” (Compare: *Securities & Exchange Commission v. Variable Annuity Life Ins. Co.*—VALIC Case, 1959, 79 S.Ct. 618, 622, 359 U.S. 65, 3 L.Ed.2d 640, and *Securities & Exchange Commission v. United Benefit Life Ins. Co.*, 1966, 123 U.S.App. D.C. 305, 359 F.2d 619, reversed 387 U.S. 202, 87 S.Ct. 1557, 18 L.Ed.2d 673.) Probable increasing annuity and variable annuity contract business makes immediate clarification and certainty as to the application of the tax provisions of [NRS 686.010](#) both desirable and urgent. Balancing and accommodation of conflicting practical interests, such as those outlined above, properly must ultimately rest with the Legislature, which alone can statutorily provide valid suitable adjustments thereof. Our restricted province is solely the construction or interpretation of the present provisions of [NRS 686.010](#), as they relate to the 2 percent tax levy on “payments on annuities,” and whether the same is payable and collectible

solely on the basis of their receipt in “the next preceding calendar year,” or whether the said levy may alternatively be validly paid and collected when applied to the purchase of specific individual annuities.

As suggested herein, a substantial portion of the diversity in tax treatment of “payments on annuities” among the states results from different language or provisions in their respective applicable statutes. Thus, Appleman, *ibid*, Vol. 19, 1968 Supplement, Section 10591, p. 109, notes as follows:

Where relevant statutes distinguish between insurance and annuity contracts, a statute imposing a gross premium tax on all premiums received on policies and contracts of insurance, as distinguished from a tax on premiums and business done, does not apply to annuity contracts. (Citing *Ariz.*, A.C.A. 1939, Sec. 61-101, 61-102, 61-328 and *Corporation Commission v. Equitable Life Assur. Soc. of U.S.*, *supra.*) Ambiguities in taxing statutes are construed in favor of the taxpayer * * *. (Note: Application of the taxing statute was denied extension to an annuity contract not specifically covered by language in the statute under consideration in the cited case. 1963 Arizona Revised Statutes, Section 20-224 A, now expressly excludes from “total direct premium income” considerations received on annuity contracts.)

Applying such criterion or test, the present provisions of [NRS 686.010](#), as amended by Chapter 362, 1961 Statutes of Nevada, reads: “Every insurance or *annuity* company * * * of whatever description * * * doing an insurance or *annuity* business in this state, shall annually pay to the commissioner a tax of 2 percent upon the total premium income * * * including * * * *payments on annuities* * * * during the next preceding calendar year * * *.” (Emphases shown are in accordance with the amendatory act.)

It is, therefore, not entirely correct (as counsel for Equitable Life Assurance Society of the United States argued in his 1964 letter to your office) that the 2 percent tax imposed on [NRS 686.010](#) only applies to “total premium income.” By express and clear comprehensive language the 1961 amendments to [NRS 686.010](#) effectively made such 2 percent tax levy additionally applicable to “payments on annuities * * * during the next preceding calendar year * * *.” It is difficult to conceive how legislative intent as to the applicability of the imposed tax levy to “payments on annuities * * * during the next preceding calendar year * * *” could have been more explicitly or plainly stated, especially in light of the legislative history of [NRS 686.010](#) and cited Attorney General legal opinions concerning the provisions thereof, as herein previously noted.

We parenthetically note that while there appear to be no facts immediately available one way or the other on the matter, possible loss of tax revenues to the State of Nevada from annuity payments, by reason of removals, transfers, etc., prior to actual application to purchase of specific individual annuities, is certainly potentially involved with any deviation from strict statutory requirement as to when the tax levy should and must be paid. It may be further assumed that included in all received “payments on annuities” is a sum to cover the Nevada tax factor which should accrue to said State in regular course and on an annual basis, in payment of the costs of government in the same manner as other taxpayers. Finally, since withdrawals because of removals, transfers, etc. during any annual period could be accounted for and treated as “return premiums” in reduction of total income from annuity payments on which the 2 percent levy shall be paid, no detriment or loss to the taxpaying insurance companies would apparently result on such basis.

Nor is it true that applicability of the involved tax on “payments on annuities” is solely dependent “on whether or not the item is included in premium income,” simply as a matter of accounting procedure, as has been argued. For, in point of fact as well as a matter of law, it is not statutory intent to permit insurance companies, on some wholly conceptual and arbitrary basis themselves alone, and independently of applicable statute, nominally to categorize, denominate, or specify what shall, or shall not, constitute “premium,” since to do so would put it within the sole power of insurers to set their own reserve requirements by or through their own re-definition

of “premium.” (See *Duel, Commissioner of Insurance v. State Farm Mutual Automobile Insurance Company*, 1 N.W.2d 887; 2 N.W.2d 871, 324 U.S. 154; *Allstate Ins. Co. v. State Bd. of Equalization*, 336 P.2d 961, 169 Cal.App.2d 165.)

Consequently, it is our considered legal opinion and conclusion that, by reason of constitutionally-valid legislative enactment, the provisions of [NRS 686.010](#) expressly and specifically include, comprehend, and apply to “payments on annuities” “* * * during the next preceding calendar year * * *” to the same extent and in the same manner as in the case of insurance “total premium income,” permitting no deviation from such plain and clear statutory requirement.

It is our understanding that transacted annuity contract business and income realized by insurance companies is only lately assuming significant proportion, due to the fact that the 1959 VALIC Case decision considerably slowed down and delayed entry and activity of insurers in the marketing of annuity contracts. (See *Securities & Exchange Commission v. Variable Annuity Life Ins. Co.*, *supra*, holding that an insurer of a variable annuity which had no element of fixed return assumed no true risk in the insurance sense, and could not offer contracts to the public without registration under the Securities Act and compliance with the Investment Company Act, generally construed as requiring that annuities were *not* to be deemed or legally treated as “insurance,” but only as “investments.”) It is also our understanding that there presently would be only a negligible differential in tax proceeds as derived from the 2 percent levy on “payments on annuities” on the basis of total income therefrom for the next preceding calendar year as compared with such tax proceeds on the basis of payment of levy on such accumulated funds when applied to the purchase of specific individual annuities. Finally, it is our understanding also that the proposed revision of the Insurance Code may include some change concerning the application of the involved tax levy as respects “payments on annuities.”

In light of such practical considerations and based upon our foregoing analysis, therefore:

CONCLUSION

It is our considered legal opinion and advice that the tax basis for the 2 percent levy on “payments on annuities,” under present provisions of [NRS 686.010](#), is the total such income received by insurers in the next preceding calendar year, and that such tax must be so paid and collected; also, that deferment and payment of such tax on the basis of when such accumulated funds are applied to the purchase of specific individual annuities is unauthorized by, and would be contrary to, present provisions of [NRS 686.010](#) in such respect.

It is our further advice that appropriate notice immediately issue that your office will accordingly henceforth expect full compliance on the part of concerned or affected insurers and others with the provisions of [NRS 686.010](#) as respects reporting and payment of the 2 percent levy on such “payments on annuities,” or income, in “the next preceding calendar year,” regardless of past practice, so long as applicable present statutory provisions in such respect remain unchanged.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 68-543 A PAROLEE who is convicted of a crime while on parole must serve the entire unexpired term of the original sentence plus the minimum term of his second sentence before he is eligible for parole on the second sentence.

Carson City, October 2, 1968

Mr. Philip P. Hannifin, Chief Parole and Probation Officer, Carson City, Nevada 89701

Dear Mr. Hannifin:

By letter dated September 25, 1968 you inquire of this office if a parolee who is convicted of a crime while he is on parole must serve the entire balance of his unexpired original sentence before he is eligible for parole from confinement for the second offense.

ANALYSIS

[NRS 176.035](#) reads:

Conviction of two or more offenses:

Concurrent and consecutive sentences.

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

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

By the terms of this statute the second sentence would not begin to run until the balance of the term of the first sentence has been fully served. We so held in Attorney General Opinion 480 issued January 19, 1968, and we affirm that position now. This statute standing alone compels the conclusion that parole eligibility on the second sentence could not be considered until the lapse of the first sentence. However, to bolster our conclusion we cite [NRS 213.150\(6\)\(b\)](#), which reads:

6. Any person who is retaken and imprisoned pursuant to this section for a violation of any rule or regulation governing his conduct shall:

(b) Serve such part of the unexpired term of his original sentence as may be determined by the board.

CONCLUSION

From this statutory language we conclude that the entire original or first sentence plus the minimum amount of the second sentence must be served before parole may be considered as to the second sentence.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: John Sheehan
Deputy Attorney General

OPINION NO. 68-544 NEVADA TAX COMMISSION—Sales and Use Tax as applied to service transactions.

Carson City, October 9, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson:

A taxpayer in the State of Nevada who owns a sign-painting business contends the Sales and Use Tax does not apply to the remuneration he receives for the painting and production of signs, show cards, and posters. He contends he performs “services” and is not making “sales.” After an administrative hearing before the hearing officer of the Nevada Tax Commission, it was determined that a decision should be held in abeyance pending some directive from this office as to the applicability of the Sales and Use Tax to such transactions or operations.

You have informed this office that many retailers in the State of Nevada perform services in addition to, or incidental with, retail sales. Additionally, the situation frequently arises where the consumer will furnish an item of tangible personal property which is to be altered or changed in some manner. Accordingly, you have submitted the following questions:

QUESTIONS

1. Does the Sales and Use Tax apply in situations where a consumer furnishes tangible personal property to an individual or firm for the alteration of such tangible personal property from one form to another (such as a blank sheet of cardboard into a sign, a bolt of material into drapery, or random pipe lengths into a trailer rack) when the tangible personal property is returned to the consumer in the altered form?
2. Does [NRS 372.060](#), subsection 1, conflict with [NRS 372.060](#), subsection 3(a)?
3. Is Nevada Tax Commission Sales and Use Tax Ruling No. 15, first paragraph pertaining to taxation of painting signs, show cards, and posters, a valid interpretation of [NRS 372.060](#)?
4. If the answer to Question No. 3 above is affirmative, does the second paragraph of Sales and Use Tax Ruling No. 15 represent discriminatory taxation in the painting or lettering of signs fixed to real property?
5. If alterations to tangible personal property are requested by the customer at the time of purchase (such as the shortening of a hem in a woman’s dress), and the charges for such alterations are separately stated in the customer billing, should the cost of such alterations be included in the measure of the amount of tax due under the Sales and Use Tax Act?

ANALYSIS

[NRS 372.105](#) provides for the imposition of a sales tax upon a retailer for the privilege of selling tangible personal property in this State.

[NRS 372.185](#) imposes a use tax upon the storage use or other consumption in this State of tangible personal property. These two tax-imposing statutes make no mention of service transactions; however, authorities are plentiful which hold that some service transactions constitute either in themselves or in conjunction with a retail sale a basis for the imposition of sales or use tax. The matter is discussed in 9 Vand.L.Rev. 227, in an article entitled, “What Is a Sale For Sales Tax Purposes.” After discussing the subject matter, generalities were announced. These general rules have heretofore been adopted by this office and recognized as being sound. Those general rules are announced in Attorney General Opinion No. 61, dated June 5, 1959, and are as follows:

1. “If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the

services rendered, then the vendor is engaged in the business of rendering services, and not in the business of selling at retail.”

2. “If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail, and the tax which he pays * * * (is measured by the total cost of article and services).”

3. “If the service rendered in connection with an article does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the business of selling at retail, and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax-exempt as to the other.”

The Sales and Use Tax Act furnishes additional assistance in answering your questions when we look at [NRS 372.025\(2\)\(a\)](#):

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are *a part of the sale*. (Italics added.)

With this background, we shall consider your specific questions.

QUESTION NO. 1

We must start with the premises that sales tax does not apply unless there has been a sale of tangible personal property and the use tax does not apply unless tangible personal property is stored, used, or consumed. Pure services are not subject to the taxes imposed by Chapter 372 or Nevada Revised Statutes. When tangible personal property is first delivered by its owner to another person, and that person performs only services before returning the property to its owner, there is no sale. Any consideration paid by the owner is compensation for services rendered. An example would be a woman delivering her wig to a beautician who merely combs it and returns it. In such cases, no tax, neither sales nor use, is involved.

Problems arise when both services are rendered and tangible personal property is added to the item and then returned to the owner. It is fairly well established that, if the value of personal property added by the person performing the service is an insignificant portion of the total bill rendered, no tax is involved. Examples of this would be the few drops of hair lotion received when purchasing the services of a barber. The rule is stated in 47 Am.Jur., Sales and Use Taxes § 26:

Under statutes taxing the sale of tangible personal property at retail, (as does Nevada) it has been held or stated that where a contract contemplating the creation of, and transfer of title to, certain property also requires the exercise of a high degree of skill, and the materials involved are of relatively little value while the principal value of the finished product lies in the skill or services to be rendered, and such product is of little value to anyone other than the buyer, the contract will be deemed to contemplate a rendition of personal services rather than a sale of goods.

If, however, the value of the article is substantially or materially enhanced by the addition of personal property to it, and the services rendered represent an insignificant part of the total value of items, then the item, when returned to the consumer, constitutes a sale and the tax applies.

QUESTION NO. 2

The two sections of the statute read:

[NRS 372.060](#):

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

* * * * *

3. "Sale" includes:

(a) The producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish, either directly or indirectly, the materials used in the producing, fabricating, processing, printing or imprinting.

We feel the two sections are entirely compatible and do not conflict. Unless two sections of a statute are clearly conflicting and cannot stand together, the validity of the entire statute must prevail. Subsection 1 of the questioned statute defines rather broadly the term "sale." Subsection 3 (a), and in fact all of subsection 3, merely goes on to define more particularly and specifically the term "sale."

QUESTION NO. 3

The first paragraph of the Nevada Tax Commission Sales and Use Tax Ruling No. 15 reads:

Tax applies to retail sales of signs, show cards and posters, and to charges for painting signs, show cards, and posters whether the materials are furnished by the painter or by the customer.

This ruling is a valid and correct interpretation of [NRS 372.060](#). The paragraph contemplates a sign, show card or poster which is tangible personal property, as does [NRS 372.060\(a\)](#). The paragraph also provides that the tax applies notwithstanding the materials used are furnished by the customer. This is precisely what the statute says. The first paragraph of Ruling No. 15 is valid.

Under a similarly worded statute, the Supreme Court of California, in *Bigby v. Johnson*, 99 P.2d 268 (1940) stated:

As already indicated plaintiff's printing operations are at times carried on with paper stock furnished to him by his customers. While in such a transaction technically there is no transfer of title to tangible personal property, except a small amount of ink, there is a transfer of "title" and possession of the new or fabricated article, within the meaning of the act and the state therefore properly asserts a tax to be due with respect thereto in view of the following language which was added to section 2(b) of the act by amendment in 1935:

' "Sale" * * * includes the fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work * * *.'

There are cases to be found which hold the contrary. However, the ruling of the Bigby case expresses the majority position.

In Vol. VIII of Law and Contemporary Problems, 1941, an article entitled "Taxable Transactions: Judicial Decisions" appears on page 530. It is stated on page 534:

Probably the majority of jurisdictions, however, hold printing and the allied acts subject to sales tax. In their judgment, the controlling factor is that the consumer, even if giving a special order, desires not a service, but rather the delivery of a finished product.

In any event, Nevada has expressed the direction in which it will go in this regard, and as is expressed by Ruling 15, it is with the majority.

QUESTION NO. 4

The second paragraph of Ruling No. 15 reads as follows:

Tax does not apply to charges for painting or lettering on real property. The painter or letterer is the consumer of the materials used in such work, and tax applies with respect to the sale of such property to him.

If the material upon which the painting or lettering is to be done is in fact real property, there is no *sale* as defined in either subsections 1 or 3(a) of [NRS 372.060](#). Those subsections contemplate either a transfer of title or possession, exchange, barter, lease, or rental of *tangible personal property*, or the producing, fabricating, processing, printing, or imprinting of *tangible personal property*. Real property is not mentioned in the statute and is not the basis of imposing sales and use tax in any event. If there is involved real property as opposed to tangible personal property, no tax imposed by Chapter 372 of Nevada Revised Statutes is involved. The statutes do not provide for such a tax, and all the second paragraph of Ruling No. 15 does is to announce this. The ruling is in accord with the statute. The statute does not even hint of discrimination in this regard and hence the ruling is nondiscriminatory.

QUESTION NO. 5

We feel the answer to Question No. 5 is in the affirmative. We feel that the key words are “at the time of purchase.” When a customer decides to purchase an item, the customer must be deemed to intend to use that item. If the item could not be used by the customer in the absence of the requested alteration, the alteration becomes an integral and motivating part of the sale itself. Without the alteration there would have been no sale, for the customer would have rejected the transaction.

The sales tax is computed upon the “gross receipts” of a retailer ([NRS 372.105](#)). “Gross receipts” means the total amount of the sale price without deduction for labor or service costs ([NRS 372.025](#)). In the case of the altered garment at the time of the sale, it appears to us that the cost of the alteration is a cost of labor or service incident to and an integral part of the sale and should be included in the sales price. Hence it is taxable. This would be in conformity with the second general rule announced in Attorney General Opinion No. 61, *supra*.

CONCLUSION

Though it must be recognized that there is no definitely established rule which will fit all the cases, the general principles above mentioned have been adopted and used both in Nevada and our sister states. In the factual situations presented to us at this time we do not feel the Nevada Tax Commission has either misinterpreted Chapter 372 of Nevada Revised Statutes or violated established rules.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: John Sheehan
Deputy Attorney General

OPINION NO. 68-545 MOBILE HOMES; CAMPERS—Mobile homes are not motor vehicles within the meaning of Article 10, Section 1 of the Nevada Constitution; campers are taxable as motor vehicles.

Carson City, October 11, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson:

The Nevada Tax Commission and the Department of Motor Vehicles are interested in the prospects of subjecting mobile homes to a privilege tax, rather than the present personal property tax. You have brought to our attention Article 10, Section 1 of the Nevada Constitution which provides:

* * * The legislature may exempt motor vehicles from the provisions of the tax required by this section, and in lieu thereof, if such exemption is granted, shall provide for a uniform and equal rate of assessment and taxation of motor vehicles, which rate shall not exceed five cents on one dollar of assessed valuation * * *.

You have further brought to our attention [NRS 482.075](#) and [NRS 706.080](#) which define the term, “motor vehicle.” They provide:

[NRS 482.075](#):

“Motor vehicle” means every vehicle as defined in [NRS 482.135](#) which is self-propelled.

[NRS 706.080](#):

1. “Motor vehicle” means any automobile, automobile truck, trailer, automobile tractor, and semitrailer, motorbus, motorcycle, or any other self-propelled or motor-driven vehicle, used upon any public highway of this state for the purpose of transporting persons or property.

Since the latter statute seems to include trailers within the definition of motor vehicles and the former does not, you have expressed concern over the apparent conflict. Thus, the following questions are posed:

QUESTIONS

1. Is a mobile home trailer a motor vehicle within the definitions set forth in [NRS 706.080](#)?
2. If the answer to Question No. 1 is affirmative, does Article 10, Section 1 of the Constitution authorize the Legislature to exempt mobile home trailers from the property tax and subject them to the privilege tax?
3. Could camper bodies affixed to motor vehicles (either temporarily or permanently) be construed as becoming an integral part of the motor vehicle, and thus subject to the privilege tax instead of the property tax?

ANALYSIS

The apparent discrepancy between [NRS 482.075](#) and [NRS 706.080](#) soon resolves itself when one considers the purpose of Chapter 706 of Nevada Revised Statutes. These statutory sections

are directed at the regulation of motor carriers on our public highways. [NRS 706.130](#) provides in part:

1. It is hereby declared to be the purpose and policy of the legislature in enacting this chapter:

(a) To confer upon the commission the power and authority and to make it the duty of the commission to supervise and regulate the common and contract motor carrying of property and passengers for hire, and to regulate for licensing purposes the private motor carrying of property when used for private commercial enterprises on the public highways of this state, and to confer upon the department the power and authority to license all motor carriers, so as to relieve the existing and all future undue burdens on such highways arising by reason of the use of such highways by motor vehicles in a gainful occupation thereon;

(b) To provide for reasonable compensation for the use of such highways in such gainful occupations, * * *.

(c) To provide for fair and impartial regulation, to promote safe, adequate, economical and efficient service and foster sound economic conditions in motor transportation, * * *.

Thus, whether or not “mobile homes” are included within the definition of motor vehicles is not really important in answering the basic question of your request, which deals with personal property tax viz privilege tax. [NRS 706.080](#) is directed at commercial enterprise.

On two former occasions this office has considered subjecting mobile homes to the privilege tax by defining them as motor vehicles. We have concluded that they are not motor vehicles. See Attorney General Opinion No. 143, dated June 5, 1964, and Attorney General Opinion No. 170, dated September 10, 1964. Nevada statutes have not considered mobile homes as “motor vehicles” for personal property tax purposes. See [NRS 371.020](#), [482.067](#) and [482.075](#).

Historically then, neither this office nor the Nevada Legislature has considered “mobile homes” as “motor vehicles” for personal property tax purposes. We see no reason to change this interpretation.

We must thus conclude that “mobile homes” are not within the definition of “motor vehicles” of [NRS 706.080](#), insofar as personal property viz privilege taxation is concerned.

In answer to your third question, this office in Attorney General Opinion No. 170, dated September 10, 1964, and Attorney General Opinion No. 173, dated October 1, 1964, has concluded that camper units placed on truck beds or manufactured so as to become an integral part of the motor vehicles are taxable as such:

We believe that camper trailers are units placed on truck beds, or manufactured so as to become an integral part of the motor vehicle, so as to provide shelter, sleeping, and cooking accommodations and as such are taxable as vehicles.

We adopt that conclusion for our answer to your third question.

CONCLUSION

Mobile homes are not motor vehicles within the meaning of Article 10, Section 1 of the Nevada Constitution.

Campers are units placed on truck beds, or manufactured so as to become an integral part of the motor vehicle, so as to provide shelter, sleeping, and cooking accommodations and as such are taxable as vehicles.

Respectfully submitted,

HARVEY DICKERSON

Attorney General

By: Peter I. Breen
Deputy Attorney General

OPINION NO. 68-546 SALES AND USE TAX; CHARITABLE OR RELIGIOUS ORGANIZATIONS—Sales of tangible personal property by a charitable or religious organization, which are not occasional sales, and which are not an integral and inseparable part of service to purchasers, are not exempt from the sales tax.

Carson City, November 12, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson:

Once again the matter of the sales tax as applied to religious and charitable organizations has been presented by your department to this office.

The question you now present is this: Are the sales of tangible personal property by religious or charitable organizations exempt from the Sales and Use Tax Act when the tangible personal property, purchased tax exempt for the purpose of resale, is not sold at occasional sale, and when the proceeds are for the support of the religious or charitable organization and not connected with service.

ANALYSIS

In a learned opinion (Attorney General Opinion No. 61, dated June 5, 1959) a predecessor in this office covered the field of sales taxation against religious and charitable organizations, including hospitals.

It was decided in that opinion that hospitals under religious auspices were charitable organizations within the construction of our statutes. That opinion also held that sales either by or to such organizations were exempt, provided the sales "by" the organization were an integral part of the service rendered the patients. Thus, the sale of medicine and drugs to patients, being a necessary part of the hospital service, would be exempt.

As stated in opinion of the Attorney General, if the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering services, and not in the business of selling at retail.

The question then arises as to whether sales, which are not occasional sales, by a religious or charitable organization of tangible personal property, the proceeds of which are to be used in a manner not directly connected with the charitable end of that organization's operation, are taxable.

If the tangible personal property sold is the subject of a transaction not directly connected with services, and the service rendered in making the sale is merely incidental to and an inseparable part of the transfer to the purchaser, then the vendor is engaged in the business of selling at retail, and the sales tax applies. This, we believe, answers the preceding question.

The fact that the money received from sales is used to directly benefit a charitable or religious organization does not bring it within the exemption.

CONCLUSION

It is therefore the opinion of this office that sales of tangible personal property by a charitable or religious organization, which are not occasional sales and which are not an integral and inseparable part of service to purchasers, are not exempt from the sales tax.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-547 SALES AND USE TAX; COLLECTION ALLOWANCE—When a retailer personally uses or consumes his inventory he must collect and remit a sales tax and should be allowed a collection allowance. When a retailer uses his inventory in furtherance of his business, a use tax is due from the retailer directly to the State, no costs of collection are incurred, and no deduction is allowed.

Carson City, November 27, 1968

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson:

You have asked us the following questions:

1. When a retailer is in fact a user or consumer of tangible personal property, is he permitted to deduct 2 percent of that portion of his total tax liability incurred as a user or consumer?
2. If the answer to Question No. 1 is in the affirmative, what distinguishes the retailer as a user from a non-retailer as a user?

ANALYSIS

[NRS 372.370](#) reads:

The taxpayer shall deduct and withhold from the taxes otherwise due from him 2 percent thereof to reimburse himself for the cost of collecting the tax.

In Attorney General's Opinion No. 478 of January 8, 1968, we stated:

The discount should be computed on all taxes collected by the retailer pursuant to Chapter 372 of NRS.

We can imagine two situations when a retailer is also a user or a consumer:

1. When items of his inventory are taken from his stock or inventory and consumed or used by the retailer for his own benefit.
2. When items of his inventory are taken from his stock or inventory and consumed or used by the retailer in the furtherance of his business.

In the first situation above, the retailer transferred tangible personal property, albeit to himself as a purchaser, and the sales tax applies. The retailer must *collect* and remit the tax to the State. Having the obligation to *collect* the tax, he should be afforded the deduction contemplated by [NRS 372.370](#).

In the second situation there is no transfer of tangible personal property from the retailer. He is merely using the property in his retail business. A use tax is due from him (the retailer) to the State. The retailer does not collect the tax, but makes a direct payment to the State. Not having the burden of collecting any tax, the retailer in the second situation above and therefore is not

subjected to discrimination. He is unlike the retailer in the first factual situation is not entitled to any deduction for reimbursement for costs incurred while paying the tax.

The answer to Question No. 2 is that a person who is a non-retailer user (that is, a person having a consumer permit) does not incur costs of collecting any taxes because he makes a direct payment of use taxes to the State. He is likened to and treated the same as the retailer in the second situation above, and therefore may be treated differently without fear of discrimination.

CONCLUSION

When a retailer personally uses or consumes his inventory, he must collect and remit a sales tax and should be allowed a collection allowance.

When a retailer uses his inventory in furtherance of his business, a use tax is due from the retailer directly to the State, no costs of collection are incurred, and no deduction is allowed.

A non-retailer user is not discriminated against by following the above procedure.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: John Sheehan
Deputy Attorney General

OPINION NO. 68-548 VETERANS; PREFERENCE UNDER STATE PERSONNEL MERIT SYSTEM—Veterans of the Armed Forces of the United States, in designated statutory periods of armed conflicts, must, if not dishonorably discharged from such service, be allowed the preference in examinations designated by [NRS 284.260](#), regardless of whether such service was in actual combat.

Carson City, December 3, 1968

Mr. John M. Lindsay, Veteran's Employment Representative for the State of Nevada, Carson City, Nevada 89701

Dear Mr. Lindsay:

You have addressed an inquiry to this office which touches on [NRS 284.260](#), which reads as follows:

In establishing the lists of eligible persons, certain preferences shall be allowed for veterans not dishonorably discharged from the Armed Forces of the United States. For disabled veterans, 10 points shall be added to the passing grade achieved on the examination. For ex-servicemen and women who have not suffered disabilities, and for the widows of veterans, 5 points shall be added to the passing grade achieved on the examination.

You ask whether it is necessary for the veteran to have had combat service in order to secure the preference outlined in the preceding paragraph.

ANALYSIS

It will be noted that the only restriction placed on entitlement to points for veterans in examinations for employment is that they have not been dishonorably discharged from the Armed Forces of the United States.

The Legislature did not place a further restriction on the awarding of points in merit system examinations by requiring that in addition to not having been dishonorably discharged, the veteran should have had combat service.

The State Personnel Board cannot then, by rule or regulation, add this as a requirement before points in the examination may be awarded to veterans.

CONCLUSION

It is the opinion of this office that veterans of the Armed Forces of the United States, in designated statutory periods of armed conflict, must, if not dishonorably discharged from such service, be allowed the preference in examinations designated by [NRS 284.260](#), regardless of whether such service was in actual combat.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-549 COUNTY COMMISSIONERS—County commissioners elected in counties having a population of less than 50,000, at the general election of 1968, have 4-year terms under [NRS 244.025](#) as amended.

Carson City, December 5, 1968

The Honorable James L. Wadsworth, District Attorney, Lincoln County, Pioche, Nevada 89043

Dear Mr. Wadsworth:

You have forwarded an inquiry to this office which involves the election of county commissioners for Lincoln County at the general election on November 5, 1968.

The ballot shows only two candidates for county commissioner, one for a long term, which under previous legislation constituted a term of 4 years, and one for a short term, previously designated for a term of 2 years.

ANALYSIS

The Legislature, at the 1967 session of that body, amended [NRS 244.025](#) (Chapter 234, 1967 Statutes) so as to provide that in the general election held in 1968, in counties having less than 50,000 population, and at the general election held every 4 years thereafter, two persons shall be elected to serve on the board of county commissioners for a term of 4 years.

CONCLUSION

The clear mandate of the Legislature in abolishing the 2-year term for county commissioners, and establishing 4-year terms, cannot be abrogated by a ballot designating a short and a long term. It appears that there were only two candidates for county commissioner on the general election ballot. Both are, therefore, elected for 4-year terms subject to the provisions of [NRS 244.025](#) as amended.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 68-550 INDIGENTS; MEDICAL TREATMENT FOR—1. The capability of a person to work and the extent of that capability are factors to be considered in determining the status of an indigent or poor person. 2. The board of trustees of a county hospital has the power to determine if a patient is entitled to county relief.

Carson City, December 9, 1968

The Honorable Mark C. Scott, Jr., Elko County District Attorney, Elko County Courthouse,
Elko, Nevada 89801

Dear Mr. Scott:

You have requested an opinion concerning hospital care of indigent residents of counties. As we see it, you have raised the following questions:

1. What is the definition of an indigent?
2. Whether the county commissioners or board of hospital trustees of a county has the authority to determine who is an indigent.

ANALYSIS

In connection with your first question, you have indicated that the county authorities feel that if a person is capable or working and ultimately paying the obligation he should not be classified as an indigent.

Our Supreme Court has dealt with this subject in *County of Lander v. Board of Trustees*, [81 Nev. 354](#) (1965), although not in the present context. They said:

Although a person has some property, he may still be considered a pauper or indigent if such property is not available for his immediate relief or is manifestly disproportionate to his needs. Annot., 98 A.L.R. 870, 872; 41 Am.Jur., Poor and Poor Laws § § 17-20. And it has been held that a person does not have to be completely destitute and helpless to be considered a destitute or indigent person, but can have some income or own some property.

We deem it significant that the Supreme Court cited Am.Jur. (41 Am.Jur. Poor and Poor Laws, § § 17-20). Section 18 thereof contains the statement:

An able-bodied man who can, if he chooses, obtain employment which will enable him to maintain himself and his family, but refuses to accept that employment, is not entitled to public relief, although relief may properly be extended to the wives and children of such men, and in some states there are statutes providing that persons who refuse to work and support themselves when able to do so may be committed to the workhouse, or otherwise treated as undesirable citizens.

It has been held that an able-bodied man who is unable to obtain employment on account of economic conditions existing at the time, and who is without means of support, is entitled to public relief.

The decision in *County of Lander v. Board of Trustees, supra*, discussed a previous Nevada case, *Lander County v. Humboldt County*, [21 Nev. 215](#), 32 P. 849. The previous case also dealt with aid to nonresidents. The former case determined that a resident county was only liable for relief furnished indigents who were paupers. It also determined that a laboring man who had always been able to make a living until his last illness and never had occasion to ask or receive charity was not a pauper. The more recent case, *Lander v. Board of Trustees, supra*, expanded that determination to include paupers, indigents, poor persons, and old or diseased persons, and said that the former case was not controlling.

While dealing with nonresidents the language used by the court clearly came from [NRS 428.010](#) which reads:

Every county shall relieve and support all pauper, incompetent, poor, indigent persons and those incapacitated by age, disease or accident, lawfully resident therein, when such persons are not supported or relieved by their relatives or friends, or by their own means, or by state hospitals or other state or private institutions.

Our Supreme Court and the Nevada Legislature have thus been less restrictive in designating those entitled to relief than their former counterparts.

The foregoing authorities convey the basic principle that those entitled to relief are those who are unable to help themselves, and that the determination of such a person coming within ch. 428, 440, etc., of NRS is a question of fact. The Nevada authorities, we believe, show that merely because a person has worked in the past, or may be capable of some work or of working at some future time would not necessarily preclude him from receiving relief. On the other hand an able-bodied person who can, if he chooses, obtain employment which would sustain that person and his dependents, but refuses to do so, would not be entitled to public relief. (See 41 Am.Jur., Poor and Poor Laws § 18, cited with approval by the Nevada Supreme Court.)

A Montana case has stated that an “employable adult must be presumed not to be an ‘indigent’ within statutes for hospital or medical assistance.” *Deaconess Hosp. v. Lewis & Clark Co.*, 425 P.2d 316.

We conclude that the capability of working and the extent of that capability are factors, not necessarily determinative, in making a person eligible for county hospital relief.

Your second question is whether the county commissioners or the county board of hospital trustees has the authority to determine the status of an indigent.

On the one hand, we have [NRS 428.010\(2\)](#), [NRS 428.050](#) and [NRS 428.090\(1\)\(3\)](#), which provide respectively:

The boards of county commissioners of the several counties are vested with entire and exclusive superintendence of the poor in their respective counties.

When application is made by any pauper to the board of county commissioners and it shall appear to the satisfaction of the board that the person so applying for relief has resided in the state and county for the times required by [NRS 428.040](#), he shall be entitled to all of the relief provided by [NRS 428.010](#) to [428.110](#), inclusive.

When any nonresident, or any other person not coming within the definition of a pauper, shall fall sick in any county, not having money or property to pay his board, nursing or medical aid, the board of county commissioners of the proper county shall, on complaint being made, give or order to be given such assistance to the poor person as the board may deem just and necessary.

The board of county commissioners shall make such allowance for board, nursing, medical aid or burial expenses as the board shall deem just and equitable, and order the same to be paid out of the county treasury.

On the other hand [NRS 450.420](#) provides:

The board of hospital trustees shall have power to determine whether or not patients presented to the public hospital for treatment are subjects of charity, and shall fix the charges for occupancy, nursing, care, medicine and attendance, other than medical or surgical attendance, of those persons able to pay for the same, as the board may deem just and proper. The receipts therefor shall be paid to the county treasurer and credited by him to the hospital fund.

County of *Lander v. Board of Trustees, supra*, in dealing with nonresidents ruled that a county hospital in the first instance shall determine the status of the patient. [NRS 450.420](#) was passed subsequent to those provisions of [NRS ch. 428](#). We must presume that the Legislature was aware of those quoted portions of [NRS ch. 428](#) when it passed [NRS 450.420](#). Furthermore [NRS 450.420](#) deals with a specific area of aid to the poor, to-wit: hospital care, whereas [NRS ch. 428](#) is broader and more general in its scope.

We must conclude that the board of trustees of the county hospital have the power to determine the status of a patient presented to the hospital for treatment.

CONCLUSION

We conclude:

1. That the capability of a person to work and the extent of that capability are factors to be considered in determining the status of an indigent or poor person.
2. The board of trustees of a county hospital has the power to determine if a patient is entitled to county relief.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: Peter I. Breen
Deputy Attorney General

OPINION NO. 68-551 BANKING DIVISION—Regulations proposed for adoption under Chapter 675 of Nevada Revised Statutes (Nevada Installment Loan and Finance Act) reviewed in light of certain filed objection; held, (1) On prepayment in full of a loan thereunder, all refunds or credits due to such borrower, comprehensively inclusive of both unearned lan and credit insurance premium charges, shall be aggregated or “lumped” together in applying the \$1 minimum requirement refund exemption. (2) Nevada licensees thereunder may validly be prohibited from purchasing and carrying on their books out-of-state loan obligations in face amounts exceeding \$2,500 and bearing interest rates higher than those legally authorized under applicable Nevada law. The proposed regulation relative thereto is not construed to prohibit receipt and handling by such Nevada licensees of any said out-of-state loan obligations from related or affiliated branch offices merely as “collection items only,” where the borrowers are now living or resident within the State of Nevada.

Carson City, December 10, 1968

Mr. Preston E. Tidvall, Superintendent, Banking Division, Nevada Department of Commerce,
Carson City, Nevada 89701

Dear Mr. Tidvall:

You have referred to us seven proposed new regulations, as of October 16, 1968, which were considered at a public hearing held thereon on November 6, 1968, relating to the Nevada Installment Loan and Finance Act, Chapter 675 of Nevada Revised Statutes. At said public hearing there was made part of the record thereof a letter dated November 1, 1968, from a national small loan company which, among other matters, suggested certain changes or revisions to Regulation No. 4, concerned with credit life and disability insurance, and to Regulation No. 7, concerned with collection of loans made outside state. You have requested our review of the proposed regulations in light of such objections or exceptions and the suggested changes or revisions.

As herein relevant, proposed Regulation No. 4, paragraph 2, provides as follows:

If a loan, on which credit insurance has been obtained, arranged or provided by the licensee, is prepaid in full, a refund of the portion of the insurance premium or cost shall be made to the borrower. Such refund shall be computed under the same method as that provided in NRS, Section 675.290 for refunds of interest and service fee and as further explained and interpreted in Regulation No. 6 hereof. *If insurance refund plus interest refund together amount to less than \$1, no refund need be made.* (Italics added; Regulation No. 6, as proposed relates to refunds upon prepayment in full and computation of interest and service charge generally.)

The suggested or recommended revision would substitute the following sentence in place of that above-emphasized:

If the refund of the insurance premium or the insurance cost amounts to less than \$1, no such refund need be made.

As herein relevant, proposed Regulation No. 7 provides as follows:

[NRS 675.310](#) provides that “Any loan made outside this state in the amount of \$2,500 or less, as permitted by the laws of the state in which the loan was made, may be collected in this state in accordance with its terms.” Any loan purchased from an office in another state, written *for an amount in excess of \$2,500*, cannot be collected at the rate shown on the contract, but must be reduced to a rate not in excess of 1 percent per month.

The suggested or recommended revision would substitute the following sentence in place of the second sentence of the above, commencing with the words, “Any loan purchased * * *.”:

Any loan in excess of \$2,500 made outside this state as permitted by the laws of such state between a lender and a borrower, who at the time resided outside this state, may be purchased by a licensee and collected according to the contract. However, if the loan thereafter is renewed, rewritten or refinanced, the maximum charges shall be subject to and governed by Nevada law.

QUESTIONS

1. (a) In the event of prepayment in full of a loan by a borrower, must the minimum \$1 requirement for refund or credit be restrictively applied separately in each case to loan charges or costs and to credit insurance premium charges or costs under applicable Nevada law?

(b) Is the requirement of proposed Regulation No. 4, paragraph 2, for aggregation or “lumping together” of loan charges and credit insurance premium charges for refund purposes, in connection with computation thereof and the application of the minimum \$1 exemption

requirement, excessive of the Nevada Bank Superintendent's authority and powers under applicable law and, therefore, improper and invalid?

2. Is Regulation No. 7, as proposed for promulgation by the Nevada Bank Superintendent, contrary to legislative intent and improper or invalid under existing Nevada law?

ANALYSIS

Question No. 1:

[NRS 675.290](#) (Loan Regulations), relating to *refunds*, as relevant hereto, provides:

2. If the loan contract is prepaid in full before the final installment date the borrower shall receive a refund of an amount which shall be at least as great a proportion of the combined total of interest and service charge * * * as the sum of the periodic time balances nearest the date of prepayment bears to the sum of all the periodic time balances *under the schedule of payments in the original contract* * * *. No refund shall be required for partial prepayments and no refund of less than \$1 need be made * * *.

6. In addition to the charges herein provided for, *no further or other amount whatsoever shall be directly or indirectly charged, contracted for or received from the borrower in connection with a loan made under this chapter*; except, such restrictions shall not apply to:

* * *.

(d) The identifiable charge or premium for insurance provided for in [NRS 675.300](#). (Italics added.)

[NRS 675.300](#), relating to *insurance on tangible personal property, obligors' lives as security for loans*, as relevant hereto, provides:

2. A licensee may insure the life of one obligor covering the unpaid balance scheduled to be outstanding. In accepting any insurance provided by this subsection as security for a loan, *the licensee may deduct the premiums or identifiable charge therefor from the proceeds of the loan*, which premium or identifiable charge shall not exceed those filed with the department of insurance, and remit such premiums to the insurance company writing such insurance, and any gain or advantage to the licensee, any employee, officer, director, agent, affiliate or associate from such insurance or its sale shall not be considered as additional or further charge in connection with any loan made under this chapter * * *. *If the unpaid balance of the loan is prepaid in full by cash or other thing of value, refinancing, renewal, a new loan or otherwise, the charge for life insurance shall be refunded or credited in accordance with the method established in [NRS 675.290](#) for refunding or computing credit charges* * * *. (Italics added.)

Finally, [NRS 690.390](#) of the Nevada Insurance Code, relating to *credit life insurance premiums and refunds*, as relevant hereto, provides as follows:

2. Each individual policy, group certificate or statement of insurance of credit life insurance shall provide that in the event of termination of the insurance prior to the scheduled maturity date of the indebtedness, any refund of premium due shall be paid or credited promptly to the person entitled thereto. But the commissioner shall prescribe a minimum refund and no refund which would be less than such minimum need be made. The formula to be used in computing such refund shall be filed with the commissioner. (*Ed.*, Under present Nevada law and rules and regulations, such minimum refund requirement is \$1.)

While the insurance premium charge, under [NRS 675.300](#), paragraph 2, shall not be considered as “additional or further charge in connection with any loan made under this chapter,” since to do so would make applicable the statutory prohibition of charging a higher loan interest than that legally permitted, “lumping together” of both loan and insurance premium charges or costs for refund purposes in the event of prepayment of the loan is expressly provided for in said statutory excerpts hereinabove set forth.

The letter of the national loan company itself concedes that [NRS 675.300](#) of the Installment Loan and Finance Act “* * * requires the lender to set up an arrangement for insurance where upon prepayment of the loan in full the charge for credit life and disability insurance *shall be refunded in accordance with the method established for the refunding of loan charges.*” (Italics added.) Such concession is properly compelled by the above excerpt from [NRS 675.300](#) which expressly provides not only for deduction by the lender licensee of the premiums or identifiable charge for credit insurance from the proceeds of the loan and remittance thereof to the insurer, but also for refund to the borrower of unearned credit insurance premium with prepayment of the loan in full “* * * in accordance with the method established in [NRS 675.290](#) for refunding or computing credit charges * * *.” Turning to the above excerpts from [NRS 675.290](#), paragraph 2 and paragraph 6(d), it is to be noted that the restriction as to the charges which may be made by a lender is expressly made inapplicable to the identifiable insurance premium; in short, any required refund upon prepayment of a loan must comprehend both loan and insurance premium charges or costs.

For further support of such conclusion, it is to be presumed that scheduled installment loan payments include factors for both loan and insurance premium charges or costs. Consequently, it would be inequitable and improper that upon prepayment of a loan in full there should not be corresponding requirement of refund or credit of both or aggregated unearned loan and insurance premium charges, since both such types of charges are comprehended in the cost of the loan to the borrower. Only if *all* refunds or credits due to the borrower or debtor amount to less than \$1 does [NRS 675.290](#), paragraph 2, exempt the lender from the requirement of making refund in the event of any prepayment of a loan.

Under the suggested revision, both loan interest and insurance premium charge refunds would each separately have to exceed \$1 before the borrower becomes entitled to refund for such unearned items of loan cost. If loan interest refund amounted to 99 cents and insurance premium refund amounted to 99 cents, the borrower would receive no refund although the aggregate sum of both said refunds amounted to \$1.98. Again, if either one of such refunds alone amounted to \$1 or more, and the other did not exceed 99 cents, the borrower would not receive any refund of said 99 cents. In practical effect, therefore, a lender in such instances would be exempted from making refund even though the amount thereof exceeded \$1 by as much as 98 cents or 99 cents, a result which is certainly not explicitly authorized in present Nevada statutory provisions. If anything, present Nevada statutes must be construed as strictly prohibiting exemption from the making of refunds with loan prepayments otherwise than as expressly provided and authorized in statute.

While it may be true that the refund to each individual borrower or lender in the event of loan prepayment may be relatively insignificant and the calculating, clerical, and mailing costs of returning them to insured borrowers or debtors may appear to be unreasonable disproportionate to the amounts involved, it is equally true that exemption from the requirement of making refunds where the amounts thereof are less than \$1 constitutes and results in very considerable and large gains and advantages to lenders and creditors, aggregating many millions of dollars on an annual basis to business firms whose operations are national in scope. Before such gains and advantages may be further enhanced or increased, legislative intent and statutory authority must be more explicit than it now is.

Finally, it is our considered opinion that the suggested revision of proposed Regulation No. 4, paragraph 2, proceeds on an arbitrary, purely formal and wholly conceptual basis, completely ignoring substantive considerations, and is plainly contrary to legislative intent as contained and expressed in the excerpted provisions of Nevada statutory law herein set forth. Only if all refunds

or credits due to the borrower amount to less than \$1 is the lender legally exempt from refund as required upon prepayment of an insured loan.

Question No. 2:

Respecting the suggested revision, it must be borne in mind that proposed Regulation No. 7, to be valid at all, must be reasonably consistent with the statutory provisions of Chapter 675 of Nevada Revised Statutes, and that the Nevada Installment Loan and Finance Act is solely applicable to loans of *\$2,500 or less*. Correspondingly, that the jurisdiction and regulatory authority and powers of the Nevada Superintendent of Banks thereunder extends only to licensees thereunder and otherwise so limited.

Briefly, the change or revision suggested to proposed Regulation No. 7 relates to loans *in excess of \$2,500* made outside the State of Nevada, presumptively valid under the laws of the state where made, and their collectability in the State of Nevada in accordance with the terms of the loan agreement between lender and borrower.

Obviously, it would be improper and excessive of statutory authority and powers conferred and vested in him, for the Nevada Superintendent of Banks to assume or attempt to exercise legislative prerogative relative to determination of Nevada public policy respecting collectability of out-of-state loan obligations bearing higher interest rates than those authorized under Nevada law; or for him to approve, and thereby to assume and attempt to exercise judicial powers relative to the collectability of any such out-of-state loan obligations in Nevada. In our view, such would be the precise practical result and effect of accepting and adopting the suggested revision to proposed Regulation No. 7, and it is our opinion that the Superintendent of Banks may not legally do this.

The provisions of [NRS 675.310](#) are fully and correctly made part of proposed Regulation No. 7, and no exception is taken, nor could any be properly taken thereto. The objection is only to the last sentence and remaining provision of the proposed regulation, namely:

Any loan purchased from an office in another state, written *for an amount in excess of \$2,500* cannot be collected at the rate shown on the contract, but must be reduced to a rate not in excess of 1 percent per month.

We consider the argument against inclusion of such provision in the proposed regulation entirely beside the point. We are well aware of the general rule of the conflict of laws that the validity of an out-of-state loan obligation is to be determined by the law of the state in which it is made and where it is payable, and Nevada courts may very well apply such general rule in specific cases involving collection of such out-of-state obligations in Nevada. The point is that the Superintendent of Banks may not officially adopt and apply any such general rule of conflict of laws, in light of existing Nevada laws and authority and powers as restrictively conferred and vested in him.

The “1 percent per month” limitation is, of course, statutorily prescribed in [NRS 99.050](#). Secondly, the proposed regulation is only valid as applicable to Nevada lenders, licensed in this State to make loans of *\$2,500 or less*, under the provisions of the Nevada Installment Loan and Finance Act (Chapter 675 of Nevada Revised Statutes). Thirdly, such wording of the provision of the proposed regulation explicitly only makes it applicable to “purchased” loans written for an amount in excess of \$2,500 in another state. In our opinion, these factors and considerations are certainly pertinent, and the objection or argument against the regulation as respects such provision apparently completely ignores them. At least, they are certainly not given proper weight as good and sufficient grounds and basis for such regulatory provision.

In our considered opinion, proposed Regulation No. 7, as worded, is merely declarative of statutory law as set forth and herein cited, having for its purpose and aim only reasonable regulatory control of loan transactions on the part of Nevada licensed lenders of “\$2,500 or less,” carrying such rate of interest and only as authorized by Nevada law. In short, such Nevada licensees shall not do indirectly that which, under applicable Nevada law, they may not directly do. Considered in such light, proposed Regulation No. 7 is certainly reasonable and entirely proper and legal under existing Nevada law.

Clearly, as so construed, there is nothing in proposed Regulation No. 7, as worded, which would make the provisions thereof applicable to anyone other than licensees under Chapter 675 of Nevada Revised Statute; nor would licensees under Chapter 675 of Nevada Revised Statutes evidently be prohibited from accepting and handling, merely as “collection items only,” out-of-state loan obligations in face amounts exceeding \$2,500, from related or affiliated branch offices, involving borrowers who had removed from the state where the loan agreement was made and who were presently living or resident within the State of Nevada.

CONCLUSION

It is, therefore, our opinion that:

1. (a) In the event of prepayment in full of a loan by a borrower, the minimum of \$1 requirement shall not respectively and separately be applied to loan charges or costs and to insurance premium charges or costs for refund computation purpose.

(b) On prepayment in full of a loan, made and regulated by the provisions of Chapter 675 of Nevada Revised Statutes, *all* refunds or credits due to such borrower, comprehensively inclusive of both unearned loan and insurance premium charges, shall be aggregated or “lumped” together in applying the \$1 minimum requirement refund exemption.

2. Licensees under Chapter 675 of Nevada Revised Statutes may validly be prohibited by regulatory provision from purchasing and carrying on their books out-of-state loan obligations in face amounts exceeding \$2,500 and bearing interest rates higher than those legally authorized under applicable Nevada law. The proposed Regulation No. 7, as worded, and relative thereto, is not construed as prohibiting receipt of any said out-of-state loan obligations from related or affiliated branch offices by such Nevada licensees, and the handling of such loan obligations by such licensees merely as “collection items only,” where the involved borrowers are not living or resident within the State of Nevada.

Yours very truly,

HARVEY DICKERSON
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 68-552 TAXATION; MUNICIPALITY—A municipality has no authority by means of an ordinance to tax the State or any of its agencies.

Carson City, December 11, 1968

Mr. Jac R. Shaw, Administrator, Buildings and Grounds Division, Carson City, Nevada 89701

Dear Mr. Shaw:

You raise the question of the legality of utilities operating in the City of Las Vegas to add a business license or franchise tax to bills rendered state agencies in Las Vegas. The license or franchise tax in question is a result of Las Vegas ordinance number 1342, which, in effect, provides that all utilities operating in Las Vegas shall pay to the city a license or franchise tax of a given percentage of the utilities’ total operating revenues generated from consumers within the corporate limits of the City of Las Vegas, Nevada.

QUESTION

May the utility pass this license or franchise tax on to state agencies?

ANALYSIS

The general rule is that a municipality or other political subdivision of the State of Nevada has no authority to tax the State or its many agencies. Recognizing this taxing prohibition, the City of Las Vegas specifically provided in ordinance number 1342 “* * * providing, however, that there shall be excluded from the term ‘total operating revenues,’ revenues earned from sales to the United States of America and to the State of Nevada, or to any of their respective agencies or political subdivisions, * * *”.

By this very language of the ordinance, the City of Las Vegas recognized its inability to apply the license or franchise tax to agencies of the State of Nevada. Such being the case, the utilities in question may not be used as a means whereby the tax is passed on to state agencies.

CONCLUSION

In view of the general rule of law that a municipality cannot tax the State or its agencies and the specific exemption in ordinance number 1342, it is concluded that the state agencies in Las Vegas are not subject to nor liable for the license fees or franchise taxes contemplated in ordinance number 1342.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: John Sheehan
Deputy Attorney General

OPINION NO. 68-553 FIRE PROTECTION DISTRICTS; GENERAL IMPROVE-MENT DISTRICTS—A tax supported improvement district may not charge a tax supported fire protection district serving the same area for use and maintenance of fire hydrants while retaining ownership thereof, in the absence of a corresponding tax credit to property owners.

Carson City, December 18, 1968

Mr. Jack A. Kissinger, North Lake Tahoe Fire Protection District, Crystal Bay, Nevada 89402

Dear Mr. Kissinger:

You have requested an opinion from this office regarding proposed charges for the use, maintenance, and repair of fire hydrants in the Incline Village area. As the basis for your inquiry, you have advised us of the following factual background.

STATEMENT OF FACTS

The Incline Village General Improvement District is the owner of the Incline Village water system, which includes approximately 311 fire hydrants. This system was constructed and installed at a cost in excess of \$1,880,000. This construction cost and the cost of maintenance of

the system was and is financed at least in part by initial and succeeding annual assessments upon property owners within the district.

The Incline Village General Improvement District heretofore has maintained, repaired and tested the system and hydrants in a manner acceptable to fire underwriters. The district now has expressed to the North Lake Tahoe Fire Protection District its intention in the future to charge the fire district for use, maintenance, repair, replacement, and testing of the hydrants, while at the same time retaining ownership thereof.

You have further advised that the maintenance, repair, and testing of hydrants and systems are customarily the functions and responsibility of the system's owners, as distinguished from fire fighting or fire prevention units. Charges for use and such maintenance and testing are frequently imposed upon fire fighting units where the owner of the water system is a privately owned company or utility company rather than a tax supported political subdivision.

Finally, you advise that if the North Lake Tahoe Fire Protection District should be required to pay for such use, maintenance, and testing, additional revenue would have to be obtained by the fire district, which in turn would necessitate increased tax assessments by the fire district to cover such additional costs of operation.

ANALYSIS

The Incline Village General Improvement District is a body politic and governmental subdivision of the State of Nevada. It is supported by taxes and assessments. The same is true of the North Lake Tahoe Fire Protection District. Both entities are subject to the Local Government Budget Act, [NRS 354.470](#). Presently both districts in cooperation with one another provide water service and fire protection for the inhabitants and property owners of the Incline Village area.

The fire district now uses the hydrants and water necessary to provide fire protection without charge. The ultimate cost of maintenance of the water system and hydrants is borne by the taxpayers. Similarly, the ultimate cost of operating the fire district and the fire protection it provides is borne by the same taxpayers.

If the improvement district may impose a further charge upon the fire district for use and maintenance of water hydrants to enable the latter to provide fire protection, while retaining ownership thereof, without a corresponding tax reduction on the part of the improvement district because it no longer has the expense of such use and maintenance, then the taxpayers are paying twice for the same thing.

If, under these circumstances, the improvement district is justified in imposing the proposed use and maintenance charges, then by the same token the fire district is equally justified in charging the improvement district for the fire protection it affords the property owners. Because both utilities are tax supported by the same taxpayers, we can perceive absolutely no basis upon which either may charge the other for the performance of their respective governmental functions.

CONCLUSION

It is therefore the opinion of this office that the Incline Village General Improvement District may not charge the North Lake Tahoe Fire Protection District for flows or maintenance and testing of the hydrants in the Incline Village water system.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: Robert A. Groves
Deputy Attorney General

OPINION NO. 68-554 SECURITIES—Trust formed to purchase corporate stock is considered a single person if the beneficial interests in such trust are evidenced by securities.

Carson City, December 26, 1968

Honorable John Koontz, Secretary of State, Carson City, Nevada 89701

Attention: Mr. Ford E. Holmes, Deputy, Division of Securities

Dear Mr. Koontz:

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

Where several persons form a trust for the purpose of purchasing corporate stock, is such trust considered a single person within the meaning of [NRS 90.075](#) defining public intrastate offerings?

ANALYSIS

[NRS 90.075](#) defines a public intrastate offering as follows:

“Public intrastate offering” means every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value made solely within this state to 25 persons or more by means of any news media, including but not limited to newspapers, magazines, radio and television, or through the use of the United States mails, or by direct solicitation by an agent, except such offerings as are registered under the Securities Act of 1933 (15 U.S.C. § 77a et seq.) or exempt from registration thereunder other than by reason of the intrastate character thereof.

If a trust is regarded as a single person within the meaning of the foregoing definition, public offering could be made to it and to 23 other persons without encountering the registration requirements imposed by [NRS ch. 90](#). On the other hand, if such trust is not deemed to be a single person within the meaning of that definition, then each person who holds a beneficial interest in the trust must be counted in determining the registration requirements.

For purposes of this question, a person is defined by [NRS 90.070](#) as follows:

“Person” means an individual, a corporation, a partnership, an association, a joint-stock company, a *trust where the interests of the beneficiaries are evidenced by a security*, an unincorporated organization, a government or a political subdivision of a government. (Italics added.)

The type of security which must evidence such beneficial interest is in turn defined by [NRS 90.090](#) as follows:

1. “Security” means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, or, in general any interest or instrument commonly known as a “security,” or any certificate of interest or

participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

2. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period.

CONCLUSION

It is therefore the opinion of this office that a trust may be regarded as a single person for purposes of determining what constitutes a public intrastate offering of corporate stock, if the interests of the beneficiaries thereof are evidenced by securities as defined by [NRS 90.090](#).

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: Robert A. Groves
Deputy Attorney General

OPINION NO. 68-555 EMPLOYMENT SECURITY DEPARTMENT, DEPUTY DIRECTOR—The executive director of the Nevada Employment Security Department has the power and the authority under existing statutes to delegate to a deputy director the power to administer funds during the executive director's absence.

Carson City, December 30, 1968

Mr. A. G. Dondero, Executive Director, Employment Security Department, Carson City, Nevada 89701

Dear Mr. Dondero:

You have requested this office for an opinion as to the powers of a deputy director of the Employment Security Department and particularly as to whether such appointee may be delegated authority to administer funds in the absence of the executive director.

[NRS 612.215](#) reads as follows:

1. The employment security department shall be administered by a full-time salaried executive director, who shall be appointed by the governor and whose term of office shall be at the pleasure of the governor.
2. The executive director of the employment security department shall receive an annual salary in the amount specified in [NRS 281.115](#).
3. The executive director shall have full administrative authority with respect to the operation and functions of the unemployment compensation service and the state employment service.

[NRS 612.220](#) reads as follows:

1. The executive director shall administer this chapter as the same now exists or may hereafter be amended.
2. He shall have power and authority to adopt, amend or rescind such rules and regulations, to employ, in accordance with the provisions of this chapter, such

persons, make such expenditures, require such reports, make such investigations, and take such other action as he deems necessary or suitable to that end. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this chapter, which the executive director shall prescribe.

3. The executive director shall determine his own organization and methods of procedure in accordance with the provisions of this chapter.

It may be determined from reading these sections that the Legislature imposed full responsibility for the successful operation of the department on the executive director. It follows from subsequent sections of the statute that the overall purpose of selecting an executive director was to assure an administrative fountainhead from whom all direction should flow.

However, the power and authority to delegate authority may be found in [NRS 612.230](#). The appointment of a deputy director would of course have to conform to the provisions of Chapter 284 NRS providing for an eligibility list from which said appointee would be selected. The executive director is authorized and empowered to fix the compensation and prescribe the duties and powers of such personnel, including such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of duties under Chapter 612, and has the power to delegate such power and authority as he deems necessary, reasonable, and proper for the effective administration of the department.

Therefore, we feel that the executive director would have the authority and the power to delegate to a selected deputy director the administration of employment security funds during his absence, and could limit the power as in his discretion seemed best. We would suggest, however, that in the event such power is delegated to a deputy director, the provisions of [NRS 612.230\(3\)](#) be followed and the deputy director be bonded.

It may well be that the federal government may, in some instances, require the signature of the executive director on instruments affecting financial transactions, including the handling of funds. In such a case we doubt the power to delegate such authority to a deputy director.

CONCLUSION

The executive director of the Nevada Employment Security Department has the power and the authority under existing statutes to delegate to a deputy director the power to administer funds during the executive director's absence.

Respectfully submitted

HARVEY DICKERSON
Attorney General
