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DISTRICT COURT
CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada domestic nonprofit corporation,

Plaintiff,

vs.

BRITTNEY MILLER, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District; DINA NEAL, an individual engaging in dual employment with the Nevada State Senate and Nevada State College and College of Southern Nevada; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and a Clark County Public Charter School,

Defendants,

and

Legislature of the State of Nevada,

Intervenor-Defendant.

CASE NO: A-20-817757-C

DEPT NO: VIII

ORDER

The initial Complaint in this matter was filed on July 9, 2020, by Nevada Policy Research Institute ("NPRI"), alleging that Defendants' dual service as members of the State Legislature and as employees of state or local government entities violates the separation-of-powers clause of the Nevada Constitution. On December 8, 2020, Judge Crockett issued an Omnibus Order Granting Motions to Dismiss based on the Plaintiffs not having standing to bring suit because NPRI did not allege a particularized injury for traditional standing and did not meet the requirements for the public-importance exception to standing. NPRI appealed the matter of standing to the Nevada Supreme Court.

On April 21, 2022, the Nevada Supreme Court reversed the district court's order, narrowly expanding the public-importance exception laid out in Schwartz v. Lopez, 132 Nev. 732, 382 P.3d 886 (2016), applying the exception to "cases where a party seeks to protect the essential nature of a government in which the three distinct departments, . . . legislative, executive, and judicial, remain within the bounds of their constitutional powers." Nevada Policy Research Institute, Inc. v. Cannizzaro, 507 P.3d 1203 (2022); *citing* State ex rel. Coll v. Johnson, 990 P.2d 1277, 1284 (N.M. 1999). The case was remanded to this Court for further proceedings on the claims.

Current Matters Under Advisement

Between June 28, 2022 and August 1, 2022 the following Motions, Oppositions and Replies were filed: (1) Defendants Brittney Miller and Selena Torres's Motion to Sever Pursuant to NRCP 21; (2) Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief; (3) Defendant James Ohrenschall's Motion to Dismiss; (4) NSHE Defendant Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5); (5) Defendants Brittney Miller and Selena Torres's Joinder to Nevada Legislature's Motion to Dismiss; (6) NSHE Defendant Dina Neal's Joinder to Legislative Counsel Bureau's Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief; (7) Defendants Brittney Miller and Selena

Torres's Joinder to Defendant James Ohrenschall's Motion to Dismiss; (8) Defendants Brittney Miller and Selena Torres's Joinder to Defendant Dina Neal's Motion to Dismiss; (9) Defendant James Ohrenschall's Joinder to NSHE Defendant Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5); and (10) Defendant James Ohrenschall's Joinder in Part, to Legislature of the State of Nevada's Motion to Dismiss Complaint; (11) Plaintiff's Motion to Strike NSHE Defendant Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5); (12) Plaintiff's Motion to Strike Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief; and(13) Plaintiff's Motion to Strike All Joinders Thereto. On August 4, 2022 the Court heard oral argument on all of the foregoing Motions, Oppositions and Replies thereto. Counsel present at the hearing were Colleen E. McCarty, Esq. and Deanna Forbush, Esq. for the Plaintiff; Bradley S. Schrager, Esq., Jonathan D. Blum, Esq., and Berna L. Rhoades-Ford, Esq. for the Defendants; and Kevin C. Powers, Esq. for the Intervenor Defendant.

The Court took the matters under advisement and now issues the following Findings of Fact, Conclusions of Law and Order.

Current Parties

The Defendants in the case have changed as individuals have left public employment or have chosen not to run for reelection. Currently, the Defendants to the case, based on the Amended Complaint, are (1) Brittney Miller, who is a member of the Nevada State Assembly and holds a paid teaching position with Clark County School District; (2) Selena Torres, who is a member of the Nevada State Assembly and holds a paid teaching position with Clark County School District; (3) Dina Neal, who is a member of the Nevada State Senate and holds a paid position as an adjunct professor with Nevada State College; (4) James Ohrenschall, who is a member of the Nevada State Senate and holds a paid position as a deputy public defender in Clark County. The Nevada State Legislature filed a Motion to Intervene, which was granted in December 2020 on the same day the Court granted the Omnibus Motion to Dismiss.

Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief

Intervenor-Defendant Legislature of the State of Nevada moved to dismiss NPRI's Amended Complaint. The Intervenor alleges that the court does not have subject matter jurisdiction under NRCP 12(b)(1) because NPRI failed to comply with NRS Chapter 41 in that it did not invoke the conditional waiver of sovereign immunity. The Intervenor further alleges that the Plaintiff should have also brought suit against the appropriate State entity or political subdivision pursuant to NRS 41.031, NRS 41.0337, and NRS 41.039. In addition, the Intervenor alleges that NPRI's claims should be dismissed because NPRI failed to join all necessary parties pursuant to NRCP 12(b)(6), and NRCP 19, which requires the joinder of all persons who qualify as necessary parties and who are needed for a just adjudication of the litigation. Specifically, the Legislature argued that it would be necessary to join all of the Judges who serve as professors at UNLV and UNR because arguably if Senators and Assemblypersons are violating the separation of powers doctrine by teaching and serving in that capacity then Judges would be as well.

This Court finds that Intervenor Nevada Legislature is mistaken in its reference to NRS 41 in the case at hand. NRS 41.031 refers to liability in relation to a tort claim and this case is one of equity, with the Plaintiff seeing declaratory and injunctive relief related to constitutional questions and not damages related to tort liability. Therefore, the Court finds the argument regarding a lack of subject matter jurisdiction in relation to NRS Chapter 41 to be without merit.

Defendant James Ohrenschall's Motion to Dismiss

Defendant Ohrenschall, a Nevada State Senator and Public Defender for Clark County, moves to dismiss the Amended Complaint pursuant to NRCP 12(b)(5) and 12(b)(6) for failure to state a claim and failure to join required parties under NRCP 19. In addition, Ohrenschall has also joined the other parties' motions to dismiss. Defendant Ohrenschall's first argument is that the Nevada Constitution separation-of-powers clause does not apply to local government employees,

citing both case law and an opinion published by the Nevada Attorney General. Ohrenschall further alleges that even if the separation-of-powers doctrine were to apply to local governments, his role as a Public Defender in the Juvenile Division is not one of a public officer, but rather a public employee.

Defendant Dina Neal's Motion to Dismiss

Defendant Dina Neal, who serves as an adjunct professor at Nevada State College ("NSC") while also serving as a Nevada State Senator, alleges that she does not exercise any powers of the executive branch by virtue of her employment with NSC and therefore is not in violation of the separation-of-powers clause and moves for dismissal based on NRCP 12(b)(5). Neal alleges that the issue is whether her position with NSC is one of a public officer or a public employee and she is a public employee because she does not exercise sovereign duties of the executive branch nor was her position created by law. Neal alleges that because the Amended Complaint does not allege that Neal is a public official or that she exercises sovereign or constitutional powers, and there are no factual allegations from which such conclusions might reasonably be drawn, it does not state a claim upon which relief may be granted.

Defendants Brittney Miller and Selena Torres's Motion to Sever Pursuant to NRCP 21[1]

Defendants Miller and Torres ("Teacher Defendants"), both of whom are public school teachers, filed their motion seeking to sever themselves from the lawsuit because they allege that they should not be subject to trial alongside public employees of widely differing classifications as there is no one-size-fits-all analysis that can be applied to all defendants in this action. Teacher Defendants rely on NRCP 21 as the legal basis for their argument and cite to A Cab, LLC v. Murray, 501 P.3d 961, 974 (Nev. 2021) regarding the Nevada Supreme Court's guidance as to when severance is proper. Teacher Defendants argue that it will require focused, factual inquiries

[1] As the Court is granting the Motions to Dismiss to which Miller and Torres joined, the Court will deny the Motion to Sever as it is moot.

into the employment status, duties, and activities of each individual to resolve this case. They further allege that the claims against them do not arise out of the same transactions or occurrences as they do for the other defendants, and they do not present common questions of law or fact. Finally, Teacher Defendants allege that judicial economy would be facilitated by the severance and their claims would require different witnesses and documentary proof due to their unique status from other defendants.

Plaintiff's Motion to Strike: (1) NSHE Defendant Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5); (2) Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief; and (3) All Joinders thereto

In response to the aforementioned motions, Plaintiff NPRI filed a motion to strike Defendant Neal's motion to dismiss, the Intervenor's motion to dismiss, and all joinders thereto. NPRI alleges that under NRCP 12(g)(2), the only party who is eligible to move for dismissal is Defendant Ohrenschall because he did not previously move for dismissal and the other parties are not allowed to make another motion raising a defense or objection that was available to the party but omitted from its earlier motion. NPRI did not include Ohrenschall's motion to dismiss in its motion to strike.

After Judge Crockett dismissed the case due to lack of standing, he did not have jurisdiction to address the other arguments raised in the motions. However, all but one of the issues were raised in the various motions to dismiss that were considered by Judge Crockett.[2] Therefore, the Motion to Strike is without merit as the arguments were all raised in the Defendants' initial Motions to Dismiss and NRCP 12(g)(2) does not apply. Moreover, "[u]pon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred." Giancola v. Azem, 109 N.E.3d 1194, 1200 (Ohio 2018) (quoting State ex rel. Douglas v. Burlew, 833 N.E.2d

[2] The issue that was not raised in the first round of motions to dismiss was the Nevada Legislature's argument relating to NRS 41. As the Court explained earlier, the argument was without merit as the statute deals with tort liability, not constitutional questions.

293, 295 (Ohio 2005)). Therefore, the parties are returned to the position they were in and this Court the Court is doing as the Nevada Supreme Court instructed and is reviewing the case on the merits, particularly whether the law supports the claims in the Amended Complaint and whether there is a claim upon which relief may be granted.

DISCUSSION

A complaint must set forth sufficient facts to establish all necessary elements of a claim for relief. Hay v. Hay, 100 Nev. 196, 198 678 P.2d 672, 674 (1984). A motion to dismiss is properly granted when even where it appears to a certainty that taking all of the allegations in the Complaint as true, the allegations are insufficient to establish the elements of a claim for relief. *See* Brent G. Theobald Const., Inc., v. Richardson Const., Inc., 122 Nev. 1163, 1166, 147 P.3d 238, 241 (2006)(*abrogated on other grounds by* Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224 (2008)).

The Amended Complaint in this case seeks declaratory and injunctive relief precluding anyone who serves as an educator or a public defender[3] from serving as a paid legislator. After reviewing the Motions, Oppositions, Replies and Joinders thereto, listening to the arguments of Counsel, and a thorough review of all of the cases cited therein plus additional multijurisdictional research, and for the reasons stated below, the Court finds that the allegations in Plaintiffs Complaint are insufficient to establish the elements of a claim for relief and therefore, GRANTS the Defendants' Motions.

The issue before the Court is whether it is a violation of the separation-of-powers clause of the Nevada State Constitution for an individual to serve in the Nevada Legislature while concurrently employed by a state or local government entity. [4]

[3] As stated above, the Defendants have changed and thus those are the only two positions currently at issue. The Court notes that the Plaintiffs are seeking Leave to Amend their Complaint to add additional Defendants, for the reasons stated herein, that Motion will likely become moot based upon the Court's decision in this matter.

[4] Although the Nevada Legislature also sought dismissal for failure to join necessary parties, as the Court is finding that there is not a violation of the separation-of-powers, the Court declines to address the Rule 19 issues.

While many states have specific constitutional or statutory prohibitions against dual public employment, Nevada is not one of those states. Therefore, in order to answer this question the Court has reviewed the words of and intent behind the Nevada Constitution and existing case law both from this jurisdiction and other jurisdictions whose Constitution mirrors the language used by the Nevada framers. This Court finds that three factors must be evaluated to determine whether an individual's dual employment violates the separation-of-powers clause of the Constitution. First, the Court must deem whether the dual roles are incompatible based on the common law doctrine of incompatible offices. Next, the Court must look at whether the individual legislator's employment is with a state entity or a local political subdivision. Finally, if the roles are compatible and the individual works for a state entity, then the Court must determine whether the position with the state entity is that of an employee or an officer.

Common Law Doctrine of "Incompatible Offices"

To date, Nevada courts have not dealt directly with the common law doctrine of incompatible offices; however, other states have. The New Jersey Supreme Court explained in Schear v. City of Elizabeth, 41 N.J. 321, 326, 196 A.2d 774, 776 (1964), that the doctrine of incompatible public offices was developed through the common law. The Court went on to say "[i]ncompatibility exists when there is a conflict or inconsistency in the functions of the two offices, i.e., where 'one office is subordinate to another, or subject to its supervision or control, or the duties clash, inviting the incumbent to prefer one obligation to another.'" Id. citing Reilly v. Ozzard, 33 N.J. 529, 543, 166 A.2d 360, 367 (1960). In Schear, property owners and taxpayers of the City of Elizabeth challenged a resolution of the Planning Board, which was formed based on a state statute, alleging that there was an incompatibility of office issue resulting from the fact that one member of the Planning Board was also the City Attorney. The Plaintiffs in Schear argued that the duty of a member of the Planning Board to participate fully and fairly in the determination of a blight problem was inconsistent with his obligation as City Attorney to provide independent

and impartial advice regarding the issue. In this case, the Court looked at the Statute and determined that the legislature contemplated a person such as the City Attorney may serve on the Planning Board and that no incompatibility existed between the positions. The Court analyzed the specific facts of the case when it upheld the lower court's ruling that there was not conflict. After the Planning Board decision was reached, the City Attorney did not give legal advice to the governing body about the matter nor did the City Council seek his opinion regarding the legality of the Board's action. The trial court relied on the restrictive provision of the statute and the common law in finding no conflict existed and therefore the plaintiffs suffered no prejudice.

The Hawaii Supreme Court has also addressed the common law doctrine of incompatible offices. In In re Water Use Permit Applications, 94 Haw. 97, 120, 9 P.3d 409, 432 (2000), the Court stated that the doctrine of incompatible public offices "applies where the functions of the offices concerned are inherently inconsistent, as where there are conflicting interests, or where public policy dictates that one person may not retain both offices."[5] In reaching its decision in Water Use, the Court looked to State v. Villeza, 85 Haw. 258, 942 P.2d 522 (1997), which explained the common law doctrine of incompatible offices as prohibiting an individual from serving in dual capacity "[i]f one office is subordinate to the other or the functions of the offices are inherently inconsistent and repugnant to each other." Whether one office is incompatible with another depends on the rights, duties, or obligations connected with or flowing from the offices. If one office is subordinate to the other or the functions of the offices are inherently inconsistent and repugnant to each other, the offices are incompatible. Id. at 270, 534 (internal citations omitted).

In Villeza, the defendant alleged that because the sentencing judge was appointed to and served as the administrative director for the court that the doctrine of incompatible offices resulted in him automatically vacating the first office [of judge], therefore relinquishing his authority to sentence the defendant. The Villeza Court stated that an office would be incompatible with the office of judge if it created a conflict of interest or a lack (or appearance) of impartiality,

[5] *See also* Mott v. Horstmann, 36 Cal. 2d 388, 391–92, 224 P.2d 11, 13 (1950).

specifically it would be incompatible if it challenged judicial integrity and offended traditional notions of the necessary impartiality of the judiciary. The Villeza Court held that the offices of circuit court judge and administrative director were not incompatible at common law because judicial integrity was not threatened in the case.

Aside from any specific constitutional or statutory prohibitions, incompatibility depends on the character and relation of the offices and not on the matter of physical inability to discharge the duties of both of them. The question is whether one office is subordinated to the other, or the performance of one interferes with the performance of the duties of the other, or whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest. Polley v. Fortenberry, 268 Ky. 369, 105 S.W.2d 143, 144–45 (1937).[6] In Polley, the Kentucky Supreme Court analyzed whether the positions of maintenance supervisor for the state highway department and member of the county board of education were incompatible under the common law. The Court first determined that they were both offices, but there was no constitution or statutory authority that would prevent the plaintiff Polley from serving in both roles. Kentucky law required that if a person accepts an office incompatible with the one he already occupies that he must vacate the first office when assuming the second. Therefore, the Court looked to the common law of incompatible offices to determine if the two roles were incompatible. The Court found that neither position was subordinate to the other nor would the performance of one position require the person to "pass upon the validity of his acts" in the other position. The Court held that it was clear that the two positions were not inherently inconsistent or repugnant nor a detriment to the public interest.

It varies by jurisdiction whether the common law rule against incompatibility applies to only offices or includes public employment as well.[7] Due to the public policy issues of

[6] *See also* Russell v. Worcester Cnty., 323 Mass. 717, 719, 84 N.E.2d 123, 124 (1949).

[7] *See* Dupras v. Cnty. of Clinton, 213 A.D.2d 952, 953, 624 N.Y.S.2d 309, 309 (1995)(New York recognizes that the doctrine of incompatible offices applies to employees as well as officers.); Eldridge v. Sierra View Loc. Hosp. Dist., 224 Cal. App. 3d 311, 319, 273 Cal. Rptr. 654, 660 (Ct. App. 1990)(California declined to extend the doctrine to a scenario where one position is a public office and the other employment.)

incompatible public office and public employment being coupled that may arise, this Court finds that the common law doctrine applies to public offices as well as public employment in determining whether an individual employed by a public entity may serve as a state legislator.

It is the Role of the Court to Determine if Offices Are Incompatible.

"Whether two public offices are incompatible is a question of law to be determined by this Court upon examining the nature of the offices and their relationship to one another." Felkner v. Chariho Reg'l Sch. Comm., 968 A.2d 865, 873 (R.I. 2009). [8]

In State v. Second Jud. Dist. Ct. in & for Cnty. of Washoe, 134 Nev. 783, 787–88, 432 P.3d 154, 159 (2018), the Supreme Court reaffirmed, based on the Nevada Constitution separation of powers doctrine, that it is prohibited for one branch of government to impinge on the functions of another." S*ee* Nev. Const. art. 3, § 1(1). In the decision, the Court noted that a prosecutor acts within the executive realm in making charging decisions based on violation of the State's laws. Id. *citing* Stromberg v. Second Jud. Dist. Ct. of State ex rel. Cnty. of Washoe, 125 Nev. 1, 200 P.3d 509 (2009). A District Attorney's Office brings charges on behalf of the State against those who have allegedly violated the laws of the State and the Legislature enacts such laws. Therefore, serving in the Legislature while simultaneously employed as a member of a county district attorney's office is incompatible based on the common law doctrine. In the case at hand, both of the named Defendants who were identified as being employed by the Clark County District Attorney's Office, Nicole Cannizzaro and Melanie Scheible, have since left their public employment, therefore they are no longer parties to the case.

As for the current Defendants, this Court finds that there is no common law incompatibility issue for an individual to be employed as a county public school teacher, a public defender, or a professor at a state college and simultaneously serve as a state legislator. Based on Schear, the

[8] *See also* LaGrange City Council v. Hall Bros. Co. of Oldham Cnty., 3 S.W.3d 765, 769 (Ky. Ct. App. 1999); Reilly, 33 N.J. 529, 166 A.2d 360; People, on Complaint of Chapman, v. Rapsey, 16 Cal. 2d 636, 641, 107 P.2d 388, 391 (1940); Tarpo v. Bowman Pub. Sch. Dist. No. 1, 232 N.W.2d 67, 71 (N.D. 1975).

Court finds that there is no conflict between the positions nor does the Plaintiff suffer prejudice based on their dual employment. After analyzing the holding in Villeza, the Court finds that the integrity of the legislative and executive branches is not threatened by a public school teacher, a public defender, or a professor simultaneously serving as a legislator. And, a public school teacher, a public defender, nor a professor have the discretionary power to review the actions of a legislator and a legislator does not have the discretionary power to review the actions taken by an educator or a public defender. Therefore, the dual employment of Defendants Miller, Torres, Ohrenschall, and Neal are found not to be incompatible under the common law doctrine.

Historical Guidance Regarding the Applicability of the Nevada Separation-of-Powers Clause to Local Political Subdivisions

Nevada's separation-of-powers clause, contained in Article 3, Section 1 of the Nevada Constitution, provides that "[t]he powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." The Nevada Supreme Court has held that the separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government. Secretary of State v. Nevada State Legislature, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). The Constitution further embodies this concept of limited government by specifically delineating the powers granted to the three distinct and coequal branches of government, as set forth in Article 4 (legislative), Article 5 (executive), and Article 6 (judicial). *See* Comm'n on Ethics v. Hardy, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009).

The Nevada Constitution Was Based on the California Constitution and California Courts Have Decided That the Constitutional Separation-of-Powers Clause Does Not Apply to Employees of Local Government Entities

In 2001, the Nevada Supreme Court recognized that the rules of statutory construction apply when interpreting constitutional provisions. "[W]hen a statute is derived from a sister state, it is presumably adopted with the construction given it by the highest court of the sister state." Thus, since Nevada relied upon the California Constitution as a basis for developing the Nevada Constitution, it is appropriate for us to look to the California Supreme Court's interpretation of [the same provisions] in the California Constitution. State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 763, 32 P.3d 1263, 1269 (2001). In fact, Article 3, Section 1 of the Nevada Constitution is identical to the original separation-of-powers clause contained in Article 3, Section 1 of the California Constitution,[9] so this Court will look to California Court decisions regarding whether the separation-of-powers clause applies to local governments.

In People ex rel. Attorney General v. Provines, (34 Cal. 520) (1868), the California Supreme Court analyzed the issue of whether the separation-of-powers clause applied to local political subdivisions. The Court held that the Constitution was formed for the purpose of establishing a State Government, contrasting it to local, county or municipal governments.[10] Simply put, the Court found that the framers of the California Constitution did not contemplate that the state government executive branch included local government. Therefore, California's separation of powers doctrine did not apply to local governments or its employees.

The Nevada Attorney General's Office ("AG") and the Nevada Legislative Counsel Bureau ("LCB") have both issued multiple opinions relevant to the matter at hand. AG Sandoval recognized that the Supreme Court has not addressed this specific issue but has emphasized the

[9] The State of California slightly amended their separation-of-powers clause in 1972 after voters approved Proposition 1A, which transformed California legislators from citizen legislators to full time employees of the Legislative Branch. *See* California Proposition 1A, 1966.

[10] The Court explained that local governments are necessary; however, the Constitution does not of itself create or establish any local or municipal governments. Provines, 34 Cal. at 520.

importance of the separation-of-powers doctrine in Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967) and Whitehead v. Comm'n on Jud. Discipline, 110 Nev. 874, 879, 878 P.2d 913 (1994). In Galloway, the Nevada Supreme Court analyzed what constitutes legislative, executive, and judicial powers in order to determine whether a statute (NRS 122.070) required a district judge to perform non-judicial powers. The Court held that the statute in question required a member of the judicial branch to perform legislative functions and was therefore unconstitutional as it violated the separation-of-powers clause of the Nevada Constitution. Galloway, 83 Nev. at 31, 422 P.2d at 249. In Whitehead, the Court addressed the issue of whether the State Attorney General serving as counsel for the Nevada Commission on Judicial Discipline violated the constitutional separation-of-powers provision. Petitioner Whitehead argued that the Attorney General is an elected, constitutional officer of the executive branch and therefore not permitted by the separation-of-powers clause of the Constitution to represent the Commission in the exercise of its powers related to judicial discipline. The Court agreed with Petitioner and held that there were multiple instances of conflict of interest and it was unconstitutional for an elected officer of the executive branch to represent the Commission in judicial discipline matters nor "prosecute" a judge before the Commission. The Court relied on its decision in Galloway in holding that "one department cannot exercise the power of the other two" without violating the separation-of-powers clause of the Constitution. Whitehead, 110 Nev. at 880, P.2d. at 917. In the case at hand, this Court recognizes the importance of the separation-of-powers clause raised by the Galloway and Whitehead Courts; however, it distinguishes Galloway as the issue at hand is not whether one branch is being required to perform powers constitutionally granted to another branch and Whitehead is dealing with an elected officer of the executive branch encroaching upon the powers of the judicial branch. While these cases provide valuable insight into the importance of the separation-of-powers clause, they do not directly inform the concern of dual employment at issue in this case.

Returning to the AG Opinions,[11] two of them were in direct conflict regarding whether a school district employee may simultaneously serve in the state legislature; however, the second opinion, published in 1971, overrode the previous decision, which was not supported by legal authority.[12] The AG Opinions have provided that, based on the intent of the framers of the Nevada Constitution, employees of local political subdivisions are not in violation of the separation-of-powers clause when they serve as state legislators. See Op. Nev. Att'y Gen. No. 401 (April 20, 1967); Op. Nev. Att'y Gen. No. 71-4 (January 11, 1971). However, there is conflict between the opinions of the AG and the LCB when it comes to state employees and in 2004, the Nevada Secretary of State asked then Attorney General Brian Sandoval to provide guidance as to whether a state or local government employee is eligible to simultaneously serve as a member of the Nevada State Legislature (dual service) without violating the Nevada Constitution's separation of powers doctrine in order to try to parse out the conflicting opinions between the AG and LCB. 2004 Nev. Op. Att'y Gen. No. 03 (Mar. 1, 2004). AG Sandoval also observed that [o]ther states are not consistent in their regulation, prohibition, and allowance of dual service. They address dual service through various combinations of constitutional, statutory, and common-law restrictions, making this a complex and conflicting issue of law and policy.

In coming to its decision that employees of local government entities are not bound by the separation-of-powers clause, the AG first looked to the United States Supreme Court for the main purpose of separation-of-powers, which is "[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others[.]" Humphrey's Ex'r v. United States, 295 U.S. 602, 629, 55 S. Ct. 869, 874 (1935). The AG reasoned that [h]istorically the requirement of the separation of powers was never applied to local governmental organizations. Thus, not only municipal corporations but counties, townships, ***school districts***, drainage districts, and the like are frequently

[11] These Opinions were referenced in the Supreme Court decision, footnote 4. *See* Cannizzaro, 507 P.3d at 1209.
[12] 2004 Nev. Op. Att'y Gen. No. 03 (Mar. 1, 2004), footnote 6.

organized with only a single commission with all the powers, legislative, executive, and judicial, in the commission. The compelling argument in favor of this is that the closeness of local authorities to popular control affords an adequate sanction and protection. Op. Nev. Att'y Gen. No. 401 (April 20, 1967).

In finding that employees of local school districts who also served in the legislature did not violate the separation-of-powers clause,[13] the AG reached its conclusion by relying on legal precedent from California, Colorado, and Maryland, each with constitutional separation of powers clauses almost identical to the Nevada Constitution. These cases[14] each held that the separation of powers clause of their respective constitutions did not apply to local government employees. Op. Nev. Att'y Gen. No. 71-4 (January 11, 1971).

While the AG's Opinions are in no way binding, this Court agrees with the AG in its analysis that the findings in Provines, as well as precedent from other jurisdictions with similar constitutional separation-of-powers clauses, provide strong support for the contention that Article 3, Section 1 of the Nevada Constitution does not apply to local political subdivisions. Therefore, as long as an individual employed by a local political subdivision does not hold an incompatible dual position, their dual employment is not prohibited by the separation-of-powers clause of the Nevada Constitution. In the case at hand, the Teacher Defendants, employed by Clark County School District, and Defendant Ohrenschall, employed by the Clark County Public Defender's Office, are not in violation of the separation-of-powers clause by operation of their dual employment. However, if an individual is dually employed by a state entity, and the roles they

[13] Op. Nev. Att'y Gen. No. 71-4 effectively overruled Op. Nev. Att'y Gen. No. 59 (May 9, 1955), which concluded that local school districts were part of the executive branch of government and therefore could not employ a member of the legislative branch under NEV. CONST. art. 3 § 1.

[14] Mariposa Cnty. v. Merced Irr. Dist., 32 Cal. 2d 467, 476–77, 196 P.2d 920, 926 (1948) (Moreover it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government.); Peterson v. McNichols, 128 Colo. 137, 142, 260 P.2d 938, 941 (1953) **(**The finding of the trial court that the ordinance usurps a judicial function and is contrary to Article III of the Constitution of the State of Colorado is inept in application to this litigation. The constitutional provision to which reference is made relates to state government and is not to be applied here in matters of purely local concern . . .); and Pressman v. D'Alesandro, 193 Md. 672, 679, 69 A.2d 453, 454 (1949) (The constitutional requirement of separation of powers is not applicable to local government.)

occupy are not incompatible under the common law, such as NSHE Defendant Neal, a third factor must be considered, whether they are a public officer or a public employee.

Treatment of Public Officers and Public Employees Under the Law When It Comes to Separation-of-Powers

The final factor in our analysis deals with how public officers and public employees are treated differently under the law. There is a split of authority between other jurisdictions as well as between our own AG and LCB when it comes to how to define a public officer. The key differences lie in whether the court or advising entity look at the function or powers appertaining to the position rather than the role (or classification) of it.

Function or Powers Appertaining To a Position

The separation-of-powers clause of the Utah Constitution[15] embodies the same language as the Nevada Constitution, including the concepts of "powers properly belonging to" and "functions appertaining to" found in the second part of the separation-of-powers clause, and in In re Young, 1999 UT 6, 976 P.2d 581, the Utah Supreme Court examined the meaning behind these phrases. The Young Court accurately noted that the second part of the clause is not plain in its meaning, particularly when "considered in the context of the real world of government." Id. at ¶11, 585. The Court noted that its case law over a century has not taken a serious look at this aspect of the separation-of-powers clause, so it elected to provide meaning to it in Young. Id. at ¶ 12, 585. After surveying the related cases decided by it, the Utah Supreme Court determined that "the most that can be said categorically is that for powers or functions to fall within the reach of the [second part of the separation-of-powers clause], they must be so inherently legislative, executive or

[15] The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted. Utah Const. art. V, § 1.

judicial in character that they must be exercised exclusively by their respective departments."[16] And, the Court noted that when defining the functions or powers which are exclusive to one department, that it had also used the terms "primary," "core," or "essential." Id. at ¶ 14, 586. After this analysis of the case law, the Court determined that there is a "necessary corollary to the doctrine that some powers or functions belong exclusively to the members of one branch is that there must be powers and functions which may, in appearance, have characteristics of an inherent function of one branch but which may be permissibly exercised by another branch." Id. (internal citations omitted). Finally, the Court held that "when the power exercised or the function performed is one that we determine is not exclusive to a branch, it is not "appertaining to" that branch and does not fall within the reach of the [second part of the separation-of-powers clause]. Id.

In Halverson v. Hardcastle, 123 Nev. 245, 163 P.3d 428 (2007), the Nevada Supreme Court spelled out the inherent powers of each branch of government, stating that the legislative power, which is vested in the state Legislature, refers to the broad authority to enact, amend, and repeal laws; the executive power, vested in the Governor, encompasses the responsibility to carry out and enforce those laws (*i.e.*, to administrate); and the judicial power is vested in the state court system carrying with it the capability or potential capacity to exercise a judicial function to hear and determine justiciable controversies. Halverson, 123 Nev. at 260, 163 P.3d at 439.

In the case before this Court, it is clear to this Court that the powers "appertaining to" each branch of the Nevada government are the inherent or primary powers as outlined in the Constitution and Halverson. It is clear that the function of a public school teacher is not to administrate the laws nor is it the function of a public defender to administrate the laws.[17] Rather

[16] *Citing* Taylor v. Lee, 119 Utah 302, 315, 226 P.2d 531, 537 (1951).

[17] In Defendant Legislature's Motion to Dismiss, they allege that pursuant to NRCP 19, judges serving as professors must be included in the suit as necessary parties. When a judge serves in the role of professor, she is not performing a primary duty of the executive branch of government, meaning she is not carrying out or enforcing the laws. Therefore, there is no violation of the separation-of-powers clause when a member of the judiciary serves as a professor at a NSHE institution. However, if a judge were to seek election as a legislator, it would clearly be unconstitutional as it would violate the separation-of-powers clause as one individual would be carrying out the primary function of two separate branches of state government.

the function of a teacher is to teach and the function of a public defender is to defend someone charged with a crime. As such, neither is enacting, amending, or repealing laws in their roles as educators or public defenders. Along this same line of reasoning, this Court finds that a member of a district attorney's office would be in violation of the separation-of-powers clause as that individual would be exercising the primary function of the legislative branch (enacting, amending, and repealing laws) as well as the primary function of the executive branch (carrying out and enforcing laws).

In State ex rel. Stratton v. Roswell Indep. Sch., 1991-NMCA-013, 111 N.M. 495, 806 P.2d 1085, the New Mexico Supreme Court decided an issue on point with the case at hand. In Roswell, the Court had to determine if a public school teacher and administrator were state employees, based on whether school districts were "arms of the state." The Court recognized that the state maintains a great degree of control over local school districts; however, also noted that it would be absurd to say that regulatory schemes could transform a political subdivision, business, or profession into state government. Id. at 502, 1092. New Mexico is a sparsely populated state with a citizen legislature, as is Nevada, and the Court looked to the New Jersey Supreme Court's holding in Reilly, 33 N.J. 529, 166 A.2d 360, in holding that all citizen legislators, whether employed publicly or privately, will likely confront a conflict of interest between their livelihood and a legislative proposal at some time. In analyzing the separation-of-powers clause of New Mexico's Constitution,[18] the Court determined that they issue of whether the public school personnel simultaneously serving as legislators violated the separation-of-powers clause could be resolved by determining whether they were "charged with the exercise of powers." The New Mexico Court then looked to a Montana Supreme Court decision in which the Court developed a separation of powers analysis that distinguished between a public officer who is invested with sovereign powers and a public employee who is not. State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411

[18] "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted." N.M. Const. art. III, § 1.

(1927). New Mexico adopted the five-part test to determine whether an employee is a public officer as laid out in Hawkins in State v. Quinn, 1930-NMSC-065, 35 N.M. 62, 290 P. 786. The Montana test adopted by New Mexico is "to constitute a position of public employment a public office of a civil nature, it must be created by the Constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond, and be held by virtue of a commission or other written authority." Id. at ¶ 5, 787. A latter New Mexico case stressed that the most important factor of the Hawkins test is that to be a public officer, the person must be invested with sovereign power. State ex rel. Gibson v. Fernandez, 40 N.M. 288, 292, 58 P.2d 1197, 1200 (1936).

In relying on the Hawkins test, the Roswell Court determined the separation-of-powers clause of their constitution applied only to public officers, not employees. The Roswell Court further held that public school teachers and administrators are not "public officers" because they do not establish policy for the local school districts or for the state department of education. Roswell, 1991-NMCA-013, ¶ 35, 111 N.M. at 505, 806 P.2d at 1095.

The separation-of-powers clause in the Nevada Constitution uses the same language as New Mexico's as it refers to one branch being prohibited from the "exercise of powers" of another branch. Public school teachers, public defenders, and professors at an NSHE institutions are not invested with sovereign powers and do not establish policy for their employers.

In the Roswell Court's analysis of whether an individual is a public officer or a public employee, one of the factors in the Hawkins test as well as an American Jurisprudence citation[19]

[19] 63A Am.Jur.2d *Public Officers and Employees* § 12, at 676 (1984) ("the characteristics of public office include creation of the office by statute or constitution, exercise of some portion of the sovereign power, a continuing position not occasional or contractual, a fixed term of office, an oath, liability for misfeasance or nonfeasance, and independence beyond that of employees[;] a public employment, on the other hand, is a position in the public

indicate than the requirement to take an oath may be taken into consideration to determine if an individual is a public officer. The Nevada Supreme Court addressed this in State v. Cole, 38 Nev. 215, 148 P. 551 (1915) when it stated that taking an oath is some indication by which to determine if a position is an office; however, the Court held that based on the Nevada Constitution that all officers shall take an oath. Id. at 215, 553. Nevada is one of fourteen states that constitutionally requires an academic loyalty oath to be administered to public educators.[20] However, the oath signed by an educator when they seek licensure references "office or position"[21] and when this is evaluated under Cole, this Court finds that the academic loyalty oath does not constitute the position of public educator being classified as a public office.

The Nevada Supreme Court has laid out the characteristics of a public office, as opposed to public employment, in multiple cases. In State ex rel. Mathews v. Murray, 70 Nev. 116, 120–21, 258 P.2d 982, 984 (1953), the Court established that in Nevada it is the function of a position, rather than its classification, that defines whether it is a public office or public employment. The Court recognized that the nature of a public office as distinguished from mere employment is the subject of a considerable body of authority, and many criteria of determination are suggested by the courts. Upon one point at least, the authorities uniformly appear to concur. A public office is distinguishable from other forms of employment in that its holder has by the sovereign been invested with some portion of the *sovereign functions of government*. Id. at 120-21, 984 (emphasis added). The Mathews Court relied on its decision in Cole, to further define a public office as one that does not spring into existence spontaneously, rather it is brought into existence, either under the terms of the Constitution, by legislative enactment, or by some municipal body, pursuant to

service which lacks sufficient of the foregoing elements or characteristics to make it an office." Roswell, 1991-NMCA-013, ¶ 34, 111 N.M. at 505, 806 P.2d at 1095.

[20] Nev. Const. art. XI, § 5; Gabriel J. Chin & Saira Rao, Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities, 64 U. Pitt. L. Rev. 431 (2003).

[21] Pursuant to NRS 391.080, all applicants for licensure as an educator must subscribe to the Oath of Office as specified in the Nevada Constitution: I,_____ , do solemnly swear (or affirm) that I will support, protect and defend the constitution and government of the United States, and the constitution and government of the State of Nevada against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance and loyalty to the same, any ordinance, resolution or law of any state notwithstanding, and that I will well and faithfully perform all the duties of the **office or position** on which I am about to enter, (if an oath) so help me God; (if an affirmation) under the pains and penalties of perjury. Section 8, NV Educator License Application. (emphasis added)

authority delegated to it. Id. at 219, 552. The Mathews Court also recognized that the Cole Court relied on secondary sources in its opinion to further define a public office in stating that "[a]ll public offices must originally have been created by the sovereign as the foundation of government"[22] and "[t]he right, authority and duty conferred by law by which, for a given period, either fixed by law or through the pleasure of the creating power of government, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The warrant to exercise powers is conferred, not by contract, but by law."[23] Mathews, 70 Nev. at 121, 258 P.2d at 984.

Role or Classification of a Position

While the separation-of-powers clause of the Nebraska Constitution[24] is similar to Nevada's, the Nebraska Supreme Court has interpreted whether a position is one of public office or public employment by role or classification rather than function or power. In State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991), the issue in front of the Nebraska Supreme Court was whether *quo warranto* was an appropriate means to challenge the right of an assistant professor at a state college to hold his position while also serving as a member of the state legislature. Id. at 769, 406. In order to determine if the remedy was appropriate, the court had to determine if assistant professor at a state college holds or exercises a "public office" within the meaning of their *quo warranto* statute.[25] The Court relied on its decision in Eason v. Majors, 111 Neb. 288, 196 N.W. 133 (1923) in stating that "[w]hen a position based upon a provision of law

[22] 3 Cruise's Dig. p. 109, § 5.
[23] Wyman on Public Offices, § 44.
[24] The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution. Neb. Const. art. II, § 1.
[25] An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law. Neb. Rev. Stat. Ann. § 25-21,121 (West).

carries with it continuing duties of public concern which involve some exercise of the sovereign power in their proper performance, the position may be said to be an office public in character. Spire, 238 Neb. at 770, 472 N.W.2d at 406. As we can see from this, the Court was viewing the "character" of the position rather than the function. The dissent in Spire is more aligned with the decisions of the Nevada Supreme Court in that it looks to whether the legislator is exercising some degree of the sovereign power of the state. Spire, 238 Neb. at 792, 472 N.W.2d at 418. Therefore, in reconciling the definition of "public officer" in relation to Spire, the Nevada Supreme Court language in Mathews and Cole mirrors the dissent rather than the majority opinion.[26]

In 1957, the Oregon Supreme Court decided the case of Monaghan v. Sch. Dist. No. 1, Clackamas Cnty., 211 Or. 360, 315 P.2d 797 (1957), holding that a school teacher may not also serve as a state legislator because it violates the separation-of-powers clause of the Oregon Constitution.[27] The Oregon Court defined "function" in a broad sense in that it held that if a person was classified as performing any role in a branch of government, they would be precluded from performing any role in a different branch. Id. at 373, 804.

However, in 1958, the voters of the state passed a referendum amending the Constitution, which superseded the decision in Monaghan. The Oregon Legislature proposed a further amendment as Senate Joint Resolution 203, which was submitted to voters as Measure 87 and was approved November 4, 2014. The amended Oregon Constitution specifically allows "(1) A person employed by any board or commission established by law to supervise and coordinate the activities of Oregon's institutions of post-secondary education, a person employed by a public university as defined by law or a member or employee of any school board is eligible to serve as a member of the Legislative Assembly, and membership in the Legislative Assembly does not prevent the person from being employed by any board or commission established by law to supervise and

[26] See Matthews, 70 Nev. at 120-21, 258 P.2d at 984; Cole, 38 Nev. at 219, 148 P. at 552.

[27] The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided. Or. Const. art. III, § 1.

coordinate the activities of Oregon's post-secondary institutions of education or by a public university as defined by law, or from being a member or employee of a school board; and (2) A person serving as a judge of any court of this state may be employed by the Oregon National Guard for the purpose of performing military service or may be employed by any public university as defined by law for the purpose of teaching, and the employment does not prevent the person from serving as a judge."[28] Both the Oregon voters and the Oregon Legislature made an implicit finding that a school teacher serving as a state legislator does not violate the separation-of-powers clause of the State Constitution.

What we have learned from Nebraska and Oregon is that some courts distinguish whether a position is a public office rather than public employment is based on the role or classification rather than the function or powers of the positions held. Oregon has also shown us that a voter-enacted constitutional amendment may supersede the interpretation by a court.

In Nevada, there is disagreement between the AG and LCB when it comes to whether public employees that fall under the executive branch of the state government are prohibited from serving in the state legislature by the separation-of-powers clause. The AG provided guidance that employees of the Nevada State Highway Patrol ("NSHP") and Nevada Department of Transportation ("NDOT") would be precluded from service in the legislature;[29] however, the LCB issued opinions that found that employees of the State Department of Agriculture ("DOA") and University and Community College System of Nevada ("NSHE")[30] could serve in the legislature as long as they were a public employee and not a public officer.[31]

The AG based its argument on its finding that the role of employee of the NSHP helps perform the administrative functions of the state executive branch of government and, therefore, he is a member of the executive branch and the separation-of-powers clause would preclude him

[28] Or. Const. art. XV, § 8
[29] *See* Op. Nev. Att'y Gen. No. 168 (May 22, 1974); Ltr. Nev. Att'y Gen. (January 28, 2002).
[30] The University and Community College System of Nevada is now called the Nevada System of Higher Education.
[31] Legislative Counsel Bureau Opinion - February 4, 2002; Legislative Counsel Bureau Opinion - January 23, 2003.

from serving in the legislature.[32] While the AG did not issue an official opinion as to the NDOT question, it did issue a letter in which it stated that it disagreed with the LCB's Opinion that the NDOT employee could run for partisan office and maintain his employment.[33]

The issue at the heart of the disagreement between the AG and LCB is one of function versus classification. The LCB has opined that the separation-of-powers clause applies to public officers but not public employees, therefore it is a matter of function, relying on the common law doctrine of incompatible offices as well as NRS 281.044, NRS 284.770, and NRS 284.143. However, the AG's opinions have relied on an argument that the classification of an employee that falls under the umbrella of the executive branch is what triggers the separation-of-powers. Both the AG and LCB have asked for judicial determination on this issue.

In relying on Matthews in its DOA Opinion, the LCB opined "the position of Senior Petroleum Chemist with the DOA is a position created by administrative authority and discretion, not by statute. Moreover, based on the statutory structure of the DOA, we believe that most employees of the DOA do not exercise any of the sovereign functions of the state. Rather, those employees simply implement the policies made by higher-ranking state officials."[34]

The AG disagreed with the LCB in its use of Matthews because the Court never analyzed whether Mr. Murray's dual employment violated Nevada's constitutional separation of powers doctrine. However, the LCB relied on Matthews to define the parameters of a public employee compared to a public official, not to determine the applicability of the separation-of-powers clause to public employees. This Court, like LCB, relies on Matthews to provide guidance on distinguishing public employees from public officers as a step in the analysis of whether a person employed by the state is subject to the separation-of-powers clause of the Constitution.

Based on the classification instructions provided by the Mathews Court, this Court finds that a professor at a NSHE institution is a public employee and not a public officer. Therefore,

[32] Attorney General's Opinion No. 183, dated July 9, 1952.
[33] Ltr. Nev. Att'y Gen. (January 28, 2002).
[34] Legislative Counsel Bureau Opinion - February 4, 2002.

NSHE Defendant Neal's simultaneous employment as an adjunct professor at NSC and her service as a state legislator does not violate the separation-of-powers clause of the Nevada Constitution because she does not exercise a sovereign function of the executive branch in her position as Adjunct Professor at Nevada State College. This Court also finds that public school teachers and public defenders employed by local political subdivisions are public employees and therefore the Teacher Defendants and Defendant Ohrenschall's employment with Clark County and service as state legislators do not violate the separation-of-powers clause of the Constitution because they do not exercise sovereign functions of the executive branch.

CONCLUSION

The Nevada Legislature has known of the Attorney General's Opinion No. 71-4, which stated that the separation-of-powers clause of the Nevada Constitution did not apply to local government employees, for over fifty years. With this knowledge, it has chosen not to act on the issue by enacting a statute that would ban dual employment as addressed in the Opinion. Therefore, this Court views this inaction as the intent of the Legislature to not enact such a law. *See* Roswell, 1991-NMCA-013, ¶ 24, 111 N.M. at 502-03, 806 P.2d at 1092-93. [35]

The legislatures of states such as Louisiana, Connecticut, and Massachusetts have enacted statutes that prohibit dual employment.[36] Connecticut and South Carolina have even spelled a dual job ban out in their constitution.[37] There are multiple examples of how other state legislatures have confronted this issue and if it was the intent of the Nevada Legislature to ban dual employment and override common law, it is in their power to do so. The New Jersey Supreme Court came to the same conclusion when it held "that the common law did not bar the dual officeholding involved in this case, and that the question whether it should be barred in the public

[35] *See also* Water Use, 94 Haw. at 120, 9 P.3d at 432 (The legislature may nevertheless override this rule as it deems appropriate or necessary.).
[36] *See* Foti v. Holliday, 2009-0093 (La. 10/30/09), 27 So. 3d 813, 819; Stolberg v. Caldwell, 175 Conn. 586, 604, 402 A.2d 763, 772–73 (1978); Osetek v. City of Chicopee, 370 Mass. 110, 112, 345 N.E.2d 897, 899 (1976).
[37] *See* Stolberg, 175 Conn. at 604, 402 A.2d at 772–73; S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 646–48, 744 S.E.2d 521, 524–25 (2013).

interest reposes in the power and responsibility of the legislative department." Reilly, 33 N.J. at 543, 166 A.2d at 372. Likewise, it is in the power of the voters of Nevada to amend the Constitution if they desire to ban dual public employment.[38] Or, Nevada voters may follow the lead of Oregon voters and amend the constitution to allow for various types of dual public employment.

Until either of these events occur, this Court finds that three factors must be evaluated to determine whether an individual's dual employment violates the separation-of-powers clause of the Nevada Constitution. First, the Court must deem whether the dual roles are incompatible based on the common law doctrine of incompatible offices. Next, the Court must look at whether the individual legislator's employment is with a state entity or a local political subdivision. Finally, if the roles are compatible and the individual works for a state entity, then the Court must determine whether the position with the state entity is that of an employee or an officer. Based on the analysis of these factors, this Court holds that (1) no officer or employee of a state or local government may also serve as a state legislator if the roles are not compatible and it is the purview of the court to determine compatibility; (2) those employed by local government entities are not a part of the state executive branch and therefore may serve in the legislative branch providing the roles are compatible; and (3) public officers of the state executive branch may not serve in the legislature; however, those who are public employees may, providing the roles are compatible.

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[38] *See also* Ackerman Dairy Inc. v. Kandle, 54 N.J. 71, 75–76, 253 A.2d 466, 469 (1969)(The holding of two offices which are incompatible under the common law may be permitted by a state constitution as a state's constitution overrides the common law.)

As a result of these findings and accepting the charge of the Plaintiff's Amended Complaint as true, this Court finds that Plaintiff NPRI has not established elements of a claim that would grant them relief.

BASED ON THE FOREGOING, the Court ORDERS that Defendant Ohrenschall's Motion to Dismiss is GRANTED;

The Court FURTHER ORDERS that NSHE Defendant Neal's Motion to Dismiss is GRANTED;

The Court FURTHER ORDERS that Defendant Nevada State Legislature's Motion to Dismiss is DENIED for the reasons as indicated in footnote 4 above;

The Court FURTHER ORDERS that the Joinders filed by co-Defendants, to the extent that they dealt with the separation-of-power issues are GRANTED;

The Court FURTHER ORDERS that the Motion to Sever filed by Teacher Defendants is DENIED for the reasons as indicated in footnote 1 above; and

The Court FURTHER ORDERS that the Plaintiffs Motions to Strike are DENIED.

Dated this 4th day of January, 2023

Judge Jessica K. Peterson

9F9 8AF BDAB 670B
Jessica K. Peterson
District Court Judge

AFFIRMATION
Pursuant to NRS 239B.030
The undersigned does hereby affirm that the preceding Order filed in District Court case number A818973 **DOES NOT** contain the social security number of any person.
/s/ Jessica K Peterson

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Nevada Policy Research Institute, Plaintiff(s) vs. Nicole Cannizzaro, Defendant(s)	CASE NO: A-20-817757-C DEPT. NO. Department 8

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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