



**STATE OF NEVADA
EMPLOYEE-MANAGEMENT COMMITTEE**
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**Meeting Minutes of the Employee-Management Committee
April 4, 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	
Ms. Pauline Beigel	X
Mr. Ron Schreckengost	
Ms. Jennelle Keith	
Ms. Tonya Laney	X

Employee Representatives	
Mr. Tracy DuPree	
Ms. Turessa Russell	X
Ms. Sherri Thompson	X
Ms. Adria White	
Ms. Sonja Whitten	X
Ms. Dana Novotny	

Staff Present:

Mr. Robert Whitney, EMC Counsel, Deputy Attorney General
Mr. Greg Ott, EMC Counsel, Deputy Attorney General
Ms. Nora Johnson, EMC Coordinator
Ms. Ivory Wright-Tolentino, EMC Hearing Clerk

1. Call to Order

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

2. Public Comment

There were no comments from the audience or Committee Members.

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

Chair Puglisi opened the meeting with Committee introductions.

4. Adoption of the Agenda – Action Item

Chair Puglisi requested a motion to adopt the agenda.

MOTION: Moved to approve the agenda.

BY: Member Whitten

SECOND: Member Russell

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

5. Discussion and possible action related to Grievance #6074 of Joshua Rogers, Department of Corrections – Action Item

This matter came on for hearing before the Employee-Management Committee¹ (EMC) pursuant to NAC 284.695 and NAC 284.6955, regarding Grievance No. 6074, filed by Joshua Rogers (“Grievant” or “Officer Rogers”). Officer Rogers was present in proper person. Christina Leathers, Human Resources Manager, represented the agency/employer, the State of Nevada Department of Corrections (“NDOC”).

There were no objections to the exhibit packets submitted by the parties. Officer Rogers was sworn in and testified in his grievance.

STATEMENT OF THE CASE

Grievant is employed with NDOC as a correctional officer, and he has worked at the Northern Nevada Correctional Center (“NNCC”) for a number of years. Officer Rogers stated in substance that when correctional staff at NNCC bid on annual leave in November 2018, and then again in January 2019, the associate warden misinterpreted the applicable section of NDOC’s Administrative Regulation (“AR”) 301, which dictated how annual leave was granted during the annual leave

¹ The Committee members present representing a quorum were: Guy Puglisi (DHHS), who chaired the meeting; Sherri Thompson (DETR), Turessa Russell (UNLV), Sonja Whitten (Div. of Ins), Pauline Beigel (NDOT), and Tonya Laney (DMV) Counsel for the EMC, Deputy Attorney General Robert A. Whitney and, EMC Coordinator, Nora Johnson and EMC Hearing Clerk, Ivory Tolentino were also present.

bidding process. Officer Rogers indicated in substance that the applicable section of AR 301 said that that officers must first bid on annual leave in a five contiguous day block or 40-hour block of annual leave, pursuant to NAC 284.539, prior to any annual leave bids for singles days. Officers could decline to bid for five contiguous days or 40-hour blocks of annual leave, but officers would not be permitted to bid for single days of annual leave until all officers had submitted their bids for the five contiguous day block or 40-hour block of annual leave.

The only part of NAC 284.539 that was applicable, Officer Rogers argued in substance, stated that “the appointing authority may not prohibit an employee from using at least five consecutive days of annual leave in any calendar year.” Officer Rogers stated in substance that this NAC was written to ensure that employees had the opportunity to take a 40-hour block of annual leave and was not meant to limit staff to only 40-hour blocks of annual leave.

Officer Rogers testified in substance that NDOC staff at Warm Springs Correctional Facility were not restricted when they bid on annual leave, while NNCC conducted its annual leave bid under the “new restriction,” as the last annual leave bidding process in late 2018 and early 2019 was the first time NNCC had conducted annual leave bidding in such a manner (according to Officer Rogers in previous years bidding at NNCC had been unrestricted with respect to single days, so that there had only been one bidding process prior to the last bidding process), although Officer Rogers acknowledged the relevant regulation could have existed prior to that time.

Officer Rogers also stated in substance that the annual leave bidding process was overly complicated and created unnecessary work. Officer Rogers further stated that the interpretation of AR 301 by NDOC was not the issue as much as the unknown reason for the addition of the relevant section to that AR sometime in 2018. Officer Rogers asked that the EMC remove the applicable section of AR 301 and then require NNCC to scrap and rebid annual leave for the 2019 calendar years.

Officer Rogers also testified in substance that as a result of the new annual leaving bidding process he was denied annual leave for singles days throughout the year and had to restructure his annual leave on short notice to re-adjust for this fact. Officers Rogers stated in substance that the way he had taken annual leave in the past prior to the last annual leave bidding process was that he took one long week during the year and a lot of singles days to make multiple three-day weekends, and that he was unable to do this with the new process for annual leave bidding.

NDOC argue in substance that AR 301 was written based on its interpretation of NAC 284.539 to ensure that its employees were allowed to take their 40 hours of block leave without having to break up their leave, because if officers were allowed to bid for individual days of leave before bidding for the 5 days or 40 hour blocks potentially there would

have been less employees able to take 40 hour blocks of leave. NDOC added in substance that AR 301 accurately reflected its interpretation of NAC 284.359, and that all of its institutions should have been conducting its annual leave bids in the manner that NNCC conducted its annual leave bidding process.

The intent of AR 301, according to NDOC, was to allow employees to bid for five-day blocks in advance, and that when AR 301 was revised in December 2018 it changed only information concerning how seniority was established, and that the five-day annual block bidding had been taking place for several years. NDOC also stated in substance that the Board of Prisons reviews and approves any modifications to NDOC's AR's. NDOC also acknowledged in substance that its annual leave bidding process was not a "win-win" for everybody, but the process conducted at NNCC was how NDOC interpreted NAC 284,539, and AR 301 reflected this interpretation.

NDOC also noted in substance that an email was sent out prior to the December 2018 revisions to AR 301 to its employees inviting suggested changes to the revisions to AR 301 through the use of Document 039, and that this would have been an opportunity for Officer Rogers to request changes to the sections of AR 301 pertaining to annual leave bidding. NDOC also stressed in substance that part of the reason for the change in AR 301 pertaining to annual leave bidding was that there had been a disparity at its different institutions concerning how annual leave bidding was performed, and that NDOC wanted its institutions to conduct annual leave bidding in the same manner at its different institutions.

NDOC also stated in substance that the reason some of the annual leave bidding had been redone at some of its facilities was because there was a disparity in how some of its institutions were conducting annual leave bidding, and so the bidding was redone in order to realign all NDOC institutions with respect to performing annual leave bidding in the same manner.

The Committee deliberated on Grievance No. 6074. Member Laney stated in substance that in looking at NAC 284.539 and AR 301, while she sympathized with the Grievant, she saw no clear violation of either AR 301 or NAC 284.539, although it had not been applied consistently by NDOC's institutions over time. Member Whitten in substance questioned why NDOC, when it found out all its institutions were not performing annual leave bidding in the same manner, did not instruct the non-complying institutions to correct their bidding process.

NDOC responded that some of its institutions that had not performed annual leave bidding process in the correct manner were required to redo their annual leave bidding, and that all its institutions were at present in compliance with AR 301 with respect to annual leave bidding.

Member Laney made a motion to deny Grievance No. 6074 on the basis that NAC 284.539 and AR 301 concerning the bidding process appeared to have been followed, and thus no clear violation of regulation or administrative rule had been shown by Grievant. Co-Chair Beigel seconded Member Laney's motion, and the Committee voted to deny Grievance No. 6074.²

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 is a non-exempt State of Nevada employee.
2. Grievant is a correctional officer employed by NDOC.
3. Grievant is employed at NNCC.
4. Grievant participated in NDOC's bidding for annual leave at NNCC for the 2019 calendar year.
5. NDOC's annual leave bidding is regulated by AR 301 and NAC 284.393.
6. Subsection 3 of AR 301 (M), titled "Annual Leave Bids," states that: Officers must bid first for annual leave in a five (5) contiguous day block, or a 40-hour block of annual leave pursuant to NAC 284.539, but will not be permitted to bid for single days of annual leave until all officers have submitted his or her bids for the five (5) contiguous day block or a 40-hour block of annual leave.
7. NDOC at NNCC followed its annual leave bidding policy as set forth in AR 301 (M)(3) and had all correctional officers at NNCC bid on annual leave in either 5-day contiguous blocks or in 40-hour increments prior to allowing its correctional officers to bid on annual leave in single day units.
8. The purpose of AR 301(M)(3) was to ensure that NDOC complied with NAC 284.359 based on NDOC's interpretation of NAC 284.539.

CONCLUSIONS OF LAW

1. For this grievance it was Grievant's burden to establish his allegations that NDOC violated NAC 284.539 or AR 301 by improperly implementing its annual leave bidding process.
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 Roger's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).

² Chair Puglisi, Co-Chair Beigel, Member Russell, Member Thompson, and Member Laney all voted to deny Grievance No. 6074. Member Whitten voted against the motion.

4. The Committee discussed and substantially relied on both NAC 284.359 and AR 301.
5. The Committee concluded that NDOC's interpretation of NAC 284.539 was not arbitrary and capricious.
6. The Committee concluded that NDOC's implementation of AR 301(M)(3) based on its interpretation of NAC 284.539 was not arbitrary, capricious or unreasonable.
7. Grievant was unable to prove by a preponderance of the evidence that NDOC had violated either NAC 284.539 or AR 301(M)(3).

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. 6074 is hereby DENIED.

MOTION: Moved to deny grievance #6074 on the basis that NAC 284.539 and AR 301 concerning the bidding process appeared to have been followed, and thus no clear violation of regulation or administrative rule had been shown by Grievant.

BY: Member Laney

SECOND: Co-Vice-Chair Beigel

VOTE: The vote was 5 to 1 with Member Whitten voting nay.

6. Discussion and possible action related to Grievance #5621 of Jorge Olague and Grievance #5674 of Johnny Bilavarn, Department of Corrections – Action Item

This matter came on for hearing before the Employee-Management Committee³ (“EMC”) pursuant to NAC 284.695 and NAC 284.6955, regarding Grievance No. 5621, filed by Jorge Olague (“Grievant” or “Officer Olague”). Officer Olague’s grievance was heard simultaneously with Officer Johnny Bilavarn’s grievance, Grievance # 5674. Officer Olague was represented by Daniel Marks (“Attorney Marks”). State of Nevada, Office of the Attorney General Deputy Attorney General Michelle Alanis (“Deputy Attorney General Alanis”), represented the agency/employer, the State of Nevada Department of Corrections (“NDOC”).

³ The Committee members present representing a quorum were: Guy Puglisi (DHHS), who chaired the meeting; Sherri Thompson (DETR), Turessa Russell (UNLV), Sonja Whitten (Div. of Ins), Pauline Beigel (NDOT), and Tonya Laney (DMV) Counsel for the EMC, Deputy Attorney General Robert A. Whitney, EMC Coordinator, Nora Johnson and EMC Hearing Clerk, Ivory Tolentino were also present.

There were objections to the exhibit packets. Deputy Attorney General Alanis objected to Exhibit 1 of Grievant/employee's packet, which was a combined packet, based on relevance. Attorney Marks argued in substance that Exhibit 1 was relevant based on NDOC's argument that there was not a list signed by its officers at the start of the officers' shifts that indicated that the officers might have to work overtime, and that the information he provided showed that the sign in process involved in the present grievance was the same, or very similar to, the sign in process that had been argue previously before a hearing officer (Hearing Officer Mark Gentile) who ruled that the list violated the four hour notice requirement in NAC 284.242 for working mandatory overtime (This decision was at times during the hearing referred to as "Bilavarn I"). Such information, according to Attorney Marks, went to issue preclusion. Chair Puglisi removed all of Exhibit 1 from evidence with the exception of page A 61 of Exhibit 1.

Deputy Attorney General Alanis also objected to Employee's Exhibits 2, 3 and 12 for relevance, and the objection was sustained with respect to Exhibits 2 and 3, which were removed from evidence, but the objection to Exhibit 12 was denied.

Officers Bilavarn and Olague, former Sergeant Mark Tansey, Warden Brian Williams, Brandon Marcano, Paul Lundquist, Michael Florio and Lieutenant Jesus Rivera were sworn in as witnesses at the grievance hearing; however, only Officers Bilavarn, Olague and Warden Williams testified at the hearing.

STATEMENT OF THE CASE

Attorney Marks argued in substance that they had put a great deal of weight on the Bilavarn I decision before Hearing Officer Mark Gentile ("Hearing Officer Gentile"). Attorney Marks further argued in substance that, barring an emergency, non-exempt State employees needed to be provided four hours of notice if the employee was required to work overtime, and that the issues raised in the present case had been raised previously before Hearing Officer Gentile, and that people calling out sick or on vacation is a known occurrence within NDOC prisons, and Hearing Officer Gentile had specifically rejected such arguments. The issue in Officer Bilavarn's previous case, according to Attorney Marks, was, could the employee come in at the beginning of the employee's shift and sign a list that said that the employee might work overtime, or were on the possible overtime list, as opposed to the employer coming to the employee 45 minutes prior to the employee's shift ending and saying that the employee was required to work mandatory overtime.

Attorney Marks added in substance that High Desert State Prison ("HDSP") made no effort to comply with the applicable NAC back in 2016, and that HDSP failed to comply with NAC 284.242 in 2018.

The evidence would show, according to Attorney Marks, that Mr. Marcano sent an email to the NDOC Director and Deputy Director advising NDOC was not complying with the appropriate NAC. Attorney Marks also argued in substance that when the employee's signed up to work at NDOC they knew they might be required to work nights, holidays and overtime, and that signing a list that said an employee might possibly work overtime was different that signing a list that said the employee was actually working overtime.

Attorney Marks also added in substance that under the NAC NDOC had the ability to mandate overtime almost virtually every day, but that four hours of notice was required, so the only thing that Officers Bilavarn and Olague wanted was the required four-hour notice of having to work overtime.

With respect to an unpredictable emergency, Attorney Marks stated in substance that NDOC did not prove there was an unpredictable emergency in this situation, and that NDOC was short staffed as it was, and that with respect to discipline, NDOC had been sporadic in imposing discipline for refusing to work overtime, and that in this case Officers Bilavarn and Olague wanted their written reprimands issued for insubordination for refusing to work the overtime removed from their files.

In summation, Attorney Marks argued in substance that NAC 284.242 talked about required, not potential overtime, and that he understood Warden William's situation, but that he was misconstruing the NAC. By initialing the mandatory overtime list, Attorney Marks stated in substance, the officers were not receiving the required notice of having to work overtime because many times the correctional officers would sign the mandatory overtime list but not in reality work overtime at the end of the particular shift. Attorney Marks added in substance that until the shift supervisor came onto duty at 4:00 a.m. and looked at staffing, NDOC did not decide that its correctional officers were definitely required to work overtime, and so the correctional officers in reality received one-hour notice that they would be working overtime. Attorney Marks also argued in substance that NDOC did not in reality even attempt to follow NAC 284.242, and that NDOC never acknowledged Bilavarn I, and that NDOC was not claiming an actual emergency in either Grievant's situation.

NDOC argued its policies required employees to work mandatory overtime on short notice, and that doing so was an essential function of a correctional officer's job. NDOC also stated that its policies and practices were in compliance with NAC 284.242. NDOC further stated the present case was different than Mr. Bilavarn's previous case before Hearing Officer Gentile, and that the focus today was different.

NDOC stated in substance that its decision to discipline Officers Bilavarn and Olague was within its discretion and in accordance with

NRS, the NAC and NDOC's Administrative Regulation ("AR") 339. NDOC also argued that in the present case Officers Olague and Bilavarn received more than four hours of notice that they were required to work overtime. The rules at NDOC, NDOC argued, were that before an employee reported for his or her shift at 9:00 p.m. they were to go to the shift command, review their assigned post, and to also review the overtime list, which said "overtime will be assigned as follows." NDOC stated in substance that both Officer Bilavarn and Officer Olague acknowledged their position on the list by initialing the list, and that Officer Olague was number 8 on the list, and Officer Bilavarn was Number 13 on the list on their respective days, and that they did so 8 hours in advance of their shift ending.

Thus, NDOC argued, both Grievants were notified in compliance with NAC 284.242. NDOC also added that both Grievants were contacted during their shift at about 4:15 a.m. and were mandated by their shift supervisor to work overtime, and that both officers refused, and that this was insubordination, and that NDOC was mandated to meet minimum staffing requirements.

NDOC also argued that HDSP was not ignoring the impact of annual leave and sick leave, and that officers could call up to an hour into their shift to call off for the day, so that this factor was an "unknown." NDOC also argued in substance that inmates could unexpectedly need to go to the hospital, which would drain staff, so that it was not true that HDSP chose to operate in the manner it did.

With respect to the Bilavarn I, NDOC argued in substance that that was an independent decision before a hearing officer, and that the hearing officer's decision was non-binding on the EMC, and that Officer Gentile's Order from Bilavarn I did not even discuss a mandatory overtime list. With respect to the argument that AR 339 was never approved by the Personnel Commission, NDOC argued that it was entitled to discipline the Grievants under NAC 284.638, which authorized agencies to issue a written reprimand for causes listed in NAC 284.650, and that the written reprimands each Officer received cited to an action found in NAC 284.650: insubordination or willful disobedience. NDOC also argued that AR 339 was valid, and that the Nevada Constitution and Nevada Legislature determined that the administration of prisons should be left up to the Board of Prison Commissioners ("the Board"), and that the Board prescribed regulations for carrying out the business of prisons and had approved AR 339.

With respect to the Grievants' allegations that the discipline they received was arbitrary and capricious because other officers received lesser or no discipline, NDOC argued in substance that there was no evidence that this allegation was true, and that even if that was the case, every employee's discipline was unique and confidential, and was also irrelevant to the present case as the facts and circumstances of every employee was different. NDOC noted in substance that the discipline

Officers Bilavarn and Olague received was less than what its guidelines called for. Finally, NDOC cited to the *O'Keefe v. Dept. of Motor Vehicles* (134 Nev. Adv. Op. 92___ P 3d __ (Dec. 6, 2018) decision and argued that a similar analysis should be followed by the Committee, and that Officer Bilavarn's and Olague's grievances should be denied because there was no violation of law or regulation, and because NDOC had just cause for issuing the reprimands.

NDOC argued in substance that officers who acknowledged their position on the mandatory sheet received 8 hours of notice that they would work overtime, and if not called to work overtime for that particular shift, would be on the sheet when they returned to work for their next shift, so that officers received more than 8 hours of notice. NDOC also noted in substance that the hour after the shift supervisors came on was very busy, and unpredictable events could happen such as officers calling off at the last minute, potential inmate issues and annual leave. Additionally, NDOC argued in substance that the Bilavarn I case was not the "end all end all," and that the case was not on point and was not binding. NDOC also argued that the Grievants only received written reprimands when the minimum discipline for the level of violation the Grievants were charged with was a suspension.

Attorney Marks noted in substance that he was citing Bilavarn I to show that the decision had previously been argued and, with respect to Officer Bilavarn, NDOC had been told that its mandatory overtime list was invalid.

Officer Bilavarn testified in substance that he was a correctional officer and had been employed at HDSP for almost 12 years. Officer Bilavarn also testified in substance that he typically worked the 9:00 p.m. to 5 a.m. ("graveyard") shift.

Officer Bilavarn stated in substance that he had previously been terminated for refusing to work overtime, and that at that time there was a list that stated correctional officer might be required to work mandatory overtime, and that this list was similar or the same as the list involved in his present grievance. Officer Bilavarn also testified that he had been reinstated, and that since Hearing Officer Gentile's decision was made no changes that he was aware of had been made to the mandatory overtime list process by NDOC.

With respect to the current grievance, Officer Bilavarn stated that he was called sometime after four in the morning and told that he needed to stay for 8 hours of overtime. Officer Bilavarn testified that he told the caller that he was unable to work 8 hours of overtime but could work three hours of overtime. Officer Bilavarn therefore indicated in substance that he refused the overtime and was not given the required four hours of notice in order to contact his family and attend to family matters. Officer Bilavarn stated in substance that he then received a written reprimand as a result of his refusal.

Officer Bilavarn also stated in substance that he believed, as a result of Bilavarn I, that NDOC should have been aware that it was required to provide him four hours of notice if it was requiring him to work overtime, and that the list he was signing at the beginning of his shift stated that he could possibly work mandatory overtime, and that he could not make arrangements for childcare just based on “possible.” Officer Bilavarn also testified in substance that he was being forced to sign the list every day, and that he felt NDOC was ignoring the decision in Bilavarn I because it was having him sign the same kind of list that was part of Bilavarn I.

With respect to discipline that other correctional officers received, Officer Bilavarn testified in substance that he had heard that other officers received no discipline as a result of their refusal to work mandatory overtime, and that the discipline as a result of correctional officer refusal to work overtime was inconsistent. Officer Bilavarn said in substance that he was asking that the EMC tell NDOC that it was required to give him four hours of notice if it needed him to work mandatory overtime.

Officer Bilavarn testified in substance that on the day in question on which he was required to work mandatory overtime there was no unpredictable emergency and that HDSP normally has call outs and sick leaves on a daily basis, and he was unaware of NDOC taking any inmate to the hospital on the day he refused to work mandatory overtime.

Upon cross examination, Officer Bilavarn testified in substance that when he applied for his position he indicated that he was available for any post and any shift, and that as a condition of his employment he would be willing to work overtime on short notice. Officer Bilavarn also testified in substance that he signed his “essential functions” notice after being hired, and that this document also indicated that he could be required to work overtime on short notice.

Officer Bilavarn further stated in substance that he signed an AR acknowledgement form, which required him to be familiar with the AR’s, and that the AR’s included AR 339, titled “Employee Code of Conduct” and AR 326, which dealt with the posting of shifts and overtime. Officer Bilavarn also acknowledged that AR 326 stated that if minimum staffing was not met the supervisor would contact an associate warden to be able to hire the overtime, and that his institution was required to meet minimum staffing for the safety and security of HDSP.

Officer Bilavarn testified in substance that when he started his shift on January 10, 2018, he went to shift command but did not recall reviewing the overtime sheet there. Officer Bilavarn acknowledged, however, that he was 13th on the mandatory overtime list and that his initials were next to his name. Officer Bilavarn also stated in substance that there was a voluntary overtime list and a mandatory overtime list, and that the mandatory overtime list/sheet said, “mandatory overtime will be

assigned as follows.” Officer Bilavarn testified in substance that when he initialed this list it was approximately 8 hours prior to the start of the next shift.

Officer Bilavarn stated that his name was not on the mandatory overtime list every day that he came into work, and so he would not be required to be guessing about childcare every day. Officer Bilavarn also stated in substance that his refusal to work overtime was considered a class four to five offense by NDOC, and that such an offense would normally lead to a dismissal, and that he was aware that if minimum staffing was unmet then correctional officers would be required to work overtime, and that working overtime was a part of his job. Officer Bilavarn further stated in substance that with respect to Bilavarn I there were other violations alleged against him besides insubordination in that matter, but that the other offenses were related to his refusal to work overtime.

Officer Bilavarn also testified in substance that he was aware that every day he went to work there was the possibility that he might have to work overtime with no notice. Officer Bilavarn further testified in substance that when he acknowledged his position on the mandatory overtime list he was aware of where he was on the mandatory overtime list, and the fact that he would be called for overtime. However, Officer Bilavarn also testified that just because a correctional officer was at a certain position on the mandatory overtime list did not mean that the correctional officer would work overtime at the end of his or her shift, and that there were days when he signed the mandatory overtime list where he did not work overtime.

Officer Bilavarn stated in substance that when he came into work at 9:00 p.m. he was not told that he absolutely was going to be working mandatory overtime, and that minimum staffing was a frequent occurrence out a HDSP.

Officer Olague testified in substance that he was employed as a correctional officer for almost 8 years. Officer Olague further testified in substance that on January 13, 2018 he was working graveyard shift, and that he signed a mandatory overtime list similar to the list signed by Officer Bilavarn. Officer Olague also stated in substance that there were “plenty of times” when he had been on the list but was not required to work mandatory overtime following his shift.

Officer Olague stated in substance that he did not believe by signing the mandatory overtime list he was receiving the four-hour notice required under the NAC. With respect to the incident concerning him, Officer Olague testified in substance that on January 12-13, 2018 his shift sergeant was Sergeant Florio, who contacted him sometime after 4:00 a.m., and that his shift was to end at 5:00 a.m. Officer Olague testified in substance that Sergeant Florio told him he was being mandated to work mandatory overtime. Officer Olague also stated in substance that he was not told there was an unpredictable emergency necessitating him

to work overtime, and that people calling out of work was an everyday occurrence, and that NDOC has been short staffed ever since he started working for that agency.

Officer Olague also testified in substance that he had heard that other officers who had refused overtime received letters of reprimand, letters of instruction, or that the matter was dropped.

With respect to Sergeant Florio's telephone call, Officer Olague stated in substance that he told Sergeant Florio that he could only work three hours of overtime and was told he was needed for 8 hours.

In response to cross examination, Officer Olague acknowledged that when he applied with NDOC his application said that he was available to work at any post and for any shift, and that as a condition of employment he was willing to work overtime on short notice. Officer Olague also stated in substance that his essential functions document indicated that he was required to work overtime on short notice, and that he signed an AR Acknowledgement Form that specifically identified AR 339 and AR 326.

Officer Olague stated in substance that on January 12, 2018, he went into shift command, reviewed the mandatory overtime list and initialed this list. Officer Olague further stated in substance that the mandatory overtime sheet indicated that "mandatory overtime will be assigned as follows."

With respect to the mandatory overtime list, Officer Olague testified in substance that he was number 8 on that list, and that he would have signed the list at about 9:00 p.m. the night of January 12, 2018. It was also noted that the list included a voluntary list, and that the correctional officers on the voluntary list also signed up at 9:00 p.m., and that if there were enough volunteers a correctional officer on the mandatory list might not be required to work overtime. Additionally, Officer Olague stated in substance that he was not given an order to work mandatory overtime at 9:00 p.m. on January 12, 2018, and that he was not notified that he absolutely had mandatory overtime until 4:30 a.m., January 13, 2019.

Officer Olague testified in substance that if he received notice that he would be required to work overtime at 1:00 a.m., then he would try and reach his babysitter. Officer Olague further testified that as a result of his refusal to work ordered mandatory overtime he received a written reprimand for violation of AR 339, insubordination. Officer Olague also testified in substance that he was aware that he might not be able to end his shift at its scheduled ending time, and that he might be required to work overtime in an emergency situation, and that he needed to have plans in place for obligations such as childcare.

Officer Olague further stated that his name did not appear on the mandatory overtime list every single day that he appeared for work. Officer Olague also stated in substance that pursuant to the AR's the mandatory overtime list reset itself every 45 days, but that in his experience the AR's were not always followed at NDOC. Officer Olague also stated in substance that NDOC had never told him that he was not needed and to go home at the end of his shift.

Attorney Marks made an offer of proof that he thought Sergeant Tansey would say that when Bilavarn I occurred there was no attempt to comply with the four-hour notice rule in NAC 284.242 concerning overtime, and that NDOC knows that correctional officers call out or go on vacation.

Attorney Marks also indicated that Mr. Marcano wrote an email to NDOC's Director discussing the "four-hour rule," and that this email was eventually sent to the HDSP warden, and that in reality everyone knew about this email. Finally, Attorney Marks indicated in substance with an offer of proof that he had witnesses who could testify to the arbitrary and capricious application of discipline by NDOC when correctional officers refused to work mandatory overtime. This offer of proof was objected to by Deputy Attorney General Alanis for relevance.

Warden Williams testified in substance that he had been the warden at HDSP since August 1, 2016, and that he was familiar with the overtime issue. Warden Williams also testified in substance that he was familiar with the mandatory overtime list, and that being on the mandatory overtime list and signing the list at the beginning of a correctional officer's shift did not guarantee the correctional officer mandatory overtime. According to Warden Williams, the mandatory overtime list started sometime in the summer of 2017, and had been modified over time. Warden Williams stated in substance that he believed that Officers Bilavarn and Olague were mandated overtime when they came onto shift, and that both officers were called about an hour before their shift ended.

Warden Williams further testified in substance that when a correctional officer comes onto shift they must check the mandatory overtime list and initial that list, and that the correctional officer would receive a call around 4:00 a.m. (when the day shift supervisor, who finalized the needs of the day shift, came into HDSP) if they had to work overtime, and that signing the list 8 hour prior to the end of the correctional officer's shift complied with NAC 284.242, and that there was no other process in place related to complying with providing four hours of notice for working mandatory overtime.

Warden Williams also testified in substance that he was unsure if there were people on the mandatory overtime list who did not work overtime on the day in question. Warden Williams further testified in substance that if an officer on the mandatory overtime list did not happen to work overtime after a particular shift, then the next time the officer reported

for their shift the officer's name would still be on the mandatory list, and that the officer's name would normally move up on the mandatory overtime list.

Warden Williams also testified in substance that the shift sergeants calling officers on the mandatory overtime list were calling them to tell them what shift the correctional officer would be assigned to because the correctional officers have already been mandated to work overtime. Warden Williams further testified in substance that between November 2017 and January 2018 the correctional officers were working overtime "like crazy" because there were so many refusals to work overtime and because of the amount of inmates in the hospital during that time period.

Warden Williams stated in substance that he felt that by letting the correctional officers know at the beginning of their shift when they came in and signed the mandatory overtime list and acknowledged that they were on the list then the correctional officers were given 8 hours-notice that they were subject to work mandatory overtime. Then when the correctional officers were called and told they would be working a certain post they were just posting the shift. Warden Williams further stated that correctional officers do not simply leave at the end of their shifts but must be properly relieved and normally another correctional officer relieves them from their post, and if a correctional officer does not come and relieve the correctional officer then the correctional officer must stay at his or her post.

Warden Williams stated in substance that the mandatory overtime list was based on seniority, and so the least senior correctional officers were placed at the top of the list and the most senior correctional officers were at the bottom of the list, and that it was possible that correctional officers on the list might have to work overtime multiple times. Warden Williams further stated in substance that the mandatory overtime list was prepared by the prior shift sergeant, and that if any correctional officers were needed to work overtime the voluntary overtime list was first used prior to the mandatory overtime list, but that it varied from day to day as to how many, if any, correctional officers were needed to work overtime, and that a lockdown could occur if minimum staffing needs could not be met.

Warden Williams also explained in substance that correctional officer sick leave was a variable factor, and that a correctional officer could call out sick an hour and a half into his or her shift, and that inmates coming and going to the hospital would affect staffing levels.

Warden Williams testified in substance that he signed the written reprimands for both Officer Bilavarn and Officer Olague, and that the written reprimands were appropriate because he was not trying to "hammer" staff but was trying to let get the officers' attention.

The Committee deliberated on the grievances. Member Laney stated in substance that she thought that NDOC's list at HDSP followed the intent of NAC 284.242, as the notice provided by the list to correctional officers that they would have to work the mandatory overtime was well in advance of four hours, and that she disagreed that there had been no attempts by NDOC to follow NAC 284.242.

Member Russell stated in substance that she was not in agreement that the overtime list met the four-hour notification requirement, and that although the list said that it was for mandatory overtime in reality a correctional officer could sign the list and not work overtime. Member Russell also stated in substance that she was leaning towards asking that a study be made to see if the State has authorized the number of positions needed at HDSP.

Member Thompson stated in substance that the mandatory overtime list "was a practice that people have become immune to" and that in real life the sign in sheet being signed at the start of a correctional officer's shift was not in compliance with regulation.

Co-Vice Chair Beigel stated in substance that NAC 284.242 discussed overtime being authorized pursuant to Subsection 10 of NRS 284.180, which discussed all overtime being approved in advance by the appointing authority or the designee, and when one looked at AR 326.01(e), that it was when the on duty shift supervisor showed up at 4:00 a.m. that the associate warden was contacted and the overtime was requested and approved, and so to her the correctional officers were not required to work overtime until after the overtime was approved.

Chair Puglisi stated in substance that he disagreed, and that the mandatory overtime list to him was like the short list, and if you were on the list you should make plans to work, and if you were released it was a bonus.

Member Russell noted that the correctional officers were sent home, but Chair Puglisi said that officers did not leave until they were relieved. Chair Puglisi also stated in substance that people who work at NDOC as correctional officers know they will likely to work overtime.

Co-Vice Chair Beigel stated in substance that she disagreed with Chair Puglisi's analysis that it was a bonus that if you were on the mandatory overtime list but then were not required to actually work overtime, and stated as an example an officer having to cancel a doctor's appointment and then paying a fee for the cancellation, and then it turned out that NDOC did not need the officer, NDOC's actions would have cost the officer money.

Member Whitten noted in substance that a correctional officer would not request annual or sick leave if the time off would have been the normal time off for the particular correctional officer.

Member Laney moved to deny both grievances based on the fact that there was not a preponderance of evidence of a violation of NAC 284.242. Her motion was seconded by Chair Puglisi. Member Laney's motion failed to pass, with two members of the Committee voting for Member Laney's motion, and four Committee members voting against Member Laney's motion.

Co-Vice Chair Beigel made a motion to grant grievances #5621 and #5674 and remove the written reprimands from the Grievants' records because NDOC violated NAC 284.242 by not giving proper notice per subsection 1 when requiring the Grievants to work overtime. Co-Vice Chair Beigel's motion was seconded by Member Whitten. Co-Vice Chair Beigel's motion passed, with four Committee members voting for the motion and two Committee members voting against the motion.⁴

A motion was also made to send a recommendation to the Governor's Office that a climate and culture study be conducted of NDOC which also evaluated staffing, retention and salary needs; the motion 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 is a non-exempt State of Nevada employee.
2. Grievant is a correctional officer employed by NDOC.
3. Grievant is employed at HDSP and was employed there on January 12-13, 2018.
4. NDOC at HDSP maintained an "Overtime Scheduling Sheet," that was referred to by various names during the hearing itself, including "mandatory overtime list."
5. The mandatory overtime list had the names of the correctional officers who were scheduled to work overtime.
6. NDOC had its correctional officers sign or initial, at or near the start of each correctional officer's shift at HDSP the mandatory overtime list.
7. At approximately 4:00 a.m. each morning at HDSP the shift supervisor for the morning/day shift arrived at HDSP and begin looking at staffing.
8. If the shift supervisor for the morning/day shift decided that he or she did not have enough correctional officers to staff HDSP then the shift supervisor first looked to a list of volunteers for overtime to see if HDSP's needs could be met using that list.
9. If the morning/day shift supervisor determined that HDSP's staffing needs could not be met by the voluntary overtime list, then

⁴ Co-Vice Chair Beigel and Members Russell, Thompson, and Whitten vote for Co-Vice Chair Beigel's motion. Chair Puglisi and Member Laney voted against the motion.

- correctional officers on the mandatory overtime list were notified that they would be required to work mandatory overtime.
10. Correctional officers were not notified they would not be working overtime in the event that the correctional officers were not required to work overtime and were simply relieved from their post by a correctional officer from the next shift.
 11. A correctional officer whose name was on the mandatory overtime list might work several days with his or her name on the list without being notified that the correctional officer was required to work overtime.
 12. Officer Olague worked the graveyard shift (9:00 p.m. to 5:00 a.m.) at HDSP on January 12-13, 2018.
 13. On January 12, 2018 Officer Olague initialed the mandatory overtime list.
 14. Sometime after 4:00 a.m. on the morning of January 13, 2018 Officer Olague was notified that he was being mandated to work mandatory overtime.
 15. Officer Olague told the sergeant notifying him that he could only work three hours of overtime.
 16. Officer Olague did not work the overtime on January 13, 2018.
 17. Officer Olague was issued a written reprimand as a result of his refusal to work mandatory overtime on January 13, 2018, as mandated by NDOC.

CONCLUSIONS OF LAW

1. For this grievance, it was Grievant's burden to establish his allegations that NDOC violated NAC 284.242 by not providing the required four-hour notice that he was required to work overtime.
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 Olague's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
4. The Committee discussed and substantially relied on NAC 284.242.
5. NAC 284.242(1) states that:

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. There were no unpredictable emergencies at HDSP during Grievant's shift that would require dispensing with the four-hour notice for working overtime mandated by NAC 284.242.
7. As Grievant was not notified that he was actually being required to work overtime until sometime after 4:00 a.m. on January 13, 2018,

and his shift ended at 5:00 a.m., he was not provided with the required four-hour notice set forth in NAC 284.242.

8. Grievant demonstrated by a preponderance of the evidence that NDOC violated NAC 284.242.
9. Conclusions of Law that are more appropriate Findings of Fact shall be deemed to be Findings of Fact.

DECISION

Based upon the evidence in the record, and the foregoing findings of fact and conclusions of law, and good cause appearing therefor, it is hereby ORDERED:

Grievance No. 5621 and No. 5674 is hereby GRANTED. Grievants written reprimands are to be removed from their files.

MOTION: Moved to grant grievances #5621 and #5674 and remove the written reprimands from the Grievants' records because NDOC violated NAC 284.242 by not giving proper notice per Subsection 1 when requiring the Grievants to work overtime.

BY: Co-Vice-Chair Beigel

SECOND: Member Whitten

VOTE: The vote was 3 to 2 with Chair Puglisi and Member Laney voting nay.

7. Public Comment

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

8. Adjournment

Chair Puglisi adjourned the meeting at approximately 2:53 pm.