

SUMMARY OF THE WORKSHOP TO SOLICIT COMMENTS ON THE PROPOSED
REGULATIONS OF THE STATE DEPARTMENT OF PERSONNEL

December 1, 2009
CARSON CITY, NEVADA

Attendees in Carson City:

Teresa Thienhaus, Director, Department of Personnel
Shelley Blotter, Division Administrator of Employee and Management Services, Department of Personnel
Mark Evans, Supervisory Personnel Analyst, Department of Personnel
Amy Davey, Personnel Analyst III, Department of Personnel
Carrie Hughes, Staff Specialist, Department of Personnel
Mary Kaye Spencer, Administrative Assistant III, Department of Personnel
Ricky Burdick, Administrative Assistant II, Department of Personnel
Kimberley King, Personnel Officer III, Department of Transportation
Renee Travis, Personnel Officer I, Department of Administration
Salli Hebert, Personnel Analyst II, Department of Cultural Affairs
Teri Hack, Personnel Technician III, Department of Conservation & Natural Resources
Mary Ashley, Chief Deputy, Gaming Control Board
Karen McRae, Supervisor, Gaming Control Board
Todd Rich, Administrative Coordinator, Gaming Control Board
Kareen Masters, Deputy Director, Department of Health and Human Services
Tracy Walters, Personnel Officer II, Department of Health and Human Services
Kathleen Kirkland, Personnel Officer I, Department of Veteran's Services
Paul Cotsonis, NCA Representative
Janet Traut, Deputy Attorney General, Attorney General's Office
Jamie Pruneau, Personnel Technician III, Department of Health & Human Services
Mindy McKay, Program Officer II, Department of Public Safety
Alys Dobel, Personnel Officer II, Department of Corrections
Catherine Thayer, Deputy Attorney General, Attorney General's Office
Peter Long, Division Administrator of Compensation & Classification, Department of Personnel
Karen Caterino, Division Administrator, Division of Risk Management
Charles Davis, Treatment Home Provider, Department of Health & Human Services

Attendees in Las Vegas:

Mark Anastas, Division Administrator of Recruitment and Retention, Department of Personnel
John Mueller, Executive Director of Human Resources, NSHE/ College of Southern Nevada
Ron Cuzze, NSLEOA

The workshop commenced at 1:00 p.m. Shelley Blotter welcomed everyone to the meeting.

Shelley Blotter stated the purpose of the workshop was to solicit comments from affected parties with regard to the regulations proposed for permanent adoption. These regulations may be considered for adoption by the Personnel Commission at their March 2010 meeting. If the Personnel Commission

adopts the regulations, they will go into effect when approved by the Legislative Commission and filed with the Secretary of State.

Shelley Blotter explained that any comments received would be summarized for the Personnel Commission and provided to them prior to their meeting for consideration.

Shelley Blotter stated that item 2 (D), NAC 284.541 on the Agenda, was pulled from consideration.

REGULATION CHANGES PROPOSED FOR PERMANENT ADOPTION

Section 1. Section 1 of LCB file No. R080-09 is hereby amended to read as follows:

Explanation of Proposed Regulation: Senate Bill 433 of the 2009 Legislative Session requires most State classified employees to take 96 hours of unpaid furlough leave in each of the next two fiscal years and for other than classified employees, 1 days of unpaid furlough leave a month during each of the next two fiscal years. The purpose of this regulation is to address concerns expressed by the Legislative Commission when they approved the permanent regulation. It is requested that this regulation expire as of June 30, 2011 unless the Legislature extends the effective date of the furlough. In such a case, this regulation will only be in effect for the period of time in which the Legislature requires furloughs to exist.

Section 1 of LCB File No. R080-09 (NRS 284.065, 284.155, 284.383, 284.385, and 284.390)

1. Except as otherwise provided in Senate Bill No. 433, chapter 391, Statutes of Nevada 2009, at page 2147, a :

(a) Full-time employee that is other than a classified employee shall take 1 day of furlough leave per month. Part-time employees that are other than classified employees must prorate their time in accordance with section 3 of Senate Bill 433 of the 2009 Legislative Session.

(b) [full-time] Full-time classified employee shall take 8 hours of furlough leave each month and a part-time classified employee shall take a number of hours of furlough leave per month that is equivalent to the portion of an 8-hour day that his scheduled workweek or biweekly schedule bears to a full-time workweek or biweekly schedule unless:

~~{(a)}~~ (1) The employee's appointing authority files a plan with the Director and the Director of the Department of Administration or their designated representatives or, in the case of employees of the Nevada System of Higher Education, with the chief financial officer of the applicable institution for the employee to take furlough leave pursuant to an alternate schedule [because of workload demands]; and

~~{(b)}~~ (2) The plan is approved in advance by the Director and the Director of the Department of Administration or their designated representatives or by the chief financial officer of the institution, as applicable.

2. Each appointing authority shall establish a policy that defines the minimum increment of furlough leave required to be taken at any one time by a classified employee of the appointing authority. The policy may provide different increments for employees in different divisions, locations or work groups based on business necessity. The appointing authority shall disseminate the policy to each employee under its authority

who is required to take furlough leave.

3. To the extent practicable, an employee who is required to take furlough leave and his or her supervisor shall jointly determine in advance a schedule pursuant to which the employee will take furlough leave. If, because of business necessity, such a schedule cannot be mutually agreed upon, a supervisor may direct an employee to take furlough leave on a specific day or at a specific time, or both.

4. Movement of an employee from one position to another position must not alter the amount of furlough leave required to be taken by the employee.

5. The amount of furlough leave that an employee is required to take must not be offset by any savings realized as a result of a vacancy delay in filling the position.

6. An employee who is initially appointed to state service after July 1, 2009, may only be required to take the number of hours or days of furlough leave that is required to be taken during the remainder of the fiscal year after his appointment. If such an employee is appointed on a day other than the first of a month, the employee may not be required to commence taking furlough leave until the immediately succeeding month.

7. An employee may not:

(a) Take more than 8 hours of furlough leave in a workweek.

(b) Receive overtime pay, compensatory time, pay for standby status, added regular time for work as a part-time employee or callback pay in the same pay period in which the employee takes furlough leave, unless approved in advance by the Director and the Director of the Department of Administration or their designated representatives or, in the case of employees of the Nevada System of Higher Education, by the chief financial officer of the applicable institution.

(c) Be required to take more furlough leave than the amount of furlough leave required by the provisions of Senate Bill No. 433, chapter 391, Statutes of Nevada 2009 at page 2147.

8. If an employee who leaves state service has taken more than the equivalent of 8 hours of furlough leave per month at the time of his separation from state service, the employee will not be reimbursed for the additional furlough leave taken.

9. Any furlough leave that an employee takes must be considered time worked for the purpose of calculating the employee's eligibility to take leave under the federal Family and Medical Leave Act. Any furlough leave that is taken during the time in which an employee takes leave that qualifies under the Family and Medical Leave Act will not be counted against the amount of leave for which an employee is entitled to take under the Family and Medical Leave Act.

10. As used in this section, "furlough leave" means the unpaid leave required to be taken pursuant to the provisions of Senate Bill No. 433, chapter 391, Statutes of Nevada 2009 at page 2147.

Shelley Blotter read the following informational statement:

Section 1 is the furlough regulation previously adopted by the Personnel Commission with a few minor changes. When the Department requested approval of this regulation from the Legislative Commission, a couple of the Legislators expressed concerns regarding how furloughs were being implemented in the various State agencies. While not specific, the primary issue seemed to be that the Legislature had intended for management to be as flexible as possible when approving furlough leave. Additionally, a

Legislator asked for clarification of the first subsection to ensure that unclassified employees are required to furlough.

The amendments to subsection 1, adds language to include other than classified employees. Additionally, the words “workload demands” were removed as a requirement for an alternate schedule of furlough leave. This will allow for additional flexibility when an employee requests to use more or less than 8 hours of furlough leave in a month. This does not change the requirement for such an alternate schedule of usage to be approved by the Department of Personnel and the Department of Administration.

Following her explanation, Shelley Blotter requested public comments.

Ron Cuzze stated that he would like to comment on this section but was unable to get a hold of Director Hafen and would like to send in his comments in writing.

Shelley Blotter responded that that was fine and any comments he submitted would be included with the minutes.

Charlie Davis read the following statement:

I would like to thank the Department of Personnel and the members of this committee for the opportunity to speak today to address my concerns in the application of the unpaid furlough policy.

I would first like to say that I commend the efforts of the state legislature in its implementation of the states furlough policy in its effort to reduce the state budget. I also commend all state employees for adhering to the furlough policy and the financial sacrifice that they and their families make in support of the fiscal well being of our state, as well as all of the agencies who have been proactive and innovative in their efforts to reduce costs and spending.

However, there are aspects of our state government that require flexibility or additional consideration. I am very proud to be a part of a very small slice of our government that provides services to children who face additional challenges in their lives. I am one of thirteen Treatment Home Providers that work for Northern Nevada Child and Adolescent Services. We provide 24 hour face to face client care for children between the ages of five and seventeen, most of whom carry a diagnosis of severely emotionally disabled. Many of the youth that we work with have dual diagnosis, have been abused both in utero and post birth; and at their current level of functioning, they can no longer be managed within their home or foster home environments because of the behaviors that they exhibit. In most instances, this involves oppositional defiance, aggression towards themselves or others, and prolonged destructive tantrum type behavior. The level and type of care that we provide in many instances will divert a youth from a locked psychiatric facility or intense services out of state. Our program is generally six to twelve months and we provide a family styled, structured environment to teach our youth to learn replacement behaviors for their unacceptable behaviors that they exhibit. While in the program, youth are monitored by the residential psychiatrist, and see a therapist to work on emotional issues in congruence with the behavioral structure they receive in the Treatment Home. The goal is to reunite and to reintegrate. Treatment Home Providers also provide Parent Training to the families and support once the youth have left the program.

My co-workers and I work an innovative work schedule as we live with our clients. We work a 24 hour shift for which we are compensated for 16 out of 24 hours. Our shift ends at 10 p.m. and then restarts at 6 a.m. the next morning. The hours between 10 p.m. and 6 a.m. are considered our “sleep/night time hours” for which we are not compensated for. Our forty hour work week is generally completed within three days as we combine two sixteen hour shifts and one eight hour shift.

All Treatment Home Providers have an employment agreement with the state that defines our responsibilities, our hours of work, and our compensation. Many of our agreements are under the title of Teaching Parent Reliefs, a title prior to our reclassification to Treatment Home Providers. Before the Personnel Commission, the Attorney General’s office stipulated that our agreements would be upheld and reflective of the name change.

Contained within this agreement in section one, paragraph (c), it states that “if the sleep/night time hours are interrupted by a call to duty, the time of the interruption will be documented and counted as hours worked, and paid at the overtime rate of time and one half the regular hourly rate. The interruption will be deemed to be for a minimum of one hour, unless more time is documented by the employee.” Further, “if the Employee does not get at least five hours of sleep during the scheduled sleep/night time hours, the entire period will be so documented and considered as hours worked.”

At night, our youth are alarmed on their beds. Motion sensors are placed between clients for their safety in an effort to eliminate aggressive episodes between clients, and worse, the possible sexual perpetration of one client on another. Because of the constraints of these alarms, youth will have to call out during the night if they need to use the restroom. Youth also call out during the night because of nightmares, illness, and anxieties. Sometimes youth sleep walk and have to be redirected back to their bed. Sometimes, a teddy bear will fall off the bed, but still we must investigate.

Recently, a six year old boy was placed in the home that I work in. My co-worker was up most of the night with this client because of his anxiety of being removed from his foster home, separated from siblings, and being placed in a new placement where he knew no one. My co-worker did not receive any sleep that night as this client called out frequently. Under our agreement, she should have been compensated for eight hours of overtime pay. However, she was told that she needed to flex this time.

My agency states that in adherence to the furlough policy, if interrupted sleep occurs during the pay period that you have furloughed, you must flex your time. This violates our agreement.

I believe and propose that during this fiscal period and implementation of mandated unpaid furlough policy, there needs to be some form of flexibility on behalf of Departments to make situational exceptions, and not display a black and white dogmatic approach to the enforcement of the furlough policy.

The Department Of Health and Human Services Furlough Policy does not recognize the circumstances that we operate within, and unfortunately for reasons that I do not understand, there is no one to advocate for our position. I believe that first, Treatment Home Providers should be allowed to receive compensation for overtime during a furlough period for interruption of sleep/night time hours in adherence to our agreements. If payment of overtime is truly an issue, then we should be able to accrue compensatory time at the rate of time and a half. However, the agencies policy of not being able to

accrue overtime pay and compensatory time during the same pay period constrains this request. Currently, an employee needs to complete a form each time they change between compensatory time and overtime for pay. I believe that we should not have to do this to make this more accessible. Secondly, if we are mandated to flex, and I have been told that you cannot be made to flex, then the flex time should be at the rate of time and half, not a straight one hour for one hour. Further, flex time policies need to be relaxed and we should be allowed to flex between weeks and pay periods.

I would like to say that my coworkers and I work with very fragile youth who can decompensate very quickly, in some cases for no other reason than they were given an answer of no. These episodes can become very violent and aggressive and some will last for hours. I can not think of anyone that I work with in my home or any other home that would leave at the end of their shift if one of these episodes occurred, just so that they would not accrue overtime during a week that they furloughed. We are our other family.

We work with the human condition and there are many things that are beyond our control. Things can change in an instant and I ask that be taken into account, considered, and respected.

There were no other questions, comments, opposition or discussion on this section

Sec. 2. NAC 284.470 is hereby amended to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Department of Personnel, clarifies language regarding substandard ratings. The current language implies that if disciplinary action is taken, then the 90-day evaluations do not need to continue even if the employee's performance does not improve. In reality when disciplinary action is taken without a subsequent substandard rating, the employee becomes eligible to receive merit increases and longevity pay.

NAC 284.470 Preparation, filing, contents, discussion and distribution of reports; power and duties of employees; review; adjustment of grievances. (NRS 284.065, 284.155, 284.340, 284.384)

1. A person shall not complete a report on performance unless he has completed the training provided or approved by the Director concerning the preparation of a report on performance.

2. A report on performance must be prepared on the form prescribed by the Department of Personnel.

3. A report on performance must be filed at the times prescribed by NRS 284.340, but may be filed more frequently at the discretion of the supervisor of the employee. If a report on performance is not filed on or before the times specified in NRS 284.340, the performance of the employee shall be deemed to be standard.

4. If any information that would have affected the rating of performance of an employee during a period of evaluation becomes available after the date on which the report on performance of the employee is filed for that period, the information may be included in the report on performance for the current period of evaluation and taken into consideration in determining the rating of performance for the current period of evaluation.

5. When a report on performance is given which reports the overall rating of performance of an employee as substandard:

(a) The report must contain a written notice that such reports affect both merit pay increases and the employee's eligibility for longevity pay; and

(b) An additional report on the performance of the employee must, in accordance with subsection 4 of NRS 284.340, be filed at least once every 90 days after the initial report that includes the substandard rating until the performance of the employee improves to standard ~~[or disciplinary action is taken against the employee]~~. ***Disciplinary action may also be taken if the employee's performance fails to improve.***

6. Except as otherwise provided in subsection 7, the preparation of each report on performance must include a discussion between the employee and his immediate supervisor. Within 10 working days after the discussion takes place:

(a) The employee must complete and sign the appropriate section on the report on performance and return the report to his supervisor for forwarding to the reviewing officer or appointing authority.

(b) If the employee disagrees with the report on performance and requests a review, he must respond to the report in writing, identify the specific points of disagreement, if such specificity is provided, and return the response to his supervisor. The reviewing officer shall respond to the employee in writing on a form prescribed by the Department of Personnel within 10 working days after the supervisor receives the request.

7. If an employee is unavailable for a discussion of the report on performance pursuant to subsection 6 because of an extended absence, the immediate supervisor of the employee shall cause the report to be mailed to the employee. Within 10 working days after the date on which the employee receives the report:

(a) The employee must complete and sign the appropriate section on the report on performance and mail the report to his supervisor for forwarding to the appointing authority or reviewing officer.

(b) If the employee disagrees with the report on performance and requests a review, he must respond to the report in writing, identify any specific point of disagreement, if the report provides such specificity, and mail his response to his supervisor. The reviewing officer shall respond to the employee in writing on a form prescribed by the Department of Personnel within 10 working days after the supervisor receives the request for review from the employee. For the purposes of this paragraph, a report on performance or request for review is deemed to have been received on the third day after the date on which the report or request is postmarked.

8. A copy of each report on performance and, if applicable, any written response to such a report, must be provided to the employee and filed with the Department of Personnel.

9. If any written comments are added to a report on performance after a copy of the report has been provided to the employee pursuant to subsection 8:

(a) A copy of the revised report which includes the written comments must be provided to the employee; and

(b) The employee may respond, in writing, to the additional comments in the revised report not later than 10 working days after he receives a copy of the revised report and submit the response to the Department of Personnel for inclusion in his file of employment.

10. An employee and his appointing authority may agree in writing to extend one or more of the periods prescribed in subsection 6 or 7.

11. If a reviewing officer fails to respond to a request for review from an employee within the time required by this section, the employee may institute the procedure for the adjustment of a grievance pursuant to NAC 284.658 to 284.6957, inclusive.

[Personnel Div., Rule IX § A, eff. 8-11-73; A 12-28-75]—(NAC A by Dep't of Personnel, 10-26-84; 9-17-87; 10-18-89; 11-16-95; R031-98, 4-17-98; A by Personnel Comm'n by R065-98, 7-24-98; A by Dep't of Personnel by R197-99, 1-26-2000; R147-01, 1-22-2002; A by Personnel Comm'n by R069-02, 8-14-2002; R096-03, 10-30-2003; R144-05, 12-29-2005; R174-08, 9-29-08)

Mark Evans read the following statement:

Section 2 proposes a change to paragraph 5 of NAC 284.470 and relates to 90-day follow-up evaluations after an employee receives a substandard rating. The current language implies that if disciplinary action is taken, then an additional 90-day follow-up evaluation does not need to be completed. However, if disciplinary action is taken without a subsequent substandard rating, the employee's performance will be deemed standard and the employee will become eligible to receive merit increases and longevity pay. The language has caused confusion for agencies and employees. The change gives supervisors the option to give discipline in conjunction with the evaluation, and this is consistent with several agencies' practices. He requested public comments.

Kareen Master commented that the language in the regulation is the same as in the statute and asked if it caused a conflict by changing the regulation to read differently?

Mark Evans replied that the way the language is worded now; the regulation is open to interpretation and that it's not clear that an agency may give discipline as well as a substandard evaluation.

Kareen Masters commented that she had felt that the regulation was requiring an agency to give an employee an evaluation every 90 days rather than pursue the disciplinary path.

Shelley Blotter replied if the 90-day evaluations are not done then Records is not notified to hold back on any merit increases. Shelley Blotter also stated the LCB would perform a pre-adoption review to ensure conformance with the statute.

Mark Evans replied that if the substandard evaluation didn't happen then that could affect an employee's progressive discipline because it could be argued that the employee's performance was acceptable.

There were no other questions, comments, opposition or discussion on this section

Sec. 3. NAC 284.506 is hereby amended to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Department of Personnel, removes the reference to the Administrative Services Section in relation to the Department's training responsibilities. Recently, the Office of Employee Development, which is responsible for training activities, was moved from the Department's Administrative Services Division to the Employee and Management Services Division.

NAC 284.506 Responsibilities of [Administrative Services Section of] Department of Personnel. (NRS 284.065, 284.155, 284.343) The responsibilities of [the Administrative Services Section of] the Department of Personnel include:

1. Reviewing the training records of state agencies which have approved training to check for compliance with NRS 284.343 and NAC 284.482 to 284.522, inclusive.
2. Providing consultative services, when requested, to assist state agencies in assessing the needs for training, developing training plans, and establishing systems of records for training.
3. Providing training which applies throughout the State and specialized training which is based on the expertise and resources available.
4. Making recommendations for the improvement of an agency's training program when requested.
5. Reviewing requests for training and making the final approval or disapproval for training provided, paid for or coordinated by the Department of Personnel. [Personnel Div., Rule X § G, eff. 1-18-82]—(NAC A by Dep't of Personnel, 10-26-84)

Mark Evans read the following statement:

Section 3 is a simple housekeeping change. It amends NAC 284.506 which states that the Administrative Services Division of the Department of Personnel is responsible for various training activities. The Office of Employee Development is no longer part of Administrative Services and is now part of Employee and Management Services. This change removes reference to a specific division and states these services will be provided by the Department of Personnel.

There were no questions, comments, opposition or discussion on this section

Sec. 4. NAC 284.588 is hereby amended to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Department of Personnel, clarifies that the intent of this regulation was to provide differential pay to Reserve or National Guard members who are called to active duty versus employees who chose to leave State service to pursue a career in the Armed Forces. This regulation was adopted following September 11, 2001 and is intended to reduce the financial hardship an employee would experience as a result of their military pay being less than what they would have earned as a State employee.

NAC 284.588 Civil leave with reduced pay when performing certain service in time of war or emergency. (NRS 284.065, 284.155, 284.175, 284.345)

An employee in the public service who performs active military service in the [~~Armed Forces of the United States~~] *United States Army Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Coast Guard Reserve, the United States*

Air Force Reserve, or the Nevada National Guard or any other category of persons designated by the President of the United States or the Governor of this State, including, without limitation, the Commissioned Corps of the Public Health Service, in time of war or emergency, is entitled to civil leave with reduced pay pursuant to this section for the period of such service. The pay that such an employee is entitled to receive pursuant to this section is the difference between the pay he would have otherwise received as a state employee and his pay for active military service. If his pay for active military service is greater than the pay he would have otherwise received as a state employee, the employee will not receive any additional pay pursuant to this section while he is in active military service.
(Added to NAC by Dep't of Personnel by R146-01, 1-18-2002, eff. 2-4-2002)

Carrie Hughes read the following statement:

In Section 4, the Department of Personnel is proposing an amendment to NAC 284.588. This amendment will clarify that the intent of this regulation was to provide differential pay to Reserve or National Guard members who are called to active duty versus employees who chose to leave State service to pursue a career in the Armed Forces. This regulation was originally adopted following September 11, 2001 and is intended to reduce the financial hardship an employee would experience as a result of their military pay being less than what they would have earned as a State employee. Are there any comments?

There were no questions, comments, opposition or discussion on this section

Sec. 5. NAC 284.678 is hereby amended to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Department of Personnel, clarifies that an employee filing a grievance concerning a performance review, may bypass any steps where the respondent has already been involved in either writing or reviewing the rating.

NAC 284.678 Submission, form and contents of grievance; informal discussions. (NRS 284.065, 284.155, 284.384)

1. Except as otherwise provided in subsection 3 and NAC 284.692, an employee who feels aggrieved and wishes to file a formal grievance must submit his grievance in writing to his immediate supervisor on the official form, or in a letter if the official form is not available, within 20 working days after the date of the origin of the grievance or the date the employee learns of the problem. The parties should make every effort to resolve the grievance through informal discussions within these 20 working days.

2. If the employee submits a letter, it must include:

- (a) His name;
- (b) His most recent date of hire;
- (c) His position;
- (d) His department, division and section;
- (e) His mailing address;
- (f) His business telephone number;
- (g) A statement that he is filing a formal grievance;
- (h) The date, time and place of the event or the date the employee learns of the event

leading to the grievance;

- (i) A concise statement of his grievance;
- (j) A detailed description of his grievance, including the names of other persons involved in the event, if any;
- (k) A proposed solution of his grievance;
- (l) His signature; and
- (m) The date he signed the statement.

3. Except as otherwise provided in NAC 284.692, if a grievance relates to a decision of a reviewing officer about a performance evaluation, an employee must file a grievance that identifies the specific points of disagreement, if such specificity is provided, not later than 10 working days after the date the employee receives the decision of the reviewing officer. Except as otherwise provided in NAC 284.692, if the grievance relates to the failure of a reviewing officer to respond to a request for a review within the time required by NAC 284.470, an employee must file a grievance not later than 10 working days after the date on which the time for such a response expired. A grievance filed pursuant to this subsection must be filed with ~~the~~:

- (a) ~~The appointing authority; or~~
- (b) ~~If the appointing authority is the immediate supervisor of the employee or the reviewing officer, the~~ *the* person who is at the next *appropriate* level of the grievance process. *The employee may bypass any individual who served as the rater, optional supervisory reviewer, or reviewing officer.*

[Personnel Div., Rule XV § A part subsec. 1, eff. 8-11-73; A 6-9-74; 2-5-82]—(NAC A by Dep’t of Personnel, 10-26-84; 10-18-89; 3-23-94; R197-99, 1-26-2000; A by Personnel Comm’n by R023-05, 10-31-2005)

Mark Evans read the following statement:

Section 5 changes language that relates to filing a grievance related to a performance evaluation. The current language does not provide clear guidance as to who can be bypassed. Also, in past regulation workshops and Personnel Commission meetings, concerns have been raised about referring to the “appointing authority” since various positions can serve in this capacity. This language clarifies specifically who can be bypassed in the grievance process for evaluations based on who was involved in the writing or review of the evaluation.

Shelley Blotter asked to hear any positive, as well as, negative comments regarding this change.

Karen Master commented that the regulation does provide more clarity and is a good change.

There were no other questions, comments, opposition or discussion on this section

Sec. 6. Chapter 284 of NAC is hereby amended by adding thereto a new section to read as follows:

Explanation of Proposed Change: This new section, proposed by the Department of Personnel, describes the method for the assignment of a hearing officer when an employee has filed an appeal of a dismissal, suspension, demotion, involuntary transfer, or a “Whistle Blower” complaint.

New Section. Assignment of hearing officer.

1. Upon notice of request for appeal, the Director shall provide both parties with an identical selection list of hearing officers.

2. The parties shall return the selection list to the Department within 10 days, as specified on the selection list, with no more than two names stricken each.

(a) If both parties respond within the 10-day period, the Department shall appoint a hearing officer from those names not stricken from the selection list;

*(b) If only one party responds within the 10-day period, the Department shall appoint a hearing officer from among those names not stricken from the selection list;
or*

(c) If neither party responds within the 10-day period, the Department shall appoint a hearing officer from among the names on the selection list.

3. If the selection process outlined above fails for any reason, including a recusal by the hearing officer, the Department shall repeat the process to select an alternate hearing officer, where practicable, or assign the first available hearing officer.

Amy Davey read the following statement:

Sections 6 through 9 establish new procedures for the assignment of hearing officers and clarify responsibilities of hearing officers and parties during an appeal. These proposed regulations are meant to address concerns of timeliness and potential bias.

Section 6 proposed by the Department of Personnel describes the method for the assignment of a hearing officer when an employee has filed an appeal of a dismissal, suspension, demotion, involuntary transfer, or a “Whistle Blower” complaint. The intent of these regulations is to establish a process in which both parties to an appeal, the employee and the agency, participate in the selection of a hearing officer. This process is modeled after court mandated arbitration programs. Amy Davey requested comments on the proposed regulation changes.

Janet Traut commented that this regulation is a welcomed addition that not only gives the agency the ability to have some flexibility, but it also gives the Commission an opportunity to see that there may be issues with a specific Hearing Officer. It gives the Commission a chance to address those issues.

Shelley Blotter replied that the Department of Personnel is creating a survey to see how the current Hearing Officers are performing from an outside point of view.

Kimberley King commented that the regulation will give both sides an opportunity to have input on a Hearing Officer and that the Department of Transportation supports this regulation change.

There were no other questions, comments, opposition or discussion on this section

Sec. 7. NAC 284.774 is hereby amended to read as follows:

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| <p>Explanation of Proposed Change: This amendment, proposed by the Department of Personnel, clarifies that the hearing officers may only adopt supplementary procedures to those established in regulation and by the Department of Personnel.</p> |
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NAC 284.774 Scope. (NRS 284.065, 284.155, 284.376, 284.390)

1. NAC 284.774 to 284.818, inclusive, governs hearings *before the hearing officer* in all cases relating to dismissals, suspensions, demotions, ~~and~~ involuntary transfers, *and in accordance with NRS 281.641.* ~~[before the hearing officer.]~~

2. The hearing officer ~~[may modify or alter the hearings]~~ *shall use the* procedures established in NAC 284.774 to 284.818, inclusive, ~~[if experience and circumstances indicate such action and interested parties have proper notice of any procedural changes or are not prejudiced thereby.]~~ *and the procedures provided to the hearing officer by the Department of Personnel.*

3. Each hearing officer may ~~[from time to time]~~ adopt supplementary rules governing practice before him not inconsistent with ~~[NAC 284.774 to 284.818, inclusive.]~~ *those provided for in subsection 2 of this regulation. Such rules must be available in writing to all parties in advance of any hearing.*

[Personnel Div., Hearings Procedures § (C), eff. 11-28-65; A 6-9-74]—(NAC A by Dep't of Personnel, 10-26-84)

Amy Davey read the following statement:

Section 7 amends language contained in NAC 284.774 to establish that hearing officers must use the procedures provided by the Department of Personnel. A hearing officer may adopt supplementary procedures that are not inconsistent with those provided by the Department of Personnel and must provide copies of supplementary procedures to all parties in advance of the hearing. She requested questions or comments regarding section 7.

There were no questions, comments, opposition or discussion on this section

Sec. 8. NAC 284.778 is hereby amended to read as follows:

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| <p>Explanation of Proposed Change: This amendment, proposed by the Department of Personnel, addresses communications between parties in an appeal and the hearing officer.</p> |
|---|

NAC 284.778 Request for hearing and other communications. (NRS 284.065, 284.155, 284.376, 284.390)

1. A request for an appeal and other pertinent communications directed to the Hearing Officer must be addressed to the Director.

2. *Parties in an appeal hearing shall not communicate directly with the Hearing Officer regarding the merits of the case, except in the presence of, or with reasonable notice to, all of the other parties.*

3. *Unless otherwise agreed in writing by all parties, no offer or demand of settlement made by any party shall be disclosed to the hearing officer prior to the issuance of a decision.*

[Personnel Div., Hearings Procedures § (A) subsec. (1), eff. 11-28-65; A 6-9-74]—(NAC A by Dep't of Personnel, 10-26-84)

Amy Davey read the following statement:

The additional language proposed to NAC 284.778 in section 8 describes prohibited communication between parties in an appeal and a hearing officer including the disclosure of any proposed offer of settlement prior to the issuance of a decision. She requested comments regarding Section 8.

Catherine Thayer commented that Section 1, of NAC 284.778, states that a request for an appeal and other pertinent communications to a Hearing Officer must be addressed to the Director of Personnel. Section 2 goes on to say that Parties in an Appeal hearing shall not communicate with a Hearing Officer regarding the merits of the case except with notice to all of the other parties. She saw a conflict between the two sections and suggested that there needed to be some clarification.

Shelley Blotter replied that the intent of Section 1 is that the appeal and other motions or requests go to the Director (of Personnel) and in Subsection 2, if there is a scheduling request, then that may be made directly to the Hearing Officer.

Catherine Thayer commented that there needed to be some clarification in the language that parties need to notify and address any additional motions to the Director of Personnel except when scheduling a hearing. She suggested the language be changed from “parties in an appeal hearing,” to “the parties to an appeal.”

Shelley Blotter asked if Ms.Thayer drafted her thoughts on these subsections. Ms. Thayer responded that she hadn’t.

Kareen Masters proposed that in, subsection 3, the language states “Unless otherwise agreed in writing by all parties, no offer or demand of settlement made by any party shall be disclosed to the hearing officer prior to the issuance of a decision”, be changed to, “shall be disclosed to or proposed by the Hearing Officer prior to the issuance of a decision?” That’s a situation her agency encountered when a Hearing Officer, prior to the start of the hearing, would say that the parties didn’t have much of a case and should get together to settle.

There were no other questions, comments, opposition or discussion on this section

Sec. 9. NAC 284.786 is hereby amended to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Department of Personnel, clarifies the procedure for requesting a continuance and when it is appropriate for a continuance to occur.

NAC 284.786 Continuances. (NRS 284.065, 284.155, 284.376, 284.390) [~~Hearings may be continued beyond the period originally scheduled or recessed until a future date which is agreeable to the hearing officer and the parties if good cause is shown.~~] No continuance of a hearing shall be granted except for good cause.

1. At least 5 working days in advance of the hearing date, a written motion or stipulation for continuance may be filed with the hearing officer and copies sent to the opposing party and the Department of Personnel. Within two working days of receiving the requested continuance, the opposing party may contest the request for a

continuance by filing a written motion with the hearing officer and provide a copy of the motion to the requesting party and the Department of Personnel. Whether contested or not, the hearing officer will determine if the hearing will proceed as scheduled.

2. On the day of the scheduled hearing, a continuance will only be allowed when:
 - a. An emergency occurs and either the hearing officer, either party or his or her legal counsel, or a primary witness cannot attend the hearing;
 - b. The hearing exceeds the allotted time for the day; or
 - c. The hearing officer recesses the hearing until a future date.

3. When a hearing is continued to a future date, the hearing shall occur within 10 working days unless there is a conflict with the hearing officer's calendar.

[Personnel Div., Hearings Procedures § (A) subsec. (9), eff. 11-28-65; A 6-9-74]—
(NAC A by Dep't of Personnel, 10-26-84)

Amy Davey read the following statement:

Section 9 describes the conditions under which a continuance of a hearing shall be granted, the process for requesting or contesting a continuance and how notification of a continuance is provided to the parties involved. She requested question or comments on Section 9.

Catherine Thayer commented that Section 1 says "At least 5 working days in advance of the hearing date, a written motion or stipulation for continuance may be filed with the hearing officer and copies sent to the opposing party and the Department of Personnel. Within two working days of receiving the requested continuance, the opposing party may contest the request for a continuance by filing a written motion." She suggested that since the person who's asking for the continuance, is filing the written motion to do so it would be better in saying "by filing a written opposition to the motion for continuance." Section 3, goes on to say "When a hearing is continued to a future date, the hearing shall occur within 10 working days unless there is a conflict with the hearing officer's calendar," and she assumed that this is applied to all requests for a continuance.

Shelly Blotter replied that that is the intent and to ensure hearings are heard on a timely basis and not continued over and over.

Catherine Thayer responded that that is admirable to try to accomplish but it wasn't very practical and suggested 20 days, instead of 10 working days.

There were no other questions, comments, opposition or discussion on this section

Sec. 10. NAC 284.888 is hereby amended to read as follows:

Explanation of Proposed Change: This regulation change, proposed by the Office of Risk Management, adds workplace accidents to the list of reasons for testing employees for alcohol and drugs based on reasonable belief. Employees who are under the influence of alcohol or drugs on the job present a safety hazard to themselves and others and are in violation of State policy. Risk Management is also proposing lowering the definition of "substantial damage of property" because supervisors are typically underestimating the amount of damage involved with motor vehicle accidents and are failing to test employees who should be tested.

NAC 284.888 Request for employee to submit to screening test: Interpretation of grounds; completion of required form. (NRS 284.065, 284.155, 284.407)

1. Objective facts upon which an appointing authority may base a reasonable belief that an employee is under the influence of alcohol or drugs which impair the ability of the employee to perform his duties safely and efficiently include, but are not limited to:

- (a) The operation of a motor vehicle by the employee in any manner that causes bodily harm;
- (b) Abnormal conduct or erratic behavior by the employee that is not otherwise normally explainable;
- (c) The odor of alcohol or other controlled substance on the breath of the employee;
- (d) Observation of the employee consuming alcohol; ~~{or}~~
- (e) Observation of the employee possessing a controlled substance or using a controlled substance that is reported by a credible source~~{,}~~; **or**
- (f) ***A workplace accident that results in the employee seeking medical treatment.***

2. Pursuant to subsection 2 of NRS 284.4065, “substantial damage to property” includes, but is not limited to:

- (a) The operation of a motor vehicle in such a manner as to cause more than ~~[\$2,500]~~\$500 worth of property damage; or
- (b) The operation of a motor vehicle in such a manner as to cause two property accidents within a 1-year period.

3. Before requiring an employee to submit to a screening test, a supervisor must complete a form provided by the Department of Personnel.
(Added to NAC by Dep’t of Personnel, eff. 12-26-91)

Carrie Hughes read the following statement:

In Section 10, the Office of Risk Management proposes an amendment to NAC 284.888. This amendment will add workplace accidents to the list of reasons for testing employees for alcohol and drugs based on reasonable suspicion. Employees who are under the influence of alcohol or drugs on the job present a safety hazard to themselves and others and are in violation of State policy. Risk Management is also proposing lowering the damage dollar amount in the definition of “substantial damage of property”.

Karen Caterino shared the following statistics in order to support the proposed change:

I am providing the following comments today as to the proposed updates to NAC 284.888 the intent, of which, is to provide additional guidelines and clarification as to when drug/alcohol screenings should be done in the event of a motor vehicle accident involving a State employee. To the best of the knowledge of the Risk Management Department, there has been no enforcement of NRS 284.4065 when a State employee is involved in a motor vehicle accident (this statement is excluding a law enforcement officers).

NRS 284.4065(2)(b) states “an appointing authority may request an employee to submit to a screening test if the employee during the performance of his duties, drives a motor vehicle in such a manner as to

cause bodily injury to himself or another person or substantial damage to property.” For the purposes of this subsection, the Commission shall adopt by regulation the definition of the term “substantial damage to property.

Before I get started on why the proposed changes are needed, I would like to share the following statistics:

Nationally, the vast majority of drug users are employed, and when they arrive for work, they don't leave their problems at the door. Of the 17.2 million illicit drug users aged 18 or older in 2005, 12.9 million (**74.8 percent**) were employed either full or part time. Furthermore, research indicates that between 10 and 20 percent of the nation's workers who die on the job test positive for alcohol or other drugs. (US Dept of Labor, Occupational Safety & Health Admin, osha.gov)

OSHA recognizes that impairment by drug or alcohol use can constitute an avoidable workplace hazard and that drug-free workplace programs can help improve worker safety and health and add value to American businesses. OSHA strongly supports comprehensive drug-free workforce programs, especially within certain workplace environments, such as those involving safety-sensitive duties like operating machinery.

The same can be said about the use and abuse of alcohol. According to the publication American Family Physician, in 2000 excessive alcohol use led to 85,000 premature deaths in the U.S. This was the third leading cause of death from modifiable factors after tobacco use, and poor diet and lack of exercise. Almost one-third of U.S. adults meet the criteria for an alcohol use disorder at some point in their life.

Risk Management Department statistics:

In FY07

| | | |
|------------------------|----------------------|--|
| All Auto Claims | Total Cost of Claims | Total Cost of At-Fault Claims |
| 207 | \$271,481 | \$201,346 (74%, due to 3 totaled NHP vehicles) |

Work Comp

| | | |
|----|-------------|---------|
| 74 | \$1,472,576 | unknown |
|----|-------------|---------|

In FY08

| | | |
|------------------------|----------------------|-------------------------------|
| All Auto Claims | Total Cost of Claims | Total Cost of At-Fault Claims |
| 326 | \$332,331 | \$162,639 (49%) |

Work Comp

| | | |
|----|-------------|---------|
| 79 | \$2,821,192 | unknown |
|----|-------------|---------|

In FY09

| | | |
|------------------------|----------------------|-------------------------------|
| All Auto Claims | Total Cost of Claims | Total Cost of At-Fault Claims |
| 294 | \$224,559 | \$142,127 (63%) |

Work Comp

| | | |
|----|-----------|---------|
| 46 | \$652,469 | unknown |
|----|-----------|---------|

The average frequency of at fault claims for all three years is approximately 50%, so in essence half of all auto claims tend to be due to our own employee's driver error. Historically, this percentage has not varied. In 2007 and 2008, MVAs were the number one cause of loss by total incurred in the State's work comp program. In 2009, MVA's were number two.

Now, I am not stating that at fault accidents were caused by an individual under the influence, but at this point how do we know for sure?

In addition, I would like to bring to your attention NRS Chapter 616C.230 which governs workers compensation grounds for denial, reduction or suspension of compensation and evidence of and examination for use of alcohol or controlled substance.

In summary, item 1 of this section states compensation is not payable for an injury proximately caused by the employee's intoxication or use of a controlled substance. If the employee was intoxicated at the time of his injury, intoxication must be presumed to be a proximate cause unless rebutted by evidence to the contrary. If the employee had any amount of a controlled substance in his system at the time of his injury for which the employee did not have a current and lawful prescription issued in his name or that he was not using in accordance with the provisions of chapter 453A of NRS, the controlled substance must be presumed to be a proximate cause unless rebutted by evidence to the contrary.

By the testimony presented thus far, Risk Management supports the Commission's amendment to NAC 284.888 for the addition of section 1(f) that a request for employee to submit to screening test be performed when a workplace accident results in the employee seeking medical treatment.

In addition, NRS 284.4065 allows the Commission to define substantial damage to property in the operation of a motor vehicle. The current \$2500 value is open to debate and usually cannot be determined at the time of an accident, especially if a supervisor is not readily available to arrive on scene.

Risk Management supports the Commission's proposed reduction in this amount to \$500 which would likely cover most motor vehicle accidents without question, thereby eliminating the need for a supervisor to make a judgment call. This will help to ensure parity and objective treatment of all employees, rather than subjective and open to debate if the motor vehicles cost were determined to not be valued at the \$2500 threshold.

I thank you for the opportunity to provide comments today in support of these proposed changes. I am happy to answer any questions. Thank you.

Shelley Blotter asked, if Ms. Caterino will be moving forward to adopt any regulations through Risk Management or in the State Administrative Manual (S.A.M) to require an employee in an automobile accident on work time to automatically get tested or if it would be approached in another way.

Karen Caterino replied that the S.A.M. regulation follows in alignment with this regulation. The supervisor has to make the determination if the damage is more than \$2,500 and would like to propose that any worker's compensation claims for bodily injury should all receive automatic drug testing if they are involved in an automobile accident.

Mark Evans asked if this regulation would give them the authority to test people as they intended?

Karen Caterino replied that she believes it does if an employee seeks medical treatment for a bodily injury, it would just be standard protocol for the facility to automatically do a drug and alcohol screen test as part of the examination process.

Kimberley King commented that NDOT also supports this regulation and it would clarify several issues they've come across in the past.

Kareen Masters commented that she thought that the procedures should be spelled out in S.A.M to make it clear that someone could be tested at the first stop clinic rather than having to go to two different test sites. She also suggested that the language itself should be changed so that it didn't tie testing to the employee seeking medical treatment because that could lead them to not seek medical treatment. She also proposed that the language be changed to "conduct that results in a workplace accident."

Shelley Blotter replied that there are times the accident may be of such a minor nature that an employee doesn't seek medical treatment and that's what the regulation was trying to screen out.

Mark Evans asked for clarification of Ms. Masters's concern. Was she concerned that if an employee got hurt on the job, they might not seek needed medical treatment because they did not want to take the drug test? Or, was she concerned that if the testing was done through workers' compensation, the Drug and Alcohol Procedure wouldn't be followed and this would affect the agency's ability to discipline an employee?

Kareen Masters replied that she would never want to be in a position where she couldn't discipline someone because the procedures weren't spelled out, but there were two separate purposes for the two sets of statutes and she wondered if they could be meshed together.

Mark Evans commented that we might be trying to do two things with one and maybe it needs to be looked at more toward the workers' compensation angle.

Karen Caterino commented that all of the other sections under 284.888 apply, and it's just adding an, "or a workplace accident results in an employee seeking medical treatment." Under 284.888 if an employee is operating a vehicle and is in an accident but doesn't cause bodily harm to anyone then that individual can still be drug or alcohol tested.

There were no questions, comments, opposition or discussion on this section

Sec. 11. NAC 284.894 is hereby amended to read as follows:

Explanation of Proposed Change: This regulation allows for the removal from all relevant recruiting lists of an applicant who tests positive on a pre-employment drug screening test. Currently, the regulation states that the appointing authority must not consider the applicant for any position requiring pre-employment drug testing. This will insure that the employee will not be considered for any such position with the State.

NAC 284.894 Treatment of applicant who tests positive; treatment of employee who tests positive twice within 5-year period. (NRS 284.065, 284.155, 284.407)

1. An applicant who tests positive for the use of a controlled substance must not be considered by an appointing authority for employment in any position which requires such testing *and will be removed from all recruitment lists requiring pre-employment drug testing* until:

- (a) One year has passed from the time of the positive test; or
- (b) The applicant provides evidence that he has successfully completed a

rehabilitation program for substance abuse.

2. An employee who tests positive for the use of a controlled substance or alcohol for the second time within a 5-year period is subject to disciplinary action by the appointing authority and may be terminated at the discretion of the appointing authority. (Added to NAC by Dep't of Personnel, eff. 12-26-91; A 7-1-94)

Carrie Hughes read the following statement:

Section 11 proposes an amendment to NAC 284.894. The amendment will allow for the removal, from all relevant recruiting lists, of an applicant who tests positive on a pre-employment drug screening test. This will insure that the person will not be considered for any such position with the State for up to a year.

There were no questions, comments, opposition or discussion on this section

Sec. 12. Section 1 of LCB file No. R066-09 is hereby amended to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Department of Health and Human Services and recommended by the Department of Personnel, clarifies that the employee not the employee's agency is responsible for the costs associated with the requirements of subsection 1 of this regulation to include counseling and documentation of that counseling.

Section 1 of LCB File No. R066-09 (NRS 284.065, 284.155, 284.407)

1. The appointing authority of an employee who tests positive for the presence of alcohol or a controlled substance while on duty and who, as a result, is subject to disciplinary action pursuant to NAC 284.646 or NAC 284.650 but is not terminated shall require the employee to:

(a) Provide to the appointing authority documentation from a counselor who is licensed or certified pursuant to chapter 641C of NRS or another health care provider who has training or experience in substance abuse counseling, which verifies that the employee is able to return to duty and perform the essential functions of his or her job.

(b) Submit to a screening test.

2. The employee is responsible for the cost of any *counseling, documentation or* screening test required pursuant to subsection 1.

3. An employee who fails or refuses to submit to a screening test required pursuant to subsection 1 is subject to disciplinary action, including, without limitation, termination, at the discretion of the employee's appointing authority.

(Added to NAC by Dep't of Personnel, eff. 10-27-09,)

Carrie Hughes read the following statement:

In Section 12, the Department of Health and Human Services (and recommended by the Department of Personnel) proposes an amendment to clarify that the employee not the employee's agency is responsible for the costs associated with the requirements of subsection 1 of this regulation, to include counseling and documentation of that counseling

Shelley Blotter commented that the intent of this regulation is to address a concern brought up by Ms. Master's at the Personnel Commission meeting.

Ms. Master's replied that she wasn't sure at the time if the Commission supported her suggestion.

Shelley Blotter responded that she felt that Ms. Master's comment was a good idea and wanted to bring it before the Personnel Commission in drafted language to see if they would adopt it.

There were no other questions, comments, opposition or discussion on this section.

Shelley Blotter called the workshop closed at 2:02 P.M.