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October 10, 2007

Leslie A. Johnstone
Executive Officer
Public Employees' Benefit Program
901 South Stewart Street, Suite 1001
Carson City, Nevada 89701

Dear Ms. Johnstone:

You have requested an opinion from this Office regarding whether the Public Employees' Benefits Program Board (Board) has the legal authority to amend the definition of eligible dependent contained in Nevada Administrative Code (NAC) 287.312 to expand Public Employees' Benefits Program (PEBP) benefit eligibility.

The request for this opinion is based on a Petition submitted pursuant to NRS 233B.100 and NAC 287.196, which allows a person to request in writing that the Board amend its regulations. The *Petition to Provide Competitive & Equitable Benefits* was presented by the Nevada System of Higher Education (NSHE) on April 12, 2007, requesting that the Board amend its regulations to provide PEBP benefits for reciprocal beneficiaries.

QUESTION ONE

Does the Board have the legal authority to amend the definition of eligible dependents contained in NAC 287.312?

ANALYSIS

The Board was created by the Nevada Legislature during the 1999 legislative session and codified at NRS 287.041. NRS 287.043 gives the Board broad authority to establish and carry out the Public Employees' Benefits Program (PEBP). Specifically, NRS 287.043(2)(h) provides in pertinent part that the Board shall adopt such regulations and perform such other duties as are necessary to administer the PEBP. Further, NRS 287.0434(1) gives the Board the authority to provide coverage for dependents.

Accordingly, the Board unquestionably has the authority to adopt or amend its regulations within the parameters of its statutory authority.

Pursuant to such authority, the Board has previously promulgated regulations governing participation in the PEBP and such regulations have been approved by the Legislative Commission. In 2000, the Board defined "Dependents" in NAC 287.035 as one spouse and all other declared members of a program coverage unit. At that same time, "program coverage unit" was also defined by the Board as the family unit declared pursuant to NAC 287.312 that seeks coverage or insurance from the Program for more persons than the sole eligible public officer, public employee or retired officer or employee. Those eligible to be in the "program coverage unit" are provided in NAC 287.312(2).

Since 2000, the Board has amended NAC 287.312 in 2004 and 2006. See R154-03, 3-22-2004 and R089-05, 6-28-2006. Such amendments were also approved by the Legislative Commission. Based on the foregoing, it is clear that the Board has the authority to amend its regulations and determine who is an eligible dependant under the PEBP.

QUESTION TWO

Does Article I, § 21 of the Nevada Constitution limit the Board's ability to amend the definition of eligible dependent contained in NAC 287.312 to include same-sex partners, opposite sex partners and/or other adult dependents?

ANALYSIS

In 2000 and 2002, Nevada voters ratified an amendment to the Nevada Constitution entitled "Limitation on recognition of marriage." The Nevada Constitution Article I, § 21 provides, "Only a marriage between a male and female person shall be recognized and given effect in this state" ("Marriage Amendment") NEV. CONST. art. 1, § 21. When interpreting Nevada Constitutional amendments, the court must evaluate the plain language of the amendment in order to ascertain the intent of the voters. *Guinn v. Legislature of the State*, 119 Nev. 277, 71 P.3d 1269 (2003). The court must give words their plain meaning unless it violates the "spirit of the provision." *Id.*

The Nevada Marriage Amendment is narrow in scope. The plain language states that Nevada only recognizes and gives effect to marriages between a man and a woman. The Marriage Amendment has no clause that refers to insurance or other benefits, nor does it contain language that indicates intent to prohibit the extension of insurance or other benefits.

Assuming, *arguendo*, that the language of the Marriage Amendment was not clear, we must turn to statutory rules of construction to resolve ambiguity. *Guinn* at 285. Statements that voters are given in favor of the passage of an amendment are relevant in evaluating the intent behind an amendment. See e.g., *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 26 P.3d 753 (2001). The Arguments for Passage of the Nevada Marriage Amendment explain only that the Marriage Amendment would prevent the Full Faith and Credit Clause of the United States Constitution from forcing Nevada to recognize same-sex marriages that occur in other states.¹

The plain language and the arguments for passage of the Marriage Amendment indicate that the intent of Nevada's Marriage Amendment was to ensure that Nevada would give legal effect exclusively to marriages that occur between a man and a woman. In adopting the Marriage Amendment, Nevada voters adopted an amendment that chooses not to recognize same-sex marriages that occur legally in other states if those who were married in same-sex marriage states moved to Nevada.

As noted above, the Board has previously amended the definition of eligible dependant contained in NAC 287.312 and continues to have the authority to amend said provision. Given this, the Marriage Amendment limits the ability of the Board to provide coverage that would be based on recognizing a same-sex marriage performed in another state when it promulgates its regulations.

Accordingly, amending NAC 287.312 to include as eligible dependents either same-sex partners, opposite sex partners or another adult dependent would not implicate Article I, § 21 of the Nevada Constitution so long as the basis for extending any such benefit does not rely upon a recognition of a lawful marriage performed in another state that is between two persons of the same-sex.

CONCLUSION

Based on the foregoing, it is clear that the Board has the legal authority to amend the definition of eligible dependents in the PEBP coverage unit as contained in NAC 287.312(2) provided that the Board does not legally recognize or give effect to a same-sex marriage in amending said definition. Furthermore, any such regulation

¹ The ballot included the following language under "Arguments for Passage." Proponents argue that passage will ensure that Nevada law upholds the definition of marriage as being only between a man and a woman. While a Nevada statute provides that marriage may only be between a male and a female, current law provides that a legal marriage that took place outside Nevada is generally given effect under the "Full Faith and Credit Clause" of the United States Constitution. Proponents argue that if same gender marriages ever become legal in another state, under the Full Faith and Credit Clause Nevada could be required to recognize such marriages entered into legally in another state. Proponents argue that this constitutional amendment is needed to define Nevada's public policy on marriage being only between a male and a female. A "Yes" vote means that the Nevada Constitution should be amended to provide that only marriages between a male and a female should be recognized and given effect in this state.

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defining eligible dependents is subject to approval or rejection by the regulatory review process established by the Nevada Legislature.

Sincerely,

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DEC/lzd