The section of the Constitution quoted is plain and unmistakable. If the emoluments provided for any board or commission members have been increased by a Legislature of which said legislator and board or commission member was an elected member, then he cannot constitutionally remain a member of such board or commission.

There is a further provision of our State Constitution which is applicable, even in the absence of emoluments or salary. This is Sec. 1 of Art. III, which provides:

> The 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 person charged with the exercise of powers 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.

There is no direction or permission in the Constitution relative to the present question.

The commissions established by law in this State are executive arms of the government, delegated with administrative powers and with supervision and control over certain phases of our State Government.

As was state in *Gibson v. Mason*, 5, Nevada 283:

> But another government, that of the State, is formed, which is usually clothed with all the sovereign authority reserved by the people from the grant of powers in the Federal Constitution. This is accomplished in this as in all the States but once, by means of the Constitution adopted by themselves, whereby, *all political power is conferred upon three great departments, each being endowed with and confined to the execution of powers peculiar to itself.* (Italics ours.)

The language employed in Sec. 1 of Art. III of the Constitution of Nevada is clear and unambiguous. It does not content itself with principles which must be apparent to any student of government, but lays down a strict rule which forbids an officer in one of the three departments from holding at the same time an office in either of the other two departments.

It is clear that for a member of the Legislature to hold office as a member of a state board or commission is incompatible with this well established constitutional provision, for by the very nature of their office they are in a position to enact laws and to make appropriations which directly affect the board or commission of which they are a member.

There is nothing to prevent a member of a state board or commission from running for the Legislature, but once elected to that august body, he must resign or be removed from the board or commission in order to gain compliance with the constitutional prohibition against holding office in separate branches of the State Government.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-213 ELECTIONS; PRIMARY ELECTION—County commissioners or county clerks not empowered to withhold name of party nominee of primary election from general election ballot in absence of appropriate court action.

Carson City, September 21, 1956

W. J. Hemingway, Chairman, Board of County Commissioners, Ely, Nevada

Dear Mr. Hemingway:

You have requested this office to furnish you with an opinion concerning the candidacy of one who, as a nonpartisan, filed for the Democratic nomination for Assemblyman from White Pine County.

Leaving out the name of the candidate, the facts were as follows:
A person who upon registration as an elector in 1953 refused to designate his party affiliation, and was thus considered a non-partisan, filed in due time for the 1956 Primary as a candidate for the Assembly on the Democratic ticket.

It was necessary for him in so doing to file a declaration of candidacy, and to swear to the same. The pertinent parts of this declaration, with which we are here concerned, read as follows:

"* * * that I am a member of the Democratic party; that I have not reregistered and changed the designation of my political party affiliation on an official registration card since the last general election; that I believe in and intend to support the principles and policies of such political party in the coming election; that I affiliated with such party at the last general election of this State; that if nominated as a candidate of the Democratic party at the ensuing election I will accept such nomination and not withdraw * * *."

The candidate was successful and received sufficient votes in the race for the Assembly in White Pine County in the primary election held September 4, 1956, to entitle him to go on the ballot as one of four Democratic aspirants for the Assembly at the general election to be held on November 6, 1956.

The specific question to be resolved by this office is this: Can a person, who is registered as a non-partisan, and who files for office as a member of one of the main political parties and is nominated by a direct vote of the people at a primary election, have his name removed from the general election ballot by other than court action?

OPINION

Subparagraph (h) of Sec. 1 of Chap. 310 of the 1955 Stats. provides:

> This statute shall be liberally construed to the end that minority groups and parties shall have an opportunity to participate in the elections and that the real will of the electors shall not be defeated by any informality or failure to comply with all the provisions of law in respect to either the giving of any notice or the conducting of the primary election or certifying the results thereof.

Sec. 7 of Chap. 310 of the 1955 Stats. of Nevada provides that the county clerk, not less than twenty-one days before the September Primary, shall prepare sample ballots, and mail five copies thereof to each candidate, and shall mail to each registry agent, for distribution, one sample ballot for every four registered voters in such precinct. This section also provides that on the fifteenth day before any primary the county clerk shall correct any errors or omissions on the official ballot and shall cause the same to be printed and furnished to precinct election officers at the ratio of

110 ballots for each 100 electors registered in such party; *and the same ratio of non-partisan ballots for electors who have registered for the primary without designating any party affiliation.*

I call attention to this section to point out that these safeguards, taken together with the published list of registered voters, are sufficient to put not only the candidates but the general public on notice as to the party affiliations of the qualified electors. Despite these safeguards the person in question filed his declaration of candidacy and it was not challenged, either by the county clerk, the election officials or a qualified elector.

On May 7, 1946, the Honorable Alan Bible, Attorney General of Nevada, issued an opinion which is closely allied with the present problem. The question asked in that case was as follows: May an elector whose registration card shows that his political affiliations are nonpartisan change such registration declaring his affiliations to be with the Democratic party and file as a candidate for nomination for the office of sheriff as a member of the Democratic party? General Bible answered in the affirmative. In his opinion he pointed out that the official registration card of an elector who registered as a non-partisan would show that he was not a member of any political party, and that Sec. 2404 N.C.L. 1929, as amended, shows a political party to be an organization of voters qualified to participate in a primary election. Under the provisions of par. (g) of Sec. 1 of Chap. 310 of the 1955 Stats. such participation may be in either of two ways: First—Any organization of electors which, under a common name or designation at the last preceding November election, polled for any of its candidates equivalent to 5 percent of the total vote cast for Representative in Congress. Second—Any organization of electors which, under a common name or designation, shall file a petition, signed by qualified electors equal in number to at least 5 percent of the entire vote cast at the last preceding November election for Representative in Congress, declaring that they represent a political party of principle, the name of which shall be stated, and that they desire to participate and nominate officers by primary * * *.

The opinion of General Bible goes on to point out that the elector, although not a member of a political party, may have affiliated with a political party and may desire to become a member of such party. In the case of *Wolck v. Weedin*, 58 Fed.2d 928, it was held that a person need not be a member of a party, but if he sympathized with the party's aims and desired to join when allowed to do so, that was sufficient to show his affiliation with such party. The non-partisan elector would not, therefore, reregister for the purpose of changing his politics, but to become a member of his selected party.

General Bible in his learned opinion points out that the manifest purpose of the Legislature was to prevent the switching from one political party to another in order to become a candidate of that party at a primary election, and the changing of a registration card for any other reason would not do violence to such purpose.

It must be pointed out that the present case differs from that set out in Attorney General Bible's opinion in that there the reregistration occurred prior to the filing for office, whereas here, the registration occurred after the nomination in the primary.

There can be no doubt that the Legislature under the powers given to it by Sec. 6 of Art. II of the Constitution of Nevada may prescribe rules and regulations governing elections, provided they do not conflict with constitutional guarantees. That the provisions of our direct primary law are constitutional has been decided in the case of *Riter v. Douglass*, 32 Nev. 400.

The contention must be forwarded that any objections to the placing of a person's name on the primary ballot should be taken prior to the election (*State v. Fransham*, 48 Pac. 1; *Lund v. Hall*, 186 N.W. 284; *Dithmar v. Bunnell*, 110 N.W. 177), and it was held in the case of *Adair v. McElreath*, 145 S.E. 841, that voters finding the names of candidates on their official ballots are not required to determine whether they are entitled to a place thereon, but may safely rely on the action of the officers of the law and on the presumption that they have performed their duty. In the case of *Torkelson v. Byrne*, 226 N.W. 134, it was held that an election will not be set aside because of irregularities on the part of election officials unless it appears that such irregularities affect the result.

This office points out these decisions because they inescapably lead to the conclusion that the person in question in this case, being a nonpartisan, would have had the right to reregister as a Democrat prior to the primary election. Does the fact that he did not, violate his statements made

in his declaration of candidacy. We think not as far as his affiliation with the Democratic party is concerned, as pointed out in Attorney General Alan Bible's opinion No. 300 of May 7, 1946, and the case of *Wolck v. Weedin*, 58 Fed.2d 928. He campaigned as a Democrat and is evidently well and favorably known to the voters of White Pine County or he would not have been elected.

While it has been determined that a nominee is not a public officer (*Riter v. Douglass*, 32 Nev. 400), it is pointed out in the case of *State ex rel. Rinder v. Goff*, 109 N.W. 628, that he holds a quasi-office and that with it certain rights are vested. He is entitled to its single privilege, the right to have his name put on the official ballot, in the proper place, as against all the world, until in some proper action or proceeding to contest his right it is decided that another person was in fact nominated.

In *State ex rel. Barger v. Circuit Court for Marathon County*, 190 N.W. 563, it was held that after nomination in the primary election of a candidate for State Senator, a court had no jurisdiction to determine that the candidate's name might be taken from the election ballot, even though prior to the general election the candidate's noneligibility might be plainly disclosed. This was based upon the proposition that under the State Constitution the respective houses of the Legislature were the sole judges of the election returns and qualifications of their own members. Art. IV, Sec. 6 of the Nevada Constitution, has a similar provision with regard to the qualifications, elections and returns of its own members.

Finally assuming that we were to find that this nominee's name should not appear on the general election ballot because prescribed procedures were not followed, the disturbing question remains as to how, and by whom, it can be removed. The offices of county commissioners and county clerks are ministerial offices, and the incumbents have only such powers as are expressly granted to them by the Legislature. Such powers are exclusive and except as to those specifically enumerated, and those as might be reasonably inferred as implied powers to carry out powers expressly granted, do not exist. (*First Nat. Bank of San Francisco v. Nye County*, *38 Nev. 123; State v. McBride*, *31 Nev. 57; State v. Boerlin*, 30 Nev. 473.) We find nothing in the law reciting or inferring that the board of county commissioners or the county clerk have the power to remove a successful candidate's name from the general election ballot.

We do not infer from the citation of the Barger case (supra) that a Nevada court does not have the power to effect such a removal, nor do we express an opinion that such power exists. Upon this question we express no opinion.

It is, therefore, the opinion of this office that the name of the successful nominee for Assembly on the Democratic ticket at the September, 1956, Primary, should go on the general election ballot in November, in the absence of an order to the contrary by a court of competent jurisdiction.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-214 PUBLIC EMPLOYEES RETIREMENT ACT—Public Employees Retirement Board has power to determine disability of employee at time of withdrawal of contributed funds, and to allow repayment of withdrawn funds and award of disability benefits, without reemployment of said employee.

Carson City, September 24, 1956

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada