IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, INC., a Nevada domestic nonprofit corporation,
Appellant,

vs.

BRITTNEY MILLER, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District; DINA NEAL, an individual engaging in dual employment with the Nevada State Senate and Nevada State College and College of Southern Nevada; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and a Clark County Public Charter School; and THE LEGISLATURE OF THE STATE OF NEVADA,
Respondents.

Electronically Filed
Aug 12 2023 04:40 AM
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 85935

Appeal from Eighth Judicial District Court, Clark County, Nevada,
Case No. A-20-817757-C

RESPONDENT LEGISLATURE'S ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

In its first amended complaint, Appellant Nevada Policy Research Institute ("NPRI") alleged that Respondent-Legislators are persons simultaneously holding elected offices in the Legislature and paid positions with the state executive branch or with local governments in violation of the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution. (*AA1:000005-6*)[1] In NPRI's first appeal, this Court held that NPRI has standing to bring its separation-of-powers claims and remanded this case to the district court. Nev. Policy Research Inst. v. Cannizzaro, 138 Nev. Adv. Op. 28, 507 P.3d 1203 (2022).

After remand, Respondent-Legislators and the Legislature filed motions to dismiss NPRI's first amended complaint. (*AA1:000013-95*) On December 15, 2022, while those motions to dismiss were still pending before the district court, NPRI filed a motion for leave to file a second amended complaint, asking the district court for permission to join additional legislators as defendants whom NPRI believes hold paid positions with the state executive branch or local governments. (*LA:0001-17*)[2] On December 29, 2022, the Legislature filed an opposition to NPRI's motion for leave to file a second amended complaint and a

[1] Citations to "*AA*" are to volume and page numbers of Appellant's Appendix.

[2] Citations to "*LA*" are to volume and page numbers of Legislature's Appendix.

countermotion to dismiss NPRI's first amended complaint, contending that NPRI's proposed second amended complaint suffered from the same jurisdictional and legal deficiencies as its first amended complaint. (*LA:0024-46*)

On January 4, 2023, the district court entered an order resolving the pending motions, except for: (1) NPRI's motion for leave to file a second amended complaint; and (2) the Legislature's countermotion to dismiss NPRI's first amended complaint. (*AA2:000352*) In its January 4 order, the district court: (1) denied the Legislature's motion to dismiss for lack of subject-matter jurisdiction based on NPRI's failure to comply with NRS Chapter 41's requirements for waiver of sovereign immunity; (2) declined to address the Legislature's motion to dismiss based on NPRI's failure to join all necessary party-defendants; and (3) granted Respondent-Legislators' motion to dismiss for failure to state a claim upon which relief can be granted, concluding that NPRI's separation-of-powers claims failed on the merits as a matter of law. (*AA2:000352-79*) On January 5, 2023, NPRI was served, by the district court's electronic filing system, with notice of entry of the January 4 order. (*AA2:000382*) On January 6, 2023, NPRI filed its notice of appeal. (*AA2:000416*)

Even though the district court's January 4 order did not address NPRI's motion for leave to file a second amended complaint, the prevailing jurisdictional rule is that when the district court's order of dismissal does not expressly address

leave to amend, appellate courts will generally consider the order to be a final and appealable order if "it appears that the district court intended the dismissal to dispose of the action." Floyd v. Am. Honda Motor Co., 966 F.3d 1027, 1031 (9th Cir. 2020) (quoting Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 983 (9th Cir. 2000) (citations omitted)).

In its January 4 order, the district court stated that "[t]he Court notes that the Plaintiffs are seeking Leave to Amend their Complaint to add additional Defendants, [but] for the reasons stated herein, that Motion will likely become moot based upon the Court's decision in this matter." (*AA2:000358:n.3*) Therefore, it appears that the district court intended for its January 4 order to dispose of the action because the district court believed that NPRI's motion for leave to file a second amended complaint would be rendered moot by the district court's conclusion that NPRI's separation-of-powers claims failed on the merits as a matter of law. Accordingly, for purposes of appellate jurisdiction, the district court's January 4 order is a final, appealable judgment under NRAP 3A(b)(1) because it: (1) adjudicates all of NPRI's claims as a matter of law; and (2) leaves nothing for future consideration by the district court. Bergenfield v. BAC Home Loans Serv., 131 Nev. 683, 684-86 (2015); Valley Bank of Nev. v. Ginsburg, 110 Nev. 440, 444-45 (1994).

ROUTING STATEMENT

For purposes of appellate assignment, this appeal should be heard and decided by the Supreme Court under NRAP 17(a) and should not be assigned to the Court of Appeals under NRAP 17(b). The principal issues raised by this appeal present questions of law that are of first impression in Nevada under NRAP 17(a)(11) and are of statewide public importance under NRAP 17(a)(12).

STATEMENT OF THE ISSUES

1. Did the district court lack subject-matter jurisdiction over NPRI's claims because NPRI failed to comply with NRS Chapter 41's requirements for waiver of sovereign immunity given that NPRI did not bring this lawsuit against the required state executive branch and local government employers?

2. Did NPRI fail to join all necessary party-defendants needed for a just adjudication of this action as required by the Due Process Clause, NRCP 19 and the Uniform Declaratory Judgments Act in NRS Chapter 30 given that NPRI failed to join all legislators and judges serving in dual roles and their respective state executive branch and local government employers?

3. If this Court reaches the merits of NPRI's claims, did the district court correctly determine that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with local governments

because local governments and their officers and employees are not part of one of the three departments of state government?

4. If this Court reaches the merits of NPRI's claims, did the district court correctly determine that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with the state executive branch or with local governments because such employees do not exercise any sovereign functions appertaining to the state executive branch?

5. Did the district court properly exercise its discretion when it denied NPRI's motion to strike Respondents' motions to dismiss and joinders?

INTRODUCTION

The Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau ("LCB Legal") under NRS 218F.720, hereby files its answering brief asking this Court to affirm the district court's order dismissing NPRI's first amended complaint for the following reasons.

First, without cross-appealing, the Legislature may raise any argument on appeal that would support affirmance of the district court's order, "even if the district court rejected or did not consider the argument." Ford v. Showboat Operating Co., 110 Nev. 752, 755 (1994). The district court denied the Legislature's motion to dismiss for lack of subject-matter jurisdiction over NPRI's claims. (*AA2:000355*) However, the district court lacked subject-matter jurisdiction, as a matter of law, because NPRI failed to comply with NRS Chapter 41's requirements for waiver of sovereign immunity given that NPRI did not bring this lawsuit against the required state and local government employers. Therefore, this Court may affirm the district court's order dismissing NPRI's first amended complaint because, under NRCP 12(h)(3), the district court was required to "dismiss the action" on jurisdictional grounds.

Second, the district court declined to address the Legislature's motion to dismiss based on NPRI's failure to join all necessary party-defendants as required

by the Due Process Clause, NRCP 19 and the Uniform Declaratory Judgments Act in NRS Chapter 30. (*AA2:000358:n.4*) However, given that NPRI filed a motion for leave to file a second amended complaint to join additional legislators serving in dual roles, NPRI already recognized that it failed to join such necessary party-defendants. (*LA:0001-17*) Additionally, because NPRI did not join all judges serving in dual roles, NPRI also failed to join those necessary party-defendants. Therefore, this Court may affirm the district court's order dismissing NPRI's first amended complaint because NPRI failed to join all necessary party-defendants needed for a just adjudication of this action.

Third, if this Court reaches the merits of NPRI's claims, it should affirm the district court's order because the separation-of-powers provision does not prohibit legislators from holding positions of public employment with the state executive branch or local governments. In particular, the district court correctly determined that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with local governments because local governments and their officers and employees are not part of one of the three departments of state government. The district court also correctly determined that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with the state executive branch or with local governments because

such employees do not exercise any sovereign functions appertaining to the state executive branch.

STATEMENT OF THE CASE AND FACTS

In its first amended complaint, NPRI alleged that Respondent-Legislators are persons simultaneously holding elected offices in the Legislature and paid positions with the state executive branch or with local governments in violation of the separation-of-powers provision. (*AA1:000005-6*) In prior proceedings, the district court dismissed NPRI's first amended complaint based on its lack of standing. However, NPRI appealed, and this Court reversed and remanded this case to the district court. Nev. Policy Research Inst. v. Cannizzaro, 138 Nev. Adv. Op. 28, 507 P.3d 1203 (2022) ("NPRI"). In its opinion, this Court held that NPRI has standing to bring its claims under the public-importance exception to traditional standing because NPRI is an appropriate party that "seeks to enforce a public official's compliance with a public duty pursuant to the separation-of-powers clause." NPRI, 507 P.3d at 1208.

In finding public-importance standing, this Court determined that NPRI is "represented by counsel who have competently advocated NPRI's position and **named as defendants all of the individuals who currently serve in dual roles**." NPRI, 507 P.3d at 1210 (emphasis added). However, on remand, the record was clarified, and it is now evident that NPRI failed to name as necessary party-

defendants all individual legislators and judges who currently serve in dual roles with the state executive branch or local governments.

On July 1, 2022, the Legislature filed a motion to dismiss contending that the first amended complaint must be dismissed because NPRI failed to name all the individual legislators and judges currently serving in dual roles, given that such individuals are necessary party-defendants who are needed for a just adjudication of this action as required by the Due Process Clause, NRCP 19, and the Uniform Declaratory Judgments Act in NRS Chapter 30. (*AA1:000075-80*) In its motion to dismiss, the Legislature identified the following individual judges whom the Legislature believes hold paid positions with the state executive branch as adjunct professors at universities and colleges within the Nevada System of Higher Education ("NSHE"), just like Respondent-Legislator Dina Neal:

> (1) Honorable Jerome T. Tao, Nevada Court of Appeals Judge and adjunct professor at William S. Boyd School of Law at the Univ. of Nev., Las Vegas; (2) Honorable Frank P. Sullivan, Clark County Family Court Judge and adjunct professor at William S. Boyd School of Law at the Univ. of Nev., Las Vegas; (3) Honorable Scott N. Freeman, Second Judicial District Court Judge and instructor at the Univ. of Nev., Reno; and (4) Honorable Dixie Grossman, Second Judicial District Court Judge and instructor at the Univ. of Nev., Reno.

(*AA1:000067-68*)

Additionally, in its motion to dismiss, the Legislature contended that the first amended complaint also must be dismissed for lack of subject-matter jurisdiction because NPRI failed to comply with NRS Chapter 41's requirements for waiver of

sovereign immunity as necessary to bring this action, given that NPRI failed to name as statutorily required party-defendants: (1) the state on relation of each particular department or other agency that employs the individual Respondent-Legislators who are state employees; and (2) each political subdivision that employs the individual Respondent-Legislators who are local employees. (*AA1:000071-75*)

Finally, in its motion to dismiss, the Legislature contended that the first amended complaint also must be dismissed because NPRI failed to name all the respective state and local government employers of all the individual legislators and judges currently serving in dual roles, given that such employers are necessary party-defendants who are needed for a just adjudication of this action as required by the Due Process Clause, NRCP 19, and the Uniform Declaratory Judgments Act in NRS Chapter 30. (*AA1:000075-80*)

When the Legislature filed its motion to dismiss, Respondent-Legislators Dina Neal and James Ohrenschall filed separate motions to dismiss. (*AA1:000013-63*) As part of their arguments, they each contended that, for several reasons, NPRI's separation-of-powers claims failed on the merits as a matter of law and that, as a result, NPRI's first amended complaint must be dismissed because it failed to state a claim upon which relief can be granted under NRCP 12(b)(5).

On December 15, 2022, while the foregoing motions to dismiss were still pending before the district court, NPRI filed a motion for leave to file a second amended complaint, asking the district court for permission to join the following individual legislators whom NPRI believes hold paid positions with the state executive branch or local governments:

> (1) Assembly member Natha C. Anderson (Washoe Cnty. Sch. Dist.); (2) Assembly member Reuben D'Silva (Clark Cnty. Sch. Dist.); (3) Assembly member Cecelia González (Univ. of Nev., Las Vegas); (4) Senator Lisa Krasner (Truckee Meadows Cmty. Coll.); (5) Assembly member Selena La Rue Hatch (Washoe Cnty. Sch. Dist.); (6) Assembly member David Orentlicher (Univ. of Nev., Las Vegas); and (7) Assembly member Shondra Summers-Armstrong (Reg'l Transp. Comm'n of S. Nev.)[3]

(*LA:0013-14:paras.7-17*)

On December 29, 2022, the Legislature filed an opposition to NPRI's motion for leave to file a second amended complaint and a countermotion to dismiss NPRI's first amended complaint, contending that NPRI's proposed second amended complaint suffered from the same jurisdictional and legal deficiencies as its first amended complaint. (*LA:0024-46*)

[3] On December 28, 2022, Assembly member Shondra Summers-Armstrong submitted a declaration to NPRI in which she declared, under penalty of perjury, that she does not "currently hold an employment position with any government agency, apart from my role as a state legislator." (*LA:00022-23*)

On January 4, 2023, the district court entered an order resolving the pending motions, except for: (1) NPRI's motion for leave to file a second amended complaint; and (2) the Legislature's countermotion to dismiss NPRI's first amended complaint. (*AA2:000352*) In its order, the district court denied the Legislature's motion to dismiss for lack of subject-matter jurisdiction based on NPRI's failure to comply with NRS Chapter 41's requirements for waiver of sovereign immunity. (*AA2:000355*) The district court concluded that "NRS 41.031 refers to liability in relation to a tort claim and this case is one of equity, with [NPRI] seeking declaratory and injunctive relief related to constitutional questions and not damages related to tort liability." (*AA2:000355*)

Having determined that it could exercise subject-matter jurisdiction, the district court addressed the merits of NPRI's separation-of-powers claims.[4] First, with regard to legislators holding positions of public employment with local governments, the district court concluded that:

> Article 3, Section 1 of the Nevada Constitution does not apply to local political subdivisions. Therefore, as long as an individual employed by a local political subdivision does not hold an incompatible dual position, their dual employment is not prohibited by the separation-of-powers clause of the Nevada Constitution. In the case at hand, the Teacher

[4] In addressing the merits, the district court cited excerpts from LCB Legal's opinions dated February 4, 2002, and January 23, 2003. For this Court's convenience, the Legislature has included those opinions in the courtesy copies submitted with this brief. (*Leg.'s Courtesy Copies* at 00014-69).

> Defendants, employed by Clark County School District, and Defendant Ohrenschall, employed by the Clark County Public Defender's Office, are not in violation of the separation-of-powers clause by operation of their dual employment.

(*AA2:000367*)

Second, with regard to legislators holding positions of public employment with the state executive branch, the district court concluded that:

> [A] professor at a NSHE institution is a public employee and not a public officer. Therefore, NSHE Defendant Neal's simultaneous employment as an adjunct professor at NSC and her service as a state legislator does not violate the separation-of-powers clause of the Nevada Constitution because she does not exercise a sovereign function of the executive branch in her position as Adjunct Professor at Nevada State College. This Court also finds that public school teachers and public defenders employed by local political subdivisions are public employees and therefore the Teacher Defendants and Defendant Ohrenschall's employment with Clark County and service as state legislators do not violate the separation-of-powers clause of the Constitution because they do not exercise sovereign functions of the executive branch.

(*AA2:000376-77*)

Because the district court concluded that NPRI's separation-of-powers claims failed on the merits as a matter of law, the district court declined to address the Legislature's motion to dismiss based on NPRI's failure to join all necessary party-defendants. (*AA2:000358:n.4*) Nevertheless, although no judges were named as party-defendants in the litigation, the district court concluded that:

> When a judge serves in the role of professor, she is not performing a primary duty of the executive branch of government, meaning she is not carrying out or enforcing the laws. Therefore, there is no violation of the

> separation-of-powers clause when a member of the judiciary serves as a professor at a NSHE institution.

(*AA2:000369:n.17*)

Finally, although the district court noted that NPRI filed a motion for leave to file a second amended complaint, the district court stated that the motion "will likely become moot based upon the Court's decision in this matter." (*AA2:000358:n.3*) However, the district court did not decide NPRI's motion for leave to file a second amended complaint or the Legislature's countermotion to dismiss NPRI's first amended complaint. Two days after the district court entered its order, NPRI filed its notice of appeal. (*AA2:000416*)

ARGUMENT

I. Standards of review.

This Court reviews de novo the district court's order dismissing NPRI's first amended complaint under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28 (2008). This Court also "applies a de novo standard of review to constitutional challenges." Callie v. Bowling, 123 Nev. 181, 183 (2007). Therefore, this Court reviews the district court's interpretation and application of constitutional provisions de novo "without deference to the district court's decision." Sparks Nugget v. State Dep't of Tax'n, 124 Nev. 159, 163 (2008).

II. The courts lack subject-matter jurisdiction over NPRI's claims because NPRI failed to comply with NRS Chapter 41's requirements for waiver of sovereign immunity given that NPRI did not bring this lawsuit against the required state and local government employers.

NPRI suggests that the lack of subject-matter jurisdiction is not an issue on appeal because the Legislature did not file a cross-appeal from the district court's order, but NPRI is wrong as a matter of law. As a general rule under NRAP 3A(a), when the defeated parties in the district court file an appeal, the prevailing parties do not have jurisdictional standing to pursue a cross-appeal as a matter law if the district court granted the ultimate relief requested by the prevailing parties, even if the district court relied on different reasons for granting such relief. Ford, 110 Nev. at 755-57. Under such circumstances, the prevailing parties may "without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument." Id. at 755; Cadle Co. v. Woods & Erickson, LLP, 131 Nev. 114, 117 n.1 (2015). The prevailing parties cannot, under such circumstances, file a cross-appeal because this Court would dismiss the cross-appeal as procedurally improper. Estate of Lomastro v. Am. Fam. Ins. Grp., 124 Nev. 1060, 1065 n.2 (2008).

In this case, by dismissing NPRI's first amended complaint, the district court granted the ultimate relief requested by the Legislature and the other prevailing parties. Therefore, the Legislature was not aggrieved by the district court's order and could not pursue a cross-appeal as a matter of law, even though the district

court granted such ultimate relief based on reasons that were different from those advanced by the Legislature. Under such circumstances, the Legislature could "without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument." Ford, 110 Nev. at 755. Accordingly, without cross-appealing, the Legislature has properly raised the lack of subject-matter jurisdiction in its answering brief.

Furthermore, regardless of any cross-appeal, it is well-established that this Court will not review the merits of any issue unless it first determines that the district court had subject-matter jurisdiction to reach the merits. Landreth v. Malik, 127 Nev. 175, 179-80 (2011). This Court must make such a jurisdictional determination in every case, regardless of whether the parties have raised or argued lack of jurisdiction, because the parties cannot confer subject-matter jurisdiction by waiver, acquiescence or consent. Id. If the district court did not have subject-matter jurisdiction, its decision on the merits is void. Id. Therefore, if the district court lacked subject-matter jurisdiction to reach the merits, this Court may affirm the district court's order dismissing NPRI's first amended complaint because, under NRCP 12(h)(3), the district court was required to "dismiss the action" on jurisdictional grounds.

Under the Nevada Constitution, sovereign immunity can be waived only by the Legislature through statutory waiver. Nev. Const. art. 4, § 22; Hardgrave v.

State ex rel. Hwy. Dep't, 80 Nev. 74, 76-78 (1964). Consequently, "[i]t is not within the power of the courts . . . to strip the sovereign of its armour." Taylor v. State, 73 Nev. 151, 153 (1957). Instead, the terms of the statutory waiver "define that court's jurisdiction to entertain the suit." U.S. Dep't of Treasury v. Hood, 101 Nev. 201, 204 (1985). Thus, when a plaintiff files a lawsuit but fails to comply with the statutory waiver of sovereign immunity, the courts lack subject-matter jurisdiction to entertain the lawsuit. Craig v. Donnelly, 135 Nev. 37, 39-40 (Nev. Ct. App. 2019); Wayment v. Holmes, 112 Nev. 232, 237-38 (1996).

In this case, the courts lack subject-matter jurisdiction over NPRI's claims because NPRI failed to comply with NRS Chapter 41's requirements for waiver of sovereign immunity given that NPRI did not bring this lawsuit against the required state and local government employers. Craig, 135 Nev. at 39-40; NRS 41.031, 41.0337 and 41.039.[5]

In its order, the district court denied the Legislature's motion to dismiss for lack of subject-matter jurisdiction because it concluded that "NRS 41.031 refers to liability in relation to a tort claim and this case is one of equity, with [NPRI] seeking declaratory and injunctive relief related to constitutional questions and not damages related to tort liability." (*AA2:000355*) However, this Court has held that

[5] NRS 41.031, 41.0337 and 41.039 are reproduced in the Addendum to this brief.

NRS Chapter 41's requirements apply to all causes of action, including tort actions and **non-tort actions**, which would encompass NPRI's action for declaratory and injunctive relief. Echeverria v. State, 137 Nev. 486, 490-93 (2021). Additionally, in states like Nevada which have enacted the Uniform Declaratory Judgments Act, courts have held that the Uniform Act does not waive the state's sovereign immunity and that a plaintiff seeking declaratory and injunctive relief in an action against the state or its public employees must first find statutory authorization for such an action in the statutes governing the state's waiver of sovereign immunity. JHK, Inc. v. Neb. Dep't of Banking & Fin., 757 N.W.2d 515, 522 (Neb. Ct. App. 2008); see also Nat'l Ass'n of Mut. Ins. Cos. v. Dep't of Bus. & Indus., 139 Nev. Adv. Op. 3, 524 P.3d 470, 477 (2023) (relying on cases from other Uniform Act jurisdictions and explaining that "Nevada's Uniform Declaratory Judgments Act does not . . . grant jurisdiction to the court when it would not otherwise exist." (internal quotations omitted)).

Under Nevada's statutory waiver of sovereign immunity, the courts cannot exercise jurisdiction when the plaintiff brings the lawsuit solely against the public officers or employees arising from the performance of public duties in their official capacities; instead, the plaintiff must also bring the lawsuit against the state or local governmental employers. NRS 41.031, 41.0337 and 41.039; Craig, 135 Nev. at 39-40; Wayment, 112 Nev. at 237-38. The reason for this rule is that when the

plaintiff brings the lawsuit against such public officers or employees arising from the performance of public duties in their official capacities, the lawsuit is effectively against the state or local governmental employers, and they must be given the opportunity to respond to the lawsuit and protect their interests. Id.

In the prior appeal, when finding that NPRI has public-importance standing, this Court recognized that NPRI brought this lawsuit against the Respondents arising from the performance of public duties in their official capacities as public employees of their state or local governmental employers, stating that NPRI "seeks to enforce a public official's compliance with a public duty pursuant to the separation-of-powers clause." NPRI, 507 P.3d at 1208. Because NPRI brought this lawsuit against the Respondents arising from the performance of public duties in their official capacities as public employees—and because they perform such public duties only on behalf of their state or local government employers—this lawsuit is effectively against those state or local government employers, and they must be given the opportunity to respond to this lawsuit and protect their interests. Craig, 135 Nev. at 39-40; Wayment, 112 Nev. at 237-38. Consequently, the courts lack subject-matter jurisdiction over NPRI's claims because NPRI failed to comply with NRS Chapter 41's requirements for waiver of sovereign immunity given that NPRI did not bring this lawsuit against the required state and local government employers.

III. NPRI failed to join all necessary party-defendants needed for a just adjudication of this action as required by the Due Process Clause, NRCP 19 and the Uniform Declaratory Judgments Act in NRS Chapter 30 given that NPRI failed to join all legislators and judges serving in dual roles and their respective state executive branch and local government employers.

NPRI suggests that its failure to join all necessary party-defendants is not an issue on appeal because the Legislature did not file a cross-appeal from the district court's order, but NPRI is wrong as a matter of law. As discussed previously, the Legislature was not aggrieved by the district court's order and could not pursue a cross-appeal as a matter of law, even though the district court granted the ultimate relief requested based on reasons that were different from those advanced by the Legislature. Under such circumstances, the Legislature could "without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument." Ford, 110 Nev. at 755. Accordingly, without cross-appealing, the Legislature has properly raised NPRI's failure to join all necessary party-defendants in its answering brief.

Furthermore, regardless of any cross-appeal, it is well-established that this Court will not review the merits of any issue unless it first determines that the district court ordered the joinder of all necessary party-defendants. Blaine Equip. Co. v. State Purchasing Div., 122 Nev. 860, 864-66 (2006). If the district court failed to order the joinder of all necessary party-defendants, its decision on the merits is void. Gladys Baker Olsen Family Tr. v. Dist. Ct., 110 Nev. 548, 552-54

(1994). By filing its motion for leave to file a second amended complaint to join additional legislators serving in dual roles, NPRI already recognized that it failed to join such necessary party-defendants. (*LA:0001-17*) Additionally, because NPRI did not join all judges serving in dual roles, NPRI also failed to join those necessary party-defendants.

The Uniform Act requires that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." NRS 30.130. Therefore, to comply with the Uniform Act, a plaintiff must join all necessary party-defendants needed for a just adjudication of the declaratory-relief action. In other states that have enacted the Uniform Act, courts have held that "in an action for a declaratory judgment, all persons interested in the declaration are necessary parties," and that "the failure to join parties, who have an interest which would be affected by the declaration, was fatal." Williams v. Moore, 137 A.2d 193, 196-97 (Md. 1957). One of the primary reasons that the Uniform Act requires joinder of all necessary party-defendants is to "make any decree rendered by the Court a final and complete determination of the subject matter in dispute, and thereby prevent a multiplicity of suits." Id. at 197. Consequently, "[a] declaratory judgment serves a legitimate purpose only when all interested persons who might be affected by the enforcement of rights and

legal relations are parties, but not otherwise. A court may and ordinarily must refuse to render a declaratory judgment in the absence of necessary parties." J-T Assocs. v. Hudson River-Black River Regulating Dist., 572 N.Y.S.2d 122, 124-25 (N.Y. App. Div. 1991).

Additionally, to comply with the Due Process Clause and NRCP 19, a plaintiff must join all necessary party-defendants needed for a just adjudication. Olsen Family Tr., 110 Nev. at 552-54; Univ. of Nev. v. Tarkanian, 95 Nev. 389, 395-98 (1979). The requirement to join all necessary party-defendants arises under the Due Process Clause as part of the fundamental guarantee of fairness in litigation. Under the Due Process Clause, a person cannot be deprived of his legal rights in a judicial proceeding unless the person has been made a party to that proceeding. Martin v. Wilks, 490 U.S. 755, 758-62 (1989). This constitutional rule stems from the "deep-rooted historic tradition that everyone should have his own day in court." Id. at 762 (quoting 18 Wright & Miller, Fed. Prac. & Proc. Civ. § 4449 (1981)). Thus, due process requires that all persons who have a material interest in the subject matter of the litigation be joined as parties, so that those persons will have proper notice of the litigation and an opportunity to protect their interests. Olsen Family Tr., 110 Nev. at 552-54; Tarkanian, 95 Nev. at 395-98.

The burden is on the plaintiff to join all necessary parties. Olsen Family Tr., 110 Nev. at 552-54. The law does not impose any burden on a person to intervene

voluntarily in an action when that person has not been made a party to the action by service of process. Id. Thus, "[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431, 441 (1934). Accordingly, due process is not satisfied by the fact that a person has knowledge of the action and an opportunity to intervene. Martin, 490 U.S. at 762-65; Olsen Family Tr., 110 Nev. at 552-53. Instead, "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." Martin, 490 U.S. at 765; Olsen Family Tr., 110 Nev. at 553.

These fundamental principles of due process are reflected in NRCP 19, which requires the joinder of all persons who qualify as necessary parties and are needed for a just adjudication of the litigation. Under NRCP 19(a)(1)(A), a person is considered a necessary party if "in that person's absence, the court cannot accord complete relief among existing parties." In order for a court to provide complete relief among the parties, the court must be able to enter a judgment that binds all persons who have a material interest in the subject matter of the litigation. Blaine Equip., 122 Nev. at 865-66. But if there are persons having such an interest who are not joined as parties, those persons would not be bound by the court's

judgment, leaving open the possibility of additional lawsuits, relitigation of the same issues and inconsistent or conflicting decisions regarding the same controversy. Id. Thus, the purpose of requiring joinder of all necessary parties under NRCP 19(a)(1)(A) is to ensure that the court can render a final and complete determination of the controversy that binds all interested parties, avoids piecemeal determination of the issues and prevents a multiplicity of lawsuits. Tarkanian, 95 Nev. at 397; Young Inv. Co. v. Reno Club, Inc., 66 Nev. 216, 222 (1949).

In the prior appeal, this Court held that NPRI has public-importance standing because "it is represented by counsel who have competently advocated NPRI's position and **named as defendants all of the individuals who currently serve in dual roles**." NPRI, 507 P.3d at 1210 (emphasis added). Unfortunately, this statement is not accurate in this litigation because there are members of the judicial branch and the legislative branch who currently serve in dual roles but who are not named as party-defendants in this litigation.

In order for a judgment in this case to provide complete and effective relief, the judgment would have to be binding on all those members who currently serve in dual roles and all their respective state and local government employers. However, under basic principles of due process, a person cannot be bound by a judgment entered in an action unless the person has been made a party to that action. See Martin, 490 U.S. at 758-62. Thus, unless all those members who

currently serve in dual roles and all their respective state and local government employers are joined as necessary party-defendants to this action, there cannot be "a complete decree to bind them all." Olsen Family Tr., 110 Nev. at 553. Without such a decree, any judgment in this case that does not include all such necessary party-defendants would clearly leave open the possibility of additional lawsuits, relitigation of the same issues and inconsistent or conflicting decisions regarding the same controversy. Therefore, by requiring NPRI to join all necessary party-defendants, this Court would be preventing piecemeal determination of the issues and a multiplicity of lawsuits.

Additionally, under NRCP 19(a)(1)(B), a person is considered a necessary party if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Because the purpose of the rule is to protect necessary parties from being deprived of their interests without notice and an opportunity to be heard, the "interest" requirement in the rule is liberally construed and applied in a practical manner. Aguilar v. L.A. Cnty., 751 F.2d 1089, 1093 (9th Cir. 1985); Lopez v. MLK, Jr. Hosp., 97 F.R.D. 24, 29 (C.D. Cal. 1983). Thus, the rule does not require that a necessary party have an

interest in the litigation which would be the equivalent of a constitutionally protected property right. Id. The rule only requires that a necessary party have an interest which could be impaired by the litigation "as a practical matter." Id.

If the courts were to grant the relief requested by NPRI, such relief would clearly impair "as a practical matter" the employment interests of all members of the judicial branch and the legislative branch who currently serve in dual roles, and such relief would also clearly impair "as a practical matter" the interests of all their respective state and local government employers which have devoted substantial time, effort and resources to developing and utilizing their skills and expertise as employees. Under such circumstances, NPRI has the burden to join all members of the judicial branch and the legislative branch who currently serve in dual roles and all their respective state and local government employers because they are necessary party-defendants. Accordingly, NPRI failed to join all necessary party-defendants needed for a just adjudication of this action as required by the Due Process Clause, NRCP 19 and the Uniform Declaratory Judgments Act in NRS Chapter 30.

IV. If this Court reaches the merits of NPRI's claims, it should affirm the district court's order because the separation-of-powers provision does not prohibit legislators from holding positions of public employment with the state executive branch or local governments.

In its order, the district court determined that the separation-of-powers provision does not prohibit legislators from holding positions of public

employment with local governments because local governments and their officers and employees are not part of one of the three departments of state government.[6] (*AA2:000363-68*) The district court also determined that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with the state executive branch or with local governments because such employees do not exercise any sovereign functions appertaining to the state executive branch. (*AA2:000368-77*) This Court should affirm the district court's order because it is consistent with historical evidence, legal treatises and other authorities on constitutional law, case law from other jurisdictions interpreting similar state constitutional provisions, common-law rules governing public officers and employees and, most importantly, the intent of the Framers and their underlying public policies supporting the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body.

[6] NPRI contends that this Court should reverse the district court's order because the district court abused its discretion by disregarding the parties' presentations and applying the common-law doctrine of incompatible offices. (*Opening Br. 21-25*). This Court should reject NPRI's contentions based on the arguments set forth in the answering briefs of Respondent-Legislators, and the Legislature joins in and adopts by reference all such arguments against NPRI's contentions set forth in those answering briefs under NRAP 28(i).

A. The district court correctly determined that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with local governments because local governments and their officers and employees are not part of one of the three departments of state government.

The separation-of-powers provision provides that "[t]he powers of the Government of the **State of Nevada** shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial." Nev. Const. art. 3, § 1 (emphasis added). By using the term "State" in the separation-of-powers provision, the Framers of the Nevada Constitution expressed a clear intent to have the provision apply only to the three departments of state government. As explained by the Ohio Supreme Court:

> [I]n general at least, when the constitution speaks of the "State," the whole State, in her political capacity, **and not her subdivisions**, is intended. That such is the natural import of the language used, no one denies. That such must be its construction, to make the constitution consistent with itself, and sensible, is very apparent.

Cass v. Dillon, 2 Ohio St. 607, 616 (1853) (emphasis added).

This Court recently stated that "the language of the separation-of-powers provision in the Constitution does not extend any protection to political subdivisions." City of Fernley v. State Dep't of Tax'n, 132 Nev. 32, 43 n.6 (2016). This determination is consistent with prior cases in which this Court has recognized that political subdivisions are not part of one of the three departments of state government. See Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195,

203-04 (2001) ("Neither state-owned institutions, nor state departments, nor public corporations are synonymous with political subdivisions of the state."); Nunez v. City of N. Las Vegas, 116 Nev. 535, 540 (2000) ("Although municipal courts are created by the legislature pursuant to authority vested in that body by the Nevada Constitution, these courts are separate branches of their respective city governments. . . . .[T]hey are not state governmental entities."); City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 362 n.5 (2013) ("While municipal courts are included within the state constitutional judicial system, they are nonetheless primarily city entities, rather than an extension of the state.").

Because political subdivisions are not part of one of the three departments of state government, their local officers generally are not considered to be state officers who are subject to the separation-of-powers provision. See State ex rel. Mason v. Bd. of Cnty. Comm'rs, 7 Nev. 392, 396-97 (1872) (noting that the exercise of certain powers by a board of county commissioners was not limited by the doctrine of separation of powers); Lane v. Dist. Ct., 104 Nev. 427, 437 (1988) (noting that the doctrine of separation of powers was not applicable to the exercise of certain powers by the district attorney because he was not a state constitutional officer).

Furthermore, the Nevada Constitution was modeled on the California Constitution of 1849. State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754,

761 (2001). In construing the separation-of-powers provision in the California Constitution of 1849, the California Supreme Court held that the separation-of-powers provision did not apply to local governments and their officers and employees. People v. Provines, 34 Cal. 520, 523-40 (1868). In Provines, the court stated that "[w]e understand the Constitution to have been formed for the purpose of establishing a *State* Government; and we here use the term 'State Government' in contradistinction to local, or to county or municipal governments." Id. at 532. After examining the history and purpose of the separation-of-powers provision, the court concluded that "the Third Article of the Constitution means that the powers of the *State* Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments." Id. at 534. Thus, the court held that the separation-of-powers provision had no application to the functions performed by a person at the local governmental level. Id. at 523-40.

In later cases, the California Supreme Court reaffirmed that under California law, "it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government." Mariposa County v. Merced Irrig. Dist., 196 P.2d 920, 926 (Cal. 1948). This interpretation of the separation-of-powers doctrine is followed by a majority of other jurisdictions. See, e.g., Poynter v. Walling, 177 A.2d 641,

645 (Del. Super. Ct. 1962); La Guardia v. Smith, 41 N.E.2d 153, 156 (N.Y. 1942); 16 C.J.S. Constitutional Law § 112, at 377 (1984).

Consequently, it is well settled that "a local government unit, though established under state law, funded by the state, and ultimately under state control, with jurisdiction over only a limited area, is not a 'State.'" U.S. ex rel. Norton Sound Health Corp. v. Bering Strait Sch. Dist., 138 F.3d 1281, 1284 (9th Cir. 1998). Furthermore, "a local government with authority over a limited area, is a different type of government unit than a state-wide agency that is part of the organized government of the state itself." Wash. State Dep't of Transp. v. Wash. Natural Gas Co., 59 F.3d 793, 800 n.5 (9th Cir. 1995). Thus, "[w]hile local subdivisions and boards created by the state may have some connection with one of the departments of the state government as defined by the Constitution, they are not 'departments of state government' within the intent and meaning of the [law]." State v. Coulon, 3 So. 2d 241, 243 (La. 1941). In the face of these basic rules of law, courts have consistently found that cities, counties, school districts and other local governmental entities are not included within one of the three departments of state government. See, e.g., Dermott Special Sch. Dist. v. Johnson, 32 S.W.3d 477, 480-81 (Ark. 2000); Dunbar Elec. Supply, Inc. v. Sch. Bd., 690 So. 2d 1339, 1340 (Fla. Dist. Ct. App. 1997); Stokes v. Harrison, 115 So. 2d 373, 377-79 (La. 1959); Coulon, 3 So. 2d at 243.

Likewise, in the context of the Eleventh Amendment, federal courts interpreting Nevada law have consistently found that cities, counties, school districts and other local governmental entities in this state are not included within one of the three departments of state government and that these local political subdivisions are not entitled to Nevada's sovereign immunity in federal court. See, e.g., Lincoln County v. Luning, 133 U.S. 529, 530 (1890); Eason v. Clark Cnty. Sch. Dist., 303 F.3d 1137, 1144 (9th Cir. 2002); Herrera v. Russo, 106 F. Supp. 2d 1057, 1062 (D. Nev. 2000). These federal cases are important because when a federal court determines whether a political subdivision is part of state government for the purposes of the Eleventh Amendment, the federal court makes its determination based on **state law**. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977); Austin v. State Indus. Ins. Sys., 939 F.2d 676, 678-79 (9th Cir. 1991).

After examining state law in Nevada, federal courts have found that the Nevada Gaming Control Board, the Nevada Gaming Commission, the Nevada State Industrial Insurance System, the Nevada Supreme Court and the Nevada Commission on Judicial Discipline are state agencies included within one of the three departments of state government and that these state agencies are entitled to Nevada's sovereign immunity under the Eleventh Amendment. See Carey v. Nev. Gaming Control Bd., 279 F.3d 873, 877-78 (9th Cir. 2002); Romano v. Bible, 169

F.3d 1182, 1185 (9th Cir. 1999); Austin, 939 F.2d at 678-79; O'Connor v. State, 686 F.2d 749, 750 (9th Cir. 1982); Salman v. Nev. Comm'n on Jud. Discipline, 104 F. Supp. 2d 1262, 1267 (D. Nev. 2000). By contrast, after examining state law in Nevada, federal courts have found that cities, counties and school districts in Nevada are not included within one of the three departments of state government and that these local political subdivisions are not entitled to Nevada's sovereign immunity under the Eleventh Amendment. See Lincoln County, 133 U.S. at 530; Eason, 303 F.3d at 1144; Herrera, 106 F. Supp. 2d at 1062. Thus, as viewed by federal courts that have interpreted Nevada law, local political subdivisions in this state are not included within one of the three departments of state government.

Accordingly, because local political subdivisions in Nevada are not included within one of the three departments of state government, their officers and employees also are not part of one of the three departments of state government, and legislators who hold such positions with local governments are not serving in positions within one of the three departments of state government. Consequently, given that the separation-of-powers provision applies only to the three departments of state government, the district court correctly determined that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with local governments because local governments and their officers and employees are not part of one of the three departments of state government.

B. The district court correctly determined that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with the state executive branch or with local governments because such employees do not exercise any sovereign functions appertaining to the state executive branch.

Under Nevada's separation-of-powers provision, because legislators hold elective offices that are expressly created by Article 4 of the Nevada Constitution, legislators are "charged with the exercise of **powers** properly belonging to" the Legislative Department. Nev. Const. art. 3, § 1 (emphasis added). Therefore, legislators are not allowed by the separation-of-powers provision to "exercise any **functions**, appertaining to either of the [other departments], except in the cases expressly directed or permitted in this constitution." Id. (emphasis added).

Thus, the critical issue under the separation-of-powers provision is whether legislators who hold positions of public employment with the state executive branch or with local governments exercise any "functions" appertaining to the state executive branch which cause their public employment to be constitutionally incompatible with their service as legislators in the state legislative branch. This Court has never directly addressed this issue of constitutional law in a reported opinion. See Heller v. Legislature, 120 Nev. 456 (2004); State ex rel. Mathews v. Murray, 70 Nev. 116 (1953).

Because there is no controlling Nevada case law directly on point to resolve this issue of constitutional law, it is appropriate to consider: (1) historical evidence

of the practices in the Federal Government and Congress immediately following the ratification of the Federal Constitution; (2) historical evidence of the practices in the California Legislature under similar state constitutional provisions which served as the model for the Nevada Constitution; (3) historical evidence of the practices in the Nevada Legislature since statehood; (4) legal treatises and other authorities on constitutional law; (5) case law from other jurisdictions interpreting similar state constitutional provisions; (6) common-law rules governing public officers and employees; and (7) the intent of the Framers and their underlying public policies supporting the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body. Taking all these compelling historical factors, legal authorities and public policies into consideration, the district court correctly determined that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with the state executive branch or with local governments.

(1) Historical evidence.

(a) Federal Government and Congress.

Based on the Federalist Papers, federal judicial precedent and long-accepted historical practices under the United States Constitution, the Founders did not believe that the doctrine of separation of powers absolutely prohibited an officer of one department from performing functions in another department.

On many occasions, the U.S. Supreme Court has discussed how the Founders adopted a pragmatic, flexible view of the separation of powers in the Federalist Papers. See, e.g., Mistretta v. United States, 488 U.S. 361, 380-82 (1989); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 441-43 (1977). Relying on the Federalist Papers, the Supreme Court has consistently adhered to "Madison's flexible approach to separation of powers." Mistretta, 488 U.S. at 380. In particular, Madison stated in the Federalist Papers that the separation of powers "'d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other.'" Id. at 380-81 (quoting The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961)).

In light of Madison's statements and other writings in the Federalist Papers, the Supreme Court has found that "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." Mistretta, 488 U.S. at 380. Thus, as understood by the Framers in the Federalist Papers, the doctrine of separation of powers did not impose a hermetic, airtight seal around each department of government. See Loving v. United States, 517 U.S. 748, 756-57 (1996). Rather, the doctrine created a pragmatic, flexible template of overlapping functions and responsibilities so that three coordinate departments could be fused into a workable government. See Mistretta, 488 U.S.

at 380-81. Therefore, the Founders believed in a "pragmatic, flexible view of differentiated governmental power." Id. at 381.

Moreover, in the years immediately following the adoption of the United States Constitution, it was a common and accepted practice for judicial officers of the United States to serve simultaneously as executive officers of the United States. See Mistretta, 488 U.S. at 397-99. For example, the first Chief Justice, John Jay, served simultaneously as Chief Justice and Ambassador to England. Similarly, Oliver Ellsworth served simultaneously as Chief Justice and Minister to France. While he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt. Id. at 398-99. Such long-accepted historical practices support the conclusion that the doctrine of separation of powers does not absolutely prohibit an officer of one department from performing functions in another department.

Finally, the Founders did not believe that, on its own, the doctrine of separation of powers would prohibit an executive officer from serving as a member of Congress. See 2 The Founders' Constitution 346-57 (Philip B. Kurland & Ralph Lerner eds., 1987). Therefore, the Founders added the Incompatibility Clause to the United States Constitution. Id. The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of

either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2. The history surrounding the Incompatibility Clause supports the conclusion that the doctrine of separation of powers does not prohibit a legislator from holding a position of public employment in the executive branch.

In 1806, Congressman J. Randolph introduced a resolution into the House of Representatives which provided that "a contractor under the Government of the United States is an officer within the purview and meaning of the [Incompatibility Clause of the] Constitution, and, as such, is incapable of holding a seat in this House." 2 The Founders' Constitution 357. Congressman Randolph introduced the resolution because the Postmaster General had entered into a contract of employment with a person to be a mail carrier and, at the time, the person was also a member of the Senate. Id. at 357-62.

In debating the resolution, many Congressmen indicated that the Incompatibility Clause was the only provision in the Constitution which prohibited dual officeholding and that, based on the long-accepted meaning of the term "office," a person who held a contract of employment with the executive branch was not an officer of the United States and was not prohibited from serving simultaneously as a member of Congress. Id. After the debate, the House soundly rejected the resolution because many members believed the resolution banning members of Congress from employment with the executive branch contained an

interpretation of the Incompatibility Clause which expanded the meaning of the provision well beyond its plain terms. Id.

Shortly thereafter, in 1808, Congress passed a federal law which prohibited an executive officer of the United States from entering into a contract of employment with a member of Congress. Id. at 371. A version of that federal law remains in effect. 18 U.S.C. § 431; 2 Op. U.S. Att'y Gen. 38 (1826) (explaining that the federal law prohibited all contracts of employment between officers of the executive branch and members of Congress).

Based on this historical evidence, it is quite instructive that, a mere 19 years after the United States Constitution was drafted, many members of the House of Representatives expressed the opinion that the Federal Constitution did not prohibit a person who held a contract of employment with the executive branch from serving simultaneously as a member of Congress. This historical evidence supports the legal conclusion that the doctrine of separation of powers does not prohibit an officer of one department from being employed in another department.

(b) California Legislature.

As discussed previously, because the Framers of the Nevada Constitution modeled its provisions on the California Constitution of 1849, it is appropriate to consider historical evidence and case law from California when interpreting analogous provisions of the Nevada Constitution. Harvey, 117 Nev. at 763. No

California court has ever held that the separation-of-powers provision in the California Constitution prohibits a legislator from being a state executive branch employee. Furthermore, the historical evidence from California establishes that during California's first 67 years of statehood, it was a common and accepted practice for California Legislators to hold positions as state executive branch employees until 1916, when the California Constitution was amended to expressly prohibit legislators from being state executive branch employees. See Chenoweth v. Chambers, 164 P. 428, 430 (Cal. Dist. Ct. App. 1917) (explaining that the constitutional amendment "was intended to reach a practice in state administration of many years' standing.").

At the general election held in California on November 7, 1916, one of the ballot questions was Amendment No. 6, which was an initiative measure to amend Cal. Const. art. 4, § 19, to read as follows:

> No senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state; *provided*, that this provision shall not apply to any office filled by election by the people.

1916 Cal. Stat. 54.[7]

[7] The substance of the 1916 constitutional amendment is now found in Cal. Const. art. 4, § 13, which provides: "A member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the State other than an elective office."

In the weeks leading up to the 1916 general election, the proposed constitutional amendment was described in several California newspapers. In an article dated October 28, 1916, the San Francisco Chronicle reported that:

> Some thirty-five or forty legislators in the employ of the State in various capacities are anxiously awaiting the result of the November election, for if the electorate should adopt amendment six on the ballot, known as the ineligibility to office measure, State Controller John S. Chambers probably will refuse to draw warrants in favor of legislators then in the employ of the State.

Measure Alarms Legislators on 'Side' Payroll, S.F. Chron., Oct. 28, 1916, at 5 (*Leg.'s Courtesy Copies* at 00009).[8]

In another article dated October 28, 1916, the Sacramento Bee reported that many California Legislators were employed at that time by executive branch agencies, including the State Lunacy Commission, State Motor Vehicles Department, State Labor Commissioner, State Pharmacy Commission, State Pharmacy Board, State Railroad Commission, Folsom State Prison and State Inheritance Tax Commission. Chambers Studies Amendment No. 6: Proposal to Make Legislature Members Ineligible to State Jobs is Perplexing, Sacramento Bee, Oct. 28, 1916, at 9 (*Leg.'s Courtesy Copies* at 00011).

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[8] This Court may take judicial notice of the history surrounding the proposal and approval of constitutional and statutory provisions. Fierle v. Perez, 125 Nev. 728, 737-38 n.6 (2009), *overruled on other grounds by* Egan v. Chambers, 129 Nev. 239 (2013).

On the ballot at the 1916 general election, the ballot arguments relating to the proposed constitutional amendment stated that "some of our most efficient officials have been men holding appointments under the state, [while] at the same time being members of the legislature." Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same to be Submitted to the Electors of the State of California at the General Election on Tuesday, November 7, 1916 (Cal. State Archives 1916) (*Leg.'s Courtesy Copies* at 00013). Those arguments also stated that:

> Here and there the state, by reason of such a law, will actually suffer, as it frequently happens that the most highly specialized man for work in connection with a certain department of state is a member of the legislature. There are instances of that sort today, where, by the enactment of such a law, the state will lose the services of especially qualified and conscientious officials.
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> * * *
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> Another argument advanced by the proponents of this measure is that members of the legislature who are appointed to state offices receive two salaries, but the records will show that leaves of absence are invariably obtained by such appointees during sessions of the legislature and the actual time of the legislative session is generally about eighty days every two years.

Id.

Shortly after the constitutional amendment was adopted, the California Court of Appeal was called upon to interpret whether the amendment applied to legislators whose terms began before the effective date of the amendment. Chenoweth v. Chambers, 164 P. 428 (Cal. Dist. Ct. App. 1917). The court held

that the amendment was intended to apply to those legislators. Id. at 434. In reaching its holding, the court noted that the constitutional amendment "was intended to reach a practice in state administration of many years' standing and which the people believed should be presently eradicated." Id. at 430.

Taken together, these historical accounts establish that before the California Constitution was amended in 1916, California Legislators routinely held positions as state executive branch employees. This is notable because, at that time, the separation-of-powers provision in the California Constitution was nearly identical to the separation-of-powers provision in the Nevada Constitution. Thus, the historical evidence in California supports the legal conclusion that, in the absence of a specific constitutional amendment expressly banning legislators from public employment, the separation-of-powers provision does not prohibit a legislator from holding a position as a state executive branch employee.

(c) Nevada Legislature.

For many decades, state and local government employees have served simultaneously as members of the Nevada Legislature. See Heller v. Legislature, 120 Nev. 456 (2004) (Case No. 43079, Doc. No. 04-08124, Affidavit of Guy L. Rocha, Former Assistant Administrator for Archives and Records of the Division of State Library and Archives of the Department of Cultural Affairs of the State of

Nevada (Apr. 29, 2004) (*Leg.'s Courtesy Copies* at 00001-00003)).[9] Although there are no official records specifically detailing the occupations of legislators who served in the Legislature during the 1800s and early 1900s, the records that are available indicate that state and local government employees have been serving in the Legislature since at least 1903. Id. The earliest known examples of local government employees who served as members of the Legislature are Mark Richards Averill, who was a member of the Assembly in 1903, and Ruth Averill, who was a member of the Assembly in 1921. Id. The earliest known examples of state executive branch employees who served as members of the Legislature are August C. Frohlich, who was a member of the Assembly in 1931, and Harry E. Hazard, who was a member of the Assembly in 1939. Id. Based on research conducted by the LCB covering the period from 1967 to 2023, state and local government employees have served as members of the Legislature during each regular session convened over the past 50-plus years. See Nevada Legislative Manual: Legislative Biographies (LCB 1967-2023); Heller v. Legislature, 120 Nev. 456 (2004) (Case No. 43079, Doc. No. 04-08124, Affidavit of Donald O. Williams, Former Research Director of the Research Division of the Legislative

[9] This Court may take judicial notice of records in other cases. Mack v. Estate of Mack, 125 Nev. 80, 91-92 (2009).

Counsel Bureau of the State of Nevada (Apr. 28, 2004) (*Leg.'s Courtesy Copies* at 00004-00005)).

Thus, the historical evidence from the Nevada Legislature supports the legal conclusion that the separation-of-powers provision does not prohibit a legislator from holding a position as a state executive branch employee or a local government employee. Under well-established rules of constitutional construction, this historical evidence represents a long-standing interpretation of the separation-of-powers provision by the Legislature which must be given great weight.

When interpreting a constitutional provision, this Court "looks to the Legislature's contemporaneous actions in interpreting constitutional language to carry out the intent of the framers of Nevada's Constitution." Halverson v. Miller, 124 Nev. 484, 488-89 (2008). Because the Legislature's interpretation of a constitutional provision is "likely reflective of the mindset of the framers," such a construction "is a safe guide to its proper interpretation and creates a strong presumption that the interpretation was proper." Id. (internal quotation marks omitted); Hendel v. Weaver, 77 Nev. 16, 20 (1961); State ex rel. Herr v. Laxalt, 84 Nev. 382, 387 (1968); Tam v. Colton, 94 Nev. 452, 458 (1978).

Furthermore, when the Legislature's construction is consistently followed over a considerable period of time, that construction is treated as a long-standing interpretation of the constitutional provision, and such an interpretation is given

great weight and deference by this Court, especially when the constitutional provision involves legislative operations or procedures. State ex rel. Coffin v. Howell, 26 Nev. 93, 104-05 (1901); State ex rel. Torreyson v. Grey, 21 Nev. 378, 387-90 (1893) (Bigelow, J., concurring); State ex rel. Cardwell v. Glenn, 18 Nev. 34, 43-46 (1883). As a result, "[a] long continued and contemporaneous construction placed by the coordinate branch of government upon a matter of procedure in such coordinate branch of government should be given great weight." Howell, 26 Nev. at 104.

The weight given to the Legislature's construction of a constitutional provision involving legislative operations or procedures is of particular force when the meaning of the constitutional provision is subject to any uncertainty, ambiguity or doubt. See, e.g., Nev. Mining Ass'n v. Erdoes, 117 Nev. 531, 539-40 (2001). Under such circumstances, this Court has stated that "although the [interpretation] of the legislature is not final, its decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail." Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 399-400 (1876).

This Court has also stated that when the meaning of a constitutional provision involving legislative operations or procedures is subject to any uncertainty,

ambiguity or doubt, the Legislature may rely on an opinion of LCB Legal which interprets the constitutional provision, and "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n, 117 Nev. at 540. For example, when the meaning of the term "midnight Pacific standard time," as formerly used in the constitutional provision limiting legislative sessions to 120 days, was subject to uncertainty, ambiguity and doubt following the 2001 regular session, this Court explained that the Legislature's interpretation of the constitutional provision was entitled to deference because "[i]n choosing this interpretation, the Legislature acted on Legislative Counsel's opinion that this is a reasonable construction of the provision. We agree that it is, and the Legislature is entitled to deference in its counseled selection of this interpretation." Id.

With regard to state and local government employees serving as legislators, the Legislature has chosen to follow LCB Legal's long-standing interpretation of the separation-of-powers provision for decades, and it has acted on LCB Legal's opinion that this is a reasonable construction of the separation-of-powers provision. As a result, "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n, 117 Nev. at 540.

Therefore, under the rules of constitutional construction, the Legislature's long-standing interpretation of the separation-of-powers provision "should be given great weight." Howell, 26 Nev. at 104 ("A long continued and

contemporaneous construction placed by the coordinate branch of government upon a matter of procedure in such coordinate branch of government should be given great weight."). Furthermore, to the extent there is any ambiguity, uncertainty or doubt concerning the interpretation of the separation-of-powers provision, the interpretation given to it by the Legislature "ought to prevail." Dayton Gold & Silver Mining, 11 Nev. at 400 ("[I]n case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail.").

(2) Case law from other jurisdictions.

Several courts from other jurisdictions have decided cases involving the legal issue of whether a state constitutional separation-of-powers provision prohibits legislators from being state or local government employees. However, the cases from the other jurisdictions are in conflict on this issue.

In State ex rel. Barney v. Hawkins, 257 P. 411, 412 (Mont. 1927), an action was brought to enjoin the state from paying Grant Reed his salary as an auditor for the state board of railroad commissioners while he served as a member of the state legislature. The complaint alleged that Reed was violating the separation-of-powers provision in the state constitution because he was occupying a position in the executive branch while serving as a state legislator. Id. at 412. At the time, the separation-of-powers provision in the Montana Constitution provided that "no

person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others." Id. at 413. The complaint also alleged that Reed was violating Section 7 of Article 5 of the Montana Constitution, which provided that "[n]o senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the State." Id. The Montana Supreme Court framed the issue it was deciding as follows:

> The only question for us to decide is—is the position of auditor, held by Grant Reed, a civil office(?); for, if it be a civil office, he is holding it unlawfully; and, if it be not a civil office, he is not an officer, but only an employee, subject to the direction of others, and he has no power in connection with his position, and is not exercising any powers belonging to the executive or judicial department of the state government. In the latter event, Article IV of the Constitution [separation of powers] is not involved.

Id.

After considering voluminous case law concerning the definition of a "civil office," including cases from Nevada that will be discussed below, the Montana Supreme Court determined that Reed was not exercising any portion of the sovereign power of state government when he was acting as an auditor for the board of railroad commissioners and that, therefore, Reed did not occupy a civil office. Id. at 418. Rather, the court found that Reed was simply an employee "holding a position of employment, terminable at the pleasure of the employing power, the Board of Railroad Commissioners." Id. Thus, because Reed did not

occupy a civil office, the court concluded that he had "no powers properly belonging to the judicial or executive department of the state government, for he is wholly subject to the power of the board, and, having no powers, he can exercise none; and, therefore, his appointment was not violative of Article IV of the Constitution [separation of powers]." Id.

The reasoning of the Montana Supreme Court was followed by the New Mexico Court of Appeals in State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1094-95 (N.M. Ct. App. 1991). In Stratton, the Attorney General argued that two members of the state legislature were violating the separation-of-powers provision in the state constitution because the legislators also occupied positions as a teacher and an administrator in local public school districts. Id. at 1088. At the time, the separation-of-powers provision in the New Mexico Constitution was identical to the separation-of-powers provision interpreted by the Montana Supreme Court in Hawkins: "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others[.]" Id. at 1094.

Like the Montana Supreme Court, the New Mexico Court of Appeals determined that a violation of the separation-of-powers provision could occur only if the members of the legislature were invested in their positions as school teacher and school administrator with sovereign power that properly belonged to another

branch of government. Id. Because only public officers exercised sovereign power, the court determined that the separation-of-powers provision "applies [only] to public officers, not employees, in the different branches of government." Id. at 1095. After considering the nature of the public school positions, the court concluded that "[p]ublic school instructors and administrators are not 'public officials.' They do not establish policy for the local school districts or for the state department of education." Id. at 1094. Instead, "[a] school teacher employed by a common school district is [an] 'employee' not [an] 'officer', and the relationship between school teacher and school board is contractual only." Id. at 1095 (citing Brown v. Bowling, 240 P.2d 846, 849 (N.M. 1952)). Therefore, because the school teacher and school administrator were not public officers, but simply public employees, the court held that they were not barred by the separation-of-powers provision from being members of the legislature. Id.

The Colorado Supreme Court has also adopted this view. Hudson v. Annear, 75 P.2d 587, 588-89 (Colo. 1938) (holding that a position as chief field deputy for the state income tax department was not a civil office, but a position of public employment, and that therefore a legislator could occupy such a position without violating Colorado's separation-of-powers provision). See also Jenkins v. Bishop, 589 P.2d 770, 771-72 (Utah 1978) (Crockett, J., concurring in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would not

prohibit a legislator from also being a public school teacher); State v. Osloond, 805 P.2d 263, 264-67 (Wash. Ct. App. 1991) (holding that a legislator who served as a judge pro tempore in a criminal case did not violate the principle of separation of powers as recognized in Washington, which does not have an express separation-of-powers provision in its constitution).

In stark contrast to the foregoing decisions are several decisions from Indiana, Oregon and Nebraska. The decisions from Indiana and Oregon are notable because the language in the separation-of-powers provisions of those states more closely resembles the language in Nevada's separation-of-powers provision.

In State ex rel. Black v. Burch, 80 N.E.2d 294 (Ind. 1948), actions were brought to prevent the state from paying four legislators salaries that they had earned while occupying positions with various state commissions and boards in the executive branch. After reviewing the relevant statutes relating to these positions, the court held that the legislators' positions in the executive branch "are not public offices, nor do they in their respective positions, perform any official functions in carrying out their duties in these respective jobs; they were acting merely as employees of the respective commission or boards by whom they were hired." Id. at 299. In other words, "[i]n performing their respective jobs, none of these [legislators] were vested with any functions pertaining to sovereignty." Id. Having determined that the legislators occupied positions of public employment,

rather than public offices, the court's next task was to determine whether such public employment in another branch of state government violated Indiana's separation-of-powers provision, which provided at the time that "no person, charged with official duties under one of these departments[,] shall exercise any of the functions of another[.]" Id. The court framed the issue as follows: "[I]t now becomes necessary for this Court to determine what is the meaning of the phrase 'any of the functions of another,' as set out in the above quoted section of the Constitution." Id.

In interpreting the use of the term "functions," the court noted that the term "power" had been used instead of the term "functions" in the original draft of the separation-of-powers provision. Id. at 302. However, the term "functions" was inserted in the final version of the provision that was adopted by the drafters of the constitution. Id. The court then stated that "[i]t would seem to us that these two words are interchangeable but, if there is any distinction, the term 'functions' would denote a broader field of activities than the word 'power.'" Id. The court also quoted extensively from the decision in Saint v. Allen, 126 So. 548 (La. 1930), in which the Louisiana Supreme Court held that a state legislator was prohibited from being employed by the executive department under the separation-of-powers provision in the Louisiana Constitution, which provided at the time that "[no] person or collection of persons holding office in one of [the departments],

shall exercise power properly belonging to either of the others[.]" Saint, 126 So. at 550. In particular, the Louisiana Supreme Court held that:

> It is not necessary, to constitute a violation of the article, that a person should hold office in two departments of government. It is sufficient if he is an officer in one department and at the same time is employed to perform duties, or exercise power, belonging to another department. The words "exercise power," speaking officially, mean perform duties or functions.

Id. at 555.

Based on the Saint case and other court decisions, the Indiana Supreme Court in Burch concluded that:

> In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an employee of an officer, even though he be performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the cases before us.

80 N.E.2d at 302.

The reasoning of the Indiana Supreme Court was followed by the Oregon Supreme Court in Monaghan v. School Dist. No. 1, 315 P.2d 797 (Or. 1957), *superseded by* Or. Const. art. XV, § 8. In that case, the court was asked "to

determine whether or not [a state legislator, Mr. Monaghan,] is eligible for employment as a teacher in the public schools of this state while he holds a position as a member of the [state] House of Representatives." Id. at 799. At that time, the separation-of-powers provision in the Oregon Constitution provided that "no person charged with official duties under one of these departments, shall exercise any of the functions of another[.]" Id. at 800. Mr. Monaghan argued that the term "official duties" was synonymous with the term "functions," and that therefore the separation-of-powers provision applied only to a person holding a public office in more than one department of state government and not to a person merely occupying a position of public employment. Id. at 801. The court flatly rejected this argument:

> It is not difficult to define the word "official duties." As a general rule, and as we think the phrase is used in the section of the constitution, they are the duties or obligations imposed by law on a public officer. 67 C.J.S. Officers § 110, p. 396; 28 C.J.S. Duty, p. 597. There can be no doubt that Mr. Monaghan, as a legislator, is "charged with official duties." But the exercise of the "functions" of a department of government gives to the word "functions" a broader sweep and more comprehensive meaning than "official duties." It contemplates a wider range of the exercise of functions including and beyond those which may be comprehended in the "official duties" of any one officer.
>
> It may appear to some as a construction of extreme precaution, but we think that it expresses the considered judgment and deliberation of the Oregon Convention to give greater force to the concepts of separation by thus barring any official in one department of government of the opportunity to serve any other department, even as an employee. Thus, to use the language of O'Donoghue v. United States, supra [289 U.S. 516], in a sense, his role as a teacher subjugates the department of his

> employment to the possibility of being "controlled by, or subjected, *directly or indirectly*, to the coercive influence of" the other department wherein he has official duties and vice versa. (Emphasis supplied.) In the Burch case, supra [80 N.E.2d 294, 302], when considering the word "functions" in its similar setting in the Indiana Constitution, the court observed that the term "functions" denotes a broader field of activities than the word "power."
>
> * * *
>
> Our conclusion is that the word "functions" embodies a definite meaning with no contradiction of the phrase "official duties," that is, he who exercises the functions of another department of government may be either an official or an employee.

Id. at 802-04. Although acknowledging that a public school teacher was not a public officer, the court concluded, nevertheless, that a public school teacher was a public employee who was exercising one of the functions of the executive department. Id. at 804-06. Therefore, the court held that Mr. Monaghan could not be employed as a public school teacher while he was a state legislator. Id.; see also Jenkins, 589 P.2d at 773-77 (Ellett, C.J., concurring and dissenting in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would prohibit a legislator from also being a public school teacher).

After the decision in Monaghan, the Oregon Constitution was amended to permit legislators to be employed by the State Board of Higher Education or to be a member of any school board or an employee thereof. In re Sawyer, 594 P.2d 805, 808 & n.7 (Or. 1979). However, the amendment did not apply to other branches of state government. Id. In Sawyer, the Oregon Supreme Court was

asked whether the state's separation-of-powers provision prohibited a judge from being regularly employed as a part-time professor at a state-funded college. The court answered in the affirmative, stating that:

> It is true that Judge Sawyer is not a full-time teacher. In our opinion, however, a part-time teacher regularly employed for compensation by a state-funded college to perform the duties of a teacher also performs "functions" of the executive department of government within the meaning of Article III, § 1, as construed by this court in Monaghan.

Id. at 809. The court noted, however, that "[w]e do not undertake to decide in this case whether the same result would necessarily follow in the event that a judge should occasionally, but not regularly, lecture at a state-funded college, but without other responsibilities as a teacher." Id. at 809 n.8.

Finally, in State ex rel. Spire v. Conway, 472 N.W.2d 403 (Neb. 1991), the Attorney General brought an action claiming that the separation-of-powers provision of the Nebraska Constitution prohibited a person from occupying a position as an assistant professor at a state-funded college while simultaneously serving as a member of the state legislature. At the time, Nebraska's separation-of-powers provision provided that "no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others." Id. at 404.

Unlike most other courts, the Nebraska Supreme Court determined that, under certain circumstances, an assistant professor at a public college could be

considered to be holding a public office. Id. at 406-07. However, despite this determination, the court found that the public officer-public employee distinction was not "determinative of the [separation-of-powers] issue now under consideration, for article II does not speak in terms of officers or employees; it speaks of persons 'being one of' the branches of government." Id. at 408. Rather, the court found that "[t]he unusual expression 'being one of these departments' is not clear; accordingly, construction is necessary. One thing that is clear, however, is that 'being one of these departments' is not intended to be synonymous with 'exercising any power of' a branch." Id. at 409.

After considering the text and history of the Nebraska Constitution, the court determined that the provision should be construed to read, "no person or collection of persons being [a member of] one of these departments." Id. at 412. Based on this construction, the court held that the separation-of-powers provision "prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch." Id. The court then applied this construction to conclude that an assistant professor at a state college is a member of the executive branch and that a legislator, therefore, could not occupy such a position during his term in the legislature. Id. at 414-16. Specifically, the court held that:

> Although we have neither been directed to nor found any case explicitly stating that the state colleges are part of the executive branch, there are

> but three branches, and the state colleges clearly are not part of the judicial or legislative branches.
>
> * * *
>
> The Board of Regents of the University of Nebraska performs a function for the university which is identical to that of the Board of Trustees of the Nebraska State Colleges. While the Board of Regents is an "independent body charged with the power and responsibility to manage and operate the University," it is, nevertheless, an administrative or executive agency of the state. As the regents are part of the executive branch, so, too, are the trustees.
>
> Since the Board of Trustees, which governs the state colleges, is part of the executive branch, those who work for those colleges likewise are members of that branch. Respondent, as an assistant professor at the college, is thus a member of the executive branch within the meaning of article II.
>
> * * *
>
> Respondent is therefore a member of one branch of government, the executive, exercising the powers of another, the legislative, and, as a consequence, is in violation of article II of the state Constitution.

Id. at 414-15 (citations omitted).

This Court should reject the reasoning of the courts of Indiana, Oregon and Nebraska. Instead, this Court should follow the reasoning of the courts of Montana, New Mexico and Colorado and conclude that the separation-of-powers provision does not prohibit legislators from holding positions as state executive branch employees or local government employees. This reasonable interpretation of the separation-of-powers provision is supported by the text and structure of the Nevada Constitution and by the concept of the "citizen-legislator," which is a

concept that is the cornerstone of an effective, responsive and qualified part-time legislative body.

(3) Interpretation of Nevada's separation-of-powers provision.

It is a fundamental rule of constitutional construction that the Nevada Constitution must be interpreted in its entirety and that each part of the Constitution must be given effect. State ex rel. Herr v. Laxalt, 84 Nev. 382, 386 (1968). Therefore, the separation-of-powers provision in the Nevada Constitution cannot be read in isolation, but rather must be construed in accordance with the Nevada Constitution as a whole. Thus, the meaning of the phrases "no persons charged with the exercise of powers properly belonging to one of these departments" and "shall exercise any functions, appertaining to either of the others" cannot be based on a bare reading of the separation-of-powers provision alone. Rather, these phrases must be read in light of the other parts of the Nevada Constitution which specifically enumerate the persons who are to be charged with exercising the powers and functions of state government. As stated by this Court:

> [Article 3, Section 1] divides the state government into three great departments, and directs that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." As will be noticed, it is the state government as created by the constitution which is divided into departments. **These departments are each charged by other parts of the constitution with certain duties and functions, and it is to these that the prohibition just quoted refers**.

Sawyer v. Dooley, 21 Nev. 390, 396 (1893) (emphasis added).

According to this Court, the prohibition in Article 3, Section 1 applies only to persons who are charged by other parts of the Nevada Constitution with exercising powers or duties belonging to one of the three departments of state government. In other words, for the purposes of the separation-of-powers provision, the officers who are prohibited from exercising functions appertaining to another department of state government are limited to those officers in the legislative, executive and judicial departments who are expressly given powers and duties under the Nevada Constitution.

This construction of the separation-of-powers provision in the Nevada Constitution is consistent with the Utah Supreme Court's construction of an identical separation-of-powers provision in Section 1 of Article V of the Utah Constitution. As to that provision, the Utah Supreme Court has held:

> [T]he prohibition of section 1, is directed to a "person" charged with the exercise of powers properly belonging to the "executive department." The Constitution further specifies in Article VII, Section 1, the persons of whom the Executive Department shall consist. Thus it is the "persons" specified in Article VII, Section 1, who are charged with the exercise of powers belonging to the Executive Department, who are prohibited from exercising any functions appertaining to the legislative and judicial departments.

State v. Gallion, 572 P.2d 683, 687 (Utah 1977); accord Robinson v. State, 20 P.3d 396, 399-400 (Utah 2001).

Consequently, a constitutional officer is an officer of the legislative, executive or judicial department who is "charged with the exercise of powers properly belonging to one of these departments." Nev. Const. art. 3, § 1; see also People v. Provines, 34 Cal. 520 (1868). No other person may exercise the powers given to a constitutional officer by the Nevada Constitution. As a result, when the Nevada Constitution grants powers to a particular constitutional officer, "their exercise and discharge by any other officer or department are forbidden by a necessary and unavoidable implication. Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department, or person." King v. Bd. of Regents, 65 Nev. 533, 556 (1948) (quoting State ex rel. Crawford v. Hastings, 10 Wis. 525, 531 (1860)). Thus, the constitutional powers of each department may be exercised only by the constitutional officers from that department to whom the powers have been assigned.

Even though it is only the constitutional officers of each department who may exercise the constitutional powers given to that department, the Framers realized that each department would also be charged with the exercise of certain nonconstitutional functions. Accordingly, the Framers provided for the creation by statute of nonconstitutional officers who could be charged by the Legislature with the exercise of nonconstitutional functions. See Nev. Const. art. 15, §§ 2, 3, 10 and 11. As observed by this Court:

> [T]he framers of the constitution decided for themselves that the officers named [in the constitution] were necessary and should be elected by the people; but they left it to the legislature to decide as to the necessity of additional ones, whether state, county, or township. . . . The duty of deciding as to the necessity of any office, other than those named in the constitution, is placed upon the legislature[.]

State ex rel. Perry v. Arrington, 18 Nev. 412, 417-18 (1884). As a result, the Nevada Constitution recognizes two distinct types of offices, "one which is created by the constitution itself, and the other which is created by statute." State ex rel. Josephs v. Douglass, 33 Nev. 82, 93 (1910) (quoting People v. Bollam, 54 N.E. 1032, 1033 (Ill. 1899)).

Like the framers of other state constitutions, the Framers of the Nevada Constitution could have simply stated that a constitutional officer shall not exercise any "powers" appertaining to another department of state government. However, the Framers of the Nevada Constitution provided that a constitutional officer shall not exercise any "functions" appertaining to another department of state government. The Framers used the term "functions" because they realized that, in each department of state government, the functions of the department would be performed by constitutional officers **and** by nonconstitutional officers. Thus, had the Framers used only the term "powers" in Article 3, Section 1, the separation-of-powers provision would have been too restrictive in its meaning, for it may have been construed simply to mean that a constitutional officer in one department could not exercise the powers entrusted to the constitutional officers in another

department. To avoid this restrictive construction, the Framers used the term "functions" to ensure that a constitutional officer in one department could not perform the **sovereign functions** entrusted to both constitutional officers **and** nonconstitutional officers in another department.

Therefore, by using the term "functions," the Framers intended to prohibit a constitutional officer in one department from holding constitutional offices or nonconstitutional offices in another department, because persons holding constitutional or nonconstitutional offices in another department exercise the **sovereign functions** of state government. Because public employees do not exercise the sovereign functions of state government, the Framers did not intend to prohibit a constitutional officer from holding a position of public employment in another department of state government. This conclusion is based on a well-established body of case law which holds that public officers are the only persons who exercise the sovereign functions of state government and that public employees do not exercise such sovereign functions.

In State ex rel. Kendall v. Cole, 38 Nev. 215 (1915), this Court discussed extensively the attributes of a public office, and this Court also cited numerous cases that had been decided in other jurisdictions well before the Nevada Constitution was drafted in 1864. See Bradford v. Justices of Inferior Ct., 33 Ga. 332 (1862); Shelby v. Alcorn, 36 Miss. 273 (1858); see also Annotation, Offices

Within Constitutional or Statutory Provisions Against Holding Two Offices, 1917A L.R.A. 231 (1917). From these cases, this Court concluded that the single most important characteristic of a public office is that the person who holds such a position is "clothed with some portion of the sovereign functions of government." Cole, 38 Nev. at 229 (quoting Attorney-General v. McCaughey, 43 A. 646 (R.I. 1899)). In later cases, this Court expressed a similar view:

> The nature of a public office as distinguished from mere employment is the subject of a considerable body of authority, and many criteria of determination are suggested by the courts. Upon one point at least the authorities uniformly appear to concur. A public office is distinguishable from other forms of employment in that its holder has by the sovereign been invested with some portion of the sovereign functions of government.

State ex rel. Mathews v. Murray, 70 Nev. 116, 120-21 (1953) (citation omitted). Simply put, "the sovereign function of government is not delegated to a mere employee." Eads v. City of Boulder City, 94 Nev. 735, 737 (1978).

Thus, in each department of state government, only two types of persons are empowered to exercise the sovereign functions of that department, those who hold constitutional offices and those who hold nonconstitutional offices. This is how the Framers of the Nevada Constitution understood the structure and organizational framework of each department of state government, and this is why the Framers used the word "functions" in Article 3, Section 1—to prohibit a constitutional officer in one department of state government from holding any other **public office**

that was empowered, either by the constitution or statute, to exercise the sovereign functions of another department of state government. Because public employees do not exercise the sovereign functions of state government, a broader construction of the term "functions" to include public employees would not be consistent with the manner in which the sovereign functions of government are exercised in Nevada.

Moreover, a broader construction of the term "functions" to include public employees would run counter to "the constituency concept of our legislature in this state, which can accurately be described as a citizens' legislature." Stratton, 806 P.2d at 1093. The Framers of the Nevada Constitution realized that "[i]n a sparsely populated state . . . it would prove difficult, if not impossible, to have a conflict-free legislature." Id. In addition, any potential conflicts of interests experienced by a legislator who is also a public employee in another branch of state government are no greater than those conflicts experienced by other members of the Legislature. As stated by Justice Crockett of the Utah Supreme Court:

> In our democratic system, the legislature is intended to represent the people: that is, to be made up from the general public representing a wide spectrum of the citizenry. It is not to be doubted that legislators from the ranks of education are affected by the interests of that calling. But all other legislators also have interests. No one lives in a vacuum.

Jenkins, 589 P.2d at 771 (Crockett, J., concurring).

Finally, it is clear that the Framers intended the Nevada Legislature to be a part-time legislative body. In particular, the Framers provided for biennial legislative sessions in Article 4, Section 2 of the Nevada Constitution, and they originally limited those biennial sessions to 60 days in Article 4, Section 29. Although Article 4, Section 29 was repealed in 1958, the fact that the citizens of Nevada voted in 1998 to limit biennial sessions to 120 days is a clear indication that the citizens of Nevada, like the Framers, want the Nevada Legislature to be a part-time legislative body.

The economic reality of a part-time Legislature is that most legislators must continue to be employed in other occupations on a full-time or part-time basis during their terms of legislative service. This is as true today as it was when the Nevada Constitution was originally adopted. Given this economic reality, it is likely that the Framers fully expected that public employees, like other citizens, would be members of the Legislature, especially since some of the most qualified and dedicated citizens of the community often occupy positions of government employment. As stated by Chief Justice Hastings of the Nebraska Supreme Court in his dissent in Conway:

> A senatorial position in the Nebraska Legislature is a part-time position. Therefore, it is not uncommon for senators to have additional sources of income and careers. An uncompromising interpretation of the separation of powers would inhibit the ability of a part-time legislature to attract qualified members.

472 N.W.2d at 417 (Hastings, C.J., dissenting). Therefore, construing the term "functions" in Article 3, Section 1 to prohibit a member of the Nevada Legislature from occupying a position of public employment would not comport with the concept of the "citizen-legislator" that was undoubtedly envisioned by the Framers of the Nevada Constitution.

Based on this construction of the separation-of-powers provision, if a legislator holds another position in state government, the deciding issue under the Nevada Constitution should be whether the other position is a public office or a position of public employment. If the other position is a public office, then the legislator would be prohibited by the separation-of-powers provision from holding the public office. However, if the other position is merely a position of public employment, then the legislator would not be prohibited by the separation-of-powers provision from holding the position of public employment.

As discussed previously, this Court has addressed the distinction between a public officer and a public employee on many occasions. See State ex rel. Kendall v. Cole, 38 Nev. 215 (1915); State ex rel. Mathews v. Murray, 70 Nev. 116 (1953); Mullen v. Clark Cnty., 89 Nev. 308 (1973); Eads v. City of Boulder City, 94 Nev. 735, 737 (1978). As recently as 2013, this Court reaffirmed that "as is clear from our jurisprudence, officers are fundamentally different from employees." City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 361 (2013). In one of its more recent

cases on the issue, this Court restated the two fundamental principles that distinguish a public officer from a public employee. Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 200-06 (2001) (holding that, for the purposes of the Open Meeting Law, the position of community college president is not a public office).

The first fundamental principle is that a public officer must serve in a position created by law, not one created by mere administrative authority and discretion. Id. The second fundamental principle is that the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. Id. Both fundamental principles must be satisfied before a person is deemed a public officer. See Mullen v. Clark Cnty., 89 Nev. 308, 311 (1973). Thus, if a position is created by mere administrative authority and discretion or if the person serving in the position is subordinate and responsible to higher-ranking policymakers, the person is not a public officer but is simply a public employee. These fundamental principles are best illustrated by the cases of State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), and Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195 (2001).

In Mathews, the defendant accepted the position of Director of the Drivers License Division of the Public Service Commission of Nevada. 70 Nev. at 120. The Attorney General brought an original action in quo warranto in this Court to

oust the defendant from that position because when the defendant accepted his position in the executive branch he was also serving as a State Senator. Id. The Attorney General argued that the defendant acted in violation of the separation-of-powers provision of the Nevada Constitution. Id. Before this Court could determine the constitutional issue, it needed to have jurisdiction over the original action in quo warranto. Id. Because an original action in quo warranto could lie only if the defendant's position in the executive branch was a public office, the issue before this Court was whether the position of Director of the Drivers License Division was a public office or a position of public employment. Id. This Court held that the Director's position was a position of public employment, not a public office, and thus this Court dismissed the original action for lack of jurisdiction without reaching the constitutional issue. Id. at 124.

In concluding that the Director's position was a position of public employment, this Court reviewed the statutes controlling the state department under which the Drivers License Division operated. Id. at 122. This Court found that the position of Director of the Drivers License Division was created by administrative authority and discretion, not by statute, and that the position was wholly subordinate and responsible to the administrator of the department. Id. at 122-23. In this regard, this Court stated:

> Nowhere in either act is any reference made to the "drivers license division" of the department or to a director thereof. Nowhere are duties

> imposed or authority granted save to the department and to its administrator. It appears clear that the position of director was created not by the act but by the administrator and may as easily by him be discontinued or destroyed. It appears clear that the duties of the position are fixed not by law but by the administrator and may as easily by him be modified from time to time. No tenure attaches to the position save as may be fixed from time to time by the administrator. The director, then, is wholly subordinate and responsible to the administrator. It cannot, then, be said that that position has been created by law; or that the duties which attach to it have been prescribed by law; or that, subject only to the provisions of law, the holder of such position is independent in his exercise of such duties. It cannot, then, be said that he has been invested with any portion of the sovereign functions of the government.

Id. at 122-23.

In DR Partners, this Court was asked to determine whether the position of community college president was a public office for the purposes of the Open Meeting Law, which is codified in chapter 241 of NRS. Although the Open Meeting Law does not define the term "public office" or "public officer," this Court found that the definition of "public officer" in chapter 281 of NRS was applicable because "[t]he Legislature's statutory definition of a 'public officer' incorporates the fundamental criteria we applied in Mathews and Kendall, and is in harmony with those cases, as we subsequently confirmed in Mullen v. Clark County." 117 Nev. at 201.

When this Court applied the fundamental criteria from Mathews and Kendall and the statutory definition from chapter 281 of NRS to the position of community college president, this Court concluded that the position of community college

president was not a public office. DR Partners, 117 Nev. at 202-06. In reaching this conclusion, this Court first found that the position of community college president is not created by the Nevada Constitution or statute, but is created by administrative authority and discretion of the Board of Regents. Id. Second, this Court found that a community college president does not exercise any of the sovereign functions of the state. Id. Instead, a community college president is wholly subordinate to the Board of Regents and simply implements policies made by higher-ranking state officials. Id. As explained by this Court:

> The community college president holds an important position, but the sovereign functions of higher education repose in the Board of Regents, and to a lesser degree in the chancellor, and not at all in the community college president.
>
> * * *
>
> Because the president is wholly subordinate and responsible to the Board, and can only implement policies established by the Board, we conclude that the community college president does not meet the statutory requisites of a public officer set forth in NRS 281.005(1)(b).

Id. at 205-06.

Accordingly, state executive branch employees and local government employees are not public officers because they do not exercise any sovereign functions appertaining to the state executive branch. As a result, the district court correctly determined that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with the state executive

branch or with local governments because such employees do not exercise any sovereign functions appertaining to the state executive branch.

V. The district court did not abuse its discretion in denying NPRI's motion to strike Respondents' motions to dismiss and joinders.

First, NPRI's motion to strike was procedurally improper and invalid because the civil rules do not authorize a party to file a motion to strike another party's motion to dismiss; rather, the civil rules require the party to file an opposition to the motion to dismiss and make its legal arguments in the opposition. Silva v. Swift, 333 F.R.D. 245, 248 (N.D. Fla. 2019); O'Connor v. Nevada, 507 F. Supp. 546, 547-48 (D. Nev. 1981); 5C Wright & Miller, et al., Fed. Prac. & Proc. Civ. § 1380 (3d ed. & Westlaw Apr. 2022 update).

Second, NPRI's motion to strike was procedurally improper and invalid because the Legislature's motion to dismiss was not "another motion" under NRCP 12, given that the Legislature never filed a motion to dismiss under NRCP 12(b) in the prior proceedings. The Legislature did not become a party in this case and was not entitled to file a motion to dismiss under NRCP 12(b) until December 8, 2020, when the district court entered an order granting the Legislature's motion to intervene. On that same date, the district court entered its omnibus order dismissing NPRI's amended complaint based on NPRI's lack of standing, which deprived the district court of subject-matter jurisdiction over NPRI's claims on December 8, 2020. Consequently, in the prior proceedings, the

Legislature never filed a motion to dismiss under NRCP 12(b) at any time before the district court entered its omnibus order dismissing NPRI's amended complaint on December 8, 2020, which thereby deprived the district court of subject-matter jurisdiction over NPRI's claims on that date.

On appeal, this Court reversed the district court's order dismissing the amended complaint based on NPRI's lack of standing and remanded for "further proceedings" on NPRI's claims. NPRI, 507 P.3d at 1211. Based on well-established rules of appellate practice, "[u]pon remand from an appellate court, the lower court is required to proceed from **the point at which the error occurred**." Giancola v. Azem, 109 N.E.3d 1194, 1200 (Ohio 2018) (quoting State ex rel. Douglas v. Burlew, 833 N.E.2d 293, 295 (Ohio 2005) (emphasis added)). Under such circumstances, this Court's remand "returned the parties to the same position they were in prior to the error," Giancola, 109 N.E.3d at 1200, and "[t]he parties are relegated to their prejudgment status and are free to re-plead or re-press their claims as well as defenses." Smedsrud v. Powell, 61 P.3d 891, 896 (Okla. 2002).

In this case, the point at which the error occurred was when the district court entered its omnibus order dismissing NPRI's amended complaint based on NPRI's lack of standing. Therefore, based on this Court's remand, the Legislature was returned to the same position that it held in this case prior to the error. At that point, the Legislature was a new party-defendant that had not filed a motion to

dismiss under NRCP 12(b) in the prior proceedings. Consequently, the Legislature's motion to dismiss is not a successive motion to dismiss that is barred by NRCP 12(g)(2) because the Legislature never filed a motion to dismiss under NRCP 12(b) in the prior proceedings.

In an attempt to avoid this result, NPRI argues that the Legislature filed a motion to dismiss under NRCP 12(b) in the prior proceedings when the Legislature joined the other Defendants in the joint countermotion to dismiss all remaining defendants based on NPRI's lack of standing, which the district court granted on December 28, 2020. However, as just discussed, this Court's remand returned this case to the point at which the error occurred in the prior proceedings, which was when the district court entered its **omnibus order** dismissing NPRI's amended complaint based on NPRI's lack of standing. When, twenty days later, the district court entered its order granting the joint countermotion to dismiss all remaining defendants based on NPRI's lack of standing, the district court did not commit a new and distinct error that was unrelated to its omnibus order dismissing NPRI's amended complaint based on NPRI's lack of standing. Instead, the district court continued the error from its omnibus order by directing the dismissal of all remaining defendants based on NPRI's lack of standing.

Accordingly, upon this Court's remand, this case was returned to the point at which the error occurred in the omnibus order dismissing NPRI's amended

complaint based on NPRI's lack of standing. At that point, the Legislature was a new party-defendant that had not filed a motion to dismiss under NRCP 12(b) in the prior proceedings. Consequently, the Legislature's motion to dismiss was not a successive motion to dismiss that is barred by NRCP 12(g)(2) because the Legislature never filed a motion to dismiss under NRCP 12(b) in the prior proceedings.

Third, even assuming that the Legislature's motion to dismiss was a successive motion to dismiss, it still would not be barred by NRCP 12(g)(2) because the defenses and objections raised in the motion to dismiss were not **available** when the Legislature joined the other Defendants in the joint countermotion to dismiss all remaining defendants based on NPRI's lack of standing. When the district court entered its omnibus order dismissing NPRI's amended complaint based on NPRI's lack of standing, the district court was precluded from considering the merits of any other defenses and objections raised by Defendants because the district court did not have any power to reach the merits, which meant that all other defenses and objections were rendered moot and unavailable. See Righthaven LLC v. Hoehn, 716 F.3d 1166, 1172-73 (9th Cir. 2013) (holding that after the district court granted defendant's motion to dismiss based on plaintiff's lack of standing, the district court lacked subject-matter

jurisdiction to consider the merits of any other defenses and objections raised by defendant because the district court did not have any power to reach the merits).

Therefore, even assuming that the Legislature's motion to dismiss was a successive motion to dismiss, it still would not be barred by NRCP 12(g)(2) because the defenses and objections raised in the motion to dismiss were not available when the Legislature joined in the joint countermotion to dismiss all remaining defendants based on NPRI's lack of standing. At that time, because the district court lacked subject-matter jurisdiction to consider the merits of any defenses and objections except for lack of standing, all defenses and objections were rendered moot and unavailable except for lack of standing. Accordingly, even assuming that the Legislature's motion to dismiss is a successive motion to dismiss, it still would not be barred by NRCP 12(g)(2) because the defenses and objections raised in the motion to dismiss were not **available** when the Legislature joined the other Defendants in the joint countermotion to dismiss all remaining defendants based on NPRI's lack of standing.

Finally, even assuming that the Legislature's motion to dismiss was a successive motion to dismiss, the district court retains broad discretion to consider successive motions to dismiss in order to promote the just, speedy and efficient resolution of important issues in litigation, even if any movants failed to raise the defenses or objections in their earlier motions to dismiss. See Fast Access

Specialty Therapeutics, LLC v. UnitedHealth Grp., Inc., 532 F. Supp. 3d 956, 962 (S.D. Cal. 2021) ("[G]iven that Specialty's preemption defense can still be raised in an answer, a motion for judgment on the pleadings, and at trial, it makes little sense to delay ruling on the issue because it was not raised in United's first motion to dismiss."); Allstate Ins. Co. v. Countrywide Fin. Corp., 824 F. Supp. 2d 1164, 1175 (C.D. Cal. 2011) ("Rather than further delay this case, the Court invokes the 'substantial amount of case law which provides that successive Rule 12(b)(6) motions [to dismiss] may be considered where they have not been filed for the purpose of delay, where entertaining the motion would expedite the case, and where the motion would narrow the issues involved.'" (quoting Doe v. White, No. 08-1287, 2010 WL 323510, at *2 (C.D. Ill. Jan. 20, 2010) (collecting cases))). As explained by the Ninth Circuit, such broad discretion in the district court is necessary because "[d]enying late-filed Rule 12(b)(6) motions [to dismiss] and relegating defendants to the three procedural avenues specified in Rule 12(h)(2) can produce unnecessary and costly delays, contrary to the direction of Rule 1." In re Apple iPhone Antitrust Litig., 846 F.3d 313, 318 (9th Cir. 2017), *aff'd sub nom.* Apple Inc. v. Pepper, 139 S. Ct. 1514, 203 L. Ed. 2d 802 (2019). Consequently, the Ninth Circuit has stated that "as a reviewing court, we should generally be forgiving of a district court's ruling on the merits of a late-filed Rule 12(b)(6) motion [to dismiss]." Apple iPhone, 846 F.3d at 319. In this case, even assuming

that the Legislature's motion to dismiss was a successive motion to dismiss, the district court properly exercised its broad discretion to consider the motion to dismiss in order to promote the just, speedy and efficient resolution of important issues in this litigation.

CONCLUSION

Based on the foregoing, the Legislature asks this Court to affirm the district court's order dismissing NPRI's first amended complaint.

DATED: This **12th** day of August, 2023.

By: /s/ Kevin C. Powers

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Attorneys for Legislature of the State of Nevada

ADDENDUM

NRS 41.031 Waiver applies to State and its political subdivisions; naming State as defendant; service of process; State does not waive immunity conferred by Eleventh Amendment.

1. The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, 485.318, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.010 or the limitations of NRS 41.032 to 41.036, inclusive. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the State, and their liability must be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive.

2. An action may be brought under this section against the State of Nevada or any political subdivision of the State. In any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit. An action against the State of Nevada must be filed in the county where the cause or some part thereof arose or in Carson City. In an action against the State of Nevada, the summons and a copy of the complaint must be served upon:

(a) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and

(b) The person serving in the office of administrative head of the named agency.

3. The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States.

NRS 41.0337 State or political subdivision to be named party defendant.

1. No tort action arising out of an act or omission within the scope of a person's public duties or employment may be brought against any present or former:

(a) Local judicial officer or state judicial officer;

(b) Officer or employee of the State or of any political subdivision;

(c) Immune contractor; or

(d) State Legislator,

➥ unless the State or appropriate political subdivision is named a party defendant under NRS 41.031.

2. No tort action may be brought against a person who is named as a defendant in the action solely because of an alleged act or omission relating to the public duties or employment of any present or former:

(a) Local judicial officer or state judicial officer;

(b) Officer or employee of the State or of any political subdivision;

(c) Immune contractor; or

(d) State Legislator,

➥ unless the State or appropriate political subdivision is named a party defendant under NRS 41.031.

3. As used in this section:

(a) "Local judicial officer" has the meaning ascribed to it in NRS 41.03377.

(b) "State judicial officer" has the meaning ascribed to it in NRS 41.03385.

NRS 41.039 Filing of valid claim against political subdivision condition precedent to commencement of action against immune contractor, employee or officer. An action which is based on the conduct of any immune contractor, employee or appointed or elected officer of a political subdivision of the State of Nevada while in the course of the person's employment or in the performance of the person's official duties may not be filed against the immune contractor, employee or officer unless, before the filing of the complaint in such an action, a valid claim has been filed, pursuant to NRS 41.031 to 41.038, inclusive, against the political subdivision for which the immune contractor, employee or officer was authorized to act.

CERTIFICATE OF COMPLIANCE

1. We hereby certify that this answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point font and Times New Roman type.

2. We hereby certify that, with certain exceptions noted below, this answering brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of this brief exempted by NRAP 32(a)(7)(C), this answering brief is proportionately spaced, has a typeface of 14 points or more, and contains **18,018 words, which exceeds the type-volume limitation of 14,000 words, but we certify that a motion to exceed the type-volume limitation for this brief will be filed pursuant to NRAP 32(a)(7)(D).**

3. We hereby certify that we have read this answering brief, and to the best of our knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. We further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in this brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. We understand that we may be subject

to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **12th** day of August, 2023.

By: /s/ Kevin C. Powers

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Email: kpowers@lcb.state.nv.us
Attorneys for Legislature of the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **12th** day of August, 2023, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of Respondent Legislature's Answering Brief, by means of the Nevada Supreme Court's electronic filing system, directed to:

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/s/ Kevin C. Powers
An Employee of the Legislative Counsel Bureau

INDEX OF LEGISLATURE'S COURTESY COPIES

AFFIDAVIT OF GUY L. ROCHA
ASSISTANT ADMINISTRATOR FOR ARCHIVES AND RECORDS
DIVISION OF STATE LIBRARY AND ARCHIVES
DEPARTMENT OF CULTURAL AFFAIRS

STATE OF NEVADA)
) ss:
CARSON CITY)

I, Guy L. Rocha, being first duly sworn, state that I have personal knowledge and am competent to testify to the following:

1. I am the Assistant Administrator for Archives and Records of the Division of State Library and Archives of the Department of Cultural Affairs of the State of Nevada.

2. Based on my research, I have not found any official records specifically detailing the occupations of state legislators who served in the Nevada Legislature during the 1800s and early 1900s. Information concerning the occupations of state legislators who served in the Nevada Legislature during this period must be obtained from Nevada newspapers that are indexed and from other historical records.

3. The earliest known example that I have been able to find of a state legislator who held a position as a state executive department employee while serving simultaneously as a member of the Nevada Legislature is Assemblyman August C. Frohlich. Mr. Frohlich was elected to the Nevada Assembly in November 1930. During the 1931 Legislative Session, Mr. Frohlich operated the Commercial Soap Company in Reno. After the 1931 Legislative Session, Mr. Frohlich sold his interest in the Commercial Soap Company. During his legislative term, Mr. Frohlich was appointed on February 26, 1932, as a purchasing agent for the State Mental Hospital located in Sparks. The appointment was made by Dr. George R. Smith, the Superintendent of the State Mental Hospital. Mr. Frohlich held his position of state employment until October 1, 1932. I have not found any evidence in Nevada newspapers of an official resignation by Mr. Frohlich from his

00001

seat in the Nevada Assembly before or after Mr. Frohlich accepted his position with the State Mental Hospital. During his legislative term, Mr. Frohlich also was a local candidate in Reno for a seat on the School District Board of Trustees, but he lost at the election held on April 2, 1932. At the general election held on November 8, 1932, Mr. Frohlich was again a local candidate in Reno, and this time he was elected to the Office of Justice of the Peace.

4. Another early example that I have been able to find of a state legislator who held a position as a state executive department employee while serving simultaneously as a member of the Nevada Legislature is Assemblyman Harry E. "Hap" Hazard. Mr. Hazard was elected to the Nevada Assembly in November 1938 while working for the Las Vegas Review-Journal. After the 1939 Legislative Session, Mr. Hazard was appointed by the State Tax Commission as the supervisor of the Liquor Division of the State Tax Commission effective April 16, 1939. Mr. Hazard relocated from Las Vegas to Carson City where Mr. Hazard worked in the Executive Department during the remainder of his legislative term. I have not found any evidence in Nevada newspapers of an official resignation by Mr. Hazard from his seat in the Nevada Assembly before or after Mr. Hazard accepted his position with the State Tax Commission. Mr. Hazard was not a member of the Nevada Legislature during the 1941, 1943 and 1945 Legislative Sessions. In 1946, Mr. Hazard was again elected to the Nevada Assembly. During the 1947 Legislative Session, Mr. Hazard served as the Speaker of the Assembly. While a member of the 1947 Legislature, Mr. Hazard also served as a member of the Board of the Clark County Housing Authority, a local government agency.

5. The earliest known example that I have been able to find of a state legislator who held a position as a local government employee while serving simultaneously as a member of the Nevada Legislature is Assemblyman Mark Richards Averill. Mr. Averill served in the Nevada Assembly during the 1903 Legislative Session, and Mr. Averill also served as the clerk of a local school

district during his legislative term. Another early example is Mr. Averill's daughter, Ruth Averill, who served in the Nevada Assembly during the 1921 Legislative Session. Ruth Averill was a primary school teacher during her legislative term.

DATED this 29th day of April, 2004.

GUY L. ROCHA

Subscribed and sworn to before me this 29th day of April, 2004.

Notary Public in and for the State of Nevada

KAREN KADE
NOTARY PUBLIC - NEVADA
Appt. Recorded in CARSON CITY
No.93-2272-3 My Appt. Exp. Jan. 10, 2005

00003

AFFIDAVIT OF DONALD O. WILLIAMS
RESEARCH DIRECTOR
RESEARCH DIVISION OF THE LEGISLATIVE COUNSEL BUREAU

STATE OF NEVADA)
) ss:
CARSON CITY)

I, Donald O. Williams, being first duly sworn, state that I have personal knowledge and am competent to testify to the following:

1. I am the Research Director of the Research Division of the Legislative Counsel Bureau of the State of Nevada.

2. Based on research conducted by the Research Division of the Legislative Counsel Bureau, beginning with the 1967 Session of the Nevada Legislature, public employees have served as members of the Nevada Legislature during each Regular Session convened over the past 37 years. The following table indicates the number of state legislators who held positions as public employees while serving simultaneously as members of the Nevada Legislature during each Regular Session convened since 1967:

Year of Legislative Session:	Number of state legislators who held positions as public employees:
1967	2
1969	1
1971	2
1973	7
1975	4
1977	7
1979	6
1981	5
1983	7
1985	9
1987	12
1989	13
1991	13
1993	12
1995	10

Year of Legislative Session:	Number of state legislators who held positions as public employees:
1997	12
1999	14
2001	13
2003	14

DATED this 28th day of April, 2004.

DONALD O. WILLIAMS

Subscribed and sworn to before me this 28th day of April, 2004.

Notary Public in and for the State of Nevada

EVELYN BENTON
NOTARY PUBLIC - NEVADA
Appt. Recorded in CARSON CITY
No.02-79243-3 My Appt. Exp. Dec. 12, 2006

OFFICE OF THE SECRETARY OF STATE

DEAN HELLER
Secretary of State

March 25, 2004

The Honorable Brian Sandoval
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701

Dear Attorney General Sandoval,

On March 1, 2004, you issued an opinion to my office, wherein you found that Article 3, Section 1 of the Nevada Constitution bars any employee from serving in the executive branch of government and simultaneously serving as a member of the Nevada State Legislature. Based on that opinion, I hereby request that, as my counsel, you bring an action on my behalf to compel the Legislature to follow the Nevada Constitution, and receive a determination from the Nevada Supreme Court concerning whether the separation of powers doctrine also bars local government employees from simultaneously serving in the Legislature.

As you are aware, there are currently several members of the Nevada State Legislature that are also serving as state executive branch employees, county government employees or city government employees. Based on your opinion, it appears that many or all of these members may be violating the separation of powers doctrine contained in the Nevada Constitution. Because the Legislature has delegated to me the power under NRS 293.124 to enforce all "state and federal laws relating to elections in this state," I believe that action should be taken to require the Legislature to compel its members to serve consistent with the Constitution. In addition, it is imperative that the state of the law be clarified prior to May 3, 2004 when candidate filing begins for the 2004 election.

As we have discussed, I believe that you can proceed on my behalf in one of two ways. The first option would be to petition the Nevada Supreme Court for a writ of mandamus to compel the State Legislature to unseat any member who is currently violating the Constitution. As part of that action, the Supreme Court would be required to determine which legislators are improperly serving in dual positions, including local positions if the court so determines that dual service involving local government employees is prohibited. A second option would be to proceed under NRS 29.010 to reach agreement with the Legislature that a controversy exists and request the Nevada Supreme Court's ruling in the same manner as option one. Because time is of the essence with candidate filing "around the corner," I request that you only proceed under NRS 29.010 if you are able to obtain the Legislature's agreement by March 31, 2004 to proceed in this manner.

ONE HUNDRED ONE NORTH CARSON STREET, SUITE THREE
CARSON CITY, NEVADA 89701-4786
(775) 684-5708 • FAX (775) 684-5717

Because this matter involves compliance with the provisions of the Nevada Constitution, and as set forth above we have little time for appeals or other post judgment relief, I am requesting you bring the above referenced petition in the Nevada Supreme Court; if you determine an alternate legal strategy is appropriate, please consult with me before proceeding on my behalf. Indeed, as we discussed, the Nevada Supreme Court has original jurisdiction to issue writs of mandamus pursuant to the Nevada Constitution Article 6, Section 4 as well as Nevada Revised Statutes Section 34.150, et seq.

Please do not hesitate to contact me if you have any questions or require additional information.

Respectfully,

Dean Heller

DEAN HELLER
Secretary of State

ONE HUNDRED ONE NORTH CARSON STREET, SUITE THREE
CARSON CITY, NEVADA 89701-4786
(775) 684-5708 • FAX (775) 684-5717

H NOTICES
...day's Issue of The Chronicle ... complete list published ... For Church Notices read
...HRONICLE

San Francisco Chronicle

LEADING NEWSPAPER of the PACIFIC COAST

CITY

Weather ...

1865 SAN FRANCISCO, CAL., SATURDAY, OCTOBER 28, 1916 ... VOL. CIX, NO.

...KENHAYN AND FERDINAND IN DEATH GRAPPL...

...D TO ...ATE ...ATER ...UP

...Substitution ...Flat Price, ...nption and ...come, Is ...quiry

...HEARINGS ...TS PILE UP

...Average In... ...n Individual ...Per Cent. ...rvey of ...unts

[illegible]

Illinois Girl to Wed Japanese Will Start for Orient Today

Miss Marie P. Cox of Evanston, Ill., who sails for Japan today to become the bride of Tukyo Yamada, a Japanese dentist of Osaka, whom she met when he was a student at Northwestern University.

Miss Marie P. Cox of Evanston, Ill., to Be Married at Osaka to Dr. Tukyo Yamada

When the Pacific Mail liner Venezuela sets her course today toward the land of the rising sun, the most excited passenger on board will be Miss Marie P. Cox of Evanston, Ill., who is bound for Osaka to be married to the man of her choice, Dr. Tukyo Yamada, a Japanese dentist, who is said to be one of the most successful in Japan.

The wedding will take place on Miss Cox's arrival and will be celebrated with all the dignity and ceremony of the ancient customs of Japan. The romance of the pretty American girl and her husband-to-be began a year and a half ago when Dr. Yamada was a student of dentistry at Northwestern University, Chicago.

[illegible]

...knows that I am going to Japan to marry Mr. Yamada, and while I do not regret my decision, I don't want them to know it. I started for Japan once before, but had to return home, and even then my family did not learn of my plans.

"Dr. Yamada's family, he has written me, is building a beautiful American bungalow for us, fearing I may not like the Japanese houses.

"The only thing that worries me is whether I can find something to do. I have been told that Dr. Yamada is wealthy, although he never mentioned that to me, and that there will be servants so that I will have no housework, but I will teach the Japanese children to speak English if I can..."

[illegible]

Strike of Caf Women In Paris Spreading

PARIS, October 27. ... [illegible]

HUGHES IS CHEERED BY THRONGS AT ROCHESTER

Nominee Makes Short Work of Wilson's Argument in the Latter's Speech at Cincinnati

SAYS THE PRESENT PROSPERITY IS FALSE

Anti-Dumping Provision of Underwood Revenue Bill Is Declared to Be Worse Than Useless

[illegible]

PARTY GETS A SCARE

[illegible]

STANDS FOR PEACE, NOT WAR

[illegible]

(Continued on Page 2, Column 3)

Diver Deutschland Reported Nearing The Virginia Coast

NORFOLK (Va.), October 27.—The German undersea merchantman Deutschland, according to reports in circulation in Norfolk and Baltimore tonight, is due at the Virginia capes in the next few hours, en route to Baltimore.

It is declared she sailed from Bremen two weeks ago and successfully eluded all British patrol boats safely.

It was reported tonight that the Deutschland passed in the capes shortly after nightfall and proceeded up the bay, but this could not be confirmed.

ABOLISH HEALTH BOARD ADVISE SURVEY EXPERTS

Centralization of Authority in Single Commissioner Recommended

[illegible]

OPPOSES FUMIGATION

[illegible]

ADVICE PARTLY FOLLOWED

[illegible]

"The health department was allowed $... for the fiscal year 1916-17. The report finds that ...

(Continued on Page 2, Column 4)

French Liner on Fire Makes Harbor of Fayal in Azores

Steamer Chicago, With Blazing Cargo and 265 Passengers on Board, Wins Race With Death

LONDON, October 27.—The French Line steamer Chicago has arrived at Fayal, Azores island, according to Lloyd's. The utmost is being done to extinguish the fire aboard.

NEW YORK, October 27.—Cable ship news from London received here today stated that the French Line steamship Chicago, which left ... the fire is not serious and that the passengers on board are in no immediate danger.

The Chicago carries only cargo and ...

Proof That Women Mean Business in Politics

Society Leaders break tradition that Politics is too "dirty" for white hands, and have taken the stump.

Mackensen Captures Hirsova Roumanian Army Seizes Two Valleys Petain Is Surrounding Vaux

Desperate Pursuit Is Kept Up on Rear and Flank of Routed Army in Dobrudja

French Commander Leaves Shattered Fortress in Pocket in Drive on Verdun Front

LONDON, October 28, 3:02 A. M.—The German troops on the Transylvania front have reached Campolung, twenty miles within the Roumanian border, says a Petrograd dispatch to the Chronicle.

By ARTHUR S. DRAPER

Special Correspondence of The Chronicle in London

LONDON, October 27.—The defeated Russo-Roumanian army in the Dobrudja is still in flight before Mackensen. Though the invading forces apparently have made no effort as yet to throw troops across the Danube at Cernavoda, they are continuing without pause the pursuit of the enemy ... north.

[illegible]

FERDINAND THREATENED IN TRANSYLVANIA

[illegible]

ROUMANIANS CAPTURE VILLAGE AND HEIGHTS

[illegible]

ROUMANIAN OUTLOOK ON WEST FRONT BRIGHTER

[illegible]

LONDON, October 27.—Steadily the French are closing in on Fort Vaux, the last great stronghold held by the Germans in the arc north of Verdun. Last night Petain's troops edged nearer their objective in operations directed from the west and south. ...

[illegible]

GUNS SMASH DAYS ONLY CONCERTED ATTACK

[illegible]

CHALONS BOMBED BY RAIDING AEROPLANES

[illegible]

LOSSES ON SOMME BEAT 1915 CAMPAIGN

[illegible]

Bullets Fly in Battle With Jitney Bandits

Policeman F. J. Kerr Exchanges Shots With Four Robbers

[illegible]

Cupid Is Outdone In Contest With Imp of Divorce

[illegible]

SEA BAT... FOUGHT ... ENGLI... CHANN...

British Claim Two Destroyers Sunk; One Warship Is Mi... and One Agrou...

ONE EMPTY TRANS... ALSO SENT TO B...

Berlin Denies Loss; 15 Enemy Craft, In... 2 or 3 Fighters, ... or Damaged

LONDON, October 27. ... [illegible]

ONE BRITISH SHIP MISSING; ONE AGR...

[illegible]

BRITISH TROOPSH... SUNK; CREW SAV...

[illegible]

14 ENEMY SHIPS SUNK, SAYS BERL...

[illegible]

under the church law,
every Episcopalian
untry.
previous pastoral let-
h secular rather than
ffairs. It reviewed
e United States and
e Orient, and pointed
ntry the threat that
tionalism which as-
role of group self-
patriotism."
ngers may lie lurking
tern horizon," it as-
ely be averted by a
, which has not al-
in our dealings with

LIP: GAPING"

he church were ad-
anctify their wealth
ly of their substance
it being added that
Armenia, Poland and
e gaping to the sky
dumb appeal to God
letter in part follows:
involved today in
fusion which finds
expression in the
Europe. No self-iso-
art is possible. The
nations are inter-
hreads of a tapestry.
never again be sec-
world is henceforth
me being in a dis-
ering unity, in days
ity whose order and
n. Here and there
ms of lifeless space.
stance in the human
but from the head to
quivering, sensitive
expediency may in
re neutrality of the
annot hold in leash
of the individual cit-
annot be passionless
manhood.

FOR SMUGNESS

at our Nation is not
no ground for smug-
upon us the search-
ity of exalting the
peace and incorpor-
our national life.
often assumes the
group selfishness or
n. Local conditions
t form this disease
nder it breaks forth
rash of war; here in
prosperity which is
manhood to decay.
that in some quar-
sake of gain, still
wheels of industry
souls of her little
allows human life to
o the inventions of
luction from lack of
rds, that heeds but
cry of the poor and
not at peace, even
not at war. If pres-
re to act as peace-
half of the warring
r aspirations be tem-
eflection that we are
e common disease of
uption of war is a
a cause. God hates
mpty peace as much
unrighteous war.

GIVE LITTLE

dly said that in pro-
er swollen wealth,
ribution to the inno-
in Europe is the
e. A few have given
to laying down their
n due proportion, to
e; the vast majority
g. If America comes
rld disorder richer in
rer in manhood, she
n herself the penalty
ife or even of losing

least of all so vast
a one as ours, is

the productive forces of manhood are at the same moment shaped into social order. The only thorough preparedness is that exemplified by Christ, the preparedness of character based upon life with God.

WARRING NATIONS TEACH US

"Would that our peace today were like rivers and our righteousness as the waves of the sea. Then we would be indeed an ensign to the nations. But how different a case it is. The nations now at war have as much to teach us as we have to teach them. They rebuke our worship of comfort and money by the daily offering, upon a reeking altar, of life and treasure; they declare to us that intoxicating liquor, which is so freely and carelessly drunk in our land, is a national menace to be dispensed with at the cost of lowered revenue, but with the gain of heightened virility; they teach us that food is the staff of physical life, not an invitation to daintiness and gluttony; they rebuke our spiritual poverty by the splendor of their spiritual eagerness which, out of their tragedy, brings new visions from God and breeds new virtues in men; they shame our self-indulgence by a degree of self-sacrifice that is royal.

"Whatever apology or explanation may be made, at home or abroad, for the world confusion, it is none the less an outcome and a revelation of unchristian principles that have dominated the life of Western Christendom and of which both the church and the nations have need to repent.

GREED USURPS THRONE

"Greed of possessions, of honor or pleasure have literally dethroned God from his supreme place among men. The sole cure is to exalt God.

"Thus far the church has been only strong enough to see and covet, not strong enough to consummate her ideal. Her own disunion dims her hopes and hinders her progress. A divided church is powerless to create an undivided world.

"History makes plain to us that man's extremity is God's opportunity. Beneath every pall of tragedy lies hidden the glory of God—new visions of faith, new counsels of virtue—to be revealed and discovered by those who look not at the things which are seen, but at things which are not seen, and wrestle with God for a blessing."

Hermon Van Luven Is Buried on Birthday

Late Banker's Funeral Is Held From the Masonic Temple

On what would have been his forty-eighth birthday, had he lived, the funeral of the late Hermon Van Luven, cashier and secretary of the Union Trust Company, was held yesterday from the Masonic Temple, at Oak street and Van Ness avenue.

The services were conducted by California Lodge, No. 1, F. and A. M., of which Van Luven was a member and formerly treasurer. Jesse M. Whited, master of the lodge, officiated, assisted by Acting Senior Warden Harry L. Dewey and Junior Warden Raimon F. Conlisk.

San Francisco Lodge, No. 3, B. P. O. E.; Islam Temple of the Mystic Shrine, and the Scottish Rite bodies were represented. The interment was private.

would be elected President of the United States. Julius Pincus, Portland hop man, took the Wilson end at even money.

Sheviin, a few days ago, backed Hughes to the extent of $10,000 at odds of 10 to 8 in favor of the Republican nominee, so this makes $11,[illegible] posted by him.

MEASURE ALARMS LEGISLATORS ON 'SIDE' PAYROLL

Amendment No. 6 Would Endanger Double Pay if It Carried at Election

SACRAMENTO, October 27.—Some thirty-five or forty legislators in the employ of the State in various capacities are anxiously awaiting the result of the November election, for if the electorate should adopt amendment six on the ballot, known as the ineligibility to office measure, State Controller John S. Chambers probably will refuse to draw warrants in favor of legislators then in the employ of the State. The act is construed to mean that resignations as legislators either before or after election will not be able to circumvent its intent.

Section 19 of the act reads: "No Senator or Assemblyman shall, during the term for which he shall have been elected, hold or accept any office, trust or employment under the State; provided, that this provision shall not apply to any office filled by election by the people."

There are a number of Senators and Assemblymen whose terms expire on January 1, 1917, and it is possible that they might agree to work for the State a month and three-quarters gratis in order to hold their positions, but there are also a number of legislators who will either be re-elected or are holdover Senators.

Company Sues Former President for $7500

Services of Attorney J. L. Taugher Subject of Dispute

The controversy between John L. Taugher, an attorney of this city, and the Moore Filter Company of Portland, Me., was renewed yesterday by the filing in the United States District Court of a suit by the company against Taugher for $7500.

It is alleged that Taugher, while president and director of the company in 1913, had the directors vote to pay him $12,500 for his services, although he was entitled to only $5000.

In a suit in the Federal Court three months ago Taugher was awarded $18,000 for legal services for the company. The company gave notice of appeal.

largest Roumanian seaport, and of the Danube bridgehead, Tchernavoda, brings the Dobrudja [illegible]ement of October 19 to Octobe[r] [illegible] glorious end and the result is [a dec]isive blow to the Roumanian campaign.

"The victorious advance of the allied German, Bulgarian and Turkish troops came at the end of September to a standstill before the strong hostile main positions of Toprai-Sari, Txopadin and Rachova. It was necessary, therefore, to rearrange the positions of our artillery and to organize the reserves and this caused long delay because of the peculiar nature of the Dobrudja war theater.

RUSSIANS HOLD CENTER

"The main hostile positions in the east began at Beilaghiol and ended in the west on the Danube. This position had been strongly fortified prior to the outbreak of the war. Toprai-Sari and Txopadin were constructed like fortresses. They had strong forces as garrisons and were armed with heavy artillery.

"The Russians held the center while the Roumanians had to defend both wings. The general line of the central allies stretched south of the hostile main position from Tatlageacu and Amuzacea Cavaclan and Enigea to the west of Bairu.

"The attack began on the morning of October 19. The weather being bright, the artillery was better able to measure the distances and its fire was more efficient. The right wing of the enemy after two hours of artillery fire and tenacious fighting was thrown from the first positions. On the evening of the first day of the battle the following line had been reached: The heights 32, 70 and 71, southwest of Tuzla, and the heights south of Mura-Tanu-Burun, south of Toprai-Sari. Farther to the west the enemy on this day was detained by uninterrupted attacks which forced him from several points of support.

TUZLA OCCUPIED

"On October 20 the battle was continued with the utmost energy. The fighting for Toprai-Sari especially was violent and the enemy had evacuated the district south of Tuzla. Tuzla itself was occupied without any fighting. In the evening the right wing

The Turkish troops showed great bravery and took prisoner more than 1500 Russians.

"On October 21 the battle concentrated around Toprai-Sari and Txopadin, which were the keys to the situation. Masked artillery and infantry attacks of the central allies against the position south of Toprai-Sari forced the enemy to yield at midday.

"Field Marshal von Mackensen, with his staff, observed from Height 90 the retreat of the hostile masses as they streamed backward and under the influence of our most efficient artillery fire at many places their retirement was turned into a mad flight.

"After the fall of Toprai-Sari and Txopadin, the main resistance of the enemy seemed to have been broken. On the evening of this hot battle day the central allied troops stood along a line from Techirghel-Mulciova, north of Toprai-Sari-Txopadin-Sapata, to Razal. The pursuit was continued, and our artillery during the night was brought ahead into the new positions.

WARSHIPS ENTER FRAY

"On October 23, seven Russian warships tried to operate from the sea between Constanza and Tuzla against the right wing of the central allies, but the ships were not successful, since they were forced by counter measures to keep a long distance away from the coast.

"No time was left to the defeated enemy for the defense of Constanza if he wanted to save himself. Reinforced by German and Bulgarian infantry, the Bulgarian cavalry captured the Roumanian support, and on the same evening the right wing of the pursuing troops reached Islamtepe and Kalarup.

"On October 23, the defeated enemy once more tried to concentrate his forces near Medijidia. Fresh Russian forces were thrown into the engagement as soon as they arrived. These troops were routed in the same quick procession, and in the evening Medjidie was captured after a hard struggle. To the west we occupied the heights northeast of Rachova.

"Army aeroplanes contributed much to our success by excellent reconnoitering.

00009

"The Royal Tiara," a Felix Boyd Story, Will Begin in The Bee

THE SACRAMENTO BEE

SACRAMENTO, CAL., SATURDAY EVENING, OCTOBER 28, 1916 —32 PAGES

...nce Loaf Can Be Sold ...r 10 Cents With a Profit for All—Riverside Baker

..., October 28.—John H. Newberry, a baker here, declared ...ent to-day that a twenty-four-ounce loaf of bread can be ...10 cents with a profit to all concerned.

...erry's figures for the cost of production for a bakery using ...arrels of flour a day are:

...ana hard wheat, $9.21 per barrel; labor, working up each ...other costs, per barrel, $1.58. Total, $12.64.

GOOD PROFIT FOR BAKERS.

...figured 200 twenty-four-ounce loaves to the barrel of ...t of production of 7½ cents a loaf, which he said could be ...he retailer at 8½ cents a loaf, by a bakery working up ...s of flour per day, with a profit of $40 a day.

...ed his price of flour, in spite of higher figures in Los ...an Francisco by a resume of wheat and milling costs.

...Bay Bakers Defend Increased Cost

...NCISCO, October 28.—Increased prices of bread were defended ...a statement by the baking expert of a large flour com... ...e cost of production on the basis of an output of a thou... ...s a day is, according to the statement:

..., $28.40; labor, $4; wrapping, 90 cents; repairs, 30 cents; ...ery, $5.17; advertising and soliciting, $1.22; interest and ...s; office expenses, $1.67; depreciation, $1.46; interest on in... ...ents; broken loaves (5 per cent. allowance), $1.44. Total ...es, $46.32.

...ment concludes that "anybody who knows merchandising ...the basis of these costs a retail price of 5 cents per loaf ...evitable as long as flour remains at its present figure."

ROAD WORK IS TO START NOV. 1ST.

County Engineer Will Be Instructed to Begin Surveying on That Date

BONDS MAY BRING RECORD RETURN

If Sold Before December 20th They Will Command Higher Price Than Similar Issues

Active work of surveying for the complete system of highways in Sacramento County, as provided for in the bond issue a few weeks ago, will begin within the next few days.

At a conference yesterday afternoon between the County Supervisors, F. B. McKevitt, Chairman of the County Highway Commission; J. C. Havely, representing the Good Roads Association; District Attorney Bradford, County Auditor Lincoln Williams, and County Treasurer Frank K. Christophel, arrangements were made to advance $12,000 out of the general fund of the county so that survey work may begin at once. The money will be paid back into the general fund when the bonds are sold some time around the first of the year.

Will Call Meeting.

Following a decision to advance the funds, Chairman McKevitt announced that he will call a meeting of the Highway Commission for Tuesday, October 31st, and County Engineer R. M. Morton will be instructed to begin work on November 1st, the day following.

Morton will at once organize his staff of surveyors and they will be put into the field with the hope of getting far enough along so that contracts may be let during the Winter months for road work to begin in the early Spring. There will be at least two surveying gangs with possibly three or four. Surveys will be made in both the Fourth and Fifth Supervisorial Districts.

Record Price.

J. C. Havely, speaking for President Peltier of the Good Roads Association, told the Supervisors that if the bonds were printed and the sale set for December 15th to 20th, the bonds would bring the highest price ever paid in the State of California for similar bonds. He said that President Peltier had made inquiries among bond men and it was the opinion of all that the sale should take place around December 15th to 20th, and that the premium offered would be exceedingly high. ... estimated that the premium would run in the neighborhood of $50,000.

Following the conference, the Supervisors passed a resolution ordering bids to be submitted on November 5th for the printing of the bonds. The Supervisors hope to have the bonds printed in time to advertise their sale for December 15th to 20th.

To Draw Coin as Needed.

Under an opinion rendered by District Attorney Bradford the Supervisors authorized the County Highway Commission to draw on the general funds as needed up to a total of $12,000. The money used by the Highway Commission will be divided equally between the road funds of the Fourth and Fifth Supervisorial Districts and will be refunded out of the premium to be paid when the bonds are sold.

ENGLAND MAY EASE UP ON BLACKLIST

Reply to Restrictive Trade Measure Received by the State Department; To Be Published Later

SOME FIRMS ARE ALREADY OFF LIST

Points Raised by Reply Expected to Result in Further Diplomatic Representations

WASHINGTON, October 28.—Great Britain's note in reply to American representations against the commercial blacklist was received to-day at the State Department. Arrangements regarding its publication will be made later.

It is understood to reiterate the contention for the right to blacklist, but offers methods of relief to Americans in certain circumstances.

Answers American Note.

The British note is in reply to the American note of July 28th, which denounced the blacklist as "an arbitrary interference with neutral trade," and "inconsistent" with true justness, sincere amity and impartial fairness which should characterize dealings of friendly governments with one another." The names of some American firms already have been taken from the blacklist; and the British note is understood to offer means of removing others.

Terms of Reply.

The British note is understood to take the line of argument it is unprecedented for a neutral to claim that a belligerent should in effect compel its subjects to trade with the enemy, and that it violates no law for the British Government to prevent its subjects from doing so. While the British Government admits the rights of all persons in neutral countries to engage in legitimate commercial transactions, it argues that such a right does not limit the right of other governments to restrict the activities of their own Nationals.

Point at Issue.

The point at issue in the controversy is whether the nationality or the domicile of the owner of goods gives character as neutral or belligerent. Previously, Great Britain and the United States have argued that domicile was decisive regardless of nationality. The continental European position has been that nationality was decisive. In the previous negotiations over the blacklist England took a position between the two theories.

The subject probably will be carried on in further diplomatic correspondence.

STOCKYARDS TO BE BUILT HERE

$30,000 Plant Planned for West Sacramento; Work to Start in Thirty Days

Stockyards with buildings to cost $30,000 are projected for West Sacramento, and will be in operation early next year, according to J. W. ..., who has been engaged in planning the details for several months. A lease for the property was signed to-day.

Work is to be begun on the yard grading and buildings within the ...

MINISTERS OPPOSED PARADE

General Protest of Clergymen Caused Last-Minute Hitch in "Johnson Unanimous Club" Tour

OFFICERS ADMIT NOW THAT DATE WAS BAD

Plans Now Being Laid for Automobile Pageant Through This City Next Saturday Night

Ministerial opposition has proven an effective obstacle to the automobile tour of Sacramento County, which was to have been made to-morrow and next Sunday by the Johnson Make It Unanimous Club.

The contention that politics and religion do not mix has received recognition by the committee in charge of the tour, so the medium whereby many persons had planned to get into personal touch with hundreds of voters in neighboring communities has been abandoned.

Langford's Statement.

While various reasons for the action are ascribed, Rev. S. Fraser Langford, pastor of the First Baptist Church, to-day made the unequivocal statement that he was one of several clergymen in this city who had protested against the tour. He said:

"I protested, and most emphatically, against the tour. And I am prepared to protest again if necessary.

"I know that other ministers, one of them in an outside town, took similar action.

"I don't believe the tour would have been good politics. I was against it for this reason and also particularly because I don't believe politics should be intruded upon the day of worship.

Churches for Johnson.

"I understand the purpose of the tour is in the interests of ... also. No? Well, that was my understanding.

"Practically all of the religious voters of this county are going to vote for Johnson, and they would have resented the intrusion of any political demonstration on Sunday.

"I am convinced I share the general opinion of clergymen and churchgoers in Sacramento."

Harrison's Protest.

There were other protestants besides himself according to the Rev. William E. Harrison, pastor of the Westminster Presbyterian Church. He said:

"I called at Governor Johnson's headquarters when I learned of the proposed tour to register a protest. I gave my card to the Secretary then and told her the church-going voters in this county would vote for the Governor and that it would be an insult to hold such a political parade on the Sabbath. I do not think it would be at all proper. And it would be unnecessary.

"There were other ministers who protested, several from the outside, but I don't care to disclose their identity."

Bills' Change of Heart.

Charles R. Bills, President and Manager of the Pioneer Fruit Company, after apparent enthusiasm for the project only a few days ago, informed the committee, of which he is Chairman, that he did not favor the tour and it would have to be ...

(Continued on page five.)

LOS ANGELES COUNTERFEITER

Blue Sky ... Califor... Many ...

Report of Commis... Wildcat Schemers ... Than a Millio... Were Deni... Depa...

FIGURES showing ... hundreds of thou... lege of securing i... motion schemes, are ... State Commission of ... Johnson to-day, by t... Department in dealing ... the report.

In the first twel... 1915, to September 1, ... is shown by Commissio... of stocks of bonds of ... by the Blue Sky Law ... bought up by the publ...

California Business ...

During the same time, ... by the report, California ... second place among all th... the Union in the number ... tions doing business withi... aries, sixth in the amoun... invested in corporate ente... also sixth in the amount ... earnings, being exceeded ... two instances only by th... New York, New Jersey, ... setts, Pennsylvania and Il...

Commission's Big ...

In the value of stocks ... approved issues, the busi... department since it was ... has averaged approximat... million dollars per day, ... holidays included, the C... having authorized the ...

Gas Bombs, With ... Smell, Exploded i... Union Restaur...

SAN FRANCISCO, Oct... One of the horrors ... warfare, namely, g... are becoming a dai... of the strike of th... ... of the largest confectio... light lunch establishme... hundreds of ... was compelled ... ceful and sickening odo... investigation disclose... this glass cell ... had been dropped ... the ... spreading ... throughout the ... tious day several small ... had been dropped ... hour.

One of the biggest ... also cleared yesterday ... an attempt to "bomb" ... spoiled by the pickets ... ... accidentally dropped the ... package on the sidewalk ... her way in. Those who ... "bombed" cafe found ... ... in others they ... ed to finish their lunc... the liquid having ... ... required ... the ... of the unfortunat... Not one suspect has ... tioned so far.

Girls, Ghosts and Witches Are Y. W. ... Halloween ...

Witches and ghosts ... traditional role in the ... lowe'en parties given ...

...USED BY ...LARS IS ...LIEF

...ck Bedroom of ...me and Are ...eved to Have ...ged Men

... In one case com... ...n on the part of ... a gun and in another ... lieved to have drugged ... ...rated with astound... ...y Thursday morning ... Street and in 206 ... The two crimes ... within a few minutes ... ...nd are believed to ... ...ork of two men. The ... Mary Sickle, 206 ... than a block away ... Street, where Steve... ...drat other Southern ... live and were ap... ...d in a robbery at...

... Over Bed.

...he sleeps in a front ... ...fant son, was awak... ...ay morning and saw ... over her bed. They ... ...ed covers away and ... about the mattress ... ...one of the burglars ... the little child and ... ...rted to ask that her ... ...jured, the other hu... ...he muzzle of a re... ...er throat and warned ... Just about that ... ...he frightened as a ... ...d and ran out of the ... ...ned a few seconds ... ...ued their search for ...

... Value Taken.

...was taken, and as ... ...ined in her bed she ... ...he adjoining room ... ...oney. Within a few ... the house. The po... ...of the affair in the ...

...ch the two men were ... ...ived to have been ... ...ouse at 1915 Fourth ... ...ount of $20 or $30 in ... The burglars also ... ...of checks and some ... ...lare, but they threw ... ...rd with it in their ...

AMENDMENT TO TAX LAW IS UPHELD

Superior Judge Sturtevant Decides Corporations Protesting Collections by State Cannot Recover

SAN FRANCISCO, October 28.—Superior Judge George A. Sturtevant of this city in a decision handed down here to-day, decided that corporations protesting the collection of taxes by the State during the last four years can not recover them, and that the amendment to the tax laws, passed by the Legislature four years ago, is constitutional.

Wells Fargo Suit.

Judge Sturtevant's decision was handed down in the action of the Wells, Fargo Express Company against the State, which sought to collect approximately $50,000 in taxes, which the plaintiff has paid under protest during the last four years and which it alleged the State had no right to collect.

Judge Sturtevant held the company could not recover the taxes paid and the State had the right to so collect them.

Assistant Attorney General Raymond Benjamin, who handled the case for the State, said to-day Judge Sturtevant's decision was one of the most important handed down in years. He said that substantially $9,000,000 in taxes collected by the State from corporations doing an interstate business was affected.

FORMER SOLICITOR ADMITS EMBEZZLEMENT

R. Brewster, former insurance solicitor who was employed by Waters, Crouch and Waters, yesterday afternoon pleaded guilty to petty embezzlement. Justice of the Peace Shirley was called in to hear the case by Police Judge J. J. Henderson, who stated that he did not care to preside.

Sentence was suspended in the case, as Brewster has promised to make good the $97 which he misappropriated.

PROHIBITION ...

—brock of Vine Street
r her aunt, Mrs. Mary
ncoln, Neb.

League of the Wesley
ntertained at the home
. Warner last evening.
ns were enjoyed. About
were present.

ency committee of the
rs Association will
p. m. Tuesday at the
Chairman, J. C. Van
nial Heights.

Stahl entertained the
Club at her home last
occasion was marked
nds of the members be-
as guests of the even-

G CLASS
PENS MONDAY NIGHT

October 23.—The
class will convene at the
h School on Monday
a course opened last
nly a few of the women
d for the class knew of

local Women have
the class. Sessions
every Monday evening.

Oak Park Parlor, Native Sons.

Rev. W. B. Re[illegible] has been called to fill the pulpit [illegible] South Methodist Church at Wheatland.

Albert Steen, Fred Steen and William Collins bagged a score of cottontails in a hunting trip to Franklin yesterday.

START McFARLAND CLUB.

OAK PARK, October 25.—Friends of Ray D. McFarland, candidate for the Assembly, met at Red Men's Hall last evening and organized a McFarland Non-partisan Club. The following officers were elected: John Orr, President; R. E. O'Neill, Vice President; Gordon Oliver, Secretary; Dr. Henry Buckman, Treasurer. The Membership Committee appointed consists of N. D. Hopton, Cliff Yost, George Uhl, D. H. Holdridge, Manuel Cassell, John Gabelsih, R. G. Currier, F. H. Honston, J. H. Silva and J. O. Schreck.

GHOST DANCE TO-NIGHT.

RIVERBANK (Yolo Co.), October 25.—The ghost dance to be given by the Riverbank Improvement Club will be held to-night. A jitney service from Washington will be maintained.

TION IS WHEREVER ITTED TO VOTE

League's Attitude Men Who Oppose Laws Getting Nowhere

use of Representatives in 914, Representative Hob- ome, speaking for the League, declared the ition forces of the Na- make prohibition the ssue of the next election, gain a two-thirds ma- two houses of Congress, an administration which he open nor under- cover ten this reform."

15, the national office of oon League issued an of- ment from Washington to that the United prohibi- of the country would g other things, any can- President "who advocates tate's Rights policy of h the liquor traffic."

ng candidates for Presi- Woodrow Wilson and ang Hughes. Neither of prohibitionist, but each his attitude. President Wil- lared openly he is against or rather he has refused answer to a question that his view, and that he has rious times so expressed

hibition Is Losing.

last Fall a prohibition to the State Constitution ted by a majority larger

CHAMBERS STUDIES AMENDMENT NO. 6

Proposal to Make Legislature Members Ineligible to State Jobs Is Perplexing

State Controller John S. Chambers is investigating the effect on the jobs of a score or more of State Senators and Assemblymen, should Amendment No. 6 on the ballot carry at the election next month.

The Proposed Measure.

This is the measure proposed to prohibit members of the Legislature holding positions of public trust during the term of their office. Section 19 reads as follows:

"No Senator or Assemblyman shall, during the term for which he shall have been elected, hold or accept any office, trust or employment under the State; provided, that this provision shall not apply to any office filled by election by the people.

Controller Chambers said today that his attention has been called to the possibilities of the proposed amendment and that he is now considering it, although it will be impossible to state the policy of his office in the matter of drawing warrants, in the event that the measure is adopted, until he has had opportunity to study the provision of the law more fully.

The passage of the law would most inconvenience the held-over Senators and Assemblymen, although legislators whose terms expire January 1, 1917, and who are not seeking re-election would be affected considerably.

Those Affected.

Among those who will be inconvenienced by the passage of the law are the following: Senator E. S. Birdsall of Auburn, Secretary of State Lunacy Commission; Senator E. J. Tyrrell of Oakland, attorney for the same Commission; Assemblyman Frank H. Mouser of Los Angeles, Inspector for the State Motor Vehicle Department; Senator Henry W. Lyon of Los Angeles, Assistant Labor Commissioner; Assemblyman Lee P. Gebhart of Sacramento, who is with the State Pharmacy Commission; Assemblyman Harry A. Encell of Berkeley, Examiner for the State Railroad Commission; Assemblyman Charles Godsil of San Francisco, of the State Pharmacy Board; Assemblyman Walter W. Chenoweth of Sacramento, head auditor at the Folsom State Prison; Assemblyman A. E. Shartell of Alturas, attorney for the State Inheritance Tax Commission.

MEETING CALLED FOR IRRIGATION DISTRICT

After adopting resolutions endorsing the Granville irrigation project the Sacramento Realty Board yesterday called a meeting of residents of the Cosumnes District in an endeavor to assist in the forming of an irrigation district under the Wright Act. The meeting of representatives of the district, located southeast of Sacramento, will be held in the office of D. W. Carmichael at 4 o'clock Monday afternoon.

Followed Discussion.

The resolutions followed discussions of the formation of irrigation districts in El Dorado, Amador and Sacramento Counties and from a business standpoint ation project shown to that is under the provisi Wright Act. The propose district will include ab acres. It is believed the toward its formation will at the meeting Monday.

RESTA OUT, AITK WINS AUTO

NEW YORK, October Aitken won the gold trop lile race at the Sheep track here to-day. His 56.37.65. Galvin was 56.45.31. Wilcox third, th

Dario Resta dropped out after breaking all speed for fifty miles. His time an average of 109.55 mil A broken crank shaft car.

Aitken's average of 102 hour is a new American seven seconds behind record.

DISCHARGED SA FIRES BULLET IN

SAN FRANCISCO, Oct W. Kent, Assistant Secr milk company, rallied nett, one of his travelli off the road and inform

ADVERTISEMENTS

Hon. Gill Wilson

Amendments to Constitution

and

Proposed Statutes

with

Arguments Respecting the Same

To be Submitted to the Electors of the State of California at the General Election on

TUESDAY, NOVEMBER 7, 1916

Index, ballot titles with numbers, and conclusions appear in last pages
Proposed changes in provisions are printed in black-faced type
Provisions proposed to be repealed are printed in italics

INELIGIBILITY TO OFFICE.

6

Initiative measure amending Section 19 of Article IV of Constitution. Declares that no Senator or Member of Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; provided that this provision shall not apply to any office filled by election by the people.

YES	
NO	

The electors of the State of California present to the secretary of state this petition, and request that a proposed amendment to section nineteen of article four of the Constitution of the State of California, as hereinafter set forth, be submitted to the people of the State of California for their approval or rejection, at the next ensuing general election, or as provided by law. The proposed amendment is as follows:

The people of the State of California do enact as follows:

Section nineteen of article four of the Constitution of the State of California is hereby amended to read as follows:

PROPOSED AMENDMENT.

Section 19. No senator or member of assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state; provided, that this provision shall not apply to any office filled by election by the people.

Section nineteen of article four, proposed to be amended, now reads as follows:

EXISTING PROVISIONS.

Section 19. No senator or member of assembly shall, during the term for which he shall have been elected, *be appointed to any civil office of profit* under this state *which shall have been created, or the emoluments of which have been increased, during such term*, except such offices as may be filled by election by the people.

ARGUMENTS IN FAVOR OF INELIGIBILITY TO OFFICE AMENDMENT.

It has always been the aim of any republican form of government to remove the legislative branch of the government from the control of the executive branch. It is evident that where a member of the legislature is holding a paid position in the executive department of the state that the separation which should exist between these two branches of the government is at an end. The American theory has always been that those who execute the laws should not be the same individuals as those who make the laws, yet one who is both an assemblyman and a member of the executive department is in just that position. It would not be an edifying spectacle, nor would it make for civic decency, to see such an individual introducing a bill in his legislative capacity which would increase the pay he would receive in his executive capacity.

There is another reason why this measure should pass. We should remember that a legislator who is holding a position on the state pay roll is too apt to allow the wishes of the one responsible for his appointment to dictate the manner in which his vote shall be cast. A man in such a position, is, to say the least, not in that independent frame of mind which should be possessed by the ideal legislator.

There can be no doubt that a vote "Yes" on this measure will tend materially to raise the standard of the California legislature of the future.

RICHMOND P. BENTON,
Assemblyman Sixty-sixth District.

While some of our most efficient officials have been men holding appointment under the state, at the same time being members of the legislature, the practice is one which some day may be subjected to abuse. The proposed law to render a member of the legislature ineligible to any office under the state, other than an elective office, during the term for which he shall have been elected, is therefore in the interest of good government and should be adopted.

Once such a law is written into our statutes, we eliminate the incentive which a legislator may have to favor a law creating a position to which later he may contemplate appointment.

The legislator should have no selfish interest in connection with the enactment of any law or the creation of any office. The proposed law without doubt will very largely eliminate the possible selfish considerations.

Here and there the state, by reason of such a law, will actually suffer, as it frequently happens that the most highly specialized man for work in connection with a certain department of state is a member of the legislature. There are instances of that sort today, where, by the enactment of such a law, the state will lose the services of especially qualified and conscientious officials.

To my mind, however, the advantages from the proposed law wholly outweigh the disadvantages, and the net result of such a law will be beneficial alike to the legislature and to the public.

DR. JOHN R. HAYNES.

ARGUMENT AGAINST INELIGIBILITY TO OFFICE AMENDMENT.

To pass this constitutional amendment is in effect to say that every governor and member of the state legislature is dishonest and without integrity or character, because those who urge its adoption are loud in their cries that it will prevent the governor from bartering for legislative votes by appointing senators and assemblymen who favor administration measures to state offices, and that it will further destroy the incentive for members of the legislature to vote with the governor in the hope of obtaining a state position in reward thereof. It is certainly a sad commentary on the integrity of our governors and legislators by thus stigmatizing executive and legislative service. And even if this amendment should pass, could not the governor, were he so lacking in integrity and unmindful of the obligations of his high office, secure the same legislative votes by appointing relatives or political friends of such servile members of the legislature who would sell their honor and barter the trust reposed in them by their constituents? Its adoption must inevitably fail in the accomplishment of any purpose except to close other avenues of political service to legislators.

Do you realize that under this amendment a senator or assemblyman could not take a civil service examination for a state position?

In many instances it makes for efficiency to appoint upon commissions members of the legislature who have given careful study to the needs, aims and objects of a commission created or a law enacted.

Another argument advanced by the proponents of this measure is that members of the legislature who are appointed to state offices receive two salaries, but the records will show that leaves of absence are invariably obtained by such appointees during sessions of the legislature and the actual time of the legislative session is generally about eighty days every two years. Thus the people lose nothing, while the incumbent of a state position who is a member of the state legislature is better fitted through his legislative experience for the discharge of his duties.

The American people love fair play; they like to reward efficient and faithful public service by promotion, yet the adoption of this proposed measure would render every member of the legislature ineligible for promotion to higher positions and graver duties and responsibilities, however efficient and meritorious his services in the legislature may have been.

THOS. P. WHITE,
Presiding Judge, Police Court, Los Angeles.

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February 4, 2002

Assemblyman Lynn Hettrick
1475 Glenwood Dr.
Gardnerville, NV 89410-8981

Dear Assemblyman Hettrick:

You have asked whether a person who is employed as a Senior Petroleum Chemist with the State Department of Agriculture ("DOA") may become a candidate for a seat in the Nevada Legislature and, if elected, serve as a member of the Nevada Legislature while remaining an employee of the DOA. To answer your question, we must consider certain limitations under state law that are contained in the Nevada Revised Statutes, the Nevada Administrative Code, the Nevada Constitution and the common law.[1]

BACKGROUND

Based on the information provided to this office, a person employed by the DOA is considering becoming a candidate for a seat in the Nevada Legislature. It is our understanding that the person is currently employed by the DOA as a Senior Petroleum Chemist in the Bureau of Petroleum Technology of the Division of Measurement Standards, and that the person is in the classified service of the state. Because the person is in the classified service of the state, we will discuss the relevant limitations under state law that apply to classified employees. In addition, we believe that a discussion of the relevant limitations under state law that apply to unclassified employees will be helpful to a fuller understanding of the issues involved. Therefore, where appropriate, we will discuss the relevant limitations under state law that apply to classified employees and unclassified employees.

[1] Ordinarily, we would also consider certain limitations under federal law that are contained in the Hatch Political Activity Act, which is commonly known as the Hatch Act. 5 U.S.C.A. §§ 1501-1508 (West 1996). However, according to the information provided to this office, the employee in question requested an advisory opinion from the United States Office of Special Counsel pursuant to 5 U.S.C.A. § 1212(f) (West 1996), concerning application of the Hatch Act. In response to that request, the Office of Special Counsel opined that the employee in question would not be violating the Hatch Act by becoming a candidate for or serving in the Nevada Legislature while remaining an employee of the DOA. In light of this opinion, we will limit our discussion to issues of state law.

DISCUSSION

As a general rule of state law, a person may hold more than one position in state government so long as the positions are not legally incompatible. See Reilly v. Ozzard, 166 A.2d 360 (N.J. 1960). There are two types of legal incompatibility under state law:

> The first is a constitutional or statutory incompatibility, which is one so declared by the Constitution or legislative enactment. The second is a common-law or functional incompatibility, which is declared by courts without the aid of specific constitutional or statutory prohibition when the two offices are inherently inconsistent or repugnant, or when the occupancy of two offices is detrimental to the public interest.

Adams v. Commonwealth, 268 S.W.2d 930, 931 (Ky. Ct. App. 1954). Thus, to determine whether two positions in state government are legally incompatible under state law, we must examine statutory and regulatory law, constitutional law and common law. We begin with Nevada's statutory and regulatory law, which are codified in the Nevada Revised Statutes and the Nevada Administrative Code.

A. Nevada Revised Statutes and Nevada Administrative Code

Chapter 281 of NRS contains certain limitations that apply to public officers and public employees. With regard to incompatible public offices, NRS 281.055 provides:

> 1. Except as otherwise provided in subsection 2, no person may:
> (a) File nomination papers for more than one elective office at any election.
> (b) Hold more than one elective office at the same time.
> 2. The provisions of subsection 1 shall not be construed to prevent any person from filing nomination papers for or holding an elective office of any special district (other than a school district), such as an irrigation district, a local or general improvement district, a soil conservation district or a fire protection district, and at the same time filing nomination papers for or holding an elective office of the state, or any political subdivision or municipal corporation thereof.

With few exceptions, NRS 281.055 prohibits a person from holding more than one elective office at the same time. Thus, pursuant to NRS 281.055, a member of the Nevada Legislature is prohibited from holding most other elective offices while serving in the Nevada Legislature. However, by it plain terms, NRS 281.055 is limited in its application to elective offices. See Op. Nev. Att'y Gen. No. 82 (Oct. 23, 1963) (concluding that NRS 281.055 does not apply to a person seeking to hold one elective office and one appointive office). Because a position of public employment with the DOA is not an elective office, it

is the opinion of this office that NRS 281.055 does not prohibit an employee of the DOA from becoming a candidate for or serving in the Nevada Legislature while remaining an employee of the DOA.

(1) Classified Employees

Chapter 284 of NRS contains certain limitations that apply to persons in the classified service of the state. A person in the classified service of the state is subject to the code of regulations adopted by the director of the Department of Personnel and approved by the Personnel Commission pursuant to NRS 284.155. In addition, the Personnel Commission is required to adopt in the code of regulations for classified employees a system for administering disciplinary measures against classified employees. NRS 284.383.

Pursuant to the code of regulations for classified employees, disciplinary measures may be taken against a classified employee who engages in "[p]rohibited political activity." NAC 284.650. Prohibited political activity is defined in NAC 284.770 as follows:

> Employees may vote as they choose and express their political opinions on all subjects without recourse, except that no employee may:
>
> 1. Directly or indirectly solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, monetary, or nonmonetary contribution for a political purpose from anyone who is in the same department and who is a subordinate of the solicitor.
>
> 2. Engage in political activity during the hours of his state employment to improve the chances of a political party or a person seeking office, or at any time engage in political activity to secure a preference for a promotion, transfer or increase in pay.

Based on the provisions of NAC 284.770, the act of becoming a candidate for or serving in the Nevada Legislature is not, by itself, prohibited political activity under the code of regulations for classified employees. Rather, the code of regulations prohibits a classified employee from directly or indirectly soliciting or receiving political contributions from certain other employees. The code of regulations also prohibits a classified employee from engaging in certain political activity during the hours of his state employment. Finally, the code of regulations prohibits a classified employee from engaging in political activity to secure a preference for a promotion, transfer or increase in pay. While these prohibitions may limit a classified employee as to the time, place or manner for engaging in certain political activity, the prohibitions do not prevent a classified employee from becoming a candidate for or serving in the Nevada Legislature. Thus, a classified employee of the DOA may become a candidate for or serve in the

Nevada Legislature so long as the classified employee observes the limitations on political activity set forth in NAC 284.770.

It should be noted, however, that the code of regulations for classified employees allows each appointing authority, with the approval of the Personnel Commission, to prohibit its classified employees from engaging in activities that are "inconsistent, incompatible, or in conflict with their duties as employees, or with the duties, functions, or responsibilities of their appointing authorities or agencies by which they are employed." NAC 284.738. Thus, with the approval of the Personnel Commission, an appointing authority like the DOA could prohibit its classified employees from becoming a candidate for or serving in the Nevada Legislature pursuant to NAC 284.738 and 284.742, which provide:

> **NAC 284.738 Conflicting activities.** Employees shall not engage in any employment, activity, or enterprise which has been determined to be inconsistent, incompatible, or in conflict with their duties as employees, or with the duties, functions, or responsibilities of their appointing authorities or agencies by which they are employed.
>
> **NAC 284.742 Appointing authorities authorized to define conflicting activities.**
>
> 1. Each appointing authority may determine and describe in writing, subject to the approval of the commission, those specific activities which, for employees under his jurisdiction, are considered inconsistent, incompatible, or in conflict with their duties as employees.
>
> 2. The appointing authority shall provide a copy to each employee.
>
> 3. In making this determination, the appointing authority shall consider the prohibitions described in NAC 284.650 and NAC 284.746 to 284.762, inclusive.

If the DOA were to adopt written rules pursuant to NAC 284.738 and 284.742 which prohibited a classified employee of the DOA from becoming a candidate for or serving in the Nevada Legislature, it is likely that those rules would be constitutional. In a series of cases dating back to 1947, the United States Supreme Court has repeatedly upheld federal and state laws and regulations prohibiting government employees from engaging in partisan political activities, including becoming candidates for and serving in state legislatures. See Broadrick v. Oklahoma, 93 S. Ct. 2908 (1973); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 93 S. Ct. 2880 (1973); United Pub. Workers of Am. (C.I.O.) v. Mitchell, 67 S. Ct. 556 (1947); Oklahoma v. United States Civil Serv. Comm'n, 67 S. Ct. 544 (1947). Based on those Supreme Court decisions, lower federal courts have also consistently rejected constitutional challenges to laws and regulations prohibiting government employees from engaging in partisan political activities. See Alexander v. Merit Sys. Prot. Bd., 165 F.3d 474 (6th Cir. 1999); Williams

v. United States Merit Sys. Prot. Bd., 55 F.3d 917 (4th Cir. 1995); Fela v. United States Merit Sys. Prot. Bd., 730 F. Supp. 779 (N.D. Ohio 1989); Connecticut v. United States Merit Sys. Prot. Bd., 718 F. Supp. 125 (D. Conn. 1989). Thus, if the DOA were to adopt written rules pursuant to NAC 284.738 and 284.742 which prohibited a classified employee of the DOA from becoming a candidate for or serving in the Nevada Legislature, it is the opinion of this office that those rules would be constitutional.

At present, however, this office is not aware of any written rules adopted by the DOA pursuant to NAC 284.738 and 284.742 that would prohibit a classified employee of the DOA from becoming a candidate for or serving in the Nevada Legislature. In the absence of such written rules, it is the opinion of this office that a classified employee of the DOA may become a candidate for or serve in the Nevada Legislature without violating chapter 284 of NRS or the code of regulations for classified employees, so long as the classified employee observes the limitations on political activity set forth in NAC 284.770.

If a classified employee is elected as a member of the Nevada Legislature, the classified employee has several options concerning leave and pay while the classified employee is performing legislative duties. With regard to regular and special sessions, the classified employee has a statutory right to take leave without pay during each regular and special session. Specifically, NRS 284.360 provides that:

> Leave of absence [without pay] must be granted to any person holding a position in the classified service to permit acceptance of a position in the legislative branch during a regular or special session of the legislature, including a reasonable period before and after the session if the entire period of employment in the legislative branch is continuous.

Alternatively, the classified employee could request administrative leave with pay during each regular and special session based on regulations adopted by the Department of Personnel pursuant to NRS 284.345. According to those regulations, an appointing authority or the Department of Personnel may grant administrative leave with pay to a classified employee for "[h]is participation in, or attendance at, activities which are directly or indirectly related to the employee's job or his employment with the state but which do not require him to participate or attend in his official capacity as a state employee." NAC 284.589. Under these regulatory provisions, the classified employee would not be entitled to leave with pay during a regular or special session. Rather, the decision to grant leave with pay during a regular or special session would rest exclusively in the discretion of the appointing authority or the Department of Personnel.

With regard to the legislative interim, NRS 218.044 requires the appointing authority to grant leave to the classified employee during the legislative interim for attendance at certain committee meetings if the classified employee is a member of the committee in his

official capacity as a legislator. Such leave must be granted with or without pay at the discretion of the appointing authority.[2]

Finally, if the classified employee is granted leave with pay during a regular or special session or during a legislative interim, the classified employee is prohibited by NRS 281.127 from receiving legislative pay for his service as a legislator. Conversely, if the classified employee is granted leave without pay during a regular or special session or during a legislative interim, the classified employee is entitled to receive legislative pay for his service as a legislator.[3]

(2) Unclassified Employees

Unlike classified employees who enjoy extensive statutory protections, unclassified employees are at-will employees who serve at the pleasure of their appointing authorities. See Nigro v. Nevada State Bd. of Cosmetology, 103 Nev. 496, 497-98 (1987); Ham v. Nevada, 788 F. Supp. 455, 460-61 (D. Nev. 1992). When a person is employed at-will, the employer has the right to discharge the person for any reason, so long as the reason does not violate public policy. Dillard Dep't Stores, Inc. v. Beckwith, 115 Nev. 372, 376 (1999); Wayment v. Holmes, 112 Nev. 232, 235-36 (1996).

In Nevada, there is a public policy that allows unclassified employees to serve in public office if such service meets certain statutory requirements. This public policy is codified in NRS 284.143, which provides:

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[2] In full, subsection 3 of NRS 218.044 provides:

3. Any private employer who has more than 50 employees or any public employer, who employs a person who is a member of the legislature shall grant leave to the employee, with or without pay at the discretion of the employer, for the employee's attendance during the legislative interim at a:

(a) Meeting of the legislative commission of which the employee is a member or a subcommittee of the legislative commission of which the employee is a member;

(b) Meeting of the interim finance committee of which the employee is a member or other legislative committee or subcommittee created by statute of which the employee is a member;

(c) Meeting of an interim committee which conducts a study or investigation pursuant to subsection 5 of NRS 218.682 of which the employee is a member or any other committee established by the legislature which conducts an interim legislative study of which the employee is a member; or

(d) Meeting of a committee, other than a legislative committee, if the employee is a member of the committee in his official capacity as a legislator.

[3] In full, NRS 281.127 provides:

1. Unless otherwise provided by law, no public officer or employee whose salary is set by law, whether or not he serves the state in more than one capacity, may be paid more than one salary for all services rendered to the state.

2. The provisions of subsection 1 do not apply to any public officer or employee for salaries:

(a) For any ex officio duties he may be required by law to perform.

(b) For teaching during off-duty hours in an educational program sponsored by a governmental authority if he is not regularly employed in such program by that governmental authority.

> Except as otherwise provided in NRS 281.127, a person in the unclassified service of the state who has been appointed or employed for service in a department, division, agency or institution, other than a director of a department, may pursue any other business or occupation or hold any other office for profit if:
>
> 1. The other employment does not conflict with the duties he is required to perform in his unclassified service;
> 2. The other employment does not conflict with the hours during which he is required to perform those duties; and
> 3. He has obtained the approval of his supervisor.

Pursuant to NRS 284.143, an unclassified employee, other than a director of a state department, is permitted to become a candidate for and serve in the Nevada Legislature if the employee obtains the approval of his supervisor and the employee is otherwise able to carry out his duties as an unclassified employee and his duties as a candidate for or member of the Nevada Legislature without undue conflict. Thus, it is the opinion of this office that an unclassified employee may become a candidate for and serve in the Nevada Legislature if the unclassified employee satisfies the requirements of NRS 284.143. However, if the unclassified employee is unable to satisfy the requirements of NRS 284.143, it is the opinion of this office that the appointing authority has the right to prohibit the unclassified employee from becoming a candidate for or serving in the Nevada Legislature and that such a prohibition would be constitutional.

If the unclassified employee is able to satisfy the requirements of NRS 284.143 and is elected as a member of the Nevada Legislature, the unclassified employee has several options concerning leave and pay while performing legislative duties. First, "[a]ny person in the unclassified service . . . may be granted by the appointing authority a leave of absence without pay for a period not to exceed 6 months." NRS 284.360. Thus, an unclassified employee may request leave without pay during each regular and special session. However, unlike classified employees who have a statutory right to leave without pay during each regular and special session, unclassified employees do not have a statutory right to leave without pay during each regular and special session. Rather, for unclassified employees, the ability to obtain leave without pay during each regular and special session rests exclusively in the discretion of the appointing authority.

With regard to leave with pay during each regular and special session, an unclassified employee is subject to the same statutory and regulatory provisions as a classified employee. Thus, an appointing authority or the Department of Personnel may grant administrative leave with pay to an unclassified employee for "[h]is participation in, or attendance at, activities which are directly or indirectly related to the employee's job or his employment with the state but which do not require him to participate or attend in his official capacity as a state employee." NAC 284.589. Under these regulatory provisions,

the unclassified employee would not be entitled to leave with pay during a regular or special session. Rather, the authority to grant leave with pay during a regular or special session would rest exclusively in the discretion of the appointing authority or the Department of Personnel.

With regard to the legislative interim, NRS 218.044 requires the appointing authority to grant leave to the unclassified employee during the legislative interim for attendance at certain committee meetings if the unclassified employee is a member of the committee in his official capacity as a legislator. Such leave must be granted with or without pay at the discretion of the appointing authority.

Finally, if the unclassified employee is granted leave with pay during a regular or special session or during a legislative interim, the unclassified employee is prohibited by NRS 281.127 from receiving legislative pay for his service as a legislator. Conversely, if the unclassified employee is granted leave without pay during a regular or special session or during a legislative interim, the unclassified employee is entitled to receive legislative pay for his service as a legislator.

B. Nevada Constitution

Many state constitutions contain provisions that directly address the issue of a person holding more than one position in state government. Scott M. Matheson, Eligibility of Public Officers and Employees to Serve in the State Legislature: An Essay on Separation of Powers, Politics and Constitutional Policy, 1988 Utah L.R. 295, 355-69 (1988). For example, some state constitutions contain broad provisions that prohibit any public officer in any branch of government from accepting or occupying another public office. See, e.g., Powell v. State, 898 S.W.2d 821 (Tex. Crim. App. 1994); State ex rel. Hill v. Pirtle, 887 S.W.2d 921 (Tex. Crim. App. 1994). Some state constitutions contain more limited provisions that prohibit members of the state legislature from accepting or occupying another public office. See, e.g., Hudson v. Annear, 75 P.2d 587 (Colo. 1938); McCutcheon v. City of St. Paul, 216 N.W.2d 137 (Minn. 1974). Finally, some state constitutions contain provisions that prohibit members of the state legislature from accepting or occupying any position of employment in the state government, whether or not the position is considered to be a public office. See, e.g., Begich v. Jefferson, 441 P.2d 27 (Alaska 1968); Parker v. Riley, 113 P.2d 873 (Cal. 1941); Stolberg v. Caldwell, 402 A.2d 763 (Conn. 1978).

The Nevada Constitution does not contain any broad provisions with regard to incompatible public offices. See State ex rel. Davenport v. Laughton, 19 Nev. 202, 206 (1885) (holding that "[t]here is nothing in the constitution of this state prohibiting respondent from holding the office of lieutenant-governor and the office of state librarian."); Crosman v. Nightingill, 1 Nev. 323, 326 (1865) (holding that there is nothing in the constitution prohibiting a person from holding the offices of Lieutenant Governor

and warden of the state prison at the same time). Rather, the Nevada Constitution contains only a few specific provisions concerning incompatible public offices. See Nev. Const. art. 4, § 9; art. 5, § 12; art. 6, § 11. Based on the facts provided to this office, those specific provisions would not be applicable to the employee in question under current circumstances.[4]

Even though the Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would be applicable to the employee in question under current circumstances, the Nevada Constitution does contain a general separation-of-powers provision that, in certain circumstances, could prohibit a person from holding more than one position in state government. In particular, the separation-of-powers provision in section 1 of article 3 of the Nevada Constitution provides:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

In State ex rel. Josephs v. Douglass, 33 Nev. 82 (1910), the Nevada Supreme Court considered the constitutionality of a statute that made the Secretary of State the ex officio Clerk of the Supreme Court. The petitioner argued that the statute violated the separation-of-powers provision. Id. at 91-92. Although the court found that the statute was unconstitutional, it declined to rule on the separation-of-powers issue. Id. Instead, the court based its decision on other constitutional grounds. Id. Specifically, the court stated:

> It has been urged that as these two offices appertain to separate and distinct coordinate departments of the state government, it would be in violation of article 3 of the Constitution to combine them, but as this contention is not clearly manifest, both offices being mainly ministerial in character, and as the question can be determined upon another view of the case, we give this point no consideration further than to observe that it emphasizes the fact that the two offices are distinct, and that the duties of one do not pertain to the duties of the other.

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[4] We note that, with few exceptions, section 9 of article 4 prohibits a person from holding a civil office of profit under this state if the person holds "any lucrative office under the Government of the United States or any other power." See State ex rel. McMillan v. Sadler, 25 Nev. 131, 173 (1899) (holding that a person who accepted an appointment to a federal office "became incapable of legally holding the office of state senator."); State ex rel. Nourse v. Clarke, 3 Nev. 566 (1867). For the purposes of this opinion, we assume that the employee in question does not hold any lucrative office under the Federal Government or any other power.

Id. at 92. No other reported case from the Nevada Supreme Court applies the separation-of-powers provision to a person who holds more than one public office or to a person who holds a public office and a position of public employment. Cf. State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), in which the separation-of-powers issue was raised against a member of the Nevada Legislature but was not addressed on its merits by the court. Because the Nevada Supreme Court has not directly addressed this issue, we must turn to court decisions from other jurisdictions for guidance in this area of the law.

At least one state court has held that the separation-of-powers provision in its state constitution does not apply to the issue of incompatible public offices because that issue is addressed in other, more specific provisions of the constitution. Attorney General v. Meader, 116 A. 433, 434 (N.H. 1922). Considering that the issue of incompatible public offices is specifically addressed in the Nevada Constitution in section 9 of article 4, section 12 of article 5 and section 11 of article 6, it could be argued that the Framers intended those provisions to be the exclusive constitutional basis for determining whether a person is holding incompatible public offices. Such an interpretation of the constitution is unlikely, however, because of the numerous court decisions which have held that the doctrine of separation of powers applies to the issue of incompatible public offices. Therefore, to fully answer your question, we must determine whether the separation-of-powers provision in the Nevada Constitution would prohibit an employee of the DOA from becoming a candidate for or from serving in the Nevada Legislature.

A member of the Nevada Legislature holds an elective office that is expressly created in article 4 of the Nevada Constitution. Thus, a member of the Nevada Legislature exercises powers properly belonging to the legislative department of state government. The separation-of-powers provision prohibits "persons charged with the exercise of powers properly belonging to one of these departments" from exercising "any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Nev. Const. art. 3, § 1. Thus, the critical issue under the separation-of-powers provision is whether a person employed by the DOA could be found to be exercising functions appertaining to the executive department of state government that would make his employment in the executive department incompatible with his service as a legislator in the legislative department. On this issue, the cases from other jurisdictions are in conflict. Because the cases are in conflict, we believe that it will be helpful to review those cases in some detail.

In State ex rel. Barney v. Hawkins, 257 P. 411, 412 (Mont. 1927), an action was brought to enjoin the state from paying Grant Reed his salary as an auditor for the state board of railroad commissioners while he served as a member of the state legislature. The complaint alleged that Reed was violating the separation-of-powers provision in the state constitution because he was occupying a position in the executive branch of state government at the same time that he was serving as a member of the state legislature. At the time, the separation-of-powers provision in the Montana Constitution provided that "no

person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others." The complaint also alleged that Reed was violating section 7 of article 5 of the state constitution, which provided that "[n]o Senator or Representative shall, during the term for which he shall have been elected, be appointed to any civil office under the State." Id. at 412-13. The Montana Supreme Court framed the issue it was deciding as follows:

> The only question for us to decide is: Is the position of auditor, held by Grant Reed, a civil office? For, if it be a civil office, he is holding it unlawfully; and, if it be not a civil office, he is not an officer, but only an employee, subject to the direction of others, and he has no power in connection with his position, and is not exercising any powers belonging to the executive or judicial department of state government. In the latter event, article 4 of the Constitution [separation of powers] is not involved.

Id. at 413.

After considering voluminous case law concerning the definition of a "civil office," including cases from Nevada that we will discuss below, the court determined that Reed was not exercising any portion of the sovereign power of state government when he was acting as an auditor for the board of railroad commissioners and that, therefore, Reed did not occupy a civil office. Id. at 418. Rather, the court found that Reed was simply an employee "holding a position of employment, terminable at the pleasure of the employing power, the board of railroad commissioners." Id. Thus, because Reed did not occupy a civil office, the court concluded that he had "no powers properly belonging to the judicial or executive department of the state government, for he is wholly subject to the power of the board, and, having no powers, he can exercise none; and therefore his appointment was not violative of article 4 of the Constitution [separation of powers]." Id.

The reasoning of the Montana Supreme Court was followed by the New Mexico Court of Appeals in State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1094-95 (N.M. Ct. App. 1991). In Stratton, the Attorney General argued that two members of the state legislature were violating the separation-of-powers provision in the state constitution because the legislators also occupied positions as a teacher and an administrator in local public school districts. Id. at 1088. At the time, the separation-of-powers provision in the New Mexico Constitution was identical to the separation-of-powers provision interpreted by the Montana Supreme Court in Hawkins: "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others." Id. at 1094. Like the Montana Supreme Court, the New Mexico Court of Appeals determined that a violation of the separation-of-powers provision could occur only if the members of the legislature were invested in their positions as school teacher and school administrator with sovereign power that properly belonged to another branch of government. Id. Because only public officers

exercised sovereign power, the court determined that the separation-of-powers provision "applies [only] to public officers, not employees, in the different branches of government." Id. at 1095. After considering the nature of the public school positions, the court concluded that "[p]ublic school instructors and administrators are not 'public officials.' They do not establish policy for the local school districts or for the state department of education." Id. at 1094. Instead, "[a] school teacher employed by a common school district is [an] employee, not [an] officer, and the relationship between school teacher and school board is contractual only." Id. at 1095 (internal quotations omitted). Therefore, because the school teacher and school administrator were not public officers, but simply public employees, the court held that they were not barred by the separation-of-powers provision from being members of the legislature. Id.

The Colorado Supreme Court has also adopted this view. Hudson v. Annear, 75 P.2d 587, 588-89 (Colo. 1938) (holding that a position as chief field deputy for the state income tax department was not a civil office, but a position of public employment, and that therefore a legislator could occupy such a position without violating Colorado's separation-of-powers provision). See also Jenkins v. Bishop, 589 P.2d 770, 771-72 (Utah 1978) (Crockett, J., concurring in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would not prohibit a legislator from also being a public school teacher); State v. Osloond, 805 P.2d 263, 264-67 (Wash. Ct. App. 1991) (holding that a legislator who served as a judge pro tempore in a criminal case did not violate the principle of separation of powers as recognized in Washington, which does not have an express separation-of-powers provision in its constitution).

In stark contrast to the foregoing court decisions are several court decisions from Indiana, Oregon and Nebraska. The court decisions from Indiana and Oregon are especially notable because the language in the separation-of-powers provisions of those states more closely resembles the language in Nevada's separation-of-powers provision.

In State ex rel. Black v. Burch, 80 N.E.2d 294 (Ind. 1948), actions were brought to prevent the state from paying four members of the state legislature salaries that they had earned while occupying positions with various state commissions and boards in the executive branch of government. After reviewing the relevant statutes relating to these positions, the court held that the legislators' positions in the executive branch "are not public offices, nor do they in their respective positions perform any official functions in carrying out their duties in these respective jobs; they were acting merely as employees of the respective commission or boards by whom they were hired." Id. at 299. In other words, "[i]n performing their respective jobs, none of these [legislators] were vested with any functions pertaining to sovereignty." Id. Having determined that the legislators occupied positions of public employment, rather than public offices, the court's next task was to determine whether such public employment in another branch of state government violated Indiana's separation-of-powers provision, which provided at the time that "no person, charged with official duties under one of these departments, shall exercise any of

the functions of another." Id. The court framed the issue as follows:. "[I]t now becomes necessary for this Court to determine what is the meaning of the phrase 'any of the functions of another," as set out in the above quoted section of the Constitution." Id.

In interpreting the use of the term "functions," the court noted that the term "power" had been used instead of the term "functions" in the original draft of the provision. Id. at 302. However, the term "functions" was inserted in the final version of the provision that was adopted by the drafters of the constitution. Id. The court then stated that "[i]t would seem to us that these two words are interchangeable but, if there is any distinction, the term 'functions' would denote a broader field of activities than the word 'power.'" Id. The court also quoted extensively from the decision in Saint v. Allen, 126 So. 548 (La. 1930), in which the Louisiana Supreme Court held that a member of the state legislature was prohibited from being employed by the executive department of state government pursuant to the separation-of-powers provision in the Louisiana Constitution, which provided at the time that "[no] person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others." In particular, the Louisiana Supreme Court held that:

> It is not necessary, to constitute a violation of the article, that a person should hold office in two departments of government. It is sufficient if he is an officer in one department and at the same time is employed to perform duties, or exercise power, belonging to another department. The words "exercise power," speaking officially, mean perform duties or functions.

Saint, 126 So. at 555.

Based on the Louisiana case and other court decisions, the Indiana Supreme Court in Burch concluded that:

> In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department, the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an employee of an officer, even though he is performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the cases before us.

80 N.E.2d at 302.

The reasoning of the Indiana Supreme Court was followed by the Oregon Supreme Court in Monaghan v. School Dist. No. 1, Clackamas County, 315 P.2d 797 (Or. 1957). In that case, the court was asked "to determine whether or not Monaghan is eligible for employment as a teacher in the public schools of this state while he holds a position as a member of the [state] House of Representatives." Id. at 799. At that time, the separation-of-powers provision in the Oregon Constitution provided that "no person charged with official duties under one of these departments, shall exercise any of the functions of another." Id. at 800. The legislator argued that the term "official duties" was synonymous with the term "functions," and that therefore the separation-of-powers provision applied only to a person holding a public office in more than one department of state government and not to person merely occupying a position of public employment. Id. at 801. The court flatly rejected this argument:

> It is not difficult to define the word "official duties." As a general rule, and as we think the phrase is used in the section of the constitution, they are the duties or obligations imposed by law on a public officer. 67 C.J.S. Officers § 110, p. 396; 28 C.J.S. Duty, p. 597. There can be no doubt that Mr. Monaghan, as a legislator, is "charged with official duties." But the exercise of the "functions" of a department of government gives to the word "functions" a broader sweep and more comprehensive meaning than "official duties." It contemplates a wider range of the exercise of functions including and beyond those which may be comprehended in the "official duties" of any one officer.
>
> It may appear to some as a construction of extreme precaution, but we think that it expresses the considered judgment and deliberation of the Oregon Convention to give greater force to the concepts of separation by thus barring any official in one department of government of the opportunity to serve any other department, even as an employee. Thus, to use the language of O'Donoghue v. United States, supra [289 U.S. 516, 53 S. Ct. 743], in a sense, his role as a teacher subjugates the department of his employment to the possibility of being "controlled by, or subjected, directly or indirectly, to the coercive influence of" the other department wherein he has official duties and vice versa. (Emphasis supplied.) In the Burch case, supra, 80 N.E.2d 302, when considering the word "functions" in its similar setting in the Indiana Constitution, the court observed that the term "functions" denotes a broader field of activities than the word "power."
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> * * *
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> Our conclusion is that the word "functions" embodies a definite meaning with no contradiction of the phrase "official duties," that is, he who exercises the functions of another department of government may be either an official or an employee.

Id. at 802-03. Although acknowledging that a public school teacher was not a public officer, the court concluded, nevertheless, that a public school teacher was a public employee who was exercising one of the functions of the executive department of state government. Id. at 804-06. Therefore, the court held that Monaghan could not be employed as a public school teacher while he held a position as a member of the state legislature. Id.; see also Jenkins, 589 P.2d at 773-77 (Ellett, C.J., concurring and dissenting in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would prohibit a legislator from also being a public school teacher).

After the decision in Monaghan, the Oregon Constitution was amended to expressly permit legislators to be employed by the State Board of Higher Education or to be a member of any school board or an employee thereof. In re Sawyer, 594 P.2d 805, 808 & n.7 (Or. 1979). The amendment, however, did not apply to other branches of state government. Id. In Sawyer, the Oregon Supreme Court was asked whether the state's separation-of-powers provision prohibited a judge from being regularly employed as a part-time professor at a state-funded college. The court answered in the affirmative, stating that:

> It is true that Judge Sawyer is not a full-time teacher. In our opinion, however, a part-time teacher regularly employed for compensation by a state-funded college to perform the duties of a teacher also performs "functions" of the executive department of government within the meaning of Article III, § 1, as construed by this court in Monaghan.

Id. at 809. The court noted, however, that "[w]e do not undertake to decide in this case whether the same result would necessarily follow in the event that a judge should occasionally, but not regularly, lecture at a state-funded college, but without other responsibilities as a teacher." Id. at 809 n.8.

Finally, in State ex rel. Spire v. Conway, 472 N.W.2d 403 (Neb. 1991), the Attorney General brought an action claiming that the separation-of-powers provision of the Nebraska Constitution prohibited a person from occupying a position as an assistant professor at a state-funded college while simultaneously serving as a member of the state legislature. At the time, Nebraska's separation-of-powers provision provided that "no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others." Unlike most other courts, the Nebraska Supreme Court determined that, under certain circumstances, an assistant professor at a public college could be considered to be holding a public office. Id. at 406-07. However, despite this determination, the court found that the public officer-public employee distinction was not "determinative of the [separation-of-powers] issue now under consideration, for article II does not speak in terms of officers or employees; it speaks of persons 'being one of' the branches of government." Id. at 408. Rather, the court found

that "[t]he unusual expression 'being one of these departments' is not clear; accordingly, construction is necessary. One thing that is clear, however, is that 'being one of these departments' is not intended to be synonymous with 'exercising any power of' a branch." Id. at 409. After considering the text and history of the Nebraska Constitution, the court determined that the provision should be construed to read, "no person or collection of persons being [a member of] one of these departments." Id. at 412. Based on this construction, the court held that the separation-of-powers provision "prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch." Id. The court then applied this construction to conclude that an assistant professor at a state college is a member of the executive branch and that a legislator, therefore, could not occupy such a position during his term in the legislature. Id. at 414-16. Specifically, the court held that:

> Although we have neither been directed to nor found any case explicitly stating that the state colleges are part of the executive branch, there are but three branches, and the state colleges clearly are not part of the judicial or legislative branches.
>
> The Board of Regents of the University of Nebraska performs a function for the university which is identical to that of the Board of Trustees of the Nebraska State Colleges. While the Board of Regents is an "independent body charged with the power and responsibility to manage and operate the University," it is, nevertheless, an administrative or executive agency of the state. As the regents are part of the executive branch, so, too, are the trustees.
>
> Since the Board of Trustees, which governs the state colleges, is part of the executive branch, those who work for those colleges likewise are members of that branch. Respondent, as an assistant professor at the college, is thus a member of the executive branch within the meaning of article II.
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> * * *
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> Respondent is therefore a member of one branch of government, the executive, exercising the powers of another, the legislative, and, as a consequence, is in violation of article II of the state Constitution.

Id. at 414-15 (citations omitted).

If the Nevada Supreme Court were to follow the reasoning of the courts of Indiana, Oregon and Nebraska, rather than the reasoning of the courts of Montana, New Mexico and Colorado, an employee of the executive branch could not, pursuant to this state's separation-of-powers provision, serve as a member of the Nevada Legislature. At this juncture, we note that if the Nevada Supreme Court were to adopt such a holding, its

decision most likely would not affect a member's seat in the Nevada Legislature, but would only affect his public office or position of public employment in the other branch of state government. Section 6 of article 4 of the Nevada Constitution provides that each House of the Nevada Legislature shall be the judge of the qualifications of its own members. Courts in other states have consistently held that such a constitutional provision prevents the judicial branch from reviewing the determination of the legislative branch to seat a member, even if the member who is seated by the legislative branch is holding a public office or occupying a position of public employment in another branch of government in violation of the state's separation-of-powers provision. See State v. Evans, 735 P.2d 29, 30-33 (Utah 1987); State ex rel. Biggs v. Corley, 172 A. 415, 420-23 (Del. 1934); Conway, 472 N.W.2d at 407-08; Monaghan, 315 P.2d at 799. In such situations, state courts generally have limited their review to determining whether the member of the legislature should be ousted from his public office or position of public employment in the other branch of government. Id. In other words, if a member of the legislature is seated by the other members of his house, state courts generally will not disturb that decision. Those courts will, however, decide whether a member of the legislature may continue to hold a public office or occupy a position of public employment in another branch of government.

For the purposes of this opinion, though, the next issue is whether the Nevada Supreme Court is likely to adopt the holdings of the courts of Indiana, Oregon and Nebraska. Although we cannot determine with any reasonable degree of certainty whether the Nevada Supreme Court would adopt those holdings, we do believe that the decisions of those courts are not consistent with the text and structure of the Nevada Constitution. In particular, while we agree with the courts of Indiana and Oregon that the term "functions" is distinct in meaning from other terms such as "powers" or "duties," we do not believe that the meaning ascribed to the term "functions" in Burch and Monaghan is consistent with the structure and organization of the government in this state. Thus, despite the holdings of the courts of Indiana, Oregon and Nebraska, it is the opinion of this office that Nevada's separation-of-powers provision would not prohibit an employee of the DOA from serving in the Nevada Legislature. While we cannot say with any certainty that the Nevada Supreme Court would agree with our opinion, we do believe that our opinion is supported by the text and structure of the Nevada Constitution and by the concept of the "citizen-legislator," which is a concept that is the cornerstone of an effective, responsive and qualified part-time legislative body.

It is a fundamental rule of constitutional construction that a constitution must be interpreted in its entirety and that each part of the constitution must be given effect. State ex rel. Herr v. Laxalt, 84 Nev. 382, 386 (1968). Therefore, the separation-of-powers provision in the Nevada Constitution cannot be read in isolation, but rather must be construed in accordance with the constitution as a whole. Thus, the meaning of the phrases "no persons charged with the exercise of powers properly belonging to one of these departments" and "shall exercise any functions, appertaining to either of the others" cannot be based on a bare reading of the separation-of-powers provision alone. Rather, these

phrases must be read in light of the other parts of the constitution which specifically enumerate the persons who are to be charged with exercising the powers and functions of state government. As stated by the Nevada Supreme Court:

> [A]rticle 3 of the constitution . . . divides the state government into three great departments, and directs that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." As will be noticed, it is the state government as created by the constitution which is divided into departments. These departments are each charged by other parts of the constitution with certain duties and functions, and it is to these that the prohibition just quoted refers.

Sawyer v. Dooley, 21 Nev. 390, 396 (1893).

According to the Nevada Supreme Court, the prohibition in section 1 of article 3 applies only to persons who are charged by other parts of the constitution with exercising powers or duties belonging to one of the three departments of state government. In other words, for the purposes of the separation-of-powers provision, the officers who are prohibited from exercising functions appertaining to another department of state government are limited to those officers in the legislative, executive and judicial departments who are expressly given powers and duties under the Nevada Constitution.

This construction of the separation-of-powers provision in the Nevada Constitution is consistent with the Utah Supreme Court's construction of an identical separation-of-powers provision in section 1 of article V the Utah Constitution. As to that provision, the Utah Supreme Court has held:

> [T]he prohibition of section 1, is directed to a "person" charged with the exercise of powers properly belonging to the "executive department." The Constitution further specifies in Article VII, Section 1, the persons of whom the Executive Department shall consist. Thus it is the "persons" specified in Article VII, Section 1, who are charged with the exercise of powers belonging to the Executive Department, who are prohibited from exercising any functions appertaining to the legislative and judicial departments.

State v. Gallion, 572 P.2d 683, 687 (Utah 1977); accord Robinson v. State, 20 P.3d 396, 399-400 (Utah 2001).

Consequently, a constitutional officer is an officer of the legislative, executive or judicial department who is "charged with the exercise of powers properly belonging to one of these departments." Nev. Const. art. 3, § 1; see also People v. Provines, 34 Cal. 520 (1868). No other person may exercise the powers given to a constitutional officer by the

constitution. As a result, when the constitution grants powers to a particular constitutional officer, "their exercise and discharge by any other officer or department are forbidden by a necessary and unavoidable implication. Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department, or person." King v. Board of Regents, 65 Nev. 533, 556 (1948) (quoting State ex rel. Crawford v. Hastings, 10 Wis. 525 (1860)). Thus, the constitutional powers of each department may be exercised only by the constitutional officers from that department to whom the powers have been assigned.

Even though it is only the constitutional officers of each department who may exercise the constitutional powers given to that department, the Framers realized that each department would also be charged with the exercise of certain nonconstitutional functions. Accordingly, the Framers provided for the creation by statute of nonconstitutional officers who could be charged by the Legislature with the exercise of nonconstitutional functions. See Nev. Const. art. 15, §§ 2, 3, 10 and 11. As observed by the Nevada Supreme Court:

> [T]he framers of the constitution decided for themselves that the officers named [in the constitution] were necessary and should be elected by the people; but they left it to the legislature to decide as to the necessity of additional ones, whether state, county, or township . . . The duty of deciding as to the necessity of any office, other than those named in the constitution, is placed upon the legislature.

State ex rel. Perry v. Arrington, 18 Nev. 412, 417-18 (1884). As a result, the Nevada Constitution recognizes two distinct types of offices, "one which is created by the Constitution itself, and the other which is created by statute." Douglass, 33 Nev. at 93 (quoting People v. Bollam, 54 N.E. 1032 (Ill. 1899)).

Like the framers of other state constitutions, the Framers of the Nevada Constitution could have simply stated that a constitutional officer shall not exercise any "powers" appertaining to another department of state government. However, the Framers of the Nevada Constitution provided that a constitutional officer shall not exercise any "functions" appertaining to another department of state government. We believe that the Framers used the term "functions" because they realized that, in each department of state government, the functions of the department would be performed by constitutional officers and by nonconstitutional officers. Thus, had the Framers used the term "powers" in section 1 of article 3, the separation-of-powers provision would have been too restrictive in its meaning, for it may have been construed simply to mean that a constitutional officer in one department could not exercise the powers entrusted to the constitutional officers in another department. To avoid this restrictive construction, we believe that the Framers used the term "functions" to ensure that a constitutional officer in one department could not perform the sovereign functions entrusted to both constitutional officers and nonconstitutional officers in another department.

Therefore, by using the term "functions," we believe that the Framers intended to prohibit a constitutional officer in one department from holding a constitutional office or nonconstitutional office in another department, because persons holding constitutional or nonconstitutional offices in another department exercise the sovereign functions of state government. Since public employees do not exercise the sovereign functions of state government, we do not believe that the Framers intended to prohibit a constitutional officer from holding a position of public employment in another department of state government. Our conclusion is based on a well-established body of case law which holds that public officers are the only persons who exercise the sovereign functions of state government and that public employees do not exercise such sovereign functions.

In State ex rel. Kendall v. Cole, 38 Nev. 215 (1915), the Nevada Supreme Court discussed extensively the attributes of a public office, and the court also cited numerous cases that had been decided in other jurisdictions well before the Nevada Constitution was drafted in 1864. See Bradford v. Justices of Inferior Ct., 33 Ga. 332 (1862); In re Opinion of Justices, 3 Me. 481 (1822); Shelby v. Alcorn, 36 Miss. 273 (1858); see also Annotation, Offices Within Constitutional or Statutory Provisions Against Holding Two Offices, 1917A L.R.A. 231 (1917). From these cases, the Nevada Supreme Court concluded that the single most important characteristic of a public office is that the person who holds such a position is "clothed with some portion of the sovereign functions of government." Cole, 38 Nev. at 229 (quoting Attorney General v. McCaughey, 43 A. 646 (R.I. 1899)). In later cases, the court expressed a similar view:

> The nature of a public office as distinguished from mere employment is the subject of a considerable body of authority, and many criteria of determination are suggested by the courts. Upon one point at least the authorities uniformly appear to concur. A public office is distinguishable from other forms of employment in that its holder has by the sovereign been invested with some portion of the sovereign functions of government.

State ex rel. Mathews v. Murray, 70 Nev. 116, 120-01 (1953) (citations omitted). Simply put, "the sovereign function of government is not delegated to a mere employee." Eads v. City of Boulder City, 94 Nev. 735, 737 (1978).

Thus, in each department of state government, only two types of persons are empowered to exercise the sovereign functions of that department, those who hold constitutional offices and those who hold nonconstitutional offices. We believe this is how the Framers of the Nevada Constitution understood the structure and organizational framework of each department of state government, and we believe that this is why the Framers used the word "functions" in section 1 of article 3: to prohibit a constitutional officer in one department of state government from holding any other public office that was empowered, either by the constitution or the legislature, to exercise the sovereign

functions of another department of state government. Because public employees do not exercise the sovereign functions of state government, a broader construction of the term "functions" to include public employees simply would not be consistent with how the sovereign functions of government are exercised in this state.

Moreover, a broader construction of the term "functions" to include public employees would run counter to "the constituency concept of our legislature in this state, which can accurately be described as a citizens' legislature." Stratton, 806 P.2d at 1093. Thus, we believe that the Framers of the Nevada Constitution realized that "[i]n a sparsely populated state . . . it would prove difficult, if not impossible to have a conflict-free legislature." Id. In addition, we believe that any potential conflicts of interests experienced by a legislator who is also a public employee in another branch of state government are no greater than those conflicts experienced by other members of the Legislature. As stated by Justice Crockett of the Utah Supreme Court:

> In our democratic system, the legislature is intended to represent the people: that is, to be made up from the general public representing a wide spectrum of the citizenry. It is not to be doubted that legislators from the ranks of education are affected by the interests of that calling. But all other legislators also have interests. No one lives in a vacuum.

Jenkins, 589 P.2d at 771 (Crockett, J., concurring).

Finally, it is clear that the Framers intended the Nevada Legislature to be a part-time legislative body. In particular, the Framers provided for biennial legislative sessions in section 2 of article 4, and they originally limited those biennial sessions to 60 days in section 29 of article 4. Although section 29 of article 4 was repealed in 1958, the fact that the citizens of this state recently voted to limit biennial sessions to 120 days is a clear indication that the citizens of Nevada, like the Framers, want the Nevada Legislature to be a part-time legislative body. The economic reality of a part-time Legislature is that most legislators must continue to be employed in other occupations on a full-time or part-time basis during their terms of legislative service. This is as true today as it was when the Nevada Constitution was originally adopted. Given this economic reality, it is likely that the Framers fully expected that public employees, like other citizens, would be members of the Legislature, especially since some of the most qualified and dedicated citizens of the community often occupy positions of government employment. As stated by Chief Justice Hastings of the Nebraska Supreme Court in his dissent in Conway:

> A senatorial position in the Nebraska Legislature is a part-time position. Therefore, it is not uncommon for senators to have additional sources of income and careers. An uncompromising interpretation of the separation of powers would inhibit the ability of a part-time legislature to attract qualified members.

472 N.W.2d at 417 (Hastings, C.J., dissenting). Therefore, we believe that construing the term "functions" in section 1 of article 3 to prohibit a member of the Nevada Legislature from occupying a position of public employment would not comport with the concept of the "citizen-legislator" that was undoubtedly envisioned by the Framers of the Nevada Constitution.

In sum, it is the opinion of this office that the separation-of-powers provision in the state constitution only prohibits a member of the Legislature, during his term, from holding a constitutional office or a nonconstitutional office in another department of state government, because a person who holds a constitutional or nonconstitutional office exercises sovereign functions appertaining to another department of the state government. However, it is also the opinion of this office that the separation-of-powers provision in the state constitution does not prohibit a member of the Legislature, during his term, from occupying a position of public employment in another department of state government, because a person in a position of public employment does not exercise any sovereign functions appertaining to another department of the state government.

Based on this construction of section 1 of article 3, the deciding issue under the Nevada Constitution is whether a person employed as a Senior Petroleum Chemist by the DOA is a public officer or a public employee. If such a person is a public officer, then the person would be prohibited by the separation-of-powers provision from serving in the Nevada Legislature. However, if such a person is not a public officer, but is simply a public employee, then the person would not be prohibited by the separation-of-powers provision from serving in the Nevada Legislature.

As discussed previously, the Nevada Supreme Court has addressed the distinction between a public officer and a public employee on many occasions. See State ex rel. Kendall v. Cole, 38 Nev. 215 (1915); State ex rel. Mathews v. Murray, 70 Nev. 116 (1953); Mullen v. Clark County, 89 Nev. 308 (1973); Eads v. City of Boulder City, 94 Nev. 735, 737 (1978). In its most recent case on the issue, the court restated the two fundamental principles that distinguish a public officer from a public employee. University and Cmty. College Sys. of Nev. v. DR Partners, 117 Nev. Adv. Op. 19, 18 P.3d 1042, 1045-49 (2001) (holding that, for purposes of the open meeting law, a community college president is not a public officer but is a public employee).

The first fundamental principle is that a public officer must serve in a position created by law, not one created by mere administrative authority and discretion. The second fundamental principle is that the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. Both fundamental principles must be satisfied before a person is deemed a public officer. See Mullen v. Clark County, 89 Nev. 308, 311 (1973). Thus, if a position is created by mere administrative authority and discretion or if the person serving in the

position is subordinate and responsible to higher-ranking policymakers, the person is not a public officer but is simply a public employee. We believe that these fundamental principles are best illustrated by the case of State ex rel. Mathews v. Murray, 70 Nev. 116 (1953).

In Mathews, the defendant accepted the position of director of the drivers license division of the public service commission of Nevada. Id. at 120. The Attorney General brought an original action in quo warranto in the Nevada Supreme Court to oust the defendant from that position because when the defendant accepted his position in the executive branch he was also serving as a state senator. Id. The Attorney General argued that the defendant acted in violation of the separation-of-powers provision of the Nevada Constitution. Id. Before the court could determine the constitutional issue, the court needed to have jurisdiction over the original action in quo warranto. Id. Because an original action in quo warranto could lie only if the defendant's position in the executive branch was a public office, the issue before the court was whether the position of director of the drivers license division was a public office or a position of public employment. Id. The court held that the position of director of the drivers license division was a position of public employment, not a public office, and thus the court dismissed the original action for lack of jurisdiction without reaching the constitutional issue. Id. at 124.

In concluding that the position of director of the drivers license division was a position of public employment, the court reviewed the statutes controlling the state department under which the drivers license division operated. Id. at 122. The court found that the position of director of the drivers license division was created by administrative authority and discretion, not by statute, and that the position was wholly subordinate and responsible to the administrator of the department. Id. at 122-23. In this regard, the court stated:

> Nowhere in either act is any reference made to the "drivers license division" of the department or to a director thereof. Nowhere are duties imposed or authority granted save to the department and to its administrator. It appears clear that the position of director was created not by the act but by the administrator and may as easily by him be discontinued or destroyed. It appears clear that the duties of the position are fixed not by law but by the administrator and may as easily by him be modified from time to time. No tenure attaches to the position save as may be fixed from time to time by the administrator. The director, then, is wholly subordinate and responsible to the administrator. It cannot, then, be said that that position has been created by law; or that the duties which attach to it have been prescribed by law; or that, subject only to the provisions of law, the holder of such position is independent in his exercise of such duties. It cannot, then, be said that he has been invested with any portion of the sovereign functions of the government.

Based on the reasoning of the court in Mathews, we believe that the position of Senior Petroleum Chemist with the DOA is a position created by administrative authority and discretion, not by statute. Moreover, based on the statutory structure of the DOA, we believe that most employees of the DOA do not exercise any of the sovereign functions of the state. Rather, those employees simply implement the policies made by higher-ranking state officials.

The statutory authority for the DOA is codified in chapter 561 of NRS. Under that authority, the DOA is administered by the ten-member state board of agriculture and the director of the department. NRS 561.045, 561.105, 561.115 and 561.145. In particular, the state board of agriculture establishes the policy for the department and, with the approval of the governor, appoints the director of the department. NRS 561.105 and 561.115. The director has the statutory duty to carry out the policies established by the state board of agriculture and to direct and supervise all administrative and technical activities of the department and all programs administered by the department. NRS 561.145. The director has the statutory authority to organize the department into divisions and to assign responsibilities and duties within the department as the director deems appropriate. Id. The director also has other independent duties and powers, including serving as the ex officio state sealer of weights and measures. NRS 561.155 and 581.030. As part of the director's duties and powers, the director may designate an employee of the department to serve as the deputy director who must perform the duties of the director under certain circumstances. NRS 561.185. In addition, the director may employ any other personnel that, in his judgment, are necessary to the proper operation of the department. NRS 561.225. Finally, pursuant to NRS 561.305, the director has the statutory duty to establish and maintain a laboratory to carry out certain responsibilities and duties of the department, including the analysis and testing of petroleum products as required by NRS 590.010 to 590.150, inclusive.

Pursuant to the statutory authority set forth in chapter 561 of NRS, the director has established the Bureau of Petroleum Technology of the Division of Measurement Standards within the DOA. The director also has approved the responsibilities and duties assigned to employees within the Bureau of Petroleum Technology, including those responsibilities and duties assigned to the position of Senior Petroleum Chemist. Based on the information provided to this office, a person employed in the position of Senior Petroleum Chemist is assigned responsibilities and duties related to the analysis and testing of petroleum products in accordance with NRS 590.010 to 590.150, inclusive, and such other responsibilities and duties as are assigned to the position by higher-ranking persons within the DOA.

In light of the statutory authority set forth in chapter 561 of NRS, it is clear that the Bureau of Petroleum Technology and the positions within that bureau are not created by statute. Rather, they are the products of the administrative authority and discretion granted to the director of the DOA pursuant to chapter 561 of NRS. Furthermore, we believe that

the sovereign functions of the DOA are exercised by the ten-member state board of agriculture, the director and the deputy director, and that other personnel of the DOA are simply subordinate and responsible to these higher-ranking state officials. Therefore, it is the opinion of this office that a person who is employed as a Senior Petroleum Chemist in the Bureau of Petroleum Technology is not a public officer, but is simply a public employee. Accordingly, it is also the opinion of this office that, because such a person is not a public officer, the person may serve in the Nevada Legislature while remaining an employee of the DOA without violating the separation-of-powers provision in section 1 of article 3 of the Nevada Constitution.

C. Common Law Doctrine of Incompatibility

As a general rule, the adoption of specific constitutional or statutory provisions relating to incompatible public offices does not operate to abolish or supersede the common law doctrine of incompatibility. See People v. Claar, 687 N.E.2d 557, 561-62 (Ill. App. Ct. 1997); Reilly v. Ozzard, 166 A.2d 360, 364-66 (N.J. 1960); but see State ex rel. Clayton v. Board of Regents, 635 So. 2d 937, 938 (Fla. 1994) (holding that the common law doctrine of incompatibility has been completely superseded in Florida by specific provisions in the state constitution). Most state courts have held that the common law doctrine of incompatibility operates to supplement any constitutional or statutory provisions, unless it is clearly established that the constitutional or statutory provisions were intended to alter or abolish the common law rule. See American Canyon Fire Prot. Dist. v. County of Napa, 190 Cal. Rptr. 189, 192 (Cal. Ct. App. 1983); Ackerman Dairy, Inc. v. Kandle, 253 A.2d 466, 469 (N.J. 1969); Columbia County Admin. School Dist. v. Prichard, 585 P.2d 701, 702-03 (Or. Ct. App. 1978); State ex rel. Thomas v. Wysong, 24 S.E.2d 463, 466 (W. Va. 1943).

Based on our review of the Nevada Constitution and the NRS, we have not discovered any provisions that we believe alter or abolish the common law doctrine of incompatibility. Therefore, in addition to the constitutional and statutory provisions that we discussed previously, we must also consider the common law doctrine of incompatibility as it applies to an employee of the DOA who desires to serve in the Nevada Legislature.

The Nevada Supreme Court has not had occasion to apply the common law doctrine of incompatibility to a person who holds a public office in the state government, although the court has recognized the doctrine with regard to persons who hold public offices in city and county governments. See County of Clark v. City of Las Vegas, 92 Nev. 323, 346 (1976). Courts in other jurisdictions, however, have had occasion to apply the common law doctrine of incompatibility to persons who hold public offices in state government, including persons who are members of a state legislature.

There is a split of authority as to whether the common law doctrine of incompatibility applies to a person who holds a public office and a position of public employment. The California Court of Appeal has held that the common law doctrine of incompatibility applies only to a person who holds two public offices, and that the doctrine has no application when one of the positions is a position of public employment rather than a public office. Eldridge v. Sierra View Local Hosp. Dist., 273 Cal. Rptr. 654, 659-60 (Cal. Ct. App. 1990). If the Nevada Supreme Court were to adopt this view, then employment as a Senior Petroleum Chemist in the Bureau of Petroleum Technology would not be incompatible under the common law with membership in the Nevada Legislature because, as discussed previously, the position of Senior Petroleum Chemist in the Bureau of Petroleum Technology is not a public office.

In contrast, the Wisconsin Court of Appeals has held that "[t]he common law doctrine of incompatibility extends to positions of public employment as well as public offices." Otradovec v. City of Green Bay, 347 N.W.2d 614, 616 (Wis. Ct. App. 1984); accord Unified Sch. Dist. No. 501 v. Baker, 6 P.3d 848, 854-55 (Kan. 2000); Cummings v. Godin, 377 A.2d 1071, 1074-75 (R.I. 1977), and the cases cited therein. If the Nevada Supreme Court were to adopt this view, then the common law doctrine of incompatibility would have to be applied to the two positions. Even when applying the common law doctrine, we believe that employment in the position of Senior Petroleum Chemist in the Bureau of Petroleum Technology would not be incompatible under the common law with membership in the Nevada Legislature.

Two positions are incompatible under the common law when one position is subordinate to the other and subject in some degree to the supervisory or revisory power of the other, or when the functions of the two positions are inherently inconsistent and repugnant. Cummings, 377 A.2d at 1075 n.2. However, the mere existence of potential conflicts of interests does not create incompatibility between two positions under the common law. Reilly, 166 A.2d at 370-71. Rather, common law incompatibility arises only when there is an actual conflict of duties, meaning that "the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both." People v. County of Santa Clara, 57 Cal. Rptr. 2d 322, 328 (Cal. Ct. App. 1996) (quoting People ex rel. Chapman v. Rapsey, 107 P.2d 388 (Cal. 1940)).

The Rhode Island Supreme Court has on several occasions dealt with the question of whether membership in the state legislature is incompatible with other positions in government. In McCabe v. Kane, 221 A.2d 103, 104-05 (R.I. 1966), the court was asked whether the office of State Senator was incompatible under the common law with the office of Clerk of the Supreme Court. The court framed the question it was deciding as follows: "While clearly there is no inherent inconsistency or repugnancy between the duties of the two offices, there are questions of whether their nature and duties, or their character and the relation of each to the other, are such as to make the clerk subordinate to the legislature." Id. at 106-07 (citations omitted). In answering this question, the court

first observed that the legislature had by statute created the office of clerk, established its method of appointment and its term, and prescribed some of its ministerial duties. Id. at 107. However, the court found that the core judicial duties of the clerk were defined and controlled by the supreme court, not the legislature. Id. In particular, the court observed that "[s]uch duties constitute the essential function of the office and . . . are matters beyond the control and direction of the legislature." Id. Because the legislature could not directly encroach upon the supreme court's "exclusive province to direct [the clerk] in the performance of his judicial duties," the court concluded that the position of clerk was not subordinate to or subject to the supervisory control of the legislature. Id. Thus, the court held that:

> In the light of our conclusion that the clerk of this court is subject to our supervision and control in the performance of his judicial duties as distinguished from his ministerial duties, we hold that the office is not subordinated to membership in the state senate and that there is no incompatibility between the two offices.

Id.; Cummings, 377 A.2d at 1075 n.2 (holding that "the Legislature's control over an individual school teacher is extremely attenuated and indirect. As a result, we conclude that the positions of school teacher and state senator are not incompatible."); cf. In re Opinion of Justices, 21 A.2d 267, 270 (R.I. 1941) (holding that the positions of member of the state legislature and member of the state board of elections were incompatible).

In applying the common law doctrine of incompatibility, the key factor is the degree of control that one position may exercise over the duties, emoluments and duration of the other position. Thus, it has been held that membership in the state legislature was incompatible under the common law with holding the office of county school commissioner because the latter office "owes its creation and continuation to legislative enactment and is completely subject to legislative control." Weza v. Auditor General, 298 N.W. 368 (Mich. 1941); see also People ex rel. Verbeck, 506 N.E.2d 464, 465-66 (Ill. App. Ct. 1987); Belleville Twp. v. Fornarotto, 549 A.2d 1267, 1272-75 (N.J. Super. Ct. Law Div. 1988); Dupras v. County of Clinton, 624 N.Y.S.2d 309, 310 (N.Y. App. Div. 1995). In contrast, membership in the state legislature is not incompatible under the common law with holding the office of township attorney because "[t]he Legislature has no power in any judicial, executive or administrative sense to interfere with, supervise or review the performance of an incumbent in local office. Nor does it have the power to appoint to or to remove from local office." Reilly, 166 A.2d at 367. Therefore, under the common law doctrine of incompatibility, the general rule is that a member of a state legislature may occupy another position in government during his legislative term if the state legislature does not directly control the duties, emoluments and duration of the other governmental position.

It could be argued that, because the Nevada Legislature has the power to create and abolish, to prescribe the duties for and to fund all positions of employment in the executive department, the Nevada Legislature directly controls the duties, emoluments and duration of all positions of employment in the executive department. Although there is some superficial appeal to this argument, we do not believe that the common law doctrine of incompatibility was intended to erect such a rigid and absolute barrier that would prohibit all employees of the executive department from serving in the Nevada Legislature, especially when such a barrier would undermine the concept of the "citizen-legislator" that was envisioned by the Framers of the Nevada Constitution.

At its core, the common law doctrine of incompatibility is "based on public policy considerations." Unified Sch. Dist. No. 501 v. Baker, 6 P.3d 848, 854 (Kan. 2000). Since the adoption of the Nevada Constitution, this state has had a strong public policy favoring a part-time legislative body whose members are qualified and dedicated citizen-legislators that come from every walk of life. We believe that this strong public policy would be undermined if the common law doctrine of incompatibility prohibited all employees of the executive department from serving in the Nevada Legislature. Therefore, we believe that the common law doctrine of incompatibility must be applied judiciously based on the individual facts and circumstances of each case so that the common law doctrine does not unduly restrict the ability of employees of the executive department to serve in the Nevada Legislature.

As discussed previously, the Bureau of Petroleum Technology and the positions within that bureau are not created by statute but are the products of the administrative authority and discretion granted to the director of the DOA pursuant to chapter 561 of NRS. Thus, it is the director of the DOA, not the Nevada Legislature, that has the most immediate and direct control over the duties and responsibilities of the employees of the Bureau of Petroleum Technology. In addition, while the Nevada Legislature retains ultimate control over the structure of the executive department and the amount and purposes of all state appropriations, the day-to-day decisions concerning the hiring, firing and pay of classified employees remains with the appointing authority and the Department of Personnel, and such decisions are controlled in the most immediate and direct sense by the state personnel system created pursuant to section 15 of article 15 of the Nevada Constitution and chapter 284 of NRS. Thus, because the Nevada Legislature's control over an individual classified employee in the Bureau of Petroleum Technology is extremely attenuated and indirect, we believe that employment in the position of Senior Petroleum Chemist in the Bureau of Petroleum Technology is not inherently inconsistent or repugnant with membership in the Nevada Legislature. It is the opinion of this office, therefore, that the common law doctrine of incompatibility does not prohibit a person who is employed in the position of Senior Petroleum Chemist in the Bureau of Petroleum Technology from serving in the Nevada Legislature.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By Kevin Powers
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January 23, 2003

Assemblyman Jason Geddes
750 Putnam Drive
Reno, NV 89503-5900

Dear Assemblyman Geddes:

You have asked whether you may serve as a member of the Nevada Legislature while remaining employed by the University and Community College System of Nevada ("UCCSN") in the position of Environmental Affairs Manager. To answer your question, we must consider certain limitations under state law that are contained in the Nevada Revised Statutes, the Nevada Administrative Code, the Nevada Constitution and the common law, and we must also consider certain limitations under federal law that are contained in the Hatch Political Activity Act, which is commonly known as the Hatch Act. 5 U.S.C.A. §§ 1501-1508 (West 1996).

BACKGROUND

Based on the information provided to this office, you are employed by the UCCSN in the position of Environmental Affairs Manager with the Department of Environmental Health and Safety of the Division of Research of the University of Nevada, Reno. Your position as an Environmental Affairs Manager with the UCCSN is in the unclassified service of the state.

On November 5, 2002, you were elected to serve as an Assemblyman in the Nevada Legislature. In light of these facts, you have asked whether you may serve as a member of the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager.

DISCUSSION

I. STATE LAW

As a general rule of state law, a person may hold more than one position in state government so long as the positions are not legally incompatible. See Reilly v. Ozzard, 166 A.2d 360 (N.J. 1960). There are two types of legal incompatibility under state law:

> The first is a constitutional or statutory incompatibility, which is one so declared by the Constitution or legislative enactment. The second is a common-law or functional incompatibility, which is declared by courts without the aid of specific constitutional or statutory prohibition when the two offices are inherently inconsistent or repugnant, or when the occupancy of two offices is detrimental to the public interest.

Adams v. Commonwealth, 268 S.W.2d 930, 931 (Ky. Ct. App. 1954). Thus, to determine whether two positions in state government are legally incompatible under state law, we must examine statutory and regulatory law, constitutional law and common law. We begin with Nevada's statutory and regulatory law, which are codified in the Nevada Revised Statutes and the Nevada Administrative Code.

A. Nevada Revised Statutes and Nevada Administrative Code

Chapter 281 of NRS contains certain limitations that apply to public officers and public employees. With regard to incompatible public offices, NRS 281.055 provides:

> 1. Except as otherwise provided in subsection 2, no person may:
> (a) File nomination papers for more than one elective office at any election.
> (b) Hold more than one elective office at the same time.
> 2. The provisions of subsection 1 shall not be construed to prevent any person from filing nomination papers for or holding an elective office of any special district (other than a school district), such as an irrigation district, a local or general improvement district, a soil conservation district or a fire protection district, and at the same time filing nomination papers for or holding an elective office of the state, or any political subdivision or municipal corporation thereof.

With few exceptions, NRS 281.055 prohibits a person from holding more than one elective office at the same time. Thus, pursuant to NRS 281.055, a member of the Nevada Legislature is prohibited from holding most other elective offices while serving in the Nevada Legislature. However, by its plain terms, NRS 281.055 is limited in its application to elective offices. See Op. Nev. Att'y Gen. No. 82 (Oct. 23, 1963) (concluding that NRS 281.055 does not apply to a person seeking to hold one elective office and one appointive office). Because your position as an Environmental Affairs Manager with the UCCSN is not an elective office, it is the opinion of this office that you may serve in the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager without violating the provisions of NRS 281.055.

As discussed previously, your position as an Environmental Affairs Manager with the UCCSN is in the unclassified service of the state. Unlike classified employees who enjoy extensive statutory protections, unclassified employees are at-will employees who serve at the pleasure of their appointing authorities. See Nigro v. Nevada State Bd. of Cosmetology,

103 Nev. 496, 497-98 (1987); Ham v. Nevada, 788 F. Supp. 455, 460-61 (D. Nev. 1992). When a person is employed at-will, the employer has the right to discharge the person for any reason, so long as the reason does not violate public policy. Dillard Dep't Stores, Inc. v. Beckwith, 115 Nev. 372, 376 (1999); Wayment v. Holmes, 112 Nev. 232, 235-36 (1996).

In Nevada, there is a public policy that allows unclassified employees to serve in public office if such service meets certain statutory requirements. This public policy is codified in NRS 284.143, which provides:

> Except as otherwise provided in NRS 281.127, a person in the unclassified service of the state who has been appointed or employed for service in a department, division, agency or institution, other than a director of a department, may pursue any other business or occupation or hold any other office for profit if:
>
> 1. The other employment does not conflict with the duties he is required to perform in his unclassified service;
> 2. The other employment does not conflict with the hours during which he is required to perform those duties; and
> 3. He has obtained the approval of his supervisor.

Pursuant to NRS 284.143, an unclassified employee, other than a director of a state department, is permitted to serve in the Nevada Legislature if the employee obtains the approval of his supervisor and the employee is otherwise able to carry out his duties as an unclassified employee and his duties as a member of the Nevada Legislature without undue conflict, such as by taking a leave of absence. Thus, it is the opinion of this office that, as an unclassified employee, you may serve in the Nevada Legislature if you are able to satisfy the requirements of NRS 284.143.

However, if you are unable to satisfy the requirements of NRS 284.143, it is the opinion of this office that the UCCSN has the right to prohibit you from serving in the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager, and that such a prohibition would be constitutional. In a series of cases dating back to 1947, the United States Supreme Court has repeatedly upheld federal and state laws, regulations and policies prohibiting government employees from engaging in partisan political activities, including becoming candidates for and serving in state legislatures. See Broadrick v. Oklahoma, 93 S. Ct. 2908 (1973); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 93 S. Ct. 2880 (1973); United Pub. Workers of Am. (C.I.O.) v. Mitchell, 67 S. Ct. 556 (1947); Oklahoma v. United States Civil Serv. Comm'n, 67 S. Ct. 544 (1947). Based on those Supreme Court decisions, lower federal courts have also consistently rejected constitutional challenges to laws, regulations and policies prohibiting government employees from engaging in partisan political activities. See Alexander v. Merit Sys. Prot. Bd., 165 F.3d 474 (6th Cir. 1999); Williams v. United States Merit Sys. Prot. Bd., 55 F.3d 917 (4th Cir. 1995); Fela v. United

States Merit Sys. Prot. Bd., 730 F. Supp. 779 (N.D. Ohio 1989); Connecticut v. United States Merit Sys. Prot. Bd., 718 F. Supp. 125 (D. Conn. 1989).

If you are able to satisfy the requirements of NRS 284.143, you have several options concerning leave and pay while performing legislative duties. First, "[a]ny person in the unclassified service . . . may be granted by the appointing authority a leave of absence without pay for a period not to exceed 6 months." NRS 284.360. Thus, an unclassified employee may request leave without pay during each regular and special session.

However, unlike classified employees who have a statutory right to leave without pay during each regular and special session, unclassified employees do not have a statutory right to leave without pay during each regular and special session. Rather, for unclassified employees, the ability to obtain leave without pay during each regular and special session rests exclusively in the discretion of the appointing authority.

With regard to leave with pay during each regular and special session, an unclassified employee is subject to the same statutory and regulatory provisions as a classified employee. Thus, an appointing authority or the Department of Personnel may grant administrative leave with pay to an unclassified employee for "[h]is participation in, or attendance at, activities which are directly or indirectly related to the employee's job or his employment with the state but which do not require him to participate or attend in his official capacity as a state employee." NAC 284.589. Under these regulatory provisions, the unclassified employee would not be entitled to leave with pay during a regular or special session. Rather, the authority to grant leave with pay during a regular or special session would rest exclusively in the discretion of the appointing authority or the Department of Personnel.

With regard to the legislative interim, NRS 218.044 requires the appointing authority to grant leave to the unclassified employee during the legislative interim for attendance at certain committee meetings if the unclassified employee is a member of the committee in his official capacity as a legislator. Such leave must be granted with or without pay at the discretion of the appointing authority.

Finally, if the unclassified employee is granted leave with pay during a regular or special session or during a legislative interim, the unclassified employee is prohibited by NRS 281.127 from receiving legislative pay for his service as a legislator. Conversely, if the unclassified employee is granted leave without pay during a regular or special session or during a legislative interim, the unclassified employee is entitled to receive legislative pay for his service as a legislator.

B. Nevada Constitution

Many state constitutions contain provisions that directly address the issue of a person holding more than one position in state government. Scott M. Matheson, Eligibility of Public Officers and Employees to Serve in the State Legislature: An Essay on Separation of Powers, Politics and Constitutional Policy, 1988 Utah L.R. 295, 355-69 (1988). For example, some state constitutions contain broad provisions that prohibit any public officer in any branch of government from accepting or occupying another public office. See, e.g., Powell v. State, 898 S.W.2d 821 (Tex. Crim. App. 1994); State ex rel. Hill v. Pirtle, 887 S.W.2d 921 (Tex. Crim. App. 1994). Some state constitutions contain more limited provisions that prohibit members of the state legislature from accepting or occupying another public office. See, e.g., Hudson v. Annear, 75 P.2d 587 (Colo. 1938); McCutcheon v. City of St. Paul, 216 N.W.2d 137 (Minn. 1974). Finally, some state constitutions contain provisions that prohibit members of the state legislature from accepting or occupying any position of employment in the state government, whether or not the position is considered to be a public office. See, e.g., Begich v. Jefferson, 441 P.2d 27 (Alaska 1968); Parker v. Riley, 113 P.2d 873 (Cal. 1941); Stolberg v. Caldwell, 402 A.2d 763 (Conn. 1978).

The Nevada Constitution does not contain any broad provisions with regard to incompatible public offices. See State ex rel. Davenport v. Laughton, 19 Nev. 202, 206 (1885) (holding that "[t]here is nothing in the constitution of this state prohibiting respondent from holding the office of lieutenant-governor and the office of state librarian."); Crosman v. Nightingill, 1 Nev. 323, 326 (1865) (holding that there is nothing in the constitution prohibiting a person from holding the offices of Lieutenant Governor and warden of the state prison at the same time). Rather, the Nevada Constitution contains only a few specific provisions concerning incompatible public offices. See Nev. Const. art. 4, §§ 8 and 9; art. 5, § 12; art. 6, § 11. Based on the facts provided to this office, those specific provisions would not be applicable to your position as an Environmental Affairs Manager with the UCCSN under current circumstances.[1]

Even though the Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would be applicable to your position as an Environmental Affairs Manager with the UCCSN under current circumstances, the Nevada Constitution does contain a general separation-of-powers provision that, in certain circumstances, could prohibit a person from holding more than one position in state government. In particular, the separation-of-powers provision in section 1 of article 3 of the Nevada Constitution provides:

[1] We note that, with few exceptions, section 9 of article 4 prohibits a person from holding a civil office of profit under this state if the person holds "any lucrative office under the Government of the United States or any other power." See State ex rel. McMillan v. Sadler, 25 Nev. 131, 173 (1899) (holding that a person who accepted an appointment to a federal office "became incapable of legally holding the office of state senator."); State ex rel. Nourse v. Clarke, 3 Nev. 566 (1867). For the purposes of this opinion, we assume that you do not hold any lucrative office under the Federal Government or any other power.

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

The Nevada Supreme Court has considered the constitutionality of a statute that made the Secretary of State the ex officio Clerk of the Supreme Court. State ex rel. Josephs v. Douglass, 33 Nev. 82 (1910), overruled in part on other grounds, State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. ---, 32 P.3d 1263 (2001). The petitioner argued that the statute violated the separation-of-powers provision. 33 Nev. at 91-92. Although the court found that the statute was unconstitutional, it declined to rule on the separation-of-powers issue. Id. Instead, the court based its decision on other constitutional grounds. Id. Specifically, the court stated:

> It has been urged that as these two offices appertain to separate and distinct coordinate departments of the state government, it would be in violation of article 3 of the Constitution to combine them, but as this contention is not clearly manifest, both offices being mainly ministerial in character, and as the question can be determined upon another view of the case, we give this point no consideration further than to observe that it emphasizes the fact that the two offices are distinct, and that the duties of one do not pertain to the duties of the other.

Id. at 92. No other reported case from the Nevada Supreme Court applies the separation-of-powers provision to a person who holds more than one public office or to a person who holds a public office and a position of public employment. Cf. State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), in which the separation-of-powers issue was raised against a member of the Nevada Legislature but was not addressed on its merits by the court. Because the Nevada Supreme Court has not directly addressed this issue, we must turn to court decisions from other jurisdictions for guidance in this area of the law.

At least one state court has held that the separation-of-powers provision in its state constitution does not apply to the issue of incompatible public offices because that issue is addressed in other, more specific provisions of the constitution. Attorney General v. Meader, 116 A. 433, 434 (N.H. 1922). Considering that the issue of incompatible public offices is specifically addressed in the Nevada Constitution in sections 8 and 9 of article 4, section 12 of article 5 and section 11 of article 6, it could be argued that the Framers intended those provisions to be the exclusive constitutional basis for determining whether a person is holding incompatible public offices. Such an interpretation of the constitution is unlikely, however, because of the numerous court decisions which have held that the doctrine of separation of powers applies to the issue of incompatible public offices.

Therefore, to fully answer your question, we must determine whether the separation-of-powers provision in the Nevada Constitution would prohibit you from serving as a member of the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager.

A member of the Nevada Legislature holds an elective office that is expressly created in article 4 of the Nevada Constitution. Thus, a member of the Nevada Legislature exercises powers properly belonging to the legislative department of state government. The separation-of-powers provision prohibits "persons charged with the exercise of powers properly belonging to one of these departments" from exercising "any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Nev. Const. art. 3, § 1. Thus, the critical issue under the separation-of-powers provision is whether a person employed by the UCCSN as an Environmental Affairs Manager could be found to be exercising functions appertaining to the executive department of state government that would make his employment in the executive department incompatible with his service as a legislator in the legislative department. On this issue, the cases from other jurisdictions are in conflict. Because the cases are in conflict, we believe that it will be helpful to review those cases in some detail.

In State ex rel. Barney v. Hawkins, 257 P. 411, 412 (Mont. 1927), an action was brought to enjoin the state from paying Grant Reed his salary as an auditor for the state board of railroad commissioners while he served as a member of the state legislature. The complaint alleged that Reed was violating the separation-of-powers provision in the state constitution because he was occupying a position in the executive branch of state government at the same time that he was serving as a member of the state legislature. At the time, the separation-of-powers provision in the Montana Constitution provided that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others." The complaint also alleged that Reed was violating section 7 of article 5 of the state constitution, which provided that "[n]o Senator or Representative shall, during the term for which he shall have been elected, be appointed to any civil office under the State." Id. at 412-13. The Montana Supreme Court framed the issue it was deciding as follows:

> The only question for us to decide is: Is the position of auditor, held by Grant Reed, a civil office? For, if it be a civil office, he is holding it unlawfully; and, if it be not a civil office, he is not an officer, but only an employee, subject to the direction of others, and he has no power in connection with his position, and is not exercising any powers belonging to the executive or judicial department of state government. In the latter event, article 4 of the Constitution [separation of powers] is not involved.

Id. at 413.

After considering voluminous case law concerning the definition of a "civil office," including cases from Nevada that we will discuss below, the court determined that Reed was not exercising any portion of the sovereign power of state government when he was acting as an auditor for the board of railroad commissioners and that, therefore, Reed did not occupy a civil office. Id. at 418. Rather, the court found that Reed was simply an employee "holding a position of employment, terminable at the pleasure of the employing power, the board of railroad commissioners." Id. Thus, because Reed did not occupy a civil office, the court concluded that he had "no powers properly belonging to the judicial or executive department of the state government, for he is wholly subject to the power of the board, and, having no powers, he can exercise none; and therefore his appointment was not violative of article 4 of the Constitution [separation of powers]." Id.

The reasoning of the Montana Supreme Court was followed by the New Mexico Court of Appeals in State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1094-95 (N.M. Ct. App. 1991). In Stratton, the Attorney General argued that two members of the state legislature were violating the separation-of-powers provision in the state constitution because the legislators also occupied positions as a teacher and an administrator in local public school districts. Id. at 1088. At the time, the separation-of-powers provision in the New Mexico Constitution was identical to the separation-of-powers provision interpreted by the Montana Supreme Court in Hawkins: "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others." Id. at 1094.

Like the Montana Supreme Court, the New Mexico Court of Appeals determined that a violation of the separation-of-powers provision could occur only if the members of the legislature were invested in their positions as school teacher and school administrator with sovereign power that properly belonged to another branch of government. Id. Because only public officers exercised sovereign power, the court determined that the separation-of-powers provision "applies [only] to public officers, not employees, in the different branches of government." Id. at 1095. After considering the nature of the public school positions, the court concluded that "[p]ublic school instructors and administrators are not 'public officials.' They do not establish policy for the local school districts or for the state department of education." Id. at 1094. Instead, "[a] school teacher employed by a common school district is [an] employee, not [an] officer, and the relationship between school teacher and school board is contractual only." Id. at 1095 (internal quotations omitted). Therefore, because the school teacher and school administrator were not public officers, but simply public employees, the court held that they were not barred by the separation-of-powers provision from being members of the legislature. Id.

The Colorado Supreme Court has also adopted this view. Hudson v. Annear, 75 P.2d 587, 588-89 (Colo. 1938) (holding that a position as chief field deputy for the state income tax department was not a civil office, but a position of public employment, and that therefore a legislator could occupy such a position without violating Colorado's separation-

of-powers provision). See also Jenkins v. Bishop, 589 P.2d 770, 771-72 (Utah 1978) (Crockett, J., concurring in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would not prohibit a legislator from also being a public school teacher); State v. Osloond, 805 P.2d 263, 264-67 (Wash. Ct. App. 1991) (holding that a legislator who served as a judge pro tempore in a criminal case did not violate the principle of separation of powers as recognized in Washington, which does not have an express separation-of-powers provision in its constitution).

In stark contrast to the foregoing court decisions are several court decisions from Indiana, Oregon and Nebraska. The court decisions from Indiana and Oregon are especially notable because the language in the separation-of-powers provisions of those states more closely resembles the language in Nevada's separation-of-powers provision.

In State ex rel. Black v. Burch, 80 N.E.2d 294 (Ind. 1948), actions were brought to prevent the state from paying four members of the state legislature salaries that they had earned while occupying positions with various state commissions and boards in the executive branch of government. After reviewing the relevant statutes relating to these positions, the court held that the legislators' positions in the executive branch "are not public offices, nor do they in their respective positions perform any official functions in carrying out their duties in these respective jobs; they were acting merely as employees of the respective commission or boards by whom they were hired." Id. at 299. In other words, "[i]n performing their respective jobs, none of these [legislators] were vested with any functions pertaining to sovereignty." Id. Having determined that the legislators occupied positions of public employment, rather than public offices, the court's next task was to determine whether such public employment in another branch of state government violated Indiana's separation-of-powers provision, which provided at the time that "no person, charged with official duties under one of these departments, shall exercise any of the functions of another." Id. The court framed the issue as follows: "[I]t now becomes necessary for this Court to determine what is the meaning of the phrase 'any of the functions of another," as set out in the above quoted section of the Constitution." Id.

In interpreting the use of the term "functions," the court noted that the term "power" had been used instead of the term "functions" in the original draft of the provision. Id. at 302. However, the term "functions" was inserted in the final version of the provision that was adopted by the drafters of the constitution. Id. The court then stated that "[i]t would seem to us that these two words are interchangeable but, if there is any distinction, the term 'functions' would denote a broader field of activities than the word 'power.'" Id. The court also quoted extensively from the decision in Saint v. Allen, 126 So. 548 (La. 1930), in which the Louisiana Supreme Court held that a member of the state legislature was prohibited from being employed by the executive department of state government pursuant to the separation-of-powers provision in the Louisiana Constitution, which provided at the time that "[no] person or collection of persons holding office in one of them, shall exercise

power properly belonging to either of the others." In particular, the Louisiana Supreme Court held that:

> It is not necessary, to constitute a violation of the article, that a person should hold office in two departments of government. It is sufficient if he is an officer in one department and at the same time is employed to perform duties, or exercise power, belonging to another department. The words "exercise power," speaking officially, mean perform duties or functions.

Saint, 126 So. at 555.

Based on the Louisiana case and other court decisions, the Indiana Supreme Court in Burch concluded that:

> In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department, the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an employee of an officer, even though he is performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the cases before us.

80 N.E.2d at 302.

The reasoning of the Indiana Supreme Court was followed by the Oregon Supreme Court in Monaghan v. School Dist. No. 1, Clackamas County, 315 P.2d 797 (Or. 1957). In that case, the court was asked "to determine whether or not Monaghan is eligible for employment as a teacher in the public schools of this state while he holds a position as a member of the [state] House of Representatives." Id. at 799. At that time, the separation-of-powers provision in the Oregon Constitution provided that "no person charged with official duties under one of these departments, shall exercise any of the functions of another." Id. at 800. The legislator argued that the term "official duties" was synonymous with the term "functions," and that therefore the separation-of-powers provision applied only to a person holding a public office in more than one department of state government and not to person merely occupying a position of public employment. Id. at 801. The court flatly rejected this argument:

> It is not difficult to define the word "official duties." As a general rule, and as we think the phrase is used in the section of the constitution, they are the duties or obligations imposed by law on a public officer. 67 C.J.S. Officers § 110, p. 396; 28 C.J.S. Duty, p. 597. There can be no doubt that Mr. Monaghan, as a legislator, is "charged with official duties." But the exercise of the "functions" of a department of government gives to the word "functions" a broader sweep and more comprehensive meaning than "official duties." It contemplates a wider range of the exercise of functions including and beyond those which may be comprehended in the "official duties" of any one officer.
>
> It may appear to some as a construction of extreme precaution, but we think that it expresses the considered judgment and deliberation of the Oregon Convention to give greater force to the concepts of separation by thus barring any official in one department of government of the opportunity to serve any other department, even as an employee. Thus, to use the language of O'Donoghue v. United States, supra [289 U.S. 516, 53 S. Ct. 743], in a sense, his role as a teacher subjugates the department of his employment to the possibility of being "controlled by, or subjected, directly or indirectly, to the coercive influence of" the other department wherein he has official duties and vice versa. (Emphasis supplied.) In the Burch case, supra, 80 N.E.2d 302, when considering the word "functions" in its similar setting in the Indiana Constitution, the court observed that the term "functions" denotes a broader field of activities than the word "power."
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> * * *
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> Our conclusion is that the word "functions" embodies a definite meaning with no contradiction of the phrase "official duties," that is, he who exercises the functions of another department of government may be either an official or an employee.

Id. at 802-03. Although acknowledging that a public school teacher was not a public officer, the court concluded, nevertheless, that a public school teacher was a public employee who was exercising one of the functions of the executive department of state government. Id. at 804-06. Therefore, the court held that Monaghan could not be employed as a public school teacher while he held a position as a member of the state legislature. Id.; see also Jenkins, 589 P.2d at 773-77 (Ellett, C.J., concurring and dissenting in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would prohibit a legislator from also being a public school teacher).

After the decision in Monaghan, the Oregon Constitution was amended to expressly permit legislators to be employed by the State Board of Higher Education or to be a member of any school board or an employee thereof. In re Sawyer, 594 P.2d 805, 808 & n.7 (Or. 1979). The amendment, however, did not apply to other branches of state

government. Id. In Sawyer, the Oregon Supreme Court was asked whether the state's separation-of-powers provision prohibited a judge from being regularly employed as a part-time professor at a state-funded college. The court answered in the affirmative, stating that:

> It is true that Judge Sawyer is not a full-time teacher. In our opinion, however, a part-time teacher regularly employed for compensation by a state-funded college to perform the duties of a teacher also performs "functions" of the executive department of government within the meaning of Article III, § 1, as construed by this court in Monaghan.

Id. at 809. The court noted, however, that "[w]e do not undertake to decide in this case whether the same result would necessarily follow in the event that a judge should occasionally, but not regularly, lecture at a state-funded college, but without other responsibilities as a teacher." Id. at 809 n.8.

Finally, in State ex rel. Spire v. Conway, 472 N.W.2d 403 (Neb. 1991), the Attorney General brought an action claiming that the separation-of-powers provision of the Nebraska Constitution prohibited a person from occupying a position as an assistant professor at a state-funded college while simultaneously serving as a member of the state legislature. At the time, Nebraska's separation-of-powers provision provided that "no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others."

Unlike most other courts, the Nebraska Supreme Court determined that, under certain circumstances, an assistant professor at a public college could be considered to be holding a public office. Id. at 406-07. However, despite this determination, the court found that the public officer-public employee distinction was not "determinative of the [separation-of-powers] issue now under consideration, for article II does not speak in terms of officers or employees; it speaks of persons 'being one of' the branches of government." Id. at 408. Rather, the court found that "[t]he unusual expression 'being one of these departments' is not clear; accordingly, construction is necessary. One thing that is clear, however, is that 'being one of these departments' is not intended to be synonymous with 'exercising any power of' a branch." Id. at 409.

After considering the text and history of the Nebraska Constitution, the court determined that the provision should be construed to read, "no person or collection of persons being [a member of] one of these departments." Id. at 412. Based on this construction, the court held that the separation-of-powers provision "prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch." Id. The court then applied this construction to conclude that an assistant professor at a state college is a member of the executive branch and that a legislator, therefore, could not occupy such a position during his term in the legislature. Id. at 414-16. Specifically, the court held that:

> Although we have neither been directed to nor found any case explicitly stating that the state colleges are part of the executive branch, there are but three branches, and the state colleges clearly are not part of the judicial or legislative branches.
>
> The Board of Regents of the University of Nebraska performs a function for the university which is identical to that of the Board of Trustees of the Nebraska State Colleges. While the Board of Regents is an "independent body charged with the power and responsibility to manage and operate the University," it is, nevertheless, an administrative or executive agency of the state. As the regents are part of the executive branch, so, too, are the trustees.
>
> Since the Board of Trustees, which governs the state colleges, is part of the executive branch, those who work for those colleges likewise are members of that branch. Respondent, as an assistant professor at the college, is thus a member of the executive branch within the meaning of article II.
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> * * *
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> Respondent is therefore a member of one branch of government, the executive, exercising the powers of another, the legislative, and, as a consequence, is in violation of article II of the state Constitution.

Id. at 414-15 (citations omitted).

If the Nevada Supreme Court were to follow the reasoning of the courts of Indiana, Oregon and Nebraska, rather than the reasoning of the courts of Montana, New Mexico and Colorado, an employee of the executive branch could not, pursuant to this state's separation-of-powers provision, serve as a member of the Nevada Legislature.

At this juncture, we note that if the Nevada Supreme Court were to adopt such a holding, its decision most likely would not affect a member's seat in the Nevada Legislature, but would only affect his public office or position of public employment in the other branch of state government. Section 6 of article 4 of the Nevada Constitution provides that each House of the Nevada Legislature shall be the judge of the qualifications of its own members. Courts in other states have consistently held that such a constitutional provision prevents the judicial branch from reviewing the determination of the legislative branch to seat a member, even if the member who is seated by the legislative branch is holding a public office or occupying a position of public employment in another branch of government in violation of the state's separation-of-powers provision. See State v. Evans, 735 P.2d 29, 30-33 (Utah 1987); State ex rel. Biggs v. Corley, 172 A. 415, 420-23 (Del. 1934); Conway, 472 N.W.2d at 407-08; Monaghan, 315 P.2d at 799. In such situations, state courts generally have limited their review to determining whether the member of the

legislature should be ousted from his public office or position of public employment in the other branch of government. Id. In other words, if a member of the legislature is seated by the other members of his house, state courts generally will not disturb that decision. Those courts will, however, decide whether a member of the legislature may continue to hold a public office or occupy a position of public employment in another branch of government.

For the purposes of this opinion, though, the next issue is whether the Nevada Supreme Court is likely to adopt the holdings of the courts of Indiana, Oregon and Nebraska. Although we cannot determine with any reasonable degree of certainty whether the Nevada Supreme Court would adopt those holdings, we do believe that the decisions of those courts are not consistent with the text and structure of the Nevada Constitution. In particular, while we agree with the courts of Indiana and Oregon that the term "functions" is distinct in meaning from other terms such as "powers" or "duties," we do not believe that the meaning ascribed to the term "functions" in Burch and Monaghan is consistent with the structure and organization of the government in this state.

Thus, despite the holdings of the courts of Indiana, Oregon and Nebraska, it is the opinion of this office that Nevada's separation-of-powers provision would not prohibit you from serving as a member of the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager. While we cannot say with any certainty that the Nevada Supreme Court would agree with our opinion, we do believe that our opinion is supported by the text and structure of the Nevada Constitution and by the concept of the "citizen-legislator," which is a concept that is the cornerstone of an effective, responsive and qualified part-time legislative body.

It is a fundamental rule of constitutional construction that a constitution must be interpreted in its entirety and that each part of the constitution must be given effect. State ex rel. Herr v. Laxalt, 84 Nev. 382, 386 (1968). Therefore, the separation-of-powers provision in the Nevada Constitution cannot be read in isolation, but rather must be construed in accordance with the constitution as a whole. Thus, the meaning of the phrases "no persons charged with the exercise of powers properly belonging to one of these departments" and "shall exercise any functions, appertaining to either of the others" cannot be based on a bare reading of the separation-of-powers provision alone. Rather, these phrases must be read in light of the other parts of the constitution which specifically enumerate the persons who are to be charged with exercising the powers and functions of state government. As stated by the Nevada Supreme Court:

> [A]rticle 3 of the constitution . . . divides the state government into three great departments, and directs that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." As will be noticed, it is the state government as created by the constitution which is divided into departments. These departments are each

> charged by other parts of the constitution with certain duties and functions, and it is to these that the prohibition just quoted refers.

Sawyer v. Dooley, 21 Nev. 390, 396 (1893).

According to the Nevada Supreme Court, the prohibition in section 1 of article 3 applies only to persons who are charged by other parts of the constitution with exercising powers or duties belonging to one of the three departments of state government. In other words, for the purposes of the separation-of-powers provision, the officers who are prohibited from exercising functions appertaining to another department of state government are limited to those officers in the legislative, executive and judicial departments who are expressly given powers and duties under the Nevada Constitution.

This construction of the separation-of-powers provision in the Nevada Constitution is consistent with the Utah Supreme Court's construction of an identical separation-of-powers provision in section 1 of article V the Utah Constitution. As to that provision, the Utah Supreme Court has held:

> [T]he prohibition of section 1, is directed to a "person" charged with the exercise of powers properly belonging to the "executive department." The Constitution further specifies in Article VII, Section 1, the persons of whom the Executive Department shall consist. Thus it is the "persons" specified in Article VII, Section 1, who are charged with the exercise of powers belonging to the Executive Department, who are prohibited from exercising any functions appertaining to the legislative and judicial departments.

State v. Gallion, 572 P.2d 683, 687 (Utah 1977); accord Robinson v. State, 20 P.3d 396, 399-400 (Utah 2001).

Consequently, a constitutional officer is an officer of the legislative, executive or judicial department who is "charged with the exercise of powers properly belonging to one of these departments." Nev. Const. art. 3, § 1; see also People v. Provines, 34 Cal. 520 (1868). No other person may exercise the powers given to a constitutional officer by the constitution. As a result, when the constitution grants powers to a particular constitutional officer, "their exercise and discharge by any other officer or department are forbidden by a necessary and unavoidable implication. Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department, or person." King v. Board of Regents, 65 Nev. 533, 556 (1948) (quoting State ex rel. Crawford v. Hastings, 10 Wis. 525 (1860)). Thus, the constitutional powers of each department may be exercised only by the constitutional officers from that department to whom the powers have been assigned.

Even though it is only the constitutional officers of each department who may exercise the constitutional powers given to that department, the Framers realized that each department would also be charged with the exercise of certain nonconstitutional functions. Accordingly, the Framers provided for the creation by statute of nonconstitutional officers who could be charged by the Legislature with the exercise of nonconstitutional functions. See Nev. Const. art. 15, §§ 2, 3, 10 and 11. As observed by the Nevada Supreme Court:

> [T]he framers of the constitution decided for themselves that the officers named [in the constitution] were necessary and should be elected by the people; but they left it to the legislature to decide as to the necessity of additional ones, whether state, county, or township . . . The duty of deciding as to the necessity of any office, other than those named in the constitution, is placed upon the legislature.

State ex rel. Perry v. Arrington, 18 Nev. 412, 417-18 (1884). As a result, the Nevada Constitution recognizes two distinct types of offices, "one which is created by the Constitution itself, and the other which is created by statute." Douglass, 33 Nev. at 93 (quoting People v. Bollam, 54 N.E. 1032 (Ill. 1899)).

Like the framers of other state constitutions, the Framers of the Nevada Constitution could have simply stated that a constitutional officer shall not exercise any "powers" appertaining to another department of state government. However, the Framers of the Nevada Constitution provided that a constitutional officer shall not exercise any "functions" appertaining to another department of state government. We believe that the Framers used the term "functions" because they realized that, in each department of state government, the functions of the department would be performed by constitutional officers and by nonconstitutional officers. Thus, had the Framers used the term "powers" in section 1 of article 3, the separation-of-powers provision would have been too restrictive in its meaning, for it may have been construed simply to mean that a constitutional officer in one department could not exercise the powers entrusted to the constitutional officers in another department. To avoid this restrictive construction, we believe that the Framers used the term "functions" to ensure that a constitutional officer in one department could not perform the sovereign functions entrusted to both constitutional officers and nonconstitutional officers in another department.

Therefore, by using the term "functions," we believe that the Framers intended to prohibit a constitutional officer in one department from holding a constitutional office or nonconstitutional office in another department, because persons holding constitutional or nonconstitutional offices in another department exercise the sovereign functions of state government. Because public employees do not exercise the sovereign functions of state government, we do not believe that the Framers intended to prohibit a constitutional officer from holding a position of public employment in another department of state government. Our conclusion is based on a well-established body of case law which holds that public

officers are the only persons who exercise the sovereign functions of state government and that public employees do not exercise such sovereign functions.

In State ex rel. Kendall v. Cole, 38 Nev. 215 (1915), the Nevada Supreme Court discussed extensively the attributes of a public office, and the court also cited numerous cases that had been decided in other jurisdictions well before the Nevada Constitution was drafted in 1864. See Bradford v. Justices of Inferior Ct., 33 Ga. 332 (1862); In re Opinion of Justices, 3 Me. 481 (1822); Shelby v. Alcorn, 36 Miss. 273 (1858); see also Annotation, Offices Within Constitutional or Statutory Provisions Against Holding Two Offices, 1917A L.R.A. 231 (1917). From these cases, the Nevada Supreme Court concluded that the single most important characteristic of a public office is that the person who holds such a position is "clothed with some portion of the sovereign functions of government." Cole, 38 Nev. at 229 (quoting Attorney General v. McCaughey, 43 A. 646 (R.I. 1899)). In later cases, the court expressed a similar view:

> The nature of a public office as distinguished from mere employment is the subject of a considerable body of authority, and many criteria of determination are suggested by the courts. Upon one point at least the authorities uniformly appear to concur. A public office is distinguishable from other forms of employment in that its holder has by the sovereign been invested with some portion of the sovereign functions of government.

State ex rel. Mathews v. Murray, 70 Nev. 116, 120-01 (1953) (citations omitted). Simply put, "the sovereign function of government is not delegated to a mere employee." Eads v. City of Boulder City, 94 Nev. 735, 737 (1978).

Thus, in each department of state government, only two types of persons are empowered to exercise the sovereign functions of that department, those who hold constitutional offices and those who hold nonconstitutional offices. We believe this is how the Framers of the Nevada Constitution understood the structure and organizational framework of each department of state government, and we believe that this is why the Framers used the word "functions" in section 1 of article 3: to prohibit a constitutional officer in one department of state government from holding any other public office that was empowered, either by the constitution or the legislature, to exercise the sovereign functions of another department of state government. Because public employees do not exercise the sovereign functions of state government, a broader construction of the term "functions" to include public employees would not be consistent with the manner in which the sovereign functions of government are exercised in this state.

Moreover, a broader construction of the term "functions" to include public employees would run counter to "the constituency concept of our legislature in this state, which can accurately be described as a citizens' legislature." Stratton, 806 P.2d at 1093. Thus, we believe that the Framers of the Nevada Constitution realized that "[i]n a sparsely populated

state . . . it would prove difficult, if not impossible to have a conflict-free legislature." Id. In addition, we believe that any potential conflicts of interests experienced by a legislator who is also a public employee in another branch of state government are no greater than those conflicts experienced by other members of the Legislature. As stated by Justice Crockett of the Utah Supreme Court:

> In our democratic system, the legislature is intended to represent the people: that is, to be made up from the general public representing a wide spectrum of the citizenry. It is not to be doubted that legislators from the ranks of education are affected by the interests of that calling. But all other legislators also have interests. No one lives in a vacuum.

Jenkins, 589 P.2d at 771 (Crockett, J., concurring).

Finally, it is clear that the Framers intended the Nevada Legislature to be a part-time legislative body. In particular, the Framers provided for biennial legislative sessions in section 2 of article 4, and they originally limited those biennial sessions to 60 days in section 29 of article 4. Although section 29 of article 4 was repealed in 1958, the fact that the citizens of this state recently voted to limit biennial sessions to 120 days is a clear indication that the citizens of Nevada, like the Framers, want the Nevada Legislature to be a part-time legislative body. The economic reality of a part-time Legislature is that most legislators must continue to be employed in other occupations on a full-time or part-time basis during their terms of legislative service. This is as true today as it was when the Nevada Constitution was originally adopted. Given this economic reality, it is likely that the Framers fully expected that public employees, like other citizens, would be members of the Legislature, especially since some of the most qualified and dedicated citizens of the community often occupy positions of government employment. As stated by Chief Justice Hastings of the Nebraska Supreme Court in his dissent in Conway:

> A senatorial position in the Nebraska Legislature is a part-time position. Therefore, it is not uncommon for senators to have additional sources of income and careers. An uncompromising interpretation of the separation of powers would inhibit the ability of a part-time legislature to attract qualified members.

472 N.W.2d at 417 (Hastings, C.J., dissenting). Therefore, we believe that construing the term "functions" in section 1 of article 3 to prohibit a member of the Nevada Legislature from occupying a position of public employment would not comport with the concept of the "citizen-legislator" that was undoubtedly envisioned by the Framers of the Nevada Constitution.

In sum, it is the opinion of this office that the separation-of-powers provision in the state constitution only prohibits a member of the Legislature, during his term, from holding a constitutional office or a nonconstitutional office in another department of state

government, because a person who holds a constitutional or nonconstitutional office exercises sovereign functions appertaining to another department of the state government. However, it is also the opinion of this office that the separation-of-powers provision in the state constitution does not prohibit a member of the Legislature, during his term, from occupying a position of public employment in another department of state government, because a person in a position of public employment does not exercise any sovereign functions appertaining to another department of the state government.

Based on this construction of section 1 of article 3, the deciding issue under the Nevada Constitution is whether a person employed by the UCCSN in the position of Environmental Affairs Manager is a public officer or a public employee. If such a person is a public officer, then the person would be prohibited by the separation-of-powers provision from serving in the Nevada Legislature. However, if such a person is not a public officer, but is simply a public employee, then the person would not be prohibited by the separation-of-powers provision from serving in the Nevada Legislature.

As discussed previously, the Nevada Supreme Court has addressed the distinction between a public officer and a public employee on many occasions. See State ex rel. Kendall v. Cole, 38 Nev. 215 (1915); State ex rel. Mathews v. Murray, 70 Nev. 116 (1953); Mullen v. Clark County, 89 Nev. 308 (1973); Eads v. City of Boulder City, 94 Nev. 735, 737 (1978). In its most recent case on the issue, the court restated the two fundamental principles that distinguish a public officer from a public employee. University and Cmty. College Sys. of Nev. v. DR Partners, 117 Nev. ---, 18 P.3d 1042, 1045-49 (2001) (holding that, for the purposes of the Open Meeting Law, the position of community college president is not a public office).

The first fundamental principle is that a public officer must serve in a position created by law, not one created by mere administrative authority and discretion. The second fundamental principle is that the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. Both fundamental principles must be satisfied before a person is deemed a public officer. See Mullen v. Clark County, 89 Nev. 308, 311 (1973). Thus, if a position is created by mere administrative authority and discretion or if the person serving in the position is subordinate and responsible to higher-ranking policymakers, the person is not a public officer but is simply a public employee. We believe that these fundamental principles are best illustrated by the cases of State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), and University and Cmty. College Sys. of Nev. v. DR Partners, 117 Nev. ---, 18 P.3d 1042 (2001).

In Mathews, the defendant accepted the position of director of the drivers license division of the public service commission of Nevada. 70 Nev. at 120. The Attorney General brought an original action in quo warranto in the Nevada Supreme Court to oust the defendant from that position because when the defendant accepted his position in the

executive branch he was also serving as a state senator. Id. The Attorney General argued that the defendant acted in violation of the separation-of-powers provision of the Nevada Constitution. Id. Before the court could determine the constitutional issue, the court needed to have jurisdiction over the original action in quo warranto. Id. Because an original action in quo warranto could lie only if the defendant's position in the executive branch was a public office, the issue before the court was whether the position of director of the drivers license division was a public office or a position of public employment. Id. The court held that the position of director of the drivers license division was a position of public employment, not a public office, and thus the court dismissed the original action for lack of jurisdiction without reaching the constitutional issue. Id. at 124.

In concluding that the position of director of the drivers license division was a position of public employment, the court reviewed the statutes controlling the state department under which the drivers license division operated. Id. at 122. The court found that the position of director of the drivers license division was created by administrative authority and discretion, not by statute, and that the position was wholly subordinate and responsible to the administrator of the department. Id. at 122-23. In this regard, the court stated:

> Nowhere in either act is any reference made to the "drivers license division" of the department or to a director thereof. Nowhere are duties imposed or authority granted save to the department and to its administrator. It appears clear that the position of director was created not by the act but by the administrator and may as easily by him be discontinued or destroyed. It appears clear that the duties of the position are fixed not by law but by the administrator and may as easily by him be modified from time to time. No tenure attaches to the position save as may be fixed from time to time by the administrator. The director, then, is wholly subordinate and responsible to the administrator. It cannot, then, be said that that position has been created by law; or that the duties which attach to it have been prescribed by law; or that, subject only to the provisions of law, the holder of such position is independent in his exercise of such duties. It cannot, then, be said that he has been invested with any portion of the sovereign functions of the government.

In DR Partners, the court was asked to determine whether the position of community college president was a public office for the purposes of the Open Meeting Law, which is codified in chapter 241 of NRS. Although the Open Meeting Law does not define the term "public office" or "public officer," the court found that the definition of "public officer" in chapter 281 of NRS was applicable because "[t]he Legislature's statutory definition of a 'public officer' incorporates the fundamental criteria we applied in Mathews and Kendall, and is in harmony with those cases, as we subsequently confirmed in Mullen v. Clark County." 18 P.3d at 1046 (footnote omitted).

When the court applied the fundamental criteria from Mathews and Kendall and the statutory definition from chapter 281 of NRS to the position of community college president, the court concluded that the position of community college president was not a public office. 18 P.3d at 1047-49. In reaching this conclusion, the court first found that the position of community college president is not created by the state constitution or statute, but is created by administrative authority and discretion of the Board of Regents. Id. Second, the court found that a community college president does not exercise any of the sovereign functions of the state. Id. Instead, a community college president is wholly subordinate to the Board of Regents and simply implements policies made by higher-ranking state officials. Id. As explained by the court:

> The community college president holds an important position, but the sovereign functions of higher education repose in the Board of Regents, and to a lesser degree in the chancellor, and not at all in the community college president.
>
> * * *
>
> Because the president is wholly subordinate and responsible to the Board, and can only implement policies established by the Board, we conclude that the community college president does not meet the statutory requisites of a public officer set forth in NRS 281.005(1)(b).

18 P.3d at 1049.[2]

Based on the reasoning in Mathews and DR Partners, we believe that your position as an Environmental Affairs Manager with the UCCSN is a position of public employment, not a public office. Like the position of community college president, your position as an Environmental Affairs Manager with the UCCSN is not created by the state constitution or statute. Rather, it is a position that is created by administrative authority and discretion of the Board of Regents, which is vested by the state constitution with the power to "control and manage the affairs of the University and the funds of the same under such regulations as may be provided by law." Nev. Const. art. 11, § 7; see also NRS 396.110, 396.230 and 396.280. Furthermore, in your position as an Environmental Affairs Manager with the UCCSN, you do not exercise any of the sovereign functions of the state. Rather, you simply implement policies made by higher-ranking state officials. See DR Partners, 18 P.3d at 1048-49.

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[2] Courts from other jurisdictions also have found that presidents, professors and other employees of universities and colleges are not public officers. See Ryan v. Mansfield State College, 677 F.2d 344, 347 n.5 (3d Cir. 1982); Pardue v. Miller, 206 S.W.2d 75, 76 (Ky. Ct. App. 1947); Seymour v. Western Dakota Vocational Tech. Inst., 419 N.W.2d 206, 207-08 (S.D. 1988); Hartigan v. Board of Regents of the W. Va. Univ., 38 S.E. 698, 700-05 (W. Va. 1901); Martin v. Smith, 1 N.W.2d 163, 172 (Wis. 1941).

Therefore, it is the opinion of this office that your position as an Environmental Affairs Manager with the UCCSN is a position of public employment, not a public office. Accordingly, it is also the opinion of this office that, because your position as an Environmental Affairs Manager with the UCCSN is a position of public employment, not a public office, you may serve in the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager without violating the separation-of-powers provision in section 1 of article 3 of the Nevada Constitution.

C. Common Law Doctrine of Incompatibility

As a general rule, the adoption of specific constitutional or statutory provisions relating to incompatible public offices does not operate to abolish or supersede the common law doctrine of incompatibility. See People v. Claar, 687 N.E.2d 557, 561-62 (Ill. App. Ct. 1997); Reilly v. Ozzard, 166 A.2d 360, 364-66 (N.J. 1960); but see State ex rel. Clayton v. Board of Regents, 635 So. 2d 937, 938 (Fla. 1994) (holding that the common law doctrine of incompatibility has been completely superseded in Florida by specific provisions in the state constitution). Most state courts have held that the common law doctrine of incompatibility operates to supplement any constitutional or statutory provisions, unless it is clearly established that the constitutional or statutory provisions were intended to alter or abolish the common law rule. See American Canyon Fire Prot. Dist. v. County of Napa, 190 Cal. Rptr. 189, 192 (Cal. Ct. App. 1983); Ackerman Dairy, Inc. v. Kandle, 253 A.2d 466, 469 (N.J. 1969); Columbia County Admin. School Dist. v. Prichard, 585 P.2d 701, 702-03 (Or. Ct. App. 1978); State ex rel. Thomas v. Wysong, 24 S.E.2d 463, 466 (W. Va. 1943).

Based on our review of the Nevada Constitution and the NRS, we have not discovered any provisions that we believe alter or abolish the common law doctrine of incompatibility. Therefore, in addition to the constitutional and statutory provisions that we discussed previously, we must also consider the common law doctrine of incompatibility as it applies to your position as an Environmental Affairs Manager with the UCCSN.

The Nevada Supreme Court has not had occasion to apply the common law doctrine of incompatibility to a person who holds a public office in the state government, although the court has recognized the doctrine with regard to persons who hold public offices in city and county governments. See County of Clark v. City of Las Vegas, 92 Nev. 323, 346 (1976). Courts in other jurisdictions, however, have had occasion to apply the common law doctrine of incompatibility to persons who hold public offices in state government, including persons who are members of a state legislature.

There is a split of authority as to whether the common law doctrine of incompatibility applies to a person who holds a public office and a position of public employment. The California Court of Appeal has held that the common law doctrine of incompatibility applies only to a person who holds two public offices, and that the doctrine has no

application when one of the positions is a position of public employment rather than a public office. Eldridge v. Sierra View Local Hosp. Dist., 273 Cal. Rptr. 654, 659-60 (Cal. Ct. App. 1990). If the Nevada Supreme Court were to adopt this view, then your position as an Environmental Affairs Manager with the UCCSN would not be incompatible under the common law with membership in the Nevada Legislature because, as discussed previously, your position as an Environmental Affairs Manager with the UCCSN is not a public office.

In contrast, the Wisconsin Court of Appeals has held that "[t]he common law doctrine of incompatibility extends to positions of public employment as well as public offices." Otradovec v. City of Green Bay, 347 N.W.2d 614, 616 (Wis. Ct. App. 1984); accord Unified Sch. Dist. No. 501 v. Baker, 6 P.3d 848, 854-55 (Kan. 2000); Cummings v. Godin, 377 A.2d 1071, 1074-75 (R.I. 1977), and the cases cited therein. If the Nevada Supreme Court were to adopt this view, then the common law doctrine of incompatibility would have to be applied to the two positions. Even when applying the common law doctrine, we believe that your position as an Environmental Affairs Manager with the UCCSN would not be incompatible under the common law with membership in the Nevada Legislature.

Two positions are incompatible under the common law when one position is subordinate to the other and subject in some degree to the supervisory or revisory power of the other, or when the functions of the two positions are inherently inconsistent and repugnant. Cummings, 377 A.2d at 1075 n.2. However, the mere existence of potential conflicts of interests does not create incompatibility between two positions under the common law. Reilly, 166 A.2d at 370-71. Rather, common law incompatibility arises only when there is an actual conflict of duties, meaning that "the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both." People v. County of Santa Clara, 57 Cal. Rptr. 2d 322, 328 (Cal. Ct. App. 1996) (quoting People ex rel. Chapman v. Rapsey, 107 P.2d 388 (Cal. 1940)).

The Rhode Island Supreme Court has on several occasions dealt with the question of whether membership in the state legislature is incompatible with other positions in government. In McCabe v. Kane, 221 A.2d 103, 104-05 (R.I. 1966), the court was asked whether the office of State Senator was incompatible under the common law with the office of Clerk of the Supreme Court. The court framed the question it was deciding as follows: "While clearly there is no inherent inconsistency or repugnancy between the duties of the two offices, there are questions of whether their nature and duties, or their character and the relation of each to the other, are such as to make the clerk subordinate to the legislature." Id. at 106-07 (citations omitted). In answering this question, the court first observed that the legislature had by statute created the office of clerk, established its method of appointment and its term, and prescribed some of its ministerial duties. Id. at 107. However, the court found that the core judicial duties of the clerk were defined and controlled by the supreme court, not the legislature. Id. In particular, the court observed that "[s]uch duties constitute the essential function of the office and . . . are matters beyond

the control and direction of the legislature." Id. Because the legislature could not directly encroach upon the supreme court's "exclusive province to direct [the clerk] in the performance of his judicial duties," the court concluded that the position of clerk was not subordinate to or subject to the supervisory control of the legislature. Id. Thus, the court held that:

> In the light of our conclusion that the clerk of this court is subject to our supervision and control in the performance of his judicial duties as distinguished from his ministerial duties, we hold that the office is not subordinated to membership in the state senate and that there is no incompatibility between the two offices.

Id.; Cummings, 377 A.2d at 1075 n.2 (holding that "the Legislature's control over an individual school teacher is extremely attenuated and indirect. As a result, we conclude that the positions of school teacher and state senator are not incompatible."); cf. In re Opinion of Justices, 21 A.2d 267, 270 (R.I. 1941) (holding that the positions of member of the state legislature and member of the state board of elections were incompatible).

In applying the common law doctrine of incompatibility, the key factor is the degree of control that one position may exercise over the duties, emoluments and duration of the other position. Thus, it has been held that membership in the state legislature was incompatible under the common law with holding the office of county school commissioner because the latter office "owes its creation and continuation to legislative enactment and is completely subject to legislative control." Weza v. Auditor General, 298 N.W. 368 (Mich. 1941); see also People ex rel. Verbeck, 506 N.E.2d 464, 465-66 (Ill. App. Ct. 1987); Belleville Twp. v. Fornarotto, 549 A.2d 1267, 1272-75 (N.J. Super. Ct. Law Div. 1988); Dupras v. County of Clinton, 624 N.Y.S.2d 309, 310 (N.Y. App. Div. 1995). In contrast, membership in the state legislature is not incompatible under the common law with holding the office of township attorney because "[t]he Legislature has no power in any judicial, executive or administrative sense to interfere with, supervise or review the performance of an incumbent in local office. Nor does it have the power to appoint to or to remove from local office." Reilly, 166 A.2d at 367. Therefore, under the common law doctrine of incompatibility, the general rule is that a member of a state legislature may occupy another position in government during his legislative term if the state legislature does not directly control the duties, emoluments and duration of the other governmental position.

It could be argued that, because the Nevada Legislature has the power to create and abolish, to prescribe the duties for and to fund all positions of employment in the executive department, the Nevada Legislature directly controls the duties, emoluments and duration of all positions of employment in the executive department. Although there is some superficial appeal to this argument, we do not believe that the common law doctrine of incompatibility was intended to erect such a rigid and absolute barrier that would prohibit all employees of the executive department from serving in the Nevada Legislature,

especially when such a barrier would undermine the concept of the "citizen-legislator" that was envisioned by the Framers of the Nevada Constitution.

At its core, the common law doctrine of incompatibility is "based on public policy considerations." Unified Sch. Dist. No. 501 v. Baker, 6 P.3d 848, 854 (Kan. 2000). Since the adoption of the Nevada Constitution, this state has had a strong public policy favoring a part-time legislative body whose members are qualified and dedicated citizen-legislators that come from every walk of life. We believe that this strong public policy would be undermined if the common law doctrine of incompatibility prohibited all employees of the executive department from serving in the Nevada Legislature. Therefore, we believe that the common law doctrine of incompatibility must be applied judiciously based on the individual facts and circumstances of each case so that the common law doctrine does not unduly restrict the ability of employees of the executive department to serve in the Nevada Legislature.

As discussed previously, the creation, duration, tenure, emoluments and duties of your position as an Environmental Affairs Manager with the UCCSN are not fixed by law. Instead, they are directly controlled by the Board of Regents, which has independent power under the state constitution to control and manage the affairs of the UCCSN. In addition, while the Nevada Legislature retains ultimate control over the structure of the executive department and the amount and purposes of all state appropriations, the most immediate and direct day-to-day control over the hiring, firing and pay of employees of the UCCSN remains with the Board of Regents as an independent constitutional body.

Thus, because the Nevada Legislature's control over your position as an Environmental Affairs Manager with the UCCSN is extremely attenuated and indirect, we believe that your employment with the UCCSN is not inherently inconsistent or repugnant with membership in the Nevada Legislature. Therefore, it is the opinion of this office that you may serve in the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager without violating the common law doctrine of incompatibility.

II. FEDERAL LAW

The federal Hatch Act prohibits certain employees of the executive branch of state or local government from engaging in certain partisan political activity, such as being a candidate for the state legislature. See 5 U.S.C.A. §§ 1501-1508 (West 1996). With very few exceptions, the Hatch Act applies to employees of the executive branch of state or local government "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C.A. § 1501(4) (West 1996).

However, the Hatch Act does not apply to a person who is employed by an educational or research institution that is supported in whole or in part by a state or local government or by a recognized religious, philanthropic or cultural organization. 5 U.S.C.A. § 1501(4)(B) (West 1996); Special Counsel v. Suso, 26 M.S.P.R. 673, 678-79 (1985). Based upon this exemption, employees of public school districts and the University and Community College System of Nevada are not subject to the Hatch Act. See In re Grindle, 1 M.S.P.R. 34, 38 (1979) (explaining that the exemption "was not limited to classroom teachers; the exemption applies to other employees of educational institutions and systems as well.").

Thus, because employees of state-funded educational institutions are expressly exempted from the Hatch Act, it is the opinion of this office that you are not required to comply with the Hatch Act in your position as an Environmental Affairs Manager with the UCCSN.

CONCLUSION

With few exceptions, NRS 281.055 prohibits a person from holding more than one elective office at the same time. However, by it plain terms, NRS 281.055 is limited in its application to elective offices. Because your position as an Environmental Affairs Manager with the UCCSN is not an elective office, it is the opinion of this office that you may serve in the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager without violating the provisions of NRS 281.055.

Pursuant to NRS 284.143, an unclassified employee is permitted to serve in the Nevada Legislature if the employee obtains the approval of his supervisor and the employee is otherwise able to carry out his duties as an unclassified employee and his duties as a member of the Nevada Legislature without undue conflict, such as by taking a leave of absence. Thus, it is the opinion of this office that, as an unclassified employee, you may serve in the Nevada Legislature if you satisfy the requirements of NRS 284.143. It is also the opinion of this office that, if you take a leave of absence without pay from your unclassified employment to serve in the Nevada Legislature, you are entitled pursuant to NRS 281.127 to receive legislative pay for your service as a legislator.

It is the opinion of this office that the separation-of-powers provision in the Nevada Constitution prohibits a member of the Nevada Legislature from holding a public office in the executive branch of state government, because a person who holds such a public office exercises sovereign functions of the state. However, it is also the opinion of this office that the separation-of-powers provision does not prohibit a member of the Nevada Legislature from occupying a position of public employment in the executive branch of state government, because a person in a position of public employment does not exercise any of the sovereign functions of the state.

After applying the well-established case law from the Nevada Supreme Court which sets out the test for distinguishing between a position of public employment and a public office, it is the opinion of this office that your position as an Environmental Affairs Manager with the UCCSN is a position of public employment, not a public office. Therefore, it is the opinion of this office that you may serve in the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager without violating the separation-of-powers provision in section 1 of article 3 of the Nevada Constitution.

Furthermore, because the Nevada Legislature's control over your position as an Environmental Affairs Manager with the UCCSN is extremely attenuated and indirect, we believe that your employment with the UCCSN is not inherently inconsistent or repugnant with membership in the Nevada Legislature. Therefore, it is the opinion of this office that you may serve in the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager without violating the common law doctrine of incompatibility.

Finally, because employees of state-funded educational institutions are expressly exempted from the Hatch Act, it is the opinion of this office that you are not required to comply with the Hatch Act in your position as an Environmental Affairs Manager with the UCCSN.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By Kevin Powers
Kevin C. Powers
Principal Deputy Legislative Counsel

KP:dtm
Encl.
Ref No. 0211171807
File No. OP_Geddes03010212519