

PROPOSED REGULATION OF THE PERSONNEL COMMISSION

LCB File No. R016-21

August 10, 2021

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

AUTHORITY: §§ 1, 2 and 10, NRS 284.065 and section 3 of Senate Bill No. 51, chapter 321, Statutes of Nevada 2021, at page 1912; §§ 3, 4 and 6, NRS 284.065, 284.155, 284.343 and section 3 of Senate Bill No. 51, chapter 321, Statutes of Nevada 2021, at page 1912; § 5, NRS 284.065, 284.155, 284.343, 284.385 and section 3 of Senate Bill No. 51, chapter 321, Statutes of Nevada 2021, at page 1912; §§ 7, 8 and 9, NRS 284.065, 284.155 and section 3 of Senate Bill No. 51, chapter 321, Statutes of Nevada 2021, at page 1912.

A REGULATION relating to state employees; defining “sex- or gender-based harassment”; requiring state employees to attend certain training classes concerning sex- or gender-based harassment; replacing the term “sexual harassment” with “sex- or gender-based harassment”; making various other changes related to sex- or gender-based harassment; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Under existing law: (1) it is the policy of this State to ensure that its employees do not engage in sex- or gender-based harassment; (2) sex- or gender-based harassment is a form of unlawful discrimination; and (3) it is prohibited for a state employee to engage in sex- or gender-based harassment against another employee, an applicant for employment or any other person in the workplace (Section 2 of Senate Bill No. 51, chapter 321, Statutes of Nevada 2021, at page 1912)

Section 1 of this regulation defines “sex- or gender-based harassment.” **Section 2** of this regulation makes a conforming change to indicate the proper placement of **section 1** in the Nevada Administrative Code.

Existing regulations require an employee to attend a certified class concerning the prevention of sexual harassment within 6 months after the initial appointment of the employee to state service. (NAC 284.496) **Section 3** of this regulation instead requires an employee to attend a certified class concerning the prevention of sex- or gender-based harassment within 30 days after his or her initial appointment to state service.

Existing regulations set forth certain training requirements for an employee who is appointed to a supervisory or managerial position, including that such an employee attend at least one training class in sexual harassment. (NAC 284.498) **Section 4** of this regulation instead requires a supervisory or managerial employee to attend: (1) a training class concerning sex- or gender-based harassment within 30 days after his or her appointment to the supervisory or

managerial position; and (2) an additional training class on sex- or gender-based harassment within 12 months after his or her appointment to the supervisory or managerial position.

Existing regulations authorize appropriate disciplinary or corrective action to be taken against an employee for the failure of the employee to participate in an investigation concerning sexual harassment. (NAC 284.650) **Section 5** of this regulation instead authorizes appropriate disciplinary or corrective action to be taken for the failure of the employee to participate in an investigation concerning sex- or gender-based harassment.

Sections 6-8 replace the term “sexual harassment” with “sex- or gender-based harassment” in certain provisions relating to investigations of discrimination by the Division of Human Resource Management of the Department of Administration.

Existing regulations authorize an appointing authority to impose harsh disciplinary sanctions on, or dismiss, persons who commit sexual harassment. (NAC 284.771) **Section 9** of this regulation instead authorizes an appointing authority to impose harsh disciplinary sanctions on, or dismiss, persons who commit sex- or gender-based harassment. **Section 9** further requires that any disciplinary sanction imposed by an appointing authority for sex- or gender-based harassment be proportionate to the violation.

Section 10 of this regulation repeals the definition of the term “sexual harassment.”

Section 1. Chapter 284 of NAC is hereby amended by adding thereto a new section to read as follows:

“Sex- or gender-based harassment” means:

1. Unwelcome sexual advances, requests for sexual favors or any other verbal or physical conduct of a sexual nature when:

(a) Submission to such conduct is explicitly or implicitly made a term or condition of a person’s employment; or

(b) Submission to or rejection of such conduct is explicitly or implicitly made a basis of employment decisions affecting a person; or

2. Engaging in unwelcome harassing verbal or physical conduct that occurs because of the sex or gender of a person or persons and has the purpose or effect of unreasonably interfering with a person’s work performance or creating an intimidating or offensive work environment where:

(a) The harassing conduct is of a sexual nature;

(b) The harassing conduct is not of a sexual nature but is related to the sex or gender of a person;

(c) The harassing conduct is sex- and gender-neutral in content but occurs because of the sex or gender of a person; or

(d) Any combination of harassing conduct described in paragraphs (a), (b) and (c).

Sec. 2. NAC 284.010 is hereby amended to read as follows:

284.010 As used in this chapter, unless the context otherwise requires, the words and terms defined in NAC 284.021 to 284.1125, inclusive, *and section 1 of this regulation*, have the meanings ascribed to them in those sections.

Sec. 3. NAC 284.496 is hereby amended to read as follows:

284.496 1. Within ~~6 months~~ *30 days* after an employee is initially appointed to state service, the employee shall attend a certified class concerning the prevention of ~~sexual~~ *sex- or gender-based* harassment.

2. At least once every 2 years after his or her initial appointment to state service, an employee shall attend a certified refresher class or training concerning the prevention of ~~sexual~~ *sex- or gender-based* harassment.

3. An appointing authority may require an employee to retake any part or all of the classes or training required by subsections 1 and 2, or to participate in any additional classes or training deemed necessary by the appointing authority.

4. The appointing authority shall retain the proof of completion by an employee of a class or training required by this section.

5. The Division of Human Resource Management will certify the classes and training concerning the prevention of ~~sexual~~ *sex- or gender-based* harassment required by this section.

Sec. 4. NAC 284.498 is hereby amended to read as follows:

284.498 1. Except as otherwise provided in this section:

(a) *Within 30 days after an agency initially appoints an employee to a supervisory position or managerial position, the employee shall attend a training class concerning sex- or gender-based harassment.*

(b) Within 6 months after an agency initially appoints an employee to a supervisory position or managerial position, the employee shall attend a training class concerning work performance standards and the evaluation of the performance of employees.

~~(b)~~ (c) Within 12 months after an agency appoints an employee to a supervisory position or managerial position, the employee shall attend at least one training class which has been approved by the Division of Human Resource Management in each of the following areas:

(1) The following:

(I) Equal employment opportunity; and

(II) Unlawful discrimination and ~~[sexual]~~ *sex- or gender-based* harassment;

(2) Interviewing and hiring;

(3) Alcohol and drug testing;

(4) Progressive disciplinary procedures;

(5) Handling grievances; and

(6) The following:

(I) Title I of the American with Disabilities Act of 1990, 42 U.S.C. §§ 12111-12117;

(II) The ADA Amendments Act of 2008, Public Law 110-325;

(III) The development of essential functions of positions that are described to each

candidate and considered by the appointing authority pursuant to NAC 284.441; and

(IV) The Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq.

2. Every 3 years, a supervisor or managerial employee shall complete training which is approved by the Division of Human Resource Management in each of the topic areas described in subsection 1.

3. The appointing authority, at its discretion, may accept, in lieu of the training required by subsection 1, supervisory or managerial training classes in each of the topic areas described in subsection 1 which are approved by the Division of Human Resource Management and taken by the employee during the 3 years immediately preceding the employee's appointment.

4. In addition to the training otherwise required by this section, the Division of Human Resource Management or an appointing authority may require a supervisor or managerial employee to retake any part or all of the training required by this section, or to participate in any additional training or other classes deemed necessary by the Division of Human Resource Management or appointing authority.

5. As used in this section:

(a) "Managerial position" means a position which is held by an employee who:

- (1) Formally evaluates supervisors;
- (2) Is involved in the hiring and firing of subordinate staff;
- (3) Determines organizational structure within a component of the organization; and
- (4) Develops, monitors and implements policies to accomplish long-range goals.

(b) "Supervisory position" means a position which is held by an employee who:

- (1) Formally evaluates staff;
- (2) Is involved in the hiring and firing of subordinate staff; and
- (3) Establishes policies which affect the performance or behavior of subordinate staff.

Sec. 5. NAC 284.650 is hereby amended to read as follows:

284.650 Appropriate disciplinary or corrective action may be taken for any of the following causes:

1. Activity which is incompatible with an employee's conditions of employment established by law or which violates a provision of NAC 284.653 or 284.738 to 284.771, inclusive.
2. Disgraceful personal conduct which impairs the performance of a job or causes discredit to the agency.
3. The employee of any institution administering a security program, in the considered judgment of the appointing authority, violates or endangers the security of the institution.
4. Discourteous treatment of the public or fellow employees while on duty.
5. Incompetence or inefficiency.
6. Insubordination or willful disobedience.
7. Inexcusable neglect of duty.
8. Fraud in securing appointment.
9. Prohibited political activity.
10. Dishonesty.
11. Abuse, damage to or waste of public equipment, property or supplies because of inexcusable negligence or willful acts.
12. Drug or alcohol misuse as described in NRS 284.4062 and NAC 284.884.
13. Conviction of any criminal act involving moral turpitude.
14. Being under the influence of intoxicants, a controlled substance without a medical doctor's prescription or any other illegally used substances while on duty.
15. Unauthorized absence from duty or abuse of leave privileges.

16. Violation of any rule of the Commission.
17. Falsification of any records.
18. Misrepresentation of official capacity or authority.
19. Violation of any safety rule adopted or enforced by the employee's appointing authority.
20. Carrying, while on the premises of the workplace, any firearm which is not required for the performance of the employee's current job duties or authorized by his or her appointing authority.
21. Failure of an employee who is authorized pursuant to NRS 202.3673 to carry a concealed firearm while on the premises of the public building in which he or she is employed to notify the appointing authority or a designated representative of the appointing authority, in accordance with section 1 of LCB File No. R123-19, that the employee will be carrying the concealed firearm.
22. Any act of violence which arises out of or in the course of the performance of the employee's duties, including, without limitation, stalking, conduct that is threatening or intimidating, assault or battery.
23. Failure to participate in any investigation of alleged discrimination, including, without limitation, an investigation concerning ~~[sexual]~~ *sex- or gender-based* harassment.
24. Failure to participate in an administrative investigation authorized by the employee's appointing authority.
25. Failure to report the suspension, revocation or cancellation of a professional or occupational license, certificate or permit or driver's license when required pursuant to NAC 284.652.

Sec. 6. NAC 284.696 is hereby amended to read as follows:

284.696 1. An employee alleging unlawful discrimination based on any pertinent state or federal law or regulation may:

(a) Report the alleged discrimination to:

- (1) The division of the Division of Human Resource Management that investigates ~~sexual~~ *sex- or gender-based* harassment and discrimination;
- (2) The Attorney General;
- (3) The employee's appointing authority;
- (4) An equal employment opportunity officer;
- (5) A personnel representative of the department in which the employee is employed; or
- (6) The office charged with enforcing affirmative action within the appropriate university, state college or community college which is part of the Nevada System of Higher Education;

(b) Except as otherwise provided in NRS 284.384, use the procedure for the adjustment of a grievance contained in NAC 284.658 to 284.6957, inclusive; or

(c) File a complaint, other than a complaint described in NAC 284.658, with:

- (1) The Nevada Equal Rights Commission pursuant to NRS 613.405; or
- (2) The United States Equal Employment Opportunity Commission.

2. The appointing authority of an employee who has alleged unlawful discrimination shall promptly notify the deputy attorney general or staff counsel assigned to represent the agency of the allegation and the actions which are being undertaken by the agency to address the allegation.

Sec. 7. NAC 284.718 is hereby amended to read as follows:

284.718 1. The following types of information, which are maintained by the Division of Human Resource Management or the agency, are confidential:

- (a) Information relating to salaries paid in other than governmental employment which is furnished on the condition that the source remain confidential;
- (b) Any document which is used in negotiations with employees or their representatives which has not been made public by mutual agreement;
- (c) The rating and remarks concerning an applicant by the individual members of the board or assessors of a center for assessment;
- (d) Any recording or document which is used in the process of interviewing an applicant, including, without limitation, a document containing interview questions, evaluation tools used for rating applicants and any notes concerning an applicant that were taken by a person as part of the process of rating an applicant;
- (e) Materials used in examinations, including suggested answers for oral examinations;
- (f) Records and files maintained by an employee assistance program offered by the State of Nevada;
- (g) Reports by employers, appointing authorities or law enforcement officials concerning the hiring, promotion or background of applicants, eligible persons or employees;
- (h) The class title and agency of an employee whose name is excluded from the official roster, as provided in subsection 3 of NAC 284.714, when an inquiry concerning the employee is received;
- (i) Any information contained on a person's application or relating to his or her status as an eligible person; and
- (j) Information in the record of employment of a current or former employee which relates to:
 - (1) The employee's performance;

- (2) The employee's conduct, including any disciplinary actions taken against the employee;
- (3) The employee's usage or balance of his or her annual leave and sick leave;
- (4) The employee's race, ethnic identity or affiliation, sex, sexual orientation, gender identity or expression, genetic information, disability or date of birth;
- (5) The employee's personal telephone number;
- (6) The employee's social security number;
- (7) Any grievance filed by the employee pursuant to NAC 284.678, any response to the grievance and any other documents related to the grievance, unless a hearing is held to determine the disposition of the grievance pursuant to NAC 284.6955;
- (8) Any complaint filed by the employee pursuant to NRS 281.755, any response to the complaint and any other document related to the complaint, unless a hearing is held to determine the disposition of the complaint pursuant to NAC 284.6955;
- (9) Any request made pursuant to NAC 284.5243 and any response to the request;
- (10) The health, medical condition or disability of the employee or a member of his or her immediate family; or
- (11) Any claim for workers' compensation made by the employee and any documentation relating to the claim.

2. If the employee has requested that his or her home address be listed as confidential, the employee's record of employment must be so designated and list his or her mailing address.

3. The name of any beneficiary of an employee contained in the payroll document must not be released to anyone unless:

- (a) The employee dies; or

(b) The employee signs a release.

4. Any records in the possession of the Committee on Catastrophic Leave created pursuant to NRS 284.3627 that reveal the health, medical condition or disability of a current or former employee or a member of his or her immediate family are confidential.

5. Any notes, records, recordings or findings of an investigation relating to ~~sexual~~ *sex- or gender-based* harassment or discrimination, or both, and any findings of such an investigation are confidential.

6. Any notes, records, recordings, findings or other information obtained from an organizational climate study that directly relate to an employee's performance or conduct are confidential.

7. Any notes, records, recordings, findings or other information obtained from an internal study conducted by an agency that directly relate to an employee's performance or conduct are confidential.

8. Any notes, records, recordings, findings or other information obtained from an internal administrative investigation conducted pursuant to NRS 284.387 are confidential.

Sec. 8. NAC 284.726 is hereby amended to read as follows:

284.726 1. Except as otherwise provided in this subsection and subsections 2 and 10, access to materials for an examination and information relating to an applicant or eligible person which are relevant to an appointing authority's decision to hire that person is limited to the appointing authority or his or her designated representative. If the name of the applicant is not disclosed and the information is used for the purposes of subparagraph (2) of paragraph (a) of subsection 1 of NAC 284.204, information relating to the education and experience of an

applicant may be made available to any affected applicant, employee or the designated representative of either.

2. Except as otherwise provided in subsection 10 and NRS 284.4068, access to information concerning the results of an applicant's screening test which indicate the presence of a controlled substance is limited to an appointing authority or his or her designated representative and the Administrator or his or her designated representative.

3. Except as otherwise provided in subsections 10 and 11, access to an employee's record of employment containing any of the items listed in paragraphs (g) to (j), inclusive, of subsection 1 of NAC 284.718 is limited to:

- (a) The employee.
- (b) The employee's representative when a signed authorization from the employee is presented or is in his or her record of employment.
- (c) An appointing authority or his or her designated representative.
- (d) Persons who are authorized pursuant to any state or federal law or an order of a court.
- (e) The State Board of Examiners if the Board is considering a claim against the State of Nevada filed pursuant to chapter 41 of NRS which involves the employee.
- (f) Persons who are involved in processing records for the transaction of business within and between state agencies.
- (g) Persons who are involved in processing records for the transaction of business that is authorized by the employee.

4. The portion of an employee's record of employment that concerns the health, medical condition or disability of the employee or a member of his or her immediate family must be kept in a locked cabinet, separate from any other portion of the employee's record of employment.

5. Except as otherwise provided in subsection 10, access to any notes, records, recordings, findings or other information obtained from an organizational climate study that directly relate to an employee's performance or conduct is limited to:

(a) The employee.

(b) The Administrator or a designated representative of the Administrator.

(c) The appointing authority or a designated representative of the agency with which the employee is employed.

(d) Persons who are authorized pursuant to any state or federal law or an order of a court.

(e) The Governor or a designated representative of the Governor.

6. Except as otherwise provided in subsections 10 and 11, access to any notes, records, recordings, findings or other information obtained from an internal study conducted by an agency that directly relate to an employee's performance or conduct is limited to:

(a) The employee.

(b) The appointing authority or a designated representative of the agency by which the employee is employed.

(c) Persons who are authorized pursuant to any state or federal law or an order of a court.

(d) The Governor or a designated representative of the Governor.

7. Except as otherwise provided in subsections 10 and 11, access to any notes, records, recordings, findings or other information obtained from an internal administrative investigation conducted pursuant to NRS 284.387 is limited to:

(a) The employee who is the subject of the internal administrative investigation.

(b) The appointing authority or a designated representative of the agency by which the employee who is the subject of the internal administrative investigation is employed.

- (c) Persons who are authorized pursuant to any state or federal law or an order of a court.
- (d) The Governor or a designated representative of the Governor.

8. Except as otherwise provided by specific statute, records maintained by an employee assistance program offered by the State of Nevada must not be released without written permission signed by the employee to whom the records pertain.

9. Upon request, the Division of Human Resource Management will provide the home address of any employee maintained by the Division of Human Resource Management in the employee's record of employment to the Division of Welfare and Supportive Services of the Department of Health and Human Services, the Department of Employment, Training and Rehabilitation and the Internal Revenue Service.

10. The Administrator or the appointing authority, or a designated representative, shall authorize the release of any confidential records under his or her control which are requested by the Employee-Management Committee, a hearings officer, the Commission, the Committee on Catastrophic Leave created pursuant to NRS 284.3627, the Nevada Equal Rights Commission, the United States Equal Employment Opportunity Commission or a court.

11. The appointing authority or a designated representative of the agency with which the employee is employed shall authorize the release of any confidential records under his or her control which are requested by the Division of Human Resource Management for the purpose of conducting a ~~sexual~~ *sex- or gender-based* harassment or other discrimination investigation.

Sec. 9. NAC 284.771 is hereby amended to read as follows:

284.771 1. ~~Sexual~~ *Sex- or gender-based* harassment violates the policy of this State and is a form of unlawful discrimination based on sex *or gender* under state and federal law. An

employee shall not engage in ~~sexual~~ *sex- or gender-based* harassment against another employee, an applicant for employment, or any other person in the workplace.

2. ~~Sexual~~ *Sex- or gender-based* harassment is a very serious disciplinary infraction. An appointing authority may impose harsh disciplinary sanctions on, or dismiss, persons who commit ~~sexual~~ *sex- or gender-based* harassment, including, without limitation, first-time offenders. *Any disciplinary sanction imposed by an appointing authority for sex- or gender-based harassment must be proportionate to the violation.*

Sec. 10. NAC 284.0995 is hereby repealed.

TEXT OF REPEALED SECTION

284.0995 “Sexual harassment” defined. (NRS 284.065) “Sexual harassment” means unwelcome sexual advances, requests for sexual favors, or other speech or physical conduct of a sexual nature when:

1. Submission to such speech or conduct is made either explicitly or implicitly a term or condition of a person’s employment;
2. Submission to or the rejection of such speech or conduct by a person is used as the basis for employment decisions affecting that person; or
3. Such speech or conduct has the purpose or effect of unreasonably interfering with a person’s work performance or creating an intimidating, hostile or offensive working environment.