

**ATTORNEY GENERAL
NEVADA DEPARTMENT OF JUSTICE**

100 North Carson Street
Carson City, Nevada 89701-4717

GEORGE J. CHANOS
Attorney General



RANDAL R. MUNN
Assistant Attorney General

February 1, 2006

OPINION NO. 2006-01

EMERGENCY MANAGEMENT IMMUNITIES
AND WORK PROGRAMS: Workers,
volunteers and responders in an emergency
situation or disaster are immune from liability, if
they act without gross negligence or willful
misconduct under NRS 414.110 and the
Governor has the authority to authorize a work
program for a state agency in the event of an
emergency (NRS 353.220).

Frank Siracusa, Chief
Nevada Department of Public Safety
Division of Emergency Management
2525 South Carson Street
Carson City, Nevada 89711

Dear Mr. Siracusa:

You have requested an Attorney General Opinion on two questions. The first question is whether first responders and volunteers engaged in emergency management are covered by the immunity provided by NRS 414.110 and NRS 414.120 prior to the declaration of an emergency by the Governor or a political subdivision of the State. The second question is whether the Governor has the authority, pursuant to NRS 353.220(5)(a), to move and expend funds during a declared emergency as defined in NRS 353.263.

ANALYSIS QUESTION ONE

First responders and volunteer emergency workers are covered by the immunity conferred by NRS 414.110 prior to the declaration of an emergency by the Governor or a political subdivision of the State if engaged in "emergency management" as defined in NRS 414.035. NRS 414.110(1) and NRS 414.035 provide the following respectively:

NRS 414.110 Immunity and exemption.

1. All functions under this chapter and all other activities relating to emergency management are hereby declared to be governmental functions. Neither the State nor *any political subdivision* thereof nor other agencies of the State or political subdivision thereof, nor except in cases of willful misconduct, gross negligence, or bad faith, *any worker* complying with or reasonably attempting to comply with this chapter, or any order or regulation adopted pursuant to the provisions of this chapter, or pursuant to any ordinance relating to any necessary emergency procedures or other precautionary measures enacted by any political subdivision of the State, is liable for the death of or injury to persons, or for damage to property, as a result of any such activity. . . . [Emphasis added.]

NRS 414.035 "Emergency management" defined.

"Emergency management" means the *preparation* for and the carrying out of all emergency functions, other than functions for which military forces are primarily responsible, to minimize injury and repair damage resulting from emergencies or disasters caused by enemy attack, sabotage or other hostile action, by fire, flood, earthquake, storm or other natural causes, or by technological or man-made catastrophes, including, without limitation, a crisis involving violence on school property, at a school activity or on a school bus. These functions include, without limitation:

1. The provision of support for search and rescue operations for persons and property in distress.
2. Organized analysis, *planning* and coordination of available resources for the mitigation of, *preparation* for, *response* to or recovery from emergencies or disasters. [Emphasis added.]

The Nevada Supreme Court discussed the issues of extent and timing of the immunity conferred in NRS 414.110 in *Nylund v. Carson City*, 117 Nev. 913, 34 P.3d 578 (2001). In that case, the city manager, pursuant to municipal code authority, declared an emergency disaster due to flooding¹. *Id.* at 583. Carson City employees diverted flood waters down a city street, resulting in the flooding of the Nylunds' residence. *Id.* at 579.

¹ Carson City Municipal Code § 6.02.060(1)

The Court in *Nylund* held that the immunity conferred by NRS 414.110 extends to local governments conducting emergency management. *Id.* at 582. The Court further held that that such emergency management on the part of local governments need not be delayed until the Governor declares an emergency pursuant to NRS 414.035. *Id.* Rather, the Legislature clearly intended to invest local governments with the power to declare emergencies on their own and to be protected by immunity under NRS 414.110. *Id.*

The immunity conferred by NRS 414.110 includes all “workers” as the term is defined in that statute. Employees, volunteers, and auxiliary employees of the State or political subdivision are specifically included in NRS 414.110(3) as workers who enjoy immunity while participating in emergency management.

In addition, Question One referred to NRS 414.120 and asked whether it would provide immunity to first responders and volunteers. This statute does not apply to first responders and volunteers. It only provides immunity from civil liability to “owners of real property” or other premises who voluntarily allow their property to be used for emergency management activities.

CONCLUSION TO QUESTION ONE

The immunity provisions of NRS 414.110 apply during a state of “emergency management,” as defined in NRS 414.035, even if the governor has not declared an emergency, provided the local government or other political subdivision is authorized by ordinance or statute to declare an emergency. First responders and volunteers are “workers” as defined in NRS 414.110(3) and therefore are covered by the immunity conferred by NRS 414.110(1) during “emergency management.” NRS 414.120 does not apply to first responders and volunteers but provides immunity to private property owners who volunteer their property for use in emergencies.

QUESTION TWO

Does the Governor have discretion, pursuant to NRS 353.220(5)(a), to approve a revision to a work program during an “emergency” incident, as defined in NRS 353.263, or for the protection of life or property?

ANALYSIS QUESTION TWO

NRS 353.220 gives the Governor of this State the discretion to approve the revision of a work program of an agency of the State in an emergency or for the protection of life or property:

5. If a request for the revision of a work program requires additional approval as provided in subsection 4 and:

(a) Is necessary because of an emergency as defined in NRS 353.263 or for the protection of life or property, the Governor shall take reasonable and proper action to approve it and shall report the action, and his reasons for determining that immediate action was necessary, to the Interim Finance Committee at its first meeting after the action is taken. . . .

(b) The Governor determines that the revision is necessary and requires expeditious action, he may certify that the request requires expeditious action by the Interim Finance Committee. . . .

NRS 353.220(5)(a)–(b).

The plain language of NRS 353.220 indicates that the Governor has broad discretion in an emergency to approve the revision of a work program for any State agency. The legal principal of the “plain meaning rule” of statutory construction should be applied to this question. The Nevada Supreme Court has stated: “When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.” *City Council of the City of Reno v. Reno Newspapers*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

When a request for the revision of a work program in an amount over \$20,000 would increase or decrease by 10 percent or \$50,000, whichever is less, the expenditure level approved by the Legislature, before any appropriated or authorized money may be encumbered, the request must be approved as provided in NRS 353.220(5) as outlined above. See NRS 353.220(4). Additionally, NRS 353.220(5)(a)–(b) place the discretion solely with the Governor to determine that, due to an emergency or for the protection of life or property, immediate action is necessary requiring the revision of a work program.

Frank Siracusa, Chief
February 1, 2005
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CONCLUSION TO QUESTION TWO

In applying the “plain meaning rule” to NRS 353.220, it is clear that the Governor has broad discretion to approve the revision of any State agency’s work program to protect life and property or in the event of an emergency or disaster.

Sincere regards,

GEORGE J. CHANOS
Attorney General

By: _____
GLADE A. MYLER
Senior Deputy Attorney General
Transportation & Public Safety Division
(775) 684-5197

GAM:ac

ATTORNEY GENERAL
NEVADA DEPARTMENT OF JUSTICE

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GEORGE J. CHANOS
Attorney General



RANDAL R. MUNN
Assistant Attorney General

June 2, 2006

OPINION NO. 2006-02

BOARD OF TRUSTEES; MINERAL COUNTY; RESIDENCY: Pursuant to NRS 386.160, the three seats on the Mineral County School District Board that are open for election in 2006 are to be filled by one resident of Hawthorne and by two residents of Mineral County who do not reside in Hawthorne.

Cheri Emm-Smith, Esq.
Mineral County District Attorney
Post Office Box 1210
Hawthorne, Nevada 89415

Dear Ms. Emm-Smith:

You have requested an opinion from the Attorney General's Office regarding the following question. The facts alleged by the Mineral County District Attorney are presumed accurate for the purposes of this opinion.

QUESTION

What are the residency requirements for purposes of NRS 386.160 for the Mineral County School Board Trustee seats open for election in 2006?

ANALYSIS

The election of county school board trustees is governed by Chapter 386 of the Nevada Revised Statutes. In a county with less than 1,000 enrolled students, such as Mineral County, there are five members of the school district board of trustees. NRS 386.120(1)(b). Each member serves a four year term. NRS 386.160. The terms of the members are staggered so that in any even numbered year, either two or three positions are up for election. *Id.* To our understanding, there are no special school district trustee election areas created pursuant to NRS 386.200 and NRS 386.205 in Mineral County.

Cheri Emm-Smith, Esq.
June 2, 2006
Page 2

In 2006 three positions on the Mineral County School District Board of Trustees are up for election. NRS 386.160(1). Pursuant to State law, one of those positions must be occupied by a member who resides at the county seat, unless less than 40 percent of the residents of the county reside at the county seat. NRS 386.160(1)(a). Another position must be occupied by a member who resides within the county but outside of the county seat. NRS 386.160(1)(b). The third position must be occupied by a member who resides within the county but outside of the county seat, unless at least 80 percent of the residents of the county reside at the county seat. NRS 386.160(1)(c).

According to the most recent decennial census figures, the total population of Mineral County is 5,071 people. NRS 0.050 (the controlling census). United States Census Bureau, Population, Housing Units, Area, and Density: 2000, Mineral County, Nevada - - County Subdivision and Place. The total population of Hawthorne is 3,311 people. *Id.* Accordingly, 65.3 percent of the population of Mineral County resides at the county seat.

With that population percentage in mind, the three positions on the Mineral County School District Board of Trustees are to be filled as follows. One seat must be filled by a resident of Hawthorne. NRS 386.160(1)(a). The other two seats must be filled by residents of Mineral County who do not reside in Hawthorne. NRS 386.160(1)(b) & (c).

CONCLUSION

Pursuant to NRS 386.160, the three seats on the Mineral County School District Board that are open for election in 2006 are to be filled by one resident of Hawthorne and by two residents of Mineral County who do not reside in Hawthorne.

Sincere regards,

GEORGE J. CHANOS
Attorney General

By: _____
JOSHUA J. HICKS
Senior Deputy Attorney General
Civil Division

JJH:mas

**ATTORNEY GENERAL
NEVADA DEPARTMENT OF JUSTICE**

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GEORGE J. CHANOS
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RANDAL R. MUNN
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June 19, 2006

OPINION NO. 2006-03

ENVIRONMENTAL PROTECTION;
ADMINISTRATIVE LAW; BOARDS AND
COMMISSIONS: Pursuant to NRS
233B.127(4) a public interest group must
demonstrate a financial interest as a direct
result of a grant or renewal of a license in
order to appeal that grant or renewal to the
State Environmental Commission.

Terry Crawford, Chairman
State Environmental Commission Appeal Panel
901 South Stewart Street, Suite 4001
Carson City, Nevada 89701-5249

Dear Mr. Crawford:

You have requested an opinion from the Attorney General's Office regarding the following questions:

QUESTION ONE

Does NRS 233B.127(4) require a public interest group to demonstrate a financial interest in the grant or renewal of a license in order to appeal that grant or renewal to the State Environmental Commission?

ANALYSIS OF QUESTION ONE

NRS 233B.127 states as follows:

1. When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

. . . .

4. Except as otherwise provided in this subsection, a person must not be admitted as a party to an administrative proceeding in a contested case involving the grant, denial or

renewal of a license unless he demonstrates to the satisfaction of the presiding hearing officer that:

(a) His financial situation is likely to be maintained or to improve as a direct result of the grant or renewal of the license; or

(b) His financial situation is likely to deteriorate as a direct result of the denial of the license or refusal to renew the license.

The provisions of this subsection do not preclude the admission, as a party, of any person who will participate in the administrative proceeding as the agent or legal representative of an agency.

Senate Bill 428 amended NRS 233B.127 during the 2005 legislative session, adding subsection (4). *Act of June 6, 2005, Ch. 283, 2005 Nev. Stat. 1002*. The first rule of statutory construction is that “[w]here a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature’s intent.” *McKay v. Board of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986).

The language used in NRS 233B.127(4) is clear and unambiguous, requiring that a person who attempts to become a party in a contested case satisfy the financial requirements of that subsection. NRS 233B.037 defines a “person” to include “any political subdivision or public or private organization of any character other than an agency.” That definition would include a public interest group. A “contested case” is defined in NRS 233B.032 to mean “a proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed.” That definition is expanded by NRS 233B.127(1) to include situations where “the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing.” A water quality permit is a contested case pursuant to this definition. As outlined below, a permit is substantially similar to a license for purposes of NRS 233B. Therefore, NRS 233B.127(4) applies to a public interest group appealing the granting or denial of a water quality permit to the State Environmental Commission.

CONCLUSION TO QUESTION ONE

NRS 233B.127(4) requires a public interest group to demonstrate a financial interest as a direct result of a grant or renewal of a license in order to appeal that grant or renewal to the State Environmental Commission.

QUESTION TWO

Under Nevada law is a “permit” substantially similar to a “license” for purposes of NRS 233B.127(4)?

ANALYSIS OF QUESTION TWO

NRS 233B.034 entitled “‘License’ and ‘licensing’ defined,” states in the pertinent section that the term license “means the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law.” Based on this definition, there is no substantial difference between the terms “license” and “permit.”

CONCLUSION TO QUESTION TWO

Under Nevada law a “permit” is substantially similar to a “license” for purposes of NRS 233B.127(4).

QUESTION THREE

Do the restrictions outlined in NRS 233B.127(4) apply to an appeal filed with the State Environmental Commission prior to the effective date of that statutory provision, but where the actual hearing on the matter occurs after its effective date?

ANALYSIS OF QUESTION THREE

Generally, statutes are given retroactive application only when such is specifically required in the legislation. In *Holloway v. Barrett*, 87 Nev. 385, 390, 487 P.2d 501, 504 (1971), the Nevada Supreme Court held that “statutes are presumed to operate prospectively and shall not apply retrospectively unless they are so strong, clear and imperative that they can have no other meaning or unless the intent of the legislature cannot be otherwise satisfied.” See *Virden v. Smith*, 46 Nev. 208, 211-12, 210 P. 129, 130 (1922) (stating that “[e]very reasonable doubt is resolved against a retroactive operation of a statute. If all the language of a statute can be satisfied by giving it prospective action only, that construction will be given it.”) (internal citations omitted); *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998) (stating that “[a]s a general matter, statutes are presumptively prospective.”); *McKellar v. McKellar*, 110 Nev. 200, 203, 871 P.2d 296, 298 (1994) (holding that “[t]here is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise be satisfied.”).

However, “the general rule against a retrospective construction of a statute does not apply to statutes relating merely to remedies and modes of procedure.” *Truckee River General Electric Co. v. Durham*, 38 Nev. 311, 316, 149 P. 61, 62 (1915) (internal citation omitted). In *Madera*, 114 Nev. at 258, 956 P.2d at 120-21, the Nevada Supreme

Court ruled that under a statute which affects whether an action can be brought or maintained against an insurer, “the legislature intended application to actions filed but not resolved, prior to the effective date of the statute.”

The United States Supreme Court and the Ninth Circuit Court of Appeals recognize this exception to the general rule, allowing retroactive application of jurisdictional statutes. In *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994), the court held that a statute does not operate in a retroactive manner simply due to the fact that it was applied to a matter filed prior to the statute’s enactment. The test is “whether the new provision attaches new legal consequences to events completed before its enactment.” The court went on to state that it has “regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed,” *Id.* at 274, and that “[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.” *Id.* at 275. See also *Nakaranurack v. US*, 231 F.3d 568 (9th Cir. 2000).

The qualifications outlined in NRS 233B.127(4) place limits on those individuals allowed to become parties in certain administrative proceedings and are jurisdictional in nature. Therefore, those jurisdictional qualifications apply to cases filed but not resolved at the time they become effective.

CONCLUSION TO QUESTION THREE

The restrictions outlined in NRS 233B.127(4) apply to an appeal filed with the State Environmental Commission prior to the effective date of that statutory provision, but where the actual hearing on the matter occurs after its effective date.

QUESTION FOUR

How do the jurisdictional provisions outlined in NRS 233B.127(4) harmonize with other statutory requirements placed upon Nevada regulatory agencies such as the State Environmental Commission?

ANALYSIS OF QUESTION FOUR

This question arises from the brief submitted by a public interest group regarding the effect of NRS 233.127(4) (quoted above) on the jurisdiction conferred to the State Environmental Commission under NRS 445A.605(1), which states:

1. Any person aggrieved by:
 - (a) The issuance, denial, renewal, suspension or revocation of a permit; or

- (b) The issuance, modification or rescission of any other order,
by the Director may appeal to the Commission.
2. The Commission shall affirm, modify or reverse any action of the Director which is appealed to it.

There is an apparent conflict between the provisions of these two statutory provisions.

The Nevada Supreme Court stated that there is an obligation to attempt to construe competing statutory provisions “in such manner as to render them compatible with each other.” *State v. Rosenthal*, 93 Nev. 36, 45, 559 P.2d 830, 836 (1977). There are several rules of statutory construction which aid in this effort.

The Nevada Supreme Court has stated that “[n]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided.” *Rodgers v. Rodgers*, 110 Nev. 1370, 1373, 887 P.2d 269, 271 (1994) (internal citations omitted). Statutes should be construed “with a view to promoting, rather than defeating, legislative policy behind them.” *State v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1250 (1994). The Legislature is presumed to have “acted with full knowledge of statutes already existing and relating to the same subject.” *Ronnow v. City of Las Vegas*, 57 Nev. 332, 366, 65 P.2d 133, 146 (1937) (internal citations omitted).

The Legislature created the State Environmental Commission and gave it jurisdiction over water quality permits under NRS 445A. In NRS 233B.020 the Legislature stated its intent in establishing the Nevada Administrative Procedure Act (APA): “By this chapter, the Legislature intends to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies of the Executive Department of the State Government and for judicial review of both functions. . . .” Therefore, agencies regulated under the APA are free to add additional regulations regarding procedural requirements, but the guidelines outlined therein represent the minimum procedural standards followed by each agency.

There is also evidence in the legislative history¹ of NRS 233B.127(4) which indicates that the Legislature intended this section to limit the participation of public interest groups in the administrative hearing process unless they could demonstrate a direct financial interest in the outcome of the matter. In a meeting of the Assembly Committee on Government Affairs, Assemblyman Goicoechea stated:

¹ It is appropriate to review public legislative records to assist in determining legislative intent. *Hotel Employees and Employees International Union, AFL-CIO v. State, Nevada Gaming Control Board and Nevada Gaming Commission*, 103 Nev. 588, 747 P.2d 878 (1987).

Terry Crawford
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This would exempt, for example, the Sierra Club or some other group that really didn't have standing— . . . —and would preclude them from coming in and having standing in the administrative appeals, which will probably end up in some court of competent jurisdiction. It is an attempt to narrow down who can play through the administrative process and judicially.

Hearing on S.B. 428 Before the Assembly Committee on Government Affairs, 2005 Leg., 73rd Sess. 13 (May 17, 2005). This statement is a strong indication of the legislative policy underlying NRS 233B.127(4).

Applying the above to the question at issue, the Legislature is deemed to have known of the existence of NRS 445A.605(1) when it amended NRS 233B.127, and it decided to restrict the parties eligible to pursue an appeal under NRS 445A.605(1). The two statutes are harmonized by allowing the State Environmental Commission to hear appeals as outlined in NRS 445A.605(1), but limiting the parties who can file such an appeal to those who can satisfy the requirements outlined in NRS 233B.127(4). This result is consistent with the legal requirement to give meaning to all terms in the statutes in question, with the legal requirement to construe the two competing statutes in a manner which makes them compatible with one another and consistent with the legislative intent.

CONCLUSION TO QUESTION FOUR

The State Environmental Commission has jurisdiction to hear appeals regarding the grant or denial of a water quality permit pursuant to the terms of NRS 445A.605(1), but it must do so in harmony with the jurisdictional limitations outlined in NRS 233B.127(4).

Sincere regards,

GEORGE J. CHANOS
Attorney General

By: _____
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DWN:efb

**ATTORNEY GENERAL
NEVADA DEPARTMENT OF JUSTICE**

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RANDAL R. MUNN
Assistant Attorney General

August 1, 2006

OPINION NO. 2006-04

DISTRICT ATTORNEYS: Deputy District Attorneys may be subject to contracts with District Attorneys' Offices and must be deputized pursuant to the requirements of NRS 252.070.

The Honorable Harold Swafford
Storey County District Attorney
Post Office Box 496
Virginia City, Nevada 89440

Dear Mr. Swafford:

By letter dated January 31, 2006, you have requested this Office's opinion concerning your authority, as Storey County District Attorney, to contract with a licensed Nevada attorney to handle certain cases and to appear on your behalf before the Storey County Commission (Commission) without deputizing the attorney. You explain in your letter that you currently contract with a local attorney for such purposes. The attorney you have under contract is reluctant to be formally deputized because he is concerned about the possibility that his retirement benefits from the Nevada Public Employees Retirement System (PERS) may be reduced or otherwise jeopardized.¹

With your request, you have provided a copy of a contract between your office and the private attorney providing for the retention of the attorney as an independent contractor to serve as a "part time special deputy district attorney."

QUESTION

May the Storey County District Attorney contract with a licensed Nevada attorney to handle litigation and advise the Commission without deputizing the attorney?

¹ Please note that this letter does not address whether or not this understanding concerning PERS benefits is accurate.

ANALYSIS

You suggest in your letter that the individual in question could be considered “operational staff” rather than a “deputy district attorney.” See NRS 252.070(5). Upon a review of NRS 252.070 in its entirety, we believe that to consider this private attorney to be an “operational” staff person is inconsistent with other provisions of the same statute that expressly contemplate the appointment of deputy district attorneys to perform official duties required of the district attorney.

NRS 252.070 provides in pertinent part:

1. *All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals.*

. . . .
3. *All appointments of deputies under the provisions of this section must be in writing, and must, together with the oath of office of the deputies, be recorded in the office of the recorder of the county within which the district attorney legally holds and exercises his office. Revocations of those appointments must also be recorded as provided in this section. From the time of the recording of the appointments or revocations therein, persons shall be deemed to have notice of the appointments or revocations.*

4. Deputy district attorneys of counties whose population is less than 100,000 may engage in the private practice of law. In any other county, except as otherwise provided in NRS 7.065 and this subsection, deputy district attorneys shall not engage in the private practice of law. . . .

5. Any district attorney may, subject to the approval of the board of county commissioners, appoint such *clerical, investigational and operational staff* as the execution of duties and the operation of his office may require. The compensation of any person so appointed must be fixed by the board of county commissioners. [Emphasis added.]

The statute uses the term “deputies” to describe those persons who “may transact all official business relating to” the offices of their principals, district attorneys. Appointment of a deputy requires that certain formalities must be followed. The appointment must be in writing, made under oath, and recorded. NRS 252.070(3). However, later in the statute, authority is given to a district attorney to appoint “clerical, investigational and operational staff.” No statutory formalities attend these appointments, except that the compensation for these kinds of staff must be approved by the Commission. NRS 252.070(5). You have suggested that the term “deputy” can

be equated with “operational staff.” That interpretation would be contrary to certain oft-cited tenets of statutory construction.

The court should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. . . . A reading of legislation which would render any part thereof redundant or meaningless, where that part may be given a separate substantive interpretation, should be avoided.

Board of Cty. Comm’rs v. CMC of Nevada, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983) (citation omitted).

Accordingly, these rules of statutory construction require us to give different meanings to the term “deputy” and the other kinds of employees which the district attorney is authorized to hire under the statute. You employ the subject attorney to transact official business relating to your office. The attorney handles cases on your behalf and attends meetings of the Commission to provide the Commission legal advice. These functions clearly are within the ambit of the phrase “transact . . . official business” relating to your office. Therefore, we conclude that the subject attorney is acting as a deputy² district attorney and should be regarded as such.

It is a fundamental principle of statutory construction that statutory provisions should be read so that they are compatible, provided that the construction is consistent with the Legislature’s intent. *Williams v. Clark County Dist. Attorney*, 118 Nev. 473, 484, 50 P.3d 536, 543 (2002). The Nevada Supreme Court has established a history of harmonizing statutory provisions to be consistent with the ascertained spirit and intent of the Legislature. *City of Las Vegas v. Las Vegas Municipal Court*, 110 Nev. 1021, 1024, 879 P.2d 739, 741 (1994); *City Council of Reno v. Reno Newspapers*, 105 Nev. 886, 892, 784 P.2d 974, 978 (1989). In the present case, it is evident that the Nevada Legislature considered attorneys who transact official business on behalf of their appointing district attorneys to be considered deputy district attorneys subject to the requirements of NRS 252.070.

² Black’s Law Dictionary defines “deputy” to be a “substitute; a person duly authorized by an officer to exercise some or all of the functions pertaining to the office, in the place and stead of the latter.” BLACK’S LAW DICTIONARY 529 (Revised 4th ed. 1968). A “deputy district attorney” is “clothed with the powers of the principal, but who acts in the name of his principal.” *Owen v. State of Arkansas*, 565 S.W.2d 607, 609 (1978).

The Honorable Harold Swafford
August 1, 2006
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CONCLUSION

The Storey County District Attorney may not contract with a licensed Nevada attorney to handle litigation and advise the Storey County Commission without deputizing the attorney as set forth in NRS 252.070.

Sincere regards,

GEORGE J. CHANOS
Attorney General

By: _____
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Senior Deputy Attorney General
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**ATTORNEY GENERAL
NEVADA DEPARTMENT OF JUSTICE**

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GEORGE J. CHANOS
Attorney General



RANDAL R. MUNN
Assistant Attorney General

August 18, 2006

OPINION NO. 2006-06

GAMING: POKER; CONTEST;
GAMBLING

For all the reasons set forth above, it is the opinion of this office that the Event is not a "gambling game" as defined within the Gaming Control Act, and the organizers thereof are not required to be licensed by the Nevada Gaming Commission to present the contest to the public. NRS 463.160(1).

Dennis K. Neilander, Chairman
State Gaming Control Board
1919 East College Parkway
Carson City, Nevada 89706

Dear Chairman Neilander:

You have asked the opinion of this office on the following:

FACTS

A person who does not hold a gaming license issued by the Nevada Gaming Commission (Commission) would like to conduct an event in which contestants compete with one another for a specified and certain cash prize by playing poker (the Event). The contestants will be chosen based upon their play on a free internet poker website. The organizers of the Event, will allow contestants to play the game of poker against each other and not against the Event's organizers. Contestants will not pay any entry fee and no money or other negotiable instruments will be used during the Event. Each contestant will start the Event with the same number of free play chips. The free play chips will not be redeemable for cash or prizes. A specified and certain cash prize, announced prior to the start of play, will be awarded by the organizers of the Event to the winning contestant. The winning contestant will be determined by the play of the contestants. The free play chips will only be used to track the play of the contestants during the Event. The free play chips have no redeemable value, may only be used to track play and may not be used for any other purpose. These facts are assumed to be accurate for purposes of this opinion.

QUESTION

Does the Event expose a “gambling game” to the public for play, such that it requires a nonrestricted gaming license issued by the Nevada Gaming Commission?

ANALYSIS

A. Legal Standard. In the State of Nevada, a person must be licensed by the Commission to expose a “gambling game” to the public for play. See NRS 463.160(1).

A “gambling game” is defined in relevant part as “any game played with cards, dice, equipment or mechanical or electromechanical or electronic device or machine for money, property, checks, credit or any *representative of value*, including . . . poker” NRS 463.0152 (emphasis added).

A “representative of value” is defined as “any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash.” NRS 463.01862.

The term “representative of value,” as defined, is inherently ambiguous.¹

The term “instrumentality”² is not defined within the Gaming Control Act (Act) or the regulations of the Commission. However, according to its plain meaning, an

¹ When a statute “is susceptible to more than one natural or honest interpretation, it is ambiguous, and the plain meaning rule has no application.” *Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. ex rel. County of Clark*, 120 Nev. 575, ___, 97 P.3d 1132, 1135 (2004). Citing *State, Bus & Indust v. Granite Construction*, 118 Nev. 83, 87, 40 P.3d 423, 426 (2002).

Testimony on A.B. 419 before the Senate Committee on Judiciary, 69th Leg. (June 25, 1997) (Statement of Senator Ernest E. Adler). Senator Adler expressed his concern with the definition of “representative of value,” *stating it was so broad he was not sure what it included*. He predicted the Legislature would be back in the future fighting over this bill. Chairman Mark James stated “instrumentality” was in the original bill. Senator Adler replied he knew that, and in his opinion, that was why it was back in the committee. Chairman James stated he did not believe the Gaming Control Board had a problem with “instrumentality.” [Emphasis added.]

² Webster’s defines “instrumentality” as “1: something through which an end is achieved or occurs <damages incurred in a single incident through an *instrumentality* owned by the employer> 2 : something that serves as an intermediary or agent through which one or more functions of a larger controlling entity are carried out : a part or branch esp. of a governing body —compare ALTER EGO.” MERRIAM-WEBSTER’S DICTIONARY OF LAW (1996).

instrumentality, as used in this context, would appear to include any physical or tangible thing.³

Applying an overly broad definition of “representative of value” to the definition of “gambling game,” a person could be criminally charged with conducting a “gambling game,” pursuant to NRS 463.160 and 463.360(3), when individuals play virtually any type of card or dice game using virtually any type of physical or tangible thing.⁴

However, because it is a category B felony,⁵ to engage in gaming without a license issued by the Commission, the expansion of activities that require a license may not be done by implication. See NRS 463.160 and 463.360(3), *see also Anderson v. State*, 95 Nev. 625, 600 P.2d 241 (1979).

Therefore, before applying what may be an overly broad definition of “representative of value,” to proscribe certain conduct as unlawful, we must first consider what the Legislature intended the term “representative of value” to encompass.

The ambiguity, inherent in the Legislature’s use of the term “representative of value,” has far ranging consequences which requires us to turn to the legislative history surrounding the enactment of “representative of value,” to determine if its meaning may be ascertained by reference to the legislative history. See *State v. Washoe County Pub. Defender*, 105 Nev. 299, 775 P.2d 217 (1989).

³ Testimony on A.B. 419 before the Senate Committee on Judiciary, 69th Leg. (June 25, 1997) (Statement of Harvey Whittemore, Attorney for the Nevada Resort Association “NRA”). Mr. Whittemore apologized, and said he assumed the question was whether there could be a definition of “representative of value,” and remarked “instrumentality” was something very specific. He read, under section 3 of A.B. 419, “used by a patron in a game,” and said; i.e., it had to be a game, “whether or not the instrumentality may be redeemed for cash.” He said it was very clear what they were talking about was something that has a physical attribute, it did not have to be redeemable for cash, but *had to be useable in a game*. So it had to be a physical, tangible thing; it could not be an idea. He gave the example of someone saying, everyone who steps up to the table gets \$20 if they just say “Howdy, folks.” He stressed that would not work, it had to be real-that was what instrumentality meant. Chairman James added the critical thing was that *it had to be used by a patron in a game*, which distinguished it from other things which might be given out promotionally. [Emphasis added.]

⁴ Taken to the extreme, playing poker for rocks would, under this overly broad definition of “representative of value,” qualify as a “gambling game.” If this were the intent of the legislature, then NRS 463.0152, defining a “gambling game” should read “any game played with cards, dice, equipment or mechanical or electromechanical or electronic device or machine for money, property, checks, credit or any physical or tangible thing. However, NRS 463.0152 does not say that. Instead, it says “representative of value.”

⁵ Nevada, it is a category B felony to engage in gaming without a license. NRS 463.160 and NRS 463.360(3). The penalty for violation can be imprisonment in the state prison from 1 to 10 years and a fine of up to \$10,000. NRS 463.360(3).

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Further, in deciding what constitutes a gambling transaction, the Nevada Supreme Court has distinguished between transactions in which a wager is present and simple contracts involving a prize.

In *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), a public offer was made to pay \$5,000 to any person having paid 50 cents who shoots a hole in one at a golf course. There, the Nevada Supreme Court held: “[G]enerally . . . the offer of a prize to a contestant who performs a specified act is not invalid as being a gambling transaction.” *Id.* at 27, 359 P.2d at 86. The Court further noted: the offer to pay upon performance of the specified act is a promise and the performance of the requested act constitutes acceptance and consideration that gives rise to a legally enforceable contract. *Id.* at 28, 359 P.2d at 86.

In *Gibson*, the Court held that a prize differs from a wager because, if he abides by the offer, the person offering the prize has no chance to gain back the thing being offered. On the other hand, each party to a wager has a chance of gain and a risk of loss. *Id.*

In *State, Gaming Comm’n v. GNLV Corp.*, 108 Nev. 456, 834 P.2d 411 (1992), the Nevada Supreme Court revisited its decision in *Gibson* and again held that a wager requires at least two parties, who each have a risk of loss and a chance of gain. *GNLV Corp.*, 108 Nev. at 457-458, 834 P.2d at 412. In so holding, the Court found that 50 cent tickets that were automatically awarded for every 75th dollar wagered were not the result of a legitimate wager. The tickets, which the patrons used to purchase certificates that could, in turn, be redeemed for cash and non-cash items, were merely prizes offered by the casino which it had no chance to win back. The award of tickets, the Court found, was mandated by the terms of the slot club contract and not by the uncertain outcome of the game.

In each of these Nevada Supreme Court holdings, the Court found that a game becomes subject to the Act only if wagers are being made: “In order to find gambling or gambling activity, a wager must be made.” See Op. Nev. Att’y Gen. No. 00-38 (2000).

The Act defines a wager as “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.” NRS 463.01962.

The Nevada Legislature has also drawn a distinction between “gambling games” and simple “contests” involving a prize through its enactment of NRS 463.01463. A “contest” being defined in NRS 463.01463 as “a competition among patrons for a prize, whether or not: 1. The prize is a specified amount of money; or 2. Consideration is required to be paid by the patrons to participate in the competition.” NRS 463.01463.

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B. Applicable Rules of Statutory Construction. The general rule of statutory construction is that (the plain meaning of a statute, where clear on its face, controls.) *Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. ex rel. County of Clark*, 120 Nev. 575, ___, 97 P.3d 1132, 1135 (2004).

However, as noted in footnote 1, when a statute “is susceptible to more than one natural or honest interpretation, it is ambiguous, and the plain meaning rule has no application.” *Id.*

Further, “in construing an ambiguous statute, we must give the statute the interpretation that reason and public policy would indicate the legislature intended.” *Id.* at 1135, citing *State, Dep’t Mtr. Vehicles v. Vezeris*, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986).⁶

Given the penal nature of NRS 463.160 and 463.360(3), we must also take into consideration the fact that penal statutes are to be strictly construed and any ambiguity must be resolved against penalization. See *Shrader v. State*, 101 Nev. 499, 706 P.2d 834 (1985), see also *Anderson v. State*, 95 Nev. 625, 600 P.2d 241 (1979).

Statutes with criminal consequences may not be enlarged by implication or intendment beyond the fair meaning of the language used. *Id.*

C. Legislative Enactment of “representative of value.” Prior to 1997, it was well settled in Nevada that a person had to risk a sum of money or something of value to have a “wager.” This was affirmed by the Nevada Supreme Court in *Harrah’s Club v. State*, 99 Nev. 158, 659 P.2d 883 (1983), when the court held that promotional activities, such as free slot play or lucky bucks, etc., did not create wagering transactions, because “[t]he casino patron has no ‘stake’ at risk in these promotional ‘wagers,’ as they cost the patron nothing.” *Id.* at 160, 659 P.2d at 885. Therefore, according to the Court in *Harrah’s*, nonnegotiable items such as chips, tokens or coupons that are given free of charge to the patron to induce gambling, which could not be redeemed for cash, did not create a wager when presented for play. *Id.* Since the patron had not risked anything to play the game, the Supreme Court held that no legitimate wager could be found.

⁶ In FN 3, both Mr. Whittemore (representing the NRA) and Senator Mark James, underscored the fact that an “instrumentality,” in order to qualify as a “representative of value,” had to be “useable in a game.” A game, according to *GNLV Corp. Supra* and Op. Nev. Att’y. Gen 00-38 (2000), requires a wager. And a wager, according to NRS 463.01962, requires a risk of loss and an opportunity for gain on an occurrence for which the outcome is uncertain. Therefore, in order for an “instrumentality” to qualify as a “representative of value,” it must be useable, in a wager which, by definition, involves a risk of loss and an opportunity for gain on an occurrence for which the outcome is uncertain. Further, reason and public policy would indicate that the Legislature did not intend to make it a criminal offense whenever people play any game using any physical or tangible thing – absent a wager.

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In 1995, the Nevada gaming industry (the Industry) sponsored legislation to clarify that gross revenue does not include free and discounted portions of tokens, chips and other representatives of value. Senate Bill 399 (S.B. 399), 1995 Leg., 68th Sess. (May 11, 1995). The purpose and intent of S.B. 399 was to clarify the definition of gross revenue for tax purposes.

At that time, the State Gaming Control Board (the Board) opposed the legislation because of the potential negative impact on gross gaming revenue collected from nonrestricted gaming licensees. *Hearing on S.B. 399 Before the Senate Committee on Judiciary*, 1995 Leg., 68th Sess. (May 11, 1995) (statement of Brian Harris, Board Member opposing the bill), at 6.

The Nevada Legislature chose the Industry's position on the legislation and adopted an amendment indicating that gross revenue would not include any portion of the face value of any chip, token or other representative of value won by a licensee from a patron from which the licensee could demonstrate that it or its affiliate has not received cash. NRS 463.0161(2)(c).

Following the 1995 legislative session, the Board interpreted the changes from S.B. 399 to mean that a nonrestricted gaming licensee could deduct losses, paid out on wagers, only when the wagering instrument used to create the wager was redeemable for cash. It was the Board's position that a wager could not be created by a non-redeemable representative of value, which was sometimes referred to as non-negotiable, because such instrumentalities have no value.⁷

The Industry took the opposite view, believing that S.B. 399 allowed for the deductibility of payouts from wagers that were created from non-redeemable, as well as redeemable, representatives of value.

This disagreement, concerning the tax effect arising out of the use of non-negotiable representatives of value, caused the Board to seek legislative clarification of the issue from the 1997 Nevada Legislature.

Assembly Bill 421 (A.B. 421), sections 3 and 4, provided a new definition for "representative of value" and "specific wager," which the Board believed would clarify the Legislature's 1995 actions in enacting S.B. 399. See A.B. 421 as introduced Nev. 69th Legislative Session (1997).

⁷ The position of the Board, was consistent with the then existing position of the Nevada Supreme Court, as set forth in *Harrah's Club*, 99 Nev. at 158, 659 P.2d at 883, where the Court held that promotional activities, such as free slot play or lucky bucks, etc. did not create wagering transactions because "the casino patron has no 'stake' at risk in these promotional 'wagers' as they cost the patron nothing." *Harrah's Club*, 99 Nev. at 160, 659 P.2d at 885.

The Industry, through its trade organization the NRA, opposed the Board's interpretation of S.B. 399 and presented testimony to counter the Board's position.

The Industry's position was explained in the Senate Committee on the Judiciary, by Harvey Whittemore, attorney for the NRA, where *Mr. Whittemore stressed that if the casinos have a risk of loss, then the instrumentality used to place the wager must have value and be a representative of value.* Mr. Whittemore made this argument in more tangible form, when he posed the question of whether a person would pay \$5 for a \$1,000 face wagering value non-redeemable chip from a gaming licensee, and asserted that they would do so. *Hearing on A.B. 421 Before the Senate Committee on Judiciary, 1997 Leg., 69th Sess. (June 25, 1997) (emphasis added).* Additional testimony introduced, during the 1997 Legislative Session, also supported this position.⁸

To better understand the Industry position, assume, for purposes of illustration, that a \$100 token (which has no cash redemption value) is given by a casino, to a patron, free of charge. Further assume that this token is freely transferable and permits the holder of the token to make a \$100 wager as if the token were cash. In this example, the token has some objective market value since the token, when used in a wager, creates a contract right to have the wager honored by the casino. Whether it is sold for \$100, \$50 or \$5, it has market value. In addition, once the token is used in a game, i.e., in a wager, both the casino and the patron have a risk of loss. The casino may lose the face value of the token if the patron wins his wager and the patron may lose what would otherwise be the market value of the token, if the casino wins the wager. The token, in this example, has value both to the patron and the casino and would therefore qualify as a "representative of value."⁹

The Industry's position was also explained in the Assembly Committee on the Judiciary, by Robert D. Faiss, attorney for the NRA, where Mr. Faiss, citing examples from the United States Court of Appeals for the Sixth Circuit and the United States Tax

⁸ The instruments given to patrons entitle them to a wager and have mathematically demonstrable value as evidenced by the current market in which people purchase promotional coupons at below wagering value to place wagers. *Hearing on A.B. 419 Before Assm. Com. on Ways and Means, 1997 Leg., 69th Sess. (June 16, 1997) (statement of Mark Lerner, attorney for Alliance Gaming).*

⁹ As it is used in the statutes, and as discussed in the legislative history, a "representative of value" is an "instrumentality" which is used in a game, i.e, used to enter into a wager as one could alternatively enter into a wager with cash, credit, property or checks. Inherent in the definition is that the instrumentality will be used in a game, as part of a wager, in which the instrumentality has value and the patron and the casino each have a risk of loss.

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Court, underscored the negotiable and contractual nature of a “representative of value.”¹⁰

The Legislature eventually agreed with the Industry and adopted the Industry’s definitions of “wager” and “representative of value” which were intended to clarify, that for purposes of determining gross revenue, instrumentalities used to wager, whether they are chips, tokens or other “representatives of value,” have value if they are accepted by the gaming licensee and given value by the licensee in a wagering transaction. The value, as argued by the Industry and adopted by the Legislature, lies in the contract right to have the wager honored by the casino.¹¹

D. Legislative Intent. The underlying axiom of statutory construction is to effectuate the intent of the legislature. *See Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 81 P.3d 532, 534, (2003). Legislative intent may be determined by examining the circumstances which propelled enactment of a statute. *Id.* Moreover, if a statute is doubtful, an agency should adopt the construction least likely to produce mischief. *See Prouse v. Prouse*, 56 Nev. 467, 471, 56 P.2d 147, 148 (1936).

An extensive review of the legislative history surrounding the adoption of S.B. 399 and A.B. 421, reveals that both S.B. 399 and A.B. 421 were intended to address what would and would not be included as gross revenue for tax purposes.

At no point, during either the 1995 Legislative Session or the 1997 Legislative Session, was there any discussion, by the Legislature, the Board or the Industry, concerning any intent, on anyone’s part, to expand the scope of what constitutes

¹⁰ In 1995, the United States Court of Appeals for the Sixth Circuit, in the context of a bankruptcy case, determined that wagers have value because “. . . the placing of a bet gives rise to legally enforceable contract rights.” (*In re Chomakos*, 69 F.3d 769, 771 (6th Cir. 1995)). The Court analogized a gaming wager to an investment in a futures contract and stated that the investment may turn out badly but “the contractual right to receive payment in the event that it turns out well is obviously worth something.” Likewise, the Internal Revenue Service has determined that instruments representing a chance to win have value. In upholding the IRS’s determination that a sweepstakes ticket has value, the United States Tax Court stated: “[a]n Irish Sweepstakes ticket has but one value – the chance that the horse assigned to it will place in the race. An assignment of the proceeds of a ticket of this nature is an assignment of the right it represents – the right to collect if the horse wins.” *Braunstein v. Commissioner*, T.C. Memo 1962-210 (August 31, 1962). *We submit that whether or not a wagering instrument can be redeemed for cash is irrelevant to whether it has a value. The value, as stated by the courts, is the contract right to have the wager honored by the casino.* Hearing on A.B. 419 Before Assembly Committee on Judiciary (May 20, 1997) (emphasis added) (statement of Robert D. Faiss, Attorney for NRA).

¹¹ This marked a departure from the Nevada Supreme Court’s prior ruling in *Harrah’s*, *supra*, where the Court held that promotional activities such as free slot play or lucky bucks, etc. did not create wagering transactions because “the casino patron has no ‘stake’ at risk in these promotional ‘wagers’ as they cost the patron nothing.” *Harrah’s*, 99 Nev. at 160, 659 P.2d at 885. From 1997 forward, instrumentalities used in a game i.e., as part of a wager, whether they are chips, tokens or other “representatives of value,” have value if they are accepted and given value in a wagering transaction.

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regulated and/or illegal gambling activity in the state of Nevada or to restrict the scope of what constitutes a legal "contest," in the state of Nevada.

Therefore, since there is absolutely no indication that the Nevada Legislature ever intended to modify the scope or reach of the Act, so as to expand the range of illegal "gaming" activity, to include legal contest activity, we may not, by implication, do so here. See *Shrader vs. State, supra*.

Further, it is clear from the legislative history, surrounding the enactment of both S.B. 399 and A.B. 421, that the Legislature did intend to adopt the definition of "representative of value" advanced by the Industry. That definition being, an instrumentality which has value, whether or not it may be redeemable for cash, because it may be used in a game, i.e., used to wager as one could alternatively enter into a wager with cash, credit, property or checks and because its use, in a wager, gives rise to legally enforceable contract rights.

E. "Contests" versus "Gambling games." A contest is defined as "A competition among patrons for a prize whether or not: 1. The prize is a specified amount of money; or 2. Consideration is required to be paid by the patrons to participate in the competition." NRS 463.01463

Here, the Event is "a competition among patrons for a prize." Further, although not required by NRS 463.01463, the prize is a specified amount of money and no consideration is required to be paid by the patron to participate in the competition.

The Event is not a "gambling game" because no "representatives of value" are used in a game, no wagering activity is involved and the awarding of the prize is not uncertain.

As in *Gibson, supra*, if they abide by the offer, the organizers of the Event have no ability to win back any portion of the specified and certain cash prize which must, pursuant to the rules of the Event, be awarded. No risk of loss and opportunity for gain exists. Consequently, no wager exists.

Like the promotion in *Gibson, supra*, the producers have "no chance to gain back the thing being offered." As such, it appears that the specified and certain cash prize, given at the conclusion of the Event, is simply a contest prize.

Finally, the chips have no value and there can never be a secondary market for the chips. Nor can anyone alternatively purchase the opportunity to participate in the contest. The chips are not being used in lieu of cash, credit, property or checks, to enter into a "wager," in which the chips have value and the contestants and/or the promoter have a risk of loss.

Conducting a “contest” does not require a license issued by the Commission. A review of the Event indicates that the Event is a “contest,” among contestants, for a specified and certain cash prize and is not a “gambling game” which requires licensing by the Commission.

F. 2000 Opinion of the Attorney General addressing MGM’s proposed internet gaming activities. The Office of the Attorney General authored a formal published opinion, Op. Nev. Att’y Gen. No. 00-38 (2000) (2000 Opinion), which addressed issues dealing with internet poker. Some of the issues addressed in the 2000 Opinion, appear to be similar to those raised by the Event.

However, the facts currently under review are clearly distinguishable from those analyzed in the 2000 Opinion. There, the free play credits had value to the operator as well as to the player. That is because the determining factor, in whether the player won and received a ticket redeemable for cash or merchandise, as well as whether the MGM had to pay any cash or merchandise to the player, was whether the player or the MGM won each play of the virtual game. As such, the free play credits had value to both parties, as part of wagering transaction, in which the payment of a prize was not certain and both participants had a risk of loss and an opportunity for gain.

Under the facts being reviewed for the Event, the payment of a specified cash prize is absolutely certain. The organizers are required, by the rules of the Event, to pay a specified and certain cash prize. The organizers of the Event have no ability to reduce any portion of the specified and certain cash prize and no risk of having to pay more than the specified and certain cash prize. The risk of loss and opportunity for gain, for both the organizers and the players of the Event, are fixed and definite at the outset of the Event. The players have no risk of loss because they pay nothing to play. The organizers have no opportunity for gain because the award of a fixed prize is certain. Given the facts presented, the Event is a contest and not a wagering event or “gambling game” as discussed in the 2000 Opinion.

Finally, referring to the 1997 legislative change to the term “representative of value,” the 2000 Opinion contains the statement; “No longer did a patron have to risk a sum of money or other thing of value to create a gaming contract, or more accurately, a wager.” This statement, contained in Op. Nev. Att’y Gen. No. 00-38 (2000), warrants clarification:

In enacting A.B. 421, the 1997 Legislature did not intend or decide that a patron no longer had to risk “a thing of value” to create a wager. Instead, what the Legislature intended and decided was that a “representative of value,” regardless of whether or not it could be redeemed for cash, was a “thing of value.”

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The above statement should, therefore, be clarified to read:

“No longer did a patron have to risk a sum of money to create a gaming contract or more accurately, a wager. A wager could now be created so long as a “representative of value” was risked on an occurrence for which the outcome is uncertain. A “representative of value” being, an instrumentality which has value, whether or not it may be redeemable for cash, because it may be used in a game, i.e., used to wager as one could alternatively enter into a wager with cash, credit, property or checks and because its use, in a wager, gives rise to legally enforceable contract rights.

CONCLUSION

In the State of Nevada, a person must be licensed by the Nevada Gaming Commission to expose a “gambling game” to the public for play. NRS 463.160(1). For all the reasons set forth above, it is the opinion of this office that the Event is not a “gambling game” as defined within the Gaming Control Act, and the organizers thereof are not required to be licensed by the Nevada Gaming Commission to present the contest to the public.

Sincere regards,

By:
GEORGE J. CHANOS
Attorney General

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October 13, 2006

OPINION NO. 2006-07

EMPLOYEES; CLASSIFICATIONS; STATUTES: An employee who accepted a promotion to a classified position from a position that is subject to the provisions of subsections 4 and 5 of § 2 of Assembly Bill 577 of the 2005 Legislative Session, but fails to attain permanent status, has restoration rights to the position formerly held as it has been altered by A.B. 577. A promoted employee who is restored to a position formerly held that has been moved to the unclassified service of the State pursuant to the provisions of subsection 5 § 2 of Assembly Bill 577 of the 2005 Legislative Session, does not possess an option to return the position to the classified system of the State.

Jeanne Greene, Director
State of Nevada
Department of Personnel
209 East Musser Street, Room 101
Carson City, Nevada 89701-4204

Dear Director Greene:

You have requested an opinion from this Office regarding the application to certain employees of the rights provided for in Assembly Bill 577 of the 2005 Legislative Session.

QUESTION ONE

Does an employee who accepted a promotion to a classified position from a position that is subject of the provisions of subsections 4 and 5 of § 2 of Assembly Bill 577 of the 2005 Legislative Session, but fails to attain permanent status, have restoration rights pursuant to NRS 284.300 to the position formerly held?

ANALYSIS

During the 2005 Legislative Session, the Nevada Legislature passed Assembly Bill 577 (A.B. 577), Act of June 15, 2005, Ch. 435, 2005 Nev. Stat. 1952. This enactment is of a type that recurs biennially to adjust salaries within the unclassified service of the State. Each legislative session this type of bill is informally referred to as the "unclassified pay bill," although the bill is also commonly used to implement cost-of-living adjustments to both the classified and unclassified services.

Pursuant to § 1 of A.B. 577, certain positions formerly in the classified service of the State were moved to the unclassified service of the State. However, pursuant to § 2(4) of A.B. 577, an employee whose position was moved from the classified service to the unclassified service had an option to remain in the classified service. Section 2(4) of A.B. 577 provides:

4. An employee occupying a position that is currently in the classified service that is moved into the unclassified service pursuant to this act has the *option* to remain in the classified service at his current grade, with all rights afforded classified employees, or move into the unclassified service. If the employee chooses to move into the unclassified service, the employee cannot at a later date choose to return to the classified service while occupying this position. [Emphasis added.]

Pursuant to § 2(5) of A.B. 577, once an employee vacates the position moved into the unclassified service pursuant to the provisions of A.B. 577, the employee who is the replacement in the position will be in the unclassified service.

You have informed this Office that before receiving the promotion, the employee at issue had exercised her option to remain in the classified service of the State pursuant to § 2(4) of A.B. 577. Subsequently, the employee was promoted to another position in the classified service of the State, but the employee may be unsuccessful in attaining permanent status in the position to which she was promoted. Pursuant to NRS 284.300 and NAC 284.462, any promotional appointee who fails to attain permanent status in the position to which she was promoted shall be restored to the position from which she was promoted. While the position from which the employee was promoted has been moved into the unclassified service of the State pursuant to the provisions of A.B. 577, the position still exists in the same budget account and with the same Position Control Number. Though the law has altered the former position into unclassified service, there are no provisions in A.B. 577 that interfere with the right of restoration provided to the employee in NRS 284.300 and NAC 284.462. Thus pursuant to the provisions of NRS 284.300 and NAC 284.462, the employee has the right to be restored to the altered position.

CONCLUSION TO QUESTION ONE

Pursuant to the provisions of NRS 284.300 and NAC 284.462, an employee who accepted a promotion to a classified position from a position that is subject to the provisions of subsections 4 and 5 of § 2 of Assembly Bill 577 of the 2005 Legislative Session, but fails to attain permanent status, has restoration rights to the position formerly held as it has been altered by A.B. 577.

QUESTION TWO

Does a promoted employee who, pursuant to the provisions of NRS 284.300 and NAC 284.462, is restored to a position she formerly held that has been moved to the unclassified service of the State pursuant to subsection 5 of § 2 of Assembly Bill 577 of the 2005 Legislative Session, have a right to remain in the classified service of the State?

ANALYSIS

Pursuant to the definition of "promotion," an employee who is promoted moves into a vacant position which has a higher grade than the position previously occupied by the employee. NAC 284.462. As the employee moves into the vacant position which has a higher grade, the employee thereby vacates the position he or she previously occupied. Once the position he or she previously occupied is vacated by the employee, pursuant to the provisions of § 2(5) of A.B. 577, the employee who is the replacement in the position will be in the unclassified service. This interpretation of the language of § 2 of A.B. 577 is consistent with the testimony of Gary Ghiggeri, Senate Fiscal Analyst, that this language:

provides a “hold-harmless” provision for state employees who are currently classified but do not wish to transfer to the unclassified service. It provides that those employees may remain in the state classified service; however, upon the position being vacated, that position would become an unclassified position.

Hearing on A.B. 577 Before the Senate Committee on Finance, 2005 Leg., 73rd Sess. 7 (June 6, 2005). You have informed this Office that the position formerly held by the employee has been filled by another person and has in fact been moved to the unclassified service of the State.

While § 2(4) of A.B. 577 provides an employee whose position was moved from the classified service to the unclassified service an option “to remain” in the classified service in their current job, there is no parallel or similar provision in A.B. 577 that provides an employee who has vacated their position and then returns to that position through a right of restoration or otherwise an option “to return” the position formerly held to the classified system of the State.¹ Had the Legislature intended to provide an option to such an employee to return the position formerly held to the classified system of the State, the Legislature could have so provided.² Where the Legislature could easily have inserted language into a statute but has chosen not to, courts decline to judicially create such exceptions. *State, Dep’t of Motor Vehicles v. Brown*, 104 Nev. 524, 526, 762 P.2d 882, 883 (1988).

Moreover, statutory construction requires that, whenever possible, statutes should be read in harmony and rendered compatible. *State, Div. of Ins. v. State Farm*, 116 Nev. 290, 295, 995 P.2d 482 (2000); *State, Tax Comm’n v. Indep. Sheet Metal*, 105 Nev. 387, 390, 776 P.2d 541 (1989). Pursuant to this rule of statutory construction, we must read the provisions of NRS 284.300 and NAC 284.462 and the provisions of § 2 of A.B. 577 in harmony with each other. Accordingly, pursuant to the provisions of NRS 284.300 and NAC 284.462, if the employee fails to attain permanent status in the position to which she was promoted, that employee is restored to the position she formerly held, but which is now by the operation of the terms of A.B. 577 in the unclassified service of the State.

¹ Similarly, if the employee had left state service entirely and was later rehired and returned to the same position in state service, there is no provision in A.B. 577 that authorizes such an employee to convert the position formerly held to the classified system of the State.

² In fact, the Legislature made clear in § 2(4) of A.B. 577 that if an employee had chosen to move his or her position into the unclassified service, the employee could not at a later date choose “to return” to the classified service while occupying the position. This language is clear evidence that the Legislature considered the concept of an employee attempting to convert a position to the unclassified system of the State. It follows that had the Legislature intended to provide a right to an employee to convert a position formerly held to the classified system of the State, the Legislature could have so provided.

Jeanne Greene, Director
October 13, 2006
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CONCLUSION TO QUESTION TWO

A promoted employee who, pursuant to the provisions of NRS 284.300 and NAC 284.462, is restored to a position she formerly held that has been moved to the unclassified service of the State pursuant to the provisions of subsection 5 of § 2 of Assembly Bill 577 of the 2005 Legislative Session, does not possess an option to return the position to the classified system of the State.

Sincere regards,

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JTS/ld