

STATE OF NEVADA
Department of Administration
Division of Human Resource Management

REGULATION WORKSHOP

Held at the Legislative Counsel Bureau, 401 S. Carson Street, Room 2135, Carson City, Nevada; and via video conference in Las Vegas at the Grant Sawyer State Building, Room 4412E, 555 East Washington Avenue.

MEETING MINUTES
Wednesday, March 7, 2018

STAFF PRESENT IN CARSON CITY:

Peter Long, Administrator, DHRM
Shelley Blotter, Deputy Administrator, DHRM
Michelle Garton, Supervisory Personnel Analyst, DHRM
Carrie Hughes, Personnel Analyst, DHRM

OTHERS PRESENT IN CARSON CITY:

Mavis Affo, Personnel Officer, Public Safety
Allison Wall, Personnel Officer, NDOT
Oscar Fuentes, Insurance/Loss Prevention Specialist, NDOT
Gennie Hudson, Personnel Officer, DHRM
Alys Dobel, Personnel Officer, DMV

I. CALL TO ORDER

Shelley Blotter: Opened the meeting and introduced herself as the Deputy Administrator for DHRM. She explained that the reason for the workshop was to solicit comments from affected parties with regard to the regulations proposed for permanent adoption. Based on the feedback received, the proposed language may be changed or deleted and additional regulations may be affected. If the regulations are submitted to the Personnel Commission for adoption, amendment or repeal, the minutes from the workshop and any other comments received will be provided to the Personnel Commission when the regulation is presented for their consideration. Staff will provide an explanation of the proposed change with time allowed for comments.

II. Review of Proposed Changes to NAC 284

NEW	Refusal to submit to a screening test: Reasons an applicant or employee shall be deemed to have refused a test; potential consequences of a refusal to submit to a screening test.
284.893	Return to work of employee who tests positive for alcohol or controlled substance while on duty.

284.890	Transportation of employee to and from location of screening test.
284.578	Leave of absence without pay.
284.470	Preparation, filing, contents, discussion and distribution of reports; powers and duties of employees; review; adjustment of grievances
284.478	Appeal of decision of reviewing officer.
284.658	“Complaint” and “Grievance” defined.
284.678	Submission, form and contents of grievance; informal discussions.

Carrie Hughes: Addressed a proposed new regulation, *Refusal to submit to a screening test: Reasons an applicant or employee shall be deemed to have refused a test; potential consequences of a refusal to submit to a screening test.* NAC 284.882 adopts the U.S. Department of Health and Human Services standards for federal workplace drug testing programs by reference, which outlines what constitutes a refusal to submit to a drug test and the consequences for refusing to submit. However, due to concerns raised by a 2017 hearing officer decision and a need to address what constitutes a refusal to submit to an alcohol test, DHRM proposes the new regulation, which is based on the adopted federal workplace guidelines. Subsection 1 defines the terminology used in the regulation. Subsection 2 outlines what constitutes a refusal to test. Subsections 3 and 4 address the consequences for an employment candidate or employee who refuses to submit to an alcohol or drug test.

Shelley Blotter: Invited questions or comments regarding the regulation. **Allison Wall:** Introduced herself as NDOT HR Manager. She noted that she would be submitting comments in writing, however she also wished to place her comments on the record at this time. She stated that NDOT recently encountered such a situation. Under 2(e) of the regulation, the language states, “Fails to provide a sufficient amount,” which refers to a “shy bladder situation” through “required medical evaluation.” She noted that the Federal HHS does not refer to this and asked whether the State of Nevada will require the medical evaluation for non-DOT testing.

Carrie Hughes: Explained that the intent is not to add a Substance Abuse Professional (SAP) evaluation requirement. The standards referred to here are different than those of the DOT. These are the mandatory guidelines for federal agencies. The requirement was seen in the guidelines, which is why it was included in this regulation. **Allison Wall:** Stated that her department did not find this when they were dealing with a non-DOT. The Drug and Alcohol Program referred them back to the federal HHS program, however, they did not find the language there. Another issue is in regard to the “Alternate specimen.” The HHS referred them back to the State policy in addressing a situation where the individual is not able to produce a sufficient sample volume. She inquired as to whether a standard protocol would be created for an alternate specimen provision. The requirements currently state that the drug and alcohol testing company is required to call the DER (designated employer representative) to receive authorization for an alternate specimen. She asked whether this is being reviewed by DHRM. **Oscar Fuentes:** Introduced himself as Safety Manager for NDOT. He addressed the refusal portion of requiring a specimen as well as the alternative collection method. Alternative methods such as blood testing is not included in the NRS or NAC, which would assist the agency in managing the situation. **Shelley Blotter:** Suggested an offline meeting to address the specific concerns.

Oscar Fuentes: Referenced to 2(c), “Fails to provide a sufficient amount of specimen when

directed and it has been determined through a required medical evaluation that there was no legitimate medical explanation for the failure.” He addressed the issue of how much time the employee would be allowed in terms of obtaining the medical evaluation. Without specifically addressing this, it will be left open to interpretation for both employees and management. **Carrie Hughes:** Cited to 2(f), “If they fail to undergo the medical evaluation or evaluation as directed by the appointing authority,” and stated that this appears to give the agency control of setting up and mandating the timeline. **Allison Wall:** Recommended looking at the DOT requirements, as no information was found in the federal HHS regarding providing insufficient specimen and referral for a medical examination in a non-DOT test. It may be helpful to have the same guidelines as the DOT in order to prevent statewide inconsistency. The DOT allows a five-day window.

Carrie Hughes: Noted that comments are also requested on the portion of the regulation in Subsection 4 regarding consequences for employees who refuse to submit when applying for another State position. **Gennie Hudson:** Introduced herself as being from Agency HR Services and recommended there be a consequence for such a refusal, as this means the individual would likely refuse to take tests for other purposes as well. **Carrie Hughes:** Stated that the reference to consequences is meant to address discipline.

Alys Dobel: Introduced herself as being from the DMV. She agrees with Ms. Hughes and also with Ms. Hudson on the issue of employees moving between agencies. However, she would appreciate clarification on the question of where the authority begins and ends between the agency releasing the employee and the agency receiving the employee. This would particularly reference an instance that has the potential to lead to the employee’s suspension, demotion or termination and any possible disciplinary action. **Shelley Blotter:** Clarified that this is a situation in which an employee holds a position where they were not required to have pre-employment drug testing and are moving into a position that does require pre-employment drug testing and that the employee refuses such testing. The question is whether there should be a consequence to the employee for such refusal. **Alys Dobel:** Agreed that there should be consequences for such a refusal. If there is no consequence, the agency receiving the employee will have no knowledge of what transpired. **Shelley Blotter:** Stated that the receiving agency would be free to refuse to hire an employee who refused to take the required drug test.

Peter Long: Said DHRM would not want to put anything in regulation that penalizes an employee who was not required to do drug testing in their current position simply because they refuse to take a drug test for a position for which they applied that required that testing. If their current position does not require drug testing, they are being penalized for refusing to test for another position in their current agency, which is the intent of the regulation. **Alys Dobel:** Stated that she did not initially understand this and apologizes. She has worked at other agencies as well as the DMV, where failure to take the required preemployment testing within 24 hours results in the offer being rescinded. **Gennie Hudson:** Said that based upon Mr. Long’s statements, she would agree that perhaps it is not in the regulation, but would be in the prohibitions and penalties for the current agency of the employee. A recent situation in her division was that an employee got reverted back to their prior agency. That agency requires a fingerprint background check. The employee at first refused to do the check and finally agreed to take it, when she was shown the prohibition and penalties. **Peter Long:** Said that DHRM

will take a look at the issue, however, he is unsure that this is the appropriate section to address it. Hopefully the prohibitions and penalties are supported by statute or regulation and he would like to make sure they all tie together.

Allison Wall: Asked whether there is a current notification process between agencies regarding refusal or failure of drug testing. **Carrie Hughes:** Stated that she is not aware of a requirement within regulation. She cannot speak to whether the agency chooses to communicate such results or refusals to the other agency. **Allison Wall:** Recommends from NDOT that they do not impose a consequence, unless the issue is looked at holistically. Imposing a consequence for a refusal requires clear regulations that also identify guidance for a failure. At this point, she does not receive notice from other agencies regarding refusal to test or a fail. An employee whose car breaks down and is unable to take the test within 24 hours would be considered a fail. She would then be required to report this as a failed drug test to the other agency when in reality they just did not show up for the test within 24 hours. This provision would require a significant number of accompanying regulations. She does not feel it should be a consequence within this section.

Carrie Hughes: Discussed NAC 284.893, *Return to work of employee who tests positive for alcohol or a controlled substance while on duty*. The amendment removes Subsection 3, as it is now being included as Subsection 4 of the previously discussed proposed new regulation. **Shelley Blotter:** Clarified that if the new section were adopted, this language would be removed. She invited questions or comments. There were none.

Carrie Hughes: Addressed NAC 284.890, *Transportation of employee to and from location of screening test*. This amendment is being proposed to clarify that an appointing authority is responsible for providing transportation for an employee, only when the test is based on reasonable suspicion of impairment. The handout provided shows the language proposed at the workshop as well as the proposed language in LCB File R118-17, which will be taken to an upcoming Personnel Commission meeting. **Shelley Blotter:** Noted that a Personnel Commission meeting was scheduled last Friday, however due to a snow day in northern Nevada, the meeting is rescheduled for March 19th. Regulations will not be heard at that meeting, but will be discussed during the June Personnel Commission meeting. **Allison Wall:** Referred to part two of the handout and asked, "When it says, 'as appropriate,' is that referring to the addition of the green in number one?" **Shelley Blotter:** Stated her belief that the "as appropriate" is referring to (a), (b), or (c). **Allison Wall:** Clarified that the intent that the "as appropriate" is referring to number one and not referring to A, B and C. **Carrie Hughes:** Stated that Subsection 1 speaks to providing transportation to the location of the test, whereas Subsection 2 is talking about after the test is conducted. They are two different situations.

Allison Wall: Asked for clarification that the division should not have to provide transportation home for the employee, if they are not under reasonable suspicion or in a workers' compensation situation. **Shelley Blotter:** Stated that if the individual goes in for a preemployment screening test, they are not being provided transportation. **Alys Dobel:** Noted that Ms. Wall brings up a good point with workers' compensation; that is, if the employee is in an accident and is required to submit to testing, the department will not be required to provide transportation after testing. **Carrie Hughes:** Stated that workers' compensation had not

specifically been discussed. However, Subsection 2 only talks about after the test. It does not include the reasonable suspicion language. **Shelley Blotter:** Added that transporting an employee for workers' comp would depend on the situation and whether the supervisor believes the employee is under the influence. The proposed regulation relates specifically to pre-employment testing, for which there would be no transportation obligation. In a case of reasonable suspicion, there are obligations to ensure that the employee is either returned to their home or receives additional medical attention, if necessary. She invited additional comments. There were none.

Carrie Hughes: Addressed *NAC 284.578, Leave of absence without pay*. The language is being removed to be consistent with the matching provisions in *NAC 284.2508* relating to compensatory time, *NAC 284.539* relating to annual leave and *NAC 284.554*, relating to sick leave.

Shelley Blotter: Invited questions or comments. There were none.

Michelle Garton: Introduced herself as the Supervisory Personnel Analyst for DHRM's Consultation and Accountability Unit. The intent of the amendments to the next three regulations is to allow an employee to file a grievance on a contested report on performance, only if the overall rating remains "Does not meet standards" after the final decision of the appointing authority review. She reviewed the amendments to each regulation. The significant change to *NAC 284.470* is contained in Subsection 14, which discusses using the grievance process, if there is no response by the appointing authority to a request for review of a contested report on performance. The language in the subsection is amended to allow for an employee to file a grievance, if no response is received, only if the overall rating on the evaluation is "does not meet standards." Subsection 9 addresses that a discussion between the employee and supervisor is required and also that the employee must sign and return the report on performance to his or her supervisor within ten working days after the discussion. Subparagraph A is specific to when an employee does not contest the report on performance, so reviewing officer has been removed. Subparagraph (b) is specific to when an employee contests a report on performance, so language has been added to say that a contested report on performance will be forwarded to the appointing authority or the designated reviewing officer. Subsection 10 addresses when an employee is unavailable for the discussion required in Subsection 9 and the amendments mirror what was outlined regarding Subsection 9.

Shelley Blotter: Invited questions or comments. **Alys Dobel:** Sought clarification on Subsection 10 in regard to whether electronic mail is allowable. **Shelley Blotter:** Stated that the section does not specify the type of mail. The regulation states that notification of disciplinary action should be given more formally than electronic format. **Peter Long:** Asked whether it would be helpful to replace the word "mail" with "deliver." **Alys Dobel:** Stated that she likes that proposal. **Shelley Blotter:** Invited additional questions or comments. **Alys Dobel:** Referred to Subsection 4 and stated her understanding that it is only after the employee has received a substandard evaluation and has not identified specific points of concern. **Peter Long:** Explained that all three regulations are written to apply the proposed new limitation on filing a grievance. This would be that an employee could not grieve a performance appraisal, unless it was below standard overall. They could have an element or two that was rated below

standard, which would not allow them to grieve. It must be an overall rating of below standard or substandard. **Shelley Blotter:** That this would apply to the results found after the reviewing officer's review. **Alys Dobel:** Stated that she disagrees for several reasons. One reason is that she does not merely look at the overall rating when hiring an employee from another area. The language in the comments are also considered. If this would impact the person working at the agency, there would be concerns, depending on what was written. In the past, there has been an instance where clarification was needed on the language in the review, including discussions with the individual's current supervisor and the individual themselves. If the employee had not had the right to go before the EMC, there may have been some internal bias. Typically, the person doing the review is an internal individual. She requested that individuals be allowed to go to the EMC to address language contained in their review that they may have an issue with.

Peter Long: Commented that to the best of his knowledge, a grievance on a below standard evaluation has never resulted in an EMC decision to overturn the overall appraisal. **Alys Dobel:** Commented that some employees may fear making waves and feel more comfortable once they file a grievance from the standpoint of feeling protected against retaliation. **Gennie Hudson:** Agreed, noting that some employees would prefer to file a grievance from any substandard rating and/or any comments in their evaluation. These employees would be very unhappy upon losing this ability. If percentages were to "go away" from the evaluation form, this could potentially change the overall ending result of the evaluation. **Peter Long:** Stated that this comment moves into territory that has not been approved one way or another. **Allison Wall:** Commented that the EMC currently receives grievances on "just about everything," and is then free to decline to hear the grievance based on lack of jurisdiction. She asked for clarification that EMC would truly be declining to hear the grievances. **Peter Long:** Confirmed that the proposed regulation would allow DHRM to remove this from the grievance process, if the result was not a below standard. **Allison Wall:** Asked if they would remove it at Level 1, if the agency notified them. **Shelley Blotter:** Stated that the remaining regulation changes would be presented and then there would be a response to this question.

Michelle Garton: Addressed *NAC 284.478*. The amendment to this regulation will allow for an employee to use the grievance process for a report on performance only when the overall rating of the report remains, "does not meet standards," after a final decision has been made by the appointing authority following a review of the contested report. The amendment for *NAC 284.658* includes the word "substandard" as it relates to a contested report of performance into the definition of grievance. **Allison Wall:** Said that currently, the agency goes through the three steps trying to resolve the issue in-house, but the EMC has already heard multiple grievances and cases, resulting in an ability to do anything for the grievant, who is at a specified standard, including exceeds standard.

Shelley Blotter: Invited further questions or comments. There were none.

Michelle Garton: Discussed *NAC 284.678*. Language in this regulation has been added to Subsection 1, which will require an informal discussion between the parties to a grievance during the 20 working days after the date of the event leading to the grievance or the date when the employee learns of the event leading to the grievance. Also, it would be required that the

date and time of the meeting must be included in the statement of the grievance. Input is desired regarding the provision to include the date and time. **Shelley Blotter:** Commented that this regulation was by request and asked for input. **Mavis Affo:** Introduced herself as being from Public Safety and stated that the date is helpful, however time could be cumbersome. There may be cases where no one knows the time. In cases where the time is known, it would be helpful. She asked for clarification that it was the employee's responsibility to document the date and time in the grievance and what the consequences of not including the information might be. **Michelle Garton:** Said there are likely to be many times were an employee will not include this in the details tab. In that case, it would be appropriate that it is documented in the details or in the step one response. **Mavis Affo:** Agreed with this approach, stating that it would not be significant enough to kick the grievance out of the process. It could be submitted via addendum by the employee, which the HR office can include as part of the grievance. **Michelle Garton:** Added that it could be at any of the other steps, but also in the log notes. **Mavis Affo:** Stated that this is important, because there are times when both sides fail to have a meaningful discussion which could have led to the resolution of the concern all together. As such, making it a requirement for them to have a dialogue serves an important purpose. **Alys Dobel:** Voiced agreement with Ms. Affo's comments. The conversation is very important. Many times, the employees do not attempt to resolve the issue within the 20 days.

Shelley Blotter: Invited further questions or comments. There were none. She expressed appreciation for all the comments provided. She invited further comment submissions via email or comment card.

III. ADJOURNMENT

Shelley Blotter: Adjourned the meeting.