

Steve Sisolak
Governor

Guy Puglisi
Chair



Jennifer Bauer
Co-Vice-Chair

Pauline Beigel
Co-Vice-Chair

Tori Sundheim
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**STATE OF NEVADA
EMPLOYEE-MANAGEMENT COMMITTEE**
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**Meeting Minutes of the Employee-Management Committee
August 29, 2019**

Held at the Nevada State Library and Archives Building, 100 N. Stewart St., Conference Room 110, Carson City, Nevada, and the Grant Sawyer Building, 555 E. Washington Ave., Room 1400, Las Vegas, Nevada, via videoconference.

Committee Members:

Management Representatives	Present
Mr. Guy Puglisi - Chair	
Ms. Jennifer Bauer	X
Ms. Pauline Beigel	
Mr. Ron Schreckengost	
Ms. Jennelle Keith	
Ms. Tonya Laney	X

Employee Representatives

Mr. Tracy DuPree	
Ms. Turessa Russell	
Ms. Sherri Thompson	X
Ms. Sonja Whitten	X
Ms. Dana Novotny	

Staff Present:

Ms. Tori Sundheim, EMC Counsel, Deputy Attorney General
Ms. Nora Johnson, EMC Coordinator
Ms. Ivory Wright-Tolentino, EMC Hearing Clerk

1. Call to Order

Co-Vice-Chair Bauer 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.

Co-Vice-Chair Bauer opened the meeting with Committee introductions.

4. Adoption of the Agenda – Action Item

Co-Vice-Chair Bauer requested a motion to adopt the agenda.

MOTION: Moved to approve the agenda.

BY: Member Laney

SECOND: Member Thompson

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

5. Discussion and possible action related to Motion to Dismiss Grievance #6333 of Mark Elliot, submitted by the Department of Health and Human Services – Action Item

Grievant was represented by Anthony L. Hall, Esq. Personnel Officer II, Annette Altman (“Ms. Altman”) represented the agency-employer, Nevada Division of Public and Behavioral Health (“NDPBH”). NDPBH filed a Motion to Dismiss, which was denied on the grounds that NDPBH did not meet its burden of proof.

Mr. Elliott objected to all of NDPBH’s witnesses on the grounds that the proposed witnesses could not offer firsthand information regarding whether Mr. Elliott was directed to remain on standby.

NDPBH disagreed with Mr. Elliott as to Drew Cross, Agency Manager, and Yeng Choa (Andy), Administrative Services Officer, but accepted Mr. Elliott’s objections to the remaining proposed witnesses Blanche Dieket, Personnel Analyst 1, and Logan Kuhlman, Personnel Analyst 1. Drew Cross and Andy Chao were sworn in as witnesses and testified at the grievance hearing.

STATEMENT OF THE CASE

Mr. Elliott contends that he qualified for standby pay, as he met each of the NAC 284.218(1) elements, for the duration of his tenure as the Facility Supervisor 2 at Lake’s Crossing Center (“Lakes Crossing”).

Mr. Elliott also argues he is entitled to penalty pay pursuant to NRS 608.050 due to NDPBH's failure to adequately compensate him with standby pay. NAC 284.218 establishes five criteria that need to be met in order for an employee to qualify for receipt of standby pay. NAC 284.218(1) states:

1. A nonexempt employee in the classified service of the State is on standby status when he or she is:
 - (a) Directed to remain available for notification to work during specified hours;
 - (b) Prepared to work if the need arises;
 - (c) Able to report to work within a reasonable time;
 - (d) Directed by his or her supervisor to carry a paging device, provide a telephone number where he or she may be notified or provide any other acceptable means for notification; and
 - (e) Allowed to use the time during which he or she is waiting for notification to work for his or her personal pursuits.

See NAC 284.218(1).

Lakes Crossing is a facility that houses and evaluates in-patients twenty-four hours a day, seven days a week.

Due to the nature of the facility's services, an employee must be available for maintenance at all times.

As Facility Supervisor 2, it was Mr. Elliott's responsibility to fulfill this duty.

Accordingly, Mr. Elliott argues he maintained standby status at all hours of every day outside of his scheduled work hours during his tenure in the Facility Supervisor 2 position, except for those days he was pre-approved for leave.

NDPBH contends Mr. Elliott did not meet the NAC 284.218(1) factors, and that he was compensated appropriately each time he was called back into work according to NAC 284.214 for callback pay

NDPBH does not intend to deprive any of its employees' appropriate pay and compensation; however, it has policies and procedures in place that document those employees that are on standby pursuant to NAC 284.218.

The agency records hours worked after the acceptance of a schedule, which is then recorded on a time sheet.

Thus, Mr. Elliott could not have been on standby pay unless it was pre-approved and scheduled. NDPBH has no documentation to support that Mr. Elliott was in standby status prior to March 4, 2019. According to NDPBH, there was no additional evidence provided to support the pay

he is requesting based on duties that he did and was required to do under the auspices of his position.

Mr. Elliott was only placed on standby after he made a valid argument that such an arrangement would be beneficial to the facility. That standby status is currently being evaluated, and it is possible that it could be discontinued.

Mr. Elliott responds that agency misapprehends the application of NAC 284.218(1), as the recent actions taken after this grievance, admits the substance of his grievance.

Prior to March 4, 2019, Mr. Elliott was only compensated for being called back to work pursuant to NAC 283.214.

Mr. Elliott testified that he initiated his request for standby pay on February 25, 2019, following knowledge that the maintenance supervisor and staff at the nearby Dini Townsend Hospital receive standby pay. After Mr. Elliott raised the issue of standby pay, Lakes Crossing Facility Director Drew Cross agreed with his request and officially assigned standby status to Mr. Elliott and another employee beginning on March 4, 2019. On March 4, 2019, Facility Director Drew Cross issued assigned such status in a Memorandum that states:

Effective March 4, 2019, the agency is implementing a rotating standby status schedule for the Maintenance Department. This will help the agency ensure maintenance services remain available 24 hours a day within the facility. Standby pay will be applied and compensated in accordance with NAC 284.218 and LLC Policy #:1.117 – Standby.

The only difference prior to March 4, 2019 is that Mr. Elliott did not previously share responsibility for maintenance emergencies with another employee.

Further, during the course of the grievance process, the Agency notes it agreed and recognized that at the point at which he was issued a work cell phone on June 18, 2018, it could be determined, possibly, that standby status could have been implied.

Mr. Elliott therefore argues that NDPBH's actions evidence that he met all of the NAC 284.218(1) criteria.

I. The Parties Arguments Regarding the NAC 284.218(1) Criteria

A. Whether Mr. Elliott was “[d]irected to remain available for notification to work during specified hours.”

NDPBH argues that Mr. Elliott did not meet criterion NAC 284.218(1)(a) for standby status, which provides that Mr. Elliott must be

“[d]irected to remain available for notification to work during specified hours.”

According to NDPBH, the reason Mr. Elliott could not meet this criterion is because “[t]he agency did not have a standby directive in place for your department prior to March 4, 2019.”¹

The practice at Lakes Crossing is to send out an e-mail and post for those who are on standby pay.

Mr. Elliott did not produce any memorandum, notes, texts, e-mails, or any other documentary evidence that reflects that his supervisor told him to be available after hours or what the requirements were.

Mr. Elliott argues that 284.218(1)(a) requires a direction to remain available but does not specify documentation.

According to Mr. Elliott, a direction to remain available includes a verbal instruction that Mr. Elliott is to remain on standby.

Mr. Elliott wrote and testified that he “was directed by his supervisor, Stan Boldis, at the start of his employment with Lakes Crossing, that [he] would be on call to handle emergencies as they arose at the facility.”² Mr. Elliott further testified that his supervisor, Stan Boldis, on multiple occasions reminded him of this instruction, and the fact that he was called after hours as he was needed corroborates his testimony.

He also testified that there were exceptions for days he was scheduled for vacation.³

B. Whether Mr. Elliott was “[d]irected by his or her supervisor to carry a paging device, provide a telephone number where he or she may be notified or provide any other acceptable means for notification.”

NDPBH argues that Mr. Elliott could not meet criterion NAC 284.218(1)(d) for standby status until at least April 18, 2018, when he was issued a work cell phone.

During the course of the grievance process, NDPBH offered to pay Mr. Elliott for standby pay beginning on April 18, 2018.

¹ Step 1 Response, Page 2.

² Step 1 Grievance, Page 1.

³ Notably, NDPBH did not provide any witnesses that contradict Mr. Elliott’s testimony. NDPBH sought to introduce an unauthenticated voice message of which there was no prior notice or means to authenticate it during the hearing. Mr. Elliott objected to the introduction of this evidence and the EMC sustained the objection.

During the hearing, NDPBH offered that the Division Administration agreed and recognized that at that point it could be possibly determined that Mr. Elliott could have met this criterion.

Mr. Elliott argues the agency misapprehends the law because he was asked to provide his personal phone number in accordance with 283.218(1)(d), which provides that Mr. Elliott must be “[d]irected by his or her supervisor to carry a paging device, provide a telephone number where he or she may be notified or provide any other acceptable means for notification.”

Mr. Elliott testified that he was directed to provide his telephone number so that he could be notified of maintenance needs after hours.

NDPBH responds that all staff are asked for their phone numbers, or to put their phones “in control.”

Therefore, Mr. Elliott’s being called back to work on his personal phone prior to June 18, 2018, does not prove that he was on standby status. According to Lakes Crossing, employees are contacted outside of work often and are appropriately compensated through callback pay. Just because an employee was contacted outside of their regular work hours does not mean they are in a ready to work status.

Accordingly, for all of the times that Mr. Elliott was called back to work, he was compensated under the applicable regulation at the minimum two hours per return to work.

Mr. Elliott provided call logs that show that he was in fact contacted by Lakes Crossing on his personal cell phone in order to respond to facility needs outside of his regular work hours.

As Facility Supervisor 2, he was not only responding to emergency maintenance calls that required him to come back into work, but also to questions the agency or its contractors had while performing maintenance on the facility at all hours.

According to Mr. Elliott, “[t]his would regard maintenance issues, and breakdowns of the physical plant that would not be able to be handled by other staff at the facility.”⁴ He testified that, as the supervisor, if he was not able to respond to a call then he had other staff he could ask for assistance. However, they have had periods of time of not having staff, so during those times he would always respond.

NDPBH responds that Mr. Elliott failed to identify all of the calls he received and did not provide evidence of any work-related texts on his personal phone. Without a formalized process, there was no expectation that either Mr. Elliott or another member of maintenance be available to answer questions of staff off site.

⁴ Step 1 Grievance, Page 1.

Mr. Elliott had every right to not answer the phone because the only time he would be held to answering the phone is if he were on standby status. NDPBH has vendor alternatives that could have been utilized without calling maintenance.

NDPBH also pointed out that those calls highlighted in Exhibit 6 of Mr. Elliott's only totaled about 21 minutes. NDPBH also questioned why Mr. Elliott failed to provide the state-phone records or to record the time on his timesheets.

Mr. Elliott responds that the phone records he submitted reflect corroboration of the instruction that he was on standby prior to his receipt of a work phone on June 18, 2018. He did not provide the state phone records because the state owns the phone.

Mr. Elliott was told to use the callback code in NEATS for reporting his hours. He followed his supervisor's instructions about how to fill out his timesheet to log his time was not told to record standby time.

Mr. Elliott was never aware of the standby pay until it was brought to his attention that he met the standby criteria. After March 4, 2019, he began using the standby code as directed by the agency.

Mr. Elliott also testified that he was only issued a cell phone after he showed his supervisor the amount of calls he was receiving on his personal phone from contractors and the agency. Even after he was issued a work phone on June 18, 2018, Mr. Elliott testified that he continued to receive work-related phone calls and text messages on his personal phone, outside of his regular work hours. NDPBH did not provide any witnesses to contradict Mr. Elliott's testimony.

C. Whether Mr. Elliott was “[p]repared to work if the need arises,” “[a]ble to report to work within a reasonable time,” and was “[a]llowed to use the time during which he or she is waiting for notification to work for his or her personal pursuits.”

Mr. Elliott testified to the remaining three NAC 284.218(1) criteria, NAC 284.218(1)(b), (c), and (e).

Mr. Elliott testified that he made himself available for notification to work outside of regular work hours between October 24, 2016, up until March 4, 2019.

Mr. Elliott does not drink alcohol and therefore during the times he alleges he was on standby he was not under the influence of alcohol. He lives roughly twenty-five minutes from the facility and has always been available to respond within a reasonable time. NDPBH does not dispute this testimony.

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. Mr. Elliott was a non-exempt State of Nevada employee at the time he filed his Grievance.
2. Mr. Elliott was promoted to Facility Supervisor 2 at Lake's Crossing Center ("Lakes Crossing") in the Maintenance Department on October 24, 2016.
3. Although there was no policy or procedure in place, Mr. Elliott was in fact being utilized as a standby employee from October 24, 2016 until March 4, 2019.
4. On or before October 24, 2016, Mr. Elliott was directed to remain available for notification to work at all times outside of his regular hours, except for vacation days.
5. On or before October 24, 2016, Mr. Elliott was asked to provide his personal cell phone number for notification outside of his regular work hours.
6. Since October 24, 2016, Mr. Elliott was prepared to work as the need arose.
7. Since October 24, 2016, Mr. Elliott remained available for notification to work outside of his regular work hours, except for vacation days.
8. Since October 24, 2016, Mr. Elliott was allowed to use the time during which he was waiting for notification to work for his personal pursuits.
9. Since October 24, 2016, Mr. Elliott was regularly called regarding work matters outside of his regular work hours, except for vacation days.
10. Since October 24, 2016, Mr. Elliott was compensated with "call-back pay" for those times he was called back into work after hours.
11. On June 18, 2018, Mr. Elliott received a work-issued mobile device.
12. On February 25, 2019, Mr. Elliott inquired with Human Resources about standby pay after he became aware that the maintenance supervisor and his staff at Dini Townsend Hospital receive standby time as defined by NAC 284.218.
13. Pursuant to Mr. Elliott's inquiry, on March 4, 2019, Lakes Crossing began implementing a rotating standby status schedule for the Maintenance Department.
14. On March 6, 2019, Mr. Elliott filed a grievance requesting standby pay from October 24, 2016, which began the duration of his tenure as the Facility Supervisor 2.
15. Mr. Elliott has not been discharged or laid off.
16. NDPBH did not intentionally withhold pay from Mr. Elliott.

CONCLUSIONS OF LAW

1. 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).
2. Mr. Elliott's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
3. The Committee discussed and relied on NAC 282.255-284.257.
4. That GRIEVANT met all of the criteria for standby status as defined by NAC 284.218.

5. That the retroactive pay date is October 24, 2016, which satisfies the GRIEVANT's request to be compensated for standby status for the duration of his tenure as Facility Supervisor 2.
6. That penalty pay pursuant to NRS 608.050 does not apply and shall not be granted.
- 7.

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. 6333 is hereby GRANTED.

The EMC further refers this matter to Central Payroll, section of Division of Human Resources Management. This matter is referred to Central Payroll as the subject matter expert in the best position to calculate, neutrally, the retroactive standby pay granted to the grievant. Under NRS 284.384.385(a) and NAC 284.697(1), the decision of the EMC is not binding on the Agency until the Budget Division determines the resolution is feasible on the basis of its fiscal effects.

6. Discussion and possible action related to Grievance #6373 Thor Martinez, Department of Health and Human Services – Action Item

Co-Vice Chair Bauer opened the Committee for discussion.

Member Laney stated it was clear the grievant was requesting the grievance move forward to hearing as the issue was not resolved during the grievance process.

Member Laney stated her concern was the Committee could not grant the requested resolution based on the EMC's authority and reviewing the EMC policy and procedure.

Member Thompson stated it appeared the grievant was asking the EMC to request an audit of his job duties which was not within the scope of the EMC.

Member Whitten stated she did not think the request fell under the Committee's jurisdiction.

Co-Vice Chair Bauer stated she agreed with the Committee and the grievant did not make the issue clear.

Co-Vice Chair Bauer stated the matter at hand was if this met the definition of a grievance and if the Committee had jurisdiction.

Member Laney stated she did not feel this met the definition of a grievance as no injustice had been proven.

Member Thompson stated she agreed no specific incident was cited and it did not meet the definition.

Member Laney moved to deny hearing for grievance #6372 the EMC lacks jurisdiction over this grievance as it did not meet the definition of a grievance as cited in NAC 284.658.

Member Thompson seconded the motion.

Co-Vice-Chair asked if there was any discussion, there was none.

MOTION: Moved to deny hearing for grievance #6372 the EMC lacks jurisdiction over this grievance as it did not meet the definition of a grievance as cited in NAC 284.658.

BY: Member Laney

SECOND: Member Thompson

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

7. Discussion and possible action related to Grievance #6492 Michael Peterson, Department of Corrections – Action Item

Co-Vice Chair Bauer opened the Committee for discussion.

Member Laney stated the Committee should not move this grievance to hearing as the agency stated the written reprimand would be removed.

Member Laney stated the grievant was requesting the grievance be moved to hearing as he would be receiving a Letter of Instruction (LOI) in lieu of the written reprimand.

Member Laney stated the EMC should not hear the issue of the LOI as the LOI was not part of the disciplinary process and the agency stated the reprimand was done in error.

Member Thompson stated she agreed as the agency had taken steps to resolve the issue.

Member Whitten stated while she did not like that the agency swapped one for the other, if the grievant wanted to grieve the LOI, he was able to do so as the Committee did not know if the LOI was a coaching tool or disciplinary.

Co-Vice Chair Bauer stated she agreed the agency resolved the original issue in regard to the written reprimand and an LOI in its true form would not be discipline and therefore, could not be grieved.

Co-Vice-Chair Bauer stated the employee is free to submit a grievance if the content of the LOI is disciplinary in nature.

Member Laney moved to deny hearing for grievance #6492 based on NAC 284.658 as the Letter of Instruction falls outside the EMC's jurisdiction.

Member Thompson seconded the motion.

Co-Vice-Chair Bauer asked if there was any discussion, there was none.

MOTION: Moved to deny hearing for grievance #6492 based on NAC 284.658 as the Letter of Instruction falls outside the EMC's jurisdiction.

BY: Member Laney

SECOND: Member Thompson

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

8. Public Comment

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

9. Adjournment

Co-Vice-Chair Bauer adjourned the meeting at approximately 11:58 am