

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

OPINION NO. 96-23 ELECTIONS; LOCAL GOVERNMENT; PUBLIC OFFICERS: If voters approve term limits for state and local officials in November 1996, only periods of service commencing after November 27, 1996, will be counted as a term for limitation purposes. "Local governing body" is defined and local offices evaluated to determine to which ones term limits will apply.

Carson City, August 9, 1996

The Honorable Scott W. Doyle, Douglas County District Attorney, Post Office Box 218, Minden, Nevada 89423

Dear Mr. Doyle:

You have requested an opinion from this office regarding term limits for state and local public officials.

BACKGROUND

In 1994 an initiative petition proposing to amend the Nevada Constitution to limit terms for various state and local public officers qualified for the general election ballot. This ballot measure was identified as Question 9. The full text of the petition follows. Voters at two consecutive elections must approve such a ballot question before it becomes law. Nev. Const. art. 19, § 2(4). Voters in the 1994 general election approved Question 9.¹ Voters must again approve this question in the 1996 general election for it to be effective.² Since 70 percent of the voters approved the question in

¹ The 1994 General Election Returns supplied by the Secretary of State at page 12 indicates 259,211 votes in favor of Question 9 and 108,780 votes against.

² If a majority of voters approve the ballot question, it will become part of the Nevada Constitution upon completion of the canvass of votes by the Nevada Supreme Court. The canvass will be conducted on November 27, 1996. Nev. Const. art 5, § 4; NRS 293.395(2).

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1994, the issues raised in this opinion request are relevant, as the probability of the question passing in 1996 is high.³

The initiative proposes to limit terms of service of three groups of elected officials: all state officers, all judges, and certain local officials. The language of the initiative is clear that all state officers and all judges are included. However, the language is not clear as to which local officials are included.

In drafting the explanation and arguments for and against passage that appear on the ballot, general and inclusive language was used to inform the voters that state and local public officers were subject to the term limitations of the initiative. Since local judges as well as members of local governing bodies would be affected by the initiative, the general term local public officers was used. Also, the initiative petition filed with the Secretary of State is entitled "Initiative to Limit Terms of State and Local Officers." The question then becomes which local public officers would be subject to term limitations if the voters again approve the ballot question.

The full text of the initiative petition as filed with the Secretary of State pursuant to NRS 295.015 is as follows:

INITIATIVE TO LIMIT TERMS OF STATE AND LOCAL OFFICERS

EXPLANATION -- Mater is italics or underscored is new;
matter in brackets[] is material to be omitted.

The People of the State of Nevada do enact as follows:

³ The Nevada Judges Association (Association) filed a lawsuit in 1995 to remove from the ballot that portion of the question pertaining to justices of the supreme court, district judges, and justices of the peace. The Nevada Supreme Court denied the relief the Association sought, but split the initiative into two questions: one pertaining to supreme court justices, district court judges, justices of the peace, and all other judges; and the other, to the other affected elected officials. *Nevada Judges Ass'n v. Lau*, 112 Nev. 51, 910 P.2d 898 (1996). The court in a footnote clarified: "If either proposal passes in the 1996 general election, the Constitution will be effectively amended as to the proposal or proposals receiving a majority vote." *Id.* 112 Nev. at 904, n.2. The Association petitioned for a rehearing arguing the divided question pertaining to judges required passage in two general elections before it could be effective. The court denied the rehearing confirming its previous determination that either part of the question only needs to be approved by the voters in the 1996 general election. *Nevada Judges Association v. Lau*, No. 26177 (Nev. Apr. 30, 1996) (order denying rehearing).

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Section 1. Section 3 of article 4 of the constitution of the State of Nevada is hereby amended to read as follows:

[Sec:] Sec. 3. 1. The members of the Assembly shall be chosen [biennially] biennially by the qualified electors of their respective districts, on the Tuesday next after the first Monday in November and their term of office shall be two years from the day next after their election.

2. No person may be elected or appointed as a member of the Assembly who has served in that office, or at the expiration of his current term if he is so serving will have served, 12 years or more, from any district of this state.

Sec. 2. Section 4 of article 4 of the constitution of the State of Nevada is hereby amended to read as follows:

[Sec:] Sec. 4. 1. Senators shall be chosen at the same time and places as members of the Assembly by the qualified electors of their respective districts, and their term of Office shall be four Years from the day next after their election.

2. No person may be elected or appointed as a Senator who has served in that office, or at the expiration of his current term if he is so serving will have served, 12 years or more, from any district of this state.

Sec. 3. Section 19 of article 5 of the constitution of the State of Nevada is hereby amended to read as follows:

[Section] Sec. 19. 1. A secretary of state, a treasurer, a controller, and an attorney general, shall be elected at the same time and places, and in the same manner as the governor. The term of office of each shall be the same as is prescribed for the governor.

2. Any elector shall be eligible to [either of said] any of these offices[.], but no person may be elected to any of them more than twice, or more than once if he has previously held the office by election or appointment.

Sec. 4. Section 11 of article 6 of the constitution of the State of Nevada is hereby amended to read as follows:

Sec. 11. 1. The justices of the supreme court and the district judges shall be ineligible to any office, other than a judicial office, during the term for which they shall have been elected or appointed; and all elections or appointment to any such judges by the people, legislature, or otherwise, during said period, to any office other than judicial, shall be void.

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2. No person may be elected a justice of the supreme court, judge of any other court, or justice of the peace more than twice for the same court, or more than once if he has previously served upon that court by election or appointment.

Sec. 5. Section 3 of article 15 of the constitution of the State of Nevada is hereby amended to read as follows:

[Section] Sec. 3. 1. No person shall be eligible to any office who is not a qualified elector under this constitution.

2. No person may be elected to any state office or local governing body who has served in that office, or at the expiration of his current term if he is so serving will have served, 12 years or more, unless the permissible number of terms or duration of service is otherwise specified in this constitution.

QUESTION ONE

To which offices does the term "local governing body" as used in section 5 of the proposed initiative apply?

ANALYSIS

Section 5 of the initiative proposes to amend section 3 of article 15 of the Nevada Constitution by adding language to limit the number of terms members of local governing bodies may serve. However, the initiative does not define "local governing body."

Courts from various jurisdictions provide guidance. The Minnesota Court of Appeals stated "it is the power to decide, as opposed to the right to recommend, that determines whether one is a member of a governing body." *Blaine v. Anoka-Hennepin Independent School District*, 498 N.W.2d 309, 314 (1993). See also *Minnesota Education Association v. Bennett*, 321 N.W.2d 395 (1982). The Supreme Court of Georgia in one case described a governing body as a policy-making apparatus. *City of Cave Spring v. Mason*, 310 S.E.2d 892, 893 (1984). In another case, the Supreme Court of Georgia identified a governing authority with performing legislative functions. The Supreme Court of Florida agrees a governing body would have the last word concerning policies. *Metro-Dade Fire*

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Rescue Service District v. Metropolitan Dade County, 616 So.2d 966 (1993).

The Supreme Court of Virginia characterizes a governing body as having the authority to legislate by ordinance. *Laird v. City of Danville*, 302 S.E.2d 21 (1983). The Supreme Court of Texas agrees a governing body exercises legislative powers. *Burch v. City of San Antonio*, 518 S.W.2d 540 (1975). The Superior Court of New Jersey also equates governing body with legislative functions. *Mentus v. Town of Irvington*, 191 A.2d 806 (1963).

After reviewing these court decisions, it is our opinion a governing body performs legislative functions, makes policy for the jurisdiction it governs, and makes decisions as opposed to making recommendations. Applying this definition, we evaluated many different local boards to determine which are governing bodies whose members would be subject to the term limitations.

Term limits clearly apply to members of a county commission, board of supervisors, or a city council since these bodies are local governing bodies. The Supreme Court of Delaware, in an unreported case, characterized the New Castle County Council as the legislative governing body of the county. *Riley v. Moyed*, 1986 WL 8169 (Del. July 22, 1986).

It is also equally clear, term limits would not apply to other elected county officials, such as county clerk, recorder, sheriff, treasurer, assessor, district attorney, and public administrator, since they are not members of governing bodies. The same conclusion applies to elected city attorneys, city clerks, and city treasurers⁴, as well as township constables.⁵ The Minnesota Supreme Court in *McGuire* stated the city attorney is not part of the governing body. *McGuire v. Hennessy*, 193 N.W.2d 313 (1971). Pursuant to various enabling statutes, these elected officials discharge their duties individually or with the assistance of deputies and staff. See NRS

⁴ If a city has an auditor who is elected, that auditor would not be subject to term limits.

⁵ Term limits would apply to justices of the peace and elected municipal court judges pursuant to section 4 of the initiative petition.

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246.060; 246.030; 247.060; 247.030; 248.090; 248.040; 249.090; 249.010; 249.060; 250.010; 250.060; 252.110; 252.070; 253.040; 253.025; 258.070; 258.060; 266.405; 266.470; 266.480; 266.500; and 266.455. The nature of these offices does not involve a governing body in performance of duties and therefore, these officers are not subject to the proposed constitutional term limitations.

However, if an elected official is a member of a group whose function is to govern, that is to control, direct, or exercise authority over others, or perform legislative or policy making decisions, then that officer would be subject to the term limitations.

The office of mayor and other local boards are more difficult to analyze. It is not clear whether mayors are included, nor is it clear which boards within a county would be affected. Mayors have both executive and legislative duties. Cf. NRS 266.165; 266.190; and 266.200. An examination of the instrument creating each city is necessary before a conclusion can be reached as to whether a mayor would be subject to term limits. If the creating instrument indicates the mayor's main function is to be an administrator for the city, and the mayor does not exercise legislative power as a member of the city council, then the mayor would not be subject to term limits. If, on the other hand, the mayor functions as a member of the city council, a governing body, then term limits would apply to that position as well as to the other members of the city council.

Cities can be created either by special charter or by general law. Nev. Const. art. 8, §§ 1, 8. General law cities have the authority to create the office of city manager. NRS 266.390(1). These city managers can have the duties of chief administrator for the city. If such is the case, the duties performed by the mayor are more legislative in nature, that is, to preside over city council meetings and exercise legislative power as a member of the council. Therefore, the proposed term limitations would apply to mayors of general law cities if the office of city manager has been created and the city manager is the chief administrator for the city. In general law cities with no city manager and the mayor's duties are executive in nature (i.e., mayor is not voting member of council), the proposed term limitation would not apply.

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The charters of cities created by special charter must be examined on a city by city basis. If the mayor is appointed, instead of elected, then the mayor is not subject to term limits. If the mayor is elected, has voting authority, and does not merely preside over council meetings, then the mayor is a member of the governing body and the number of terms served would be limited. In those cities, the mayor is part of the governing body that discharges legislative duties for the city.

Carson City is unique in that it is a consolidated city and county government with features comparable to both cities and counties. The functions performed by members of the board of supervisors and the mayor are legislative in nature, so the proposed initiative would apply to both the board members and the mayor.

If members of a town board are elected and perform legislative duties comparable to those in municipalities, then such members would be subject to term limitations. Citizen advisory council members would not be subject to the limitation since such offices are appointive and merely advisory. The same conclusion applies to town advisory boards if the members are appointed.

However, if members of a town advisory board are elected, they would be subject to term limits. We reach this conclusion even though the board may be denominated the "town *advisory* board" since such a board may often have the same attributes as a local governing body. By statute, a town advisory board may be responsible for providing and managing many town services, may control expenditures, and may have the authority to promulgate town bylaws and codes as well as acquire, manage, and improve town property. See NRS 269.575; 269.580; 269.590; 269.595; 269.600; 269.610; and 269.620.

Elected trustees of county school districts would be included in the term limitation due to the nature of the responsibilities they discharge pursuant to NRS 386.350 and the fact that school districts are political subdivisions pursuant to NRS 386.010(2). "Elected members of a county board of education are 'members of the legislative body of [a] political subdivision . . .'" *West Virginia v. West Virginia Public Employees Retirement System*, 401 S.E.2d 916, 918 (1991).

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Statutory authority exists for creation of other local districts. The test to determine whether term limits will apply to the directors of such districts is two-fold: (1) Are the directors elected? and (2) Is the function of the directors legislative in nature? Examples of these types of boards include: districts created pursuant to the Nevada Improvement District Act, NRS 309.050 and 309.070; general improvement districts, NRS ch. 318; boards of hospital trustees and district hospitals, NRS ch. 450; county fire protection districts and districts for the control of floods, NRS ch. 474. An example of a board to which term limits would not apply is an irrigation district.

NRS ch. 539 authorizes creation of irrigation districts. If such a district is created, it is to be administered by elected directors. NRS 539.045. However, the Nevada Supreme Court has characterized an irrigation district as a "public corporation" and elaborated that "[t]he district is not established for political or governmental purposes." *In re Walker River Irrigation District*, 44 Nev. 321, 339, 195 P. 327, 335 (1921). Subsequent courts have agreed with this reasoning. See *Truckee-Carson Irrigation Dist. v. McLean*, 49 Nev. 278, 287, 245 P. 285, 294 (1926); *Truckee-Carson Irrigation Dist. v. Barber*, 80 Nev. 263, 266, 392 P.2d 46, 49 (1964).

If such a district has no governmental purpose, then it cannot be a local government for purposes of the term limitation petition and its directors would not be members of a local governing body. This conclusion is supported by *State of Nevada Employees Ass'n, Inc.* which requires liberal construction in favor of the right of the voters to exercise their electoral choice. *State of Nevada Employees Ass'n v. Lau*, 110 Nev. 715, 720, 877 P.2d 531, 535 (1994).⁶

Elected members of the State Board of Education would be subject to the 2-term limitation pursuant to the language in section 5 of the initiative petition that includes other state elected officials. NRS 385.021(6) currently imposes a limitation of three terms upon members of this state board; however, the exemption granted in section 5 of the petition is only for those offices where the term is already limited by the Nevada Constitution, like the position of governor.

⁶ This case is discussed more fully in the analysis to the second question of this opinion.

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Members of the board of regents would also be subject to the term limitation under the "any state office" limitation in section 5 of the initiative petition.

If a question arises concerning an elected local position which is not resolved by the guidelines provided above, this office will issue a supplemental opinion upon request of the district attorney or city attorney.

CONCLUSION TO QUESTION ONE

The initiative will apply to county commissioners for the reasons that they are elected and perform a legislative function as members of the county commission, a "local governing body." The petition will not limit terms of service of the county clerk, recorder, sheriff, treasurer, assessor, district attorney, and public administrator because they do not perform legislative functions as part of a "local governing body."

The initiative will also apply to city councils and to mayors in general law cities where city managers have been appointed, but not to mayors in general law cities where no city manager has been appointed and the mayor exercises only executive functions. The petition will not limit terms of service of city attorneys, city clerks, and city treasurers. Nor will it limit terms of township constables.

For special law cities, the limitation will apply to city council members and those mayors who, by charter, are part of the city council.

Members of an elected town board would be subject to term limitations, but advisory board members would not, if they are appointed, not elected. If advisory board members are elected and perform legislative functions, term limits would apply.

For other districts, the test is whether the directors are elected and whether the function of the directors as a board is legislative in nature. If the answer to both of these questions is yes, then term limits would apply. An exception to this is an irrigation district.

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QUESTION TWO

How will limitations on elective service be construed and applied should the initiative be approved by the voters in the general election in November 1996?

ANALYSIS

If this measure is approved in November, limitations on terms of elective service for most state and many locally elected officials will be placed in the Nevada Constitution. To answer this second question, two issues must be resolved: (1) When does the initiative go into effect? and (2) Which terms of office will be counted under the proposed limitations on service?

The issue of when the initiative goes into effect is controlled by a 1977 opinion issued by the Nevada Supreme Court. In *Torvinen v. Rollins*, 93 Nev. 92, 560 P.2d 915 (1977), the court addressed a similar question regarding the effective date of a constitutional amendment approved by the voters extending the term of office for district court judges.

In *Torvinen* the lower court ruled the amendment applied retroactively to all judges holding office at the time it was adopted, thereby extending their 4-year terms to six years. *Id.* at 93. The supreme court reversed, holding "the amendment applies prospectively only to elections held after its effective date." *Id.* at 94.

The supreme court reasoned:

We therefore determine a constitutional amendment adopted pursuant to article 16 becomes effective upon the canvass of the votes by the supreme court. This provides uniformity for the effective date of amendments adopted pursuant to article 16 and those adopted pursuant to the initiative procedures of article 19, which specifically mandates such amendments "become a part of this constitution upon completion of the canvass of voters by the supreme court." Nev. Const. Art. 19 §2.

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As a general rule, a constitutional amendment is to be given only prospective application from its effective date unless the intent to make it retrospective clearly appears from its terms. Here, the amendment is void of any term indicating the legislature or electorate intended retrospective application.

Id. (citations omitted). Accordingly, if the voters approve this term limitation initiative, the provisions will go into effect on the day of the canvass, November 27, 1996.

The *Torvinen* case also assists in analyzing the second issue in this question: Which terms of office will be counted under the proposed limitations on service?

The court in *Torvinen* applied the general rule that "a constitutional amendment is to be given only prospective application from its effective date unless the intent to make it retrospective clearly appears from its terms." *Id.* The court had previously stated "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." *Holloway v. Barrett*, 87 Nev. 385, 390, 487 P.2d 501, 506 (1971).

An examination of the language of the term limitation initiative reveals the petition is not clear as to when the tenure limitations start. In fact, it is vague and ambiguous on the point of when to begin counting terms. The Arkansas Supreme Court in *U.S. Term Limits, Inc., v. Hill*, 872 S.W.2d 349, 360 (1994) *aff'd* *U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, 115 S. Ct. 1842 (1995)⁷, noted several other states have adopted term limitation amendments and provided a date certain from which terms will be counted:

⁷ *Hill* addressed term limitations for state and congressional officers. The U.S. Supreme Court granted certiorari, but limited its review to the issue of term limits for congressional officers.

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--State of Washington. Wash.Rev.Code § 29.15.240 (Supp.1993) (no terms served before November 3, 1992, may be used to determine eligibility to appear on the ballot) (approved Nov. 3, 1992).

--State of California. Cal. Const. art. XX, § 7 (applies to terms of state constitutional officers and legislators where the official was elected or appointed to the office after November 6, 1990) (adopted Nov. 6, 1990).

.....
--State of Colorado. Colo. Const. art. XVIII, § 9a (applies to terms of office in Congress beginning on or after January 1, 1991) (approved Nov. 6, 1992).

--State of Wyoming. Wyo.Stat. §§ 22-5-103, 22-5-104 (1992) (terms of service in state offices and in Congress prior to January 1, 1993, shall not be counted) (approved Nov. 3, 1992).

Nevada's term limits initiative does not provide a date after which terms of service will be counted, although it easily could have stated that it applies to all prior terms of service.

The court in *Hill* concluded only periods of service commencing on or after the effective date of the amendment would be counted as a term for limitation purposes. *Id.* at 361. Besides applying the rule of statutory construction that constitutional amendments operate prospectively unless the language used or the purpose of the provision indicates otherwise, the court also reasoned "with respect to an amendatory act the legislation will not be construed as retroactive when it may be reasonably construed otherwise. The same rule of construction is equally applicable to a constitutional amendment." *Id.* at 361 (citations omitted); *see also State v. Dovey*, 19 Nev. 396, 399 (1885).

Since the initiative fails to include specific language indicating it is intended to be retroactive in effect, it must be applied prospectively. This is especially apparent in light of the Nevada Supreme Court holding: "The right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office. *Gilbert v. Breithaupt*, 60 Nev. 162, 165-66, 104 P.2d 183, 185 (1940)." *Nevada Judges Ass'n*, 112 Nev. at 54.

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In 1994, the court addressed the term limitation provision imposed on the governor by article 5, section 3 of the Nevada Constitution. In holding a governor who had served two "years" of another governor's term was eligible for reelection since "years" as used in the constitution referred to "official years" rather than "calendar years," the court stated:

Most importantly, we conclude that the people's ability to choose a governor should not be restricted by an ambiguous provision. Petitioners should prevail only if the phrase "years of a term" cannot possibly refer to anything other than "calendar years." If a constitutional provision is capable of being understood in two or more senses by reasonably informed persons, it must be liberally construed in favor of the right of the voters to exercise their electoral choice:

The right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office "Statutes imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers." *Gilbert v. Breithaupt*, 60 Nev. 162, 165-66, 104 P.2d 183, 185 (1940) (quoting 46 C.J.S. *Officers* Sec. 32 at 937 (1928)).

State of Nevada Employees Ass'n v. Lau, 110 Nev. 715, 720, 877 P.2d 531, 535 (1994) (citations omitted).

Since the effective date of the petition would be November 27, 1996, the term limitations will not apply to affected officials elected in the 1996 general election. If approved, term limits would be in effect for the 1997 municipal elections, and the 1998 primary and general elections, and so on.

CONCLUSION TO QUESTION TWO

If the voters approve the Initiative to Limit Terms of State and Local Officers in the general election in November 1996, only periods of service

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commencing after November 27, 1996, will be counted as a term for limitation purposes.¹

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By: KATERI CAVIN
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¹ Officials elected at the general election on November 5, 1996, but who take office at a later date, are not affected by this opinion.