

PROPOSED REGULATION OF THE PERSONNEL COMMISSION

LCB File No. R097-16

Explanation of Proposed Change: S.B. 62 of the 2015 Legislative Session allows the Personnel Commission to adopt regulations for the non-competitive appointment of an employee with a disability. As a result, several 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 Division of Human Resource Management proposes a new section to define the term "reassignment" for the purposes of accommodation of a permanent classified employee. The amendment specifically applies to classified employees; however, the State's reassignment obligation under the ADA applies to all employees including those in unclassified and non-classified positions.

NEW: "Reassignment" defined.

"Reassignment" means the noncompetitive placement, subject to the appointing authority's approval, of a permanent 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 can perform the essential functions.

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The Division of Human Resource Management proposes a new section to NAC 284. If an employee is reassigned to a position with the same grade as his or her position held immediately before the reassignment, the determination of the employee's rate of pay for the new position must follow NAC 284.175, Rate of pay: Effect of transfer. If an employee is reassigned to a position with a lower grade than his or her position held immediately before the reassignment, the determination of the employee's rate of pay for the new position must follow NAC 284.173, Rate of pay: Effect of demotion.

NEW: Rate of pay: Reassignment.

The rate of pay of an employee who is reassigned will be determined in accordance with the provisions of NAC 284.175 governing an employee's pay on transfer and subsection 1 of NAC 284.173 governing an employee's pay on demotion.

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The Division of Human Resource Management proposes a new section to establish a method of retaining a qualified employee with a disability who is no longer able to perform the essential functions of his or her current position by noncompetitively placing him or her into another position within the State. The amendment specifically applies to classified employees; however, the State's reassignment obligation under the ADA applies to all employees including those in unclassified and non-classified positions.

The newly proposed section describes the reassignment process that will be used when a permanent classified employee can no longer perform the essential functions of his or her position with or without reasonable accommodation. As part of the interactive process, the Division will work with the State agency of the employee to determine if a vacant or soon to be vacant position is available and if the employee meets the minimum qualifications. The Equal Employment Opportunity Commission in its own posted Policy on Reasonable Accommodations outlines that when considering reassignment, they consider positions currently vacant and positions which they have "reason to believe will become vacant within 60 days from the date the search is initiated."

An offer of appointment to such a position at the employee's same grade level and within the same occupational group within the employee's agency will be made first. If no such position is available, then an offer of placement at the same grade level in the current agency will be made. Then, the search will be broadened into different agencies. If no position is available at the employee's current grade, the search is expanded into looking for the position with the closest grade to the employee's current grade. And, if multiple positions exist with the closest grade to the employee's current grade in the employee's current agency, another agency or multiple agencies, consideration of the position(s) in the employee's current agency will be made first.

During the search for positions in the same grade, both within and outside the employee's current agency, an effort will be made to place the employee in a position within the same occupational group due to the impact on both potential layoff seniority calculations and to minimize any impact on the employee's career path.

The term "agency" has been defined to clarify that both departments as defined in regulation and other organizations such as boards, commissions and elected officials shall participate in the interactive process.

NEW: Reassignment: Process for placement of a permanent classified employee with a disability as part of the accommodation process.

1. *As part of the reasonable accommodation process required by the Americans with Disabilities Act and as adopted by reference in NAC 284.120, the Division of Human Resource Management will support the accommodation process of a qualified permanent classified employee with a disability by assisting the employee's appointing authority in identifying vacant or soon to be vacant positions for which the employee meets the minimum qualifications. The employee will be referred to positions until the employee ends his or her participation in the process or it is determined that no other positions are available. When available, the employee will be referred to positions outside of his or her geographical location; however, if the employee refuses an offer of a position outside of his or her geographical location the refusal will not affect his or her reassignment rights pursuant to this section.*

2. *While the agency may offer a temporary appointment as described in subsection 6, the appointing authority of the employee or his or her designated representative shall determine, through the interactive process, if a vacancy exists or a vacancy will soon exist in a position within the employee's current agency at the employee's current grade. If a position is identified and the employee meets the minimum qualifications, as determined by the Division of Human Resource Management or the delegated representative of the Division of Human Resource Management, and can perform the essential functions of the position with or without accommodation, the appointing authority or his or her designated representative shall offer the employee the position unless the appointing authority demonstrates that such an appointment would be an undue hardship.*

3. *If the employee's appointing authority is not able to reassign the employee pursuant to subsection 2, the appointing authority or his or her designated representative shall notify the Division of Human Resource Management. The Division of Human Resource Management will place the employee on reassignment lists for vacant positions being filled at the employee's current grade, for which the employee meets the minimum qualifications and has expressed an interest, for 30 days from notification. If such a position is determined to be available, the appointing authority of the position or his or her designated representative, shall, through the interactive process, determine if the employee can perform the essential functions of the position with or without reasonable accommodation. With the approval of the appointing authority of the position, the employee may be offered the position.*

4. *If reassignment is not available pursuant to subsection 2 or 3, the appointing authority of the employee or his or her designated representative shall determine if a vacancy exists or a vacancy will soon exist in a position within the employee's current agency at a grade level lower than the employee's current grade. If a position is identified and the employee meets the minimum qualifications, as determined by the Division of Human Resource Management, or the delegated representative of the Division of Human Resource Management, and can perform the essential functions of the position with or without reasonable accommodation, the appointing authority or his or her designated representative shall:*

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

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

5. *If reassignment is not available pursuant to subsection 2, 3, or 4 the appointing authority of the employee or his or her designated representative shall notify the Division of*

Human Resource Management. The Division of Human Resource Management will place the employee on reassignment lists for vacant positions being filled at or below the employee's current grade, for which the employee meets the minimum qualifications and has expressed an interest, for 30 days from notification. If such a position is determined to be available, the appointing authority of the vacant or soon to be vacant position, or his or her designated representative, shall, through the interactive process, determine if the employee can perform the essential functions of the position with or without reasonable accommodation. With the approval of the appointing authority of the position, the employee may be offered the position.

↳ *For the purposes of this section, the employee's reassignment rights are exhausted if the employee:*

- (a) Accepts a reassignment at or below his or her current grade level;*
- (b) Accepts an appointment through the competitive or non-competitive process;*
- (c) Expresses in writing that he or she no longer wishes to seek a reassignment;*
- (d) Has not been appointed from any of the lists for which his or her name was included in accordance with this section;*
- (e) Refuses a position at the same grade or a grade lower than the employee's current grade within his or her geographical location;*
- (f) Is approved by the Retirement Board for a Disability Retirement Benefit; or*
- (g) Accepts reemployment pursuant to NAC 284.6014 to 284.6019.*

6. At the discretion of the appointing authority, if a vacant or soon to be vacant position at the employee's current grade is not identified within the employee's agency but a position at a lower grade is identified in the employee's agency and the Division of Human Resource Management, or the delegated representative of the Division of Human Resource Management, determines the employee meets the minimum qualifications and the appointing authority or his or her designated representative, determines the employee can perform the essential functions of the position with or without reasonable accommodation, the appointing authority or his or her designated representative, may offer the employee the position and the employee may choose to accept the offered position. For a period of up to 60 days following such an appointment, the employee will be able to exercise his or her reassignment rights as outlined in this section concurrent with the appointment pursuant to this subsection.

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

8. This regulation does not prevent the employee from accepting another position through competitive or non-competitive processes.

9. The status of an employee who is reassigned pursuant to this section will be determined in accordance with the provisions of NAC 284.444 governing the application of probationary period.

10. As used in this section:

(a) "Soon to be vacant" means that the Division of Human Resource Management has been made aware of an imminent vacancy, a list has not already been certified for the position, and the employee is able and available to fill the position within 30 days of the position becoming open;

(b) "Agency" means a department as defined pursuant to NAC 284.055 or another entity of the Executive Branch of State Government which employs classified workers to include offices of elected officials. For the purposes of this section, divisions of the Department of

Health and Human Services and the Nevada System of Higher Education will be deemed to be agencies; and

(c) “Geographical location” has the meaning ascribed to it in NAC 284.612.

11. The reassignment of an employee as an accommodation under this section will take precedence over all other types of appointment and use of lists including those in NAC 284.358 with the exception of reemployment lists.

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The following amendment, proposed by the Division of Human Resource Management, removes the word “reassignment” because it will now be a defined term as a part of the reasonable accommodation process.

NAC 284.094 “Reclassification” defined. (NRS 284.065) “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.

[Personnel Div., Rule I § D subsec. 23, eff. 8-11-73; renumbered as subsec. 24, 4-14-76]—(NAC A by Dep’t of Personnel, 10-26-84)

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This amendment, proposed by the Division of Human Resource Management, is contingent upon the adoption of the newly proposed section, included above, establishing a process for the placement of a permanent, classified employee with a disability as part of the accommodation process required by the American’s with Disabilities Act. This regulation identifies resources to find the meaning of specific terms used in NAC 284, which are related to persons with disabilities.

NAC 284.120 Adoption by reference of federal law, regulations and manual regarding persons with disabilities. (NRS 284.065)

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>.

(Added to NAC by Dep’t of Personnel, eff. 7-6-92; A 10-27-97; R082-00, 8-2-2000; A by Personnel Comm’n by R059-09, 10-27-2009)

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The amendment to this section, proposed by the Division of Human Resource Management, is necessary because the word “reassignment” will become a defined term describing a new appointment type. This type of appointment should be included in the reports of appointment pursuant to NRS 284.121.

NAC 284.439 Reports of appointments. (NRS 284.065, 284.121, 284.155) Reports of appointments made pursuant to NRS 284.121 must include the type of position, the type of appointment, 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) Promotion;
 - (f) Reinstatement; ~~or~~
 - (g) New hire ~~H~~; *or*
 - (h) Reassignment.*
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.”

(Added to NAC by Dep’t of Personnel, eff. 10-26-84; A 8-28-85; 8-1-91; 7-6-92; A by Personnel Comm’n by R183-03, 1-27-2004)—(Substituted in revision for NAC 284.383)

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The following amendment, proposed by the Division of Human Resource Management, is based upon S.B. 62 of the 2015 Legislative Session. The amendment clarifies that reassignment is the final type of reasonable accommodation that must be attempted prior to separating an employee due to “a physical, mental or emotional disorder”.

NAC 284.611 Separation for physical, mental or emotional disorder. (NRS 284.065, 284.155, 284.355, 284.383, 284.385, 284.390)

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 the employee to perform the essential functions of his or her job **to include:**

(1) Reassignment, if the employee’s appointing authority has determined that there is no reasonable accommodation that will allow the employee to remain in his or her current position or all other accommodations would impose an undue hardship as defined in 29 CFR § 1630.2.

(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.

(Added to NAC by Dep't of Personnel, eff. 10-26-84; A 8-1-91; 12-26-91; 7-6-92; R197-99, 1-26-2000; A by Personnel Comm'n by R182-03, 1-27-2004; R143-05, 12-29-2005; R063-09, 11-25-2009, **R009-14, 6-23-14**)