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ADVISORY OPINION 18-01

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This advisory opinion is written pursuant to Nevada Administrative Code (“NAC”) 233.250, request for an opinion on behalf of Southern Nevada Regional Housing Authority regarding the applicability of Assembly Bill No. 384 of the 79th Legislative Session (“AB 384”), which is Nevada’s enactment of “Ban the Box” (“BTB”) legislation.

Please be advised that the opinions expressed in this advisory opinion are in response to your specific question and are not applicable to any specific facts, circumstances, or transaction, as no such specifics were provided in your request. Accordingly, this response is predicated upon the general question you provided in your correspondence, and no reliance should be placed on this advisory opinion for any purpose other than that described herein.

Please be further advised that subsequent changes in statute(s), regulation(s), or judicial interpretations of the statutes, rules, or regulations upon which any opinion is based may subject similar future circumstances, facts, claims, or requests to treatment other than that expressed herein.

Facts

Generally, BTB legislation is intended to prevent employers from inquiring about an applicant’s criminal history on an application, during the initial application process, and often during the interview process.¹ Hawaii was the first state to pass BTB legislation in 1998, and similar legislation has since gained popularity throughout the country, with more than 150 cities and counties throughout 29 states having implemented some version of BTB legislation.² In 2015, the Obama Administration issued a presidential memorandum to utilize BTB for hiring federal employees.³ Generally, BTB applies to public employers; however some states, cities, and counties have begun applying BTB to the private sector as well.⁴

¹ “Ban the Box: Where Are We Now?” Debbie Lamb, Sterling Talent Solutions, May 3, 2017, <https://www.sterlingtalentsolutions.com>.

² “Ban the Box and Beyond.” Angela Hanks, July 27, 2017, <https://www.americanprogress.org/issues/economy/reports/2017/07/27/436756/ban-box-beyond>.

³ *Id.*

⁴ *Id.*

Nevada recently enacted its own version of BTB legislation through AB 384. As of January 1, 2018, the criminal history of an applicant or other qualified person under consideration for a position in *public employment*⁵ may be considered only under certain circumstances. Violations of Nevada's BTB is considered an unlawful employment practice and under the jurisdiction of the Nevada Equal Rights Commission ("NERC").⁶

NRS 315.320 provides that "in each city, town or county of the State there is hereby created a public body corporate and politic to be known as the housing authority of the city, town or county; but such authority shall not transact any business or exercise its powers hereunder until or unless the governing body of the city, town or county, as the case may be, by proper resolution shall declare at any time thereafter that there is need for an authority to function in such city, town or county. Such housing authority is hereby created a public body corporate for municipal purposes and shall be a municipal corporation." See NRS 315.320(2) and (3) [emphasis added]. Pursuant to the aforementioned statute, the Las Vegas Housing Authority, the Clark County Housing Authority, and the North Las Vegas Housing Authority were created through appropriate declarations of the respective city, or county.⁷

NRS 315.7805 states:

1. In a county whose population is 700,000 or more, any two or more authorities may form a regional authority.
2. To form a regional authority as described in subsection 1, the governing body of the county and the governing body of each city and town located within the county that desires to participate in the regional authority shall adopt a resolution setting forth:
 - (a) The intent to regionalize some or all of their powers;
 - (b) A reference to the development of a plan for transitioning to a regional authority;
 - (c) The geographic scope of the regional authority; and
 - (d) Such other matters as the governing bodies determine to be necessary or advisable.
3. If the formation of a regional authority pursuant to this section involves fiscal matters, the ownership of real property or the consolidation of functions, the governing bodies who form the regional authority shall, in consultation with the United States Department of Housing and Urban Development, resolve such matters by written contract, agreement or other arrangement entered into by those governing bodies.

⁵ Nevada's BTB does not apply to peace officers, firefighters, any position that entails physical access to a computer or other equipment used for access to the Nevada Criminal Justice Information System (CJIS) or the National Crime Information Center ("CIC").

⁶ AB 385, Section 6.5, subsection (7) and section 6.7, subsection (2)

⁷ Both North Las Vegas and Las Vegas are incorporated cities, see North Las Vegas Charter of 1971 (<https://www.leg.state.nv.us/CityCharters/CtyNLVCC.html>) and Las Vegas Charter of 1983 (<https://www.leg.state.nv.us/CityCharters/CtyLasVegasCC.html>)

Pursuant to the aforementioned statute, in January of 2010, the Las Vegas Housing Authority, the Clark County Housing Authority, and the North Las Vegas Housing Authority formed the Southern Nevada Regional Housing Authority (“SNRHA”).⁸ SNRHA serves as a public housing agency (“PHA”), a governmental entity providing housing programs and assistance to low income families.⁹ SNRHA is funded by the federal Department of Housing and Urban Development (“HUD”) and must comply with federal and state laws, regulations, and notices.¹⁰

Question Presented:

Whether AB384, Nevada’s BTB legislation, applies to SNRHA as SNRHA does not consider itself a “State” employer because it is federally funded?

Short Answer

Yes. AB 384 is applicable to SNRHA because a regional authority is empowered to perform public and essential governmental functions on behalf of a local public body and was created, with statutory authorization, by actions of the governing body of a county, and two incorporated cities bringing it within the confines of Section 6.5, subsection 7 of AB 384.

Analysis of the Issue:

Nevada’s adoption of BTB through AB 384 applies to state, city, incorporated city or unincorporated town, town board, county and local level(s) of government because it amends Chapters 245, 284, 268, 269, and 613 of NRS.¹¹ SNRHA administers its public housing program in accordance with all applicable federal, state and local statutes, regulations and ordinances and is governed by HUD regulations and Chapter 315 of NRS.

SNRHA receives federal funding for its programs and it is a public employer.¹² Furthermore AB 384 does not require state funding to bring a public employer within its reach. First, SNRHA is formed from three “public bodies” or “municipal corporations” each known as a housing authority. *See* NRS 315.320 and each formed through the authorization of the governing body of a county or incorporated city. Also “an authority shall...exercis[e] **public and essential governmental functions.**” NRS 315.420(emphasis added). Two or more authorities may form a regional authority. *See* NRS 315.7805(1). The regional authority may have the same powers as each authority, thus, exercising public and essential governmental functions and is also, by definition, a municipal corporation. *See* NRS 315.7805(2)(a); *see also* NRS 315.170, NRS 315.7811(2). By its creation, SNRHA is a public body.

⁸ Southern Nevada Regional Housing Authority, About Us, <http://www.snrha.org/about-us.htm>

⁹ SNRHA Admissions and Continued Occupancy Policy for the Public Housing Program, June 2015, Pg. 1-1.

¹⁰ *See generally* NRS Chapter 315. *See also* SNRHA Admissions and Continued Occupancy Policy for the Public Housing Program, June 2015, Pg. 1-1, 1-8, 1-9, 1-10.

¹¹ AB 384, Section 6.5, subsection (7)

¹² AGO 889 (3-7-1950)

Second, SNRHA's employees participate in Nevada's Public Employee's Retirement System ("PERS"). NRS 286.290(1) states that "no person may become a member of the System unless the person is in the service of a *public employer*." (emphasis added). NRS 286.070 defines "public employer" as "the State, one of its agencies or one of its political subdivisions... a public or quasi-public organization or agency that is funded, at least in part, by public money, including ... a council of governments created pursuant to the laws of the State of Nevada." See NRS 286.070(1). To add, SNRHA also advertises on the State's website for vacant employment opportunities within the entity. SNRHA is clearly, through its participation in PERS, and the previous analysis of the Attorney General's Office, a public employer.

Third, in providing safe, sanitary and affordable housing to Nevada residents, SNRHA has thirteen persons serving as commissioners of the authority appointed by local governing bodies¹³. See NRS 315.7809. The commission establishes and oversees policy for the authority, including approving guidelines to determine eligibility requirements and continued occupancy. By the establishment of policy by local governments, it is the clear intent that SNRHA is a "State" employer regardless of federal funding.

Finally, it is well established in Nevada that an agency tasked with administering an act "is impliedly clothed with the power to construe the relevant laws and set necessary precedent to administrative action, and the construction placed on a statute by the agency charged with the duty of administering it is entitled to deference".¹⁴ Here NERC is tasked with administering this law.¹⁵ To the extent that any ambiguity in the law exists, NERC is within its power to interpret the reach of the law to include Housing Authorities created by the governing bodies of counties and incorporated cities.

Advisory Conclusion:

Based on the foregoing, SNHRA is a public employer within the meaning of AB384 and should apply "Ban the Box" legislation to its hiring practice.

KEVIN E. HOOKS
Chairperson
Nevada Equal Rights Commission

¹³ NRS 315.220 defines governing body as "city council, board of trustees, board of county commissioners, or other legislative body of the city, town or county."

¹⁴ Elliot v. Resnick 114 Nev. 25, 32 (1998)

¹⁵ AB 384, Section 6.7, subsection 2.