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Greg Ott, Acting Deputy Attorney General

DEFERRED COMPENSATION PROGRAM NAC WORKSHOP MINUTES

April 6, 2018

The NAC Regulatory Workshop was held on Friday, April 6, 2018, at 9:00 a.m. in room 2134 of the Legislature Building, 401 S. Carson Street, Carson City, Nevada. The meeting was held by videoconference from the Nevada Legislature Building to the Grant Sawyer Building, 555 E. Washington Avenue, Suite 4412E, Las Vegas. Attendees participated in person or by teleconference.

A copy of meeting material including this set of meeting minutes, the agenda, the audio recording and other supporting material, is available on the Nevada Deferred Compensation (NDC) website at: <http://defcomp.nv.gov/Meetings/2018>.

WORKSHOP ATTENDEES

Rob Boehmer, NDC Executive Officer
Kevin Doty, Purchasing
Kent Ervin, NDC Committee Member
Jeff Haag, Purchasing

Matt Kruse, NDC Committee Member
Greg Ott, Deputy Attorney General
Mark Stevens, NDC Committee Member

1. Call to Order/Roll Call

Mr. Rob Boehmer opened the workshop at 9:02 a.m. on Friday, April 6, 2018, and explained the purpose of the meeting was to solicit comments from parties that may have an interest or may be affected by regulations being proposed for permanent adoption. Based on feedback received, the proposed language may change, be deleted, or have additional wording added. If the regulation was submitted to the Legislative Counsel Bureau (LCB) and eventually to the NDC Committee for adoption, amendment, or repeal, all the material would be provided to LCB when the proposed regulation was presented. Once the final language came back they would hold an adoption hearing and the Committee would decide what action they would take.

Mr. Boehmer recognized anyone calling in to the meeting. No one was on the line.

The Workshop was to solicit comments for proposed amendments to Nevada Administrative Code (NAC) Regulation 287 and to review and discuss potential amendments pertaining to chapter 287 of the NAC. Deferred Compensation as a result of the passage of Nevada Legislative Senate Bill (SB) 502.

2. Public Comment

No public comment.

3. For Possible Action - Workshop to Solicit Comments for Proposed Amendments to the Following Regulation: NAC 287 – Review and discuss potential amendments to the regulations pertaining to Chapter 287 of the Nevada Administrative Code. Deferred Compensation as a result of the passage of Nevada Legislative Senate Bill 502.

Mr. Boehmer introduced the proposed language based on a meeting between DAG Ott, Patrick Cates, Director of Administration, and Jeff Haag, Administrator of Purchasing and himself. They wanted to determine what authority they had to make changes to existing language and/or other sections. He reviewed the few proposed changes to NAC 287 and explained the intent of the revisions

4. Public Comment

Kent Ervin, Vice Chair of the NDC Committee, was also involved in the drafting legislative process of SB 502 primarily representing the Nevada Faculty Alliance during session. SB 502 with respect to NDC did three main things: one changed the Committee appointment rules allowing for membership on the Committee to allow a person from a participating Political Subdivision. This has been implemented and there is a new member from a Political Subdivision serving on the Committee. Next, it changed how the Executive Officer was appointed and duties of officer and staff. Last, was a change in Purchasing requirements for recordkeeper request for proposals (RFP) which was a balancing act trying to require the Committee to use NRS 333 following all the rules and yet allow members of the Committee to serve on an evaluation committee while keeping evaluations confidential. It could have been in conflict with Open Meeting Law but this clarifies that when members are serving in that capacity they are part of confidential process until the evaluations came back to the NDC Committee.

For the record, Dr. Ervin submitted the following written ideas for discussion. Regarding the Executive Officer he felt like it was important enough to have its own section and defined it to follow statute. He proposed a new section covering the appointment, duties, and removal of the executive officer with six items which he summarized for the record. Dr. Ervin continued with section 287.710 and 287.715 had minor suggestions and 287.730 spoke about the evaluation committee and he recommended several edits and additions to that section that he explained.

Proposed draft conceptual amendments to NAC 287.700-735 to align with SB502 (2017) and NDC Program practices.

Submitted by Kent Ervin for discussion for regulation workshop of 4/6/2018.

(insertions and deletions versus NAC 287.700-735 as revised in 2013)

NAC 287.700 -Definitions- (NRS 287.330) ~~-As used in NAC 287.700 to 287.735 NAC 287.700 to 287.735,~~ inclusive, unless the context otherwise requires:

- ~~1.~~ 1. "Committee" means the Committee established to administer the Program.
- ~~2.~~ 2. "Executive Officer" means the administrative manager of the Program appointed as provided by NRS 232.215, 232.2165, and {SB502, 2017}.
- ~~2.~~ 2. "Investment consultant" means a private person, corporation, institution or other entity that provides advice on investments, plan policies and design, and operations of the Program, including, without limitation, advice provided for the purposes of paragraph (a) of subsection 3 of ~~NRS 287.330-~~ NAC 287.735.
- ~~3.~~ 3. "Program" means the Public Employees' Deferred Compensation Program authorized by ~~NRS 287.250-~~ to 287.370, inclusive.
- ~~4.~~ 4. "Recordkeeper" means a corporation, institution or other entity that offers investment options and other services which are necessary to the administration of the Program and to the proper investment of the money of the employees who are participants in the Program. The term does not include a private person.

NAC 287.705 Appointment, Duties, and Removal of the Executive Officer (~~{SB502, 2017}; NRS 232.215, 2165~~)

1. The Executive Officer of the Program is appointed by the Director of the Department of Administration with the concurrence of the Governor. The appointment becomes effective upon the concurrence of the Committee.
2. At a meeting following the recommended appointment of the Executive Officer by the Director of the Department of Administration, the Committee shall vote to concur or not to concur with the appointment. Concurrence requires a majority vote of the Committee members present and voting.
3. The Executive Officer is in the unclassified service of the State and serves at the pleasure of the Director of the Department of Administration.
4. The Executive Officer may be removed by a majority of the full membership of the Committee at an open meeting under an agenda item for that purpose. The Committee may hold a closed meeting prior to the vote only for the purpose of receiving and reviewing confidential personnel information, pursuant to NRS 241.030.
5. The Committee may delegate administrative duties for the Program to the Executive Officer, who may in turn delegate duties to administrative staff members. The delegation of duties shall be incorporated in written documents approved by the Committee or as directed by Committee.
6. In the case of a vacancy of the Executive Officer position by resignation, removal, or other reason, the Director of the Department of Administration shall recommend the appointment of a new Executive Director within 60 days or as soon as administratively feasible.

NAC 287.705 -Purpose- (NRS 287.330) ~~The purpose of NAC 287.705 to 287.735 The purpose of~~

NAC 287.705 to 287.730, inclusive, is to set forth the procedures for the selection of investment consultants ~~and~~ recordkeepers ~~and other contracted service providers~~ for the Program.

~~NAC 287.710~~ Recordkeepers and Investment Consultants: Selection and removal. (NRS 287.330)

~~1.~~ 1. The Committee will select ~~recordkeepers~~ Recordkeeper(s) and Investment Consultant(s) for the Program. The Committee will contract with more than one ~~recordkeeper~~ Recordkeeper or more than one Investment Consultant if the Committee deems it necessary and in the best interests of the participants.

~~2.~~ 2. The selection of ~~recordkeepers~~ Recordkeeper(s) and Investment Consultant(s) will be made as often as the Committee deems necessary, but not less frequently than every fifth year.

~~3.~~ 3. Recordkeepers and Investment Consultants serve at the pleasure of the Committee ~~and are subject to removal. A contracted Recordkeeper or Investment Consultant may be removed~~ at any time by a majority vote of the Committee, subject to contractual notice requirements.

~~NAC 287.715~~ Recordkeepers and Investment Consultants: Procedures for selection. (NRS 287.330) SB502, 2017 In selecting a ~~recordkeeper~~ Recordkeeper or Investment Consultant, the Committee will follow the procedures set forth in ~~chapter 333~~ of NRS, NRS 287.xxx {SB502, 2017}, the applicable regulations, and the State Administrative Manual.

~~NAC 287.730~~ Appointment of ~~subcommittee~~ an evaluation committee to review proposals for ~~position contracts pursuant to NRS 333.335; award of recordkeeper and make recommendations; general meeting of Committee regarding applicants contracts;~~ negotiation of changes to accepted proposals. (NRS 287.330) SB502, 2017

~~1. The Chair shall, if he or she deems it appropriate, appoint a subcommittee to review the proposals from applicants for the position of recordkeeper and make recommendations to the full Committee.~~

~~2. The Chair shall call a general meeting of the Committee to:~~

~~(a) Accept information from appropriate sources pertaining to any applicant.~~

~~(b) Conduct interviews of the applicants.~~

~~(c) Select one or more of the applicants for appointment as a recordkeeper.~~

~~3.~~ 1. The Committee is the chief of the using agency for the purposes of NRS 333, except that the Committee may delegate the duty as chief of the using agency to the Executive Officer for any provider contracts other than a contract for a Recordkeeper or a contract for an Investment Consultant.

2. Except as provided in paragraph (3) of this section, the entire membership of the Committee and the Executive Officer shall serve on any evaluation committee established under NRS 333.135 for the purpose of evaluating proposals for contracts for a Recordkeeper or for an Investment Consultant. Additional members of the evaluation committee may be appointed pursuant to NAC 333.162.

3. Any member of the Committee may choose not to serve on an evaluation committee.

4. A committee established under NRS 333.135 for the purpose of evaluating proposals for contracts for a Recordkeeper may utilize the services of an Investment Consultant to assist in the confidential evaluation of proposals;

5. If one or more members of the Committee are appointed to a committee to evaluate proposals for contracts pursuant to NRS 333.135 :

a) No action or deliberation regarding any business of the Committee other than the confidential

review of the proposals pursuant to NRS 333.335 may be taken or conducted by the evaluation committee.

b) Except as otherwise provided in subparagraph (a), a meeting of the evaluation committee is not subject to chapter 241 of NRS.

6. The Committee shall review the results of any evaluation of proposal for a contract for the Program pursuant to NRS 333.335 in a closed meeting. If the entire membership of the Committee has served on the evaluation committee, then the only purpose of this closed Committee meeting is the announcement of the of the numerical evaluation ratings. Otherwise, representative(s) of the evaluation committee may provide information about the confidential proposals. No action may be taken during this closed meeting.

7. Following the confidential review provided in paragraph (6), the Committee shall in an open meeting take any one the following three permitted actions:

a) Award the contract pursuant to NRS 333.335 and NAC 333.170.

b) Cancel the request for proposals; or

c) Modify and reissue the request for proposals.

8. Acceptance of an applicant's proposal and intent to award the contract does not preclude the Committee, the Executive Officer, the Administrator of the Purchasing Division, or their designees, from negotiating specific changes to the proposal which are in the best interests of the State of Nevada pursuant to NAC 333.170. If the negotiation to enter into a contract fails, the award of the contract to the proposal with the next highest ranking by the evaluation comment follows paragraphs (6) and (7) of this section.

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~~NAC 287.735 Investment consultants: Selection and removal. (NRS 287.330)~~

~~1. The Committee will select such investment consultants as are necessary to provide services needed for the selection of recordkeepers and for the administration of the Program and the investment of the money of the participants.~~

~~2. Such an investment consultant serves at the pleasure of the Committee and may be removed from the position at any time by a majority vote of the Committee.~~

Mr. Jeff Haag, Administrator of State Purchasing Division, had an opportunity to speak with Dr. Ervin as well as Mr. Boehmer and Director Cates with Department of Administration concerning SB 502. It was his personal opinion that the language in SB 502 was very clear as it related to state procurement processes within NDC. They did not require regulatory changes or updates as the law was very clear but he respected the desire of the agency and Committee to move forward with regulations and was willing to provide his opinion and engage in any dialogue necessary. First, he addressed the recommendations made by NDC. Purchasing staff reviewed them in detail and had some opportunity to co-create the language with NDC. He was largely in agreement with everything captured and had one recommendation in NAC 287.710 as it related to recordkeeper selection and removal. Section 2 stated "The selection of recordkeepers will be made as often as the Committee deems necessary, but not less frequently than every fifth year." That was a bit different than historical direction that the State gave where they always recommended a 4-year lifecycle on contracts. The State was moving beyond that now since best practices within the contracting environment had proven that you not set an arbitrary date for reselection or going back out to bid. Industry was of the opinion that if the contractor was performing well, meeting the needs of the division, and the state as a whole, and performing at a fair and reasonable cost, the agencies should have the ability to extend contracts and not have to arbitrarily go out to RFP. The solicitation process costed money, expended time, and created

uncertainty within a program that benefited from certainty. He recommended giving some latitude rather than having a firm requirement to compete every 5 years.

Mr. Haag moved on to NAC 287.730 which spoke to some of the comments from Dr. Ervin. It boiled down to who was the chief of the using agency. It was not currently defined by NRS 333 but he shared a practical definition of how they interpreted chief of the using agency, and how they position them within the procurement process. The chief of the using agency was always viewed as the administrative head/functional lead of the organization. It was imperative to leverage their day to day insight of the interactions of the department/division that was entering into the procurement process. He liked to see and encouraged the participation of boards and committees in evaluation but it was important to delineate the responsibilities between the committee and the chief of the using agency. It spoke to regulations around NRS 333 that no one member of the evaluation committee could have majority supervisory authority over the others. It was his very strong opinion and the opinion of their legal counsel and deputy attorney general that in allowing the NDC Committee to be the chief of the using agency and to be the evaluation committee that it would potentially violate the regulation that states no one member could have majority supervisory authority over the others. It did not give the ability for outside entities to weigh in on what was required by law to be an open, competitive solicitation process evaluated by a compilation of peers represented by at least two using agencies, which was another regulatory requirement. The language being adopted could create some problems down the road if a contract was appealed or challenged in any way. They could still allow for separation and adhere to the rules and regulations of State Purchasing and still give the Committee every opportunity to participate in the process if they would so choose. From a practical perspective they wanted to give careful consideration to the full Committee being the evaluation committee. In his experience it was not the best option and it often created a delay in the procurement process so they needed to be mindful of what the potential impact could be.

Mr. Haag had some concerns with the changes discussed by Dr. Ervin. Specific to the procurement process, it was his professional opinion as head of State Purchasing that revisions in SB 502 and to the Nevada law were appropriate and did not require any additional regulatory changes. Since some changes were recommended he had comments on those recommendations submitted by Dr. Ervin specific to the contracting process. In NAC 287.730 making the Committee the chief of the using agency and giving them the opportunity to be the sole evaluation committee posed potential violations of NAC 333, as he referenced in his previous comments. With his experience in contracting and procurement he was concerned about having the Committee be the authority over any contract. In an environment where the committee or board was not a full-time employee of the department/division they oversee. It was imperative that they had practical insight and day to day experience and interaction with the two most important contracts for NDC – recordkeeping and investing. It could give a potential vendor, who may not have the best interest of the State or participants, a little longer leash by being overseen by a board that was not a full time employee of the organization. The recommendation from NDC still gave authority to the Committee, however the day to day responsibility of managing the contracts was done by the executive officer. The proposed regulatory regulations from the agency were thoughtful to ensure the Committee had robust involvement and a say in how the contracts were awarded, but the day to day management was done by executive officer.

Mr. Boehmer asked for clarification since he was told that through statute the State had a requirement that whoever managed the contract(s) for an agency had to be a Certified Contract Manager (CCM) which was done through Purchasing.

Mr. Haag confirmed that was correct. They required a CCM to manage a contract and approve contracts within the State's database.

Mr. Boehmer remarked on Dr. Ervin's comments from 287.710 section 2. He was concerned because NRS 333 stipulated a body that had oversight over an employee or the ability to terminate them, that employee should not serve on an evaluation committee. He was afraid if they considered adopting that language it could violate NAC 333.

Mr. Haag agreed with Mr. Boehmer's comment and referred to his previous testimony that no one member could have majority supervisory authority over the others. He again stated the law was clear and the proposed regulatory changes overstated the intent of the law.

Dr. Ervin referred to Section 11.5 of SB 502 which said the Program was subject to provisions in NRS 333. The next paragraph of 11.5 said the Committee shall act as the chief of the using agency for purposes of 333.335 which involved RFP evaluations. It was clearly the intent of the Legislature that the Committee act as chief of the using agency. So, if they took the recommendation not to have a specific regulation around that, then it would fall back to SB 502 and the Committee would be the chief of using agency for those purposes. Section 43 stated the Committee could delegate duties to the Executive Officer. The Legislature's intent was the Committee keep control of the RFP process and it not be taken over completely by the Executive Officer. With regard to the requirement of the evaluation committee not having a supervisor and supervisee, the way around that would be to remove the Executive Officer from the membership of the evaluation committee. Although he would bring valuable insight, perhaps he could do that as an assistant to the evaluation committee or manager of the administrative process. Section 11.5, paragraph 3 stated that any number of the NDC Committee could be appointed to the evaluation committee. His intent in the proposed sections was trying to prevent a majority of the Committee from excluding another member of the Committee by saying up front that everyone could serve but could withdraw at their choosing.

Mr. Haag appreciated Dr. Ervin's comments and agreed with most of them but still affirmed that the law was clear and that regulations were not necessary. If they were necessary he would support the ones proposed by the division. Similar changes were made to the Public Employee Benefit Program last session and they chose not to adopt regulations. They recognized as a body that they could participate on any evaluation committee they chose, and they recognized their authority to ultimately approve the contract and were comfortable delegating that authority to who had the best knowledge of the day to day operations of the organization. This would apply equally to Deferred Compensation.

Dr. Ervin remarked on the differences between the PEBP Program and staff versus the NDC Committee and staff. Based on Mr. Haag's comments he proposed to change his language in 287.730, item 1 to: The Committee is the chief of the using agency for purposes of 333.335 except that the Committee may delegate the administrative and managerial duties as chief of the using agency to the executive officer. Item 2 may not be required but he believed they could combine 2 and 3 to protect the minority Committee member and allow an opt out instead of opt in to the evaluation committee. Item 4 was probably not required. In Section 7 he wanted it to be crystal clear that the final RFP outcome only had three choices to be consistent with 333. The goal would be to show the Committee has oversight and control over the RFP process, but the Executive Officer and Purchasing could have the day to day management of the RFP process.

Mr. Haag largely agreed with what Dr. Ervin stated and felt it was beneficial to have dialogue. They would see what LCB said and where they ended up but ultimately, he believed the law was clear and sufficient and he would leave it as it was.

DAG Ott explained something would be submitted to LCB and they would prepare language. LCB would look to ensure there was not conflict with existing law and that existing law was not restated.

Dr. Ervin appreciated the opportunity to speak and the dialogue with Purchasing. He wanted to confirm the meeting was being recorded so LCB had access to the full audio.

Mr. Boehmer confirmed the meeting was recorded. He also remarked on the role of the investment consultant that is contracted to provide an expert component in developing the RFP.

5. Adjournment

The meeting was adjourned at 10:10 a.m.

Respectfully submitted,

Micah Salerno
NDC Administrative Assistant