

**ADOPTED REGULATION OF THE
PERSONNEL COMMISSION**

LCB File No. R097-16

Effective November 2, 2016

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§1-4 and 7, NRS 284.065, 284.155 and 284.305; §§5 and 6, NRS 284.065 and 284.155; §8, NRS 284.065, 284.155, 284.305 and 284.355.

A REGULATION relating to state personnel; revising provisions relating to the reassignment of certain state employees with a disability; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law authorizes the Personnel Commission of the Division of Human Resource Management of the Department of Administration to adopt regulations that provide for filling positions in the classified service without competition by the appointment of current employees with disabilities to certain positions. (NRS 284.305) Existing law also requires an appointing authority to consider whether an employee with a disability can be appointed to a vacant position at or below the grade level of the employee’s current position before considering separation from service or disability retirement. (NRS 284.379)

Sections 2-4 of this regulation set forth a process for the reassignment of a classified employee with a disability, as a reasonable accommodation, in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. and existing law.

Section 8 of this regulation specifically provides that the appointing authority must determine whether reasonable accommodation can be made to reassign the employee under certain circumstances before separating the employee from service because of a physical, mental or emotional disorder which results in the inability of the employee to perform the essential functions of his or her job.

Sections 5-7 of this regulation make conforming changes to existing regulations.

Section 1. Chapter 284 of NAC is hereby amended by adding thereto the provisions set forth as sections 2, 3 and 4 of this regulation.

Sec. 2. *“Reassignment” or “reassign” means a noncompetitive placement of an employee as a reasonable accommodation to a position within the same grade or, if a position in the same grade is not available, to a position in a class with a lower grade for which the employee meets the minimum qualifications and is able to perform the essential functions.*

Sec. 3. *If an employee is reassigned to a position which is in:*

1. The same grade which he or she currently holds, the employee’s base rate of pay in the position to which he or she was reassigned will be determined in accordance with the provisions of NAC 284.175.

2. A lower grade than he or she currently holds, the employee’s base rate of pay in the position to which he or she was reassigned will be determined in accordance with the provisions of subsection 1 of NAC 284.173.

Sec. 4. *1. The Division of Human Resource Management shall assist an appointing authority with the reassignment of an employee with a disability who is unable to perform the essential functions of his or her position with or without reasonable accommodation by identifying any vacant or soon to be vacant positions for which the employee meets the minimum qualifications. Those vacant or soon to be vacant positions may include positions that are outside of the geographical location of the employee. A refusal by the employee of an offer of a position that is outside of the geographical location of the employee will not affect the employee’s reassignment rights pursuant to this section. The employee will continue to be referred to positions pursuant to this section until the reassignment rights of the employee are exhausted in accordance with subsection 10.*

2. The appointing authority of the employee shall, through the interactive process, determine if a vacant or soon to be vacant position at the employee’s current grade exists

within the employee's agency. If such a position is identified and the employee meets the minimum qualifications, as determined by the Division of Human Resource Management pursuant to NAC 284.317, and is able to perform the essential functions of the position with or without reasonable accommodation, the appointing authority shall offer the employee the position unless the appointing authority demonstrates that such an appointment would cause an undue hardship to the appointing authority.

3. If the appointing authority of the employee is not able to reassign the employee pursuant to subsection 2, the appointing authority of the employee shall notify the Division of Human Resource Management. For at least 30 days after receipt of the notification, the Division of Human Resource Management shall place the employee on reassignment lists for any vacant or soon to be vacant positions being filled at the grade of the current position of the employee if the employee meets the minimum qualifications for the positions and has expressed an interest in those positions. If such a position is determined to be available and it is determined through the interactive process that the employee is able to perform the essential functions of the position with or without reasonable accommodation, the employee must be offered the position unless it is demonstrated that such an appointment would cause an undue hardship.

4. If reassignment is not available pursuant to subsection 2 or 3, the appointing authority of the employee shall, through the interactive process, determine if a vacant or soon to be vacant position below the grade of the current position of the employee exists within the employee's agency. If such a position is identified and the employee meets the minimum qualifications, as determined by the Division of Human Resource Management pursuant to

NAC 284.317, and is able to perform the essential functions of the position with or without reasonable accommodation, the appointing authority shall:

(a) Consider the employee for any such positions in the order of the grade of the positions beginning with the grade closest to the grade of the current position of the employee if multiple positions with different grades are determined to be available within the employee's agency; and

(b) Offer the employee such a position unless the appointing authority demonstrates that such an appointment would cause an undue hardship to the appointing authority.

5. If reassignment is not available pursuant to subsection 2, 3 or 4, the appointing authority of the employee shall notify the Division of Human Resource Management. For at least 30 days after receipt of the notification, the Division of Human Resource Management shall place the employee on reassignment lists for vacant or soon to be vacant positions being filled at or below the grade of the current position of the employee if the employee meets the minimum qualifications for the positions and has expressed an interest in those positions. If such a position is determined to be available and it is determined through the interactive process that the employee is able to perform the essential functions of the position with or without reasonable accommodation, the employee must be offered the position unless it is demonstrated that such an appointment would cause an undue hardship.

6. The appointing authority of an employee to whom subsection 1 applies may offer the employee a position in the employee's agency below the grade of the current position of the employee if:

(a) A vacant or soon to be vacant position at the grade of the current position of the employee is not identified within the employee's agency;

(b) The employee meets the minimum qualifications of the position as determined by the Division of Human Resource Management pursuant to NAC 284.317; and

(c) It is determined that the employee is able to perform the essential functions of the position with or without reasonable accommodation unless it is demonstrated that such an appointment would cause an undue hardship.

↪ If the employee accepts the position offered pursuant to this subsection, the employee may continue to exercise his or her reassignment rights pursuant to subsections 1 to 5, inclusive, and subsections 7 to 12, inclusive, for a period of 60 days following the appointment.

7. An employee may not be reassigned to underfill a vacant or soon to be vacant position allocated at grade 30 or higher if that position is allocated at a higher grade than the position the employee currently occupies.

8. After the reassignment of an employee is made pursuant to this section, the status of appointment of the employee will be determined in accordance with NAC 284.444.

9. The reassignment of an employee which is made pursuant to this section will take precedence over all other types of appointments and use of lists, including, without limitation, the lists, other than reemployment lists, set forth in NAC 284.358.

10. Except as otherwise provided in subsection 6, reassignment rights pursuant to this section are exhausted when an employee:

(a) Accepts a reassignment at or below the grade of the current position of the employee;

(b) Accepts a position through a competitive or noncompetitive appointment;

(c) Notifies the appointing authority in writing that he or she no longer wishes to seek reassignment;

(d) Has not been appointed from any of the lists on which his or her name was included in accordance with this section and the Division of Human Resource Management determines that there are no other positions available;

(e) Refuses a position within his or her geographical location that is at or below the grade of the current position of the employee; or

(f) Accepts reemployment pursuant to NAC 284.6014.

11. The provisions of this section do not prohibit an employee from accepting another position through a competitive or noncompetitive appointment.

12. As used in this section:

(a) "Agency" includes:

(1) A department as defined in NAC 284.055;

(2) Any other entity of the Executive Branch of State Government which employs persons in the classified service, including, without limitation, the office of an elected officer;

(3) A division of the Department of Health and Human Services; and

(4) Any division or institution of the Nevada System of Higher Education.

(b) "Geographical location" has the meaning ascribed to it in NAC 284.612.

(c) "Soon to be vacant" means a position in which:

(1) The Division of Human Resource Management is aware will have an imminent vacancy;

(2) A list has not been certified for the position; and

(3) The employee will be able and available to fill the position within 30 days after the position becomes open.

(d) "Undue hardship" has the meaning ascribed to it in 29 C.F.R. § 1630.2.

Sec. 5. NAC 284.094 is hereby amended to read as follows:

284.094 “Reclassification” means a ~~reassignment or~~ change in *the* allocation of a position by:

1. Raising it to a class with a higher grade;
2. Reducing it to a class with a lower grade; or
3. Moving it to another class at the same grade on the basis of significant changes in kind, difficulty or responsibility of the work performed.

Sec. 6. NAC 284.120 is hereby amended to read as follows:

284.120 1. For the purposes of determining the meaning of “essential functions of a position,” *“interactive process,”* “person with a disability,” “qualified person with a disability” and “reasonable accommodation,” the Division of Human Resource Management hereby adopts by reference and will refer to:

- (a) The Americans with Disabilities Act of 1990 (Public Law 101-336).
 - (b) The ADA Amendments Act of 2008 (Public Law 110-325).
 - (c) The provisions of 29 C.F.R. Part 1630.
 - (d) The *Technical Assistance Manual* for the Americans with Disabilities Act.
2. A copy of the materials adopted by reference pursuant to this section may be obtained at no charge from the United States Equal Employment Opportunity Commission ~~{Clearinghouse, by mail at P.O. Box 541, Annapolis Junction, Maryland 20701, by telephone at (800) 669-3362 or TDD (800) 800-3302 or}~~ at the Internet address ~~{<http://www.eeoc.gov/eeoc/publications/index.cfm>}~~ <http://www.eeoc.gov>.

Sec. 7. NAC 284.439 is hereby amended to read as follows:

284.439 Reports of appointments made pursuant to NRS 284.121 must include the type of position, the type of appointment ~~(f)~~ and the employee's status of appointment as follows:

1. The type of classified position must be:
 - (a) Permanent;
 - (b) Special project;
 - (c) Temporary;
 - (d) Seasonal; or
 - (e) Intermittent.

2. The type of appointment to a classified position must be:
 - (a) Demotion;
 - (b) Reemployment;
 - (c) Transfer;
 - (d) Reappointment;
 - (e) *Reassignment*;
 - ~~(f)~~ (f) Promotion;
 - ~~(g)~~ (g) Reinstatement; or
 - ~~(g)~~ (h) New hire.

3. The status of appointment in a classified position must be:
 - (a) Probationary for a nonpermanent employee;
 - (b) Permanent;
 - (c) Trial period for a permanent employee;
 - (d) Provisional;
 - (e) Emergency;

- (f) Temporary; or
- (g) Special disabled.

4. In the unclassified service, the type of position, type of appointment and status of appointment are each “unclassified.”

Sec. 8. NAC 284.611 is hereby amended to read as follows:

284.611 1. Before separating an employee because of a physical, mental or emotional disorder which results in the inability of the employee to perform the essential functions of his or her job, the appointing authority must:

(a) Verify with the employee’s physician or by an independent medical evaluation paid for by the appointing authority that the condition does not, or is not expected to, respond to treatment or that an extended absence from work will be required;

(b) Determine whether reasonable accommodation can be made to ~~enable~~ :

(1) Enable the employee to perform the essential functions of his or her job; *or*

(2) Reassign the employee if it has been determined that:

(I) There is no reasonable accommodation that can be made to enable the employee to perform the essential functions of his or her job; or

(II) All other reasonable accommodations would cause an undue hardship to the appointing authority.

(c) Make a request to the Administrator of the Rehabilitation Division of the Department of Employment, Training and Rehabilitation to obtain the services provided by that Division, or if the employee is receiving worker’s compensation, request the services of the rehabilitation provider, to evaluate the employee’s condition and to provide any rehabilitative services possible; and

(d) Ensure that all reasonable efforts have been made to retain the employee.

2. A separation pursuant to this section is only justified when:

(a) The information obtained through the procedures specified in subsection 1 supports the decision to separate;

(b) The employee is not on sick leave or other approved leave; and

(c) A referral has been made to the Public Employees' Retirement System and the employee has been determined to be ineligible for, or has refused, disability retirement.

3. A permanent employee separated pursuant to this section is entitled to the same rights and privileges afforded permanent employees who are dismissed for disciplinary reasons. The procedures contained in NAC 284.656, 284.6561 and 284.6563 must be followed, and he or she may appeal the separation to the hearing officer.

4. A permanent employee who is separated because of a physical, mental or emotional disorder is eligible for reinstatement pursuant to NAC 284.386 if he or she recovers from the disorder.

5. As used in this section, "undue hardship" has the meaning ascribed to it in 29 C.F.R. § 1630.2.

LEGISLATIVE REVIEW OF ADOPTED REGULATIONS--NRS 233B.066
Informational Statement
LCB File No. R097-16

1. A clear and concise explanation of the need for the adopted regulation.

Senate Bill 62 of the 2015 Legislative Session amended NRS 284.305 and 284.379 to allow the Personnel Commission to adopt regulations for the non-competitive appointment of an employee with a disability. As a result, several new regulations and amendments have been proposed which are intended to bring the State's reasonable accommodation process into closer alignment with the Americans with Disabilities Act's (ADA) provisions.

The amendments included in this LCB File are related to the "reassignment" of an employee who can no longer perform the essential functions of his or her position with or without reasonable accommodation. Prior to these amendments, reassignment was primarily considered within the employee's current agency. After consultation with the Attorney General's Office, it has been determined that when reassignment is appropriate, positions across State service should be considered in conjunction with input from the employee through the interactive process. These regulations establish a process to first look for vacant or soon to be vacant positions at the same grade level and then for a position at a lower grade level.

2. A description of how public comment was solicited, a summary of public response, and an explanation of how other interested persons may obtain a copy of the summary.

On August 31, 2016, copies of the proposed regulation amendments were sent by email to persons who were known to have an interest in the subject of proposed personnel regulation changes as well as any person who had specifically requested such notice via Listserv. These documents were also made available on the Division of Human Resource Management's website, the Nevada Public Notice website, the Legislative Counsel Bureau's website, and mailed to all county libraries in Nevada, and posted at the following locations:

Blasdel Building
209 E. Musser Street
Carson City, NV

Legislative Counsel Bureau
401 S. Carson Street
Carson City, NV

Nevada State Library and Archives
100 N. Stewart Street
Carson City, NV

Grant Sawyer Office Building
555 E. Washington Avenue
Las Vegas, NV

Nevada State Capitol Building
101 N. Carson Street
Carson City, NV

A regulation workshop was conducted by the Division of Human Resource Management on August 12, 2015.

Comment was received from the then Deputy Director of the Department of Health and Human Services (DHHS representative), suggesting that in the new regulation regarding the “reassignment” process that the language “minimum qualifications” should be changed to “qualified” to allow for a “broader connotation” to address additional aspects that may make an individual disqualified for a position. After review of 29 CFR § 1630.2 (the ADA federal regulations), it was determined that the word “qualified,” as with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.” While the first part of the definition appears to fit the intent, the second part (i.e., “and, with or without reasonable accommodation, can perform the essential functions of such position”) does not match the intent of the terminology “minimum qualifications” and therefore it was not changed.

The DHHS representative commented that an employee demoting and then later promoting with retention of a higher step should not be allowed, and suggested that reassignment be added to the exception in subsection 1(d) of NAC 284.172 regarding retention of an employee’s step. As a result of this comment, Section 3 of this file was added.

The DHHS representative further commented that the provisions for reemployment of people with permanent disabilities relating to workers’ compensation may be moot or duplicative due to the proposed regulation changes relating to reassignment. Additionally, the then Personnel Officer of the Department of Transportation (NDOT representative) commented that it would be preferable to have the same process with the ADA and workers’ compensation. A representative of the Division expressed concern with limiting the reassignment process to the workers’ compensation process which requires that any reemployment (as part of the workers’ compensation process) could not result in the employee being reemployed at a pay grade lower than 80% of the employee’s current pay grade. The intent of the ADA is to try and get the employee back to work at the same grade or if that is not possible, as close as possible. Mirroring the workers’ compensation process would eliminate that option to look for positions at pay grades below 80% of the employee’s current pay grade so it was determined that both processes are necessary.

The DHHS representative suggested that language be added to clarify that vacant positions would be those that the agency intends to fill, as it is common for agencies to hold positions vacant to obtain salary savings. The Division will place individuals that are eligible for reassignment on lists for positions in which an agency wishes to fill or maybe surveyed to determine if the agency has a vacant position in which they are going to fill.

The DHHS representative expressed concern regarding requiring an employee to go to his or her health care provider repeatedly and suggested the Division or the Division of Risk Management (due to their responsibility for fitness for duty evaluations) take responsibility

for reviewing medical documentation. This process is best handled through the interactive process between the employee and the agency with the vacant position therefore the proposed regulation was not modified to include this suggestion.

The DHHS representative commented that we should not expand what is required under the ADA law as the Equal Employment Opportunity Commission guidance is not law. After consultation with the Attorney General's Office, it has been determined that when reassignment is appropriate positions across State service should be considered.

The DHHS representative asked if requiring employees who are reassigned to serve a probationary period had been considered. The Division has considered this issue and chosen to adopt the State's current rules outlined in NAC 284.444.

The DHHS representative and the NDOT representative expressed concern regarding whether a thorough analysis of whether an employee is disabled within the meaning of the ADA will be done prior to the reassignment process. The Division encourages agency staff to work with their Deputy Attorney General or general counsel to review information provided by the employee and his or her provider of health care to determine if the employee is a qualified individual under the ADA.

The NDOT representative also outlined concern regarding the fact that while with workers' compensation light duty may be offered, the Department of Transportation does not provide light duty for non-industrial injuries. A representative of the Division inquired and the NDOT representative confirmed that the concern was related to the subsection which is now subsection 6 in the new regulation outlining the reassignment process (Section 4). The representative of the Division clarified that the language in that subsection is permissive.

The DHHS representative and the NDOT representative also suggested incorporating into the reassignment process a meeting similar to Risk Management's workers' compensation roundtable meeting. While this process is not in regulation, the Division will be available to assist agencies and employees with the reassignment process.

The NDOT representative concluded her comments by expressing her appreciation for the legislative change and the Division's developing of the reassignment process.

After consideration and consultation with legal counsel, the Division recommended changes be made to the text pre-approved by the Legislative Counsel Bureau, Legal Division. The original language provided to the Division from the Legislative Counsel Bureau conformed to the statutory language in NRS 284.305 as amended by S.B. 62 of the 2015 Legislative Session. However, statutory language in NRS 284.305 regarding an employee needing to have completed a probationary period and allowing appointing authorities to refuse reassignment of an employee without having to meet the ADA standard of undue hardship, do not concur with the federal standard required by the Americans with Disabilities Act and the Equal Employment Opportunity Commission's guidance; therefore the Division provided the Personnel Commission with the proposed regulation which had received pre-adoption review at the Personnel Commission meeting

held on September 30, 2016 but also recommend removing those references in the proposed regulation and the Personnel Commission adopted the regulations with revisions. At the public hearing, comment was received from Dennis Perea, Deputy Director, Department of Employment, Training and Rehabilitation, in support of the proposed regulation amendments.

At the public hearing, staff provided information regarding the intent and need for the regulations.

Written minutes and comments from the regulation workshop and public hearing can be obtained from the Division of Human Resource Management by contacting Shelley Blotter at sblotter@admin.nv.gov or by calling (775) 684-0105.

3. The number of persons who:

- (a) Attended each hearing: - 37**
- (b) Testified at each hearing: - 2**
- (c) Submitted written comments: - 0**

4. Following is a list of names and contact information, including telephone number, business address, business telephone number, electronic mail address, and name of entity or organization represented, for each person identified above in #3(b):

Carrie Hughes, Personnel Analyst
State of Nevada
Department of Administration
Division of Human Resource Management
100 N. Stewart Street
Carson City, NV 89701
(775) 684-0111
cphughes@admin.nv.gov

Dennis Perea, Deputy Director
State of Nevada
Department of Employment, Training and Rehabilitation
2800 E. St. Louis Avenue
Las Vegas, NV 89104
DAPEREA@nvdetr.org

5. A description of how comment was solicited from affected businesses, a summary of their response and an explanation of how other interested persons may obtain a copy of the summary.

Comments were not solicited from businesses, as the regulation does not affect businesses. Comments were solicited from effected parties including employees and employee associations. Written minutes and comments from the workshop and public hearing can be obtained as instructed in the response to question #2.

6. **If the regulation was adopted without changing any part of the proposed regulation, a summary of the reasons for adopting the regulation without change.**

There was no opposition to the regulation at the Personnel Commission hearing.

7. **The estimated economic effect of the regulation on the business which it is to regulate and on the public. These must be stated separately, and each case must include:**
 - (a) **Both adverse and beneficial effects; and**
 - (b) **Both immediate and long-term effects.**

This regulation does not have a direct economic effect on either a regulated business or the public.

8. **The estimated cost to the agency for enforcement of the proposed regulation:**

There is no additional cost to the agency for enforcement of this regulation.

9. **A description of any regulations of other State or governmental agencies which the proposed regulation overlaps or duplicates and a statement explaining why the duplication or overlap is necessary. If the regulation overlaps or duplicates a federal regulation, the name of the regulating federal agency.**

This regulation does not overlap or duplicate any State or federal regulations.

10. **If the regulation includes provisions that are more stringent than a federal regulation that regulates the same activity, a summary of such provisions.**

The regulation does not include any provisions that are covered by any federal regulations.

11. **If the regulation provides a new fee or increases an existing fee, the total annual amount the agency expects to collect and the manner in which the money will be used.**

No fees are associated with this regulation.