

1. Call to Order

Chair Puglisi called the meeting to order at approximately 9:00 am.

2. Public Comment

There were no comments from the audience or Committee Members.

3. Committee introductions and meeting overview and/or update - For discussion only.

Chair Puglisi opened the meeting with Committee introductions.

4. Adoption of the Agenda – Action Item

Chair Puglisi requested a motion to adopt the agenda.

MOTION: Moved to approve the agenda.

BY: Member Thompson

SECOND: Member Russell

VOTE: The vote was unanimous in favor of the motion.

5. Discussion and possible action related to Grievance #5915 Colin Usher, Department of Education – Action Item

Mr. Usher was represented by Kevin Ranft of the American Federation of State, County and Municipal Employees. Genevieve Hudson, Personnel Officer III represented the employer, State of Nevada, Nevada Department of Education (“DOE”). There were no objections to the exhibit packets submitted by the parties. Karen Gordon, Kevin Laxalt, Shawn Osborne, Gabrielle Lamarre (“Ms. Lamarre”), Seng Dao Keo, Cindy Lou Little and Johnathan Moore were sworn in as witnesses at the grievance hearing; ultimately Ms. Lamarre did not testify at the hearing.

STATEMENT OF THE CASE

Grievant is a State Coordinator with DOE and has been employed with that agency for approximately seven and a half years. Mr. Usher received an oral warning on August 10, 2018 in connection with the theft of a DOE laptop computer on October 22, 2017. Mr. Usher felt that DOE violated NAC 284.638(1) and (2) when it issued its oral warning to him. Additionally, Mr. Usher felt that he never received a process from his supervisors notifying him that he had to check in and out assigned electronic devices before he took them home, either after hours or on weekends.

Mr. Usher argued in substance that in order to first have discipline imposed, the employee must be made aware of the procedure the employee was alleged to have violated, and that the employee must be made aware that there was a formal process for addressing alleged violations. It was also argued by Mr. Usher that NAC 284.638 required

prompt and specific notification of an employee before the employee actually received discipline, and that DOE did not do that in his case.

Additionally, Mr. Usher stated in substance that he had taken accountability for his actions, and that proper notification had been made by Mr. Usher to his supervisors right after the theft had occurred, and that proper reports had been filed. Mr. Usher also stated in substance that he wanted to assure that a proper policy was in place to ensure that there was a clear procedure regarding the taking home of electronic devices at DOE.

Mr. Usher stated in substance that the most concerning alleged discipline to him was inexcusable negligence and acting willfully with regard to his actions, and that it would be shown he did not act in this manner. It was also stated in substance that DOE was not acting in a fair manner, as Mr. Usher was the only employee in his work area who was told that he could not take electronic devices home after hours or on weekends. Mr. Usher said that he was asking that a fair and equitable process be put in place prior to DOE disciplining him or any other employee.

DOE noted that under NAC 284.638, an oral warning was used to correct a condition, and that it allowed for a supervisor to discipline an employee for actions listed in and pursuant to NAC 284.650. DOE further stated in substance that there were no rules or regulations defining a time frame for issuing an oral warning, nor was it stated anywhere how much communication had to occur with an employee prior to an employer issuing a disciplinary action.

It was further argued that DOE was justified in issuing Mr. Usher an oral warning, which was the lowest form of disciplinary action, for the loss of State equipment or property, considering it was the second piece of equipment assigned to Mr. Usher that was lost or stolen, and that there was also personally identifiable information (“PII”) found in the stolen laptop’s backed up files. Thus, DOE argued, Mr. Usher’s grievance must be denied.

With respect to Employer’s Exhibit 5 (DOE Prohibitions and Penalties), Mr. Usher stated in substance that he was familiar with the document. Mr. Usher also stated in substance that prior to this discipline he had never been advised not to take his laptop home after work or on weekends. Mr. Usher further stated in substance that he filed his grievance because he felt that the time frame in imposing the discipline was “off.” Mr. Usher felt that the lack of, and absence of, coaching along the way was problematic with respect to what he should be doing when taking equipment home. Mr. Usher also felt that the charge of willful neglect was improper and felt that he had been very diligent with respect to the matter and with respect to communication. Mr. Usher also stated in substance that there was a lack of communication from DOE leadership, and that he had sent several emails directly to his supervisors asking for support along the way that went unanswered.

With respect to the facts surrounding the loss of the laptop, Mr. Usher said that he took the laptop home in a backpack, went to an event in San Francisco, parked his jeep at the event location, and when he returned to his jeep a window was broken out and the backpack with the laptop had been taken. Mr. Usher said that he was unaware of the laptop’s theft

until he returned home from San Francisco, and that as soon as he was aware of the laptop's theft he reported it to authorities, and he also reported the theft of the computer to his DOE supervisors immediately. Mr. Usher stated in substance that he was not told that he had done anything wrong until several months after the theft, when he was given the oral warning.

Mr. Usher also stated in substance that he was not aware of a process being in place at DOE for taking home portable electronic devices, and that it was standard practice for DOE employees to take home laptops.

Mr. Usher spoke to Prohibition and Penalty No. 11, "Abuse, damage to or waste of public equipment, property or supplies because of inexcusable negligence or willful acts." Mr. Usher stated in substance that he felt that he was not willfully negligent in his actions, and that the theft could have happened to anyone, and that simply because a computer was stolen did not mean that he acted willfully, and that he had not acted negligently, as there was not process in place at DOE concerning taking home electronic devices such as laptops.

In looking at Employee Exhibit 2, page 11, Mr. Usher stated in substance that he felt that in his situation (with respect to DOE Prohibition and Penalty No. B7) equipment was lost or stolen, but that it was not wasteful on his part. With respect to Employee Exhibit 3, DOE Prohibition and Penalty No. G.6, "Removing property, equipment or documents from the workplace unless approved by the appropriate authority," Mr. Usher reiterated in substance that there was no procedure in place at DOE for removing DOE property from the office, so he did not know he had to receive appropriate authority to take laptops from the office. Mr. Usher also stated in substance that since receiving the oral warning he had not removed his laptop from his place of work. Mr. Usher also testified in substance that he did not feel that DOE was equitable with respect to its employees across the board.

With respect to NAC 284.638, titled "Warnings and written reprimands," Subsection 1 of that NAC states: "If an employee's conduct comes under one of the causes for action listed in [NAC 284.650](#), the supervisor shall inform the employee promptly and specifically of the conduct," Mr. Usher in substance stated that he was not promptly and specifically informed by his supervisor of the conduct for which DOE was going to issue the oral warning to him. With respect to NAC 284.638(2), Mr. Usher also stated in substance that there was no discussion with respect to removing laptops from the office which followed a reasonably appropriate period of time.

In looking at Employee Exhibit 4 (DOE's email to Mr. Usher concerning accessing Mr. Usher's computer), Mr. Usher stated in substance that the document had been left on his desk, and that it simply stated in accordance with NRS 281.195 his state laptop computer was being accessed on November 3, 2017. The next document, according to Mr. Usher, was a corrected version of the document, with the date of the document being November 2, 2017, and the third document was an email he wrote after speaking with an IT employee about needing to access his computer after November 2, 2017, because the IT employee was unable to access his computer on the stated date, and the fact that the IT

employee needed Mr. Usher's password to access his computer. Mr. Usher stated in substance that he asked for guidance from his supervisors with his email, but that he never heard back from either of his DOE supervisors.

In looking at Exhibit 3 (NAC 284.638(1)), Mr. Usher stated in substance that his understanding was that the word "shall" meant that DOE was required to do something, and that it was not legal or warranted for his supervisor to have given him the oral warning.

In looking at Employee Exhibit 6, page 20, an email from DOE Superintendent Steve Canavero ("Superintendent Canavero"), Mr. Usher stated in substance that he met with Superintendent Canavero concerning the oral warning Mr. Usher had received, and that although Superintendent Canavero agreed that several processes should be put into place he did not take action to remove the oral warning issued to Mr. Usher. Mr. Usher also noted in substance that no policies resulted from the meeting with Superintendent Canavero.

Mr. Usher further testified in substance that it was standard practice to take a laptop home after hours and on weekends, and that there was poor communication from his supervisors to him with respect to the oral warning, as he had written several emails to his supervisors related to the theft of the laptop that went unanswered.

Mr. Usher stated in substance upon questioning that he took the laptop home in his backpack, and that he arrived at his home, and then he and his family left immediately for a music event in San Francisco, with the backpack still in his vehicle, as he was planning on using it that weekend for work.

In response to whether he was authorized to use flex or overtime to work that weekend, Mr. Usher stated in substance that he could have. Mr. Usher further stated in substance that historically the use of flex time at DOE had been between an employee and his or her supervisor, and that he was unaware of any hard and fast rules with respect to flex time, and that he could not remember whether he had been approved for flex or overtime for the weekend on which the laptop had been stolen.

Mr. Usher further testified in substance that in the past he had worked often over the weekends, and that several of his supervisors had supported doing so. Mr. Usher also stated in substance that he was aware, as a classified employee, that he was supposed to receive approval for the use of overtime and flex time, and that he was not supposed to work outside of his normal hours without this approval.

Mr. Usher was asked about the email from Superintendent Canavero he had received, and whether Dr. Canavero said that improvements to DOE policy and procedure should be considered, not that they must be, which Mr. Usher agreed with, although it was his understanding that a review of DOE policy and procedure would take place, with recommended improvements.

With respect to DOE's Prohibitions and Penalties, Mr. Usher said in substance that he understood that DOE could not identify every action that an employee might engage in which could be considered misconduct.

Kevin Laxalt (“Dr. Laxalt”) testified in substance that she worked for the DOE in the office of Student and School Support section and had worked for DOE for almost seven years. She knew Mr. Usher, and had worked with him for about four years. Dr. Laxalt stated in substance that a supervisor had never spoken to her about not taking her laptop home after work hours and on weekends, and that it was standard practice to take laptops home after hours and on weekends. Dr. Laxalt further stated in substance that it was standard practice for DOE employees to work outside their normal schedule hours without pre-approval, and that there was no policy and procedure with respect to taking flex time, although DOE indicated that such a policy existed. Dr. Laxalt also stated in substance she was unaware of anyone else at DOE who had equipment lost or stolen.

Shawn Osborne (“Mr. Osborne”) stated in substance that he was with the DOE IT Department, and that he knew Mr. Usher. Mr. Osborne stated in substance that most DOE employees were provided with laptop computer so that they could work from home or away from their desk. Mr. Osborne also testified in substance that he was aware of other DOE employees who had lost or had their equipment stolen, and that he was unaware of any disciplinary action being taken as a result. Mr. Osborne further testified in substance that there was a DOE policy for checking out and taking home phones and I-Pads but none for laptops.

With respect to DOE’s Penalties and Prohibitions, No. B(7), in Mr. Osborne’s interpretation of “loss” in “waste or loss of State material or property or equipment,” meant not in the possession of the employee, and that stolen is loss, but that this was not clear. In looking at Prohibition and Penalties G(6), “removing paper, equipment and documents from the work place unless approved by the appropriate authority,” Mr. Osborne indicated in substance there was no process at DOE for such removal, and in looking at the Introduction to DOE’s Prohibitions and Penalties, he felt tracking the possession of a computer and policies and procedures to take computers home after hours and on weekends was important to DOE.

In response to questioning, Mr. Osborne also noted in substance that DOE employees also went to off worksite meetings during their work hours, into schools, attended conferences and other functions, so that their worksite was often not in a DOE building. Mr. Osborne also stated in substance that he was aware of DOE employees taking equipment to non-DOE sanctioned events.

With respect to whether it was standard practice for DOE employees to take their laptops home after hours and on weekends, Mr. Osborne said in substance that doing so would be on a personal basis. Additionally, Mr. Osborne, in looking at DOE Prohibitions and Penalties, page five, B(7), said that in his personal preference he did not see stolen as being lost, but that the employee who was issued equipment had the responsibility to see that the equipment was safe and secure. With respect to the number of pieces of computer equipment lost or stolen by employees across DOE within the past few years, Mr. Osborne was aware of two pieces of equipment lost or stolen, and he was aware of two DOE employees losing equipment more than once.

Karen Gordon (“Ms. Gordon”) testified in substance that she worked for DOE, where she was the State Homeless Coordinator, and that she worked with Mr. Usher. Ms. Gordon testified in substance that she often took her computer home for work purposes after hours and on weekends, and that she was unaware of any policies and procedures for checking out portable equipment from DOE on weekends and evenings, and that no supervisor had ever spoken with her about taking her laptop home. Ms. Gordon also stated that it was standard practice at DOE to take laptop computers home, and that her supervisor was aware of her doing so. Additionally, Ms. Gordon felt that generally computer equipment was not properly secured at DOE.

Ms. Gordon also stated in substance that if there is a procedure for checking in and out equipment for after-hours work, she would like to be informed of it, and that guidance with respect to taking home laptops should be provided occasionally.

Ms. Gordon said with respect to comp time her supervisors always provided her approval for use of it, and that if the comp time was less than three hours she just put the time on her computer and used flex time, and that she did not need pre-approval for the flex time.

Cindy Lou Little (“Ms. Little”) testified in substance that she was the information security officer at DOE, and that she helped set up computers and worked on security issues. With respect to Mr. Usher’s stolen laptop, Ms. Little testified in substance that, as information security officer, she filled out a security incident report and sent it to the Office of Information Security, and that she also notified upper management at DOE.

With respect to the Memo being issued to Mr. Usher concerning accessing his computer (Exhibit C), Ms. Little stated that she was able to access Mr. Usher’s computer and found PII had been on Mr. Usher’s laptop. With respect to the time it took from the November 3, 2017 notice to Mr. Usher for accessing his laptop to the time it took to issue the oral warning, Ms. Little stated in substance that the research she was performing and the research the Office of Information Security was performing was taking place during that time period, and that during this time she also took the information to Superintendent Canavero.

Ms. Little also stated in substance that over the past few years four DOE employees had their equipment stolen or lost. With respect to the amount of hours devoted to researching Mr. Usher’s lost/stolen equipment, Ms. Little estimated the time as approximately 30 hours. In looking at DOE Prohibitions and Penalties B(7), with respect to loss, Ms. Little stated in substance that loss meant that the employee no longer had the equipment. Ms. Little further testified in substance that if an employee took reasonable steps to protect equipment and the equipment was lost, the employee would not be negligent, or the loss willful. Ms. Little also stated in substance that she was aware that employees took their laptops to non-DOE sanctioned events.

Dr. Seng Dao Keo (“Dr. Keo”) testified in substance that she was the Director of the Office of Student and School Supports, and that she supervised three assistant directors, who in turn supervised other employees. With respect to a policy concerning requesting flex time and

overtime at DOE, Dr. Keo testified that there was a DOE policy on requesting flex time and comp time, and that DOE employees were not permitted to work outside their hours without prior supervisor approval, and that this had been shared verbally and in writing inside the Office of Student and School Supports. Dr. Keo also stated in substance any pre-approved comp or flex time would be documented in NEATS. Dr. Keo further stated in substance that she did not know if Mr. Usher had approval for either flex or comp time over the weekend during which the laptop was stolen. Dr. Keo also testified in substance that it was not standard practice for employees in her Office to work outside of their normal work hours, and if they did work a small amount of time, such as 30 minutes, the employee did not need pre-approval to do so, but if the time worked or to be worked was significant, then it was standard practice to receive pre-approval. Dr. Keo also stated in substance that it was not standard practice for an employee to take equipment on a family outing in order to check his or her email.

Dr. Keo stated that she was aware of the oral warning issued to Mr. Usher, and that she felt the oral warning was legal and justified. In response to questioning, Dr. Keo felt that NAC 284.638(1) had been complied with because she had a verbal conversation with Mr. Usher a few days after the theft of the laptop concerning why there was a need for him to take the laptop over the weekend, and she brought up the fact that Mr. Usher's supervisor's practice is to typically not ask employees who she supervises to work overtime without her prior approval or without sharing this information with Dr. Keo. Dr. Keo also stated that she did not know of the full investigation around the matter, and that as soon as she found out the results of the investigation, she moved forward with Mr. Usher's oral warning.

Dr. Keo also stated that she believed that she used the words "negligence" in her conversation with Mr. Usher, and that she had asked about the need for a work computer to be used over the weekend in a different state without pre-approval, and that the situation did not make sense to her. Dr. Keo did not remember any discussion of an oral warning being issued during her conversation with Mr. Usher.

With respect to the time frame for issuing the oral warning to Mr. Usher, Dr. Keo recalled there was a conversation right after the theft of the laptop, and that once the investigation was finished the oral warning was issued. Dr. Keo also stated that there was no policy in place at DOE with respect to employees taking home laptops. Dr. Keo further stated that she was not aware of situations where DOE employees brought their laptops home or to non-DOE sanctioned events, and that this concerned her.

The EMC deliberated on the grievance. Chair Puglisi felt that the matter came down to whether there was negligence shown by Mr. Usher in securing the State equipment, and he did not feel like the testimony was consistent with respect to whether DOE employees could take laptops home. However, Chair Puglisi was concerned because the laptop was not kept track of by Mr. Usher.

Member Bauer stated in substance that she was concerned that this was the second time Mr. Usher had lost DOE equipment, but Member Bauer

was also concerned about the length of time it took DOE to issue the oral warning to Mr. Usher, and felt that the oral warning was issued untimely. Member Bauer also noted that there appeared to be variable rules with respect to flex time and the noting of flex time at DOE. Member Bauer stated in substance that she did not hear of any rules at DOE concerning the taking home of laptops, and that the culture at DOE might be to routinely take laptops off site, both for work sanctioned events and non-work sanctioned events. It also seemed to Member Bauer that the scenario in this situation could have happened to any other DOE employee.

Member Russell stated that she had some concerns, the first one being the duration of time between the actual incident and the time which the oral warning was actually issued, and that she did not understand why this took so long. Member Russell also stated in substance that she was not really considering the loss of the I-Pad, as that had occurred years ago. With respect to flex time, Member Russell thought there had been conflicting information presented, and that there appeared to be no set practice at DOE with respect to flex time.

Member Novotny stated in substance that it appeared the employees and management at DOE had two different ideas of flex time, and that DOE employees had laptops for a reason, and that laptops were not issued unless you could take them home. With respect to the I-Pad, Member Novotny noted in substance that Mr. Usher had testified that the I-Pad had been misplaced, and that it was eventually found, so that was a “non-starter” issue with her. Member Novotny also stated in substance that she did not believe that it would take 10 months to run a review on a computer, and that if the matter had truly been a problem the report should have been written when the laptop was stolen.

Chair Puglisi also stated in substance that although there was no requirement that an oral warning be given within 90 days of the incident, 90 days in this situation was more than enough time to issue an oral warning within, and that the issue that was addressed in the oral warning was not contingent on the delays in the case.

Member Keith stated in substance that she shared the same concerns that had already been voiced. Member Keith also stated in substance that the loss of the I-Pad should have resulted in a letter of instruction going to Mr. Usher at the time he lost the I-Pad, so in a sense the letter of instruction issued as a result of the theft of the laptop was a first incident. Member Russell stated in substance that she took issue with the fact that there had been no notice of an investigation provided to Mr. Usher (although Chair Puglisi stated that notice of investigation was not a requirement for oral warnings), and that she had an issue with the apparent distinction between classified staff and DOE and non-classified staff, and that the non-classified staff was given more responsibility, which to her equated to a little more of a higher standard with respect to employee conduct.

Member Russell further noted, in looking at the oral warning, in looking at the testimony, in looking at Prohibition and Penalty “Misuse of Departmental or State property, removing property, equipment, and/or documents from the workplace unless approved by the appropriate

authority,” that there was no policy in place at DOE concerning removal of laptops from its employee’s office, and it did not seem possible to violate a non-existent policy. Member Russell also stated that she was leaning towards granting the grievance and removing the oral warning. Member Thompson brought up the fact that Mr. Usher had offered to replace the computer with his own funds; however, Member Bauer stated in substance that this offer did not negate the fact that Mr. Usher had lost multiple pieces of equipment. Member Bauer also stated in substance, with respect to the apparent distinction between classified and unclassified employees at DOE, that there should not be a different standard for employees based on their class of service, but in the unclassified service there was not the progressive discipline set forth in regulation. Member Bauer also stated that she was in favor of granting the grievance because she was concerned about the untimely notification and the equitable treatment of this employee vs other employees at DOE. Chair Puglisi stated in substance that his concern was that the DOE had complied with regulation, but that it took them an inordinate amount of time to do so, and he felt that there was a lack of evidence that there was negligence involved in the theft of the laptop.

Member Bauer stated in substance that there was evidence of a conversation between Mr. Usher and DOE when he reported the conduct, but was unsure there was a preponderance of the evidence that there was a discussion when Mr. Usher reported the conduct that was one of the causes of action under NAC 284.650, and that was where negligence was reached.

Member Novotny noted in substance that in the oral warning NAC 284.650 was referred to and asked whether the EMC should focus on that NAC, which Member Keith agreed with.

Chair Puglisi also noted in substance that the oral warning issued to Mr. Usher in a sense recommended Mr. Usher not work on DOE matters his own time, and that he was not prohibited from working on DOE matters on his own time.

Member Russell said she came back to where the oral warning was issued because it was the second piece of equipment lost by Mr. Usher, but the first device was found on DOE property, so in her mind the I-Pad was not a true loss, but was misplaced, and that made the current laptop loss the first occurrence.

Member Bauer motioned that the EMC grant Grievance # 5915 and remove the oral warning from Grievant’s file, as Mr. Usher had demonstrated that there was a lack of preponderance of evidence that he had violated NAC 284.650(1), and that there was an apparent inconsistency in the application of agency policies. Member Bauer’s motion was seconded by Member Russell and carried by a unanimous vote.

FINDINGS OF FACT

Based upon the testimony of the witnesses, the arguments made by the parties, the briefs, evidence, and documents on file in this matter, the

EMC makes the following findings of fact. All findings made are based upon a preponderance of the evidence.

1. Grievant was a non-exempt State of Nevada employee.
2. Grievant was employed by DOE as a State coordinator at the relevant time period.
3. Grievant took a laptop computer from his DOE office on or about October 22, 2017.
4. Mr. Usher took the laptop because he had planned to work on DOE matters sometime over the weekend of October 22, 2017.
5. Mr. Usher left the laptop, which was in a backpack, in his Jeep when he and his family immediately left his home for an event in San Francisco, CA, on October 22, 2017.
6. Mr. Usher took reasonable precautions by in substance securing his jeep and placing the backpack in a location where it was not in plain sight, as his jeep had no trunk.
7. Mr. Usher's Jeep was broken into while Mr. Usher was at the event, and the laptop was stolen.
8. Mr. Usher did not realize that the laptop had been stolen until he returned to Reno, NV.
9. Once Mr. Usher realized that the laptop was stolen, he reported the theft to police and the DOE.
10. DOE accessed Mr. Usher's laptop data on November 3, 2017, and PII was found to be on the laptop.
11. During the period between November 3, 2017, and August 10, 2018, the date DOE issued its oral warning to Mr. Usher, the Office of Information Security was performing research after receiving information from DOE concerning Mr. Usher's computer, and the DOE Information Security Officer during this time took information related to the theft of the laptop and the laptop to Superintendent Canavero.
12. DOE issued its oral warning to Mr. Usher on August 18, 2018 for alleged violations on NAC 284.650(1) and 11, which states:

NAC 284.650 Causes for disciplinary action. Appropriate disciplinary or corrective action may be taken for any of the following causes:

1. Activity which is incompatible with an employee's conditions of employment established by law or which violates a provision of [NAC 284.653](#) or [284.738](#) to [284.771](#), inclusive.

11. Abuse, damage to or waste of public equipment, property or supplies because of inexcusable negligence or willful acts.

and for alleged violations of DOE's Prohibitions and Penalties B(7), Waste or loss of State material, property or equipment, and G(2), Removing property, equipment or documents from the workplace unless approved by the appropriate authority.

13. DOE did not have a policy concerning its employee's taking home laptop computers for either work related matters or non-work-related matters.
14. With respect to working outside of a DOE employee's normal working hours, it was unclear what DOE's policy was concerning whether or when flex time needed to be recorded in NEATS or approved by a DOE employee's supervisor prior to taking flex time.
15. Many DOE employees, including Mr. Usher, in fact took their laptops home and/or offsite for work and non-work-related purposes.

CONCLUSIONS OF LAW

1. For this grievance, it was Grievant's burden to establish that there was a lack of preponderance of the evidence to support a violation of NAC 284.650(1), activities which are incompatible with an employee's conditions of employment established by law or which violates a provision of [NAC 284.653](#) or [284.738](#) to [284.771](#), inclusive, by showing that there was a lack of preponderance of evidence that he had abused, damaged or wasted public equipment, property or supplies (in this case his laptop) because of inexcusable negligence or willful acts.
2. A grievance is any act, omission or occurrence which an employee who has attained permanent status feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee. NRS 284.384(6).
3. Mr. Usher's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
4. The Committee discussed and substantially relied on NAC 284.650(1), NAC 284.650(11), and DOE Prohibitions and Penalties B(7) and G(6).
5. The Committee concluded that Mr. Usher had demonstrated that there was a lack of preponderance of the evidence that he had violated NAC 284.650(1), as he demonstrated that he had not abused, damaged or wasted public equipment or property in connection with the theft of the laptop, and Mr. Usher demonstrated that there was a lack or preponderance of the evidence that he was inexcusably or willfully negligent in connection with the theft of his laptop.
6. Additionally, although there is no time limit with which to administer an oral warning pursuant to NAC 284.638, the EMC was in consensus that the oral warning was untimely issued in this grievance, as it was administered almost 10 months after the theft of the laptop.
7. Conclusions of Law that are more appropriately Findings of Fact shall be deemed Findings of Fact.
- 8.

DECISION

Based upon the evidence in the record, and the foregoing findings of fact and conclusions of law, and good cause appearing therefor, it is hereby ORDERED: Grievance No. 5915 is hereby GRANTED, and the oral warning administered by DOE is to be removed from Mr. Usher's file.

MOTION: Move to grant Grievance # 5915 and remove the oral warning from Grievant's file, as Mr. Usher had demonstrated that there was a lack of preponderance of evidence that he had violated NAC 284.650(1), and that there was an apparent inconsistency in the application of agency policies.

BY: Member Bauer

SECOND: Member Russell

VOTE: The vote was unanimous in favor of the motion.

6. Discussion and possible action related to Grievance #5951 Jason Lapuz-Belisle, Department of Corrections – Action Item

Mr. Lapuz-Belisle was represented in proper person.

The agency was represented by Ms. Christina Leathers.

Upon the request for packet objections, Exhibit ‘G’ was removed from the employer packet to be collected at the end of the hearing.

The witnesses were sworn in.

Mr. Lapuz-Belisle presented his case regarding his ranking on an eligibility list.

Mr. Lapuz-Belisle did not feel the interviews were conducted in compliance with the revised NAC and AR 300.

Ms. Leathers stated the agency failed to make proper updates to the AR’s and wanted to apologize on behalf of the agency to the employee for feeling like the agency failed.

Ms. Leathers stated the intent was not to reinvent the wheel with the AR’s but to ensure the AR’s are in compliance with the interview process.

The Committee began discussion and did ask multiple questions of both Ms. Leathers and Mr. Lapuz-Belisle.

After much discussion, Ms. Leathers proposed a resolution that stated a sergeants list would be compiled and Mr. Lapuz-Belisle would be the first contacted and offered the interview.

Chair Puglisi offered a brief recess for the parties to discuss the agency’s proposed resolution and the Committee went of the record at 2:40 pm.

The Committee went back on the record at 3:00 pm.

Both parties had come to a resolution of grievance #5951.

Per Ms. Leathers on behalf of NDOC, Mr. Lapuz-Belisle would be ranked in the top 10 on future recruitment lists and would be guaranteed the offer of an interview.

Based on the agreement offered by Ms. Leathers, Mr. Lapuz-Belisle agreed to withdraw his grievance with prejudice.

7. Discussion and possible action related to Grievance #6284 Ashley McAllister, Department of Corrections – Action Item

Grievant was present in proper person. Christina Leathers (“Ms. Leathers”), Personnel Officer III, represented the agency-employer, Nevada Department of Corrections (“NDOC”). There were no objections to the exhibit packets submitted by the parties. Grievant, Ms. Leathers and Management Analyst II Sarette Wolfe (“Ms. Wolfe”) were sworn in as witnesses and testified at the grievance hearing.

STATEMENT OF THE CASE

Grievant stated in substance that NDOC had wrongfully audited her time sheets for 2018 due to communication via email with payroll representative Jennifer McComb (“Ms. McComb”), and Grievant alleged violations by NDOC of NRS 227.150, NAC 284.256 and NAC 284.292. According to Grievant NDOC Payroll stated that it found errors in Grievant’s timesheets through its audit, but Grievant was questioning the holiday pay taken from her July 4, 2018, and November 12, 2018. Grievant stated in substance that NAC 284.256 clearly explained that a non-exempt employee who worked on a holiday was entitled to premium pay, overtime pay or comp time, in addition to any holiday the employee was entitled to pursuant to NAC 284.255.

Grievant argued that money was taken from her because of NDOC’s errors and that she was never notified by NDOC that it was going to do so, and was not given an option on how to repay the amount NDOC claimed was overpaid to her. According the Grievant, the deductions were taken from her in Check No. 8547706 and Check No. 8565823.

Grievant also stated that she asked NDOC payroll several times where it was shown that PHPRM was not authorized for overtime in an NRS, NAC or the Department of Human Resources Manual (“DHRM Manual”). Grievant argued that she intended to show that NAC 284.256 explained that employees do receive holiday pay while on overtime.

NDOC argued that it would show that, according to NAC 284.256, the adjustments to Grievant’s pay were made in accordance with the law, had been verified with NDOC Payroll and Department of Human Resource Management (“DHRM”) Central Payroll, and that the audit had been performed in compliance with the law. NDOC admitted that the deductions from Grievant’s pay checks were not made in a timely manner, and that there had been an error in communicating to Grievant that pay was going to be taken from her paychecks but reiterated that the adjustments were made in accordance with the law.

Grievant testified in substance that she was a correctional officer who worked a variable work schedule, including 12-hour shifts, at Casa Grande Traditional Housing. Grievant noted that a response from NDOC on the bottom of the second page of her grievance, which concerned 284.256, titled “Holidays Compensation for working” defined how an employee should be paid for working on a paid holiday, and that NODC argued an employee’s hours could not exceed the total number of hours in the established workday. Grievant in substance disputed that

NDOC's response was what NAC 284.256 actually stated, and noted that Exhibit 2 contained the actual NAC itself, and Grievant read subsection 1, which stated: "As used in this section, "holiday premium pay" means pay or compensatory time at an employee's normal rate of pay for hours designated as worked on a holiday, except those hours that are considered overtime pursuant to [NRS 284.180](#)." Grievant also noted that Section 2 of NAC 284.256 stated:

A nonexempt employee who works on a holiday is entitled to receive holiday premium pay, overtime pay or compensatory time for the hours he or she works on the holiday, in addition to any holiday pay that he or she is entitled to be paid pursuant to [NAC 284.255](#).

Grievant argued that nowhere in the NAC did it say that holiday pay could not exceed an established workday as NDOC stated in its response. Grievant stated in substance that in order to understand NAC 284.256, Section 1 and 2 of that NAC had to be read together. The first section, according to Grievant, explained the rate of pay, and the second section explained the hours worked and entitlements.

According to Grievant, the entire subject matter of her grievance began after she completed a payroll memo for November 12, 2018, because she had forgotten to include four hours of overtime worked in Pay Period 11. After she completed the payroll memo, Grievant stated that she received an email from Ms. McComb saying that Ms. McComb would be making corrections to Grievant's payroll memo. Grievant pointed out that Exhibit 1 contained Ms. McComb's email to her, telling her of changes that she was going to make to Grievant's pay. Pay Period 15 and 16 were the pay periods, according to Grievant, where the deductions occurred, which were shown in Exhibit 4.

Grievant noted that in Exhibit 1, page four, Ms. McComb explained the deductions of four hours PPHRM that had been taken for November 12, 2018. Ms. McComb said that PPHRM was only allowed for the hours the employee was normally scheduled to work, and that anything over the regularly scheduled hours worked would be classified as overtime. Grievant disagreed with this interpretation, and that Ms. McComb was saying that once overtime begins, holiday pay stopped. Grievant also argued that NDOC Payroll tried to use paragraph one of NAC 284.256 to justify the pay rate of zero for the holiday on overtime, while NAC 284.256 clearly stated that an employee who worked a holiday was entitled to both overtime and holiday pay.

Grievant directed the EMC's attention to Exhibit 1, page 6, and stated that when she noticed money was missing from Pay Period 16, she emailed Ms. McComb to ask if she knew about the adjustments. Grievant stated in substance that Ms. McComb said she had to do her holiday timesheet audit, and errors were found in Grievant's timesheets. Grievant noted in substance that she and Ms. McComb went back and forth about how holiday pay should be paid.

In looking at Exhibit 1, page three, Grievant noted that she copied and pasted what the DHRM Manual stated about holiday pay, and that the DHRM Manual stated that in addition, if an employee worked on a

holiday the employee was entitled to earn straight time pay for the hours the employee worked on the holiday. Grievant stated that after emails going back and forth Ms. McComb had to do a holiday audit, and that she just happened to audit Grievant's entire year of 2018 time sheets. Grievant noted in substance that she was never told of the audit and was never given the option of how to pay back the overpayments. Grievant also cited the language of NRS 227.150, and noted that it said the State Controller must give written notice to the employee of the State Controller's intent to withhold such amounts from the compensation of the employee, and the employee could request a hearing within 10 working days of receiving the notice where the employee would be given the chance to contest the State Controller's determination to withhold such amounts from the employee's compensation. Grievant stated that she was not given the opportunity to challenge the withholdings from her paychecks, and that she found out about the withholdings through her own review.

Grievant called the EMC's attention to Exhibit 4, the last page, which contained her Pay Period 16, and stated that 12 hours of PHPRM had been taken from her and replaced with 8 hours of paid day off holiday, even though she worked 12 hours on the holiday in question. Grievant further noted in substance that NDOC's packet had a copy of her timesheet, where it appeared that NDOC Payroll was trying to make corrections to the timesheet that covered the July 4 holiday 2018, to take away the 12 hours PHPRM and add 12 hours of PDOH (Paid Day Off Holiday), although the time sheet seemed to say she was paid 8 hours PDOH.

Grievant also stated in substance that NDOC's Administrative Regulation ("AR") 320.05(10) concerned holiday pay, and that it seemed to support her argument that she should have received 12 hours of PDOH, instead of the 8 hours Grievant was paid for working the July 4, 2018 Holiday. Grievant also stated in substance that NAC 284.256 said that if an employee worked on a holiday the employee received PHPRM, but AR 320.05 said the employee would receive PDOH for working a holiday. Grievant also noted that there was the verbiage in AR 320.05 about not exceeding the number of hours in the employee's established workday, and that she could not find this verbiage in any NAC.

Grievant argued in substance that it clearly stated in NAC 284.256 that an employee who worked on a holiday was entitled to receive PHPRM, POT (overtime) or compensatory time for the hours he or she worked on a holiday, in addition to any holiday pay that he or she was entitled to pursuant to NRS 284.250. Grievant thus argued that she should have been paid 12 hours of PHPRM and 12 hours of POT for the July 4, 2018 Holiday.

Grievant noted in substance that on November 12, 2018, she worked 16 hours, and that all 16 hours were on holiday. Grievant stated in substance that she was not paid for four hours of holiday pay because, per NDOC Payroll, those four hours were on POT. If that was the policy NDOC followed, reasoned Grievant, then she should not have been paid any holiday pay for July 4, 2018, since all 12 hours she worked would have

been considered POT. NDOC Payroll could not pick and choose, Grievant argued, when a policy or law applied and when it did not apply. NDOC argued in substance that on March 22, 2019, a resolution conference was held between Officer McAllister and Lt. Spiece to review the corrections payroll had made, the applicable policy and regulations, as well as the information NDOC had received from DHRM Central Payroll. Based on that meeting, according to NDOC, it had been agreed that NDOC would perform one final review of the holidays in question, July 4, 2018 and November 12, 2018, to assure that Ms. McComb audit had been performed correctly. NDOC stated that based on the information that it received back from DHRM Central Payroll, all of the corrections made by NDOC were in compliance with NAC and NRS, and that Grievant had been provided with this information.

NDOC stated that holiday pay had been a challenge for NDOC, and that NDOC Payroll performed audits after each holiday pay period. NDOC noted that it had went so far as to send out a memorandum to assist supervisors and staff to correctly fill out their time sheets when a holiday fell in a pay period. NDOC also stated that the memorandum would allow them to take coaching and corrective action against supervisors who continued to violate policy in reviewing and approving employee time sheets improperly.

NDOC further stated that based on the information it received from DHRM Central Payroll it determined no errors had been made with respect to Grievant's pay adjustments, and the only error that occurred, which Ms. Leathers said she discussed with Grievant, was the manner in which NDOC Payroll representative Ms. McComb handled the matter, and that since then the entire NDOC Payroll staff had been reminded about what the AR and NRS said about proper notification when adjustments were made to employee pay.

Grievant noted in substance that her timesheets were reviewed by NDOC, and that if NDOC performed everything correctly then how could NDOC pay her 8 hours of PDOH when NDOC's AR said that if an employee worked on his or her day off the employee would receive 12 hours of PDOH, so that if NDOC performed their audit correctly how was her situation specifically a problem? Grievant called attention to Exhibit 4, her paycheck covering the July 4, 2018 time period. Chair Puglisi stated in substance he had noticed that in the communications from NDOC Payroll that there were discrepancies between those communications and what NDOC actually changed with respect to Grievant's pay.

Chair Puglisi asked Ms. Leathers to take the EMC though the relevant timesheet which covered the July 4, 2018 Holiday. Ms. Leathers in substance responded that the entire documentation was extremely confusing to her, which was why she involved DHRM Central Payroll. Ms. Leathers stated in substance that the way matters were explained to her was that POT on a holiday was more than PHPRM when one looked at the actual dollars and cents paid, but they way that NDOC interpreted statute was that an employee could not be paid PHPRM in excess of what an employee's regular shift scheduled hours would be, which would be a 12 hour shift in this case, so that anything above that 12 hours would

be paid premium paid overtime, which was more than premium holiday pay, as the day in question worked as a holiday.

Ms. Leathers continued and stated in substance that the law in question appeared to read that if an employee had an 8, 10- or 12-hour shift then the employee's holiday pay would be paid 8, 10 or 12 hours, based on the hours the employee actually worked. Ms. Leather stated that Grievant worked three 12 hour shifts one week, three 12 hour shifts the next week, and then an 8 hour shift the week after, which Grievant corrected by noting that these hours depended on when her "short" day was, and that her short day was on a short week, so that she worked two 12 hour shifts and then an 8 hour shift, and then the next week she would work four 12 hour shifts.

Chair Puglisi noted there was a DHRM document, PERD # 58-10, which might be helpful, as it provided clarification that was not in statute concerning when PHPRM, PSDOT (Paid Shit Differential Overtime) and other types of pay applied. Chair Puglisi noted that for July 4, 2018, which was Grievant's scheduled day off, Grievant worked 12 hours. Member Bauer asked, to clarify, if July 4, 2018, was Grievant's regularly scheduled day off ("RDO"), to which Grievant stated that day was her RDO, and that she worked 12 hours on her RDO. Chair Puglisi noted that the PDOH was the straight time Grievant had worked. Grievant noted in substance that shift differential was not at issue in her grievance, but that an employee received PSDOT if an employee worked overtime on his or her day off. Chair Puglisi noted that PERD # 58-10 stated that an employee normally scheduled to work a qualifying shift, but whose regular day off fell on a holiday, was entitled to PDOH; however, the employee was not entitled to paid shift differential, and in this case the Grievant had both, which Grievant said she acknowledged was an error on her part during the grievance process with NDOC.

Chair Puglisi noted in substance that the entire day of July 4, 2018 was overtime, so that was the POT in the documentation. Chair Puglisi stated in substance that whether it was PHPRM or PDOH it was still straight time, and that the shift differential was taken into account twice when it should not have been taken into account. Chair Puglisi noted on July 14, 2018 a "double dip" had occurred, which was also Grievant's day off. Grievant, in response to questioning, stated in substance that NDOC had taken away 12 hours PHPRM and replaced it with PDOH, and that there were two PHRM's listed in the documentation because it was the holiday pay week, and that the rates of pay were different because she had a different pay rate on July 4.

Chair Puglisi noted that for July 4, 2018, there was PDOH for 8 hours, but that on the correction it said NDOC added the PDOH and removed the premium pay, but that it was 8 hours vs 12 hours, and so his question was when an employee was paid for a holiday was an employee being paid for their average hours? Ms. Leathers stated in substance that she was unsure of the answer to Chair Puglisi's question. Chair Puglisi in substance stated that NDOC may owe Grievant four hours of pay for the July 4, 2018 Holiday.

Member Bauer stated in substance that she was looking at Exhibit 3 in the Employee Packet, at the Special Pay Document, Pay Period 16,

which was the adjustment for the July 4 Holiday, which would have resulted in the adjustment to Grievant's paycheck. Member Bauer noted that if one looked in the event code column, fourth row, it said PDOH with a positive 8, and that in her interpretation if the Grievant worked on her regular day off (RDO) July 4 Holiday, for 12 hours, then she thought it should have been PDOH 12 hours.

Ms. Leathers responded in substance that if an employee worked from 6 pm to 6 am, and the holiday ended at 11:59 p.m., that would cause confusion, and that part of Grievant's shift went overnight. Grievant acknowledged that she worked from 6 p.m. to 6 a.m. on the dates in question, and that she worked from July 3 from midnight to 6 a.m. July 4. However, Grievant argued that an employee was supposed to receive his or her holiday pay at the start of the employee's shift.

Chair Puglisi noted in substance that in considering the overlapping schedule Grievant had, she worked 12 hours on July 4, and that he thought there was four hours of a discrepancy with respect to straight time, regular pay. Chair Puglisi stated in substance that there were 12 hours of paid shift differential being adjusted for July 4, 2018, and then another 12 hours was adjusted for July 14. Member Bauer noted that the special pay adjustment was subtracted out 12 hours of paid shift differential and 12 hours of PHPRM and added 8 hours of PDOH. Therefore, Member Bauer noted, if one looked at PERD 58-10, it said an employee who was normally scheduled to work a qualifying shift, but whose regular day off fell on a holiday was entitled to PDOH, however, the employee was not entitled to shift differential for the holiday.

Member Bauer noted that 284.257 provided for the appointing authority to designate whether such compensation would be based on a calendar date for the entire shift of the employee or designation of time for holiday pay adjustment of work schedule if the holiday occurred on an employee's day off. Grievant noted that NAC 284.257 went further and stated the "the employee may receive compensation related to the holiday for his or her entire shift only if 50 percent or more of the shift occurs on the holiday."

Ms. Leathers noted in substance that NAC 284.257(2)(c) stated that: the appointing authority of an employee who has two or more scheduled shifts on a holiday shall designate only one shift on the holiday for which the employee may receive compensation related to the holiday.

Member Bauer stated in substance that it appeared that Grievant would be entitled to PDOH for 12 hours for the July 4, 2018 Holiday. Member Russell stated in substance that from previous grievances she thought Grievant's entire shift should be counted towards the holiday pay. Member Russell further stated in substance that when it came to the holiday pay, leaving out shift differential, if an employee was working a holiday then the employee received holiday pay for the entire shift.

DHRM Central Payroll supplied a subject matter expert, Ms. Wolfe, who testified at the grievance hearing. Chair Puglisi stated in substance that if he understood correctly that on July 3, Grievant worked from 10 p.m. to 6 a.m., and then she worked from 12 a.m. to 6 a.m. on July 4, and then

again 6 p.m. to midnight on July 4, 2018. Chair Puglisi asked, considering Grievant normally worked 12-hour days except for one day in a pay period, when a holiday fell on her day off, how many hours would the employee get paid for?

Ms. Wolfe replied in substance that she believed the NAC talked about having the employee get paid for what their average hours were, so that when there was a 12 hour shift the employee would receive 12 hours of holiday pay. Ms. Wolfe stated in substance that if the employee's short day fell on a holiday they would still be working. Ms. Wolfe further stated in substance that with respect to working on an RDO the employee would receive PDOH, the employee's benefit for not receiving a day off. Member Thompson asked if Grievant would receive 12 hours of holiday pay (PDOH) and 12 hours of overtime for the July 4, 2018 Holiday, which Ms. Wolfe stated was correct. Member Bauer asked if Ms. Wolfe had the NDOC packet and asked her to look at the timesheet for Pay Period Two. Member Bauer stated in substance that that adjustment looked like it should have removed 12 hours of paid shift differential, removed 12 hours PHPRM, and replaced this with 12 hours of PDOH, and 12 hours of POT, which Ms. Wolfe agreed with.

Ms. Wolfe was directed to Exhibit 3, Pay Period 16, and asked if, for the July 4, 2018 Holiday, the adjustments appeared to be accurate, to which Ms. Wolfe responded that the overtime was missing. Ms. Wolfe noted that NAC 284.255(2) was the guide for the holiday day off or for holiday benefits, and that it would be an 8-hour benefit, not a 12-hour benefit, and so was correcting her previous testimony. Grievant noted that this was not what NDOC's AR said. Chair Puglisi added that to reach the 8 hours of holiday pay referenced on NAC 284.255(2) one would take the base hours of work per year, and then multiply 52 weeks x 40 hours, and divide that amount (2080), by 2088 x 8, which resulted in 7.9, or 8 hours. Member. Keith stated in substance that if the NAC said that Grievant received 8 hours of holiday pay then Grievant still needed to be paid for the other four hours she actually worked. Chair Puglisi responded that Grievant was paid POT for those four hours. Chair Puglisi also noted that it was determined that there was four hours of PDOH involved, because Grievant worked 12 hours.

Grievant stated in substance that because she was on an innovative work schedule, she received extra hours for holiday pay, hour for hour, because she was not on an 8-hour schedule. Ms. Leathers argued that currently the State standard was that if an employee worked four 10 hour shifts and the employee's regular work day fell on a holiday the employee received only 8 hours of holiday pay regardless, and that would still apply in this grievance, regardless of the 12 hours in this scenario.

Chair Puglisi asked, based on NAC 284.255(3)(c)(1), which said:

1) Full-time nonexempt employee with an innovative workweek agreement may earn additional holiday pay on an hour-for-hour basis for any hours he or she works in excess of the holiday pay provided in paragraph (a) and in subsection 2,

not to exceed the number of hours in his or her established workday as set forth in his or her innovative workweek agreement,

if it would be true that if a holiday fell on Grievant's short day if she would receive 8 hours holiday pay, and if a holiday fell on Grievant's regular 12-hour day, if she would receive 12 hours pay. Ms. Wolfe stated in substance that Chair Puglisi was correct. It was noted, though, by Ms. Leathers, that the day in question was Grievant's RDO, and that she was called into work.

Ms. Wolfe said that the key word in NAC 284.255(3)(c)(1) was "workday," so it had to be on the employee's normal workday that the employee was paid on the hour for hour basis.

Chair Puglisi noted in substance that in this scenario Grievant worked on her RDO and that if Grievant had not worked on her RDO she would still have received PDOH, but that if it was her regularly scheduled day to work, and she was scheduled to work 12 hours, Grievant would have received 12 hours PHPRM. According to Chair Puglisi, this would indicate the changes made to Grievant's pay concerning the July 4, 2018 Holiday were correct.

Grievant read NDOC's AR 320.05(10), which conflicted with Ms. Wolfe's testimony. Member Russell stated in substance that due to the fact the EMC had upheld AR's that were more restrictive than NRS or NAC, she believed the same practice should be followed in this present grievance.

Chair Puglisi moved to the pay adjustment for November 2018. Grievant indicated that she was scheduled to work on the Veteran's Day Holiday, and that she worked that day and also worked overtime. Grievant indicated that she worked a total of 16 hours on November 12, 2018: 12 hours for her normal shift, and four hours of overtime, and that the 12 hours was coded as PHPRM. Grievant stated in substance that per NAC 284.256(2), a non-exempt employee who worked on a holiday was entitled to receive PHPRM, overtime pay or comp time for the hours he or she worked on the holiday, in addition to any holiday pay that he or she was to be paid pursuant to NAC 284.255, and that nothing was said about not being qualified for more than 12 hours, and that the regulation said an employee was paid for the hours he or she worked on a holiday. Chair Puglisi noted that on the timesheet Grievant originally had 16 hours of paid shift differential and 16 hours PHPRM, and so NDOC took that all out and put in 12 hours of regular shift differential, which corresponded with the PHPRM, and 12 hours of PHPRM, and then four hours of overtime and four hours of paid shift differential overtime. Grievant stated that she would owe NDOC for the paid shift differential, PST, for four hours.

Ms. Leather stated in substance that Employee's Exhibit 3, the last two pages, that both of those documents explained the corrections NDOC made to Grievant's pay and why the corrections were made. Grievant noted in substance that NDOC, on those pages, never cited to authority, such as NRS' or NAC's for its actions.

Chair Puglisi stated in substance that based on NAC he felt that the adjustments NDOC made were correct, and if Grievant would have worked on her day off that fell on a holiday she would have received 8 hours for the holiday, and if she had not worked on the holiday she would have received 8 hours for the holiday, and if the holiday fell on Grievant's regularly scheduled day to work she would receive hour for hour for Grievant's normal shift, unless the holiday fell on Grievant's short day.

Chair Puglisi thought that the issue was AR 320.05 did not match the relevant NAC's.

Member Bauer stated that in this situation regulation would supersede the AR, since there was a conflict between the AR and NAC, to which Mr. Puglisi agreed, stating in substance that an agency could not change what the State said an employee's rate of pay was in the law. Chair Puglisi also noted in substance that there was the side issue of NRS 227.150, which said the State Controller's Office had to make contact with the employee before recovering a payroll overpayment.

In response to questioning, Ms. Wolfe stated that she did not believe the current grievance involved an overpayment as much as it did a correction. Ms. Wolfe also noted that taking all of the overpaid money out of Grievant's pay at once may have been incorrect, but the coding errors needed to be corrected. Ms. Wolfe also stated in substance that the grievance involved a normal payroll reconciliation and was something that DHRM Central Payroll would expect to be handled at the agency level. Ms. Wolfe further stated in substance that since the matter was not an overpayment situation there was no requirement that she was aware of that required employee notification within a certain time frame of the correction being made to Grievant's pay.

Member Bauer pointed out Employee's Exhibit 3, the last page, at the bottom of that Exhibit, which Member Bauer called a Memo, dated January 31, 2019, by Ms. McComb, that would have been the notification for the adjustment for the paycheck issued February 8, 2019. However, Grievant responded in substance that this was incorrect, and that she received an email from Ms. McComb on February 4, 2019, a day after Grievant had emailed Ms. McComb alleging that Ms. McComb was violating NRS 227.150 by not providing notice of the withholding of money from her pay. Grievant pointed out that Exhibit 1, page 6, contained her February 3, 2019 email to Ms. McComb, asking her about the adjustments to her Pay Period 16.

Member Novotny clarified that two of Grievant's pay periods were adjusted, Pay Period 15 and Pay Period 16. Chair Puglisi asked whether NDOC had any policy and procedure in place to ensure that an employee's paycheck was not "wiped out" all at one time when reconciling payroll. Ms. Leathers responded in substance that overpayment agreements could be made with employees where deductions from an employee's paycheck could be taken out in smaller amounts. Ms. Leathers also stated that NDOC Payroll did not handle this matter appropriately, but that she did not believe that the situation could be corrected after the fact by having all of the money removed from Grievant's pay restored to then turn around and enter into a

payment agreement with Grievant to recover money in smaller amounts from Grievant's pay.

Chair Puglisi asked, in view of the fact that the grievance involved a coding correction, whether the only way to spread the recovery of money taken back from Grievant over time would be to make the corrections over time, to which Ms. Wolfe responded in substance yes, and that there was no need to make the correction/recovery of money all at one time. Member Bauer asked Grievant in substance that if the adjustments were already made to Grievant's paycheck, and if she did not know whether Grievant's proposed resolution was feasible, and that given NDOC said improvements were in process for communication and timely notification, whether Grievant saw a proposed resolution at this time to her grievance?

Grievant responded that she came before the EMC in order to show that the NAC stated that an employee received holiday pay for the hours worked, and that no one had cited anything to her saying otherwise, and that she had cited from the DHRM Manual, the AR, and the NAC, and nowhere was it said that an employee did not receive holiday pay while on overtime. Chair Puglisi responded in substance that Grievant was being paid for the holiday because she was either receiving day off holiday pay or PHPRM, but what kind of pay was contingent on whether the holiday fell on Grievant's day off or on a day Grievant was scheduled to work. Chair Puglisi further noted that the NAC 284.255 stated that "full time non-exempt employees with an innovative work week agreement may earn additional holiday pay on an hour for hour basis for any hours he or she works in excess of the holiday pay provided in paragraph (a) and in subsection (2)." Chair Puglisi further stated that Paragraph (a) of NAC 284.255 said that a full time non-exempt employee whose base hours exceed 40 hours per week or eighty hours biweekly, and who was in paid status for any portion of his or her shift immediately preceding the holiday was entitled to receive holiday pay equal to they pay he or she received for his or her average workday.

Chair Puglisi also stated in substance that in Grievant's case if a holiday fell on Grievant's short day she would receive 8 hours of holiday pay, and if the holiday fell on her day off she would receive 8 hours of holiday pay, and that if Grievant worked and the holiday fell on her short day she would receive hour for hour up to 8 hours, or 12 hours.

Grievant disagreed with Chair Puglisi, stating that NAC 284.256 said that an employee was paid for the hours the employee worked on a holiday and not what Chair Puglisi or anyone else had stated, and that it also said the same thing in the DHRM Manual. Chair Puglisi responded that if an employee worked on their day off an employee received PHPRM. Chair Puglisi added that he thought the language in 284.256(2) was stating that if an employee was normally off on a certain day and the employee actually worked that day the employee would either receive POT or comp time in lieu of POT, or PHPRM, for the hours the employee worked. Thus, Chair Puglisi stated that if an employee worked on a holiday, and it was the employee's scheduled day off or on a regularly scheduled work day, if Grievant's workday was a short (6 hours) workday then she would receive 8 hours of PHPRM and if the Grievant

worked her regular day she would receive 12 hours PHPRM. Thus, Chair Puglisi stated in substance that Grievant would receive PHPRM and would also be paid for what time she worked (straight time), until the point Grievant exceeded 40 hours, and then Grievant would receive paid overtime for the rest of the time.

Grievant stated in substance that if she worked 16 hours on a holiday why was NDOC only trying to pay her for 12 hours? Chair Puglisi responded in substance that an employee in Grievant's situation would either receive 8 or 12 hours of PHPRM, and not 16 hours. Grievant stated in substance that she believed that NAC 284.256(1) was being confused for hours worked, rather than rate of pay.

Ms. Leathers stated in substance that, with respect to the 16 hours Grievant worked, the regulation only allowed for up to 12 hours of PHPRM, and then the four additional hours were paid as paid overtime, and that with respect to rate of pay, PHPRM was less than paid overtime. Member Bauer stated in substance that State employees typically say double time on a holiday, but that this needed to be clarified, and that if an employee were in paid status immediately preceding a holiday, and the employee did not work the holiday, then the employee received holiday pay at the employee's standard rate of pay, which was the employee's base rate of pay. Member Bauer added in substance that if the employee worked the holiday the employee would receive that pay, plus the premium holiday pay, which was another base rate of pay times the hour the employee worked, so that was the double time, so the employee was in effect receiving 200% compensation for when an employee worked on a holiday; and then overtime was added to that if applicable.

Chair Puglisi stated that the dispute was the 16-hour day, as the maximum for holiday pay was 12 hours. Member Bauer stated in substance that the November 12, 2018 Holiday was adjusted correctly, but she was struggling with the July 4, 2018 Holiday adjustment. Chair Puglisi stated in substance that the difference between the two situations was that July 4, 2018 was Grievant's RDO.

Member Bauer stated in substance that she was leaning towards granting the grievance in part for the July 4, 2018 Holiday, and that she was looking at NAC 284.255(2), which provided for 8 hours of holiday pay for any holiday that the employee was in paid status directly preceding the holiday. So in the present grievance, Member Bauer noted, on July 3, 2018 Grievant was in paid status, so Grievant would be entitled to 8 hours of holiday pay pursuant to NAC 284.255(2), and that further, as provided for in NAC 284.255(3)(c), an employee with an innovative work week agreement may earn additional holiday pay on an hour for hour basis for any hours worked in excess of the holiday pay not to exceed the number of hours in the established innovative workday agreement.

Chair Puglisi stated in substance that with respect to July 4, 2018, it was Grievant's RDO, so on her regular day off she was paid for 8 hours, but if the holiday fell on a workday for the employee then it would depend on what the variable work schedule agreement would make that day, so that if the day was an 8 hour day it was 8 hours, if it was a 12 hour day

it was 12 hours. Since July 4, 2018 was Grievant's RDO Chair Puglisi stated that Grievant was paid for working on a day off, but the holiday pay was only 8 hours because it was Grievant's day off.

Chair Puglisi went on to state that there appeared to be three possibilities, that if a holiday fell on Grievant's normal day off Grievant would receive 8 hours pay, per NAC 284.255(2), but in the case of innovative workweek agreements it depended on where the holiday fell. Member Bauer stated in substance that she focused on NAC 284.255(2)(c). Chair Puglisi commented in substance that in this case there were 12-hour days involved and the one 8 hour day, so that if July 3, 2018 was a holiday and an 8 hour shift, the holiday pay would be 8 hours, but if the holiday happened to fall on Monday, July 2 then the holiday would have been 12 hours. Chair Puglisi stated in substance that in the present case the holiday fell on July 4, 2018, and it was an RDO for Grievant, so the pay should only have been 8 hours.

Grievant stated in substance that the 12-hour shift people were being treated unfairly if Chair Puglisi's reasoning was correct, and that although she received paid overtime, she did not receive holiday pay for all the hours she actually worked. Chair Puglisi noted that with respect to July 4, 2018, Grievant was paid time and a half pay, and shift differential for 12 hours, and then 8 hours for the holiday, because if employee had not worked at all she would have been paid for 8 hours.

Member Bauer made a motion to grant grievance # 6284 in part by adjusting Grievant's pay for the July 4, 2018 Holiday to increase the event code PDOH to 12 hours based on NAC 284.255(2), and paragraph (c) of subsection 3. Member Bauer moved to deny Grievance No. 6284 in part based on the evidence that the correct adjustment to the November 12, 2018 Holiday was made. Member Thompson seconded the motion. Member Bauer's motion passed unanimously.

FINDINGS OF FACT

Based upon the testimony of the witnesses, the arguments made by the parties, the briefs, evidence, and documents on file in this matter, the EMC makes the following findings of fact. All findings made are based upon a preponderance of the evidence.

1. Grievant was a non-exempt State of Nevada employee.
2. Grievant was employed by NDOC as a correctional officer during the relevant time period.
3. During the relevant time period Grievant worked a variable work schedule.
4. July 4, 2018 was Grievant's RDO.
5. Grievant worked 12 hours on the July 4, 2018 Holiday: from 12:00 a.m. until 6:00 a.m., and from 6:00 p.m. until 12:00 a.m.
6. Grievant worked 16 hours over the Veteran's Day 2018 Holiday, 12 hours of which was Grievant's regularly scheduled shift, and four hours of overtime.
7. NDOC, after an audit of Grievant's timesheets, took away pay for the July 4, 2018 and Veteran's Day 2018 Holiday from Grievant in pay periods 15 and 16.

8. For the July 4, 2018 Holiday, NDOC removed 12 hours of PHPRM from Grievant's pay and replaced it with 8 hours of PDOH.
9. For the November 12, 2018 Holiday, NDOC changed 16 hours of PSD (Paid shift differential) to 12 hours PSD, 16 hours of PHPRM to 12 hours PHPRM, added four hours POT and four hours PSDOT.

CONCLUSIONS OF LAW

9. For this grievance, it was Grievant's burden to establish by a preponderance of the evidence that NDOC was in error when it took back pay from Grievant in Pay Periods 15 and 16.
10. A grievance is any act, omission or occurrence which an employee who has attained permanent status feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee. NRS 284.384(6).
11. Ms. McAllister's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
12. The Committee discussed and substantially relied on NAC 282.255 and NAC 284.256.
13. The grievance involved payroll reconciliation, so NRS 227.150, which required notice to an employee prior to withholding of compensation, was not relevant to the grievance
14. NAC 284.255(2) states:

Except as otherwise provided in paragraph (c) of subsection 3 and subsections 5 and 7, a full-time nonexempt employee whose base hours are 40 hours per week or 80 hours biweekly is entitled to receive 8 hours of holiday pay for any holiday that he or she is in paid status during any portion of his or her shift immediately preceding the holiday.

15. NAC 284.255(3)(c) states:

A:

(1) Full-time nonexempt employee with an innovative workweek agreement may earn additional holiday pay on an hour-for-hour basis for any hours he or she works in excess of the holiday pay provided in paragraph (a) and in subsection 2, not to exceed the number of hours in his or her established workday as set forth in his or her innovative workweek agreement.

16. NAC 284.256(2) states:

A nonexempt employee who works on a holiday is entitled to receive holiday premium pay, overtime pay or compensatory time for the hours he or she works on the holiday, in addition to any holiday pay that he or she is entitled to be paid pursuant to [NAC 284.255](#). A nonexempt employee who elects to receive compensatory time for the hours he or she works on a holiday must not exceed the

limits on the accrual of compensatory time set forth in [NAC 284.250](#).

17. Grievant was in paid status immediately preceding the July 4, 2018 Holiday. Thus, Grievant was entitled, pursuant to NAC 284.255(2) and (3)(c), to 12-hour PDOH, and not 8 hours PDOH, for having worked 12 hours on July 4, 2018.
18. Grievant was in paid status immediately preceding the November 12, 2018 Holiday. Pursuant to NAC 284.255(c), Grievant was entitled, for the November 12, 2018 Holiday, to receive either 8 or 12 hours PPHRM, but not 16 hours PPHRM. NDOC correctly applied NAC 284.256(2) in calculating Grievant's POT and PSDOT for November 12, 2018, considering that Grievant had an innovative work schedule that fell under NAC 284.255(3)(c).
19. Conclusions of Law that are more appropriately Findings of Fact shall be deemed Findings of Fact.

DECISION

Based upon the evidence in the record, and the foregoing Findings of Fact and Conclusions of Law, and good cause appearing therefor, it is hereby ORDERED:

Grievance No. 6284 is hereby GRANTED in part and DENIED in part. The event code PDOH for the July 4, 2018 Holiday will be increased from 8 hours to 12 hours based on NAC 284.255(2) and NAC 284.255(3)(c). Grievance No. 6284 is denied in part based on evidence that the correct adjustment was made to Grievant's pay for the November 12, 2018 Holiday.

MOTION: Move to grant grievance # 6284 in part by adjusting Grievant's pay for the July 4, 2018 Holiday to increase the event code PDOH to 12 hours based on NAC 284.255(2), and paragraph (c) of subsection 3. Member Bauer moved to deny Grievance No. 6284 in part based on the evidence that the correct adjustment to the November 12, 2018 Holiday was made.

BY: Member Bauer

SECOND: Member Thompson

VOTE: The vote was unanimous in favor of the motion.

8. Discussion and possible action related to Grievance #6250 Tanya Armendariz, and Grievance #6277 Teresa McCastle, Department of Corrections – Action Item

Chair Puglisi stated agenda item #8 and agenda item #9 were similar, but due to the time, would not be heard during this meeting.

Chair Puglisi requested the items be placed on the next practical agenda for discussion.

9. Public Comment

There were no comments in the North or in the South.

10. Adjournment

Chair Puglisi adjourned the meeting at approximately 5:27 pm.