

**PROPOSED REGULATION OF THE
PERSONNEL COMMISSION**

LCB File No. R097-16

August 25, 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 permanent 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 a permanent employee as a reasonable accommodation, with the approval of the appointing authority, 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 a permanent 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, the appointing authority of the position shall, through the interactive process, determine if the employee is able to 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 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, the appointing authority of the position shall, through the interactive process, determine if the employee is able to 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.

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) The appointing authority determines that the employee is able to perform the essential functions of the position with or without reasonable accommodation.

↪ 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 failed to be 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;

(f) Has been referred to the Public Employees' Retirement System and has refused disability retirement; or

(g) 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 Government which employs persons in the classified service, including, without limitation, the office of an elected officer; and

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

(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 the appointing authority of the employee has 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 reasonable accommodations, other than reassignment, 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.