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**ASSEMBLY COMMITTEE  
ON EDUCATION**



**WORK SESSION DOCUMENT**

March 17, 2003

Prepared by

Carol M. Stonefield  
Committee Policy Analyst  
Research Division

J 1/8

ASSEMBLY EDUCATION  
DATE: 3/26/03 ROOM: 3143 EXHIBIT J  
SUBMITTED BY: CAROL STONEFIELD

TAB

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Sponsor: Assembly Committee on Education on behalf of the Pershing County School District

Assembly Bill 175 proposes to provide for the appointment of a temporary replacement to a board of trustees of a school district for a member who enters active military service.

Proponents:

A vacancy has occurred on the Pershing County School Board of Trustees because a member of the board, who is also a member of the armed services, has been called to active duty in the Middle East. He joined a recent board meeting via audio conference.

Proponents said that board members, absent for military reasons, need to focus on what they are doing. An elected board needs full representation.

Opponents: None

Fiscal Impact: None

Proposed Amendments: None

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MEMORANDUM

DATE: March 11, 2003  
TO: Assemblyman Wendell P. Williams  
FROM: Carol M. Stonefield, <sup>AMS</sup> Senior Research Analyst  
Research Division  
SUBJECT: Vacancies on School Boards of Trustees

Assembly Bill 175 proposes to allow the members of a school board of trustees to fill a vacancy with a temporary appointment if the vacancy occurs because a member of the board has been called to active military service.

During the hearing, Assemblyman William C. Horne raised the question of the procedures to follow when a vacancy on a board of trustees is the result of a catastrophic illness or injury. This memorandum provides a response to that inquiry.

**VACANCIES IN ELECTED BOARDS**

*Nevada Revised Statutes* (NRS) 386.270 provides that, when a vacancy occurs on a school board of trustees, it shall be filled by appointment by the remaining members. The appointee shall serve until the next general election, when a successor shall be elected for the balance of the unexpired term.

Since the question presented by Assemblyman Horne appears to center on when a vacancy must be determined or declared because the elected member is debilitated and cannot discharge his duties, Title 23 of the NRS, governing "Public Officers and Employees," may offer some guidance.

*Nevada Revised Statutes* 283.040 provides that a public office becomes vacant when any one of a number of events happens before the expiration of the term. One such event occurs when the incumbent has been prevented from discharging his duties due to sickness. Section 283.040 in subsection (g) provides in part:

In a county whose population is less than 15,000, after an incumbent, other than a state officer, has been prevented by sickness from discharging the duties of his office for at least 6 months, the district attorney, either on his own volition or at the request of another person, may petition the district court to declare the office vacant . . . . The district court shall hold a hearing to determine whether to declare the office vacant and, in making this determination, shall consider evidence relating to:

- (1) The medical condition of the incumbent;
- (2) The extent to which illness, disease or physical weakness has rendered the incumbent unable to manage independently and perform the duties of his office; and
- (3) The extent to which the absence of the incumbent has had a detrimental effect on the applicable governmental entity.

The annotations accompanying this section include numerous cases and opinions of attorneys general, some of which appear to apply to school districts.

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### CONCLUDING REMARKS

Although NRS 283.040 provides some remedies, subsection (g) specifically refers to counties with a population of less than 15,000. Further, NRS 386.270 is silent on procedures to follow in the event that a vacancy must be declared or determined as a result of the incapacitation of an elected member.

I have enclosed copies of the annotations from NRS 283.040. If the Chair desires further clarification on this subject, I will be happy to seek an opinion from the Legal Division of the Legislative Counsel Bureau.

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Enc.

J 5/8

## VACANCIES

## WEST PUBLISHING CO.

Officers and Public Employees ⇔ 55 to 59,  
63, 67, 71.  
States ⇔ 51, 52.

## WESTLAW Topic Nos. 283, 360.

C.J.S. Officers and Public Employees §§ 32 to  
48, 74 to 79, 100 to 120, 146, 148, 264.  
C.J.S. States §§ 61, 87 to 102.

**NRS 283.040** Events causing vacancy in office; action by attorney general or district attorney.

1. Every office becomes vacant upon the occurring of any of the following events before the expiration of the term:

(a) The death or resignation of the incumbent.  
(b) The removal of the incumbent from office.  
(c) The confirmed insanity of the incumbent, found by a court of competent jurisdiction.

(d) A conviction of the incumbent of any felony or offense involving a violation of his official oath or bond or a violation of NRS 241.040, 293.1755 or 293C.200.

(e) A refusal or neglect of the person elected or appointed to take the oath of office, as prescribed in NRS 282.010, or, when a bond is required by law, his refusal or neglect to give the bond within the time prescribed by law.

(f) Except as otherwise provided in NRS 266.400, the ceasing of the incumbent to be an actual, as opposed to constructive, resident of the state, district, county, city, ward or other unit prescribed by law in which the duties of his office are to be exercised, or from which he was elected or appointed, or in which he was required to reside to be a candidate for office or appointed to office.

(g) The neglect or refusal of the incumbent to discharge the duties of his office for a period of 30 days, except when prevented by sickness or absence from the state or county, as provided by law. In a county whose population is less than 15,000, after an incumbent, other than a state officer, has been prevented by sickness from discharging the duties of his office for at least 6 months, the district attorney, either on his own volition or at the request of another person, may petition the district court to declare the office vacant. If the incumbent holds the office of district attorney, the attorney general, either on his own volition or at the request of another person, may petition the district court to declare the office vacant. The district court shall hold a

hearing to determine whether to declare the office vacant and, in making its determination, shall consider evidence relating to:

- (1) The medical condition of the incumbent;
- (2) The extent to which illness, disease or physical weakness has rendered the incumbent unable to manage independently and perform the duties of his office; and
- (3) The extent to which the absence of the incumbent has had a detrimental effect on the applicable governmental entity.

(h) The decision of a competent tribunal declaring the election or appointment void or the office vacant.

(i) A determination pursuant to NRS 293.182 or 293C.186 that the incumbent fails to meet any qualification required for the office.

2. Upon the happening of any of the events described in subsection 1, if the incumbent fails or refuses to relinquish his office, the attorney general shall, if the office is a state office or concerns more than one county, or the district attorney shall, if the office is a county office or concerns territory within one county, commence and prosecute, in a court of competent jurisdiction, any proceedings for judgment and decree declaring that office vacant.

[35:108:1866; A 1921, 5; 1949, 516; 1943 NCL § 4799]—(NRS A 1975, 616; 1977, 1101; 1997, 274, 1518, 1519, 3475; 1999, 679, 2171; 2001, 678, 1973, 1999)

#### NRS CROSS REFERENCES.

Open meeting law, NRS 241.040  
Residency requirements, NRS 293.1755

#### WEST PUBLISHING CO.

Municipal Corporations ¶ 138.  
WESTLAW Topic No. 268.  
C.J.S. Municipal Corporations § 476.

#### NEVADA CASES.

Acceptance not necessary for valid resignation. Under secs. 33-35, ch. 108, Stats. 1866 (cf. NRS 283.010-283.040), relating to resignations of public officers and vacancies in office, acceptance is not necessary to effect a valid resignation. State ex rel. Ryan v. Murphy, 30 Nev. 409, 97 Pac. 391, 720 (1908)

Where portion of county is annexed to another, office of county commissioner held by resident of portion annexed becomes vacant. NCL § 4799 (cf. NRS 283.040) provides that an office shall become vacant when an incumbent ceases to be a resident of the state, district, county, city or precinct in which the duties of his office are to be exercised, or for which he shall have been elected or appointed, and where, by statute, a portion of a county was severed and annexed to another, the office of county commissioner which had been filled by the one who was a resident of the portion severed and annexed becomes vacant, since he was, by operation of the statute, no longer a resident of the county of his office. State ex rel. Wichman v. Gerbig, 55 Nev. 46, 24 P.2d 313 (1933)

Person elected under unconstitutional statute is not de facto officer. A person elected under an unconstitutional statute is not a de facto officer

whose office will not be vacated until declared vacant under NCL § 4799 (cf. NRS 283.040), because an unconstitutional law is no law at all, and cannot create an office. State ex rel. Bible v. Malone, 68 Nev. 32, 226 P.2d 277 (1951), cited, State ex rel. Pagni v. Brown, 88 Nev. 339, at 342, 497 P.2d 1364 (1972)

#### ATTORNEY GENERAL'S OPINIONS.

If school trustee leaves school district with no intention of returning, vacancy occurs. If a school trustee leaves the school district with no intention of returning, a vacancy occurs immediately, but if a school trustee leaves the school district through the necessity of obtaining his living at some other place with no intention of losing his residence in the district, no vacancy would occur, provided that he continues to perform his duties as a school trustee. AGO 10 (1-31-1917); AGO 11 (2-6-1917)

Certain vacancies under statute only established through quo warranto action by attorney general. A vacancy in an office under the terms of the 6th and 7th clauses of RL § 2799 (cf. subsection 1 (f) and (g) of NRS 283.040) can be established only at the suit of the attorney general in an action in the nature of a quo warranto establishing by judicial decision that a vacancy in the office exists. AGO 110 (11-1-1917)

Failure of school trustee to perform duties creates vacancy. Under subdivision 7 of RL § 2799 (cf. subsection 1(f) of NRS 283.040), if a school trustee has ceased to discharge his duties for the statutory period when not prevented by sickness, or has been absent from the state without leave permitted by law, then his office is vacant. AGO 56 (5-19-1919)



When appointing power is certain that holder of office is no longer resident it should declare vacancy. Under subdivision 6 of RL § 2799 (cf. subsection 1(f) of NRS 283.040), if an appointing power is satisfied that the holder of a public office is no longer a resident of the state, district, county, city or precinct, as the case may be, then such appointing power should declare that a vacancy exists and should appoint some person to fill such vacancy. The appointing power must be certain that the absence is not temporary and one wherein the incumbent intends to return to the place where he is required to perform his official duties, but, on the contrary, has absolutely ceased to be a resident of the state, district, county, city or precinct, as the case may be, with no immediate intention to return to the place where he is required to perform his official duties. AGO 181 (9-29-1920)

Clerk of board of school trustees who moved residence across state line within town not disqualified from office. Under subsec. 6, sec. 35, ch. 108, Stats. 1866 (cf. subsection 1(f) of NRS 283.040), prohibiting nonresidents from holding office, the clerk of a board of school trustees was not disqualified from holding office by virtue of moving his residence across the state line within the town. AGO 94 (11-19-1923)

No vacancy when county auditor inducted into Armed Forces. Where an elected county auditor and recorder is inducted into the Armed Forces there is no legal vacancy in his office; thus county commissioners must make a temporary appointment, subject to the return of the officer within his term of office. AGO 363M (12-4-1942)

State senator not barred from serving his term even though his residence moved to another county. A state senator, elected by the electors of the county in which he resides at the time of election, is not barred from serving during his term even though he removes his residence, after the election, to another county. (But see subsection 1(f) of NRS 283.040.) AGO 93 (8-11-1955)

Vacancy created where assemblyman ceases to be resident of county where elected. Under Nev. Art. 4, § 5, NRS 283.040 and former 292.070, relating to residence requirements for

assemblymen, a vacancy is created where an assemblyman ceases to be a resident of the county from which he was elected. AGO 70 (7-16-1959)

Assemblyman who lives, works and rents house out of county may retain legislative office if he keeps home in county he represents. Under Nev. Art. 4, § 5, NRS 283.040 and former 292.070, relating to residence requirements for assemblymen, an assemblyman who lives, works and rents a house in a county other than the one from which he was elected, but has not disposed of his home in the county he represents or otherwise indicated an intent to abandon his residence there, may retain his legislative office. AGO 70 (7-16-1959)

Statute not applicable to real estate commission; legislative intent. Subsection 1(f) of NRS 283.040, which provides that a vacancy in an office is created when the incumbent removes himself from the state or political subdivision in which his duties of office are to be exercised or from which he was appointed or elected, was intended to prevent nonresident representation or performance of duties in a political subdivision by a person not a resident thereof. The statute does not apply to a member of the Nevada real estate commission who changed his residence to a county within the state other than that from which he was appointed, because as evidenced by NRS. 645.150, providing for commission meetings in different parts of the state, the duties of members are to be exercised statewide; and despite NRS 645.100, requiring at least two members from eastern and western districts of the state, a member does not represent only the county from which he is appointed. AGO S-9 (11-5-1962)

Vacancy created on state board of education when member removes his residence to another district. A member of the state board of education elected pursuant to former NRS 385.020 (cf. NRS 385.021) is a state officer, because his field of duty is the entire state. Therefore, under NRS 283.040, a vacancy is created when a member elected for one educational supervision district removes his residence to another district. Under Nev. Art. 17, § 22, this vacancy is to be filled by appointment by the governor. AGO 246 (7-21-1965), cited, AGO 96-30 (10-10-1996)

J 8/8