



STATE OF NEVADA
EMPLOYEE-MANAGEMENT COMMITTEE
100 N. Stewart Street, Suite 200 | Carson City, Nevada 89701
Phone: (775) 684-0135 | <http://hr.nv.gov> | Fax: (775) 684-0118

Meeting Minutes of the Employee-Management Committee
September 5, 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	X
Ms. Jennifer Bauer	X
Ms. Pauline Beigel	
Mr. Ron Schreckengost	
Ms. Jennelle Keith	
Ms. Tonya Laney	X

Employee Representatives

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

Staff Present:

Mr. Robert Whitney, EMC Counsel, Deputy Attorney General
Ms. Carrie Lee, Acting EMC Coordinator
Ms. Ivory Wright-Tolentino, EMC Hearing Clerk

1. Call to Order

Chair Puglisi called the meeting to order at approximately 11:00 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 Whitten

SECOND: Member Russell

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

5. Discussion and possible action related to Grievance #6409 of Jesse Haines, Department of Corrections – Action Item

This matter came on for hearing before the Employee-Management Committee¹ (“EMC”) on September 5, 2019 pursuant to NAC 284.695 and NAC 284.6955, regarding Grievance No. 6409, filed by Correctional Officer Jesse Haines (“Grievant” or “Officer Haines”). Grievant was in proper person. The agency-employer, the Nevada Department of Corrections (“NDOC”), was represented by Personnel Officer II Megan Bottom (“Ms. Bottom”). There were no witnesses testifying at the hearing.

STATEMENT OF THE CASE

Grievant is a correctional officer at the Northern Nevada Correctional Center (“NNCC”) in Carson City, NV. Grievant opened by stating in substance that NDOC needed to provide its employees the notice required by law before it could require its employees to work overtime.

Grievant added in substance that NDOC violated the law (NAC 284.242) requiring that State employees be provided with four hours-notice that they would be required to work overtime almost every day, and that when an employee protested NDOC threatened the employee.

¹ The Committee members present representing a quorum were: Guy Puglisi (DHHS), who chaired the meeting; Sherri Thompson (DETR), Tonya Laney (DMV), Jennifer Bauer (SPCSA), Tracy DuPree (DETR) and Turessa Russell (UNLV). Counsel for the EMC, Deputy Attorney General Robert A. Whitney, Acting EMC Coordinator, Carrie Lee and EMC Hearing Clerk, Ivory Tolentino were also present.

Grievant stated in substance that was there were previous EMC decisions concerning required notice prior to an employee being required to work overtime that NDOC continued to violate.

Grievant stated in substance that although he was not disciplined for failing to work overtime he had been threatened for refusing to work overtime a few years ago, and in fact had a written reprimand filed against him by NDOC two or three years ago for refusing to work overtime, which was removed as the result of a resolution conference.

Grievant stated in substance that he felt that NDOC switching to 12-hour shifts would be helpful to the situation, and he asked the EMC to fine NDOC \$500.00 for not providing him with the required four hours of notice prior to requiring him to work overtime on April 6, 2019.

Ms. Bottom stated in substance that, pursuant to the NAC's, NDOC was required to have certain posts at its facilities staffed, and that she did not believe Grievant had been disciplined for refusing to work mandatory overtime.

Ms. Bottom also stated in substance that the ability to mandate 12-hour shifts was beyond NDOC's control, and that to do so was a legislative decision.

Ms. Bottom noted that since January 2019 NDOC had hired 36 correctional officers at NNCC, and that this had somewhat alleviated the need for correctional officers to work overtime, although Grievant stated that he was required to sign in almost every day on NNCC's mandatory overtime list, and that he had been required to work mandatory overtime one time (in July 2019) after the date he filed his current grievance (April 6, 2019).

The EMC deliberated on Officer Haines' grievance.

Co-Vice-Chair Bauer stated in substance that the EMC could not fine NDOC or mandate that it operate in a certain manner, or operate using 12-hour shifts.

Co-Vice-Chair Bauer also stated that it appeared Grievant suffered an injustice, as it appeared, he was not provided with the required four hours-notice pursuant to NAC 284.242 prior to being required to work overtime on April 6, 2019.

Member Russell noted in substance that she was in favor of reconfirming the decisions previously made by the EMC (Bilavarn and Olague) that deemed signing in on the mandatory overtime list was insufficient to meet the four hour notice requirement pursuant to NAC 284.242, as NDOC correctional officers signed in on the mandatory overtime list far more than they actually worked overtime.

Member Thompson state in substance that the EMC could not mandate that NDOC operate with 12-hour shifts, nor could the EMC fine NDOC \$500.00. Member Thompson also stated in substance that she felt that having correctional officers sign the mandatory overtime list at the start of their shift did not constitute four hours-notice in compliance with NAC 284.242.

Co-Vice-Chair Bauer motioned to grant Grievance No. 6409 in part and deny it in part. Co-Vice-Chair Bauer moved to grant Grievance No. 6409 in part based on consistency with the EMC's previous decisions, 13-19 (Olague) and 14-19 (Bilavarn), and evidence that the NDOC had not complied with NAC 284.242(1). Co-Vice-Chair Bauer motioned to deny Grievance No 6409 based on Grievant's proposed resolution of requiring NDOC to implement 12-hour shifts and a fine of \$500.00, due to lack of EMC jurisdiction.

Co-Vice-Chair Bauer's motion was seconded by Member DuPree and carried 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 at NNCC during the appropriate time period.
3. On April 6, 2019, Grievant was required to sign NDOC's mandatory overtime list.
4. Grievant was required to sign the mandatory overtime list at the start of his shift, which began at 5:00 a.m. on April 6, 2019.
5. As noted in the Bilavarn (No 14-19) and Olague (No. 13-19) Decisions, Grievant and other correctional officers were not actually required to work overtime each time they signed the mandatory overtime list at the start of their shift.
6. Grievant's shift was scheduled to end at 1:00 p.m. on April 6, 2019.
6. At approximately 11:45 a.m. on April 6, 2019, Grievant was notified that he would be required to work overtime.
7. Grievant in fact worked overtime on April 6, 2019.
8. Grievant requested as a resolution that NDOC provide him four hours-notice when NDOC required him to work overtime.
9. Grievant also requested that the EMC mandate that NDOC move to 12-hour shifts for every post at NNCC, and that the EMC require that NDOC compensate Grievant \$500.00 for every time that Grievant was notified that he was required to work overtime without the required for hours-notice.

CONCLUSIONS OF LAW

1. For this grievance, it was Grievant's burden to establish by a preponderance of the evidence that NDOC violated NAC 282.242 by requiring him to work overtime without providing the required four hours-notice.
2. Grievant also needed to establish that NDOC be mandated to operate at NNCC using 12-hour shifts, and that NDOC be required to compensate him \$500.00 each time it required him to work overtime without providing the required four-hour notice to him.
3. 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).
4. Officer Haines grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
5. NAC 284.242 states in relevant part:

NAC 284.242 Overtime: Authorization.

1. If a nonexempt employee is required to work overtime, the overtime must be authorized pursuant to subsection 10 of [NRS 284.180](#) and communicated to the employee at least 4 hours in advance by the responsible supervisor before being worked, unless an unpredictable emergency prevents prior approval and communication.
6. The EMC did not have jurisdiction to mandate that NDOC switch to 12-hour shifts at NNCC.
7. The EMC had no jurisdiction to require that NDOC pay Mr. Haines \$500.00 compensation each time it required him to work overtime after failing to provide him with the required four hour notice pursuant to NAC 284.242(1).
8. NDOC failed to comply with NAC 284.242 on April 6, 2019, because having Grievant sign the mandatory overtime list at the start of his shift did not constitute four hours-notice that he would be working overtime.

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. 6409 is hereby GRANTED in part and DENIED in part. Grievance No. 6409 is granted in part based on consistency with the EMC's previous decisions, 13-19 (Olague) and 14-19 (Bilavarn), and evidence that the NDOC had not complied with NAC 284.242(1). Grievance No 6409 is denied in part based on Grievant's proposed resolution of requiring NDOC to implement 12-hour shifts at NNCC and

pay a fine of \$500.00 each time it failed to comply with NAC 284.242(1), due to lack of EMC jurisdiction.

MOTION: Moved to grant grievance #6409 in part and deny in part.
BY: Co-Vice-Chair Bauer
SECOND: Member DuPree
VOTE: The vote was unanimous in favor of the motion.

6. Discussion and possible action related to Grievance #6210 of David Eckard, Department of Corrections – Action Item

This matter came on for hearing before the Employee-Management Committee² (“EMC”) on September 5, 2019 pursuant to NAC 284.695 and NAC 284.6955, regarding Grievance No. 6201, filed by Correctional Officer David Eckard (“Grievant” or “Officer Eckard”). Grievant was in proper person. The agency-employer, the Nevada Department of Corrections (“NDOC”), was represented by Personnel Officer II Megan Bottom (“Ms. Bottom”). There were no objections to the exhibits by either party, and there were no witnesses testifying at the hearing.

STATEMENT OF THE CASE

Grievant is a correctional officer at High Desert State Prison (“HDSP”) at Indian Springs, NV. Grievant stated in substance that he began working for the State of Nevada, Department of Employment, Training and Rehabilitation (“DETR”) in 2011 and worked for DETR for approximately two years and four months.

Grievant stated in substance that he quit working for the State/DETR for a month but had a resolutions conference with DETR after he quit and was reinstated, and then he transferred from DETR to NDOC.

Grievant argued that NDOC was not applying all of his years of service with the State, as NDOC was not counting the two years and four months that Grievant was employed with DETR towards his seniority with NDOC, so that there was a break in his service.

Grievant in substance asked that the EMC require NDOC to consider his years of State service prior to April 28, 2014.

Grievant noted that NDOC, in its Administrative Regulation (“AR”) 301, was basing its seniority for purposes of shift bidding on an employee’s

² The Committee members present representing a quorum were: Guy Puglisi (DHHS), who chaired the meeting; Sherri Thompson (DETR), Tonya Laney (DMV), Jennifer Bauer (SPCSA), Tracy DuPree (DETR) and Turessa Russell (UNLV). Counsel for the EMC, Deputy Attorney General Robert A. Whitney, Acting EMC Coordinator, Carrie Lee and EMC Hearing Clerk, Ivory Tolentino were also present.

years of continuous State service without any break in employment with the State.

Grievant testified that his start date with NDOC was April 28, 2014, and that his last day with DETR was April 25, 2014.

Ms. Bottom argued that Grievance No. 6201 was really not an NDOC issue, and that the matter was really a grievance Officer Eckard had with DETR.

Ms. Bottom added that NDOC could not control continuous service dates, that those dates were all part of Human Resources' ("HR") Data Warehouse and were related to how terminations and reinstatements were coded.

Ms. Bottom stated in substance that NDOC had hired Grievant, and that he showed as a "new hire" on April 28, 2014 (However, later during the hearing Ms. Bottom corrected this statement and stated that it appeared Grievant was hired by NDOC as a transferee), and not as a reinstated employee or a transfer in, which would have allowed NDOC to have considered Grievant's previous service time.

Ms. Bottom also stated in substance that NDOC could not change the way that another agency moved an employee out of the State system, and that NDOC was not part of the resolution Grievant had with DETR.

Ms. Bottom also testified in substance that Grievant's paperwork showed, when he started with NDOC, that he was considered a rehire, which meant that there was no continuous service to be considered.

Ms. Bottom also pointed out that DETR was saying that Grievant had quit for a month before he was reinstated, which was why his continuous service date began in 2014 and not 2011.

It was noted by the EMC that Grievant's status upon starting employment with NDOC would not matter except for the fact that NDOC performed its shift bidding based on the State service time of its employees.

Grievant testified that he was unsure of what date the State HR Data Warehouse had as his hire date, but that it should have been in September 2011, as that was when he was hired by DETR.

Grievant also testified in substance that he believed his continuous service date was March 3, 2014.

Grievant stated that DETR had agreed to reinstate him to his original hire date, but that had not been done.

It was suggested by Member DuPree that Grievance No. 6201 be held in abeyance until it could be determined the information the HR Data Warehouse had concerning Grievant's hire date.

Chair Puglisi noted that such a motion would need to be made by one of the parties.

Ms. Bottom stated in substance that she had no concerns with Grievant's hire date; rather the relevant question appeared to be what Grievant's continuous service date was.

Ms. Bottom stated that her argument was that Grievant quit to withdraw his PERS, and then returned to State service.

Ms. Bottom noted that Grievant wanted his continuous service date to go back to 2011 and not have a gap of time in 2014, but that this was out of NDOC's control, as the events leading to this result had occurred prior to Grievant becoming an NDOC employee.

Member Thompson questioned Grievant as to whether he noticed what date on his hire/transfer paperwork had been used, to which Grievant responded that he did not know.

Chair Puglisi noted that Grievant's first hire date with the State was September 19, 2011, and that he resigned from DETR in February 2014. During the month off Grievant stated that he went to a resolution conference. On April 25, 2014, after Grievant's reinstatement with DETR (March 3, 2014), he resigned from DETR and transferred to NDOC.

Grievant testified in substance that he had contacted DETR and spoke with its Human Resources Director, who Grievant alleged told him two different things.

Grievant stated that DETR's Human Resources Director told him that he had a one month break in service and that he had removed his PERS, which was the defining break in service, so that was why Grievant was not entitled to his service years prior to 2014 being applied to NDOC.

Grievant stated that when he put this information in his grievance when addressing NDOC Warden Brian Williams his grievance was returned to him with information indicating that what DETR Human Resources had told him was not the case, and that DETR Human Resources had told NDOC that Grievant had not followed through with the settlement agreement.

In response to questioning, Grievant stated that he terminated State service on February 1, 2014, and removed his PERS contributions.

Grievant stated in substance that his termination was more for issues arising in the workplace and the resulting stress than any other reason.

Grievant also stated that he was reinstated by agreement with DETR to March 3, 2014.

Grievant noted however, that it was agreed upon in the resolution conference with DETR that he would be reinstated with his full-service years and the same pay grade and step he had prior to his termination of service.

Grievant stated that the exact date on which his service years were to start was not in the settlement agreement with DETR, but he reiterated that such a course of action had been agreed upon at his resolution conference.

Chair Puglisi noted in substance that when an employee left State service on his or her own and drew their PERS the employee started over if he or she returned to State service, and normally there was a new continuous service date because there was a break in State service.

Co-Vice-Chair Bauer stated that regardless of the reason, Grievant had at least a one-day break in State service without the repayment of his contributions.

Co-Vice-Chair Bauer stated that this one-day break would create a new continuous service date when Grievant returned to State service.

Co-Vice-Chair Bauer noted in substance that in order to remove his PERS contributions Grievant had to terminate from State service, which ended his State employment, and that even if Grievant was reinstated a day later a new employment relationship was created when he was reinstated.

Member Russell stated in substance that if the official record stated that Grievant was reinstated, and not discharged, and then rehired, then Grievant would have been reinstated. Member Russell also noted that in this case the official record said Grievant had transferred to NDOC.

Ms. Bottom testified in substance that on February 1, 2014, HR Data Warehouse, said concerning Grievant, "termed to pull PERS," and that Grievant was not reinstated with the State until March 3, 2014.

Ms. Bottom also argued that a reinstatement would not have anything to do with a continuous service date, and that reinstatement just meant that Grievant was reinstated to the same position at the same pay he had previously held before his break in employment.

Ms. Bottom stated in substance that Grievant's continuous service date was March 3, 2014.

Ms. Bottom also noted that it would be problematic if NDOC considered Grievant's previous years of State service, as State employees not

uncommonly left State service only to return to State employment at some point in the future.

The EMC deliberated on Officer Eckard's grievance.

Member DuPree stated in substance that a break in services was a break in service, and that when an employee had a break in service the employee had to start over with respect to his or her service years.

Member Laney stated her agreement with Member DuPree's position, noting that Grievant in fact did take at least a one-day break in service, and so the employee left State service and the date on which Grievant returned to State service was his new hire date.

Member Laney added in substance that she saw no other option than for the EMC to deny the grievance. Member Thompson agreed.

Co-Vice-Chair Bauer noted that NAC 284.0525 defined "continuous service" as service that was not broken by a separation except for those separations listed in NAC 284.598.

Co-Vice-Chair Bauer also stated in substance that breaks in continuous service under NAC 284.598 included military leave for active service, a layoff, and a separation as a result of a permanent disability arising from a work-related injury.

Member Laney added that she did not see a violation of NAC 284.598 or NAC 284.0525 in the grievance.

Co-Vice-Chair Bauer noted that in looking at the definition of a grievance as an injustice suffered by an employee out of the employment relationship, in this case the employment relationship currently was with NDOC and its application of AR 301.02, and so she was leaning towards denying the grievance based on evidence that NDOC had complied with its own regulation.

Member Russell stated that she was leaning towards denying the grievance based on AR 301.02, page three, which stated that seniority for shift bidding purposes was calculated based on an officer's continuous date of service, and that continuous date of service was defined by date of hire without breaks in State service.

Member Russell also stated that she was going back to Exhibit 2, Grievant's settlement agreement, with DETR page three, Paragraph 19, which stated that there were no oral agreements and/or representations made that would be considered outside of the settlement agreement.

Member Laney moved to deny Grievance No. 6201, as NDOC followed AR 301.02(2), and as the EMC determined there had been a break in Grievant's service as defined by NAC 284.0525 and NAC 284.598. Co-

Vice-Chair Bauer seconded Member Laney's motion, which carried 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 is currently employed by NDOC as a correctional officer.
3. Grievant started his State service with DETR on September 19, 2011.
4. Grievant left State service on February 1, 2014. As part of leaving State service Grievant removed his PERS contributions.
5. Grievant was reinstated with DETR pursuant to a settlement agreement on March 3, 2014.
6. Grievant's last day with DETR was April 25, 2014.
7. Grievant began employment with NDOC on April 28, 2014.
8. Grievant was hired by NDOC as a transferee.

CONCLUSIONS OF LAW

1. For this grievance, it was Grievant's burden to establish by a preponderance of the evidence that NDOC failed to follow AR 301.02(2).
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. Officer Eckard's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
4. AR 301.02(2) states that "[a]nnual shift bidding is based on each Officer's seniority. Seniority is calculated based on the officer's continuous date of service as defined by NAC 284.025. Pursuant to NAC 284.632 continuous service date is defined as date of hire without break in service."
NAC 284.0525 states: "[c]ontinuous service" means service which is not broken by a separation except for those separations listed in [NAC 284.598](#)."
5. NAC 284.598 states:
The following are not breaks in continuous service:
 1. Military leave for active service if the person returns from leave within 90 calendar days after an honorable discharge from military service.
 2. A layoff if the employee is reemployed within 1 year after the date he or she was laid off.

3. A seasonal layoff if the employee is reemployed within 1 year after the end of the previous seasonal appointment.
4. A separation as a result of a permanent disability arising from a work-related injury or occupational disease, if the employee is reemployed within 1 year after the date on which he or she sustained the permanent disability as determined pursuant to [NAC 284.6013](#).
6. Grievant had a break in service on February 1, 2014, when he quit State service and removed his PERS contributions. This action would have been a separation from State service, and none of the events listed in NAC 284.598 that are not considered a break in a State employee's continuous service were applicable.
7. Grievant was unable to demonstrate that the settlement agreement with DETR which reinstated him also provided that his continuous service date would be September 19, 2011.

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. 6201 is hereby DENIED. Grievant failed to demonstrate that NDOC failed to follow AR 301.02(2), as the EMC determined there had been a break in Grievant's State service as defined by NAC 284.0525 and NAC 284.598.

MOTION: Moved to deny grievance #6201.
BY: Member Laney
SECOND: Co-Vice-Chair Bauer
VOTE: The vote was unanimous in favor of the motion.

7. Discussion and possible action related to Grievance #6290 of Katie Jones, and Grievance #6296 of Samuel Butler, Department of Corrections – Action Item

This matter came on for hearing before the Employee-Management Committee³ ("EMC") on September 5, 2019 pursuant to NAC 284.695 and NAC 284.6955, regarding Grievance # 6296, filed by Samuel Butler ("Grievant" or "Mr. Butler"). This grievance was heard by the EMC simultaneously with # 6290, In re Grievance of Katie Jones ("Ms. Jones"). Mr. Butler and Ms. Jones were both nurses at NDOC's Northern Nevada Correctional Center ("NNCC") in Carson City, NV at the time their grievances were filed. Joshua Hendrickson ("Attorney

³ The Committee members present representing a quorum were: Guy Puglisi (DHHS), who chaired the meeting; Sherri Thompson (DETR), Tonya Laney (DMV), Jennifer Bauer (SPCSA), Tracy DuPree (DETR) and Turessa Russell (UNLV). Counsel for the EMC, Deputy Attorney General Robert A. Whitney, Acting EMC Coordinator, Carrie Lee and EMC Hearing Clerk, Ivory Tolentino were also present.

Hendrickson”) represented Mr. Butler and Ms. Jones. The agency-employer, Nevada Department of Corrections (“NDOC”), was represented by State of Nevada, Senior Deputy Attorney General Theresa Haar (“DAG Haar”). NDOC Chief of Nursing Services Theresa Wickham (“Ms. Wickham”) was sworn in and testified at the hearing. DAG Haar objected to Grievant’s Exhibit 4, as it was unclear when it was originally provided to the correctional nurses, or who it was actually provided to. The objection was overruled.

STATEMENT OF THE CASE

It was noted by Chair Puglisi that Attorney Hendrickson had argued in his pre-hearing statement that the EMC should decide the grievances without a hearing pursuant to NAC 284.695 based on the EMC’s decision in the Prost Grievance (Decision # 23-18), as that decision was a prior decision concerning similar facts and circumstances.

However, Chair Puglisi stated in substance that the reason the EMC had not done so was because the EMC could not just take for granted that the Prost Grievance was identical to Mr. Butler’s and Ms. Jones’ grievance.

Attorney Hendrickson argued that the relevant facts and law in the current grievances were the same as in the Prost Grievance, in that NDOC required its employees to perform work before and after the start of their shift without pay.

Attorney Hendrickson stated in substance that for the same reasons the EMC recognized in Prost, and to ensure consistency in the EMC’s decisions, the EMC should grant the grievances at hand.

Attorney Hendrickson further stated that the only new argument presented by NDOC in the present grievances was that the State was immune from claims under the Fair Labor Standards Act (“FLSA”).

Attorney Hendrickson argued that regardless of whether NDOC was required to pay its employees in compliance with Federal law it was still required to pay its employees for all work performed under Nevada law, so Federal immunity would not change the result.

Attorney Hendrickson also argued in substance that the State had waived its immunity to the FLSA pursuant to NRS 41.031(1).

Attorney Hendrickson added in substance that the State was required to pay its workers for work performed just as any other employer would be required to do.

Attorney Hendrickson also argued in substance that there was no dispute concerning the nurses’ work schedules.

Attorney Hendrickson stated in substance that he did not believe there was any dispute that correctional nurses performed during their work the tasks specified in his brief prior to reporting for their regularly scheduled shift, such as signing in and picking up keys, being ready to respond in case of an emergency as the nurses crossed the prison yard, receiving briefings from the outgoing nurses, and then the reverse of those activities when the nurses ended their shift.

Attorney Hendrickson added that there was no dispute that the nurses were not paid for these activities, and that the nurses had the right to be paid for this work.

DAG Haar argued in substance that the FLSA did not apply to Nevada employee claims, as Nevada had not waived its sovereign immunity with respect to the FLSA, which was consistent with the U.S. Supreme Court decision in *Alden v. Maine* cited in her pre-hearing statement, and that nothing in NRS Chapter 41 changed the fact that Nevada had not waived its immunity with respect to the FLSA.

DAG Haar also noted that in looking at NRS 281.100 it could be seen that it did not apply to Grievants' situation, as NRS 281.100(3)(b)(2) stated that it did not apply to employees who elected to work a variable 80-hour work schedule.

DAG Haar also noted that NRS 281.100(3)(b)(5) indicated that the section did not apply to professional employees, and that nurses were considered professional employees under NRS Chapter 632.

DAG Haar stated that if one looked at the duties of correctional nurses, the series concept, nurse duties included identifying patient healthcare needs, preparing nursing plans, coordinating health services and providing emergency medical treatment.

None of those essential job functions required keys to perform, DAG Haar noted.

DAG Haar also argued that signing in at the gatehouse and passing through metal detectors had no direct nexus to nursing duties, and that every NDOC institution had an operations procedure that required all non-custodial staff to sign in at the gatehouse and go through a metal detector.

DAG Haar stated in substance that this procedure was for the safety and security of people entering an institution so that an institution maintained an accurate count at all times of non-custodial staff who were in the facility in the event of an incident such as a riot.

DAG Haar stated that the argument had been raised that during the time that the nurses walked from the gatehouse to the nurses' station a situation could arise where the nurses would be required to respond to an

emergency, but that NDOC had a mechanism that allowed employees to seek overtime pay in such situations (a Doc 1000), and that nurses were routinely compensated for work performed during and after shift through the use of the Doc 1000.

DAG Haar also argued that the EMC should not use the Prost Decision as binding precedent, as NDOC failed to appear at that hearing and did not provide statements or argument at that time.

In summation, DAG Haar asked that the EMC deny Mr. Butler's and Ms. Jones' grievances.

Chair Puglisi asked about Exhibit 4, a memorandum dealing with nurses having the option of taking an unpaid 30-minute lunch, which would have allowed the nurses time for the other activities that the nurses said were occurring but for which they were not being paid.

Chair Puglisi asked if the nurses were exercising their option of taking an unpaid lunch, or if they were taking a paid lunch and working straight through their shift.

Mr. Butler testified that the nurses were told to be present on site at all times, and that they were supposed to work through their lunch, and that an unpaid lunch was never an option for them.

Ms. Jones added in substance that in reality the nurses would have no time to leave the facility with a 30-minute lunch, as it took about 15 minutes to leave/check out of NNCC.

Member Laney asked the nurses what would happen if they did not sign the log at the gatehouse until the start of their shift time, and if the nurses would be considered late if they did so.

Ms. Jones stated that she was aware NDOC used the log for recording purposes, and that she thought that some people had been disciplined for not signing in on the carpeted area, and not the gatehouse.

According to the Grievants, the carpeted area was a 7-15-minute walk from the gatehouse.

Ms. Wickham testified stating that the sign in logs at each building were for accountability of where NDOC staff were located in the event of a riot or hostage situation and were not timekeeping mechanisms.

Ms. Wickham stated at NNCC the nurses walked across the yard until they reached the building they were assigned to, where the nurse would sign in in case something such as a hostage taking situation occurred, so that when the highest ranking NDOC officer looked at the sign in log he or she could account for everyone in the particular area.

Attorney Hendrickson argued in substance that the only guidance in Nevada law dealing with whether the nurses should be compensated was found in NRS 281.100.

Attorney Hendrickson noted that NRS 281.100(3) provided certain exceptions that applied to certain employees.

Attorney Hendrickson noted that NRS 281.100(3) exempted certain categories of employees from the 40-hour limitation set forth in subsection NRS 281.100(1) and recognized that some employees work a variable work shift with no more than 80 hours in a two-week period, and that if those employees work over 80 hours they are still entitled to overtime.

Attorney Hendrickson argued that NRS 281.100(2) was relevant because it provided guidance as to the specific activities that constituted the start of employment for the purpose of determining compensation. This NRS section provided that the period of daily employment referenced in section NRS 281.100 started from the time an employee took charge of any equipment of the employer.

Attorney Hendrickson stated in substance that he thought the key event for determining when daily employment began was the employee picking up and taking charge of the keys.

Attorney Hendrickson added that although there was Nevada law on this subject perhaps it was appropriate to look at corresponding Federal law in order to provide more clarity and guidance as to what the impact of the activity on the start of the workday would be.

According to Attorney Hendrickson, the Federal law asked whether an activity was integral and indispensable to the carrying out of an employee's duties. One of the considerations, according to Attorney Hendrickson, was whether the employee needed the equipment in order to perform his or her job safely and effectively. Attorney Hendrickson further argued that nurses could not perform their daily tasks safely and effectively without having the keys.

Mr. Butler testified in substance that typically the nurses walk into the gatehouse, they give the officer on duty their bags, the officer searched the bags, then the nurses passed through a metal detector, after which they passed through another door controlled by an officer, and then the nurses were required to sign into a log book, and then picked up their keys. After signing in Mr. Butler testified that the nurses were required to go over to an identifying machine that read the nurses' thumbprint and into which the nurses put their PIN number.

Mr. Butler testified in substance that the nurses then went through another door, and then through two separate fences, through which the

nurses had to be let through by an officer, and at that point the nurses started walking across the yard to Building (Unit) 8. After arriving at this building, the nurses put in a PIN number and went through two separate doors with this PIN number, and after entering the building were required to sign another logbook, and then proceed to another door.

According to Mr. Butler the nurses then went through another door controlled by an officer.

Mr. Butler testified in substance that the nurses needed their keys to access cabinets which contained medical supplies, and to also access the “med room.”

Mr. Butler stated that the nurses would be unable to safely and effectively perform their jobs without the keys.

Member Russell asked in substance whether the variable work shift was optional or mandatory.

Ms. Jones responded that the nurses had a set schedule of 12-hour shifts with an alternating 8-hour shift to make up the 80 hours in a two-week period, and that the nurses really had no choice in the setting of this schedule.

According to Mr. Butler, the amount of time between going through the metal detector to the time the nurse picked up the keys was miniscule, as the keys were located in the same area.

Ms. Wickham testified that she was currently the Chief of Nursing Services for NDOC and had been employed by NDOC for six and a half years.

Ms. Wickham’s current duties included supervising the Directors of Nursing at NDOC, making executive policy, supervising the clinical based medical administration staff, and being an expert witness for nursing policies and procedure when it related to negligence or failure to abide by the Nurses Practice Act.

Ms. Wickham testified that she visited the different NDOC institutions, and that she did not have keys for the institutions, but that this did not prevent her from performing her job as a nurse at the different facilities.

Ms. Wickham also testified that when a person accepted employment with any law enforcement agency the person agreed that they were subject to searches and seizures.

Ms. Wickham also agreed that the logbook was located past the metal detector at NNCC, and that when they reached that point the nurses, if required, would pick up keys.

Ms. Wickham also testified that if a nurse was assigned to an institution, they would be assigned a set of keys, but due to the fact that NNCC had four shifts there were not enough keys for each nurse to have his or her own set of keys, so the nurses had to share keys.

Ms. Wickham stated in substance that there was an inmate entry into Unit 8 that led into the clinic area, and that the nurses and any employees entered through a keypad entryway.

Ms. Wickham further stated that at one time the keys were located inside of Unit 8, but at some point, the keys were moved out of Unit 8, although nurse duties had not changed.

In discussing nurse job duties, such as identifying patient healthcare needs, preparing health care plans, coordinating health services, administering medicine and providing emergency medical treatment, among other tasks, Ms. Wickham testified that none of those job duties required keys.

Ms. Wickham also testified that she was familiar with Doc 1000, and that the form was used for requesting leave and overtime.

Ms. Wickham stated in substance that if a nurse responded to a medical emergency when crossing the prison yard, the nurse could submit a Doc 1000 for the (over)time responding, as it was actually time worked.

Ms. Wickham testified in substance that the keys were used to lock up some of the nursing equipment, such as computers, and that someone at NNCC had keys to everything, usually the Director of Nursing.

Ms. Wickham further testified that there were multiple pill rooms and multiple patient areas at NNCC, and that there was always one pill room for the outpatient clinic, and that, unlike the infirmary, the clinic was not staffed 24 hours, 7 days a week.

Ms. Wickham stated in substance that the nursing stations at NNCC were secured areas to some extent, and that the doors leading to and from the nursing areas were locked, but that the keys the nurses picked up would unlock these doors.

Ms. Wickham also stated that the keys the nurses picked up were not a requirement, and that usually the first day a nurse reported to work at an NDOC institution the nurse would not have keys and would not be issued keys until sometime during the nurse's first week of employment.

With respect to John Keast's (Director of Nursing Services at NNCC) grievance response that all nurses were required to obtain key sets immediately after entering the gatehouse, Ms. Wickham stated in substance that there was nothing in the job description for NDOC nurses that required them to pick up a set of keys, and that the keys were not

essential to nurse job performance, although it might be more convenient for the nurses to have the keys to perform their job.

Ms. Wickham also testified in substance that correctional nurses were required to brief oncoming nurses only with respect to inmates who were 24/7 inpatients, and that this requirement applied to Ms. Jones and Mr. Butler.

Ms. Wickham stated in substance that the whether or not the briefing was “on the clock” for Mr. Butler and Ms. Jones depended on the circumstances at the end of the nurses’ shift.

In reviewing Exhibit 4 (John Keast’s memorandum), Section 2, Ms. Wickham testified that nurses’ shifts at NNCC did not overlap, and that nurses would either not be receiving pay when hearing the briefing or would not be receiving pay for providing the briefing.

In closing, Attorney Hendrickson argued that the correctional nurses needed the keys in order to perform their jobs safely and efficiently.

Attorney Hendrickson stated that under relevant State law, the question was “when does the workday start?” Attorney Hendrickson argued that the answer to that question was provided by NRS 281.100, and that the answer was at the time the nurses pick up the keys.

Attorney Hendrickson noted that this answer was consistent with Federal standards, where the question would also be “when does the workday start?”

Attorney Hendrickson argued in substance that the workday started when one picked up keys/equipment from the employer.

Attorney Hendrickson also reminded the EMC that NDOC admitted that end of shift/beginning of shift briefings happened “off the clock” for at least one nurse in every instance.

Attorney Hendrickson argued that correctional nurses were required to be paid for overtime for hours worked over 40 hours in a week, or hours worked over 80 hours if the nurse was on a variable schedule.

Attorney Hendrickson added that, with respect to the Prost decision, the decision for overtime payment in that grievance was limited to 20 days, but that it was appropriate for the EMC to make an award for the time frame set forth in statute, which was three years.

Attorney Hendrickson argued that NDOC’s violation was a continuing violation in this situation, and not a discreet act with a beginning and an end.

DAG Haar argued that the FLSA did not apply to the State, and so Federal guidelines could not be relied upon for determining the start of an employee's shift. If one looked at NRS 281.100, DAG Haar argued, the employees were only looking at Subsection (2) of NRS 281.100, which stated when the period of daily employment commenced, but that the next paragraph stated that the Section did not apply to professional employees.

DAG Haar argued that "professional employee" was defined in NRS 608.0116, and that nurses were considered professional employees, and so NRS 281.100 did not apply in this situation, and so the definition of what constituted the start of a work shift in NRS 281.100 was inapplicable.

DAG Haar noted that walking had not been shown to be a compensable activity, and so whether a nurse picked up his or her keys at the gatehouse or in Unit 8 itself, it was simply walking across the yard with keys in the nurses' pocket, and no tools were being used as the nurses walked across the yard, and if the nurses happened to respond to an emergency situation while walking across the yard keys would not be required to perform those services, and so the keys being picked up at the gatehouse did not start a nurses' shift.

DAG Haar also noted in substance that nothing in the nurses' requirements and duties required keys, although they were convenient, and that if a pre or post shift response was required of a nurse the Doc 1000 could be completed and the nurse would be compensated.

DAG Haar also noted that the EMC's ability to provide relief to the Grievants was limited to the period of time for the grievance.

Chair Puglisi noted that it had been determined in Prost that the EMC could only look at the event date of the grievance forward for purposes of awarding relief, and that the EMC could not make an award outside of that time frame.

Member Laney stated in substance that she believed that the keys which the nurses picked up and dropped off at the end of their shifts were a necessary tool to perform their job, and that fact would meet the first part of NRS 281.100.

However, Member Laney stated in substance that she could not overlook that in NRS 281.100(3)(b)(4), nurses were defined as professionals, and so exempted from the provisions on NRS 281.100(2).

Member Thompson stated that under NRS 281.100(2), the reference to taking charge of any equipment of the employer was made, so she thought that once an employee was under the direction of the employer and were mandated to do something by the employer then they were

considered employed, and so in this case the nurses should be paid from the time they picked up their keys.

Chair Puglisi stated in substance that NRS 281.100 was unclear, but he felt that in looking at NRS 281.100, once an employee worked over 40 hours or 80 hours, depending on the employee's work schedule, the employee was entitled to overtime.

Co-Vice-Chair Bauer stated in substance that she thought the issue was when the Grievants were eligible for overtime for the work performed.

Co-Vice-Chair Bauer also stated in substance that she had heard during argument that the FLSA did not apply to Nevada, and reference had been made to sovereign immunity, and that when she looked at NRS Chapter 41.031, the FLSA applied to State employees, so she did not understand how the FLSA could not apply to the current grievances.

Co-Vice-Chair Bauer noted in substance that the FLSA covered specifically when employees were on the premises of an employer, and so she was concentrating on that rather than NRS 281.100.

Co-Vice-Chair Bauer asked to hear from both attorneys concerning the applicability of the FLSA to the current grievances.

Attorney Hendrickson argued in substance that the FLSA applied to the present grievances and that he felt that NRS 41.031 was an unequivocal waiver of the State's sovereign immunity, so that the State was subject to the same wage and hour claims that any other employer in Nevada would be subject to.

DAG Haar argued in substance that NRS 41.031 stated that the State did not waive its 11th Amendment immunity, and so it still retained its sovereign immunity concerning Federal claims against it under the 11th Amendment, and that in looking at *Alden v. Maine*, that case was similar to the present grievances, in that FLSA claims could not be brought against non-consenting states.

DAG Haar stated in substance that Nevada had not explicitly anywhere in the NRS' consented to be sued under the FLSA, and that without that explicit waiver Nevada could not be sued in its own courts for claims under the FLSA.

Attorney Hendrickson argued that 11th Amendment immunity was separate and distinct from a state's general immunity, as 11th Amendment immunity was jurisdictional, and that meant that a state was immune from being sued in Federal court unless it consented to the action.

Attorney Hendrickson further stated that the other type of immunity was referred to as general immunity, which was addressed in the *Alden* case,

and stated that a state was immune from liability from all claims in any court unless it consented to those claims. Thus, what NRS 41.031 did, according to Attorney Hendrickson, was expressly waive immunity with the exception of 11th Amendment immunity, and not the substantive immunity that was at issue in the present grievances.

Member DuPree stated that as soon as the nurses picked up their keys and put in their State ID number they were at work.

Member DuPree further stated that the nurses were walking across an entire institution, taking 7-15 minutes to do so, to get to their workstations, and that the nurses should be paid to do so.

Co-Vice-Chair Bauer noted that some evidence had been presented that indicated that keys were not an essential function of a nurse's job, which had been a focus in the Prost grievance, and that the time of picking up the keys was when the employee should have been compensated from.

Co-Vice-Chair Bauer stated in substance that now she was torn because she felt that it had been demonstrated in the present grievance that keys were not an essential tool of a nurses job, but that when one reached the applicability of the FLSA, she looked at 29 CFR 553.221(e), which stated compensable hours of work generally included all of the time which an employee was on duty on the employer's premises or at a prescribed workplace, as well as all other times at which the employee is suffered or permitted to work for the employer.

Co-Vice-Chair Bauer stated that this definition led her towards the belief that when the employee was on the employer's premises the employee was on duty.

Co-Vice-Chair Bauer stated that on duty could be walking through the prison yard, or on duty could be when the nurse was at the assigned duty station, whether it was at the infirmary or the pill room, and that if there was an instance where there was an emergency overtime would be warranted.

Member Russell stated that there were parts of a nurse's job where keys were required as equipment needed for the nurses to perform their work, and that NDOC made a determination as to where the keys were to be located, and that at the time the keys were retrieved and in control of the employee the employee needed to be compensated from that time forward.

Chair Puglisi noted that the nurses' station was a secure area, but not on the patient waiting room side of the station, and keys were needed to access what had been referred to as the carpeted area, and that correctional officers also had keys to these areas.

It was also testified to that a correctional officer was stationed in the infirmary at all times. However, it was testified to by Ms. Wickham that no nurse had a key to the infirmary door from the carpeted area or the clinic. There was conflicting testimony as to whether necessary medical equipment was stored in the carpeted area.

Member Russell asked in substance whether the nurses ever did not pick up their keys when entering NNCC.

Mr. Butler testified that he always picked up his keys when entering NNCC.

Chair Puglisi stated that when he looked at NRS 281.100(2), it said that the period of daily employment mentioned in that section commenced from the time the employee took charge of any equipment of the employer or acted as an assistant or helper to a person who was in charge of any equipment of the employer, and that the nurses here were taking charge of the keys.

Chair Puglisi added in substance that he kept getting stuck on NRS 281.100 and pondered as to whether the EMC was following it, as there were exemptions in it, but he thought the exemptions were connected to the variable work schedules that the nurses worked.

Member Laney brought up the fact that she was concerned with NRS 281.100, Section 3, Subsection (b)(4), which seemed to say that the section did not apply to professional employees, and that this section applied to all of NRS 281.100.

Member Thompson motioned to grant Grievance No. 6290 and Grievance No. 6296, finding that compensable time of Grievants' shift began at the time Grievants signed in and collected keys and ended when they returned the keys and signed out. Additionally, Grievants should receive payment for such compensable time going back to January 22, 2019, up through to the present time.

Member Thompson's motion was seconded by Member DuPree. The motion carried 5-1, with Member Laney voting against the motion.

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 Nurse II during the relevant time period of this grievance.
3. Grievant worked a variable work schedule.
4. Grievant had no choice in setting of his work schedule.

5. When Grievant arrived at NNCC for work he entered a gatehouse, then passed through a metal detector before he signed in and picked up his keys.
6. Grievant never failed to pick up his keys upon starting his shift.
7. Grievant then walked for another 7-15 minutes, depending on circumstances, such as the weather, across the yard at NNCC and passed through other doors prior to reaching the nurses' workstation in Unit 8.
8. Once Grievant reached his workstation in Unit 8 he was required to sign in again.
8. Grievant's shift/workday commenced upon reaching his workstation in Unit 8, and Grievant started receiving pay from this time until the end of his shift.
9. Grievant repeated the process of arriving at Unit 8 in reverse upon leaving NNCC at the end of his shift.
10. It was noted that nurses provide and receive briefings at the beginning and end of their shifts, respectively.
11. Because nurses' schedules do not overlap, either the nurses coming onto their shift who receive the briefings did not receive pay for listening to the briefings, or the nurses ending their shift did not receive pay for providing the briefings.
12. Testimony was presented concerning the job description/requirements of NDOC correctional nurses. These duties included identifying patient healthcare needs, preparing nursing plans, coordinating health services and providing emergency medical treatment.
13. Grievant used his keys to access cabinets in his workstation area that contained necessary medical supplies, and also to access the "med room," which contained various kinds of medical equipment nurses used that were necessary to perform their job.
14. Grievant's keys also unlocked doors leading to and from the nurses' station/carpeted area.

CONCLUSIONS OF LAW

1. For this grievance, it was Grievant's burden to establish by a preponderance of the evidence that NDOC failed to properly compensate Grievant for the work he performed at NNCC. In order to do so, Grievant was required to establish when his workday began and ended pursuant to NRS 281.100(2).
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. Butler's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
4. NRS 281.100(2) states:
The period of daily employment mentioned in this section commences from the time the employee takes charge of any equipment of the employer or acts as an assistant or

helper to a person who is in charge of any equipment of the employer, or enters upon or into any conveyance of or operated by or for the employer at any camp or living quarters provided by the employer for the transportation of employees to the place of work.

5. Pursuant to the FLSA, as codified in 29 CFR § 785.24, principal activities that are an integral part of the employee's job are considered work and are compensable.
6. An activity is integral and indispensable to Grievant's principal activities "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 135 S. Ct. 513, 514, 190 L. Ed. 2d 410 (2014).
7. The keys that Grievant picked up were necessary, and not simply convenient, for his employment duties and could not be dispensed with, and thus were an integral part of Grievant's duties.
8. Thus, when Grievant took possession of the keys after entering the gatehouse at NNCC he began his workday/daily employment at NDOC in accordance with NRS 281.100 and 29 CFR § 785.24.
9. As Grievant began his daily employment after picking up the keys he was required to be compensated pursuant to 29 CFR § 785.24 from the time he picked up his key until he returned the keys at the end of his shift.
10. The exceptions to NRS 281.100(2) found in NRS 281.100(3) were not applicable to this grievance.
11. The EMC only has jurisdiction, pursuant to NAC 284.678, to award damages beginning on January 22, 2019 (date of the event leading to the grievance) until the present.

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. 6290 is hereby GRANTED. Grievant established by a preponderance of the evidence that his workday began pursuant to NRS 281.100(2) when he picked up his keys after entering the gatehouse at NNCC, as the keys were an integral part of his employment as a correctional nurse pursuant to 29 CFR § 785.24.

As picking up the keys were an integral part of Grievant's employment activities, he was entitled pursuant to 29 CFR § 785.24 to be paid from the time he picked the keys up until the time he returned the keys, ending his shift. Pursuant to NAC 284.678, the EMC may only award damages back to the event date of the grievance.

MOTION: Moved to grant grievance #6290 and 6296
BY: Member Thompson
SECOND: Member DuPree

VOTE: The vote was 5-1, with Member Laney voting against the motion.

9. Public Comment

Ms. Theresa Wickham stated she notified the acting Director of Department of Corrections to notify the wardens to move the key box per the statement of the EMC.

10. Adjournment

Chair Puglisi adjourned the meeting at approximately 1:52 pm.