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OPINION NO. 2006-03

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

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

Dear Mr. Crawforth:

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

QUESTION ONE

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

ANALYSIS OF QUESTION ONE

NRS 233B.127 states as follows:

> 1. When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.
>
> . . . .
>
> 4. Except as otherwise provided in this subsection, a person must not be admitted as a party to an administrative proceeding in a contested case involving the grant, denial or

> renewal of a license unless he demonstrates to the satisfaction of the presiding hearing officer that:
>
> (a) His financial situation is likely to be maintained or to improve as a direct result of the grant or renewal of the license; or
>
> (b) His financial situation is likely to deteriorate as a direct result of the denial of the license or refusal to renew the license.
>
> The provisions of this subsection do not preclude the admission, as a party, of any person who will participate in the administrative proceeding as the agent or legal representative of an agency.

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

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

CONCLUSION TO QUESTION ONE

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

QUESTION TWO

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

ANALYSIS OF QUESTION TWO

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

CONCLUSION TO QUESTION TWO

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

QUESTION THREE

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

ANALYSIS OF QUESTION THREE

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

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

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

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

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

CONCLUSION TO QUESTION THREE

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

QUESTION FOUR

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

ANALYSIS OF QUESTION FOUR

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

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

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

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

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

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

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

There is also evidence in the legislative history[1] of NRS 233B.127(4) which indicates that the Legislature intended this section to limit the participation of public interest groups in the administrative hearing process unless they could demonstrate a direct financial interest in the outcome of the matter. In a meeting of the Assembly Committee on Government Affairs, Assemblyman Goicoechea stated:

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

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

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

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

CONCLUSION TO QUESTION FOUR

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

Sincere regards,

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Note: This AGO is for electronic distribution – the original opinion is on file at address shown on the letterhead