

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION
DIVISION OF HUMAN RESOURCE MANAGEMENT

Legislative Building
401 S. Carson St., Room 2135
Carson City, Nevada

and

Grant Sawyer Building, Room 4412E
555 East Washington Avenue
Las Vegas, Nevada

REGULATIONS WORKSHOP
MINUTES

Thursday, August 12, 2015

Speakers Present In Carson City:

Shelley Blotter, Deputy Administrator, Division of Human Resource Management
Peter Long, Deputy Administrator, Division of Human Resource Management
Carrie Hughes, Personnel Analyst, Division of Human Resource Management
Michelle Garton, Supervisory Personnel Analyst, Division of Human Resource Management
Kimberley King, Personnel Officer III, Department of Transportation
Kareen Masters, Deputy Director, Department of Health and Human Services
Alys Dobel, Personnel Officer III, Department of Motor Vehicles

Speakers Present In Las Vegas:

Brian Boughter, Personnel Officer III, Department of Employment, Training and Rehabilitation

1. CALL TO ORDER

Shelley Blotter: Opened the meeting. She introduced herself and asked everyone to sign-in. She indicated the purpose of the workshop is to solicit comments from affected parties with regard to regulations proposed for permanent adoption. She explained that the regulations maybe heard at a future Personnel Commission meeting. She stated that the format would be that staff would provide an explanation of the proposed regulation change which would be followed by a period for public comment. She indicated that comments would be summarized for the Personnel Commission and provided to them at the time that the regulation would be proposed for adoption. She noted that

there were comment cards available if participants wanted to use that format or comments could be sent through email.

2. REVIEW OF THE PROPOSED CHANGES TO NAC 284:

284.462 Restoration of promoted employee to former position

Shelley Blotter: Starting with 284.462. She stated, there are three versions presented today for consideration. She explained why all three were being presented and introduced Peter Long to provide further explanation.

Peter Long: Explained that the proposed changes are based upon SB62 of the 2015 Legislative Session, where in the past a restored employee or an employee that didn't meet the terms of their probation or trial period was restored to the position from which they promoted. He further explained that, the amended statute provides for more options and rights for when an employee is restored. He explained that, what we are trying to do is define seniority for the purposes of restoration and the rights that a restored employee has. He then went over the three versions. He explained the Department did not have a vested interest in any of the versions. He stated the hurdles he felt were involved in each version and the due diligence that agencies are going to have to engage in. He then asked for input from those present.

Shelley Blotter: Asked if there were any comments and reminded individuals to introduce themselves and refer to the version they are commenting on.

Kimberley King: Noted her appreciation for keeping it simple with regards to calculating seniority, but that she feels performance should be taken into account, not just seniority. She feels it is important to include performance and potentially have more consideration go to a good performer than a bad performer if seniority is close. She noted, as far as the language on the doubling is concerned, she didn't feel a need to comment on this as they would not be affected.

Shelley Blotter: Clarified that Ms. King's preference would be version 3.

Kimberley King: Stated 2 or 3. She believes, they both accomplish what we need and it won't impact another department that might need version 2.

Kareen Masters: Stated her preference would be version 2. She explained she gave it a lot of thought and couldn't answer her own questions on how to respond to an employee impacted by this on why there were different policies, such as for layoff. She also commented if version 2 is chosen, a reference to the seniority calculations for layoff could be made so that people would know where the calculation came from.

Shelley Blotter: Asked for comments from Las Vegas. There was none. Came back to Carson City.

Alys Dobel: Agreed with Ms. Masters. Her preference is 2 or 3 but wanted to keep them consistent with how the layoff rules are today.

Shelley Blotter: Closed comments after no other respondents. Carrie Hughes was introduced to present the next several regulations and explained that comments would be taken after each proposed regulation.

NEW Reassignment Defined, Under the American's with Disabilities Act

Carrie Hughes: Started with a newly proposed regulation, "Reassignment Defined." Under the Americans with Disabilities Act, reassignment to a vacant position is a form of reasonable accommodation that must be attempted if a qualified employee can no longer perform the essential functions of his/her position with or without accommodation or if providing reasonable accommodation would be an undue hardship. Senate Bill 62 of the 2015 Legislative Session in part amended NRS 284 to allow for non-competitive reassignment in the classified service. She explained, the following proposed amendments in regulation provide an overall concept of reassignment and an outline of a possible procedure to implement the reassignment process. This proposed new regulation, Reassignment Defined, defines the term 'reassignment' as, the 'non-competitive placement of a permanent classified employee as an accommodation'.

Shelley Blotter: Asked for comments.

Kareen Masters: Stated her suggestion would be in the latter part of the sentence where it says, which the employee meets the minimum qualifications, she suggests that we say, for which the employee is qualified, that is consistent with the language in NRS 284.379 that was adopted. She would want to keep the broader connotation. She further explained that there might be other aspects that may make them disqualified for position.

Shelley Blotter: Thanked Ms. Masters. Asked Peter Long for comment.

Peter Long: Said it seemed totally reasonable. Acknowledged that there are special notes and special requirements that are above and beyond the basic minimum qualification, but are required to do the job.

Shelley Blotter: Asked for additional comments; there were none.

284.177 Rate of Pay: Effect of reemployment

Carrie Hughes: Stated the amendment to 284.177, addresses the impact of an employee's reassignment on his/her rate of pay. It applies the rules for reemployment which place an employee at the step which is closest to the employee's rate of pay prior to the reassignment.

Shelley Blotter: Asked for comments.

Kareen Masters: Asked if a change would be appropriate in the regulation about pay upon promotion? She feels that we want to get away from the issue of someone demoting for

reassignment and then later promotes resulting in the employee keeping higher steps, and gave an example of pay grade changes.

Peter Long: Asked for clarification. He noted that we revised that regulation not too long ago to limit the prohibition of demoting to promote to one year and asked if she wanted to it extended it in these circumstances.

Kareen Masters: Referred to the pay upon promotion regulation and that one of the subsections there states that it doesn't apply to reemployment.

Peter Long: Confirmed that she meant, reemployment referred to in NAC 284.172, paragraph D and read, this subsection does not apply when an employee's reemployed or reappointed to his/her former grade within one year after holding that grade. He asked if she was requesting that reassignment also be included as an exception.

Kareen Masters: Confirmed.

Shelley Blotter: Asked for additional comments; there were none.

284.6014 Eligibility of employee with permanent disability for reemployment

Carrie Hughes: Stated amendment to NAC 284.6014 addresses how reassignment will impact our workers' compensation provisions by clarifying that reassignment must be attempted prior to placing an employee on a reemployment list.

Shelley Blotter: Asked for comments.

Kareen Masters: Stated that she strongly feels that this whole section about reemployment for people with permanent disabilities and workers' compensation needs to be reexamined. She feels with the adoption of these reassignment regulations, the workers' compensation regulations are probably moot or that these proposed regulations are duplicative of that. She believes the initial intent of adopting these regulations was in some respects to contain workers' comp costs and find a placement for someone that was disabled due a workers' comp injury. If that's feasible through the reassignment process, there's no need to continue with this reemployment regulation.

Shelley Blotter: Replied that there had been some conversations with Risk Management and they were not ready to get rid of this regulation. There were concerns about processes getting in the way of timelines and they wanted to make sure that commitments were being met. This way the State is not charged for retraining. Asked if Ms. Hughes had further comment.

Carrie Hughes: Stated yes, Risk Management did have concerns about the timeliness of the process and that this was going to alter their overall process when they dealt with workers' compensation.

Kimberley King: She agreed and feels it gets confusing between workers' compensation and ADA. She gave different scenarios and stated it would be nice to have them the same. She further stated that there may be consideration made with the rate of pay and timeframes to be the same type of situations between workers' compensation and ADA.

Shelley Blotter: Stated she had a hesitation on requiring ADA accommodations to match the employee's salary requirement that is in-place under workers' compensation. The intent of the ADA is to try and get the employee at the same level or as close as you could possibly get; but there could be situations where somebody could not be accommodated at that level and it may not be that they could meet the 80% or 75% of what they had previously earned but they could work in some capacity. We wouldn't want to eliminate that option.

Kimberley King: She stated she could agree to that.

Shelley Blotter: Asked for additional comments.

Kareen Masters: Suggested a flow chart, of a sample case of someone that was disabled due to workers' compensation and lay the two provisions against each other and see what we're going through.

Shelley Blotter: Stated there is a flow chart for just the regular process without considering workers' compensation, but will look into that further. Asked for additional comments; there were none.

284.094 "Reclassification" defined

Carrie Hughes: Stated the amendment to NAC 284.094 removes the word 'reassignment', so that it can become a defined term in the proposed new regulations and amendments.

Shelley Blotter: Asked for comments; there were none.

284.439 Reports of appointments

Carrie Hughes: Stated the amendment to NAC 284.439 adds 'reassignment' to the list of types of appointment.

Shelley Blotter: Asked for comments; there were none.

284.611 Separation for physical, mental or emotional disorder.

Carrie Hughes: Stated the amendment to NAC 284.611 clarifies that reassignment must be attempted as part of the accommodation process, prior to separating an employee due to a physical, mental or emotional disorder.

Shelley Blotter: Asked for comments; there were none.

NEW Employee with a disability as part of the accommodation process

Carrie Hughes: Stated the process in this proposed new regulation was structured to make every effort to keep the employee in his/her own current agency, if possible, and to carry through the statutory requirement that a reassignment requires an appointing authority's approval. While this regulation includes multiple factors and decision points, the intent is that many of these steps would happen concurrently to allow for a timely process. A handout has been provided to outline the process that is in this newly proposed regulation.

Shelley Blotter: Noted that the language discussed at the Agency Personnel Liaison meeting did not contain the reference to occupational group but that was added in consideration of possible layoffs in the future.

Carrie Hughes: Said that was correct. Further stating, in discussions with Peter Long, there was concern that this would affect agencies that use the occupational group in the seniority calculation. This would allow the employee to retain that benefit. She went on to say that following the Agency Personnel Liaison meeting the references about geographical location were also added.

Shelley Blotter: Asked for comments.

Kareen Masters: Went over language in subsection 1 and would want it to say, for which the employee is qualified. When we're talking about vacant or soon to be vacant positions, we might want to think about adding some language, to clarify vacant positions of which the agency intends to fill. It is common for departments to hold positions vacant, to obtain vacancy savings and wouldn't want to disrupt that process. She also feels that it would be an important process, maybe for DHRM, to confirm that the individual has a disability within the meaning of the ADA. She feels it's very common for employees to throw out the term, I'm disabled, but not meet the very defined meaning under the ADA. DHRM could be the neutral party that reviews the medical documentation and certify that on behalf of all divisions to avoid eligibility confusion. The process is tremendously complex when we're looking among multiple departments to find positions and what burden we're putting on the disabled employee as well with the interactive process that we go through, we would typically have a physician review the essential functions and certify that they can perform them. She doesn't picture requiring individual employees to keep going over this process multiple times when we're trying to place them in a position. Risk Management could play a role in that too, since they contract with doctors for Fitness for Duty Evaluations. This process could work similarly to the "roundtable" process used for workers' compensation.

Another concern she has is that we not expand what's required under the ADA law. She feels that we have to keep in mind that EEOC provides guidance but their guidance isn't law. Multiple courts have entered decisions saying they are overstepping what the law requires so I don't think we want to be in the position, through regulatory process, to be expanding what the ADA requires and gave a detailed example. She also questioned whether there was a desire to give some thought

to individuals on reassignment having to serve a probationary period. For example, if you're reemployed in a different class and a different agency, you do serve a new probationary period.

Shelley Blotter: Stated that there have been discussions about the role that DHRM would take as far as determining whether the person was qualified and there's a level of discomfort to make the determination of whether or not someone is disabled. Our expertise is in evaluating their education and experience to see whether they then meet those qualifications, but not from a medical standpoint. Acknowledged the suggestion to include Risk Management and asked Ms. Hughes to comment further.

Carrie Hughes: Stated that the process that we are providing for, especially with the form that we've provided to agencies is, one, that they evaluate the essential functions, but also that they provide what the restrictions are, independent of those essential functions. One of the things we were looking at is, that each agency would have those restrictions and be able to compare them to the essential functions of the position being considered.

Shelley Blotter: Stated we're wanting to make certain that we didn't leave out the agency in making the determination of whether this person could perform those duties.

Kareen Masters: Explained the process that she goes through with the reassignment. Stated that she wants some assurance that other departments are held to the same standards.

Kimberley King: Stated she would want to make sure that before we got a reassignment that the department did go through a thorough analysis to make sure that the employee does have a disability that qualifies. She explained their process and agreed, not all positions are going to be filled just because they're vacant. She agreed that the idea to involve Risk Management was good. Ms. King went on to explain the roundtable that happens for workers' compensation, and thinks that can be incorporated into this process. Stated her other concern is, that our department has a fast and hard rule that if there's an industrial injury, we will do light duty. Light duty is not provided for non-industrial injuries.

Carrie Hughes: Asked if subsection 2 was being referenced.

Kimberley King: Confirmed that it was and that it says "may."

Carrie Hughes: Stated that's what she was going to point out and that it is permissive.

Kimberley King: Stated concerns about having to argue with employees regarding something that is permissive.

Shelley Blotter: Asked for additional comments; there were none.

284.120 Adoption by reference of federal law, regulations and manual regarding persons with disabilities

Carrie Hughes: Stated the amendment to NAC 284.120 adopts the Federal ADA meaning of the term ‘interactive process’, as used in the proposed new regulations, outlining the reassignment process.

Kimberley King: Gave thanks for working on this and recognized this is not easy. She gave her appreciation for getting this bill passed and at least getting this process going.

Shelley Blotter: Gave thanks to Ms. King and asked for additional comments; there were none. Ms. Garton was asked to continue with the introduction of the proposed regulations.

284.658 “Grievance” defined

Michelle Garton: Stated the proposed amendment is to NAC 284.658, “Grievance” defined. The first change is to add ‘classified’ to identify the individuals’ eligible to file a grievance. The second proposed amendment would provide the Division of Human Resource Management the authority to remove a grievance from Steps 1-3 if it was not in the correct venue. She explained the importance of getting the complaint in the correct venue due to timelines. She went on to say if the regulation is adopted and during Steps 1-3, an agency identifies a grievance that seems to be in the wrong venue or has been filed by an individual who is not eligible to use the process, a form can be completed and submitted to our office for review. A copy of the proposed request form was available at the workshop. She noted that if there is a question of the facts then the grievance would be allowed to proceed through the grievance process.

Shelley Blotter: Clarified that the form has not been adopted yet, but only proposed. She also stated that it would be a good tool when working with DAGs to determine the correct jurisdiction.

Brian Boughter: Gave thanks to the Department for the addition of the word ‘classified’ in subsection 1 and also appreciates the consideration for the removal of grievances. Too much time is spent at Steps 1, 2 and 3 for grievances that have no merit and no value and are certainly in the wrong venue.

Shelley Blotter: Thanked Mr. Boughter and congratulated him on his promotion. She also noted that this would not remove grievances from the process that have no merit. It would only handle jurisdictional issues. Asked for additional comments; there were none.

284.678 Submission, form and contents of grievance; informal discussions

Michelle Garton: Stated the proposed amendment to NAC 284.678 changes the phrase ‘date of origin of the grievance’ to the ‘date of the event of the grievance’, it flows with all of the communications and with the NEAT System, using date of the event.

Shelley Blotter: Asked if there were any comments and that this proposal was more of a housekeeping issue than substantive. There were no comments.

284.695 Submission of grievance to Employee-Management Committee

Michelle Garton: Stated, the next proposed amendment is to NAC 284.695. The proposal is for the Employee-Management Committee to establish a subcommittee consisting of two committee members to review the grievances for jurisdictional issues and/or if the same facts were decided upon by a previous decision, once it gets to the Step 4 level. She further explained the intention is to reduce the number of grievances heard by the whole Committee related to jurisdictional issues.

Shelley Blotter: Stated there was a need to make certain that if a jurisdictional issue wasn't resolved in Steps 1-3, there would be another opportunity for jurisdiction to be determined. The intent is that there wouldn't be a lot of these meetings because jurisdictional determinations would've already been made. Meetings of the Subcommittee would be public and have to go through the regular notice requirements. Asked for comments.

Kareen Masters: Thanked the Division in bringing this forward. Feels it's been a long time coming.

Shelley Blotter: Asked Michelle if she had further to add to that.

Michelle Garton: Continued to go over a couple of other amendments proposed for this regulation. The second proposed amendment, which is in subsection 2, changes the requirement that a hearing must be held within 45 days to that it must be scheduled within 45 days. This is how it's been interpreted and also the intent is really not to lengthen the process, but to allow for specific situations that may just prevent the grievance from being heard within those 45 days.

Shelley Blotter: Asked for comments; there were none.

284.6955 Hearing before Employee-Management Committee: Procedure

Michelle Garton: Stated the first change would be to have packets sent directly to the Clerk, rather than the Chair, which is actually what is currently happening. Further explained the change to requiring 12 packets from the parties. Also, the change from Chair or his/her designated representative, to Chair or Member of the Committee designated by the Chair. It basically clarifies that the Designee of the Chair would always be a Committee Member. The amendment to subsection 2 allows the Chair of the Committee or the Designee to dismiss a grievance with prejudice if the requirements for the submission of the packets are not met. She further stated that there continue to be questions surrounding the subpoena process. The proposed language clarifies the request for subpoena process. Subsection 7 says that when confidential information is identified in subpoenaed documents, the information must be redacted and an original copy must also be submitted, under seal, for use by the Committee. The sealed documents would only be opened should it be deemed necessary to gain clarifying information in order for the Committee to ultimately make a decision on the grievance. The proposed regulation requires one original be provided under seal, but as a result of a recent meeting of the EMC, it was determined that two copies of these documents should be submitted under seal, because there are almost always

Committee members serving in the North and the South, so two would provide a set for both locations. The change in subsection 8, clarifies that the Committee Member serving as the Chair for the meeting would be the individual to recognize Committee Members for questions during the hearing.

Shelley Blotter: Asked for comment.

Kimberley King: Stated agreement with the 15 working days if, we can change the notice of hearing to give us some additional days. She explained that there are only six days to get our copies for the grievances, or for the exhibits. More notice would allow for more preparation time.

Michelle Garton: Said, absolutely and we've talked about that in terms of an internal process to do that.

Kimberley King: Confirmed that would allow for more than six days?

Michelle Garton: Confirmed.

Kimberley King: Additionally explained the EMC's role in the subpoenas and feels that if the EMC is going to participate in determining witnesses, documents or other pieces to the hearing, the department would like notification of such to prevent double work.

Shelley Blotter: Agreed that seemed appropriate. Asked for additional comments.

Kareen Masters: Agreed with last suggestion. Asked for clarification on the meaning of 'submitting under seal'.

Michelle Garton: Clarified what submitting under seal was.

Kareen Masters: Asked if that prevented it from being a public record.

Michelle Garton: Confirmed.

Kareen Masters: Offered there should be additional language added that the documents 'under seal' would be reviewed only if necessary.

284.6957 Hearing before Employee-Management Committee: Continuance

Michelle Garton: Stated the next regulation is, NAC 284.6957. The significant change to this regulation is the inclusion of language related to placing a grievance into abeyance and gave reasons why this may be appropriate. The other proposed change to this section would allow the Chair or Committee Member designated by the Chair, to make the decision regarding a request for continuance.

Shelley Blotter: Asked for comment; there was none.

284.697 When resolution of grievance becomes binding.

Michelle Garton: Stated, the final regulation proposed for amendment is NAC 284.697. The proposed changes are as a result of a couple of the other amendments proposed in different regulations. The proposed amendment clarifies the decision of the grievance becoming binding when the Chair or the Committee Member he/she designates dismisses the grievance with prejudice because the employee failed to comply with the packet requirement. Also, it would also clarify decision becomes binding when it is determined the grievance lack jurisdiction or it is denied based upon on a previous decision by the subcommittee.

Shelley Blotter: Asked for comments; there was none. She reminded the audience of the ability to submit written comments on the comment cards, by letter, or by email.

3. ADJOURNMENT

Shelley Blotter: Closed the workshop.