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September 24, 2007

Chief John Allan Gonska
State of Nevada
Department of Public Safety
Division of Parole and Probation
1445 Old Hot Springs Road, Suite 104
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Dear Mr. Gonska:

You have requested an opinion from the Attorney General's Office regarding Assembly Bill (A.B. 510), that amends NRS 176A.500 and which was signed into law on June 14, 2007, and became effective on July 1, 2007.

On August 20, 2007, as Chief of the Division of Parole and Probation, you issued a temporary Standing Order with respect to A.B. 510 in order "to provide guidance and consistency in the application of the 20-day reduction of the supervision term for felony probationers pursuant to NRS 176A.500(5)." In the process of establishing a permanent directive for division staff, you are requesting assistance in (1) defining the term "serious infraction" as the term is used in that legislation and (2) also defining the impact of the probation period deduction provision contained in A.B. 510.

QUESTION ONE

What is a "serious infraction" as the term is used in Assembly Bill No. 510 Section 8.7 modifying NRS 176A.500?

ANALYSIS

The Department of Public Safety ("Department") is vested with the general power and authority to administer the laws relating to public safety. NRS 480.100¹. As part of that role, the Nevada Legislature tasked the Department with the responsibility to execute, administer and enforce, and perform the functions and duties provided in chapters 176A and 213 of NRS relating to parole and probation. NRS 480.110(1). NRS 213.1071 creates, as part of the Department of Public Safety, the Division of Parole and Probation ("the Division").

The Division is statutorily directed to execute, administer, and enforce the provisions of Chapters 176A and 213 of NRS relating to parole and probation and perform such duties and exercise such powers as may be conferred upon it pursuant to those chapters and any other specific statute. NRS 480.140(6). The Chief of the Division is assigned the responsibility to administer all duties, activities, and services of the Division and is responsible for its management. NRS 213.1072.

As part of its specific authority to administer and enforce its applicable NRS provisions, the Division has the power to interpret the relevant statutes. "An agency charged with the duty of administering an act is impliedly clothed with the power to construe it as a necessary precedent to administrative action." *Clark County School District v. Local Government Emp. Management Relations Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974). Moreover, considerable deference should be given to that interpretation:

[a]n administrative construction which is within the language of a statute and the rules promulgated thereunder should not be lightly disturbed by the courts, particularly a construction by the agency charged with its administration when such construction is intended to advance the purposes of a statute.

Oliver v. Spitz, 76 Nev. 5, 10, 248 P.2d 158, 161 (1960).

Considering this, appropriate care must be taken when defining a particular phrase in a statute. The Division should interpret the phrase in a manner consistent with legislative intent that is neither too restrictive on its ability to perform the duties it is assigned to perform by the legislature, nor too vague or ambiguous which could lead to arbitrary enforcement of the statute. In addition, a statutory term or phrase must be interpreted in a manner that will avoid inconsistent application. It is with these

¹ The Department is vested with the powers and authority provided in this chapter and shall carry out the purposes of this chapter. NRS 480.100 (2). NRS Chapter 480 is titled Administration of Laws Relating to Public Safety.

parameters in mind that we examine the proposed definition of the phrase "serious infraction" as set forth in the Standing Order.

The Division has narrowly defined a "serious infraction" as whenever a "violation report" or "incident report" is submitted to the district court. With a "violation report" being defined as a written report requesting a hearing before the appropriate authority and describing the manner in which an offender has violated the conditions of their supervision, including actions or recommendations made by the Division of Parole and Probation," and an "incident report" defined as a written informational report to the appropriate *authority* describing the manner in which an offender violated the condition(s) of their supervision, and noting any actions taken by the Division or Parole and Probation.

In reviewing the definition proposed by the Division, some difficulty may arise with the application of this proposed definition. To illustrate, by defining a serious infraction as only when a report is submitted to the district court (or appropriate authority), either requesting a hearing or describing the manner in which an offender violated his/her supervision, the Division limits its ability to enforce the provision because the report may be found to be incorrect or it may be determined that the individual did not commit the act described in the report. In addition, this definition would limit a serious infraction to only those two instances (i.e., when a violation or incident report is submitted) and thus, further limiting when the Division could implement the provision.

Considering the above limitations, the Division may wish to consider a more general definition that allows for greater flexibility in its application. For example, using the plain dictionary meaning, the phrase serious infraction means "a violation that has important or dangerous consequences."² Using this general definition and adding terms which provide the Division more flexibility, one proposed definition might read:

any type of violation that would have important or dangerous consequences as determined by the director, including but not limited to violations that result in either a violation report or incident report being submitted to the district court or other appropriate authority.

This definition would grant the Division all the authority under its current proposed definition but expands the applicability and use of the provision. We note that any regulation proposed by the Division would be subject to review by the Director, who has statutory authority to adopt regulations "necessary for the operation of the Department and enforcement of laws administered by the Department." NRS 480.150.

² MERRIAM WEBSTER'S DICTIONARY defines "serious" as having important or dangerous possible consequences; and "infraction" as a violation.

CONCLUSION TO QUESTION ONE

The Division is granted the authority to interpret the phrase "serious infraction" as it deems necessary to perform its statutorily proscribed duties and great deference will be afforded to the Division's definition of the phrase. The Division, however, should propose for adoption by the Department a regulation definition that affords clarity, flexibility, and consistency in its application.

QUESTION TWO

Must the Division discharge a probationer pursuant to A.B. 510 section 8.7 even though that individual would be released from probation prior to his or her completion of a legislatively created Drug Court program?

ANALYSIS

NRS 453.580 grants courts the authority to establish treatment programs whereby a district court, pursuant to various statutes, may assign certain alcohol and drug users for treatment.³ An assignment to a drug rehabilitation program must include the terms and conditions for successful completion of the program. NRS 453.580(1). These rehabilitation or treatment programs are commonly referred to as "Drug Court."

Nevada law provides courts with specific guidance on how to assign different individuals to Drug Court. For example, for individuals without a prior drug-related conviction, a court may suspend the proceedings against an accused without entering a judgment and place the individual on probation with terms that include the attendance and completion of a rehabilitation program:

If a person who has not previously been convicted of any offense pursuant to NRS 453.011 to 453.552, inclusive, or pursuant to any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant or hallucinogenic substances tenders a plea of guilty, nolo contendere or similar plea to a charge pursuant to subparagraph (1) of paragraph (a) of subsection 2 of NRS 453.3325, subsection 2 or 3 of NRS 453.336, NRS 453.411 or 454.351, or is found guilty of one of those charges, the court, without entering a judgment of conviction and with the consent of the accused, may suspend further proceedings and place him on probation upon terms and conditions that

³ A court may establish an appropriate treatment program to which it may assign a person pursuant to subsection 4 of NRS 453.336, NRS 453.3363 or 458.300 or it may assign such a person to an appropriate facility for the treatment of abuse of alcohol or drugs which is certified by the Health Division of the Department. NRS 453.580 (1).

must include attendance and successful completion of an educational program or, in the case of a person dependent upon drugs, of a program of treatment and rehabilitation pursuant to NRS 453.580.

NRS 453.3363(1) (emphasis added).

Likewise, NRS 458.290 through 458.350 allow the courts to postpone sentencing and assign certain alcoholics or drug addicts⁴ to Drug Court for treatment. NRS 458.310 requires a court to hold a hearing to determine whether an individual should receive drug treatment. At that hearing, the court is required to advise a candidate for Drug Court that, "the court may impose any conditions upon the election of treatment that could be imposed as conditions of probation," and that his or her conviction will be set aside if he or she "satisfactorily completes treatment and satisfies the conditions upon the election of treatment, as determined by the court." NRS 458.310(2)(d).

Both NRS 453.3363 and 458.300 expressly require individuals participating in Drug Court to successfully or satisfactorily complete the program or risk having any postponed sentence executed or a conviction entered against them. "Upon violation of a term or condition, the court may enter a judgment of conviction and proceed as provided in the section pursuant to which the accused was charged." NRS 453.3363(2). If a Drug Court participant "does not satisfactorily complete the treatment and satisfy the condition, he may be sentenced and the sentence executed." NRS 458.310(d). Therefore, the completion of a Drug Court program is a necessary condition under both provisions and for an individual to avoid a more severe conviction or sentencing.

Section 8.7 of A.B. 510 amends NRS 176A.500 by adding subsection (5) which provides:

An offender who is sentenced to serve a period of probation for a felony who has no serious infraction of the regulations of the Division, the terms and conditions of his probation or the laws of the State recorded against him, and who performs in a faithful, orderly and peaceable manner the duties assigned to him, must be allowed for the period of his probation a deduction of 20 days from that period for each month he serves.

A.B. 510, 74th Sess. (Nev. 2007).

⁴ Drug Addict is defined in NRS 458.290 as "any person who habitually takes or otherwise uses any controlled substance, other than any maintenance dosage of a narcotic or habit-forming drug administered pursuant to chapter 453 of NRS, to the extent that he endangers the health, safety or welfare of himself or any other person."

The impact of this provision is that a probationer who satisfies the conditions set forth in NRS 176A.500 (5) could have his or her period of probation reduced by 20 days for every month served. A strict application of this 20-day reduction rule could result in a conflict with the completion of a Drug Court ordered course of treatment, to the detriment of both the probationer and the legislative intent for the treatment. This would be an absurd result.

In light of the foregoing, there is possibly a statutory conflict regarding the intent of the legislature with respect to A.B. 510 and its established Drug Court program. Courts generally interpret statutes based upon their plain meaning, which is intended to reflect legislative intent. *Washington v. State*, 117 Nev. 735, 30 P.3d 1134 (2001). In fact, a court will not look beyond the language of the statute if the statutes are clear on their face. *White v. Warden, Nevada State Prison*, 96 Nev. 634, 614 P.2d 536 (1980). In addition, statutes must be interpreted harmoniously with one another and should not be read to produce unreasonable or absurd results. *Washington* at 739. However, where ambiguity exists, the legislature's intent is controlling, and the statute must be interpreted in accordance with reason and public policy. *Sheriff v. Witzenburg*, 145 P.3d 1002 (2006) quoting *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005). When two statutes conflict with each other they are ambiguous. See *SIIS v. Woodall*, 106 Nev. 653, 657, 799 P.2d 552, 554 (1990). Precedence will be given to a specific statute where a specific statute conflicts with a general one. *Sheriff*, at 1005.

The Nevada Legislature has concluded that the treatment of drug abuse is an important goal for the state:

It is the purpose of NRS 453.600 to 453.730, inclusive, to protect and promote the health, welfare and safety of the people of this State by combating the effects of the disease of narcotic addiction and by assisting the rehabilitation of certain narcotic addicts through a comprehensive program of treatment, research and investigation.

NRS 453.600. In lieu of punishment, the legislature has granted the courts the ability to develop a drug treatment program for certain individuals. NRS 453.580. In doing so, it drafted specific statutes that outline the process that allows courts to suspend proceedings or postpone sentencing for individuals willing to enter into and complete a Drug Court program. NRS 453.3363 and 458.290 et seq. As noted above, both of these statutes expressly require any individual participating in Drug Court to complete the program or risk having any postponed sentence executed or conviction entered. Comparatively, the addition of NRS 176A.500(5) is a general statutory provision that allows for a reduction in the probationary period for eligible probationers based on their good behavior.

Considering this, it is unlikely that the 2007 Legislature intended the general provisions of NRS 176A.500(5), applicable to all probationers, to effectively subvert the intent behind the NRS 453 and 458 as they relate to the requisite completion of Drug Court for a specific subset of probationers. Rather, the more logical interpretation is that the legislature intended the language in A.B. 510 to apply to those individuals who have successfully completed all requirements and obligations of their probation, including Drug Court, if so required. An interpretation whereby probationers would automatically "fall off" probation despite their failure to complete a drug rehabilitation program would render the provisions of NRS 453 and 458 mere surplusage and would be contrary to the intent of the legislature. Such an interpretation yields an absurd result and cannot withstand scrutiny.

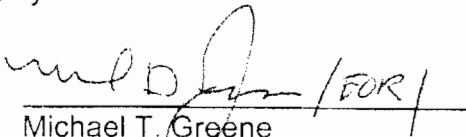
CONCLUSION TO QUESTION TWO

Because the additions of A.B. 510 section 8.7 appear to conflict with the provisions of NRS 453 and 458, the statutes must be read harmoniously as to not produce an unreasonable or absurd result. According to the rules of statutory construction, precedence must be given to a specific statute over a general statute. A.B. 510 is a general statute that applies to all individuals on probation. Conversely, NRS 453 and 458 are specific statutes that apply to a specific and limited subset of probationers. Because the Drug Court statutes are specific they take precedence over general language of NRS 176A.500(5). Therefore, probationers who have completed their Drug Court program and still have time left on probation, may take advantage of statutory deduction language contained in NRS 176A.500(5). However, probationers who have not completed the Drug Court program must first satisfy their obligation to complete the Drug Court program before they can have their probationary period reduced pursuant to NRS 176A.500(5).

Sincerely,

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By:


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MTG/pks