

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

DONALD WALDEN JR., NATHAN  
ECHEVERRIA, AARON DICUS,  
BRENT EVERIST, TRAVIS  
ZUFELT, TIMOTHY RIDENOUR,  
and DANIEL TRACY on behalf of  
themselves and all others similarly  
situated,

Appellants,

v.

THE STATE OF NEVADA ex rel  
NEVADA DEPARTMENT OF  
CORRECTIONS,

Respondent.

Case No. 82030

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Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANTS' SUPPLEMENTAL APPENDIX**

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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

DONALD WALDEN JR, NATHAN  
 ECHEVERRIA, AARON DICUS, BRENT  
 EVERIST, TRAVIS ZUFELT, TIMOTHY  
 RIDENOUR, and DANIEL TRACY on behalf  
 of themselves and all others similarly situated,

Plaintiffs,

v.

THE STATE OF NEVADA, *EX REL.* ITS  
 NEVADA DEPARTMENT OF  
 CORRECTIONS, and DOES 1-50,

Defendant.

Case No.: 3:14-cv-00320-MMD-WGC

**DECLARATION OF JAMES KELLY IN  
 SUPPORT OF PLAINTIFFS' MOTION  
 FOR RECONSIDERATION OF THE  
 COURT'S MARCH 26, 2018, ORDER  
 WITH RESPECT TO THE NRS 284.180  
 OVERTIME CLAIM PURSUANT TO  
 FRCP 59(e) AND 60(b)**

I, James Kelly, hereby declare and state as follows:

1. I am over the age of eighteen and I have personal knowledge of the facts and circumstances set forth in this declaration. If I were called as a witness I would and could competently testify to the matters set forth herein.

2. I was employed by Defendant THE STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS ("Defendant" or "NDOC") as a Correctional Officer at the Northern Nevada Correctional Center ("NNCC") from on or about June 2008 to September 2010, and at Warm Springs Correctional Center ("WSCC") from on or about September 2010

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1 to August 2011, and then I went back to NNCC on or about August 2011 until I retired in  
2 November 2015.<sup>1</sup>

3 3. I opted-in to this action and became a party plaintiff before conditional  
4 certification was granted in this action on August 8, 2014. I also submitted a Consent to Join  
5 after conditional certification was granted on April 1, 2015.

6 4. On February 13, 2013, I filed a grievance with NDOC to be compensated for all  
7 of the pre and post shift activities that I had performed without compensation. A true and correct  
8 copy of the the grievance that I filed, along with attachments, and the response from NDOC is  
9 attached hereto as Exhibit A.

10 5. My grievance was summarily denied by NDOC. On March 13, 2013, I appealed  
11 the NDOC's decision to the Employee-Management Committee ("EMC"). The EMC refused to  
12 hear my grievance. A true and correct copy of the EMC's refusal to hear my grievance is  
13 attached hereto as Exhibit B.

14 I declare under the penalty of perjury under the laws of the United States of America  
15 and the State of Nevada that the foregoing is true and correct.

16 Executed on: 4/9/2018, at Dayton, Nevada.

17  
18 DocuSigned by:  
19   
20 52B1528D63FD481...  
21 JAMES KELLY

22  
23  
24  
25  
26  
27  
28 <sup>1</sup> I also worked at Southern Desert Correctional Center ("SDCC"), High Desert State Prison ("HDSP"), and Nevada State Prison ("NSP") prior to the relevant class period.



# **EXHIBIT A**

## ***James Kelly Grievance***

**EXHIBIT A**

## State of Nevada - GRIEVANCE

Grievance Id: 2474

<u>Grievance Number</u> 2474	<u>Grievant</u> KELLY,JAMES	<u>Status</u> Step 3 Escalated
---------------------------------	--------------------------------	-----------------------------------

## Grievant Information

<u>Name</u> KELLY,JAMES	<u>Send Documents to External Rep</u> No
<u>Agency</u> 440	<u>Work Phone</u> 7758879297
<u>Organization</u> 3717	<u>Home Phone</u> 7752467390
<u>Location</u> CC0360	<u>Email</u> jakelly@doc.nv.gov
<u>Title</u>	

## Mailing Address

<u>Mailing Address</u> 135 River Village Cr. Dayton, NV 89403 -
<u>Contact Number</u> 775-246-7390

## Grievance Details

<u>Event Date</u> 02/13/2013	<u>Location</u> NNCC
<u>Event Time</u>	<u>Date Aware of Event</u>
<u>Grievant Submission Waiver</u> No	<u>Agency Submission Waiver</u> No
<u>Categories(s)</u>	
<u>Compensation, Shift/Hours, Work Duties</u>	
<u>Detailed Description</u> I have been working for the department in unpaid status for several years. I came to realize that my employer is required to pay me for time that I have been actively engaged in department business. I have attached several documents from the Department of Labor which describe in detail just what work time consists of.	
<u>NRS or NAC Sections</u>	
<u>Attached documents</u>	
<u>Proposed Resolution</u> I want my pay records and my work schedules reviewed so that I may receive all back pay that I am entitled to.	

## Details Attachment

<u>WHD fact sheet 22 Define hours worked.pdf</u>
<u>whdfs23 overtime.pdf</u>
<u>FLSA letter February 13.doc</u>
<u>FairLaborStandAct.pdf</u>

## Step 1 Details

<u>Submitted to</u> SCHRECKENGOST, RONALD	
<u>Submission Due Date</u> 03/14/2013	<u>Submit Date</u> 02/13/2013
<u>Response Due Date</u> 02/28/2013	<u>Response Date</u> 02/27/2013
<u>Action Due Date</u> 03/13/2013	<u>Action Date</u> 02/27/2013
<u>Grievant extension</u> No	<u>Agency extension</u> No
<u>Response</u>	



## State of Nevada - GRIEVANCE

Grievance Id: 2474

In response to your recent request for a review of pay records and work schedules, you allege that you are entitled to receive back pay. This allegation is based on your belief that you have been working for the NDOC in unpaid status for several years. However, you have provided no documentation to support this. All State employees have the ability to access their time sheets in NEATS. Officers commenced entering their own timesheets in NEATS in 2007. You can self-audit and then provide appropriate documentation to support your claim if it is valid.

Your grievance is denied.

NRS or NAC Sections

Grievant Action

Escalate to Next Step

Grievant Comments

The Department of Corrections has been enriched by my labor for years. I arrive for work and commence to engage in activities that enrich the Department, and/or in activities that are required of me by my employer, and I have not been compensated. These activities are explained in my attached statement. It is clear that the WHD of the FLSA considers these activities as compensable. I am not the final auditor of my timesheet. I have placed overtime that I have earned on my timesheet in the past, only to have it removed without my consent. I have had to file grievances to get that overtime back. This is what I am currently engaged in, now that I have a clear definition of what is compensable to me. Federal law is clear on what I shall be compensated for, and I would suggest that you read the attached fact sheets, and that you comply with the Federal law as defined in these fact sheets. It is not work requested, but it is work suffered or permitted as defined by the Fact Sheet.

## Step 1 Response Attachments

No Attachments

## Step 1 Grievant Attachments

No Attachments

## Step 1 Event Log

Date/Time	User	Event Type	Description
02/27/2013	jkeli1	Grievance Escalated by Grievant	Step 1 Grievant Response Submitted
02/27/2013	rschreck	Grievance Response Submitted	Step 1 Response Submitted
02/13/2013	jkeli1	Grievance Submitted	Submitted at Step 1

## Step 2 Details

Submitted to

BACA, ISIDRO

Submission Due Date

03/13/2013

Submit Date

02/27/2013

Response Due Date

03/13/2013

Response Date

03/08/2013

Action Due Date

03/22/2013

Action Date

03/08/2013

Grievant extension

No

Agency extension

No

Response

You were answered correctly at the first step of your grievance. You have made a general statement about work you claimed to have done. You have not provided any information in regards to specific dates and times where you worked and were not compensated. It would be your responsibility to do this research and provide the information.

NRS or NAC Sections

Grievant Action

Escalate to Next Step

Grievant Comments

## Step 2 Response Attachments

No Attachments

## Step 2 Grievant Attachments

No Attachments



## State of Nevada - GRIEVANCE

Grievance Id: 2474

## Step 2 Event Log

Date/Time	User	Event Type	Description
03/08/2013	jkell1	Grievance Escalated by Grievant	Step 2 Grievant Response Submitted
03/08/2013	ibaca	Grievance Response Submitted	Step 2 Response Submitted
02/27/2013	jkell1	Grievance Submitted	Submitted at Step 2

## Step 3 Details

<u>Submitted to</u> MCDANIEL, ELDON	
<u>Submission Due Date</u> 03/22/2013	<u>Submit Date</u> 03/08/2013
<u>Response Due Date</u> 03/22/2013	<u>Response Date</u> 03/11/2013
<u>Action Due Date</u> 03/25/2013	<u>Action Date</u> 03/12/2013
<u>Grievant extension</u> No	<u>Agency extension</u> No
<u>Response</u> <p>I have read your grievance and the responses you have recieved from your supervisors. It is the employees responsibility to accurately report on their own time sheet the time they come to work and arrive on their post assignment and begin work and the time they leave their post assignment and end their work shift each work day. It is the responsibility of their supervisor to ensure this is accurate information and approve this time sheet if this time sheet is in question then it must be brought to the attention of the supervisor at the end of that pay period. I have not recieved any information in regards to your time sheets being inaccurate and you as well as your supervisor has signed them according to the regulations. According to your grievance you state a date of 2007 your time to grieve an employment issue has well past since 2007 and you are not eligible to grieve any issue during that extended time frame. Your grievance is denied. I would suggest that you ensure on a pay period by pay period basis you make sure your time sheet is accurate and understand that when you sign it That is how your pay will be calculated and paid.</p>	
<u>NRS or NAC Sections</u>	
<u>Grievant Action</u>	
Escalate to Next Step	
<u>Grievant Comments</u> <p>I disagree with the notion that my grievance timeframe has expired. I just recently became aware of the Federal law which entitles me to be paid from the time I arrive and begin to conduct activity which is job related (walking in the secured gatehouse, and clearing the scanner) and therefore I am within the timeframe. Because this has been happening in the past, I am entitled to receive back pay for the known mistakes by the Department in not knowing the law, and allowing this to continue. At the time I signed my timesheets, the Department has led me to believe that I can only be paid when I arrive at my duty station. Federal law shows that this is not the case. Your continued ignorance of the proper application of this law I believe will be shown as a deliberate action that has taken place and continues to take place. Also, when timesheets are submitted, they are always allowed to be corrected. I have reviewed timesheets for years, and I can tell you that there were several timesheets each and every time period, where changes and corrections were needed for one reason or another. The fact that I signed my timesheets does not put me in a position where I can not file a payroll memorandum and have it corrected. I am always entitled to be paid for my labor. The Department cannot claim "tuff luck" if there was a mistake.</p>	

## Step 3 Response Attachments

No Attachments

## Step 3 Grievant Attachments

No Attachments

## Step 3 Event Log

Date/Time	User	Event Type	Description
03/12/2013	jkell1	Grievance Escalated by Grievant	Step 3 Grievant Response Submitted
03/11/2013	emcdanie	Grievance Response Submitted	Step 3 Response Submitted
03/08/2013	jkell1	Grievance Submitted	Submitted at Step 3



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February 13, 2013

Activities performed at Northern Nevada Correctional Center which are required activities and therefore constitute activities that are compensable under the Fair Labor Standards Act.

1. When I arrive for my work day, I am let into the gatehouse door which is controlled by someone other than myself. I am in the gatehouse and have no means of leaving the building unless someone else allows me to leave.
2. I receive a work assignment from my supervisor, and I am sometimes briefed on general activities that may be occurring on the Institution. I am also *required* to occasionally take care of some administrative business which the supervisor would inform me of.
3. If I am working on a unit, I am *required* to pick up the mail bag for that unit which contains mail for the inmates. I would otherwise never be allowed to carry U.S. postal material for anyone other than myself.
4. I am *required* to walk to the unit which I am assigned to, and I am *required* to receive a briefing from the off going officer. During my walk to the assigned unit, I am wearing a Correctional uniform which clearly identifies me as a correctional officer on a correctional facility.
5. When I leave for the day, I am *required* to carry the mail bag for the inmates to the gatehouse and put it near the mailroom.
6. I am allowed to leave when the officer controlling the gatehouse door opens it and allows me to leave.

It is clear to me that from the time I enter the gatehouse, until the time I leave the gatehouse, I am in a work environment and at the very least, I fall under the category of, "Suffer or Permit to Work" as defined in the FLSA.

As far as the walk to the unit, I am walking onto an Institution with hundreds of inmates having full access to me. It is like a bank teller sitting at his desk with his name tag on, but is not working. This would never be allowed to happen.

I am asking for a full review of the time I have spent in these unpaid activities, and that I be compensated for this time in accordance with the Fair Labor Standards Act.



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**U.S. Department of Labor**  
**Wage and Hour Division**



## **Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)**

This fact sheet provides general information concerning what constitutes compensable time under the FLSA. The Act requires that employees must receive at least the minimum wage and may not be employed for more than 40 hours in a week without receiving at least one and one-half times their regular rates of pay for the overtime hours. The amount employees should receive cannot be determined without knowing the number of hours worked.

### **Definition of "Employ"**

By statutory definition the term "employ" includes "to suffer or permit to work." The workweek ordinarily includes all time during which an employee is necessarily (required to be on the employer's premises) on duty or at a prescribed work place. ("Workday", in general, means the period between the time on any particular day when such employee commences his/her "principal activity" and the time on that day at which he/she ceases such principal activity or activities.) The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time.

### **Application of Principles**

Employees "Suffered or Permitted" to work: (Work not requested but suffered or permitted to be performed is work time that must be paid for by the employer.) For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. The reason is immaterial. The hours are work time and are compensable.

**Waiting Time:** Whether waiting time is hours worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."

**On-Call Time:** An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

**Rest and Meal Periods:** Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.



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**Sleeping Time and Certain Other Activities:** An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least 5 hours of sleep is taken.

**Lectures, Meetings and Training Programs:** Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

**Travel Time:** The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

**Home to Work Travel:** An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

**Home to Work on a Special One Day Assignment in Another City:** An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

**Travel That is All in a Day's Work:** Time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

**Travel Away from Home Community:** Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

### Typical Problems

Problems arise when employers fail to recognize and count certain hours worked as compensable hours. For example, an employee who remains at his/her desk while eating lunch and regularly answers the telephone and refers callers is working. This time must be counted and paid as compensable hours worked because the employee has not been completely relieved from duty.

### Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243). This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor  
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200 Constitution Avenue, NW  
Washington, DC 20210

1-866-4-USWAGE  
TTY: 1-866-487-9243  
Contact Us



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U.S. Department of Labor  
Wage and Hour Division



## Fact Sheet #23: Overtime Pay Requirements of the FLSA

This fact sheet provides general information concerning the application of the overtime pay provisions of the FLSA.

### Characteristics

An employer who requires or permits an employee to work overtime is generally required to pay the employee premium pay for such overtime work.

### Requirements

Unless specifically exempted, employees covered by the Act must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay. There is no limit in the Act on the number of hours employees aged 16 and older may work in any workweek. The Act does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, as such.

The Act applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments excluded by the Act itself. Payments which are not part of the regular rate include pay for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. This is calculated by dividing the total pay for employment (except for the statutory exclusions noted above) in any workweek by the total number of hours actually worked.

Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. In addition, section 7(g)(2) of the FLSA allows, under specified conditions, the computation of overtime pay based on one and one-half times the hourly rate in effect when the overtime work is performed. The requirements for computing overtime pay pursuant to section 7(g)(2) are prescribed in 29 CFR 778.415 through 778.421.



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Where non-cash payments are made to employees in the form of goods or facilities, the reasonable cost to the employer or fair value of such goods or facilities must be included in the regular rate.

### Typical Problems

**Fixed Sum for Varying Amounts of Overtime:** A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, no part of a flat sum of \$180 to employees who work overtime on Sunday will qualify as an overtime premium, even though the employees' straight-time rate is \$12.00 an hour and the employees always work less than 10 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at \$13.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire \$78.00 must be included in determining the employees' regular rate.

**Salary for Workweek Exceeding 40 Hours:** A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 45 hour workweek for a weekly salary of \$405. In this instance the regular rate is obtained by dividing the \$405 straight-time salary by 45 hours, resulting in a regular rate of \$9.00. The employee is then due additional overtime computed by multiplying the 5 overtime hours by one-half the regular rate of pay ( $\$4.50 \times 5 = \$22.50$ ).

**Overtime Pay May Not Be Waived:** The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for compensable overtime hours that are worked.

### Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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Frances Perkins Building  
200 Constitution Avenue, NW  
Washington, DC 20210

1-866-4-USWAGE  
TTY: 1-866-487-9243  
Contact Us

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Fair Labor Standards Act (FLSA) - Hours Worked Advisor

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**elaws**® - FLSA Hours Worked Advisor**Suffer or Permit to Work**

The FLSA defines the term "employ" to include the words "suffer or permit to work". Suffer or permit to work means that if an employer requires or allows employees to work they are employed and the time spent is probably hours worked.

Thus, time spent doing work not requested by the employer, but still allowed, is generally hours worked, since the employer knows or has reason to believe that the employees are continuing to work and the employer is benefiting from the work being done. This time is commonly referred to as "working off the clock".

For example; An employee may voluntarily continue to work at the end of the working hours. He or she may need to finish an assigned task, prepare reports, finish waiting on a customer or take care of a patient in an emergency. An employee may take work home to complete in the evening or on weekends to meet a deadline. All such activity is hours worked.

When an employee must correct mistakes in his or her work, the time must be treated as hours worked. The correction of errors, or "rework", is hours worked, even when the employee voluntarily does the rework.

All time is hours worked which an employee is required to be at work or allowed to work for his or her employer. An employer may hire a person to do nothing or to do nothing but wait for something to do or something to happen.

Time which an employee is required to be at work or allowed to work for his or her employer is hours worked. A person hired to do nothing or to do nothing but wait for something to do or something to happen is still working. The Supreme Court has stated that employees subject to the FLSA must be paid for all the time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business."

Hours worked include all time during which an employee is required or allowed to perform any work for an employer, regardless of where the work is done, whether on the employer's premises, at a designated work place, at home or at some other location.

It is the duty of management to exercise control and see that work is not performed if the employer does not want it to be performed. An employer cannot sit back and accept the benefits of an employee's work without considering the time spent to be hours worked. Merely making a rule against such work is not enough. The employer has the power to enforce the rule and must make every effort to do so. Employees generally may not volunteer to perform work without the employer having to count the time hours worked.

Please click on the [Back](#) button to return to previous page.



## **EXHIBIT B**

### ***James Kelly Grievance Appeal***

## **EXHIBIT B**

Brian Sandoval  
Governor



STATE OF NEVADA  
EMPLOYEE-MANAGEMENT COMMITTEE

100 N. Stewart Street, Suite 200 | Carson City, NV 89701  
Phone: (775) 684-0135 | <http://dop.nv.gov>

Mark Evans  
Chair

Stephanie Canter  
Co-Vice-Chair

Mandy Payette  
Co-Vice-Chair

Carrie Parker  
Deputy Attorney General

March 25, 2013

Dyer Lawrence Law Firm  
2805 Mountain Street  
Carson City, Nevada 89703

*Re: Grievance #2474 submitted by James Kelly (Decision 21-13)*

Dear Counsel:

This correspondence is being sent to you regarding the above-entitled grievance and the request for consideration of the grievance by the Employee-Management Committee ("EMC") that was submitted to this office on or about March 13, 2013.

When the EMC receives a request for consideration of a grievance, it may answer the request without a hearing if the matter is based upon the EMC's previous decisions or does not fall within its jurisdiction. See NAC 284.695(1). The EMC has jurisdiction to adjust grievances, as defined in NRS 284.384(6) and NAC 284.658. For the purposes of the EMC's jurisdiction, "the term 'grievance' does not include any grievance for which a hearing is provided by federal law." NAC 284.658(2).

The grievance issues related to the United States Department of Labor's ("DOL") legal interpretation of the federal Fair Labor Standards Act ("FLSA"). The proposed resolution requests review of pay records and work schedules for the purpose of determining whether, and to what extent, Mr. Kelly may be entitled to back pay under the FLSA. With the grievance paperwork, Mr. Kelly has included printouts and publications from the DOL's Wage and Hour Division related to the FLSA. The FLSA provides for a complaint and hearing process.

James Kelly  
March 25, 2013  
Page 2

Because a hearing is provided by federal law, the EMC must regrettably DENY Mr. Kelly's request for EMC consideration of his grievance. *See* NAC 284.658(2). He may choose to pursue consideration by FLSA officials should he so determine.

Sincerely,



---

Mark Evans, Chair  
Employee-Management Committee

Enclosure

cc: Greg Cox, Director, NDOC  
Susie Bargmann, Human Resources Manager, NDOC  
Beth Bacon, Human Resources Analyst, NDOC  
Ann McDermott, Sr. Deputy Attorney General  
Celina Lopez, Attorney General Office  
Carrie Parker, EMC Counsel, Deputy Attorney General  
EMC File



MICHAEL W. DYER  
SANDRA G. LAWRENCE\*  
FRANCIS C. FLAHERTY  
THOMAS J. DONALDSON  
JESSICA C. PRUNTY

SUE S. MATUSKA\*  
CASEY A. GILLHAM

OF COUNSEL  
HON. MICHAEL E. FONDI\*

\* ALSO ADMITTED IN CALIFORNIA

April 9, 2013

*Sent via U.S. Mail and facsimile to (775) 684-0118*

Mark Evans, Chair  
Employee-Management Committee  
100 N. Stewart Street, Suite 200  
Carson City, NV 89701

Re: Appeal of James Kelly Grievance #2474;  
Decision 21-13

Dear Mr. Evans:

As you know, this law firm represents the Nevada Corrections Association (NCA). Sr. Officer James Kelly is a member of NCA. I am writing in response to your letter dated March 25, 2013, denying Sr. Officer Kelly's request for EMC consideration of the above-referenced grievance.

According to your letter, you dismissed the grievance pursuant to NAC 284.695(1) for lack of jurisdiction by the EMC. The EMC clearly has jurisdiction of Sr. Officer Kelly's grievance challenging the denial of overtime compensation. Clearly, the alleged improper denial of overtime pay "constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee," which is the definition of a grievance pursuant to NRS 284.384(6) and NAC 284.658. More specifically, NAC 284.658(1) provides:

As used in NAC 284.341 and 284.658 to 284.697, inclusive, a "grievance" means an act, omission or occurrence which a permanent employee feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee, including, but not limited to, **compensation**, working hours, working conditions, membership in an organization of employees or the interpretation of **any law**, regulation or disagreement. [emphasis added]

Thus, the applicable statutes and regulations contemplate and provide for grievances regarding compensation for overtime. The EMC clearly has the authority to award back pay for the inappropriate denial of overtime.

Additionally, you contend that NAC 284.658(2) restricts the EMC's jurisdiction stating "the term 'grievance' does not include any grievance for which a hearing is provided by federal law." However, NAC 284.658(2) provides:

For the purposes of NAC 284.341 and 284.658 to 284.697, inclusive, the term "grievance" does not include any grievance for which a hearing is provided by NRS 284.165, 284.376 or 284.390.

Mark Evans, Chair  
April 9, 2013  
Page 2

NRS 284.165 addresses "Allocation of positions; hearing; review by Commission;" NRS 284.376 addresses "Involuntary transfer; hearing; remedies;" and NRS 284.390 addresses "Hearing to determine reasonableness of dismissal, demotion or suspension; judicial review." None of which contemplate a hearing provided by federal law, nor do they address the denial of compensation for overtime.

Therefore, on behalf of Sr. Officer Kelly, I am hereby requesting that you reconsider and reverse your decision to deny the above-referenced grievance and set the matter for hearing. Thank you for your anticipated attention to this matter. Please contact me if you have any questions.

Sincerely yours,

DYER, LAWRENCE, FLAHERTY,  
DONALDSON & PRUNTY

Casey A. Gillham

CAG/ns

cc: Sr. Officer James Kelly  
Greg Cox, NDOC Director  
Matthew Deal, DAG



Brian Sandoval  
Governor



STATE OF NEVADA  
EMPLOYEE-MANAGEMENT COMMITTEE  
100 N. Stewart Street, Suite 200 | Carson City, NV 89701  
Phone: (775) 684-0135 | <http://dop.nv.gov>

Mark Evans  
Chair

Stephanie Canter  
Co-Vice-Chair

Mandy Payette  
Co-Vice-Chair

Carrie Parker  
Deputy Attorney General

April 12, 2013

Casey A. Gillham, Esq.  
2805 Mountain Street  
Carson City, Nevada 89703

*Re: Grievance #2474*

Dear Mr. Gillham:

This correspondence is in response to your April 9, 2013 letter requesting reconsideration of the grievance of James Kelly by the Employee-Management Committee ("EMC").

In your request, you have asserted "alleged improper denial of overtime pay constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee," citing NRS 284.384(6) and NAC 284.658. While the EMC has jurisdiction to address injustices related to compensation, NAC 284.658(2) provides an exception from the definition of a "grievance" in situations where a hearing is provided by federal law. The letter denying Mr. Kelly's request for a hearing explicitly relied upon this exception.

The version of NAC 284.658(2) cited in your request for reconsideration is not the current version of this regulation. NAC 284.658(2) was amended, effective January 1, 2012, to include the following, in pertinent part:

For the purposes of NAC 284.341 and 284.658 to 284.697, inclusive, *and section 1 of this regulation*, the term "grievance" does not include any grievance for which a hearing is provided by *federal law or* NRS 284.165, *284.245, 284.3629*, 284.376 or 284.390.



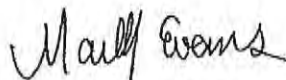
James Kelly  
April 12, 2013  
Page 2

While the legislature's website containing NAC 284.658(2) has not been updated to reflect this amendment, it does contain the following disclaimer: "This chapter of NAC has changes which have been adopted but have not been codified; you can see those changes by viewing the following regulation(s) on the Nevada Register of Administrative Regulations: R026-11, R027-11, R077-11." Section 2 of adopted regulation LCB File R026-11 contains the new language excepting any grievance for which a hearing is provided by federal law. <http://www.leg.state.nv.us/Register/2011Register/R026-11A.pdf>. A copy is enclosed for your convenience. Additionally, it is noted that the Division of Human Resource Management has published *Rules for State Personnel Administration*, <http://dop.nv.gov/NAC.pdf>, which organizes the statutes and regulations by topic and which includes the amendments that are effective but may not yet have been codified.

In Mr. Kelly's grievance, he has asserted a violation of the federal Fair Labor Standards Act. As this federal law provides for a hearing, Mr. Kelly's grievance is not a "grievance" per NAC 284.658(2), and the EMC lacks jurisdiction to adjust it. Additionally, Mr. Kelly's request that his pay records and work schedules be reviewed is essentially a request for an investigation, and the EMC has previously determined that it is not authorized to order an investigation.

Accordingly, the EMC must deny your request for reconsideration.

Sincerely,



---

Mark Evans, Chair  
Employee-Management Committee

Enclosure

cc: Greg Cox, Director, NDOC  
Susie Bargmann, Human Resources Manager, NDOC  
Beth Bacon, Human Resources Analyst, NDOC  
Ann McDermott, Sr. Deputy Attorney General  
Celina Lopez, Attorney General's Office  
Carrie Parker, EMC Counsel, Deputy Attorney General  
EMC File

**ADOPTED REGULATION OF  
THE PERSONNEL COMMISSION**

**LCB File No. R026-11**

Effective January 1, 2012

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

AUTHORITY: §§1-5, NRS 284.065, 284.155 and 284.384, as amended by section 1.7 of Assembly Bill No. 354, chapter 484, Statutes of Nevada 2011, at page 3066.

A REGULATION relating to the State Personnel System; revising provisions concerning the adjustment of grievances; and providing other matters properly relating thereto.

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

*1. If an employee is not satisfied with the decision rendered by the highest administrator of the department pursuant to NAC 284.690 and submits a request for consideration of the grievance by the Committee pursuant to NAC 284.695, the employee or the highest administrator or his or her designee may request a resolution conference to meet informally in the presence of a neutral facilitator to discuss the grievance and possible resolutions.*

*2. Except as otherwise provided in this subsection, a request for a resolution conference may be submitted to the Division at any time after the employee submits his or her request for consideration of the grievance by the Committee. If the Committee has notified the parties of the date on which it will hold a hearing to consider the grievance, the request for a resolution conference may not be submitted less than 15 working days before that date.*



3. *Upon receipt of a request for a resolution conference, the Division shall appoint a neutral facilitator to conduct the resolution conference. The facilitator must not be affiliated with either party.*

4. *The submission of a request for a resolution conference does not deprive the Committee of jurisdiction to consider the grievance if:*

*(a) The parties are unable to reach an agreement for the resolution of the grievance at the resolution conference; or*

*(b) The parties reach an agreement for the resolution of the grievance at the resolution conference, but the employee subsequently notifies the Committee that the agreement has failed.*

Sec. 2. NAC 284.658 is hereby amended to read as follows:

284.658 1. As used in NAC 284.341 and 284.658 to 284.697, inclusive, *and section 1 of this regulation*, a "grievance" means an act, omission or occurrence which a permanent employee feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee, including, but not limited to, compensation, working hours, working conditions, membership in an organization of employees or the interpretation of any law, regulation or disagreement or a contested report on performance. The act, omission or occurrence must be established with factual information including, but not limited to, the date, time and place of the act, omission or occurrence and the names of other persons involved.

2. For the purposes of NAC 284.341 and 284.658 to 284.697, inclusive, *and section 1 of this regulation*, the term "grievance" does not include any grievance for which a hearing is provided by *federal law or* NRS 284.165, 284.245, 284.3629, 284.376 or 284.390.

Sec. 3. NAC 284.6955 is hereby amended to read as follows:

284.6955 If a hearing is held to determine the proper disposition of a grievance pursuant to NAC 284.695, the following procedure must be followed:

1. Each party shall submit to the Chairman of the Committee or his designated representative 10 copies of the set of documents and materials to be presented at the hearing or any rescheduled hearing. These copies must be submitted not less than 12 working days before the scheduled date of the hearing. The Chairman or his designated representative shall forward one copy of the set of the documents and materials of each party to the other party.

2. If the employee fails to comply with subsection 1, the Chairman or his designated representative may reschedule the hearing to the next time designated for such hearings, but in no case earlier than 20 working days after the originally scheduled date of the hearing. If the employer fails to comply with subsection 1, the Chairman or his designated representative may reschedule the hearing at his discretion. If the employee fails to comply with the provisions of subsection 1 for a rescheduled hearing, his grievance must be dismissed with prejudice unless he can show in writing to the Committee's satisfaction that the reason for noncompliance was beyond his control.

3. Each document or material offered in evidence must be marked as follows:

(a) Documents or materials presented by the employee must be marked at the bottom of the page as "Exhibit\_\_\_\_" indicated by consecutive arabic numerals, beginning with the number "1."

(b) Documents or materials presented by the employer must be marked at the bottom of the page as "Exhibit\_\_\_\_" indicated by consecutive letters of the English alphabet, beginning with the letter "A." If the employer offers more than 26 exhibits, the 27th exhibit must be marked as "Exhibit AA," the 28th exhibit as "Exhibit BB," and so forth.

4. All evidence offered at the hearing must be relevant and bear upon the grievance.

5. Each person who ~~{testifies}~~ *provides a statement* at the hearing shall state his name, address, and occupation for the record. ~~{before testifying.}~~

6. It is the responsibility of each party to arrange for the appearance of all necessary witnesses. The Committee may request additional witnesses or information as it deems necessary.

7. ~~{The grievance must be heard in the following order:~~

- ~~—(a) Opening statement for the employee;~~
- ~~—(b) Opening statement for the employer;~~
- ~~—(c) Presentation of employee's case, followed by cross-examination;~~
- ~~—(d) Presentation of employer's case, followed by cross-examination;~~
- ~~—(e) Closing statement for the employee;~~
- ~~—(f) Closing statement for the employer;~~

~~—8.}~~ Upon proper recognition by the Chairman or his designated representative, any member of the Committee may ask a question of a party or witness at any time during the hearing.

Sec. 4. 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 Department of Personnel that investigates sexual 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) ~~{Use}~~ *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 ~~{}~~, and section 1 of this regulation; or*

(c) File a complaint 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. 5. This regulation becomes effective on January 1, 2012.

**LEGISLATIVE REVIEW OF ADOPTED REGULATIONS AS REQUIRED BY  
NRS 233B.066  
LCB File #R026-11**

The following statement is submitted for amendments to Nevada Administrative Code (NAC) 284.

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

Copies of the proposed regulations, notices of workshop, and notices of intent to act upon a regulation 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. These documents were also made available on the Division of Human Resource Management website at <http://dop.nv.gov/> (formerly The Department of Personnel,) mailed to all county libraries in Nevada and posted at the following locations:

Department of Administration Division of Human Resource Management Blasdel Building 209 E. Musser St Carson City, NV 89701	Grant Sawyer State Office Bldg. 555 E. Washington Blvd Suite 4401 Las Vegas, NV 89101
Nevada State Library and Archives 100 Stewart St Carson City, NV 89701	Capitol Building Main Floor Carson City, NV 89701
Legislative Building 401 S. Carson St Carson City, NV 89701	Gaming Control Board 1919 College Parkway Carson City, NV 89701

Attached are excerpts from the minutes from the workshop and a summary of the Personnel Commission comments that apply to these regulations.

A Regulation Workshop was conducted by the Department of Personnel on June 2, 2011 and a public hearing was held by the Nevada Personnel Commission on December 9, 2011.

2. **The number of persons who:**
  - (a) **Attended each hearing:** June 2, 2011 – 42; December 9, 2011 – 45
  - (b) **Testified at each hearing:** June 2, 2011 – 15; December 9, 2011 – 7
  - (c) **Submitted written comments:** 2
3. **A description of how comment was solicited from businesses, a summary of their response, and an explanation how other interested persons may obtain a copy of the summary.**



Comments were not solicited, as the regulations do not affect businesses.

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

Under public comment, agency representatives stated that they did not see the need for the resolution conference or the use of a neutral facilitator. However, Assembly Bill 354 requires that the regulations provide for a resolution conference. Representatives from the employee associations stated that the use of a resolution conference would give the agency and the employee one more opportunity to resolve the issue before the case went to the EMC. Both agency and employee association representatives discussed the possibility of using mediation in place of a resolution conference. Although the State already offers a mediation process, both sides have to agree to hold the mediation. A resolution conference would be held if either side requested it, so calling it mediation would be inaccurate. There was also discussion regarding at what step the resolution conference should be held. Representatives of the employee associations felt strongly that it needed to follow the third step, so that the top decision maker at the agency would be involved.

Several agencies requested that notification of a failed resolution conference agreement require a time frame to avoid, over time, details of the incident becoming vague and the loss of involved personnel.

Section 3 and 5 were removed from the proposed regulation by the Division of Human Resource Management to allow more time for discussion and consensus building between the participating parties that these processes would affect.

Removing sections 3 and 5, the regulation was adopted as written.

- 5. 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.

These regulations do not have a direct economic effect on either a regulated business or the public.

- 6. The estimated cost to the agency for enforcement of the adopted regulation:**

There is no additional cost to the agency for enforcement of these regulations. A division's staff member, a Subject Matter Expert, a trained mediator or a Personnel Officer from a state agency other than the employee's own agency could be used as a neutral facilitator.

- 7. A description of any regulations of other State or governmental agencies which the 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.

There are no other state or government agency regulations that the proposed amendments duplicate.

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

These regulations do not include any provisions that are more stringent than any federal regulation.

9. **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 these regulations.

10. **Is the proposed regulation likely to impose a direct and significant economic burden upon a small business or directly restrict the formation, operation or expansion of a small business? What methods did the agency use in determining the impact of the regulation on a small business?**

These regulations are specific to State government agencies and has no impact on small businesses.

May 08 13 06:19a

p.1

May 7, 2013

Hi Nancy,

This is the letter I sent the Division of Labor. I CC'd to Tom and Casey, but I think that if you have it, this will suffice.

Thanks for your help with this, and we'll see what happens!?!

Jim

May 08 13 06:19a

p.2

May 7, 2013

U.S. Department of Labor  
Wage and Hour Division  
Las Vegas District Office  
600 Las Vegas Blvd. S., Suite 750  
Las Vegas, NV 89101-6654

RE: WAGE VIOLATIONS BY THE NEVADA DEPARTMENT OF CORRECTIONS

To whom it may concern,

I would like to file a complaint against the Nevada Department of Corrections (NDOC) for violating Wage and Hour provisions of the Fair Labor Standards Act.

The NDOC has been in violation of the FLSA for years in that they have been paying Correctional Officers only for scheduled time, and not for the time that we arrive for work. In my own personal circumstance, I arrive for work and must perform activities which are undisputed work activities such as clearing a metal scanner, receive a work assignment, give/receive a briefing, deliver materials to the unit, etc. I am also required to walk across a prison yard in full uniform as an on duty peace officer. If there were to be an incident while doing this, I would assuredly be expected to respond, lest I be derelict in my duties; which would subject me to severe disciplinary action for Insubordination, conduct unbecoming, etc.

I have attempted to resolve this matter through the State's internal grievance process to no avail. I have submitted fact sheet #'s 22 and 23 which clearly describe the "permit or suffer to work" rule which I believe clearly applies. I have attached all documents from this process for your review.

May 08 13 06:19a

p.3

The following is the requested information for your investigation:

**My information:**

James A. Kelly III  
135 River Village Cr.  
Dayton, NV 89403  
H: (775) 246-7390  
C: (775) 338-0533  
Best time to call is in the morning

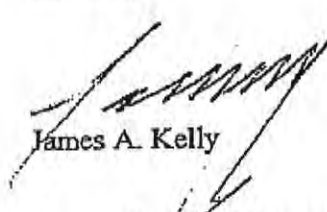
**Company Information**

Nevada Department of Corrections  
Casa Grande Transitional Housing  
3955 W. Russell Road  
Las Vegas, NV 89118-2316  
PHONE: (702) 486-9906  
Director James "Greg" Cox

I am an hourly Correctional Officer (peace officer)  
currently assigned to a correctional unit. I am working a  
variable schedule which consists of 80 hour every 2 weeks,  
and I am paid every other Friday.

Please don't hesitate to contact me if there is anything that I may do to expedite this  
investigation.

Sincerely,



James A. Kelly

Cc: Casey Gillham, Esq.  
Tom Donaldson, Esq.  
Nancy Schreihans, Case Manager, NCA  
Gene Columbus, President, NCA



May 20 13 04:50p

p.1

U.S. Department of Labor  
Wage & Hour Division  
600 Las Vegas Blvd. S., #550  
Las Vegas, NV 89101-5833  
Tel. (702) 928-1240  
Fax: (702) 928-1241



Friday, May 17, 2013

James Kelly III  
135 River Village Cr  
Dayton, NV 89403

Subject: Nevada Department of Corrections

Dear Mr. Kelly III:

You recently contacted the Wage and Hour Division (WHD) with a complaint that the above-named employer failed to pay proper overtime under the Fair Labor Standards Act (FLSA). The FLSA requires covered employers to comply with all provisions of the Act. After careful consideration of the information you provided, the WHD is declining to pursue your complaint.

The WHD fosters and promotes the welfare of wage earners by improving their working conditions to support the Department's goal of good jobs for everyone. In carrying out this mission, the Division administers and enforces a variety of Federal labor laws including those that guarantee workers' rights to safe and healthful working conditions; a minimum hourly wage and overtime pay; and a balanced family work life. The WHD receives more than 30,000 complaints each year and its resources do not permit it to investigate all of the complaints it receives. As a result the WHD must decline to investigate certain complaints and advise complainants of other resources that may be available to them to resolve their claims.

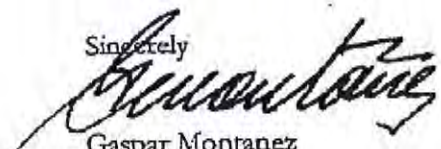
Although your complaint is important to us, after careful consideration of our mission, priorities and resources, we are declining to take further action on your behalf. This does not affect your legal right to bring a private action in federal or state court against your employer under the FLSA to recover unpaid wages and an equal amount in liquidated damages, plus attorney's fees and court costs. The Department of Labor does not encourage or discourage such suits. The decision is entirely up to you.

Please keep in mind that recovery of unpaid back wages under the FLSA is subject to a two-year statute of limitations, unless the employer's actions are willful, which extends the statute of limitations an additional year. Generally, this means that back wages or other remedies for violations that occurred more than two years before a lawsuit is filed may not be recoverable.

You may also wish to contact Nevada State Labor Commission at 702-486-2650. That agency may be able to assist you with your complaint.

Please feel free to contact this office at 702-928-1240 if you have any questions regarding this letter.

Sincerely,

  
Gaspar Montanez  
District Director

Enclosure: HRG

MICHAEL W. DYER  
SANDRA G. LAWRENCE\*  
FRANCIS C. FLAHERTY  
THOMAS J. DONALDSON  
JESSICA C. PRUNTY

SUE S. MATUSKA\*  
CASEY A. GILLHAM

OF COUNSEL  
HON. MICHAEL E. FONDI\*

\* ALSO ADMITTED IN CALIFORNIA

July 31, 2013

*Sent via U.S. Mail and facsimile to (775) 684-0118*

Mark Evans, Chair  
Employee-Management Committee  
100 N. Stewart Street, Suite 200  
Carson City, NV 89701

Re: Appeal of James Kelly Grievance #2474;  
Decision 21-13 and Denial of Request for Reconsideration

Dear Mr. Evans:

I am writing in regards to the above-referenced grievance to again request the Employee-Management Committee (EMC) grant a hearing and consider the above-referenced grievance.

According to your letter dated April 12, 2013, you denied our request for reconsideration stating that federal law provides for a hearing. As you can see from the enclosed letter from the U.S. Department of Labor (DOL) dated May 17, 2013, that is not the case. The DOL declined to pursue Sr. Officer Kelly's complaint based upon the volume of complaints they receive each year, in excess of 30,000, and DOL's resources not permitting their investigation all of the complaints it receives.

Again, it is our position that the EMC clearly has the authority to award back pay for the inappropriate denial of overtime. Therefore, before Sr. Officer Kelly explores his legal rights to bring action in federal or state court, I hereby respectfully requests that the EMC reconsider their position and grant Sr. Officer Kelly due process by way of a hearing before the EMC in order to exhaust his administrative remedies.

Thank you for your anticipated attention to this matter. Please contact me if you have any questions.

Sincerely yours,

DYER, LAWRENCE, FLAHERTY,  
DONALDSON & PRUNTY

Casey A. Gillham

Enclosure  
cc (w/encl.): Sr. Officer James Kelly  
Greg Cox, NDOC Director  
Anne McDermott, Chief DAG



Brian Sandoval  
Governor



STATE OF NEVADA  
EMPLOYEE-MANAGEMENT COMMITTEE

100 N. Stewart Street, Suite 200 | Carson City, Nevada 89701  
Phone: (775) 684-0135 | [www.hr.nv.gov](http://www.hr.nv.gov) | Fax: (775) 684-0118

Mark Evans  
Chair

Stephanie Canter  
Co-Vice-Chair

Mandy Payette  
Co-Vice-Chair

Carrie L. Parker  
Deputy Attorney General

August 8, 2013

Via U.S. mail

Casey A. Gillham, Esq.  
2805 Mountain Street  
Carson City, Nevada 89703

*Re: Grievance #2474 – Second Request for Reconsideration*

Dear Mr. Gillham:

This correspondence is in response to your July 31, 2013 letter requesting, for the second time, reconsideration of the grievance of James Kelly by the Employee-Management Committee ("EMC").

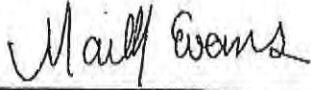
The EMC previously denied a request for reconsideration on or about April 12, 2013. Pursuant to NRS 233B.130(4), a petition for reconsideration must be filed within 15 days after the date of service of the final decision. Assuming *arguendo* that NRS Chapter 233B allows for a petition for reconsideration of a denial of a petition for reconsideration, your letter is untimely.

Additionally, as explained in the March 25, 2013 Decision 21-13 and the April 12, 2013 denial of request for reconsideration, the EMC lacks jurisdiction to adjust Mr. Kelly's grievance. NAC 284.658(2) excludes from EMC jurisdiction "any grievance for which a hearing is provided by federal law." The federal Fair Labor Standards Act ("FLSA") provides for a complaint and hearing process. The May 17, 2013 Department of Labor ("DOL") letter you provided explained that its decision to decline to investigate Mr. Kelly's complaint does not affect his legal right to bring a private action in court under the FLSA. The EMC cannot control whether the DOL chooses to pursue a complaint, and the DOL's decision not to investigate Mr. Kelly's complaint has no bearing on the application of NAC 284.658(2).

Page 2 of 2  
James Kelly  
August 8, 2013

Accordingly, the EMC must deny your second request for reconsideration.

Sincerely,



Mark Evans, Chair  
Employee-Management Committee

cc: Greg Cox, Director, NDOC  
E.K. McDaniel, Deputy Director, NDOC  
Isidro Baca, Warden, NNCC  
Sharlet Gabriel, HR Administrator  
Susie Bargmann, HR Manager, NDOC  
Brian Boughter, HR Manager, NDOC  
Ann McDermott, Chief Deputy Attorney General  
Celina Lopez, Attorney General's Office  
Carrie Parker, EMC Counsel, Deputy Attorney General  
EMC File



THIERMAN BUCK LLP

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(775) 284-1500 Fax (775) 703-5027

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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

DONALD WALDEN JR, NATHAN  
ECHEVERRIA, AARON DICUS, BRENT  
EVERIST, TRAVIS ZUFELT, TIMOTHY  
RIDENOUR, and DANIEL TRACY on behalf  
of themselves and all others similarly situated,

Plaintiffs,

v.

THE STATE OF NEVADA, *EX REL.* ITS  
NEVADA DEPARTMENT OF  
CORRECTIONS, and DOES 1-50,

Defendants.

Case No.: 3:14-cv-00320-MMD-WGC

**PLAINTIFFS' MOTION TO REASSERT  
CLAIM FOR FAILURE TO PAY  
OVERTIME IN VIOLATION OF NRS  
284.180 AND MEMORADUM IN  
SUPPORT THEREOF**

Plaintiffs DONALD WALDEN JR, NATHAN ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated (collectively, "Plaintiffs"), through their attorneys at Thierman Buck LLP, hereby move to reassert their claim for failure to pay overtime in violation of NRS 284.180.

This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities as set forth herein, the complaint in this action, the declarations filed contemporaneously herewith, all concurrently filed and attached exhibits, all pleadings and

documents on file in this matter, and upon such evidence and arguments as may properly come before the Court at the time of the hearing.

DATED: March 27, 2020

Respectfully Submitted,

THIERMAN BUCK LLP

/s/ Mark R. Thierman

Mark R. Thierman

Joshua D. Buck

Leah L. Jones

*Attorneys for the Plaintiffs*

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Plaintiffs move to reassert their claims under Nevada State law on grounds that they now have exhausted their administrative procedures. Since a second amended complaint dismissing these claims has never been filed, and the claim Plaintiffs seek to reassert is already alleged in the operative First Amended Complaint, there is no need to require the filing of an additional amended pleading. In order to avoid confusion, and to make the record perfectly clear, Plaintiffs bring this motion for an order by the Court re-asserting these claims as if they had never been dismissed.

### **II. STATEMENT OF FACTS**

On March 26, 2018, this Court “dismissed without prejudice Plaintiffs’ claim for failure to pay overtime in violation of NRS 284.180,” holding that Plaintiffs’ claim was “not ripe for judicial review” based solely on Plaintiffs’ “[f]ailure to exhaust state administrative remedies.” ECF No. 166 at p.16. In dismissing the claim without prejudice, the Court recognized that Plaintiffs may move to reassert their state law claim following administrative exhaustion. Plaintiffs have now exhausted their state administrative remedies and seek to reassert this claim.

On August 26, 2018, Opt-In Plaintiff David Eckard submitted a grievance to the Employee Management Committee for the State of Nevada (“EMC”) arguing, *inter alia*, that:

All Correctional Officers, including me, are required to work at least a half-hour per shift “off-the-clock” performing work activities before and after their regularly scheduled shift for which they are not

1 compensated. A detailed description of the grievance, including  
 2 names of other persons involved, is provided in the attached  
 3 Complaint, which Plaintiffs filed in the First Judicial District Court  
 of the State of Nevada, in and for Carson City, on July 27, 2018.<sup>1</sup>

4 Opt-In Plaintiff Eckard escalated his grievance through all required steps and further detailed and  
 5 supported his claims in his Employee Packet, a copy of which is attached hereto as Exhibit A.  
 6 Notably, Opt-In Plaintiff Eckard sought relief under NRS 284.180 “on behalf of himself and all  
 7 similarly situated NDOC correctional officers,” including Plaintiffs and the putative class in this  
 8 action, based on the same facts and circumstances alleged in this action.

9 The hearing for Opt-In Plaintiff Eckard’s grievance was continued multiple times. The  
 10 hearing was initially scheduled for June 6, 2019. However, at NDOC’s request, the EMC  
 11 indefinitely postponed the hearing and held the grievance in abeyance pending the Ninth Circuit’s  
 12 decision in this case. Following the Ninth Circuit’s published opinion filed on October 16, 2019  
 13 and amended on December 23, 2019, in which the court recognized Plaintiffs’ right to proceed with  
 14 their claims in the this case, the EMC set the grievance for hearing on March 12, 2020. Defendant  
 15 again requested a continuance, which the EMC granted, setting the new hearing date for April 30,  
 16 2020. Unfortunately, the onset of the COVID-19 pandemic forced the EMC to again cancel that  
 17 date and further postpone the hearing indefinitely.

18 The long-awaited grievance hearing finally occurred on February 4, 2021. At the conclusion  
 19 of the hearing, the EMC granted in part and denied in part Opt-In Plaintiff Eckard’s grievance. The  
 20 EMC subsequently issued its written Decision No. 02-21 memorializing its ruling and finally  
 21 resolving the grievance. A copy of this Decision is attached hereto as Exhibit B.

22 ///

23  
 24 <sup>1</sup> As an FLSA Opt-In Plaintiff, Opt-In Plaintiff Eckard is a party plaintiff in this action.  
 25 See ECF No. 217. However, in the event that this Court determines that Opt-In Plaintiff Eckard  
 26 must be a named Plaintiff in this action for his state law claim to move forward in a representative  
 27 capacity, Opt-In Plaintiff Eckard is willing and able to join this action as a named plaintiff and  
 28 Plaintiffs hereby request that he be added as a named Plaintiff if necessary. Plaintiffs also note  
 that Opt-In Plaintiff Eckard was previously a named plaintiff in a separate case against NDOC  
 that has since been dismissed, which is referenced in his grievance.



### III. ARGUMENT

With the issuance of the final written agency decision, Opt-In Plaintiff Eckard has fully exhausted the administrative requirements of NRS Chapter 284. *See* NRS § 284.384 (“Except as otherwise provided in subsection 3, a final decision of the Committee is binding” and thus exhausts administrative requirements.) Accordingly, Plaintiffs respectfully request permission to reassert their state law claim for failure to pay overtime in violation of NRS 284.180, as alleged in Plaintiffs’ First Amended Complaint. Because Plaintiffs seek only to reassert their claim as fully pled in the operative pleading, Plaintiffs submit no additional amended complaint reasserting these claims need be filed. *Cf.*, *KST Data, Inc. v. DXC Tech. Co.*, 980 F.3d 709, 715 (9th Cir. 2020) (holding that a defendant is not required to file an answer to an amended complaint “when an amended complaint ‘does not add new parties, new claims, or significant new factual allegations, ... the previously filed response to the original pleading [will] suffice’” (internal citations omitted)).

DATED: May 27, 2021.

Respectfully Submitted,

THIERMAN BUCK LLP

/s/ Mark R Thierman

Mark R. Thierman

Joshua D. Buck

Leah L. Jones

*Attorneys for Plaintiffs*

### INDEX OF EXHIBITS

Exhibit A	Opt-In Plaintiff Eckard’s Employee Packet
Exhibit B	EMC Decision No. 02-21

# **EXHIBIT A**

Opt-In Plaintiff Eckard's Employee Packet

# **EXHIBIT A**



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May 15, 2019

Nevada Employee Management Committee  
ATTN: EMC Coordinator  
100 N. Stewart Street, Room 200  
Carson City, NV 89701

***In Re: Grievance of David Eckard #5908 – Employee’s Packet***

Dear Committee Members,

This correspondence serves as Mr. David Eckard’s “Employee Packet” for the upcoming June 6, 2019, step 4 grievance hearing. This Packet includes the following:

- 1) Pre-Hearing Statement;
- 2) Witness List;
- 3) Index of Exhibits.

As required, twelve (12) copies of this Packet will be hand delivered to the above address, no later than 5:00 p.m., Wednesday, May 15, 2019.

**I. Background**

As an initial matter, this Committee heard a similar grievance involving materially identical facts and legal claims on October 18, 2018. *See* Decision 23-18, In re: Grievance of Kellen Prost, No. 5754.<sup>1</sup> On November 16, 2018, the EMC issued its decision granting Ms. Prost’s grievance and making detailed findings of fact and conclusions of law adopting Ms. Prost’s factual allegations as set forth in her Complaint.

For the same reasons set forth in the Committee’s Order granting Ms. Prost’s grievance, this Committee should likewise grant Mr. Eckard’s grievance based on the facts and legal arguments summarized below.

**A. Facts<sup>2</sup>**

Mr. Eckard has been employed by the Nevada Department of Corrections (“NDOC”) as a non-exempt hourly correctional officer at the High Desert State Prison (“HDSP”) from on or about April 2014 to the present. NDOC currently pays Mr. Eckard \$27.76 per hour. At almost all times (except when taking paid time off or holidays), Mr. Eckard was required to work and did work a

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<sup>1</sup> Attached hereto as Exhibit 1 is a true and correct copy of the EMC’s Decision No. 23-18.

<sup>2</sup> Mr. Eckard will testify to all facts set forth herein. In addition, these facts are corroborated by the supporting declarations attached hereto as Exhibit 2.



regular schedule of 40 hours per work week with an agreement in writing that all times worked in excess of 40 hours would be paid at one and one-half his normal regular hourly rate.

This grievance arises out of the fact that Mr. Eckard and all NDOC correctional officers are required to perform approximately forty-five (45) minutes of work activities before and after their regularly scheduled shifts for which they are not compensated.<sup>3</sup> This is the case because NDOC’s policy is to only pay to the scheduled shift and NDOC does not have correctional officers clock in and clock out to record their time for pay purposes. Instead, NDOC has an exception-based reporting system whereby employees must manually enter overtime. Because Mr. Eckard and his fellow correctional officers have been instructed that it is NDOC’s policy to refuse to pay for the pre- and post-shift activities described throughout this statement, Mr. Eckard and all NDOC correctional officers are deprived of approximately 45 minutes of pay each and every shift worked. The follow summarizes the pre- and post-shift off-the-clock work that NDOC requires Mr. Eckard to perform every day without pay.

### **Pre-Shift Work**

After arriving at HDSP and passing through security—which Mr. Eckard does not allege to be compensable time—Mr. Eckard (along all other NDOC correctional officers) is required to perform the following work activities on a daily basis without compensation.

#### **1. Muster / Roll Call**

As set forth in Mr. Eckard’s Complaint, the first work-related task performed by Mr. Eckard and all class members “off the clock” before their scheduled work time is called “muster” or “roll call.” Prior to the beginning of a correctional officers’ regularly scheduled shifts, each officer is required to report to the shift supervisor for “muster” (or “roll call”) in order to receive assignments for the day, pass a uniform inspection, and receive pertinent information on the global status of the facility. ). Indeed, this pre-shift requirement is specifically set forth in the Nevada Department of Corrections’ Administrative Regulations: “All correctional staff will report to the shift supervisor/shift sergeant upon arrival to ensure their status if required to work mandatory overtime.” See <http://www.doc.nv.gov/sites/doc/files/pdf/AR326.pdf> (last visited May 3, 2018). Correctional officers are required to complete this pre-shift task every day. Muster occurs after officers passed through security and metal detectors<sup>4</sup> but prior to the beginning of their regularly scheduled shift.

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<sup>3</sup> Mr. Eckard is a named Plaintiff in a collective and class action lawsuit that was filed in the First Judicial District Court of the State of Nevada in and for Carson City alleging failure to pay overtime in violation of 29 U.S.C. § 207 and failure to pay overtime in violation of NRS 284.100. He seeks damages according to proof for all hours worked with associated penalties, interests, costs, and attorneys’ fees on behalf of himself and all other similarly situated NDOC correctional officers. A copy of the Complaint is attached as Exhibit 3.

<sup>4</sup> Again, Mr. Eckard does *not* allege that the time it takes him to pass through the security check point/metal detectors is compensable work time.

Each officer has to attend muster to receive his/her assignment and for the express purpose of finding out the specific post the officer is assigned to for that day. Officers are required to report to their shift supervisor each day because correctional officers’ assignments can change from day to day based on the needs of the institution and supervisors would not post officers to their shift without seeing them face-to-face. Indeed, Wardens of the various facilities have confirmed in sworn deposition testimony that this was a requirement of correctional officers’ positions.

Another stated purpose of requiring Mr. Eckard and all class member to report to Muster is for a uniform inspection by their shift supervisor. Administrative Regulation (“AR”) 350 specifies the correct uniforms for officers. In fact, officers cannot proceed to their posts if they are not wearing the appropriate uniform. Officers would be reprimanded (including being sent home) if their uniform was not up to standards, and officers are required to remain in uniform until they fully exit the facility in case of an emergency or inmate situation.

An additional stated purpose of requiring Mr. Eckard and all class members to report to muster is to give correctional officers information related to any new developments at the facility or issues relating to the officer’s employment such as security issues, lockdown situations, changes in rules, and inmate problems, and other pertinent information by their shift supervisor prior to reporting to their assigned post.

## 2. Gear Collection

After attending Muster, but prior to the beginning of his regularly scheduled shift, Mr. Eckard and all other correctional officers are required to pick up the equipment and tools that are necessary and required to complete their daily job tasks, including but not limited to: keys, radios, weapons, mail, reports, restraints, and pepper spray. Correctional officers cannot collect any tools and equipment needed for their post prior to being assigned by the shift supervisor at muster. After collecting required gear, correctional officers must then proceed to their post.

## 3. Pass Down

Finally, prior to the beginning of his regularly scheduled shift, Mr. Eckard and all other correctional officers are required to complete a “pass down” with the outgoing officer. This briefing is in addition to the briefing by their shift supervisor during the muster process. Both of these briefings are necessary in order for the officer to perform their job because the briefings are the officers’ “source of [] security system for the institution” facility-wide and post-specific.

During their time in the academy, correctional officers are trained to show up early in order to complete all of these pre-shift tasks. And, if they showed up at the time their regularly scheduled shift started, their supervisors would reprimand them for not showing up early enough to complete these tasks so that they could assume their post at their regularly scheduled shift start time. In connection with a previously filed related case against Defendant, Warden Williams confirmed in deposition under oath that officers would have to get in a half hour early “to clear and do everything” and that he had seen officers “come in ten minutes to the start of their shift. And I’m scratching my head, if he [shift supervisor] assigns them to a tower or something, how are they going to get to their shift on time.” See Exhibit 3, attached hereto, Deposition Transcript of Warden Brian Williams, hereinafter “Williams Depo” at 133:17:22 and 134:12-17 and 136:2-4.

Because of the time it took for Mr. Eckard and all class members to collect gear after Muster, and the time it took to walk to their actual post assignments, correctional officers would get to Muster upwards to 30 minutes before their official shift start time in order to make sure they were present at their post prior the other officer’s end of shift/ beginning of their shift to be briefed by that outgoing officer prior to the incoming officer’s regularly scheduled shift start time, and in order to complete all these required work tasks, and to get the other officer out as near as possible to the end of his or her shift.

### **Post-Shift Work**

In addition to these uncompensated pre-shift work activities, NDOC required Mr. Eckard and all class members to engage in uncompensated post shift activities as follows.

At the end of correctional officers’ regularly scheduled shift, each officer was required to provide a pass down of information to the officer who was relieving that post. Just as these meetings take time prior to the start of a correctional officer’s regularly scheduled shift, they likewise take time following the end of the shift. Mr. Eckard and all class members could not do their jobs without these briefings and debriefings because the briefings contained “critical safety information.” In fact, Warden Williams specifically testified that communication and exchange of information between officers is “key in everything we do.” Williams Depo at 121:14-17 and 122:20-21.

In addition, just because the correctional officers had been relieved officially at the end of their shift didn’t mean Mr. Eckard and all other class members were done working without compensation. After being “officially relieved,” Mr. Eckard and all other class members had to return that same equipment and/or drop off/complete paperwork and they still had to adhere to all rules and regulations until they exited the gatehouse in case something happened on their way out. For instance, one officer indicated that they were trained at the academy that they always must be ready to respond and that correctional officers “get paid for what they might have to do.”

Because of the time it took for Mr. Eckard and all class members to debrief the incoming officer who was relieving them, return collected gear picked up at the beginning of their shift, and complete paperwork, correctional officers would spend approximately another 15 minutes or more after the end of their official shift end time performing work off-the-clock.

## **II. Legal Argument**

The time spent working off-the-clock before the start and after the end of Mr. Eckard’s regularly scheduled shift is compensable under NRS 284.180 and under the federal Fair Labor Standards Act (“FLSA”). Per NRS 281.100(2), “[t]he period of daily employment mentioned in this section commences from the time the employee takes charge of any equipment of the employer.” Likewise, 29 C.F.R. § 785.38 provides that “[w]here an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day’s work, and must be counted as hours worked.”



Under both Nevada state law and federal law, the pre- and post-shift activities at issue are compensable, and any hours worked over 40 in a workweek and/or over 80 in a two-week period must be compensated at time and one-half times the employee’s regular hourly rate of pay.

**A. NRS 281.100<sup>5</sup> requires payment from the time Mr. Eckard and all NDOC Correctional Officers report for muster.**

NRS 281.100 indicates that an employee’s time should start “from the time the employee takes charge of any equipment of the employer.” NDOC has not directly contested this applicability of this mandate, and has responded only that “At current the courts are determining whether this is applicable as the infractions are described in a Correctional setting. At this time no judgment has been made in the case. The Nevada department of corrections is unable to answer your complaint pending a ruling in a court of law as the case is still ongoing.” NDOC further affirmed that “Until that case is resolved we will continue to follow our current policy.”

While the court cases referenced by NDOC are still ongoing, this Committee resolved many of the legal and factual issues at hand in a recent decision. *See generally* Decision 23-18, *In re: Grievance of Kellen Prost*, No. 5754. In Decision 23-18, the Committee concluded as a matter of fact that the grievant, a correctional nurse, was required to perform the alleged pre- and post-shift tasks without pay. *Id.* at p. 5. Additionally, the Committee made the following conclusions of law:

1. For this grievance, it was Grievant’s burden to establish that her pre- and post-shift duties are compensable.
2. The EMC has the final authority to “adjust grievances.” NRS 284.073(1)(e).
3. A grievance is any act, omission or occurrence which an employee who has attained permanent status feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee. NRS 284.386.(6).
4. Ms. Prost’s grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
5. Pursuant to NRS 281.100(2), an employee’s shift starts from the time the employee takes charge of any equipment of the employer.
6. Pursuant to 29 C.F.R. § 785.24, principal activities that are an integral part of the employee’s job are considered work and as compensable.
7. Pursuant to 29 C.F.R § 785.38, where an employee is required to report at a meeting place to pick up and carry tools, the travel from such place to the actual work station is part of the day’s work and must be included as hours worked.
8. Grievant’s shift begins when she signs-in to the logbook and takes charge of equipment or collects the keys, which is an integral part of, and indispensable to her work assignment.
9. The time it takes for Grievant to travel from the place she signs-in and collects the keys to her actual work station is part of her day’s work. The time it takes for Grievant to travel from her work station to return the keys and sign-out is also part of her day’s work.

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<sup>5</sup> See Exhibit 4, NRS 281.100 in its entirety.

10. The pre- and post-shift duties involving signing-in and out of the logbook, as well as collection and return of the keys are compensable time, in which Grievant is entitled to payment.
11. Pursuant to NAC 284.678, a grievant must submit a grievance within twenty (20) working days of an event date leading to the grievance. The EMC will not consider matters prior to the event date of the grievance.<sup>6</sup>
12. Grievant is entitled to payment for her pre- and post-shift duties from May 25, 2018, the event date of her grievance, forward.

NRS 284.180(2) provides that overtime “must be earned at the rate of time and one-half, except for those employees described in NRS 284.148.” NRS 284.148(2) exempts unclassified employees from the overtime provisions of the FLSA *if* they qualify for an executive, administrative or professional exemption if they are paid on a salary basis. Mr. Eckard, and all NDOC correctional officers, are clearly not paid on a salary basis and they are thus not subject to the exemptions set forth under NRS 284.148. Therefore, Mr. Eckard, and all NDOC correctional officers are entitled to overtime premium pay of time and one-half for all overtime hours worked. Moreover, NRS 284.180(6) defines overtime “[f]or employees who choose and are approved for a variable workday, overtime will be considered only after working 40 hours in 1 week.”

And, NRS 284.180(7) states “[e]mployees who are eligible under the Fair Labor Standards Act of 1938, 29 U.S.C. §§201 *et seq.*, to work a variable 80-hour work schedule will be considered eligible for overtime only after working 80 hours biweekly, except those eligible employees who are approved for overtime in excess of one scheduled shift of 8 or more hours per day.”

Because none of the statutory exemptions apply to Mr. Eckard, or any NDOC correctional officer for that matter, Nevada state law requires that NDOC correctional officers must be paid for all of the pre- and post-shift work they complete, and must further be paid at an overtime premium where their hours equal over 40 in a week or over 80 biweekly.

## **B. The pre- and post-shift activities are compensable under federal law.**

As quoted above, the EMC Committee determined the work at issue to be compensable as a matter of law in its decision in the Prost Grievance. Further authority for this conclusion is summarized below.

### *1. The legal framework for determining compensable work under the FLSA*

The Fair Labor Standards Act (“FLSA”) provides that a covered employee who “is employed for a workweek longer than forty hours” must be paid for any hours in excess of forty at a rate at least one and one-half times his or her regular rate. 29 U.S.C. § 207(a); 29 U.S.C. § 203(g) (“Employ” is defined as “to suffer or permit to work.”). The FLSA itself does not contain a definition of “workweek” or “work.”

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<sup>6</sup> Mr. Eckard maintains that the entire period of violation is compensable because of the continuing nature of the violation.

Congress amended the FLSA with passage of the Portal-to-Portal Act. 61 Stat. 84 (1947). The Portal-to-Portal Act “narrowed the coverage of the FLSA slightly by excepting two activities that had been treated as compensable under [prior Supreme Court] cases: [1] walking on the employer’s premises to and from the actual place of performance of the principal activity of the employee, and [2] activities that are ‘preliminary or postliminary’ to that principal activity.” *IBP, Inc. v. Alvarez*, 546 U.S. 21, 27 (2005) (quoting 29 U.S.C. § 254(a)). As with the FLSA, the Portal-to-Portal Act itself does not define “work.” The Portal-to-Portal Act left unchanged the prior precedent relating to what constitutes “work” under the FLSA, *see IBP*, 546 U.S. at 28 (“[T]he Portal-to-Portal Act does not purport to change this Court’s earlier descriptions of the terms ‘work’ and ‘workweek’, or define the term ‘workday.’”), which is defined as any activity “controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business[.]” *see Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

The two exceptions from what would otherwise be considered compensable “work” under the FLSA are commonly known as the travel and postliminary/preliminary exceptions, respectively. 29 U.S.C. § 254(a)(1) and (2). This case concerns the latter. As such, the relevant inquiry is whether the pre- and post-shift activities in question are “integral and indispensable” to the employees’ primary job responsibilities.

The United States Supreme Court’s recent decision in *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014), provides the necessary guidance to determine whether Mr. Eckard and all correctional officers have adequately stated a claim for compensation under the FLSA.<sup>7</sup> In *Integrity*, the Supreme Court reaffirmed its prior holding in *Steiner v. Mitchell*, 350 U.S. 247, 252-253 (1956), that a preliminary and/or postliminary activity must be compensable if it is integral and indispensable to an employee’s job. For the first time since *Steiner*, the Supreme Court defined those two terms:

The word “integral” means “[b]elonging to or making up an integral whole; constituent, component; *spec[ifically]* necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage.” 5 Oxford English Dictionary 366 (1933) (OED); accord, Brief for United States as *Amicus Curiae* 20 (Brief for United States); see also Webster’s New International Dictionary 1290 (2d ed. 1954) (Webster’s Second) (“[e]ssential to completeness; constituent, as a part”). And, when used to describe a duty, “indispensable” means a duty “[t]hat cannot be dispensed with, remitted, set aside, disregarded, or neglected.” 5 OED 219; accord, Brief for United

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<sup>7</sup> Grievant’s counsel is very familiar with the Supreme Court’s decision in *Integrity*—Grievant Eckard’s counsel argued that case before the Ninth Circuit and the United States Supreme Court.



States 19; see also Webster's Second 1267 (“[n]ot capable of being dispensed with, set aside, neglected, or pronounced nonobligatory”).

*Integrity Staffing Solutions, Inc.*, 135 S. Ct. at 517. The Supreme Court then held that “[a]n activity is therefore integral and indispensable to the principal activities that an employee is employed to perform ***if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.***” 135 S. Ct. at 517 (emphasis added).

Justice Sotomayor’s concurrence provides further guidance as to the standard applied by the Court. *Id.* at 519 (“I concur in the opinion, and write separately only to explain my understanding of the standard the Court applies.”). In her concurrence, Justice Sotomayor states that a preliminary and/or postliminary activity is compensable if an employee cannot dispense with it without impairing her ability to perform the principal activity “safely or effectively”:

[T]he Court confirms that compensable “‘principal’” activities “‘includ[e] ... those closely related activities which are indispensable to [a principal activity's] performance,’” *ante*, at 518 (quoting 29 CFR § 790.8(c)(2013)), and holds that the required security screenings here were not “integral and indispensable” to another principal activity the employees were employed to perform, *ante*, at 518. I agree. As both Department of Labor regulations and our precedent make clear, an activity is “indispensable” to another, principal activity only when an employee could not dispense with it without impairing his ability to perform the principal activity safely and effectively. Thus, although a battery plant worker might, for example, perform his principal activities without donning proper protective gear, he could not do so safely, see *Steiner v. Mitchell*, 350 U.S. 247, 250–253, 76 S.Ct. 330, 100 L.Ed. 267 (1956); likewise, a butcher might be able to cut meat without having sharpened his knives, but he could not do so effectively, see *Mitchell v. King Packing Co.*, 350 U.S. 260, 262–263, 76 S.Ct. 337, 100 L.Ed. 282 (1956); accord, 29 CFR § 790.8(c). Here, by contrast, the security screenings were not “integral and indispensable” to the employees’ other principal activities in this sense. The screenings may, as the Ninth Circuit observed below, have been in some way related to the work that the employees performed in the warehouse, see 713 F.3d 525, 531 (2013), but the employees could skip the screenings altogether without the ***safety or effectiveness*** of their principal activities being substantially impaired, see *ante*, at 518.

*Id.* at 519-20 (emphasis).

**B. The pre- and post-shift activities described in Mr. Eckard’s Grievance are integral and indispensable to his and other correctional officers’ primary job responsibility.**

The pre- and post-shift activities Mr. Eckard and other correctional officers were required to perform could not be ignored without affecting the safety or effectiveness of their principal activities of maintaining security at state correctional facilities. Correctional officers are hired to protect the safety of the inmate population and the general public. Each and every day, correctional officers go to work to guard the inmate population against themselves (*e.g.*, prevent disturbances) and guard against security breaches from the facility (*e.g.*, the quintessential “jail break”). While some correctional officers may be assigned to the watch tower over the exercise yard and others are assigned to the cafeteria, their primary job responsibilities remain the same—inmate and public safety. Correctional officers cannot dispense with these primary job responsibilities safely or effectively without performing the pre- and post-shift activities that have been required by NDOC.

*1. The pre shift activities correctional officers are required to perform enable them to perform their jobs safely and/or effectively.*

As outlined above, Mr. Eckard and other correctional officers perform the following pre-shift activities prior to the start of their regularly scheduled shift (and prior to the point of receiving compensation for their work): Officers report to the supervisor or sergeant on duty for roll-call/check-in; receive their work assignments for the day; they must pass a uniform inspection; they then collect any and all tools/materials/gear that would be needed for their daily assignments (*e.g.*, radios, keys, weapons, tear gas, hand cuffs); they then walk to their designated work station; and lastly receive a debrief from the out outgoing correctional officer about the current happenings at their assigned post. Whether taken as a whole or analyzed separately, each activity must be performed in order for Mr. Eckard and other correctional officers to perform their primary job responsibilities safely and/or effectively.

**Roll-Call/Check-In.** Mr. Eckard and other correctional officers must report to the supervisor or sergeant on duty for roll-call/check-in to ascertain who is present and ready for work so that supervisor or sergeant knows the facility will be adequately staffed. Importantly, the Department of Labor has consistently held that such time is compensable. Part 553 of the Department of Labor’s regulations applies the FLSA to employees of state and local governments; subsection C of those regulations applies to law enforcement employees of public employees; and section 553.221 defines “compensable hours of work.” Subsection (b) of Section 553.221 states:

Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-shift and post-shift activities which are an integral part of the employee’s principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses.

29 C.F.R. § 553.221(b) (emphasis added). Attending roll call is one example of what the Department of Labor considers to be compensable work for law enforcement employees. Although not explained by the Department of Labor, the reason such time is compensable is fairly apparent. A law enforcement entity cannot ensure the safety of the population it oversees without (1) knowing who is present at a given time and (2) dispatching those that are present to attend to the greatest need. This is precisely why NDOC requires its correctional officers to attend roll call/check-in upon passing through security prior to the start of their regularly scheduled shift. NDOC must know who is present for work and then assign each officer to address the greatest need for the day, whether it be the transport of an inmate or maintaining a lock down in a particular building.

This is consistent with NDOC’s own job descriptions for correctional lieutenants and sergeants which describes “roll-call” as a process of assigning work. See <http://hr.nv.gov/uploadedFiles/hrnv.gov/Content/Resources/ClassSpecs/13/13-310spc.pdf> (last visited Apr. 12, 2015) (stating that correctional lieutenants and sergeants must “Assign work by conducting roll call (verifying attendance) at the beginning of each shift to ensure sufficient employees are available and authorize or recommend overtime when necessary by assessing institution/facility’s need and availability of personnel to provide adequate security staffing.”).

**Receiving Assignments.** Upon reporting for duty, correctional officers are given instructions for the day, such as the current happenings at the facility and their assigned post for the day. Receiving assignments, such as the current happenings of the facility and where the officer is to be stationed for the day, is compensable under the FLSA. See, e.g., *Dole v. Enduro Plumbing, Inc.*, 1990 WL 252270, at \*5 (C.D. Cal. Oct. 16, 1990) (“[A]n employee is required to report to a designated meeting place (such as the shop in this case) to receive instructions before he proceeds to another work place (such as the jobsites in this case), the start of the workday is triggered at the designated meeting place, and subsequent travel is part of the day's work and must be counted as hours worked for purposes of the FLSA, regardless of contract, custom, or practice.”). Indeed, a correctional officer simply cannot perform his required job duties without first knowing where to go (whether to the exercise yard or to transport an inmate) nor can he perform his job safely or effectively without knowing whether there is any potential dangerous situation developing amongst the inmates (such as a gang related issue or hunger strike). The Department of Labor once again supports the position that receiving instructions prior to arriving at an officers assigned post is compensable: “Where an employee is required to report at a meeting place *to receive instructions* or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice.” 29 C.F.R. § 785.38 (emphasis added).

**Retrieving Tools/Donning Gear.** After receiving their assignments and instructions for the day, Mr. Eckard and other correctional officers must collect any and all tools/gear for their particular assignment. Indeed, on some days, correctional officers need to transport an inmate so they need to check out handcuffs while on other days they are going to a post that requires that they carry tear gas. Without these tools or this gear, correctional officers will not be able to perform their jobs safely or effectively. These tools are necessary to protect their safety, the safety of their co-workers, the safety of the inmate, and, ultimately, the safety of the general public. The



time it takes to retrieve tools/gear to be used in carrying out an employee’s primary job duties has always been considered compensable. *See Dole v. Enduro Plumbing, Inc.*, No. 88-7041-RMT (KX), 1990 WL 252270, at \*5 (C.D. Cal. Oct. 16, 1990) (“The performance of other work at such a designated meeting place (even merely picking up needed tools or materials), as in this case, similarly triggers at the designated meeting place the start of the employee’s workday, with the same effect on the subsequent travel[.]”); 29 C.F.R. § 785.38 (“Where an employee is required . . . to pick up and to carry tools, the travel from the designated place to the work place is part of the day’s work, and must be counted as hours worked regardless of contract, custom, or practice.”).

Similarly, in *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 187 L. Ed. 2d 729 (2014), the United States Supreme Court recognized that the preshift donning of protective gear is compensable. U.S. Steel Corp, the employer in *Sandifer*, required its employees to don and doff clothing and protective gear on employer premises pre and post shift without compensation. *Id.* at 879-80 (holding that 9 of the items required to don/doff were clothing and 3 of the items were protective gear). Notably, the employees in *Sandifer* were unionized. *Id.* at 870 Although non-union employees would be entitled to compensation for donning and doffing clothing on an employer’s premises pursuant to an employer directive, the FLSA grants employers of union employees an exception from that general rule: “Because this ***donning-and-doffing time would otherwise be compensable under the Act***, U.S. Steel’s contention of noncompensability stands or falls upon the validity of the provision of its collective-bargaining agreement with the petitioner’s union, which says that this time is noncompensable.” *Id.* at 874. Section 203(o) of the FLSA allows parties to collectively bargain over whether “time spent in changing clothes ... at the beginning or end of each workday” must be compensated. But this exemption for union employees (1) only applies to union employees and (2) only applies to “changing clothes”, neither of which are applicable in this case.

**Travel To The Assigned Post After Roll-Call, Receiving Instructions, Passing Uniform Inspection, and Donning Gear.** Travel time that occurs after an employee performs his or her first compensable activity and before his last compensable activity is compensable under the continuous workday doctrine. *IBP, Inc.*, 546 U.S. at 37 (“[D]uring a continuous workday, any walking time that occurs after the beginning of the employee’s first principal activity and before the end of the employee’s last principal activity is excluded [from the travel exemption], and as a result is covered by the FLSA.”). Accordingly, the time spent travelling to correctional officers’ assigned post is compensable.

**Pre-Shift Meeting With Outgoing Correctional Officer.** Upon arriving at their assigned post, Mr. Eckard and other correctional officers then conduct a pre-shift meeting with the outgoing correctional officer to exchange information about the current happenings at the post. These meetings are essential to relay information so that correctional officers can adequately perform their jobs safely and effectively. Pre-shift meeting requirements, regardless of their length have consistently been deemed compensable. *See e.g., Brubach v. City of Albuquerque*, 893 F. Supp. 2d 1216, 1229 (D.N.M. 2012) (“[A] required in-person debriefing of a security officer beginning duty by the officer whose shift is ending constitutes time during which an employee is “on duty,” 29 C.F.R. § 553.221(b), and that this briefing is an integral part of and indispensable to the officers’ principal activities, *see Steiner*, 350 U.S. at 254, 76 S.Ct. 330, of maintaining custody and control of, patrolling designated areas of, and ensuring the security of City property.”).

2. *The post-shift activities correctional officers are required to perform enable them to perform their jobs safely and/or effectively.*

Following their regularly scheduled shift, Mr. Eckard and other correctional officers must debrief the incoming officer, walk back to the gatehouse area, and return all their gear prior to leaving work for the day. Mr. Eckard and other correctional officers are not free to leave work until they have completed the last work activity—returning their gear—and thus the time spent performing all of the activities, including the walking time from the post to the gatehouse, is compensable under the continuous workday doctrine. *See IBP, Inc.*, 546 U.S. at 37. Failure to inform the incoming officer of current developments or returning their gear (keys, radios, weapons, tear gas) would severely undermine the safety and effectiveness of other correctional officers and the entire correctional system. These activities are integral and indispensable to their primary job duties of maintaining a safe and secure environment for inmates and the general public.

In sum, each of the pre- and post-shift activities described meet the definition of “integral and indispensable to the job tasks” defined by the Supreme Court of the United States, in *Integrity Staffing Solutions, Inc. v. Busk*, because they are all activities that are intrinsic elements of the job tasks Mr. Eckard and other correctional officers were hired to complete, as well as activities that they cannot dispense with if they are to perform their principal job activities.

**C. The pre- and post-shift activities are compensable under Nevada law because the federal Portal-to-Portal Act’s limitation does not apply and there is no comparable provision in state law.**

Notwithstanding the statutory language analyzed in section A above, Nevada does *not* recognize the Portal to Portal Act’s limitation on what is considered to be compensable work time. The Court of Appeals for the Sixth Circuit recently rejected an employer-defendant’s argument that pre- and post-shift activities should be deemed noncompensable because the activity in questions was postliminary to the performance of a principal activities (i.e., a federal Portal-to-Portal Act argument). *See Busk v. Integrity Staffing Solutions*, Case No. 17-5782, decided Sept. 18, 2018, <http://www.opn.ca6.uscourts.gov/opinions/opinions.php> attached at Exhibit 8. The Court in *Busk* found that there was no reason to assume the Nevada Legislature has adopted the Portal-to-Portal Act, there are several Nevada laws that are in direct conflict with the Portal-to-Portal Act, and *if* the Nevada legislature decides to explicitly incorporate the Portal-to-Portal Act into its Code, it must do so.

### **III. Proposed Solution**

Mr. Eckard, on behalf of himself and all similarly situated NDOC correctional officers, seeks the following: (1) a change in NDOC policy to provide for compensation for all compensable work activities; (2) an Order for an accounting of all hours Mr. Eckard and other correctional officers have worked in the last three years with a calculation of all unpaid wages and overtime wages due for the forty-five (45) minutes of unpaid pre- and post-shift work for each and every

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shift worked, and (4) payment for all hours worked off-the-clock plus applicable penalties, costs, and fees.

Respectfully submitted,

*Joshua R. Hendrickson*

Joshua R. Hendrickson, Esq.



Witness List

No witnesses need to be subpoenaed for this hearing. Grievant will testify regarding the facts alleged in this grievance.

Exhibit List

- 1) Exhibit 1: The EMC’s Decision No. 23-18.
- 2) Exhibit 2: Supporting declarations of similarly situated class members Gene Columbus, Donald Walden, Nathan Echeverria, Brent Everist, Tim Ridenour, and Daniel Tracy.
- 3) Exhibit 3: Collective and Class Action Complaint: Case No. 18 OC 001881B, Gene Columbus, on behalf of himself and all others similarly situated (“Plaintiff”) v. The State of Nevada, Ex Rel. It’s Nevada Department of Corrections and Does 1-50 (“Defendants”).
- 4) Exhibit 4: Deposition Transcript of Warden Brian Williams, hereinafter “Williams Depo” at 121:14-17; 122:20-21; 133:17:22; 134:12-17 and 136:2-4;
- 5) Exhibit 5: NRS 284.100 in its entirety.
- 6) Exhibit 6: NRS 284.180 in its entirety.
- 7) Exhibit 7: NRS 284.148 in its entirety.
- 8) Exhibit 8: Grievance ID: 5908.
- 9) Exhibit 9: *Busk v. Integrity Staffing Solutions*, Case No. 17-5782, decided Sept. 18, 2018.

## **EXHIBIT 1**

## **EXHIBIT 1**



**BEFORE THE STATE OF NEVADA  
EMPLOYEE-MANAGEMENT COMMITTEE**

In re:	)	
Grievance of Kellen Prost,	)	<b>Decision # 23-18</b>
No. 5754	)	
	)	<b><u>Findings of Fact, Conclusions of</u></b>
	)	<b><u>Law and Decision</u></b>

This matter came on for hearing before the Employee-Management Committee<sup>1</sup> (EMC) on October 18, 2018 pursuant to NAC 284.695 and NAC 284.6955, regarding Grievance No. 5754, filed by Kellen Prost ("Grievant" or "Ms. Prost"). Ms. Prost was present and represented by Joshua Buck ("Mr. Buck"). The State of Nevada, Department of Corrections ("NDOC") was properly noticed of the hearing, but not present. Ms. Prost submitted exhibits, to which there were no objections. NDOC did not submit exhibits or evidence for review by the EMC in this matter. NDOC Correctional Nurse, Kathleen Henderson ("Ms. Henderson") was present on behalf of Ms. Prost in order to provide testimony in the matter. Ms. Prost and Ms. Henderson were duly sworn in and testified at the hearing.

**STATEMENT OF THE CASE**

Ms. Prost is employed with NDOC as a Correctional Nurse II ("CN II") at Northern Nevada Correctional Center ("NNCC"). Mr. Buck argued in substance that the issue presented before the EMC is a legal question of whether NDOC nurses are entitled to overtime pay for pre- and post-shift activities.

Mr. Buck noted in substance that after Ms. Prost arrives to work at NNCC, she must walk to the gatehouse and pass through security. Mr. Buck clarified that Ms. Prost is not alleging that she should be paid for that time. Mr. Buck further stated in substance that Ms. Prost then signs-in to a logbook and collects keys before proceeding to her assigned work

<sup>1</sup> The Committee members present representing a quorum were: Guy Puglisi (DHHS); Jennifer Bauer (SPCSA); Pauline Beigel (NDOT); Sherri Thompson (DETR); Turessa Russell (UNLV), and Sonja Whitten (DHHS). Counsel for the EMC, Deputy Attorney General Tiffany Breinig, EMC Coordinator, Nora Johnson and EMC Hearing Clerk, Ivory Tolentino were also present.



1 station. Once she arrives at the medical clinic, Ms. Prost is required to unlock several doors  
2 before her shift officially begins. Mr. Buck stated in substance that all of these pre-shift duties,  
3 from signing-in and picking up the keys to the start of her shift, take approximately fifteen (15)  
4 minutes to complete. Additionally, Mr. Buck noted in substance that during the approximate  
5 fifteen (15) minutes of pre-shift duties, Ms. Prost is required to respond if there is a medical  
6 emergency. Mr. Buck argued in substance that the process is the same at the end of the day,  
7 wherein Ms. Prost spends approximately fifteen (15) minutes on post-shift duties until she  
8 returns the keys and signs-out of the logbook. Ms. Prost works a variable forty (40) hour work  
9 week and is not compensated for the pre- and post-shift duties amounting to approximately  
10 thirty (30) minutes of additional work per shift.

11 Mr. Buck stated in substance that NDOC appears to be sympathetic to Ms. Prost, as  
12 the grievance acknowledges that these pre- and post-shift duties take place; however, it is  
13 NDOC policy not to compensate Ms. Prost for that time. However, Mr. Buck argued in  
14 substance that the Fair Labor Standards Act ("FLSA") and Nevada Revised Statutes (NRS)  
15 281.100 entitle Ms. Prost to overtime payment for these pre- and post-shift duties.

16 Directing the EMC to Exhibit 8, Mr. Buck referenced a case in the United States Court  
17 of Appeals for the Sixth Circuit, wherein the Court examined steps to determine whether  
18 activity is compensable, and based on a similar analysis, Mr. Buck argued in substance that  
19 Ms. Prost's pre- and post-shift duties are compensable. Specifically, Mr. Buck noted in  
20 substance that Ms. Prost's collection of keys in furtherance of her job is compensable  
21 pursuant to Title 29 of the Code of Federal Regulations ("C.F.R.") Section ("§") 785.38, which  
22 addresses time spent by any employee in travel as part of his or her principal work activity.  
23 Mr. Buck also argued in substance, citing to U.S. Supreme Court case *Integrity Staffing*  
24 *Solutions, Inc. v. Busk*,<sup>2</sup> that Ms. Prost's collection of the keys is integral and indispensable to  
25 her job, and is therefore compensable. Further, Mr. Buck argued in substance that pursuant to  
26 NRS 281.100(2), Ms. Prost's compensable time begins when she takes charge of equipment,  
27 or collects the keys.

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<sup>2</sup> 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014).



1 Mr. Buck argued in substance that any argument from NDOC claiming that NRS  
2 281.100 does not apply because Ms. Prost works a variable hour work week runs afoul of the  
3 FLSA. Mr. Buck stated in substance that 29 CFR § 553.211(g) specifically exempts medical  
4 personnel from falling under a variable hour work week, and therefore, Ms. Prost is eligible for  
5 overtime payment where her hours equal over forty (40) in a week or over eighty (80)  
6 biweekly.

7 In closing, Mr. Buck noted in substance that NDOC failed to appear at the hearing and  
8 declined to provide any evidence for the EMC to review. Mr. Buck requested Ms. Prost's  
9 grievance be granted, or in the alternative, the EMC decline jurisdiction of the grievance,  
10 allowing Ms. Prost to proceed with this matter in court.<sup>3</sup>

11 In response to questioning, Ms. Prost and Ms. Henderson testified in substance that  
12 NDOC requires all nurses to sign a form indicating that they will work a variable hour  
13 schedule. Mr. Buck argued in substance that an employee must be paid overtime regardless  
14 of whether the employee voluntarily chooses to or is required to work a variable hour work  
15 week by their employer. In further response to questioning, Mr. Buck noted in substance that  
16 an employer can modify shifts to include these pre- and post-shift duties.

17 Ms. Prost, in response to questioning, testified that she has been employed with NDOC  
18 for over four (4) years and this issue has been raised several times to no avail. However, this  
19 is the first grievance Ms. Prost has filed regarding this issue.

20 The EMC discussed and deliberated on the matter. Committee Member Beigel stated  
21 in substance that pursuant to NAC 284.678, a grievant must submit a grievance within twenty  
22 (20) working days after the date of the event leading to the grievance or within twenty (20)  
23 working days of the grievant learning of the event leading to the grievance. Accordingly,  
24 Committee Member Beigel indicated hesitancy in considering the three (3) years prior to filing  
25 the grievance in deliberations of this issue. Committee Chair Puglisi added in substance that  
26 he agreed, and the EMC should determine what pre- and post-shift activities, if any, are  
27 compensable under the law. Committee Member Bauer agreed in substance and clarified in

28 <sup>3</sup> Ms. Prost is a named Plaintiff in a class action lawsuit that was filed in the First Judicial District Court of the State of Nevada in and for Carson City alleging failure to pay overtime in violation of 29 U.S.C. § 207 and failure to pay overtime in violation of NRS 284.100. *Prost v. State of Nevada, ex rel. NDOC*, Case No. 18 OC 00131 1B.



1 substance that Ms. Prost must unlock several doors into the medical clinic, including supply  
2 and exam rooms, as well as respond to medical emergencies that arise before she begins her  
3 shift.

4 Committee Member Russell stated in substance that compensable time should begin  
5 when Ms. Prost signs-in to the logbook and picks up the keys and ends when she returns the  
6 keys and signs-out of the logbook because those activities are job requirements, in which Ms.  
7 Prost is on duty. Committee Chair Puglisi stated in substance that pursuant to 29 C.F.R. §  
8 785.24, the keys are an integral part of Ms. Prost's principal work activities because she  
9 needs the keys to enter the medical clinic to perform her job. Committee Member Bauer  
10 agreed and noted in substance that Ms. Prost cannot do her job without the keys to open the  
11 doors and obtain medicine to treat inmates. Committee Member Bauer further agreed in  
12 substance that signing-in to the logbook and collecting keys are integral parts to Ms. Prost's  
13 work assignment. However, Committee Member Bauer concurred with Committee Member  
14 Beigel and noted in substance that she was uncertain whether the EMC had the ability to  
15 provide relief beyond the event date of the grievance, which demonstrates the injustice  
16 suffered by Ms. Prost.

17 Committee Chair Puglisi agreed in substance, noting that it is beyond the EMC's  
18 jurisdiction to consider the matter prior to the event date of the grievance. A motion was made  
19 by Committee Member Russell to grant the grievance, finding that compensable time of the  
20 shift begins at the time Ms. Prost signs-in and collects keys and ends when she returns the  
21 keys and signs-out pursuant to NRS 281.100(2), 29 C.F.R. § 785.24, and 29 C.F.R. § 785.38.  
22 The motion also indicated that Ms. Prost should receive payment for such compensable time  
23 beginning May 25, 2018, as the event date of the grievance, forward. The EMC voted  
24 unanimously to grant the grievance.

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**FINDINGS OF FACT**

Based upon the testimony of the witnesses, the arguments made by the parties, and the briefs, evidence, and other documents on file in this matter, the EMC makes the following findings of fact. All findings made are based upon a preponderance of the evidence.

1. Grievant is a Correctional Nurse II at the Northern Nevada Correctional Center within the Nevada Department of Corrections, and was employed as such at the time of her grievance.
2. Grievant was a non-exempt State of Nevada employee.
3. Grievant is required to sign-in to a logbook and collect keys prior to proceeding to her assigned work station. At the end of her shift, Grievant is required to return keys and sign-out of the logbook. These pre- and post-shift duties take approximately fifteen (15) minutes each to complete, for a total of approximately thirty (30) minutes per shift worked.
4. Grievant is also required to respond to medical emergencies after signing-in to the logbook and before signing-out of the logbook, should the need arise.
5. Grievant is unable to complete her scheduled work assignment without first signing-in to the logbook and collecting keys that open the doors to and throughout the medical clinic.
6. Grievant is not compensated for these pre- and post-shift activities.
7. Grievant noted an event date of May 25, 2018, on her grievance related to this instant matter.

**CONCLUSIONS OF LAW**

1. For this grievance, it was Grievant's burden to establish that her pre- and post-shift duties are compensable.
2. The EMC has the final authority to "adjust grievances." NRS 284.073(1)(e).

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3. A grievance is any act, omission or occurrence which an employee who has attained permanent status feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee. NRS 284.384(6).
4. Ms. Prost's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
5. Pursuant to NRS 281.100(2), an employee's shift starts from the time the employee takes charge of any equipment of the employer.
6. Pursuant to 29 C.F.R. § 785.24, principal activities that are an integral part of employee's job are considered work and as compensable.
7. Pursuant to 29 C.F.R. § 785.38, where an employee is required to report at a meeting place to pick up and carry tools, the travel from such place to the actual work station is part of the day's work and must be included as hours worked.
8. Grievant's shift begins when she signs-in to the logbook and takes charge of equipment or collects the keys, which is an integral part of, and indispensable to her work assignment.
9. The time it takes for Grievant to travel from the place she signs-in and collects the keys to her actual work station is part of her day's work. The time it takes for Grievant to travel from her work station to return the keys and sign-out is also part of her day's work.
10. The pre- and post-shift duties involving signing-in and out of the logbook, as well as collection and return of the keys are compensable time, in which Grievant is entitled to payment.
11. Pursuant to NAC 284.678, a grievant must submit a grievance within twenty (20) working days of an event date leading to the grievance. The EMC will not consider matters prior to the event date of the grievance.
12. Grievant is entitled to payment for her pre- and post-shift duties from May 25, 2018, the event date of her grievance, forward.

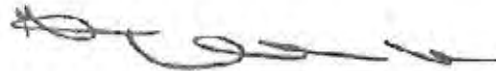


**DECISION**

Based upon the evidence in the record, and the foregoing findings of fact and conclusions of law, and good cause appearing therefor, it is hereby ORDERED:

Ms. Prost's grievance is GRANTED,<sup>4</sup> and she shall receive compensation for all aforementioned pre- and post-shift activities beginning May 25, 2018, forward.

DATED this 16<sup>th</sup> day of November, 2018.



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GUY PUGLISI, CHAIR  
EMPLOYEE MANAGEMENT COMMITTEE

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<sup>4</sup> Committee Member Turessa Russell's motion to grant the grievance was seconded by Committee Member Sonja Whitten and carried by a unanimous vote in favor of the motion.


**CERTIFICATE OF MAILING**

I hereby certify that on the 16<sup>th</sup> day of November 2018, I deposited for mailing at Carson City, Nevada, a true copy of the attached document, sent via Certified U.S. Mail to:

Joshua Hendrickson  
Joshua Buck  
Theirman Buck Law Firm  
7287 Lakeside Drive  
Reno, Nevada 89511

I hereby certify that on the 16<sup>th</sup> day of November 2018, I deposited for mailing at Carson City, Nevada, a true copy of the attached document, sent via interdepartmental mail to:

Nevada Department of Corrections  
James Dzurenda, Director  
3955 West Russell Road  
Las Vegas, NV 89118

  
Nora Johnson  
EMC Coordinator  
Division of Human Resource Management

cc: Harold Wickham, Deputy Director, Department of Corrections  
Christina Leathers, Human Resources Officer I, Department of Corrections  
Cameron Vandenberg, Chief, Deputy Attorney General, Office of the Attorney General  
Anela Kaheaku, Legal Secretary II, Office of the Attorney General  
Traci Plotnick, Legal Secretary II, Office of the Attorney General  
Tiffany Breinig, EMC Counsel, Deputy Attorney General  
Robert A. Whitney, EMC Counsel, Deputy Attorney General  
EMC File

## **EXHIBIT 2**

## **EXHIBIT 2**



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7 *Attorneys for Plaintiffs*  
8  
9

10 **UNITED STATES DISTRICT COURT**  
11 **DISTRICT OF NEVADA**  
12

13 DONALD WALDEN JR, NATHAN  
14 ECHEVERRIA, AARON DICUS, BRENT  
15 EVERIST, TRAVIS ZUFELT, TIMOTHY  
16 RIDENOUR, and DANIEL TRACY on  
behalf of themselves and all others similarly  
situated,

17 Plaintiffs,  
18

19 v.

20 THE STATE OF NEVADA, NEVADA  
21 DEPARTMENT OF CORRECTIONS, and  
DOES 1-50,  
22

23 Defendants.  
24  
25  
26  
27  
28

Case No.: 3:14-cv-00320-LRH-WGC

**DECLARATION OF GENE  
COLUMBUS**

**THIERMAN LAW FIRM, PC**  
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Reno, NV 89511  
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I, Gene Columbus, hereby declare and state as follows:

1. I am over the age of eighteen and I have personal knowledge of the facts and circumstances set forth in this declaration. If I were called as a witness I would and could competently testify to the matters set forth herein.

2. I have been employed by Defendant THE STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS (“Defendant” or “NDOC”) as a Correctional Officer since June 1996. I currently work at the Northern Nevada Correctional Center (“NNCC”). My rate of pay was approximately \$29.00 per hour as of the last day I worked prior to the date of this declaration.

3. During my 18 year career with NDOC I have worked a variety of different shifts and was assigned to a variety of different job posts. For instance, I have held the following job posts and worked the following shifts dating back to 2011:

i. Currently, dating back to 2012, I have been scheduled to work a 14-day variable work schedule. I routinely worked at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

ii. In 2011, I was scheduled to work a standard workweek of 40 hours a week. I routinely worked at least 40 hours a week (not counting the hours I worked without pay as set forth below).

4. In addition to my duties as a correctional officer with NDOC, I am also the President of the Nevada Corrections Association (“NCA”). The NCA is employee organization made up of correctional staff in Nevada. Our mission is to represent all of our member's interests, ensuring that their voices are heard whenever there are concerns regarding safety, security, fair treatment and compliance with laws and regulations. The NCA strives to work together with state agencies to fairly and equitably resolve issues that matter most to both our membership and state agencies, in order to create a more harmonious work place; so together we can better protect the citizens of Nevada. Currently NCA has approximately 300 members at various NDOC facilities across the state of Nevada. We have members who work at all the Correctional Facilities in the state of Nevada: Ely State Prison (ESP), Florence McClure Women's

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1 Correctional Center (FMWCC), High Desert State Prison (HDSP), Lovelock Correctional  
 2 Center (LCC), Northern Nevada Correctional Center (NNCC), Southern Desert Correctional  
 3 Center (SDCC), Springs Correctional Center (WSCC). We also have members NDOC  
 4 Conservation Camps, Restitution Centers, and Transitional Housing Centers across the state.

5 5. As NCA President, I represent the association's key issues before the state  
 6 Legislature and the Executive branch, deal with membership workplace complaints and issues,  
 7 preside over association meetings, and run the day to day operations. Being President of the  
 8 NCA, I have knowledge of all NDOC's statewide policies and procedures and the policies and  
 9 procedures of each particular facility.

10 6. I have reviewed the complaint filed by DONALD WALDEN JR, NATHAN  
 11 ECHEVERRIA, AARON DICUS, BRENT EVERIST, TRAVIS ZUFELT, TIMOTHY  
 12 RIDENOUR, and DANIEL TRACY on behalf of themselves and all others similarly situated,  
 13 against the State of Nevada and NDOC. I believe that everything stated in the complaint is true  
 14 and accurately reflects the realities faced by Correctional Officers in the state of Nevada. More  
 15 specifically, I can attest that NDOC policies and procedures of requiring Correctional Officers  
 16 to show up before their regularly schedule shift to check in and perform work activities without  
 17 compensation has been a longstanding practice at NDOC. The same is true at the end of the day,  
 18 whereby Correctional Officers are required to perform work activities without compensation  
 19 after the end of their regularly scheduled shift.

20 7. Indeed, NDOC's own Administrative Regulations require Correctional Officers  
 21 to report in for duty prior to their regularly scheduled shift. Attached to this declaration as  
 22 Exhibit A is a true and correct copy of NDOC Administrative Regulation 326, which states, in  
 23 relevant part, that "All correctional staff will report to the shift supervisor/shift sergeant upon  
 24 arrival . . . ." All of the policies and procedures of NDOC facilities requiring work activities to  
 25 pre and post-shift are essentially the same. Each facility requires Correctional Officers to report  
 26 to their sergeant on-duty pre shift for roll call, to have their uniforms checked, to get their  
 27 assignment for the day, attain any tools they may need to perform their assignment for that day  
 28 (e.g., radio, tear gas, handcuffs). After engaging in these pre-shift activities, Correctional



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1 Officers are then required to proceed to their assigned post to then conduct a debriefing with the  
2 outgoing officer. All of this time has been and continues to be non-compensable pursuant to  
3 NDOC's policies, procedures, rules and regulations. At the end of the shift, Correctional Offices  
4 are supposed to engage in many of the same pre-shift activities, but in reverse order.

5 8. In addition to believing that all NDOC Correctional Officers should have been  
6 paid for the time they spent engaging in these work activities without compensation, I also  
7 believe that I am entitled to recover back wages and associated penalties, costs, and fees, in full  
8 for having to work for free all these years. I estimate that I have worked off-the-clock and  
9 without compensation approximately 30 to 45 minutes each and every workday during my  
10 employment with NDOC. Even though I am required to be at my post at the start of my regularly  
11 scheduled shift, I am not compensated for all the work activities that I perform prior to arriving  
12 at my post. Prior to proceeding to my assigned post for the day, I must report to the muster room  
13 to report to the shift sergeant/shift supervisor, receive my assignment, get debriefed as to any  
14 new developments at the facility or issues relating to my employment, check my mail box, and  
15 be checked for proper uniform attire. Depending on my assignment, I may also be required to  
16 pick up keys, radios, tear gas equipment, weapons, and handcuffs. Only after I have completed  
17 all these tasks am I able to proceed to my assigned post for the day. Given the size of the  
18 correctional facility, walking to my designated post could take me approximately 15-minutes.  
19 When I arrive at my post I typically relieve an outgoing officer and am debriefed by that officer.  
20 I am not compensated for performing any of these activities prior to my regularly scheduled shift.

21 9. In addition for not being paid for the pre-shift activities described above, I'm  
22 likewise denied compensation for engaging in post-shift activities. Even though I'm only  
23 compensated until the end of my scheduled shift, I'm required to conduct debriefing sessions  
24 with oncoming officers after the end of my shift, walk back to the facility's main office, and  
25 return the various tools (*i.e.*, keys, radios, tear gas equipment, weapons, and handcuffs) that I  
26 was required to use during the workday. I am not compensated for performing any of these  
27 activities after my regularly scheduled shift.  
28

1 I declare under the penalty of perjury under the laws of the United States of America and  
2 the State of Nevada that the foregoing is true and correct.

3 Executed this 4th day of August, 2014, at Washoe Valley, Nevada.  
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6 GENE COLUMBUS  
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# EXHIBIT A

# EXHIBIT A



**NEVADA DEPARTMENT OF CORRECTIONS  
ADMINISTRATIVE REGULATION  
326**

**POSTING OF SHIFTS/OVERTIME**

**Supersedes:** AR 326 (Temporary, 05/02/10)  
**Effective Date:** 08/13/10

**AUTHORITY:** NRS 284.055; 284.155; 284.175; 284.180 NAC 284.242; 284.245; 284.250

**RESPONSIBILITY:**

Wardens/ Facility Managers are responsible to ensure there is sufficient staff on duty to safely operate their institutions and facilities.

An Associate Warden/facility manager are responsible to document attendance, management of relief factor usage by all uniformed staff, and ensure proper documentation is maintained.

**326.01 STAFFING**

**1. NORMAL OPERATIONS**

A. Normal operation staffing is utilized during the normal operations of an institution. This pattern will identify the staff required to run a specified post when all positions are utilized.

B. An Associate Warden will create a written staffing pattern identifying and prioritizing specific posts operating within the institution as either a pull position or a shut down position.

(1) A pull position is identified as a position in which the assigned officer may be pulled from that position and assigned elsewhere in the institution during their assigned shift.

(2) A shut down position is identified as a position in which the assigned officer may be pulled from his assigned post and the post closed with the officer being assigned elsewhere in the institution for their entire assigned shift.

C. Shift Sergeants reporting for their scheduled shifts will adjust the shift roster and fill all positions mandated to fulfill the minimum staffing requirements.

D. The shift sergeant will use all Sick/Annual positions first, and then use pull/shutdown positions as appropriate, in the order as listed by the institution.

E. If the minimum staffing has not been met, the on duty Shift Supervisor will contact an Associate Warden and request the minimum amount of overtime hours needed. The Associate Warden will then notify the Warden for approval of the decision/overtime approved.

F. Only when all pull positions and shutdown positions have been utilized will overtime be considered.

## 2. EMERGENCY OPERATIONS

A. Emergency operation staff is the staffing pattern that identifies posts that must meet minimal requirements for officer and inmate safety. This pattern will identify those posts that are critical for running a specific area of the institution.

B. An Associate Warden will create a written staffing pattern identifying additional specific posts within the institution either as pull or shutdown positions; this staffing pattern will prioritize these positions in the order they are to be pulled / shut down in the event of an emergency or staff shortage.

C. Staffing will also be evaluated as to the absolute minimum required to safely operate a particular shift.

D. It may be necessary to modify or cancel some activities as a result of emergency staffing. The Warden/Associate Warden will be notified of the cancellation of any activity or program.

E. Only when all pull positions and shutdown positions have been utilized only then will overtime be considered. Authorization is only granted by the Warden/Designee.

## 326.02 RELIEF FACTOR MANAGEMENT (RFM)

1. Relief Factor Management (RFM) positions are to be:

A. Used for unscheduled annual leave relief to cover greater than normal sick leave, if it is available.

B. Used for pull and shutdown posts to cover greater than expected sick leave.

2. No more annual leave will be scheduled than there are relief factor management positions available to support the requested leave without overtime.

A. Staff should request annual leave per the requirements of AR 322 Types of Leave and Leave Procedure

B. Leave requests submitted without sufficient notice will not be granted if there is no relief factor to accommodate the leave without overtime except in a case of a personal emergency.

3. To the degree possible, Lieutenants and Sergeants should not be replaced, however, these positions may be used as a pull/shutdown position if designated by the institutional staff procedure,

4. Shift rosters for each institution and facility are to be organized so the components of the relief factor can be combined to identify specific staff to occupy RFM positions.

5. Relief factor for regular days off, sick leave, annual leave, or training, will not be combined in order to create new positions.

6. Days off are assigned to the post and not the person.

### **326.03 MANAGEMENT OF OVERTIME**

1. Overtime is not guaranteed for any employee.

A. Institutional/facility requirements will determine all overtime hired.

B. All staff overtime requires the completion of DOC Form 1000, Authorization for Leave and Overtime Request Form.

C. Staff can not work more than two (2) consecutive double shifts.

D. Unless an emergency situation occurs, no staff can work than more than a 16 hour shift in a 24 hour period.

2. Assigned staff may be reassigned when an institutional need exists.

3. Employees on modified duty assignments are not authorized to work overtime.

4. Correctional officers may be used to fill Senior Correctional Officer positions on a case by case basis. However Senior Correctional Officers may not be utilized to fill a Correctional Officer position.

5. A voluntary overtime list will be established and used prior to utilizing mandatory overtime. This voluntary overtime list will be re-started when exhausted

A. No employee who calls in sick or utilizes sick leave during any given pay period will be allowed to work voluntary overtime.

B. If an employee accrues overtime during the first week of the pay period and then utilizes sick leave, that employee will not be permitted any voluntary overtime in the next pay period.

C. No employee who must provide "proof" may work voluntary overtime until this status is modified.

D. Employees who are in AWOL or LWOP status will not to be allowed to volunteer/eligible for overtime in the same pay period.

(1) If overtime is accrued during the first week of the pay period and then LWOP or AWOL is accrued, that employee will not be permitted to work voluntary overtime in the entire following pay period.

6. If overtime is required to maintain a safe and secure operation and insufficient staff voluntarily agrees to work, mandatory overtime will be initiated.

A. A list of Senior Correctional Officers, Correctional Officers, and Correctional Officer Trainees will be establish by based on least seniority in their hire date and last involuntary, i.e. mandatory, overtime date, will be established for each shift.



- B. The mandatory overtime list will be restarted once exhausted or every 45 days.
- C. Adjustments will be made when an officer is reassigned to a new shift. That officer will be added to the mandatory list according to their last mandatory date.
- D. Based on the least seniority the first time after shift bidding, staff will be selected by their last involuntary overtime date. Once completed, the employee will move to the bottom of the involuntary overtime list.
- E. All correctional staff will report to the shift supervisor/shift sergeant upon arrival to ensure their status if required to work mandatory overtime.
  - (1) If an employee is required to work mandatory overtime, that employee may be allowed to solicit a volunteer to work in his/her place.
    - (a) If a volunteer is found, the shift supervisor/shift sergeant must approve the substitution prior to the person being allowed to work.
    - (b) If the substitution is approved, the Officer originally scheduled to work the mandatory overtime will remain at the top of the mandatory overtime list until he/she actually works it.
  - (2) The employee has 1 hour to find a substitute whenever possible.

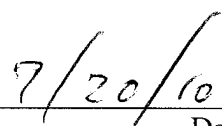
7. A written overtime tracking log must be approved by the appropriate Deputy Director.

- A. All overtime will be entered into the NSIS Computer Roster.
- B. Verification will be made that the timesheet entry is properly coded and hours are correctly entered by viewing the timesheet of the staff member.
- C. A written overtime tracking log will be utilized to ensure proper utilization of overtime and entry into the computer.

#### APPLICABILITY

- 1. This regulation requires an Operational Procedure for every institution and facility.
- 2. This regulation requires an audit.

  
\_\_\_\_\_  
Howard Skolnik, Director

  
\_\_\_\_\_  
Date

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7 *Attorneys for Plaintiffs*  
8  
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10 **UNITED STATES DISTRICT COURT**  
11 **DISTRICT OF NEVADA**  
12

13 DONALD WALDEN JR, NATHAN  
14 ECHEVERRIA, AARON DICUS, BRENT  
15 EVERIST, TRAVIS ZUFELT, TIMOTHY  
16 RIDENOUR, and DANIEL TRACY on  
behalf of themselves and all others similarly  
situated,

17 Plaintiffs,  
18

19 v.

20 THE STATE OF NEVADA, NEVADA  
21 DEPARTMENT OF CORRECTIONS, and  
22 DOES 1-50,  
23 Defendants.

Case No.: 3:14-cv-00320-LRH-WGC

**DECLARATION OF NATHAN  
ECHEVERRIA**

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I, Nathan Echeverria, hereby declare and state as follows:

1. I am over the age of eighteen and I have personal knowledge of the facts and circumstances set forth in this declaration. If I were called as a witness I would and could competently testify to the matters set forth herein.

2. I have been employed by Defendant THE STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS (“Defendant” or “NDOC”) as a Correctional Officer at the Southern Desert Correctional Center (“SDCC”) from on or about May 1, 2006 to the present. My current rate of pay is approximately \$23.50 per hour as of the last day I worked prior to the date of this declaration.

3. During my eight year career with NDOC I have worked a variety of different shifts and was assigned to a variety of different job posts. For instance, I have held the following job posts and worked the following shifts dating back to 2011:

i. Currently, as of the date of this declaration, I am assigned to Unit 5 B and am scheduled to work a 14-day variable work schedule of 80 hours during that work period. I routinely work at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

ii. In 2013, I was assigned to Visitation and was scheduled to work a 14-day variable work schedule of 80 hours during that work period. I routinely worked at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

iii. In 2012, I was assigned to Visitation and was scheduled to work a 14-day variable work schedule of 80 hours during that work period. I routinely worked at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

iv. In 2011, I was assigned to Unit 7 A and was scheduled to work a standard workweek of 40 hours a week. I routinely worked at least 40 hours a week (not counting the hours I worked without pay as set forth below).

4. When I work a standard 40 hour workweek, pursuant to the NDOC Administrative Regulation 320, my contract, and state and federal law, I should be compensated at my overtime rate for all hours I work that exceed 40 hours during that workweek. When I



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work a 14-day variable work schedule, pursuant to the NDOC Administrative Regulation 320 and my contract, I should be compensated at my overtime rate for all hours I work that exceed 80 hours during that work period.

5. As a NDOC Correctional Officer, I am required to be at my post at the start of my regularly scheduled shift. Upon my own information and belief, all NDOC Correctional Officers across the state of Nevada are similarly required to be at their post at the start of their respective shift.

6. Attached to this declaration as Exhibit A is a true and correct copy of NDOC Administrative Regulation 326, which states, in relevant part, that "All correctional staff will report to the shift supervisor/shift sergeant upon arrival . . . ."

7. Attached to this declaration as Exhibit B is a true and correct copy of SDCC Operational Procedure 326.03, which states the following:

1. All Staff shall report for duty fully prepared for any work assignment
  - Uniform and equipment shall be in accordance with A.R. 350
2. Staff will report to the shift supervisor in the muster room for posting of their assignment.
  - Staff will report early enough to be on their post by the beginning of their shift.
  - Staff will report in person
    - Areas of assignment or working hours do no exempt the staff from reporting for duty to the Shift Supervisor
3. All Staff shall check their respective mailboxes prior to reporting for duty.

8. Attached to this declaration as Exhibit C is a true and correct copy of an email from Lieutenant McKeehan, which reaffirms the department's policy or requiring Correctional Officers to be at their post by the start of their shift:

A few people need to be reminded. You need to arrive on your post by the start of your shift (OP 032). It is approx. 10-15 minute walk from Operations to 9/12 quad. You need to incorporate this walk in your travel to work to ensure you arrive on time.

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1           9.       Even though I am required to be at my post at the start of my regularly scheduled  
2 shift, I am not compensated for all the work activities that I perform prior to arriving at my post.  
3 Prior to proceeding to my assigned post for the day, I must report to the muster room to report  
4 to the shift sergeant/shift supervisor, receive my assignment, get debriefed as to any new  
5 developments at the facility or issues relating to my employment, check my mail box, and be  
6 checked for proper uniform attire. Depending on my assignment, I may also be required to pick  
7 up keys, radios, tear gas equipment, weapons, and handcuffs. Only after I have completed all  
8 these tasks am I able to proceed to my assigned post for the day. Given the size of the  
9 correctional facility, walking to my designated post could take me approximately 15-minutes.  
10 When I arrive at my post I typically relieve an outgoing officer and am debriefed by that officer.  
11 I am not compensated for performing any of these activities prior to my regularly scheduled shift.  
12 Upon my own information and belief, I understand that all NDOC Correctional Officers across  
13 the state of Nevada are similarly required to perform these work activities prior to the start of  
14 their regularly scheduled shift and are not compensated for doing so.

15           10.     In addition for not being paid for the pre-shift activities described above, I'm  
16 likewise denied compensation for engaging in post-shift activities. Even though I'm only  
17 compensated until the end of my scheduled shift, I'm required to conduct debriefing sessions  
18 with oncoming officers after the end of my shift, walk back to the facility's main office, and  
19 return the various tools (*i.e.*, keys, radios, tear gas equipment, weapons, and handcuffs) that I  
20 was required to use during the workday. I am not compensated for performing any of these  
21 activities after my regularly scheduled shift. Upon my own information and belief, I understand  
22 that all NDOC Correctional Officers across the state of Nevada are similarly required to perform  
23 these work activities after the end of their regularly scheduled shift and are not compensated for  
24 doing so.

25           11.     I estimate that I have worked off-the-clock and without compensation  
26 approximately 30 to 45 minutes each and every workday during my employment with NDOC.  
27  
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1           11. I estimate that I have worked off-the-clock and without compensation  
2 approximately 30 to 45 minutes each and every workday during my employment with NDOC.

3           12. Upon my own information and belief, NDOC has been failing to pay  
4 Correctional Officers for years. I want to be paid all my wages and associated penalties, costs,  
5 and fees, in full for having to work for free all these years.

6           I declare under the penalty of perjury under the laws of the United States of America  
7 and the State of Nevada that the foregoing is true and correct.

8           Executed this 30<sup>th</sup> day of June, 2014, at Las Vegas, Nevada.

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12 NATHAN ECHEVERRIA  
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# EXHIBIT A

# EXHIBIT A



**NEVADA DEPARTMENT OF CORRECTIONS  
ADMINISTRATIVE REGULATION  
326**

**POSTING OF SHIFTS/OVERTIME**

**Supersedes:** AR 326 (Temporary, 05/02/10)  
**Effective Date:** 08/13/10

**AUTHORITY:** NRS 284.055; 284.155; 284.175; 284.180 NAC 284.242; 284.245; 284.250

**RESPONSIBILITY:**

Wardens/ Facility Managers are responsible to ensure there is sufficient staff on duty to safely operate their institutions and facilities.

An Associate Warden/facility manager are responsible to document attendance, management of relief factor usage by all uniformed staff, and ensure proper documentation is maintained.

**326.01 STAFFING**

**1. NORMAL OPERATIONS**

A. Normal operation staffing is utilized during the normal operations of an institution. This pattern will identify the staff required to run a specified post when all positions are utilized.

B. An Associate Warden will create a written staffing pattern identifying and prioritizing specific posts operating within the institution as either a pull position or a shut down position.

(1) A pull position is identified as a position in which the assigned officer may be pulled from that position and assigned elsewhere in the institution during their assigned shift.

(2) A shut down position is identified as a position in which the assigned officer may be pulled from his assigned post and the post closed with the officer being assigned elsewhere in the institution for their entire assigned shift.

C. Shift Sergeants reporting for their scheduled shifts will adjust the shift roster and fill all positions mandated to fulfill the minimum staffing requirements.

D. The shift sergeant will use all Sick/Annual positions first, and then use pull/shutdown positions as appropriate, in the order as listed by the institution.

E. If the minimum staffing has not been met, the on duty Shift Supervisor will contact an Associate Warden and request the minimum amount of overtime hours needed. The Associate Warden will then notify the Warden for approval of the decision/overtime approved.

F. Only when all pull positions and shutdown positions have been utilized will overtime be considered.

## 2. EMERGENCY OPERATIONS

A. Emergency operation staff is the staffing pattern that identifies posts that must meet minimal requirements for officer and inmate safety. This pattern will identify those posts that are critical for running a specific area of the institution.

B. An Associate Warden will create a written staffing pattern identifying additional specific posts within the institution either as pull or shutdown positions; this staffing pattern will prioritize these positions in the order they are to be pulled / shut down in the event of an emergency or staff shortage.

C. Staffing will also be evaluated as to the absolute minimum required to safely operate a particular shift.

D. It may be necessary to modify or cancel some activities as a result of emergency staffing. The Warden/Associate Warden will be notified of the cancellation of any activity or program.

E. Only when all pull positions and shutdown positions have been utilized only then will overtime be considered. Authorization is only granted by the Warden/Designee.

## 326.02 RELIEF FACTOR MANAGEMENT (RFM)

1. Relief Factor Management (RFM) positions are to be:

A. Used for unscheduled annual leave relief to cover greater than normal sick leave, if it is available.

B. Used for pull and shutdown posts to cover greater than expected sick leave.

2. No more annual leave will be scheduled than there are relief factor management positions available to support the requested leave without overtime.

A. Staff should request annual leave per the requirements of AR 322 Types of Leave and Leave Procedure

B. Leave requests submitted without sufficient notice will not be granted if there is no relief factor to accommodate the leave without overtime except in a case of a personal emergency.

3. To the degree possible, Lieutenants and Sergeants should not be replaced, however, these positions may be used as a pull/shutdown position if designated by the institutional staff procedure,

4. Shift rosters for each institution and facility are to be organized so the components of the relief factor can be combined to identify specific staff to occupy RFM positions.

5. Relief factor for regular days off, sick leave, annual leave, or training, will not be combined in order to create new positions.

6. Days off are assigned to the post and not the person.

### **326.03 MANAGEMENT OF OVERTIME**

1. Overtime is not guaranteed for any employee.
  - A. Institutional/facility requirements will determine all overtime hired.
  - B. All staff overtime requires the completion of DOC Form 1000, Authorization for Leave and Overtime Request Form.
  - C. Staff can not work more than two (2) consecutive double shifts.
  - D. Unless an emergency situation occurs, no staff can work than more than a 16 hour shift in a 24 hour period.
2. Assigned staff may be reassigned when an institutional need exists.
3. Employees on modified duty assignments are not authorized to work overtime.
4. Correctional officers may be used to fill Senior Correctional Officer positions on a case by case basis. However Senior Correctional Officers may not be utilized to fill a Correctional Officer position.
5. A voluntary overtime list will be established and used prior to utilizing mandatory overtime. This voluntary overtime list will be re-started when exhausted
  - A. No employee who calls in sick or utilizes sick leave during any given pay period will be allowed to work voluntary overtime.
  - B. If an employee accrues overtime during the first week of the pay period and then utilizes sick leave, that employee will not be permitted any voluntary overtime in the next pay period.
  - C. No employee who must provide "proof" may work voluntary overtime until this status is modified.
  - D. Employees who are in AWOL or LWOP status will not to be allowed to volunteer/eligible for overtime in the same pay period.
    - (1) If overtime is accrued during the first week of the pay period and then LWOP or AWOL is accrued, that employee will not be permitted to work voluntary overtime in the entire following pay period.
6. If overtime is required to maintain a safe and secure operation and insufficient staff voluntarily agrees to work, mandatory overtime will be initiated.
  - A. A list of Senior Correctional Officers, Correctional Officers, and Correctional Officer Trainees will be establish by based on least seniority in their hire date and last involuntary, i.e. mandatory, overtime date, will be established for each shift.

- B. The mandatory overtime list will be restarted once exhausted or every 45 days.
- C. Adjustments will be made when an officer is reassigned to a new shift. That officer will be added to the mandatory list according to their last mandatory date.
- D. Based on the least seniority the first time after shift bidding, staff will be selected by their last involuntary overtime date. Once completed, the employee will move to the bottom of the involuntary overtime list.
- E. All correctional staff will report to the shift supervisor/shift sergeant upon arrival to ensure their status if required to work mandatory overtime.
  - (1) If an employee is required to work mandatory overtime, that employee may be allowed to solicit a volunteer to work in his/her place.
    - (a) If a volunteer is found, the shift supervisor/shift sergeant must approve the substitution prior to the person being allowed to work.
    - (b) If the substitution is approved, the Officer originally scheduled to work the mandatory overtime will remain at the top of the mandatory overtime list until he/she actually works it.
  - (2) The employee has 1 hour to find a substitute whenever possible.

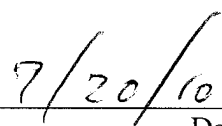
7. A written overtime tracking log must be approved by the appropriate Deputy Director.

- A. All overtime will be entered into the NSIS Computer Roster.
- B. Verification will be made that the timesheet entry is properly coded and hours are correctly entered by viewing the timesheet of the staff member.
- C. A written overtime tracking log will be utilized to ensure proper utilization of overtime and entry into the computer.

#### APPLICABILITY

- 1. This regulation requires an Operational Procedure for every institution and facility.
- 2. This regulation requires an audit.

  
\_\_\_\_\_  
Howard Skolnik, Director

  
\_\_\_\_\_  
Date



# EXHIBIT B

# EXHIBIT B

### 326.03 STAFF RESPONSIBILITY

1. All staff shall report for duty fully prepared for any work assignment.
  - Uniform and equipment shall be in accordance with A.R. 350.
2. Staff will report to the shift supervisor in the muster room for posting of their assignment.
  - Staff will report early enough to be on their post by the beginning of their shift.
  - Staff will report in person.
    - o Areas of assignment or working hours do not exempt the staff from reporting for duty to the Shift Supervisor.
3. All staff shall check their respective mailboxes prior to reporting for duty.

### 326.04 SHIFT ROSTERS

1. To efficiently utilize assigned staff, shift supervisors must plan in advance the work week, schedule and take into account changes in the workload such as, transportation, hospital coverage or parole boards.
  - Shift Supervisors must staff all mandatory positions.
  - Shift rosters will be reviewed one (1) week in advance.
    - o Final review and adjustments to shift rosters will be completed by end of shift each day.

### 326.05 CALL-INS

1. A call-in shall only be accepted by a shift sergeant or above.
2. Call-ins shall be documented in NSIS
  - Shift supervisors shall enter the appropriate leave code in NSIS.
  - The shift supervisor shall make adjustments to ensure proper staff coverage.
3. A DOC 1000 Authorization for Leave and Overtime request form shall be completed for all used leaves and overtime.

### 326.06 IDENTIFIED SHUTDOWN AND PULL POSITIONS BY SHIFT

1. Day Shift supervisors will utilize the below listed shutdown and pull positions to ensure mandatory positions are staffed prior to hiring overtime.
  - The Warden or Associate Warden of Operations shall be notified and must approve all overtime.
  - Shift supervisors should refrain from repeatedly pulling the same personnel and should take work load into consideration.
  - Day shift A, B, (0500 hrs – 1700 hrs) and C (0500 hrs – 1300 hrs) has Sixty (60) legislatively approved posts. Prior to requesting the use of overtime, the shift Supervisor must utilize all pull and shut down posts as defined below:

# EXHIBIT C

# EXHIBIT C

## Nathan Echeverria - Fwd: 9/12 quad brief

---

**From:** Aaron Dicus  
**To:** Nathan Echeverria  
**Date:** 5/10/2014 8:34 AM  
**Subject:** Fwd: 9/12 quad brief  
**Attachments:** Night Time Yard Schedule 05-06-14.pdf

---

>>> Brandon Badger 5/8/2014 7:43 AM >>>



Senior Correctional Officer  
Brandon Badger  
Nevada Department of Corrections  
HDSP

>>> Keith McKeehan 5/7/2014 11:37 AM >>>  
Good morning,

### Morning feeding

Grave staff should have the food already in the warmers to be ready for the 5am shift. Day shift needs to get the porters working and start serving trays no later than 0530 hrs. Unit 11 has been doing this religiously for some time. I know the rest of us can get it done. This ensures that the carts are loaded and ready to go by the time culinary staff picks up the dirties at 0700 hrs.

### Tardy

A few people need to be reminded. You need to arrive on your post by the start of your shift (OP.032). It is approx 10-15 minute walk from Operations to 9/12 quad. You need to incorporate this walk time in your travel to work to ensure you arrive on time.

### Night yard

See attached night yard schedule. Night yard begins on Memorial Day and continues thru Labor Day.

Be safe.

Lt. McKeehan



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7 *Attorneys for Plaintiffs*  
8  
9

10 **UNITED STATES DISTRICT COURT**  
11 **DISTRICT OF NEVADA**  
12

13 DONALD WALDEN JR, NATHAN  
14 ECHEVERRIA, AARON DICUS, BRENT  
15 EVERIST, TRAVIS ZUFELT, TIMOTHY  
16 RIDENOUR, and DANIEL TRACY on  
behalf of themselves and all others similarly  
situated,

17 Plaintiffs,  
18

19 v.

20 THE STATE OF NEVADA, NEVADA  
21 DEPARTMENT OF CORRECTIONS, and  
22 DOES 1-50,  
23 Defendants.

Case No.: 3:14-cv-00320-LRH-WGC

**DECLARATION OF BRENT EVERIST**

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I, Brent Everist, hereby declare and state as follows:

1. I am over the age of eighteen and I have personal knowledge of the facts and circumstances set forth in this declaration. If I were called as a witness I would and could competently testify to the matters set forth herein.

2. I have been employed by Defendant THE STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS (“Defendant” or “NDOC”) as a Correctional Officer at the High Desert State Prison (“HDSP”) from on or about May 1, 2006 to the present. My current rate of pay is approximately \$22.80 per hour as of the last day I worked prior to the date of this declaration.

3. During my eight year career with NDOC I have worked a variety of different shifts and was assigned to a variety of different job posts. For instance, I have held the following job posts and worked the following shifts dating back to 2011:

i. Currently, as of the date of this declaration, I am assigned to Housing Unit 1 CD Control and am scheduled to work 5 days a week 8 hours a day work schedule of 40 hours during the work week. I routinely work at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

ii. In 2013, I was assigned to Housing Unit 1 CD Control and was scheduled to work a 5 days a week 8 hours a day work schedule of 40 hours during the work week. I routinely worked at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

iii. In 2012, I was assigned to Housing Unit 4 AB Floor and was scheduled to work a 14-day variable work schedule of 80 hours during that work period. I routinely worked at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

iv. In 2011, I was assigned to Housing Unit 3 AB Control and was scheduled to work a standard workweek of 40 hours a week. I routinely worked at least 40 hours a week (not counting the hours I worked without pay as set forth below).

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4. When I work a standard 40 hour workweek, pursuant to the NDOC Administrative Regulation 320, my contract, and state and federal law, I should be compensated at my overtime rate for all hours I work that exceed 40 hours during that workweek. When I work a 14-day variable work schedule, pursuant to the NDOC Administrative Regulation 320 and my contract, I should be compensated at my overtime rate for all hours I work that exceed 80 hours during that work period.

5. As a NDOC Correctional Officer, I am required to be at my post at the start of my regularly scheduled shift. Upon my own information and belief, all NDOC Correctional Officers across the state of Nevada are similarly required to be at their post at the start of their respective shift.

6. Attached to this declaration as Exhibit A is a true and correct copy of NDOC Administrative Regulation 326, which states, in relevant part, that "All correctional staff will report to the shift supervisor/shift sergeant upon arrival . . . ."

7. Even though I am required to be at my post at the start of my regularly scheduled shift, I am not compensated for all the work activities that I perform prior to arriving at my post. Prior to proceeding to my assigned post for the day, I must report to the muster room to report to the shift sergeant/shift supervisor, receive my assignment, get debriefed as to any new developments at the facility or issues relating to my employment, check my mail box, and be checked for proper uniform attire. Depending on my assignment, I may also be required to pick up keys, radios, tear gas equipment, weapons, and handcuffs. Only after I have completed all these tasks am I able to proceed to my assigned post for the day. Given the size of the correctional facility, walking to my designated post could take me approximately 15-minutes. When I arrive at my post I typically relieve an outgoing officer and am debriefed by that officer. I am not compensated for performing any of these activities prior to my regularly scheduled shift. Upon my own information and belief, I understand that all NDOC Correctional Officers across the state of Nevada are similarly required to perform these work activities prior to the start of their regularly scheduled shift and are not compensated for doing so.

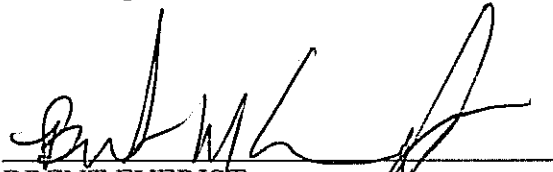
8. In addition for not being paid for the pre-shift activities described above, I'm likewise denied compensation for engaging in post-shift activities. Even though I'm only compensated until the end of my scheduled shift, I'm required to conduct debriefing sessions with oncoming officers after the end of my shift, walk back to the facility's main office, and return the various tools (*i.e.*, keys, radios, tear gas equipment, weapons, and handcuffs) that I was required to use during the workday. I am not compensated for performing any of these activities after my regularly scheduled shift. Upon my own information and belief, I understand that all NDOC Correctional Officers across the state of Nevada are similarly required to perform these work activities after the end of their regularly scheduled shift and are not compensated for doing so.

9. I estimate that I have worked off-the-clock and without compensation approximately 30 to 45 minutes each and every workday during my employment with NDOC.

10. Upon my own information and belief, NDOC has been failing to pay Correctional Officers for years. I want to be paid all my wages and associated penalties, costs, and fees, in full for having to work for free all these years.

I declare under the penalty of perjury under the laws of the United States of America and the State of Nevada that the foregoing is true and correct.

Executed this 16 day of July, 2014, at Las Vegas, Nevada.

  
BRENT EVERIST



# EXHIBIT A

# EXHIBIT A

**NEVADA DEPARTMENT OF CORRECTIONS  
ADMINISTRATIVE REGULATION  
326**

**POSTING OF SHIFTS/OVERTIME**

**Supersedes:** AR 326 (Temporary, 05/02/10)  
**Effective Date:** 08/13/10

**AUTHORITY:** NRS 284.055; 284.155; 284.175; 284.180 NAC 284.242; 284.245; 284.250

**RESPONSIBILITY:**

Wardens/ Facility Managers are responsible to ensure there is sufficient staff on duty to safely operate their institutions and facilities.

An Associate Warden/facility manager are responsible to document attendance, management of relief factor usage by all uniformed staff, and ensure proper documentation is maintained.

**326.01 STAFFING**

**1. NORMAL OPERATIONS**

A. Normal operation staffing is utilized during the normal operations of an institution. This pattern will identify the staff required to run a specified post when all positions are utilized.

B. An Associate Warden will create a written staffing pattern identifying and prioritizing specific posts operating within the institution as either a pull position or a shut down position.

(1) A pull position is identified as a position in which the assigned officer may be pulled from that position and assigned elsewhere in the institution during their assigned shift.

(2) A shut down position is identified as a position in which the assigned officer may be pulled from his assigned post and the post closed with the officer being assigned elsewhere in the institution for their entire assigned shift.

C. Shift Sergeants reporting for their scheduled shifts will adjust the shift roster and fill all positions mandated to fulfill the minimum staffing requirements.

D. The shift sergeant will use all Sick/Annual positions first, and then use pull/shutdown positions as appropriate, in the order as listed by the institution.

E. If the minimum staffing has not been met, the on duty Shift Supervisor will contact an Associate Warden and request the minimum amount of overtime hours needed. The Associate Warden will then notify the Warden for approval of the decision/overtime approved.

F. Only when all pull positions and shutdown positions have been utilized will overtime be considered.

## 2. EMERGENCY OPERATIONS

A. Emergency operation staff is the staffing pattern that identifies posts that must meet minimal requirements for officer and inmate safety. This pattern will identify those posts that are critical for running a specific area of the institution.

B. An Associate Warden will create a written staffing pattern identifying additional specific posts within the institution either as pull or shutdown positions; this staffing pattern will prioritize these positions in the order they are to be pulled / shut down in the event of an emergency or staff shortage.

C. Staffing will also be evaluated as to the absolute minimum required to safely operate a particular shift.

D. It may be necessary to modify or cancel some activities as a result of emergency staffing. The Warden/Associate Warden will be notified of the cancellation of any activity or program.

E. Only when all pull positions and shutdown positions have been utilized only then will overtime be considered. Authorization is only granted by the Warden/Designee.

## 326.02 RELIEF FACTOR MANAGEMENT (RFM)

1. Relief Factor Management (RFM) positions are to be:

A. Used for unscheduled annual leave relief to cover greater than normal sick leave, if it is available.

B. Used for pull and shutdown posts to cover greater than expected sick leave.

2. No more annual leave will be scheduled than there are relief factor management positions available to support the requested leave without overtime.

A. Staff should request annual leave per the requirements of AR 322 Types of Leave and Leave Procedure

B. Leave requests submitted without sufficient notice will not be granted if there is no relief factor to accommodate the leave without overtime except in a case of a personal emergency.

3. To the degree possible, Lieutenants and Sergeants should not be replaced, however, these positions may be used as a pull/shutdown position if designated by the institutional staff procedure,

4. Shift rosters for each institution and facility are to be organized so the components of the relief factor can be combined to identify specific staff to occupy RFM positions.

5. Relief factor for regular days off, sick leave, annual leave, or training, will not be combined in order to create new positions.

6. Days off are assigned to the post and not the person.

### **326.03 MANAGEMENT OF OVERTIME**

1. Overtime is not guaranteed for any employee.
  - A. Institutional/facility requirements will determine all overtime hired.
  - B. All staff overtime requires the completion of DOC Form 1000, Authorization for Leave and Overtime Request Form.
  - C. Staff can not work more than two (2) consecutive double shifts.
  - D. Unless an emergency situation occurs, no staff can work than more than a 16 hour shift in a 24 hour period.
2. Assigned staff may be reassigned when an institutional need exists.
3. Employees on modified duty assignments are not authorized to work overtime.
4. Correctional officers may be used to fill Senior Correctional Officer positions on a case by case basis. However Senior Correctional Officers may not be utilized to fill a Correctional Officer position.
5. A voluntary overtime list will be established and used prior to utilizing mandatory overtime. This voluntary overtime list will be re-started when exhausted
  - A. No employee who calls in sick or utilizes sick leave during any given pay period will be allowed to work voluntary overtime.
  - B. If an employee accrues overtime during the first week of the pay period and then utilizes sick leave, that employee will not be permitted any voluntary overtime in the next pay period.
  - C. No employee who must provide "proof" may work voluntary overtime until this status is modified.
  - D. Employees who are in AWOL or LWOP status will not to be allowed to volunteer/eligible for overtime in the same pay period.
    - (1) If overtime is accrued during the first week of the pay period and then LWOP or AWOL is accrued, that employee will not be permitted to work voluntary overtime in the entire following pay period.
6. If overtime is required to maintain a safe and secure operation and insufficient staff voluntarily agrees to work, mandatory overtime will be initiated.
  - A. A list of Senior Correctional Officers, Correctional Officers, and Correctional Officer Trainees will be establish by based on least seniority in their hire date and last involuntary, i.e. mandatory, overtime date, will be established for each shift.



- B. The mandatory overtime list will be restarted once exhausted or every 45 days.
- C. Adjustments will be made when an officer is reassigned to a new shift. That officer will be added to the mandatory list according to their last mandatory date.
- D. Based on the least seniority the first time after shift bidding, staff will be selected by their last involuntary overtime date. Once completed, the employee will move to the bottom of the involuntary overtime list.
- E. All correctional staff will report to the shift supervisor/shift sergeant upon arrival to ensure their status if required to work mandatory overtime.

(1) If an employee is required to work mandatory overtime, that employee may be allowed to solicit a volunteer to work in his/her place.

(a) If a volunteer is found, the shift supervisor/shift sergeant must approve the substitution prior to the person being allowed to work.

(b) If the substitution is approved, the Officer originally scheduled to work the mandatory overtime will remain at the top of the mandatory overtime list until he/she actually works it.

(2) The employee has 1 hour to find a substitute whenever possible.

7. A written overtime tracking log must be approved by the appropriate Deputy Director.

A. All overtime will be entered into the NSIS Computer Roster.

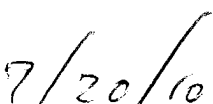
B. Verification will be made that the timesheet entry is properly coded and hours are correctly entered by viewing the timesheet of the staff member.

C. A written overtime tracking log will be utilized to ensure proper utilization of overtime and entry into the computer.

## APPLICABILITY

- 1. This regulation requires an Operational Procedure for every institution and facility.
- 2. This regulation requires an audit.

  
Howard Skolnik, Director

  
Date

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6 Fax. (775) 703-5027

7 *Attorneys for Plaintiffs*  
8  
9

10 **UNITED STATES DISTRICT COURT**  
11 **DISTRICT OF NEVADA**  
12

13 DONALD WALDEN JR, NATHAN  
14 ECHEVERRIA, AARON DICUS, BRENT  
15 EVERIST, TRAVIS ZUFELT, TIMOTHY  
16 RIDENOUR, and DANIEL TRACY on  
behalf of themselves and all others similarly  
situated,

17 Plaintiffs,  
18

19 v.

20 THE STATE OF NEVADA, NEVADA  
21 DEPARTMENT OF CORRECTIONS, and  
DOES 1-50,  
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23 Defendants.  
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Case No.: 3:14-cv-00320-LRH-WGC

**DECLARATION OF TIMOTHY  
RIDENOUR**

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I, Timothy Ridenour, hereby declare and state as follows:

1. I am over the age of eighteen and I have personal knowledge of the facts and circumstances set forth in this declaration. If I were called as a witness I would and could competently testify to the matters set forth herein.

2. I have been employed by Defendant THE STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS (“Defendant” or “NDOC”) as a Correctional Officer at the Southern Desert Correctional Center (“SDCC”) from on or about March 2007 to the present. My current rate of pay is approximately \$20.00 per hour as of the last day I worked prior to the date of this declaration.

3. During my seven year career with NDOC I have worked a variety of different shifts and was assigned to a variety of different job posts. For instance, I have held the following job posts and worked the following shifts dating back to 2011:

i. Currently, as of the date of this declaration, I am assigned to Search and Escort B, days B shift, and am scheduled to work a 14-day variable work schedule of 80 hours during that work period. I routinely work at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

ii. In 2013, I was assigned to Search and Escort B, days B shift and was scheduled to work a 14-day variable work schedule of 80 hours during that work period. I routinely worked at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

iii. In 2012, I was assigned to Unit 2 A Officer, days B shift and then Search and Escort B, days B shift and was scheduled to work a 14-day variable work schedule of 80 hours during that work period. I routinely worked at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

iv. In 2011, I was assigned to the swing shift. I do not recall whether I was working Search and Escort or as a Unit Officer during this time. I was scheduled to work a standard workweek of 40 hours a week. I routinely worked at least 40 hours a week (not counting the hours I worked without pay as set forth below).

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4. When I work a standard 40 hour workweek, pursuant to the NDOC Administrative Regulation 320, my contract, and state and federal law, I should be compensated at my overtime rate for all hours I work that exceed 40 hours during that workweek. When I work a 14-day variable work schedule, pursuant to the NDOC Administrative Regulation 320 and my contract, I should be compensated at my overtime rate for all hours I work that exceed 80 hours during that work period.

5. As a NDOC Correctional Officer, I am required to be at my post at the start of my regularly scheduled shift. Upon my own information and belief, all NDOC Correctional Officers across the state of Nevada are similarly required to be at their post at the start of their respective shift.

6. Attached to this declaration as Exhibit A is a true and correct copy of NDOC Administrative Regulation 326, which states, in relevant part, that "All correctional staff will report to the shift supervisor/shift sergeant upon arrival . . . ."

7. Attached to this declaration as Exhibit B is a true and correct copy of SDCC Operational Procedure 326.03, which states the following:

1. All Staff shall report for duty fully prepared for any work assignment
  - Uniform and equipment shall be in accordance with A.R. 350
2. Staff will report to the shift supervisor in the muster room for posting of their assignment.
  - Staff will report early enough to be on their post by the beginning of their shift.
  - Staff will report in person
    - Areas of assignment or working hours do no exempt the staff from reporting for duty to the Shift Supervisor
3. All Staff shall check their respective mailboxes prior to reporting for duty.

8. Even though I am required to be at my post at the start of my regularly scheduled shift, I am not compensated for all the work activities that I perform prior to arriving at my post. Prior to proceeding to my assigned post for the day, I must report to the muster room to report to the shift sergeant/shift supervisor, receive my assignment, get debriefed as to any new



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1 developments at the facility or issues relating to my employment, check my mail box, and be  
 2 checked for proper uniform attire. Depending on my assignment, I may also be required to pick  
 3 up keys, radios, tear gas equipment, weapons, and handcuffs. Only after I have completed all  
 4 these tasks am I able to proceed to my assigned post for the day. Given the size of the  
 5 correctional facility, walking to my designated post could take me approximately 15-minutes.  
 6 When I arrive at my post I typically relieve an outgoing officer and am debriefed by that officer.  
 7 I am not compensated for performing any of these activities prior to my regularly scheduled shift.  
 8 Upon my own information and belief, I understand that all NDOC Correctional Officers across  
 9 the state of Nevada are similarly required to perform these work activities prior to the start of  
 10 their regularly scheduled shift and are not compensated for doing so.

11 9. In addition for not being paid for the pre-shift activities described above, I'm  
 12 likewise denied compensation for engaging in post-shift activities. Even though I'm only  
 13 compensated until the end of my scheduled shift, I'm required to conduct debriefing sessions  
 14 with oncoming officers after the end of my shift, walk back to the facility's main office, and  
 15 return the various tools (*i.e.*, keys, radios, tear gas equipment, weapons, and handcuffs) that I  
 16 was required to use during the workday. I am not compensated for performing any of these  
 17 activities after my regularly scheduled shift. Upon my own information and belief, I understand  
 18 that all NDOC Correctional Officers across the state of Nevada are similarly required to perform  
 19 these work activities after the end of their regularly scheduled shift and are not compensated for  
 20 doing so.

21 10. I estimate that I have worked off-the-clock and without compensation  
 22 approximately 30-45 minutes each and every workday during my employment with NDOC.

23 11. Upon my own information and belief, NDOC has been failing to pay Correctional  
 24 Officers for years. I want to be paid all my wages and associated penalties, costs, and fees, in  
 25 full for having to work for free all these years.  
 26  
 27  
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1 I declare under the penalty of perjury under the laws of the United States of America  
2 and the State of Nevada that the foregoing is true and correct.

3 Executed this 29 day of June, 2014, at Las Vegas, Nevada.

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TIMOTHY RIDENOUR

THIERMAN LAW FIRM, PC

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# EXHIBIT A

# EXHIBIT A

**NEVADA DEPARTMENT OF CORRECTIONS  
ADMINISTRATIVE REGULATION  
326**

**POSTING OF SHIFTS/OVERTIME**

**Supersedes:** AR 326 (Temporary, 05/02/10)  
**Effective Date:** 08/13/10

**AUTHORITY:** NRS 284.055; 284.155; 284.175; 284.180 NAC 284.242; 284.245; 284.250

**RESPONSIBILITY:**

Wardens/ Facility Managers are responsible to ensure there is sufficient staff on duty to safely operate their institutions and facilities.

An Associate Warden/facility manager are responsible to document attendance, management of relief factor usage by all uniformed staff, and ensure proper documentation is maintained.

**326.01 STAFFING**

**1. NORMAL OPERATIONS**

A. Normal operation staffing is utilized during the normal operations of an institution. This pattern will identify the staff required to run a specified post when all positions are utilized.

B. An Associate Warden will create a written staffing pattern identifying and prioritizing specific posts operating within the institution as either a pull position or a shut down position.

(1) A pull position is identified as a position in which the assigned officer may be pulled from that position and assigned elsewhere in the institution during their assigned shift.

(2) A shut down position is identified as a position in which the assigned officer may be pulled from his assigned post and the post closed with the officer being assigned elsewhere in the institution for their entire assigned shift.

C. Shift Sergeants reporting for their scheduled shifts will adjust the shift roster and fill all positions mandated to fulfill the minimum staffing requirements.

D. The shift sergeant will use all Sick/Annual positions first, and then use pull/shutdown positions as appropriate, in the order as listed by the institution.

E. If the minimum staffing has not been met, the on duty Shift Supervisor will contact an Associate Warden and request the minimum amount of overtime hours needed. The Associate Warden will then notify the Warden for approval of the decision/overtime approved.



F. Only when all pull positions and shutdown positions have been utilized will overtime be considered.

## 2. EMERGENCY OPERATIONS

A. Emergency operation staff is the staffing pattern that identifies posts that must meet minimal requirements for officer and inmate safety. This pattern will identify those posts that are critical for running a specific area of the institution.

B. An Associate Warden will create a written staffing pattern identifying additional specific posts within the institution either as pull or shutdown positions; this staffing pattern will prioritize these positions in the order they are to be pulled / shut down in the event of an emergency or staff shortage.

C. Staffing will also be evaluated as to the absolute minimum required to safely operate a particular shift.

D. It may be necessary to modify or cancel some activities as a result of emergency staffing. The Warden/Associate Warden will be notified of the cancellation of any activity or program.

E. Only when all pull positions and shutdown positions have been utilized only then will overtime be considered. Authorization is only granted by the Warden/Designee.

## 326.02 RELIEF FACTOR MANAGEMENT (RFM)

1. Relief Factor Management (RFM) positions are to be:

A. Used for unscheduled annual leave relief to cover greater than normal sick leave, if it is available.

B. Used for pull and shutdown posts to cover greater than expected sick leave.

2. No more annual leave will be scheduled than there are relief factor management positions available to support the requested leave without overtime.

A. Staff should request annual leave per the requirements of AR 322 Types of Leave and Leave Procedure

B. Leave requests submitted without sufficient notice will not be granted if there is no relief factor to accommodate the leave without overtime except in a case of a personal emergency.

3. To the degree possible, Lieutenants and Sergeants should not be replaced, however, these positions may be used as a pull/shutdown position if designated by the institutional staff procedure,

4. Shift rosters for each institution and facility are to be organized so the components of the relief factor can be combined to identify specific staff to occupy RFM positions.

5. Relief factor for regular days off, sick leave, annual leave, or training, will not be combined in order to create new positions.

6. Days off are assigned to the post and not the person.

### **326.03 MANAGEMENT OF OVERTIME**

1. Overtime is not guaranteed for any employee.
  - A. Institutional/facility requirements will determine all overtime hired.
  - B. All staff overtime requires the completion of DOC Form 1000, Authorization for Leave and Overtime Request Form.
  - C. Staff can not work more than two (2) consecutive double shifts.
  - D. Unless an emergency situation occurs, no staff can work than more than a 16 hour shift in a 24 hour period.
2. Assigned staff may be reassigned when an institutional need exists.
3. Employees on modified duty assignments are not authorized to work overtime.
4. Correctional officers may be used to fill Senior Correctional Officer positions on a case by case basis. However Senior Correctional Officers may not be utilized to fill a Correctional Officer position.
5. A voluntary overtime list will be established and used prior to utilizing mandatory overtime. This voluntary overtime list will be re-started when exhausted
  - A. No employee who calls in sick or utilizes sick leave during any given pay period will be allowed to work voluntary overtime.
  - B. If an employee accrues overtime during the first week of the pay period and then utilizes sick leave, that employee will not be permitted any voluntary overtime in the next pay period.
  - C. No employee who must provide "proof" may work voluntary overtime until this status is modified.
  - D. Employees who are in AWOL or LWOP status will not to be allowed to volunteer/eligible for overtime in the same pay period.
    - (1) If overtime is accrued during the first week of the pay period and then LWOP or AWOL is accrued, that employee will not be permitted to work voluntary overtime in the entire following pay period.
6. If overtime is required to maintain a safe and secure operation and insufficient staff voluntarily agrees to work, mandatory overtime will be initiated.
  - A. A list of Senior Correctional Officers, Correctional Officers, and Correctional Officer Trainees will be establish by based on least seniority in their hire date and last involuntary, i.e. mandatory, overtime date, will be established for each shift.

- B. The mandatory overtime list will be restarted once exhausted or every 45 days.
- C. Adjustments will be made when an officer is reassigned to a new shift. That officer will be added to the mandatory list according to their last mandatory date.
- D. Based on the least seniority the first time after shift bidding, staff will be selected by their last involuntary overtime date. Once completed, the employee will move to the bottom of the involuntary overtime list.
- E. All correctional staff will report to the shift supervisor/shift sergeant upon arrival to ensure their status if required to work mandatory overtime.
  - (1) If an employee is required to work mandatory overtime, that employee may be allowed to solicit a volunteer to work in his/her place.
    - (a) If a volunteer is found, the shift supervisor/shift sergeant must approve the substitution prior to the person being allowed to work.
    - (b) If the substitution is approved, the Officer originally scheduled to work the mandatory overtime will remain at the top of the mandatory overtime list until he/she actually works it.
  - (2) The employee has 1 hour to find a substitute whenever possible.

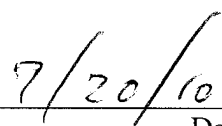
7. A written overtime tracking log must be approved by the appropriate Deputy Director.

- A. All overtime will be entered into the NSIS Computer Roster.
- B. Verification will be made that the timesheet entry is properly coded and hours are correctly entered by viewing the timesheet of the staff member.
- C. A written overtime tracking log will be utilized to ensure proper utilization of overtime and entry into the computer.

#### APPLICABILITY

- 1. This regulation requires an Operational Procedure for every institution and facility.
- 2. This regulation requires an audit.

  
\_\_\_\_\_  
Howard Skolnik, Director

  
\_\_\_\_\_  
Date

# EXHIBIT B

# EXHIBIT B



### 326.03 STAFF RESPONSIBILITY

1. All staff shall report for duty fully prepared for any work assignment.
  - Uniform and equipment shall be in accordance with A.R. 350.
2. Staff will report to the shift supervisor in the muster room for posting of their assignment.
  - Staff will report early enough to be on their post by the beginning of their shift.
  - Staff will report in person.
    - o Areas of assignment or working hours do not exempt the staff from reporting for duty to the Shift Supervisor.
3. All staff shall check their respective mailboxes prior to reporting for duty.

### 326.04 SHIFT ROSTERS

1. To efficiently utilize assigned staff, shift supervisors must plan in advance the work week, schedule and take into account changes in the workload such as, transportation, hospital coverage or parole boards.
  - Shift Supervisors must staff all mandatory positions.
  - Shift rosters will be reviewed one (1) week in advance.
    - o Final review and adjustments to shift rosters will be completed by end of shift each day.

### 326.05 CALL-INS

1. A call-in shall only be accepted by a shift sergeant or above.
2. Call-ins shall be documented in NSIS
  - Shift supervisors shall enter the appropriate leave code in NSIS.
  - The shift supervisor shall make adjustments to ensure proper staff coverage.
3. A DOC 1000 Authorization for Leave and Overtime request form shall be completed for all used leaves and overtime.

### 326.06 IDENTIFIED SHUTDOWN AND PULL POSITIONS BY SHIFT

1. Day Shift supervisors will utilize the below listed shutdown and pull positions to ensure mandatory positions are staffed prior to hiring overtime.
  - The Warden or Associate Warden of Operations shall be notified and must approve all overtime.
  - Shift supervisors should refrain from repeatedly pulling the same personnel and should take work load into consideration.
  - Day shift A, B, (0500 hrs – 1700 hrs) and C (0500 hrs – 1300 hrs) has Sixty (60) legislatively approved posts. Prior to requesting the use of overtime, the shift Supervisor must utilize all pull and shut down posts as defined below:

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7 *Attorneys for Plaintiffs*  
8  
9

10 **UNITED STATES DISTRICT COURT**  
11 **DISTRICT OF NEVADA**  
12

13 DONALD WALDEN JR, NATHAN  
14 ECHEVERRIA, AARON DICUS, BRENT  
15 EVERIST, TRAVIS ZUFELT, TIMOTHY  
16 RIDENOUR, and DANIEL TRACY on  
behalf of themselves and all others similarly  
situated,

17 Plaintiffs,  
18

19 v.

20 THE STATE OF NEVADA, NEVADA  
21 DEPARTMENT OF CORRECTIONS, and  
22 DOES 1-50,  
23 Defendants.

Case No.: 3:14-cv-00320-LRH-WGC

**DECLARATION OF DANIEL TRACY**

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I, Daniel Tracy, hereby declare and state as follows:

1. I am over the age of eighteen and I have personal knowledge of the facts and circumstances set forth in this declaration. If I were called as a witness I would and could competently testify to the matters set forth herein.

2. I have been employed by Defendant THE STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS (“Defendant” or “NDOC”) as a Correctional Officer at the Southern Desert Correctional Center (“SDCC”) from on or about October 9<sup>th</sup>, 2000 to the present. My current rate of pay is approximately \$26.00 per hour as of the last day I worked prior to the date of this declaration.

3. During my fourteen year career with NDOC I have worked a variety of different shifts and was assigned to a variety of different job posts. For instance, I have held the following job posts and worked the following shifts dating back to 2011:

i. Currently, as of the date of this declaration, I am assigned as Gym Officer and am scheduled to work an 8 hour shift, 5 days a week. I routinely work at least 40 hours a work period (not counting the hours I worked without pay as set forth below).

ii. In 2013, I was assigned as Gym Officer and was scheduled to work an 8 hour shift, 5 days a week. I routinely worked at least 40 hours a work period (not counting the hours I worked without pay as set forth below).

iii. In 2012, I was assigned to K Officer for part of the year and was scheduled to work a 12 hour shift work schedule of 80 hours during that work period. I routinely worked at least 80 hours a work period (not counting the hours I worked without pay as set forth below). I was also assigned as Lead Officer for Units One and Two for part of the year, and was scheduled to work an 8 hour shift, 5 days a week. I routinely worked at least 40 hours a work period (not counting the hours I worked without pay as set forth below).

iv. In 2011, I was assigned to the Women’s Correctional Center and was scheduled to work a standard workweek of 40 hours a week. I routinely worked at least 40 hours a week (not counting the hours I worked without pay as set forth below).

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4. When I work a standard 40 hour workweek, pursuant to the NDOC Administrative Regulation 320, my contract, and state and federal law, I should be compensated at my overtime rate for all hours I work that exceed 40 hours during that workweek. When I work a 14-day variable work schedule, pursuant to the NDOC Administrative Regulation 320 and my contract, I should be compensated at my overtime rate for all hours I work that exceed 80 hours during that work period.

5. As a NDOC Correctional Officer, I am required to be at my post at the start of my regularly scheduled shift. Upon my own information and belief, all NDOC Correctional Officers across the state of Nevada are similarly required to be at their post at the start of their respective shift.

6. Attached to this declaration as Exhibit A is a true and correct copy of NDOC Administrative Regulation 326, which states, in relevant part, that “All correctional staff will report to the shift supervisor/shift sergeant upon arrival . . . .”

7. Attached to this declaration as Exhibit B is a true and correct copy of SDCC Operational Procedure 326.03, which states the following:

1. All Staff shall report for duty fully prepared for any work assignment
  - Uniform and equipment shall be in accordance with A.R. 350
2. Staff will report to the shift supervisor in the muster room for posting of their assignment.
  - Staff will report early enough to be on their post by the beginning of their shift.
  - Staff will report in person
    - Areas of assignment or working hours do no exempt the staff from reporting for duty to the Shift Supervisor
3. All Staff shall check their respective mailboxes prior to reporting for duty.

8. Even though I am required to be at my post at the start of my regularly scheduled shift, I am not compensated for all the work activities that I perform prior to arriving at my post. Prior to proceeding to my assigned post for the day, I must report to the muster room to report to the shift sergeant/shift supervisor, receive my assignment, get debriefed as to any new



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1 developments at the facility or issues relating to my employment, check my mail box, and be  
 2 checked for proper uniform attire. Depending on my assignment, I may also be required to pick  
 3 up keys, radios, tear gas equipment, weapons, and handcuffs. Only after I have completed all  
 4 these tasks am I able to proceed to my assigned post for the day. Given the size of the  
 5 correctional facility, walking to my designated post could take me approximately 15-minutes.  
 6 When I arrive at my post I have turn on lights, unlock doors and perform administrative tasks  
 7 such as booting up my computer. I am not compensated for performing any of these activities  
 8 prior to my regularly scheduled shift. Upon my own information and belief, I understand that  
 9 all NDOC Correctional Officers across the state of Nevada are similarly required to perform  
 10 these work activities prior to the start of their regularly scheduled shift and are not compensated  
 11 for doing so.


12 9. In addition for not being paid for the pre-shift activities described above, I'm  
 13 likewise denied compensation for engaging in post-shift activities. Even though I'm only  
 14 compensated until the end of my scheduled shift, I'm required to conduct debriefing sessions  
 15 with oncoming officers after the end of my shift, walk back to the facility's main office, and  
 16 return the various tools (*i.e.*, keys, radios, tear gas equipment, weapons, and handcuffs) that I  
 17 was required to use during the workday. I am not compensated for performing any of these  
 18 activities after my regularly scheduled shift. Upon my own information and belief, I understand  
 19 that all NDOC Correctional Officers across the state of Nevada are similarly required to perform  
 20 these work activities after the end of their regularly scheduled shift and are not compensated for  
 21 doing so.

22 10. I estimate that I have worked off-the-clock and without compensation  
 23 approximately 30 to 45 minutes each and every workday during my employment with NDOC.

24 11. Upon my own information and belief, NDOC has been failing to pay Correctional  
 25 Officers for years. I want to be paid all my wages and associated penalties, costs, and fees, in  
 26 full for having to work for free all these years.  
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 28

1 I declare under the penalty of perjury under the laws of the United States of America and  
2 the State of Nevada that the foregoing is true and correct.

3 Executed this 30<sup>th</sup> day of June, 2014, at Las Vegas, Nevada.

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7 DANIEL TRACY

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# EXHIBIT A

# EXHIBIT A

**NEVADA DEPARTMENT OF CORRECTIONS  
ADMINISTRATIVE REGULATION  
326**

**POSTING OF SHIFTS/OVERTIME**

**Supersedes:** AR 326 (Temporary, 05/02/10)  
**Effective Date:** 08/13/10

**AUTHORITY:** NRS 284.055; 284.155; 284.175; 284.180 NAC 284.242; 284.245; 284.250

**RESPONSIBILITY:**

Wardens/ Facility Managers are responsible to ensure there is sufficient staff on duty to safely operate their institutions and facilities.

An Associate Warden/facility manager are responsible to document attendance, management of relief factor usage by all uniformed staff, and ensure proper documentation is maintained.

**326.01 STAFFING**

**1. NORMAL OPERATIONS**

A. Normal operation staffing is utilized during the normal operations of an institution. This pattern will identify the staff required to run a specified post when all positions are utilized.

B. An Associate Warden will create a written staffing pattern identifying and prioritizing specific posts operating within the institution as either a pull position or a shut down position.

(1) A pull position is identified as a position in which the assigned officer may be pulled from that position and assigned elsewhere in the institution during their assigned shift.

(2) A shut down position is identified as a position in which the assigned officer may be pulled from his assigned post and the post closed with the officer being assigned elsewhere in the institution for their entire assigned shift.

C. Shift Sergeants reporting for their scheduled shifts will adjust the shift roster and fill all positions mandated to fulfill the minimum staffing requirements.

D. The shift sergeant will use all Sick/Annual positions first, and then use pull/shutdown positions as appropriate, in the order as listed by the institution.

E. If the minimum staffing has not been met, the on duty Shift Supervisor will contact an Associate Warden and request the minimum amount of overtime hours needed. The Associate Warden will then notify the Warden for approval of the decision/overtime approved.



F. Only when all pull positions and shutdown positions have been utilized will overtime be considered.

## 2. EMERGENCY OPERATIONS

A. Emergency operation staff is the staffing pattern that identifies posts that must meet minimal requirements for officer and inmate safety. This pattern will identify those posts that are critical for running a specific area of the institution.

B. An Associate Warden will create a written staffing pattern identifying additional specific posts within the institution either as pull or shutdown positions; this staffing pattern will prioritize these positions in the order they are to be pulled / shut down in the event of an emergency or staff shortage.

C. Staffing will also be evaluated as to the absolute minimum required to safely operate a particular shift.

D. It may be necessary to modify or cancel some activities as a result of emergency staffing. The Warden/Associate Warden will be notified of the cancellation of any activity or program.

E. Only when all pull positions and shutdown positions have been utilized only then will overtime be considered. Authorization is only granted by the Warden/Designee.

## 326.02 RELIEF FACTOR MANAGEMENT (RFM)

1. Relief Factor Management (RFM) positions are to be:

A. Used for unscheduled annual leave relief to cover greater than normal sick leave, if it is available.

B. Used for pull and shutdown posts to cover greater than expected sick leave.

2. No more annual leave will be scheduled than there are relief factor management positions available to support the requested leave without overtime.

A. Staff should request annual leave per the requirements of AR 322 Types of Leave and Leave Procedure

B. Leave requests submitted without sufficient notice will not be granted if there is no relief factor to accommodate the leave without overtime except in a case of a personal emergency.

3. To the degree possible, Lieutenants and Sergeants should not be replaced, however, these positions may be used as a pull/shutdown position if designated by the institutional staff procedure,

4. Shift rosters for each institution and facility are to be organized so the components of the relief factor can be combined to identify specific staff to occupy RFM positions.

5. Relief factor for regular days off, sick leave, annual leave, or training, will not be combined in order to create new positions.

6. Days off are assigned to the post and not the person.

### **326.03 MANAGEMENT OF OVERTIME**

1. Overtime is not guaranteed for any employee.
  - A. Institutional/facility requirements will determine all overtime hired.
  - B. All staff overtime requires the completion of DOC Form 1000, Authorization for Leave and Overtime Request Form.
  - C. Staff can not work more than two (2) consecutive double shifts.
  - D. Unless an emergency situation occurs, no staff can work than more than a 16 hour shift in a 24 hour period.
2. Assigned staff may be reassigned when an institutional need exists.
3. Employees on modified duty assignments are not authorized to work overtime.
4. Correctional officers may be used to fill Senior Correctional Officer positions on a case by case basis. However Senior Correctional Officers may not be utilized to fill a Correctional Officer position.
5. A voluntary overtime list will be established and used prior to utilizing mandatory overtime. This voluntary overtime list will be re-started when exhausted
  - A. No employee who calls in sick or utilizes sick leave during any given pay period will be allowed to work voluntary overtime.
  - B. If an employee accrues overtime during the first week of the pay period and then utilizes sick leave, that employee will not be permitted any voluntary overtime in the next pay period.
  - C. No employee who must provide "proof" may work voluntary overtime until this status is modified.
  - D. Employees who are in AWOL or LWOP status will not to be allowed to volunteer/eligible for overtime in the same pay period.
    - (1) If overtime is accrued during the first week of the pay period and then LWOP or AWOL is accrued, that employee will not be permitted to work voluntary overtime in the entire following pay period.
6. If overtime is required to maintain a safe and secure operation and insufficient staff voluntarily agrees to work, mandatory overtime will be initiated.
  - A. A list of Senior Correctional Officers, Correctional Officers, and Correctional Officer Trainees will be establish by based on least seniority in their hire date and last involuntary, i.e. mandatory, overtime date, will be established for each shift.

- B. The mandatory overtime list will be restarted once exhausted or every 45 days.
- C. Adjustments will be made when an officer is reassigned to a new shift. That officer will be added to the mandatory list according to their last mandatory date.
- D. Based on the least seniority the first time after shift bidding, staff will be selected by their last involuntary overtime date. Once completed, the employee will move to the bottom of the involuntary overtime list.
- E. All correctional staff will report to the shift supervisor/shift sergeant upon arrival to ensure their status if required to work mandatory overtime.
  - (1) If an employee is required to work mandatory overtime, that employee may be allowed to solicit a volunteer to work in his/her place.
    - (a) If a volunteer is found, the shift supervisor/shift sergeant must approve the substitution prior to the person being allowed to work.
    - (b) If the substitution is approved, the Officer originally scheduled to work the mandatory overtime will remain at the top of the mandatory overtime list until he/she actually works it.
  - (2) The employee has 1 hour to find a substitute whenever possible.

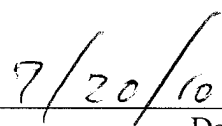
7. A written overtime tracking log must be approved by the appropriate Deputy Director.

- A. All overtime will be entered into the NSIS Computer Roster.
- B. Verification will be made that the timesheet entry is properly coded and hours are correctly entered by viewing the timesheet of the staff member.
- C. A written overtime tracking log will be utilized to ensure proper utilization of overtime and entry into the computer.

#### APPLICABILITY

- 1. This regulation requires an Operational Procedure for every institution and facility.
- 2. This regulation requires an audit.

  
\_\_\_\_\_  
Howard Skolnik, Director

  
\_\_\_\_\_  
Date

# EXHIBIT B

# EXHIBIT B

### 326.03 STAFF RESPONSIBILITY

1. All staff shall report for duty fully prepared for any work assignment.
  - Uniform and equipment shall be in accordance with A.R. 350.
2. Staff will report to the shift supervisor in the muster room for posting of their assignment.
  - Staff will report early enough to be on their post by the beginning of their shift.
  - Staff will report in person.
    - o Areas of assignment or working hours do not exempt the staff from reporting for duty to the Shift Supervisor.
3. All staff shall check their respective mailboxes prior to reporting for duty.

### 326.04 SHIFT ROSTERS

1. To efficiently utilize assigned staff, shift supervisors must plan in advance the work week, schedule and take into account changes in the workload such as, transportation, hospital coverage or parole boards.
  - Shift Supervisors must staff all mandatory positions.
  - Shift rosters will be reviewed one (1) week in advance.
    - o Final review and adjustments to shift rosters will be completed by end of shift each day.

### 326.05 CALL-INS

1. A call-in shall only be accepted by a shift sergeant or above.
2. Call-ins shall be documented in NSIS
  - Shift supervisors shall enter the appropriate leave code in NSIS.
  - The shift supervisor shall make adjustments to ensure proper staff coverage.
3. A DOC 1000 Authorization for Leave and Overtime request form shall be completed for all used leaves and overtime.

### 326.06 IDENTIFIED SHUTDOWN AND PULL POSITIONS BY SHIFT

1. Day Shift supervisors will utilize the below listed shutdown and pull positions to ensure mandatory positions are staffed prior to hiring overtime.
  - The Warden or Associate Warden of Operations shall be notified and must approve all overtime.
  - Shift supervisors should refrain from repeatedly pulling the same personnel and should take work load into consideration.
  - Day shift A, B, (0500 hrs – 1700 hrs) and C (0500 hrs – 1300 hrs) has Sixty (60) legislatively approved posts. Prior to requesting the use of overtime, the shift Supervisor must utilize all pull and shut down posts as defined below:



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7 *Attorneys for Plaintiffs*  
8  
9

10 **UNITED STATES DISTRICT COURT**  
11 **DISTRICT OF NEVADA**  
12

13 DONALD WALDEN JR, NATHAN  
14 ECHEVERRIA, AARON DICUS, BRENT  
15 EVERIST, TRAVIS ZUFELT, TIMOTHY  
16 RIDENOUR, and DANIEL TRACY on  
behalf of themselves and all others similarly  
situated,

17 Plaintiffs,  
18

19 v.

20 THE STATE OF NEVADA, NEVADA  
21 DEPARTMENT OF CORRECTIONS, and  
DOES 1-50,  
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23 Defendants.  
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Case No.: 3:14-cv-00320-LRH-WGC

**DECLARATION OF DONALD  
WALDEN**

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 Reno, NV 89511  
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I, Donald Walden, hereby declare and state as follows:

1. I am over the age of eighteen and I have personal knowledge of the facts and circumstances set forth in this declaration. If I were called as a witness I would and could competently testify to the matters set forth herein.

2. I was employed by Defendant THE STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS (“Defendant” or “NDOC”) as a Correctional Officer at the Southern Desert Correctional Center (“SDCC”) from on or about February 24, 2003 to February 14, 2013. My rate of pay was approximately \$23.00 or \$24.00 per hour as of the last day I worked prior to the date of this declaration.

3. During my ten year career with NDOC I have worked a variety of different shifts and was assigned to a variety of different job posts. For instance, I have held the following job posts and worked the following shifts dating back to 2011:

i. In 2013, I was on medical leave due to an incident where I was hurt on the job in May of 2012. I was formally separated from NDOC on February 14, 2013.

ii. In 2012, I was the Senior Officer assigned to Search and Escort on swing shift, until I was hurt on the job in May, and was scheduled to work a 14-day variable work schedule of 80 hours during that work period. I routinely worked at least 80 hours a work period (not counting the hours I worked without pay as set forth below).

iii. In 2011, I was the Senior Officer for Unit 8 (lock down unit) on day shift and was scheduled to work a standard workweek of 40 hours a week. I routinely worked at least 40 hours a week (not counting the hours I worked without pay as set forth below).

4. When I work a standard 40 hour workweek, pursuant to the NDOC Administrative Regulation 320, my contract, and state and federal law, I should be compensated at my overtime rate for all hours I work that exceed 40 hours during that workweek. When I work a 14-day variable work schedule, pursuant to the NDOC Administrative Regulation 320 and my contract, I should be compensated at my overtime rate for all hours I work that exceed 80 hours during that work period.

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5. As a NDOC Correctional Officer, I am required to be at my post at the start of my regularly scheduled shift. Upon my own information and belief, all NDOC Correctional Officers across the state of Nevada are similarly required to be at their post at the start of their respective shift.

6. Attached to this declaration as Exhibit A is a true and correct copy of NDOC Administrative Regulation 326, which states, in relevant part, that "All correctional staff will report to the shift supervisor/shift sergeant upon arrival . . . ."

7. Attached to this declaration as Exhibit B is a true and correct copy of SDCC Operational Procedure 326.03, which states the following:

1. All Staff shall report for duty fully prepared for any work assignment
  - Uniform and equipment shall be in accordance with A.R. 350
2. Staff will report to the shift supervisor in the muster room for posting of their assignment.
  - Staff will report early enough to be on their post by the beginning of their shift.
  - Staff will report in person
    - Areas of assignment or working hours do no exempt the staff from reporting for duty to the Shift Supervisor
3. All Staff shall check their respective mailboxes prior to reporting for duty.

8. Even though I am required to be at my post at the start of my regularly scheduled shift, I am not compensated for all the work activities that I perform prior to arriving at my post. Prior to proceeding to my assigned post for the day, I must report to the muster room to report to the shift sergeant/shift supervisor, receive my assignment, get debriefed as to any new developments at the facility or issues relating to my employment, check my mail box, and be checked for proper uniform attire. Depending on my assignment, I may also be required to pick up keys, radios, tear gas equipment, weapons, and handcuffs. Only after I have completed all these tasks am I able to proceed to my assigned post for the day. Given the size of the correctional facility, walking to my designated post could take me approximately 15-minutes. When I arrive at my post I typically relieve an outgoing officer and am debriefed by that officer.

1 I am not compensated for performing any of these activities prior to my regularly scheduled shift.  
 2 Upon my own information and belief, I understand that all NDOC Correctional Officers across  
 3 the state of Nevada are similarly required to perform these work activities prior to the start of  
 4 their regularly scheduled shift and are not compensated for doing so.

5 9. In addition for not being paid for the pre-shift activities described above, I'm  
 6 likewise denied compensation for engaging in post-shift activities. Even though I'm only  
 7 compensated until the end of my scheduled shift, I'm required to conduct debriefing sessions  
 8 with oncoming officers after the end of my shift, walk back to the facility's main office, and  
 9 return the various tools (*i.e.*, keys, radios, tear gas equipment, weapons, and handcuffs) that I  
 10 was required to use during the workday. I am not compensated for performing any of these  
 11 activities after my regularly scheduled shift. Upon my own information and belief, I understand  
 12 that all NDOC Correctional Officers across the state of Nevada are similarly required to perform  
 13 these work activities after the end of their regularly scheduled shift and are not compensated for  
 14 doing so.

15 10. I estimate that I have worked off-the-clock and without compensation  
 16 approximately 30 to 45 minutes each and every workday during my employment with NDOC.

17 11. Upon my own information and belief, NDOC has been failing to pay Correctional  
 18 Officers for years. I want to be paid all my wages and associated penalties, costs, and fees, in  
 19 full for having to work for free all these years.

20 I declare under the penalty of perjury under the laws of the United States of America and  
 21 the State of Nevada that the foregoing is true and correct.

22 Executed this 18 day of July, 2014, at Las Vegas, Nevada.

23  
 24   
 25 DONALD WALDEN  
 26  
 27  
 28

# EXHIBIT A

# EXHIBIT A



**NEVADA DEPARTMENT OF CORRECTIONS  
ADMINISTRATIVE REGULATION  
326**

**POSTING OF SHIFTS/OVERTIME**

**Supersedes:** AR 326 (Temporary, 05/02/10)  
**Effective Date:** 08/13/10

**AUTHORITY:** NRS 284.055; 284.155; 284.175; 284.180 NAC 284.242; 284.245; 284.250

**RESPONSIBILITY:**

Wardens/ Facility Managers are responsible to ensure there is sufficient staff on duty to safely operate their institutions and facilities.

An Associate Warden/facility manager are responsible to document attendance, management of relief factor usage by all uniformed staff, and ensure proper documentation is maintained.

**326.01 STAFFING**

**1. NORMAL OPERATIONS**

A. Normal operation staffing is utilized during the normal operations of an institution. This pattern will identify the staff required to run a specified post when all positions are utilized.

B. An Associate Warden will create a written staffing pattern identifying and prioritizing specific posts operating within the institution as either a pull position or a shut down position.

(1) A pull position is identified as a position in which the assigned officer may be pulled from that position and assigned elsewhere in the institution during their assigned shift.

(2) A shut down position is identified as a position in which the assigned officer may be pulled from his assigned post and the post closed with the officer being assigned elsewhere in the institution for their entire assigned shift.

C. Shift Sergeants reporting for their scheduled shifts will adjust the shift roster and fill all positions mandated to fulfill the minimum staffing requirements.

D. The shift sergeant will use all Sick/Annual positions first, and then use pull/shutdown positions as appropriate, in the order as listed by the institution.

E. If the minimum staffing has not been met, the on duty Shift Supervisor will contact an Associate Warden and request the minimum amount of overtime hours needed. The Associate Warden will then notify the Warden for approval of the decision/overtime approved.

F. Only when all pull positions and shutdown positions have been utilized will overtime be considered.

## 2. EMERGENCY OPERATIONS

A. Emergency operation staff is the staffing pattern that identifies posts that must meet minimal requirements for officer and inmate safety. This pattern will identify those posts that are critical for running a specific area of the institution.

B. An Associate Warden will create a written staffing pattern identifying additional specific posts within the institution either as pull or shutdown positions; this staffing pattern will prioritize these positions in the order they are to be pulled / shut down in the event of an emergency or staff shortage.

C. Staffing will also be evaluated as to the absolute minimum required to safely operate a particular shift.

D. It may be necessary to modify or cancel some activities as a result of emergency staffing. The Warden/Associate Warden will be notified of the cancellation of any activity or program.

E. Only when all pull positions and shutdown positions have been utilized only then will overtime be considered. Authorization is only granted by the Warden/Designee.

## 326.02 RELIEF FACTOR MANAGEMENT (RFM)

1. Relief Factor Management (RFM) positions are to be:

A. Used for unscheduled annual leave relief to cover greater than normal sick leave, if it is available.

B. Used for pull and shutdown posts to cover greater than expected sick leave.

2. No more annual leave will be scheduled than there are relief factor management positions available to support the requested leave without overtime.

A. Staff should request annual leave per the requirements of AR 322 Types of Leave and Leave Procedure

B. Leave requests submitted without sufficient notice will not be granted if there is no relief factor to accommodate the leave without overtime except in a case of a personal emergency.

3. To the degree possible, Lieutenants and Sergeants should not be replaced, however, these positions may be used as a pull/shutdown position if designated by the institutional staff procedure,

4. Shift rosters for each institution and facility are to be organized so the components of the relief factor can be combined to identify specific staff to occupy RFM positions.

5. Relief factor for regular days off, sick leave, annual leave, or training, will not be combined in order to create new positions.

6. Days off are assigned to the post and not the person.

### **326.03 MANAGEMENT OF OVERTIME**

1. Overtime is not guaranteed for any employee.

A. Institutional/facility requirements will determine all overtime hired.

B. All staff overtime requires the completion of DOC Form 1000, Authorization for Leave and Overtime Request Form.

C. Staff can not work more than two (2) consecutive double shifts.

D. Unless an emergency situation occurs, no staff can work than more than a 16 hour shift in a 24 hour period.

2. Assigned staff may be reassigned when an institutional need exists.

3. Employees on modified duty assignments are not authorized to work overtime.

4. Correctional officers may be used to fill Senior Correctional Officer positions on a case by case basis. However Senior Correctional Officers may not be utilized to fill a Correctional Officer position.

5. A voluntary overtime list will be established and used prior to utilizing mandatory overtime. This voluntary overtime list will be re-started when exhausted

A. No employee who calls in sick or utilizes sick leave during any given pay period will be allowed to work voluntary overtime.

B. If an employee accrues overtime during the first week of the pay period and then utilizes sick leave, that employee will not be permitted any voluntary overtime in the next pay period.

C. No employee who must provide "proof" may work voluntary overtime until this status is modified.

D. Employees who are in AWOL or LWOP status will not to be allowed to volunteer/eligible for overtime in the same pay period.

(1) If overtime is accrued during the first week of the pay period and then LWOP or AWOL is accrued, that employee will not be permitted to work voluntary overtime in the entire following pay period.

6. If overtime is required to maintain a safe and secure operation and insufficient staff voluntarily agrees to work, mandatory overtime will be initiated.

A. A list of Senior Correctional Officers, Correctional Officers, and Correctional Officer Trainees will be establish by based on least seniority in their hire date and last involuntary, i.e. mandatory, overtime date, will be established for each shift.

- B. The mandatory overtime list will be restarted once exhausted or every 45 days.
- C. Adjustments will be made when an officer is reassigned to a new shift. That officer will be added to the mandatory list according to their last mandatory date.
- D. Based on the least seniority the first time after shift bidding, staff will be selected by their last involuntary overtime date. Once completed, the employee will move to the bottom of the involuntary overtime list.
- E. All correctional staff will report to the shift supervisor/shift sergeant upon arrival to ensure their status if required to work mandatory overtime.
  - (1) If an employee is required to work mandatory overtime, that employee may be allowed to solicit a volunteer to work in his/her place.
    - (a) If a volunteer is found, the shift supervisor/shift sergeant must approve the substitution prior to the person being allowed to work.
    - (b) If the substitution is approved, the Officer originally scheduled to work the mandatory overtime will remain at the top of the mandatory overtime list until he/she actually works it.
  - (2) The employee has 1 hour to find a substitute whenever possible.

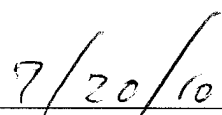
7. A written overtime tracking log must be approved by the appropriate Deputy Director.

- A. All overtime will be entered into the NSIS Computer Roster.
- B. Verification will be made that the timesheet entry is properly coded and hours are correctly entered by viewing the timesheet of the staff member.
- C. A written overtime tracking log will be utilized to ensure proper utilization of overtime and entry into the computer.

#### APPLICABILITY

- 1. This regulation requires an Operational Procedure for every institution and facility.
- 2. This regulation requires an audit.

  
\_\_\_\_\_  
Howard Skolnik, Director

  
\_\_\_\_\_  
Date

## **EXHIBIT B**

## **EXHIBIT B**



### 326.03 STAFF RESPONSIBILITY

1. All staff shall report for duty fully prepared for any work assignment.
  - Uniform and equipment shall be in accordance with A.R. 350.
2. Staff will report to the shift supervisor in the muster room for posting of their assignment.
  - Staff will report early enough to be on their post by the beginning of their shift.
  - Staff will report in person.
    - o Areas of assignment or working hours do not exempt the staff from reporting for duty to the Shift Supervisor.
3. All staff shall check their respective mailboxes prior to reporting for duty.

### 326.04 SHIFT ROSTERS

1. To efficiently utilize assigned staff, shift supervisors must plan in advance the work week, schedule and take into account changes in the workload such as, transportation, hospital coverage or parole boards.
  - Shift Supervisors must staff all mandatory positions.
  - Shift rosters will be reviewed one (1) week in advance.
    - o Final review and adjustments to shift rosters will be completed by end of shift each day.

### 326.05 CALL-INS

1. A call-in shall only be accepted by a shift sergeant or above.
2. Call-ins shall be documented in NSIS
  - Shift supervisors shall enter the appropriate leave code in NSIS.
  - The shift supervisor shall make adjustments to ensure proper staff coverage.
3. A DOC 1000 Authorization for Leave and Overtime request form shall be completed for all used leaves and overtime.

### 326.06 IDENTIFIED SHUTDOWN AND PULL POSITIONS BY SHIFT

1. Day Shift supervisors will utilize the below listed shutdown and pull positions to ensure mandatory positions are staffed prior to hiring overtime.
  - The Warden or Associate Warden of Operations shall be notified and must approve all overtime.
  - Shift supervisors should refrain from repeatedly pulling the same personnel and should take work load into consideration.
  - Day shift A, B, (0500 hrs – 1700 hrs) and C (0500 hrs – 1300 hrs) has Sixty (60) legislatively approved posts. Prior to requesting the use of overtime, the shift Supervisor must utilize all pull and shut down posts as defined below:

## **EXHIBIT 3**

## **EXHIBIT 3**

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12 *Attorneys for Plaintiffs*

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
 IN AND FOR CARSON CITY

12 GENE COLUMBUS, DAVID ECKARD,  
 13 APRIL HILL, and ANDREW MARRERO, on  
 14 behalf of themselves and all others similarly  
 15 situated,

16 Plaintiffs,

17 v.

18 THE STATE OF NEVADA, *EX REL.* ITS  
 19 NEVADA DEPARTMENT OF  
 20 CORRECTIONS, and DOES 1-50,

21 Defendant(s).

Case No.: 180C001881B

Dept. No.: II

**COLLECTIVE AND CLASS ACTION  
 COMPLAINT**

**(EXEMPT FROM ARBITRATION  
 PURSUANT TO NAR 5)**

- 1) Failure to Pay Overtime in Violation of 29 U.S.C. § 207; and
- 2) Failure to Pay Overtime in Violation of NRS 284.180.

21 COME NOW Plaintiffs GENE COLUMBUS, DAVID ECKARD, APRIL HILL, and  
 22 ANDREW MARRERO ("Plaintiffs") on behalf of themselves and all others similarly situated and  
 23 allege the following:

24 All allegations in this Complaint are based upon information and belief except for those  
 25 allegations that pertain to the Plaintiffs named herein and their counsel. Each allegation in this  
 26 Complaint either has evidentiary support or is likely to have evidentiary support after a reasonable  
 27 opportunity for further investigation and discovery.  
 28

**JURISDICTION AND VENUE**

1. This Court has original jurisdiction over both state and federal claims alleged herein. This Court has original jurisdiction over the state law claims alleged herein because the amount in controversy exceeds \$15,000.

2. This Court also has jurisdiction over the federal claims alleged herein pursuant to Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b) which states in relevant part "An action to recover [such liability] may be maintained against any employer (*including a public agency*) in any Federal *or State court* of competent jurisdiction...." (emphasis supplied).

3. Venue is proper in this Court pursuant to NRS 41.013(2).

4. The State of Nevada has waived its sovereign immunity from suit for the claims alleged herein. *See* NRS 41.031.

**PARTIES**

5. Plaintiff GENE COLUMBUS is a natural person who is and was a resident of the State of Nevada at all relevant times herein and was employed by Defendant as a non-exempt hourly correctional officer at the Northern Nevada Correctional Center ("NNCC") from on or about June 1996 to on or about November 2016, when he retired.

6. Plaintiff DAVID ECKARD is a natural person who is and was a resident of the State of Nevada at all relevant times herein and has been employed by Defendant as a non-exempt hourly correctional officer at the High Desert State Prison ("HDSP") from on or about April 2014 to the present.

7. Plaintiff APRIL HILL is a natural person who is and was a resident of the State of Nevada at all relevant times herein and has been employed by Defendant as a non-exempt hourly correctional officer at the Southern Desert Correctional Center ("SDCC") from on or about September 2016 to the present.

8. Plaintiff ANDREW MARRERO is a natural person who is and was a resident of the State of Nevada at all relevant times herein and was employed by Defendant as a non-exempt hourly correctional officer at SDCC from on or about September 2014 to on or about July 2017.

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9. Defendant STATE OF NEVADA, *EX. REL.* ITS DEPARTMENT OF CORRECTIONS (hereinafter collectively “Defendant” or “NDOC”) is a public agency subject to the provisions of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et. seq.* and is an employer entity under the Nevada Constitution, Nev. Const. Art. 15 § 16 (defining “employer” as any “entity that may employ individuals”).

10. The identity of DOES 1-50 is unknown at this time and this Complaint will be amended at such time when the identities are known to Plaintiffs. Plaintiffs are informed and believe that each Defendant sued herein as DOE is responsible in some manner for the acts, omissions, or representations alleged herein and any reference to “Defendant,” “Defendants,” or “NDOC” herein shall mean “Defendants and each of them.”

### **FACTUAL ALLEGATIONS**

#### **Background Facts Regarding Defendant’s Common Plans, Policies, and Practices of Failing to Compensate Correctional Officers for Compensable Time Worked**

11. Plaintiffs have been employed as correctional officers at various correctional facilities throughout the state of Nevada. At all times relevant herein, the State of Nevada has operated 19 correctional facilities within the State of Nevada: two (2) transitional housing units, ten (10) conservation camps, and seven (7) correctional facilities (prisons). *See* NDOC Web site: <http://doc.nv.gov/Facilities/Home/> (last visited May 3, 2018). A facilities map can be found at this same Web address. As will be set forth in more detail below, the relevant operational procedures for working employees “off the clock” apply to each of these facilities.

12. Despite having been employed at different facilities, Plaintiffs’ experiences with regard to the claims alleged herein were similar, common, and typical of all other correctional officers employed by Defendant throughout the State during the relevant time period alleged herein. Namely, Plaintiffs were hourly paid employees of Defendant. By law and by agreement, Defendant is required to pay Plaintiffs and all other similarly situated correctional officers for all hours worked. However, Plaintiffs were required to perform work activities before and after their regularly scheduled shifts for which they were not compensated. Plaintiffs were required to work at least a half-hour per shift without compensation “off-the-clock” at the agreed upon hourly rate.



1 In almost all workweeks or 80-hour two-week alternative work periods during the Plaintiffs'  
 2 employment with Defendant, the additional time worked "off the clock" was in part or completely  
 3 in excess of 40 hours a week or the 80 hours per two-week alternative variable work schedule and  
 4 thus should have been compensated at an overtime rate of one and one half the employee's regular  
 5 rate of pay, as more fully set forth hereinafter.

6 13. At almost all times (except when taking paid time off or holidays), Plaintiffs were  
 7 required to work and did work a 40 hour work week with an agreement in writing that all times  
 8 worked in excess of 40 hours would be paid at one and one half their normal regular hourly rate,  
 9 or, in the cases of an alternative variable work week schedule, were required to work and did  
 10 work, 80 hours within a two week period and with an agreement in writing that all hours worked  
 11 in excess of 80 hours in a two week period would be paid at one and one half their normal regular  
 12 hourly rate.

13 14. For all times relevant herein, Defendant maintained a system of time recording  
 14 known as NEATS ("Nevada Employee Action and Timekeeping System"). NEATS records only  
 15 the exceptions to the "scheduled" work hours worked by Plaintiffs and all members of the putative  
 16 class, as well as any workweeks in which a plaintiff or class members worked less or more than  
 17 the scheduled work times. The "scheduled" work hours are always 40 hours a week, or 80 hours  
 18 within a two-week period if the alternative variable work period has been elected, except rare  
 19 occasions where otherwise noted on the Defendant's normal records. This system of recording  
 20 time is sometimes referred to as exception time reporting, when only the hours worked the  
 21 scheduled amount are recorded for later subtraction or overtime addition for payroll purposes  
 22 from the scheduled 40 hours per week or 80 hours per two-week period. If the employee worked  
 23 not less than the "scheduled hours" in a pay period, the employer's business records kept in the  
 24 normal course would simply reflect that the employed worked his or her normal scheduled shift  
 25 of 40 hours per workweek or 80 hours per two-week period of time (except the records do not  
 26 reflect any off the clock time as stated herein).

27 15. However, Defendant did not properly count or record the time it took to perform  
 28 the work activities prior to the start and/or after the conclusion of the scheduled work times, a



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1 violation of the record keeping requirements of the FLSA, as more fully alleged herein, as well  
2 as a violation of the overtime provisions of the FLSA, and a breach of the variable alternative  
3 workweek agreement signed by Defendant and each Plaintiff and class member.

4 16. As a matter of policy system wide, Plaintiffs were only compensated for their  
5 regularly scheduled shift times when they were at their work stations. Notwithstanding that their  
6 compensation was only for their scheduled shift times when they were at their work stations,  
7 Plaintiffs and all others similarly situated NDOC correctional officers were required to perform  
8 numerous work-related activities prior to arriving at their work station and after leaving their work  
9 station without any compensation at all.

10 17. Upon arriving to the correctional facility and passing through security (which  
11 Plaintiffs do not allege to be compensable time), Plaintiffs were required to report to the  
12 supervisor or sergeant on duty to check in, receive their assignments for the day, pass a uniform  
13 inspection, and collect any and all tools that would be needed for their daily assignment (e.g.,  
14 radios, keys, weapons, tear gas, hand cuffs). Indeed, this pre-shift requirement is specifically set  
15 forth in the Nevada Department of Corrections' Administrative Regulations: "All correctional  
16 staff will report to the shift supervisor/shift sergeant upon arrival to ensure their status if required  
17 to work mandatory overtime." See <http://www.doc.nv.gov/sites/doc/files/pdf/AR326.pdf> (last  
18 visited May 3, 2018). Plaintiffs would then be required by Defendant to proceed to their  
19 designated work station, which, given the size of the correctional facilities involved, could take  
20 up to 15-minutes or more per employee per shift. Once they arrived at their designated work  
21 station, Plaintiffs were required by the employer to be and were briefed by the outgoing  
22 correctional officer. Only after the employee had received instructions and/or briefing, would the  
23 "scheduled" shift time begin. Plaintiffs were not compensated for any of these pre-shift activities.

24 18. By regulation, administrative operating procedure and in fact, Defendant required  
25 Plaintiffs and every member of the class to perform these duties pre-shift and without  
26 compensation each and every shift worked. On average, Plaintiffs estimate that they, and every  
27 member of putative class, performed upwards to 30 minutes of compensable work before their  
28 regularly scheduled shifts, each and every shift worked, for which they were not paid.

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19. Similar to their pre-shift activities, Plaintiffs and class members were also uniformly required to perform work activities without compensation on a daily basis after the end of their regularly scheduled shift. Plaintiffs would routinely have to stay past their scheduled shift to conduct the mandatory de-briefing with the oncoming correctional officer and then would have to return to the main office to return the various tools they attained for the day. Only upon returning the tools were they finally permitted to process through security (which Plaintiffs do not allege to be compensable time) and leave the facility.

20. On average, Plaintiffs estimate that they performed upwards to 15 minutes of compensable work after their regularly scheduled shifts, each and every shift worked, for which they were not paid. By regulation, administrative operating procedure and in fact, Defendant required Plaintiff and every member of the class to perform these duties post-shift and without compensation daily.

21. Plaintiffs and plaintiff class members rely (and will rely at trial) on the records maintained by the Defendant to establish the base hours worked per workweek or two-week period of time. Plaintiff and class members will then rely on just and reasonable inferences from a representative sampling of employees and expert research and opinions, such as the one attached hereto as Exhibit 1, for exact calculation of the amount of time due to be compensated at either the regular rate (if there were additional hours worked before the employee worked his "scheduled" shifts) and at time and one half time the regular rate for all overtime hours worked.

22. Upon Plaintiffs' own observations, beliefs, and understanding of the Nevada Department of Corrections' Administrative Regulations, all correctional officers in the state of Nevada were required to perform work off-the-clock. Almost all of this off-the-clock work occurred in addition to a full 40 hour or 80 hour "scheduled" hours worked. The basis for this conclusion is set forth in more detail below.

///

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**Specific Pre- and Post-Shift Activities That Were Required by Defendant and  
Performed by Plaintiffs and Class Members**

23. Defendant's own regulations specify a list of work-related tasks that must be completed before the employee is considered to be at his or her scheduled post, ready for work and finally "on the clock" for purposes of Defendant's payroll compensation purposes.

24. For example, NDOC Administrative Regulation 326 states, in relevant part, that "All correctional staff will report to the shift supervisor/shift sergeant upon arrival . . . ."

25. The operational procedures at one of the prisons states as follows:

1. All Staff shall report for duty fully prepared for any work assignment.
  - Uniform and equipment shall be in accordance with A.R. 350.
2. Staff will report to the shift supervisor in the muster room for posting of their assignment.
  - Staff will report early enough to be on their post by the beginning of their shift.
  - Staff will report in person.
    - Areas of assignment or working hours do no exempt the staff from reporting for duty to the Shift Supervisor.
3. All Staff shall check their respective mailboxes prior to reporting for duty.

26. In furtherance of these directives, high ranking supervisors enforce Defendant's policy of requiring Correctional Officers to be at their post by the start of their shift. The following is an email excerpt sent to Correctional Officers by their Lieutenant:

A few people need to be reminded. You need to arrive on your post by the start of your shift (OP 032). It is approx. 10-15-minute walk from Operations to 9/12 quad. You need to incorporate this walk in your travel to work to ensure you arrive on time.

27. In addition to the written plan and policies of Defendant that mandate the performance of pre-shift work activities without compensation, the following work tasks must be performed by Plaintiffs and class members.

28. The first work related task performed by Plaintiffs and all class members "off the clock" before their scheduled work time is called MUSTER, and is described in detail as follows:

1 a. Prior to the beginning of a correctional officers' regularly scheduled shifts,  
 2 each officer is required to report to the shift supervisor for "muster" (or "roll call") in  
 3 order to receive assignments for the day, pass a uniform inspection, and receive pertinent  
 4 information on the global status of the facility. Correctional officers indicated that they  
 5 had to partake in these pre-shift tasks every day. Muster occurred after officers passed  
 6 through security and metal detectors<sup>1</sup> but prior to the beginning of their regularly  
 7 scheduled shift. Each officer had to attend muster to receive his/her assignment and for  
 8 the express purpose of finding out the specific post the officer was assigned to for that  
 9 day. Officers were required to report to their shift supervisor because correctional officers'  
 10 assignments can change from day to day based on the needs of the institution and  
 11 supervisors would not post officers to their shift without seeing them face-to-face). Indeed,  
 12 Wardens of the various facilities have confirmed in sworn deposition testimony that this  
 13 was a requirement of correctional officers' positions.

14 b. Another stated purpose of requiring Plaintiffs and all class member to  
 15 report to Muster was for a uniform inspection by their shift supervisor. Administrative  
 16 Regulation ("AR") 350 specified the correct uniforms for officers. In fact, officers could  
 17 not proceed to their posts if they were not wearing the appropriate uniform, would be  
 18 reprimanded (including being sent home) if their uniform was not up to standards, and  
 19 had to remain in uniform until they fully exited the facility in case of an emergency or  
 20 inmate situation.

21 c. Another stated purpose of requiring Plaintiffs and all class members to  
 22 report to muster was to also give correctional officers information related to any new  
 23 developments at the facility or issues relating to officer's employment such as security  
 24 issues, lockdown situations, changes in rules, and inmate problems among other pertinent  
 25 information by their shift supervisor prior to reporting to their assigned post.

26  
 27 <sup>1</sup> Plaintiffs do *not* allege that the time it takes them to pass through the security check  
 28 point/metal detectors is compensable work time.



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29. In addition to attending Muster, whether in a group or at a common place to retrieve and review written instructions, the next work-related task performed by plaintiffs and all class members “off the clock” before their scheduled work time was called GEAR COLLECTION, and is described in detail as follows:

a. After the correctional officer has finished “muster” but prior to the beginning of his or her regularly scheduled shift, officers are required to pick up equipment and tools necessary and required to complete their daily job tasks, including but not limited to: keys, radios, weapons, mail, reports, restraints, and pepper spray. Correctional officers could not collect any tools and equipment needed for their post prior to being assigned by the shift supervisor and proceeding to their post for their regularly scheduled shift.

30. The next work-related task performed by Plaintiffs and all class members “off the clock” before their scheduled work time was called PASS DOWN and is described in detail as follows:

a. In addition to receiving a briefing by their shift supervisor during the muster process, correctional officers would also receive a briefing from the officer they were relieving when they took over a post and prior to the beginning of their regularly scheduled shift. Both of these briefings were necessary in order for the officer because the briefings are officers’ “source of [] security system for the institution” facility-wide and post-specific.

31. Correctional officers were actually trained to show up early during their time at the academy in order to complete all of these pre-shift tasks. And, if they showed up at the time their regularly scheduled shift started, their supervisors would reprimand them for not showing up early enough to complete these tasks so that they could assume their post at their regularly scheduled shift start time. In connection with a previously filed related case against Defendant, Warden Williams confirmed in deposition under oath that officers would have to get in a half hour early “to clear and do everything” and that he had seen officers “come in ten minutes to the start of their shift. And I’m scratching my head, if he [shift supervisor] assigns them to a tower or

1 something, how are they going to get to their shift on time.” *See* Exhibit 2, attached hereto,  
 2 Deposition Transcript of Warden Brian Williams, hereinafter “Williams Depo” at 133:17:22 and  
 3 134:12-17 and 136:2-4.

4 32. Because of the time it took for Plaintiffs and all class members to collect gear after  
 5 Muster, and the time it took to walk to their actual post assignments, correctional officers would  
 6 get to Muster upwards to 30 minutes before their official shift start time in order to make sure  
 7 they were present at their post prior the other officer’s end of shift/ beginning of their shift to be  
 8 briefed by that outgoing officer prior to the incoming officer’s regularly scheduled shift start time,  
 9 and in order to complete all these required work tasks, and to get the other officer out as near as  
 10 possible to the end of his or her shift.

11 33. In addition to these uncompensated pre-shift work activities, Defendant required  
 12 Plaintiffs and all class members to engage in uncompensated POST SHIFT ACTIVITIES as  
 13 follows:

14 a. At the end of correctional officers’ regularly scheduled shift, each officer  
 15 was required to provide a pass down of information to the officer who was relieving that  
 16 post. Plaintiffs and all class members could not do their jobs without these briefings and  
 17 debriefings because the briefings contained “critical safety information.” In fact, Warden  
 18 Williams specifically testified that communication and exchange of information between  
 19 officers is “key in everything we do.” Williams Depo at 121:14-17 and 122:20-21.

20 b. In addition, just because the correctional officers had been relieved  
 21 officially at the end of their shift didn’t mean Plaintiffs and all other class members were  
 22 done working without compensation. After being “officially relieved,” Plaintiffs and all  
 23 other class members had to return that same equipment and/or drop off/complete  
 24 paperwork and they still had to adhere to all rules and regulations until they exited the  
 25 gatehouse in case something happened on their way out. For instance, one officer  
 26 indicated that they were trained at the academy that they always must be ready to respond  
 27 and that correctional officers “get paid for what they might have to do.”  
 28

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1           34. Because of the time it took for Plaintiffs and all class members to debrief the  
2 incoming officer who was relieving them, return collected gear picked up at the beginning of their  
3 shift, and complete paperwork, correctional officers would spend approximately another 15  
4 minutes or more after the end of their official shift end time performing work off-the-clock.

5                   **Defendant's Scheduling Policies, Contracts of Employment for the Payment of**  
6                   **Overtime, and Hours Worked Yet Unpaid for the Named-Plaintiff/Class**  
7                   **Representatives**

8           35. Plaintiffs and similarly situated employees were all scheduled for and worked  
9 overtime hours, either over 40 hours per workweek and/or over 80 hours during the two-week  
10 work period.

11           36. There is no need for guesswork for whether overtime is owed to Plaintiffs and  
12 class members. All NDOC facilities adhere to set of uniform published policies and regulations.  
13 For example, Operational Procedure 320, which applies to all facilities and is attached hereto as  
14 Exhibit 3, defines overtime as follows:

15                   Overtime-Hours worked in excess of 8 hours in one calendar day; 40 hours  
16 in a week or an 80-hour variable work schedule within a biweekly pay  
17 period.

18           37. Administrative Regulation (AR) 320, also applicable to all facilities, attached  
19 hereto as Exhibit 4, states in relevant part:

20                   Non-exempt employees, as specified in the State Classification and  
21 Compensation Plan, shall earn overtime at the rate of time and one-half.

22           38. The Nevada Department of Corrections Variable Work Schedule constitutes an  
23 agreement to pay overtime rates after an employee works 40 hours in a week, or, if the employee  
24 elects to work an 80-hour variable (innovative) work schedule, then to pay overtime premium  
25 rates for all hours worked in excess of 80 in a two-week period. For all class members, the form  
26 states:

27                   For employees who choose and are approved for a variable workday, overtime  
28 will be considered only after working 40 hours in one week.

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39. The agreement also states that Overtime will be paid under the Nevada Revised Statute 284.180. Overtime will be considered only after working 80 hours biweekly. The overtime rate for public employees specified in NRS 284.180 “must be earned at the rate of time and one-half” their regular rate of pay.

40. Like every other member of the class, the hours worked can be determined by reference to the Defendant’s exception time reporting records, the aforementioned NEATS, and by the addition of the times worked before and after each shift “off the clock” which were not recorded by Defendant. The regular pay rate is reflected in the Defendant’s pay grade records as the rate that the Defendant has agreed to pay for all hours worked (not including time and one half for overtime premium pay). Like most public-sector agencies, Defendant has agreed to follow the federal OMB regulations, and to include holidays and sick days as hours actually worked, which are noted as exceptions on the NEATS form when applicable. Like all class members, the named Plaintiffs were required to and did sign a “Nevada Department of Corrections Variable Work Schedule Request,” an exemplar copy of which is attached hereto and marked as Exhibit 5.

41. Plaintiff **GENE COLUMBUS** worked for NDOC as a Correctional Officer at NNCC from in or around June 1996 to in or around November 2016, when he retired. His rate of pay was approximately \$29.00 per hour as of the last he day worked. During his ten-year career with NDOC, Plaintiff Columbus worked a variety of different shifts and was assigned to a variety of different job posts. For instance, he has held the following job posts and worked the following shifts dating back to 2015:

a. Beginning in May 2016, until his retirement in November 2016, he was assigned to Unit 4 and was scheduled to work a regular schedule of 5 days a week, 8 hours a day, 40 hours in a work week. He routinely worked at least 80 hours a work period (not counting the hours he worked without compensation).

b. Beginning in January 2016 through May 2016, he was assigned to Unit 4 and was scheduled to work a regular schedule of 5 days a week, 8 hours a day, 40 hours in a work week. He routinely worked at least 80 hours a work period (not counting the hours he worked without compensation).



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c. In 2015, he was assigned to Unit 2 and was scheduled to work a 14-day variable work schedule of 80 hours during that work period. He routinely worked at least 80 hours a work period (not counting the hours he worked without compensation).

d. Plaintiff Columbus spent an average of 30 to 45 minutes pre- and post-shift performing required work activities, as described above, off-the-clock and without compensation, each and every shift worked. Thus, because Defendant required Plaintiff Columbus to work up to 45 minutes of uncompensated work time each and every shift worked, at the required overtime rate of pay of one and one-half time his regular rate of pay of approximately \$43.50 ( $\$29.00 \times 1.5$ ) for .75 hours of overtime, he is owed \$32.63 for each shift worked, or \$7,830.00 ( $\$32.63 \times 240$  shifts per year) per year worked. As an example, Plaintiff Columbus worked his full schedule of 5 shifts for the workweek of January 25, 2016 through January 31, 2016 and was required to complete the pre- and post-shift work tasks described above, off-the-clock and without compensation. In that workweek, Plaintiff Columbus worked 5 eight (8) hour shifts for a total of 40 hours. Because he was not compensated for his pre- and post-shift work activities, Plaintiff Columbus worked 3.75 hours of uncompensated overtime that workweek and is owed \$163.13 ( $3.75 \times \$43.50$ ) for that workweek.

42. Plaintiff **DAVID ECKARD** has worked for NDOC as a Correctional Officer at the High Desert State Prison ("HDSP") since on or about April 2014 to the present. Plaintiff Eckard's rate of pay is approximately \$27.76 per hour. Plaintiff Eckard has worked a variety of different shifts and has been assigned to a variety of different job posts during his tenure with Defendant. For instance, he has held the following job posts and worked the following shifts dating back to 2015:

a. Since on or about January, 2018 Plaintiff Eckard has been assigned as RDO Relief and has been scheduled to work a regular schedule of 5 days a week, 8 hours a day, 40 hours in a work week. He routinely works at least 80 hours a work period (not counting the hours he worked without compensation).

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b. In 2017, he was assigned to 3AB Control and was scheduled to work a regular schedule of 5 days a week, 8 hours a day, 40 hours in a work week. He routinely worked at least 80 hours a work period (not counting the hours he worked without compensation).

c. From May 2015 through 2016, he was assigned to 3AB Floor and was scheduled to work a regular schedule of 5 days a week, 8 hours a day, 40 hours in a work week. He routinely worked at least 80 hours a work period (not counting the hours he worked without compensation).

d. Plaintiff Eckard spent an average of 45 minutes pre- and post-shift performing required work activities, as described above, off-the-clock and without compensation, each and every shift worked. Thus, because Defendant required Plaintiff Eckard to work approximately 45 minutes of uncompensated work time each and every shift worked, at the required overtime rate of pay of one and one-half time his regular rate of pay of approximately \$41.64 ( $\$27.76 \times 1.5$ ) for .75 hours of overtime, he is owed \$31.23 for each shift worked, or \$7,495.20 ( $\$31.23 \times 240$  shifts per year) per year worked. As an example, Plaintiff Eckard worked his full schedule of 10 shifts for the pay period of June 18, 2018 through July 1, 2018, and was required to complete the pre- and post-shift work tasks described above, off-the-clock and without compensation. In both workweeks, Plaintiff Eckard worked 5 eight (8) hour shifts for a total of 40 hours per workweek. At the time, Plaintiff Eckard's hourly rate was \$27.76 per hour, with an overtime rate of \$41.64. Because he was not compensated for his pre- and post-shift work activities, Plaintiff Eckard worked 3.75 hours of uncompensated overtime for each workweek and is owed \$156.15 ( $3.75 \times \$41.64$ ) for each of these workweeks.

43. Plaintiff **APRIL HILL** has worked for NDOC as a Correctional Officer at SDCC since on or about September 2016 to the present. Plaintiff Hill's rate of pay is approximately \$24.31 per hour. Plaintiff Hill has held the following job posts and worked the following shifts dating back to 2015:



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1 a. For the duration of her employment with NDOC, Plaintiff Hill has been  
2 assigned as RDO Relief and has been scheduled to work a regular schedule of 5 days a  
3 week, 8 hours a day, 40 hours in a work week. She routinely works at least 80 hours a  
4 work period (not counting the hours she worked without compensation).

5 b. Plaintiff Hill spent an average of 30 to 40 minutes pre- and post-shift  
6 performing required work activities, as described above, off-the-clock and without  
7 compensation, each and every shift worked. Thus, because Defendant required Plaintiff  
8 Hill to work up to 40 minutes of uncompensated work time each and every shift worked,  
9 at the required overtime rate of pay of one and one-half time her regular rate of pay of  
10 approximately \$36.47 (\$24.31 X 1.5) for .67 hours of overtime, she is owed \$24.31 for  
11 each shift worked, or \$5,834.40 (\$24.31 X 240 shifts per year) per year worked. As an  
12 example, Plaintiff Hill worked her full schedule of 10 shifts for the pay period of June 18,  
13 2018 through July 1, 2018, and was required to complete the pre- and post-shift work tasks  
14 described above, off-the-clock and without compensation. In both workweeks, Plaintiff  
15 Hill worked 5 eight (8) hour shifts for a total of 40 hours per workweek. At the time,  
16 Plaintiff Hill's hourly rate was \$24.31 per hour, with an overtime rate of \$36.47. Because  
17 she was not compensated for her pre- and post-shift work activities, Plaintiff Hill worked  
18 3.33 hours of uncompensated overtime for each workweek and is owed \$121.57 (3.33 X  
19 \$36.47) for each of these workweeks.

20 44. Plaintiff **Andrew Marrero** worked for NDOC as a Correctional Officer at SDCC  
21 from in or around September 2014 to in or around July 2017. Plaintiff Marrero's rate of pay was  
22 approximately \$30.00 per hour as of the last he day worked. Plaintiff Marrero worked a variety  
23 of different shifts and was assigned to a variety of different job posts during his tenure with  
24 Defendant. For instance, he held the following job posts and worked the following shifts since  
25 graduating from the academy in or around July 2015:

26 a. From January 2017 to July 2017, Plaintiff Marrero was assigned to Unit  
27 1A and was scheduled to work a regular schedule of 5 days a week, 8 hours a day, 40  
28

1 hours in a work week. He routinely worked at least 80 hours a work period (not counting  
2 the hours he worked without compensation).

3 b. From May 2016 to January 2017, he was assigned to Unit 6B and was  
4 scheduled to work a regular schedule of 5 days a week, 8 hours a day, 40 hours in a work  
5 week. He routinely worked at least 80 hours a work period (not counting the hours he  
6 worked without compensation).

7 c. From August 2015 to September 2015, and again from December 2015 to  
8 April 2016, he was assigned to work as a drill instructor at the Three Lakes Valley  
9 Conservation Camp and was scheduled to work a regular schedule of 5 days a week, 8  
10 hours a day, 40 hours in a work week. He routinely worked at least 80 hours a work period  
11 (not counting the hours he worked without compensation).

12 d. From July 2015 to August 2015, and again from October 2015 to  
13 December 2015, he was assigned to work as a relief officer and was scheduled to work a  
14 regular schedule of 5 days a week, 8 hours a day, 40 hours in a work week. He routinely  
15 worked at least 80 hours a work period (not counting the hours he worked without  
16 compensation).

17 e. Plaintiff Marrero spent an average of 35 to 45 minutes pre- and post-shift  
18 performing required work activities, as described above, off-the-clock and without  
19 compensation, each and every shift worked. Thus, because Defendant required Plaintiff  
20 Marrero to work up to 45 minutes of uncompensated work time each and every shift  
21 worked, at the required overtime rate of pay of one and one-half time his regular rate of  
22 pay of approximately \$45.00 ( $\$30.00 \times 1.5$ ) for .75 hours of overtime, he is owed \$33.75  
23 for each shift worked, or \$8,100.00 ( $\$33.75 \times 240$  shifts per year) per year worked. As an  
24 example, Plaintiff Marrero worked his full schedule of 5 shifts for the workweek of  
25 November 6, 2017 through November 12, 2017, and was required to complete the pre-  
26 and post-shift work tasks described above, off-the-clock and without compensation. In  
27 this workweek, Plaintiff Marrero worked 5 eight (8) hour shifts for a total of 40 hours per  
28 workweek. Because he was not compensated for his pre- and post-shift work activities,



1 Plaintiff Marrero worked 3.75 hours of uncompensated overtime in that workweek and is  
2 owed \$168.75 (3.75 X \$45.00) for that workweek.

### 3 COLLECTIVE AND CLASS ACTION ALLEGATIONS

4 45. Plaintiffs reallege and incorporate by this reference all the paragraphs above in this  
5 Complaint as though fully set forth herein.

6 46. Plaintiffs bring this action on behalf of themselves and all other similarly situated  
7 and typical employees as both a collective action under the FLSA and a true class action under  
8 Nevada law.

9 47. The statute of limitations under the FLSA is 3 years for willful violations.

10 48. The statute of limitations for violation of a constitutional duty under Nevada law  
11 is 2 years.

12 49. The statute of limitations for violation of a statutory obligation under Nevada law  
13 is 3 years.

14 50. The FLSA and Nevada Classes are defined as follows: **All persons who were**  
15 **employed by Defendant as correctional officers at any time during the**  
16 **applicable statute of limitations time period and who have not previously**  
17 **joined in the class recognized in *Donald Walden, Jr., et al., v. The State of***  
18 ***Nevada*, Case No.: 3:14-cv-00320-MMD-WGC.**

19 51. With regard to the conditional certification mechanism under the FLSA, Plaintiffs  
20 are similarly situated to those that they already represent and those that they further seek to  
21 represent for the following reasons, among others:

22 A. Defendant employed Plaintiffs as hourly employees who did not receive  
23 pay for all hours that Defendant suffered or permitted them to work, and did not receive  
24 overtime premium pay of one and one half their regular rate of pay for all hours worked  
25 in excess of forty (40) hours in a workweek, or 80-hour variable workweek. Plaintiffs and  
26 all opt-ins were scheduled for and did work either 40-hours per workweek or 80 hours for  
27 a two-week work period but were not compensated for the time spent performing the off  
28 the clock activities above. The time spend performing these off the clock activities was in

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1 excess of the scheduled for, and worked, 40 hours per workweek and/or 80 hours per 2-  
2 week work period.

3 B. Plaintiffs' situations are similar to those they seek to represent because  
4 Defendant failed to pay Plaintiffs and all other Class Members for all time they were  
5 required to work, including time spent performing off-the-clock activities, pursuant to a  
6 uniform policy, plan and/or practice embodied in part in the applicable administrative  
7 regulations themselves.

8 C. Common questions of fact and/or law exist whether the time spent by  
9 Plaintiffs and all other Class Members engaging in off-the-clock activities is compensable  
10 under federal law and whether Defendant failed to pay Plaintiffs and Class Members one  
11 and one-half times their regular rate for all hours worked in excess of 40 hours a week or  
12 80-hour variable workweek.

13 D. Upon information and belief, Defendant employs, and has employed, in  
14 excess of 1,000 Class Members within the applicable statute of limitations.

15 E. Plaintiffs have filed or will file their consents to sue with the Court.

16 F. Defendant has known or should have known its policies alleged herein  
17 were unlawful and that they owe employees this money, and has willfully failed to pay its  
18 employees properly. Indeed, receiving assignments, picking up tools/gear, and passing  
19 down job related information are generally understood to be compensable activities and  
20 the failure to pay for such activities prior to and after the initiation of this action represents  
21 willful misconduct on part of the Defendant. Defendant's actions or omissions giving rise  
22 to this complaint were thus not in good faith and/or were not based upon an informed,  
23 reasonable belief that Defendant's behavior was lawful.

24 52. Pursuant to the decision of the Ninth Circuit Court of Appeals in *Busk v. Integrity*  
25 *Staffing Solutions, Inc.*, 2013 U.S. App. LEXIS 7397 (9th Cir. Nev. Apr. 12, 2013), both opt-in  
26 collective and representative treatment of claims under the federal FLSA and FRCP Rule 23 Class  
27 treatment of pendant state law claims may be maintained in the same action. Therefore, FRCP  
28



1 Rule 23(b)(3) Class treatment for all non-FLSA claims alleged in this complaint is appropriate in  
2 this case for the following reasons:

3 A. The Class is Sufficiently Numerous: Upon information and belief,  
4 Defendant employs, and has employed, in excess of 1,000 Class Members within the  
5 applicable statute of limitations.

6 B. Plaintiffs' Claims are Typical to Those of Fellow Class Members: Each  
7 Class Member is and was subject to the same practices, plans, or policies as Plaintiffs—  
8 Defendant required Class Members to perform off-the-clock activities without  
9 compensation.

10 C. Common Questions of Law and Fact Exist: Common questions of law and  
11 fact exist and predominate as to Plaintiffs and the Class, including, without limitation:  
12 Whether the time spent by Plaintiffs and Class Members engaging in off-the-clock  
13 activities is compensable under Nevada law. Specifically, in addition to the allegations  
14 made above, all of the policies and procedures of NDOC facilities requiring work  
15 activities to pre- and post-shift are essentially the same. Each facility requires Correctional  
16 Officers to report to their sergeant on-duty, pre-shift, for roll call, to have their uniforms  
17 checked, to get their assignment for the day, and collect any tools they may need to  
18 perform their assignment for that day (e.g., radio, tear gas, handcuffs). After engaging in  
19 these pre-shift activities, correctional officers are then required to proceed to their  
20 assigned post to conduct a debriefing with the outgoing officer. All of this time has been,  
21 and continues to be, non-compensable pursuant to NDOC's policies, procedures, rules and  
22 regulations. At the end of the shift, correctional offices are supposed to engage in many  
23 of the same pre-shift activities, but in reverse order.

24 D. Plaintiffs are Adequate Representatives of the Class: Plaintiffs will fairly  
25 and adequately represent the interests of the Class because Plaintiffs are members of the  
26 Class, they have issues of law and fact in common with all members of the Class, and they  
27 do not have interests that are antagonistic to Class members.  
28

1 E. A Class Action is Superior/Common Claims Predominate: A class action  
 2 is superior to other available means for the fair and efficient adjudication of this  
 3 controversy, since individual joinder of all members of the Class is impractical, and  
 4 common claims of whether Plaintiffs and Class Members are entitled to compensation for  
 5 the work activities performed predominate over individual issues. Class action treatment  
 6 will permit a large number of similarly situated persons to prosecute their common claims  
 7 in a single forum simultaneously, efficiently, and without unnecessary duplication of  
 8 effort and expense. Furthermore, the expenses and burden of individualized litigation  
 9 would make it difficult or impossible for individual members of the Class to redress the  
 10 wrongs done to them, while an important public interest will be served by addressing the  
 11 matter as a class action. Individualized litigation would also present the potential for  
 12 inconsistent or contradictory judgments.

### 13 FIRST CAUSE OF ACTION

14 Failure to Pay Overtime Wages in Violation of the FLSA, 29 U.S.C. § 207

15 (On Behalf of Plaintiffs and the FLSA Class Against Defendant)

16 53. Plaintiffs reallege and incorporate by this reference all the paragraphs above in this  
 17 Complaint as though fully set forth herein.

18 54. 29 U.S.C. Section 207(a)(1) provides as follows: "Except as otherwise provided  
 19 in this section, no employer shall employ any of his employees who in any workweek is engaged  
 20 in commerce or in the production of goods for commerce, or is employed in an enterprise engaged  
 21 in commerce or in the production of goods for commerce, for a workweek longer than forty hours  
 22 unless such employee receives compensation for his employment in excess of the hours above  
 23 specified at a rate not less than one and one-half times the regular rate at which he is employed."

24 55. 29 U.S.C. Section 207(k) provides as follows:

25 No public agency shall be deemed to have violated subsection (a) of  
 26 this section with respect to the employment of any employee in fire  
 27 protection activities or any employee in law enforcement activities  
 28 (including security personnel in correctional institutions) if—



1 (1) in a work period of 28 consecutive days the employee  
2 receives for tours of duty which in the aggregate exceed the  
3 lesser of

4 (A) 216 hours, or

5 (B) the average number of hours (as determined by the  
6 Secretary pursuant to section 6(c)(3) of the Fair Labor  
7 Standards Amendments of 1974) in tours of duty of  
8 employees engaged in such activities in work periods of 28  
9 consecutive days in calendar year 1975; or

10 (2) in the case of such an employee to whom a work period of at  
11 least 7 but less than 28 days applies, in his work period the  
12 employee receives for tours of duty which in the aggregate  
13 exceed a number of hours which bears the same ratio to the  
14 number of consecutive days in his work period as 216 hours (or  
15 if lower, the number of hours referred to in clause (B) of  
16 paragraph (1)) bears to 28 days, compensation at a rate not less  
17 than one and one-half times the regular rate at which he is  
18 employed.

19 56. Once the work day has begun, all time suffered or permitted by the employer to be  
20 worked by the employee is compensable at the employee's applicable rate of pay, whether  
21 scheduled or not.

22 57. By engaging in the conduct explained above, Defendant paid Plaintiffs and Class  
23 Members \$0 for working off-the-clock.

24 58. By failing to compensate Plaintiffs and Class Members either in cash payment or  
25 compensating time off at one and one half the hours worked for the time spent engaging in off-  
26 the-clock activities identified above, Defendant failed to pay Plaintiffs and Class Members  
27 overtime for all hours worked in excess of forty (40) hours in a week in violation of 29 U.S.C.  
28 Section 207(a)(1) and/or in excess of the hours set forth in 29 U.S.C. Section 207(k).

59. Defendant has not satisfied this obligation to pay for all hours worked in excess of  
40-hour per week and/or in excess of the hours set forth in 29 U.S.C. Section 207(k) at one and  
one half the employees regular rate by the payment of money nor by the grant of compensatory  
time off as provided in 29 U.S.C. §207(o).

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60. As set forth above, the time spent performing the pre- and post-shift activities that are the subject of this action was performed after Plaintiffs and all other similarly situated individuals had worked at least 40 hours in a workweek and/or 80 hours in a 2-week work period. Therefore, the uncompensated activities in question were performed during overtime hours for which Plaintiffs and similarly situated class members were denied overtime compensation by Defendant as a result of its unlawful pay practices.

61. Defendant's unlawful conduct has been widespread, repeated, and willful. Defendant knew or should have known that its policies and practices have been unlawful and unfair. The actions complained of herein were willful and deliberate and without good cause, from the relevant time period until the date of judgment after trial. Indeed, Defendant has been on notice at least since the inception of the related earlier lawsuit in 2014 that they have not compensated Plaintiffs and Class Members for the time spent performing pre- and post-shift activities but have nothing to correct their illegal behavior.

62. Wherefore, Plaintiffs demand for themselves and for all others similarly situated, that Defendant pay Plaintiffs and all members of the Class one and one half times their regular hourly rate of pay for all hours worked in excess of forty (40) hours a week and/or in excess of the hours set forth in 29 U.S.C. Section 207(k) during the relevant time period alleged herein together with liquidated damages, attorneys' fees, costs, and interest as provided by law.

## **SECOND CAUSE OF ACTION**

### **Failure to Pay Overtime in Violation of NRS 284.180**

(On Behalf of Plaintiffs and the Nevada Class Against Defendant)

63. Plaintiffs reallege and incorporate by this reference all the paragraphs above in this Complaint as though fully set forth herein.

64. NRS 284.180 provides that employees such as Plaintiffs and members of the Class shall receive overtime pay for hours worked in excess of 40 hours in a workweek and/or 80 hours in a two-week period of time.



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65. Once the work day has begun, all time suffered or permitted by the employer to be worked by the employee is compensable at the employee's applicable rate of pay, whether scheduled or not.

66. By engaging in the conduct explained above, Defendant paid Plaintiffs and Class Members \$0 for working off-the-clock.

67. By failing to compensate Plaintiffs and Class Members for the time spent engaging in "off-the-clock" work activities as described above identified above, Defendant failed to pay Plaintiffs and Class Members overtime for all hours worked in excess of 40 hours per workweek and/or over 80 hours during the two-week work period.

68. As set forth above, the time spent performing the pre- and post-shift activities that are the subject of this action was performed after Plaintiffs and all other similarly situated individuals had worked at least 40 hours in a workweek and/or 80 hours in a 2-week work period. Therefore, the uncompensated activities in question were performed during overtime hours for which Plaintiffs and similarly situated class members were denied overtime compensation by Defendant as a result of its unlawful pay practices.

69. Wherefore, Plaintiffs demand for themselves and for all others similarly situated, that Defendant pay Plaintiffs and all members of the Class one and one half times their regular hourly rate of pay for all hours worked in excess of forty (40) hours a week and/or in excess of or 80 hours in a 2-week work period during the relevant time period alleged herein together with liquidated damages, attorneys' fees, costs, and interest as provided by law.

### **PRAYER FOR RELIEF**


Wherefore Plaintiffs, by themselves and on behalf of all Class Members, pray for relief as follows relating to their collective and class action allegations:

1. For an order conditionally certifying this action under the FLSA and providing notice to all members of the Class so they may participate in this lawsuit;
2. For an order certifying this action as a traditional class action under Nevada Rule of Civil Procedure Rule 23 for all other claims presented in this complaint;

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3. For an order appointing Plaintiffs as the Representatives of the Class and their counsel as Class Counsel;
4. For damages according to proof for overtime compensation under federal law for all hours worked over 40 per week and/or in excess of the hours set forth in 29 U.S.C. § 207(k);
5. For liquidated damages pursuant to 29 U.S.C. § 216(b);
6. For damages according to proof for overtime compensation under Nevada law for all hours worked over 40 per week and/or in excess of 80 hours for the two-week time period;
7. For interest as provided by law at the maximum legal rate;
8. For reasonable attorneys' fees authorized by statute;
9. For costs of suit incurred herein;
10. For pre-judgment and post-judgment interest, as provided by law, and
11. For such other and further relief as the Court may deem just and proper.

DATED: July 26, 2018

  
 Mark R. Thierman  
 Joshua D. Buck  
 Leah L. Jones

*Attorneys for Plaintiffs*



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## **EXHIBIT 4**

## **EXHIBIT 4**

**In the Matter Of:**

**WALDEN vs. STATE OF NEVADA**

3:14-cv-00320-LRH-WGC

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**BRIAN WILLIAMS**

*April 16, 2015*

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BRIAN WILLIAMS  
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1 relieved, that officer that they're relieving, that  
2 officer normally lets them know, hey, look, whites  
3 and blacks, they've been having some grouping up.  
4 So they'll get it word of mouth.

5 Q. So the officers kind of do, like, hey,  
6 here is what is going on; I had problems with inmate  
7 number so and so?

8 A. Right. Anything pertinent, like, cell  
9 door on Housing C22, not secure; maintenance was  
10 notified; but, you know, it's not locking, so just  
11 to let you know, you might want to have a caseworker  
12 do a housing unit change. With any pertinent  
13 information, they talk, they communicate.

14 Q. It seems like that was probably pretty  
15 critical in this line of work is to have open  
16 communication and exchange of information.

17 A. Communication is key in everything. I  
18 just met with an officer the other day who filed a  
19 grievance. And like I told him, I said, "Would it  
20 have hurt you to tell the other staff, hey, did you  
21 get approval to have that inmate out"?

22 "Yes, I did. In accordance with OP such  
23 and such, I contacted the shift supervisor, he said  
24 I could have the inmate." No more questions asked.

25 But, instead, the officer put the inmate



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1 on the wall while he's walking with the staff, sent  
2 the inmate back to the unit. The unit officer sent  
3 the inmate back out. The officer put him on the  
4 wall again, sent him back to the unit. And then he  
5 was finally directed by the sergeant. He said, no,  
6 I approve for that inmate to be out.

7 And then I told the chaplain, "Would it  
8 have hurt you to tell that officer, no, no, no;  
9 look, he's not on a call-out list, but I did get  
10 approval from the shift supervisor like I'm  
11 supposed; you can all him and verify."

12 It's done. But instead, he sent the  
13 inmate back twice. And the third time, he was  
14 allowed to come. In the meantime, the staff -- the  
15 three staff are at each other's throat. And now the  
16 officer has a meeting with the sergeant saying, hey,  
17 look, blah, blah, blah, blah, this is your OP, this  
18 is what it says. All that could have been  
19 alleviated if, no, I did this. Oh, okay, I didn't  
20 know. Communication is key in everything that we  
21 do. So --

22 Q. Again, you're on, and there's stuff going  
23 on in a particular area of housing -- you know,  
24 Housing 1 or something, and you have a correctional  
25 officer that comes on, the shift supervisor's got it

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1 morning until 1:00 in the afternoon.

2 Q. And that is the day shift?

3 A. That is the day shift. Then we have our  
4 12-hour shifts that start at 5:00 in the morning  
5 until 5:00 p.m.

6 Q. Let's just go with the eight-hour for  
7 simplicity's sake for me.

8 A. Okay.

9 Q. And then I get complicated.

10 You're on at 5:00 in the morning, so the  
11 incoming CO is expected to be at Housing 1 --

12 A. At 5:00.

13 Q. -- at 5:00, right?

14 A. Yes.

15 Q. Okay. Does the incoming officer, then --  
16 does he or she clock in to a timekeeping system?

17 A. No. I've seen them come in a half an  
18 hour early to clear and do everything. I have seen  
19 them come in ten minutes to the start of their  
20 shift. And I'm scratching my head, if he assigns  
21 them to a tower or something, how are they going to  
22 get to their shift in time.

23 So, I mean, it varies. In most staff --  
24 like, I got this one officer, I don't know how he  
25 does it, but he comes in. He comes in -- the guy



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1 comes in about ten minutes before his shift. And he  
2 comes in, okay, you're Tower 2.

3 And he gets to Tower -- he leaves that  
4 OPs building, and he is on his post before -- right  
5 at the start of his shift or a little before the  
6 start of his shift. As a matter of fact, his shift  
7 supervisor couldn't believe he got there. And so  
8 she called, and he answered the phone. So it was,  
9 like, oh, you did make it there.

10 So how do they do it, I don't know. I  
11 guess I'm getting old, can't move as fast, but --  
12 yeah, they come in between 30 minutes. I have seen  
13 them come in as short as ten minutes and go through  
14 the metal detector and check in to their post.

15 Q. Because, I mean, they're expected to be  
16 there at the time of their shift?

17 A. At the start of their shift, yes.

18 Q. And if they aren't, I mean, again, you're  
19 talking maybe kind of counseling first, like, hey,  
20 man, you got to get there on time, or is there a  
21 written warning or anything like that?

22 A. Sometimes there is a warning. Most  
23 likely it's going to be a performance card or  
24 something saying, hey, you need to get on your post,  
25 if that relieving officer complains. Like, look,

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1 A. Correct.

2 Q. So a lot of people will get there about a  
3 half hour, 20 minutes before?

4 A. Correct.

5 Q. Yeah. I lost my train of thought.

6 The outgoing officer -- I mean, you know,  
7 the incoming officer is supposed to be there at the  
8 time of their shift, but they can arrive early,  
9 right?

10 A. Some do, yes.

11 Q. And, then, does the outgoing shift  
12 officer leave whenever the officer gets there? So  
13 if they get there, let's just say five minutes  
14 before the start of their shift, does the outgoing  
15 officer wait until the end of their shift?

16 A. No. They're allowed -- once they're  
17 properly relieved, they're allowed to leave.

18 Q. Okay.

19 A. When you read our policy, it says, "once  
20 you're properly relieved." So once that officer  
21 that's coming on relieves that officer, they're  
22 pretty much free to go.

23 Q. And what policy is that?

24 A. It's either 326, 322 or 301. And there  
25 may be -- some verbiage of that may be in all three.



## **EXHIBIT 5**

## **EXHIBIT 5**

**NRS 284.091 Hearing officers: Appointment; duties.** A majority of the members of the Commission shall appoint one or more hearing officers to conduct hearings and render decisions as provided in NRS 284.376 and 284.390.

(Added to NRS by 1973, 588; A 1983, 247)

## **EXHIBIT 6**

## **EXHIBIT 6**

**NRS 284.180 Pay plan to set official rates applicable to all positions in classified service; overtime; workweek for certain firefighters; innovative workweeks; existing contracts of employment; report; payment for working on holiday.**

1. The Legislature declares that since uniform salary and wage rates and classifications are necessary for an effective and efficient personnel system, the pay plan must set the official rates applicable to all positions in the classified service, but the establishment of the pay plan in no way limits the authority of the Legislature relative to budgeted appropriations for salary and wage expenditures.

2. Credit for overtime work directed or approved by the head of an agency or the representative of the head of the agency must be earned at the rate of time and one-half, except for those employees described in NRS 284.148.

3. Except as otherwise provided in subsections 4, 6, 7 and 9, overtime is considered time worked in excess of:

- (a) Eight hours in 1 calendar day;
- (b) Eight hours in any 16-hour period; or
- (c) A 40-hour week.

4. Firefighters who choose and are approved for a 24-hour shift shall be deemed to work an average of 56 hours per week and 2,912 hours per year, regardless of the actual number of hours worked or on paid leave during any biweekly pay period. A firefighter so assigned is entitled to receive 1/26 of the firefighter's annual salary for each biweekly pay period. In addition, overtime must be considered time worked in excess of:

- (a) Twenty-four hours in one scheduled shift; or
- (b) Fifty-three hours average per week during one work period for those hours worked or on paid leave.

➔ The appointing authority shall designate annually the length of the work period to be used in determining the work schedules for such firefighters. In addition to the regular amount paid such a firefighter for the deemed average of 56 hours per week, the firefighter is entitled to payment for the hours which comprise the difference between the 56-hour average and the overtime threshold of 53 hours average at a rate which will result in the equivalent of overtime payment for those hours.

5. The Commission shall adopt regulations to carry out the provisions of subsection 4.

6. For employees who choose and are approved for a variable workday, overtime will be considered only after working 40 hours in 1 week.

7. Employees who are eligible under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq., to work a variable 80-hour work schedule within a biweekly pay period and who choose and are approved for such a work schedule will be considered eligible for overtime only after working 80 hours biweekly, except those



eligible employees who are approved for overtime in excess of one scheduled shift of 8 or more hours per day.

8. An agency may experiment with innovative workweeks upon the approval of the head of the agency and after majority consent of the affected employees. The affected employees are eligible for overtime only after working 40 hours in a workweek.

9. This section does not supersede or conflict with existing contracts of employment for employees hired to work 24 hours a day in a home setting. Any future classification in which an employee will be required to work 24 hours a day in a home setting must be approved in advance by the Commission.

10. All overtime must be approved in advance by the appointing authority or the designee of the appointing authority. No officer or employee, other than a director of a department or the chair of a board, commission or similar body, may authorize overtime for himself or herself. The chair of a board, commission or similar body must approve in advance all overtime worked by members of the board, commission or similar body.

11. The Division shall prepare and submit quarterly to the Budget Division of the Office of Finance a report regarding all overtime worked by employees of the Executive Department in the quarter. The Budget Division shall:

(a) Review the report and analyze the overtime reported; and

(b) Transmit quarterly to the State Board of Examiners the report and the analysis of the Budget Division regarding the report.

12. A state employee is entitled to his or her normal rate of pay for working on a legal holiday unless the employee is entitled to payment for overtime pursuant to this section and the regulations adopted pursuant thereto. This payment is in addition to any payment provided for by regulation for a legal holiday.

[Part 24:351:1953] — (NRS A 1971, 1061; 1975, 242; 1983, 627, 1235, 1236; 1991, 1170; 1993, 2091; 1999, 252; 2003, 1439; 2005, 322; 2011, 2887; 2017, 131)

## **EXHIBIT 7**

## **EXHIBIT 7**

**NRS 284.148 Unclassified and classified service: Persons exempt pursuant to federal Fair Labor Standards Act; determination of exempt positions by Division.**

1. An elected officer or an employee in the unclassified service who is on the personal staff of an elected officer, an appointed head of a department or division who serves at the pleasure or discretion of an elected officer or an executive, administrative or professional employee within the meaning of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq.:

(a) Must be paid on a salary basis, within a maximum amount established by law;

(b) Is not entitled to compensation for overtime; and

(c) Is not subject to disciplinary suspensions for less than 1 week.

2. An employee in the classified service who is an executive, administrative or professional employee within the meaning of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq., and who is either a head of a department, division or bureau, or a doctoral level professional:

(a) Must be paid on a salary basis;

(b) Is not entitled to compensation for overtime; and

(c) Is not subject to disciplinary suspensions for less than 1 week.

3. Unless otherwise specified by statute, the Division shall determine which positions in the classified and unclassified service are subject to the provisions of this section.

(Added to NRS by 1993, 2090; A 2003, 52)

## **EXHIBIT 8**

## **EXHIBIT 8**



Grievance Number	Grievant	Status
5908	ECKARD,DAVID	Step 1 Escalated

## Grievant Information

Name	Send Documents to External Rep
ECKARD,DAVID	Yes
Agency	Work Phone
440	7752841500
Organization	Home Phone
3762	
Location	Email
IS0010	
Title	
CORRECTIONAL OFFICER	

## Mailing Address

Mailing Address
Las Vegas, NV - United States
Contact Number

## Grievance Details

Event Date	Location
08/26/2018	HDSP
Event Time	Date Aware of Event
Grievant Submission Waiver	Agency Submission Waiver
No	No

### Categories(s)

## Compensation

### Detailed Description

### Ongoing Wage and Hour Violations:

All Correctional Officers, including me, are required to work at least a half-hour per shift "off-the-clock" performing work activities before and after their regularly scheduled shift for which they are not compensated. A detailed description of the grievance, including names of other persons involved, is provided in the attached Complaint, which Plaintiffs filed in the First Judicial District Court of the State of Nevada, in and for Carson City, on July 27, 2018.

### NRS or NAC Sections

Correctional Officers must be paid for time spent working before and after the start of their regularly scheduled shift, as more fully set forth in the attached Complaint. See e.g., 29 C.F.R. § 785.38 ("Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked.") (emphasis added); NRS 281.100(2) ("The period of daily employment mentioned in this section commences from the time the employee takes charge of any equipment of the employer . . . ).

### Proposed Resolution

Payment for all hours worked off-the-clock for GENE COLUMBUS, DAVID ECKARD, APRIL HILL, ANDREW MARRERO and all similarly situated employees.

## Details Attachment

FOR FILING - F NAL Complaint pdf
EX 1 - 11.23.15 Cohen Report pdf
EX 2 - Excerpts of B. Williams Depo pdf
EX 3 - OP 320 pdf
EX 4 - AR 320.pdf
EX 5 - Variable Work Schedule Request pdf

## Step 1 Details

Submitted to	
BEAN, JEREMY	
Submission Due Date	Submit Date
09/25/2018	08/26/2018
Response Due Date	Response Date
10/15/2018	10/12/2018
Action Due Date	Action Date
10/29/2018	10/29/2018
Grievant extension	Agency extension
Yes	Yes
Response Officer Eckard, as indicated in your grievance a lawsuit has been filed in relation to this issue. At current the courts are determining whether this is applicable as the infractions are described in a Correctional setting. At this time no judgment has been made in the case. The Nevada department of corrections is unable to answer your complaint pending a ruling in a court of law as the case is still ongoing. In addition there is no mention in this grievance of the functions or activities you have been mandated to complete prior to being in payed status and simply references receiving tools or equipment.	
NRS or NAC Sections	
Grievant Action	
Escalate to Next Step	
Grievant Comments	

Step 1 Response Attachments
No Attachments

Step 1 Grievant Attachments
No Attachments

Step 1 Event Log			
Date/Time	User	Event Type	Description
10/29/2018	deckard	Grievance Escalated by Grievant	Step 1 Grievant Response Submitted
10/12/2018	jbean	Grievance Response Submitted	Step 1 Response Submitted
10/08/2018	cleathe1	Recipient Reassignment	Reassigned from user: bwillia3 to user: jbean
10/15/2018	cleathe1	Response Due Date Extension	Grievance Response Due Date changed from 09/11/2018 to 10/15/2018
10/08/2018	cleathe1	Response Due Date Extension	Agency extension flag was set in Step 1
09/26/2018	deckard	Response Due Date Extension	Grievant extension flag was set in Step 1
08/26/2018	deckard	Grievance Submitted	Submitted at Step 1

C/O Eckard, I have read through your grievance details and your proposed resolution. The concerns you outlined in your grievance have been carefully reviewed and considered. It appears that you were given detailed and substantive responses at the previous levels; that being said I will try to skip over the semantics and re-stating the obvious. Your concerns have been submitted for review by Human Recourses and the Attorney General's office. I am certain you are aware that there is a lawsuit pending regarding similar circumstances.

## **EXHIBIT 9**

## **EXHIBIT 9**



RECOMMENDED FOR FULL-TEXT PUBLICATION  
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0207p.06

**UNITED STATES COURT OF APPEALS**

FOR THE SIXTH CIRCUIT

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IN RE: AMAZON.COM, INC., FULFILLMENT CENTER  
FAIR LABOR STANDARDS ACT (FLSA) AND WAGE AND  
HOUR LITIGATION.

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JESSE BUSK; LAURIE CASTRO; SIERRA WILLIAMS;  
MONICA WILLIAMS; VERONICA HERNANDEZ,

*Plaintiffs-Appellants,*

v.

INTEGRITY STAFFING SOLUTIONS, INC.; AMAZON.COM,  
INC.,

*Defendants-Appellees.*

Nos. 17-5784/5785

Appeal from the United States District Court  
for the Western District of Kentucky at Louisville.  
Nos. 3:14-cv-00139; 3:14-md-02504—David J. Hale, District Judge.

Argued: June 14, 2018

Decided and Filed: September 19, 2018

Before: BATCHELDER and CLAY, Circuit Judges; SARGUS, District Judge.\*

---

**COUNSEL**

**ARGUED:** Joshua D. Buck, THIERMAN BUCK LLP, Reno, Nevada, for Appellants. Rick D. Roskelley, LITTLER MENDELSON, Las Vegas, Nevada, for Appellee Integrity Staffing Solutions. Richard G. Rosenblatt, MORGAN, LEWIS & BOCKIUS, LLP, Princeton, New Jersey, for Appellee Amazon.com. **ON BRIEF:** Joshua D. Buck, Mark R. Thierman, THIERMAN BUCK LLP, Reno, Nevada, for Appellants. Rick D. Roskelley, LITTLER MENDELSON, Las Vegas, Nevada, Cory G. Walker, LITTLER MENDELSON, Phoenix,

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\*The Honorable Edmund A. Sargus, Jr., Chief United States District Judge for the Southern District of Ohio, sitting by designation.

Arizona, for Appellee Integrity Staffing Solutions. Richard G. Rosenblatt, MORGAN, LEWIS & BOCKIUS, LLP, Princeton, New Jersey, for Appellee Amazon.com.

CLAY, J., delivered the opinion of the court in which SARGUS, D.J., joined, and BATCHELDER, J., joined in part. BATCHELDER, J. (pp. 27–28), delivered a separate opinion concurring in part and dissenting in part.

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## OPINION

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CLAY, Circuit Judge. Plaintiffs in this purported class action seek compensation under Nevada and Arizona law for time spent undergoing or waiting to undergo mandatory onsite security screenings at the Amazon facilities where they worked. The district court granted summary judgment for Defendants on the grounds that time related to security checks is not compensable as “hours worked” under Nevada and Arizona labor law. Because we conclude that time spent undergoing mandatory security checks is compensable under Nevada law, we **REVERSE** the district court’s judgment with regard to the Nevada claims and **REMAND** for further proceedings. Because we conclude that the Arizona Plaintiffs have failed to satisfy Arizona’s “workweek requirement,” we **AFFIRM** the district court’s dismissal of Plaintiffs’ Arizona claims.

## BACKGROUND

### Factual Background

Defendant Integrity Staffing Solutions, Inc. (“Integrity”), provides warehouse labor services to businesses throughout the United States where hourly workers fill orders, track merchandise, and process returns. Integrity employs thousands of hourly warehouse employees like Plaintiffs at each of Defendant Amazon.com’s (“Amazon”) facilities. Some Plaintiffs in this case were hourly employees of Integrity at warehouses in Nevada and Arizona. Other Plaintiffs were directly employed by Amazon. According to Plaintiffs, “Amazon.com exercises direct control over the hours and other working conditions of all Plaintiffs and all similarly-situated hourly shift employees who are paid on the payroll of Integrity working at all Amazon.Com’s [sic] warehouse locations nationwide.” (R. 134, Third Amended Compl., PageID # 2351.)

This case concerns a security clearance policy that is enforced by both Integrity and Amazon at all Amazon locations throughout the United States. Under the policy, Plaintiffs and all other hourly paid, non-exempt employees were required to “undergo a daily security clearance check at the end of each shift to discover and/or deter employee theft of the employer’s property and to reduce inventory ‘shrinkage.’” (*Id.*) The policy worked like this: “At the end of their respective shifts, hundreds, if not thousands, of warehouse employees would walk to the timekeeping system to clock out and were then required to wait in line in order to be searched for possible warehouse items taken without permission and/or other contraband.” (*Id.* at PageID # 2352.) Plaintiffs allege that “Defendants’ policy of requiring hourly warehouse employees to undergo a thorough security clearance before being released from work and permitted to leave the employer’s property was solely for the benefit of the employers and their customers.” (*Id.* at PageID # 2351.) Plaintiffs further allege that this screening process took approximately 25 minutes each day. Plaintiffs were also required to undergo the same security clearance prior to taking their lunch breaks, thereby reducing the full thirty-minute break they were supposed to receive. Because employees were required to “clock out” before undergoing the security screening, they were not compensated for their time spent waiting in line for and then undergoing the screenings. (*Id.* at PageID # 2351, 2352.)

### **Procedural History**

In 2010, Plaintiffs filed a putative class action in the District Court of Nevada against Integrity on behalf of similarly situated employees in the Nevada warehouses for alleged violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (“FLSA”) and Nevada labor laws. The employees alleged that they were entitled to compensation under the FLSA for the time spent waiting to undergo and actually undergoing the security screenings. They also alleged that the screenings were conducted “to prevent employee theft” and thus occurred “solely for the benefit of the employers and/or their customers.” (R. 30-3, First Amended Compl., PageID # 223.)

The district court dismissed Plaintiffs’ first amended complaint for failure to state a claim, holding that the time spent waiting for and undergoing the security screenings was not compensable under the FLSA. *Busk v. Integrity Staffing Sols., Inc.*, No. 2:10-cv-01854, 2011

WL 2971265 (D. Nev. July 19, 2011). It explained that, because the screenings occurred after the regular work shift, the employees could state a claim for compensation only if the screenings were an integral and indispensable part of the principal activities they were employed to perform. The district court held that these screenings were not integral and indispensable, but instead fell into a noncompensable category of postliminary activities. As for Plaintiffs' Nevada state law claims for unpaid wages arising from the security checks and shortened meal periods, the Nevada district court found that Plaintiffs had properly asserted a private cause of action under Nev. Rev. Stat. § 608.140 but failed to allege sufficient facts to support their claim. *Id.* at \*7.

Plaintiffs appealed to the Ninth Circuit, which affirmed the dismissal of the meal-period claims but reversed as to the security-check claims. *Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525 (9th Cir. 2013). The Ninth Circuit asserted that post-shift activities that would ordinarily be classified as noncompensable postliminary activities are nevertheless compensable as integral and indispensable to an employee's principal activities if those post-shift activities are necessary to the principal work performed and done for the benefit of the employer. *Id.* at 530. Accepting as true the allegation that Integrity required the security screenings to prevent employee theft, the court concluded that the screenings were "necessary" to the employees' primary work as warehouse employees and done for Integrity's benefit. *Id.* at 531.

The case was then appealed to the Supreme Court, which held that the time related to the security checks was not compensable under the FLSA. *Integrity Staffing Solutions, Inc. v. Busk*, 135 S.Ct. 513 (2014) ("*Integrity Staffing*"). Specifically, the Court found that the security screenings were "noncompensable postliminary activities" under the Portal-to-Portal Act, 29 U.S.C. § 254(a)(2). *Id.* at 518. The Portal-to-Portal Act was enacted as an amendment to the FLSA, and it "narrowed the coverage of the [Act]" by excluding certain "preliminary" and "postliminary" activities from the FLSA's compensation requirements. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 27 (2005). *Integrity Staffing* clarified that post-shift security screenings are among those noncompensable, "postliminary" activities under federal law. 135 S. Ct. at 518.

Following the Supreme Court's reversal, the Ninth Circuit remanded the remainder of Plaintiff's state law claims to the district court. *Busk v. Integrity Staffing Sols., Inc.*, 797 F.3d



756 (9th Cir. 2015). Plaintiffs again amended their complaint, and the case was then transferred to an ongoing multidistrict litigation in the Western District of Kentucky.

Consistent with the Supreme Court's decision, Plaintiffs' third amended complaint eliminates the claims for compensation under federal law and asserts claims under Nevada and Arizona law for unpaid wages and overtime, as well as minimum wage violations. Plaintiffs asserted their claims as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of the following persons:

**Nevada Class:** All person [sic] employed by Defendants, and/or each of them, as hourly paid warehouse employees who worked for Defendant(s) within the State of Nevada at anytime [sic] within three years prior to the original filing date of the complaint in this action.

**Arizona Class:** All person [sic] employed by Defendants, and/or each of them, as hourly paid warehouse employees who worked for Defendant(s) within the State of Arizona at any time from within three years prior to the filing of the original complaint until the date of judgment after trial, and shall encompass all claims by such persons for the entire tenure of their employment as provided in A.R.S. 23-364 (G).

(R. 134, Third Amended Compl., PageID # 2353.)

The Nevada plaintiffs allege claims on behalf of themselves and the Nevada Class for failing to pay for all the hours worked (NRS § 608.016), daily and weekly overtime (NRS § 608.018), and a minimum wage claim under the Nevada Constitution (Nev. Const. art. 15, § 16). The Nevada plaintiffs seek continuation wages in the amount of 30-days of additional wages for failing to pay employees all their wages due and owing at the time of separation from employment (NRS § 608.020–.050). The Arizona plaintiffs allege claims on behalf of themselves and the Arizona Class for failing to pay regular and minimum wages (A.R.S. § 23-363). These Plaintiffs also seek continuation wages under A.R.S. § 23-353 *et seq.*

Defendants filed a motion to dismiss the claims, which the district court granted. The district court dismissed the Nevada claims on three grounds: first, there was no private right of action to assert claims under Nevada's wage-hour statutes, NRS Chapter 608; second, Nevada law incorporated the FLSA in relevant part and Plaintiffs' Nevada state claims were barred by Nevada's incorporation of the Portal-to-Portal Act and the Supreme Court's decision in *Busk*;

and third, Plaintiffs' claims for minimum wages failed because they failed to identify any workweek in which they were paid less than the minimum wage. The district court concluded the same with respect to the Arizona claims, holding that Arizona impliedly adopted the Portal-to-Portal Act and thus Plaintiffs "have not demonstrated that they are entitled to compensation under Arizona law for time spent undergoing, or waiting to undergo, security screenings." (R. 236, Order, PageID # 4702.) The court also concluded that Arizona minimum wage claims failed because Plaintiffs had failed to identify a particular workweek in which they were paid less than the minimum wage.

Plaintiffs filed a timely notice of appeal.

## DISCUSSION

### I. Standard of Review

We review the district court's grant of a motion to dismiss under Rule 12(b)(6) *de novo*. *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 599 (6th Cir. 2016). When reviewing such a grant, "we must 'accept all factual allegations as true,' construing the complaint, 'in the light most favorable to the plaintiff[s].'" *Id.* (quoting *Laborers' Local 265 Pension Fund v. iShares Trust*, 769 F.3d 399, 403 (6th Cir. 2014)) (alteration in *Puckett*). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

### II. Analysis

#### A. Nevada employees have a private right of action to pursue unpaid wage and penalty claims

The court's main basis for dismissing Plaintiffs' Nevada law claims was its legal conclusion that there is no private right of action for the recovery of unpaid wages under Nevada law. The court held that "no private right of action exists for violations of Nevada Revised Statutes §§ 608.005–.195 in the absence of a contractual claim." (R. 236, Order, PageID # 4694.)

Since briefing was completed in this case, the Nevada Supreme Court issued a decision in *Neville v. Eighth Jud. Dist. Ct.*, 406 P.3d 499 (Nev. 2017), which holds exactly the opposite. In *Neville*, the court began its opinion thus: “In this opinion, we clarify that NRS 608.140 explicitly recognizes a private cause of action for unpaid wages.” *Id.* at 500. And the court explained as follows:

Because NRS 608.016, NRS 608.018, and NRS 608.020 through NRS 608.050 do not expressly state whether an employee could privately enforce their terms, *Neville* may only pursue his claims under the statutes if a private cause of action for unpaid wages is implied. The determinative factor is always whether the Legislature intended to create a private judicial remedy. We conclude that the Legislature intended to create a private cause of action for unpaid wages pursuant to NRS 608.140. It would be absurd to think that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself. *See Bisch v. Las Vegas Metro. Police Dep’t*, 129 Nev. 328, 336, 302 P.3d 1108, 1114 (2013) (“In order to give effect to the Legislature’s intent, [this court] ha[s] a duty to consider the statute[s] within the broader statutory scheme harmoniously with one another in accordance with the general purpose of those statutes.” (internal quotation marks omitted)). The Legislature enacted NRS 608.140 to protect employees, and the legislative scheme is consistent with private causes of action for unpaid wages under NRS Chapter 608.

*Id.* at 504.

The court’s intervening decision thus decides the issue in this case: Plaintiffs *do* have a private cause of action for unpaid wages. The district court’s decision to the contrary is reversed.<sup>1</sup>

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<sup>1</sup>In its brief on appeal, Defendants anticipated a decision in *Neville* and argued that even if the Nevada Supreme Court went against them, nothing in that decision would support a private right of action for meal break claims under NRS § 608.019. However, the *Neville* decision provides no basis for distinguishing claims brought under § 608.019 from other claims brought under Chapter 608 for unpaid wages. Like claims under §§ 608.016, 608.018, and 608.020–.050, § 608.019 is also a claim for unpaid wages: if Plaintiffs were not provided a full half-hour break, there was no interruption of a “continuous period of work” under the statute, and they must be compensated for that time. Thus, we conclude that, under *Neville*, Plaintiffs have a private cause of action to enforce their rights under § 609.019; hence, Defendants’ argument fails.

## **B. Time spent undergoing security screenings is compensable under Nevada and Arizona law**

In *Integrity Staffing*, the Supreme Court held that the post-shift security screenings at issue in this case were noncompensable postliminary activities under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, as amended by the Portal-to-Portal Act, 29 U.S.C. § 251 *et seq.* 135 S. Ct. at 518–19. The main question on appeal in this case is whether *Integrity Staffing* resolves similar claims brought under Nevada and Arizona law.

“As a federal court applying state law, ‘we anticipate how the relevant state’s highest court would rule in the case and are bound by controlling decisions of that court.’” *Vance v. Amazon.com*, 852 F.3d 601, 610 (6th Cir. 2017) (quoting *In re Dow Corning Corp.*, 419 F.3d 543, 549 (6th Cir. 2005)). Neither the Nevada Supreme Court nor the Arizona Supreme Court have decided whether their states have adopted the federal Portal-to-Portal Act or whether time spent undergoing mandatory security screening is compensable under the respective states’ wage laws. Thus, since “‘the state supreme court has not yet addressed the issue,’ we render a prediction ‘by looking to all the available data.’” *Id.* (quoting *Allstate Ins. Co. v. Thrifty Rent-A-Car Sys., Inc.*, 249 F.3d 450, 454 (6th Cir. 2001)). Sources of relevant data include the decisions (or dicta) of the state’s highest court in analogous cases, pronouncements from other state courts, and regulatory guidance.

Before turning to an analysis of Nevada and Arizona law, we will first explain how the issue is decided under federal law. We will then address whether time spent undergoing security screenings is compensable under Nevada and Arizona law.

### **1. Time spent undergoing security screenings is noncompensable postliminary activity under federal law**

In *Vance*, this Court recently had occasion to explain the background of the Portal-to-Portal Act and the Supreme Court’s decision in *Integrity Staffing* as it was relevant to a case arising out of the same multidistrict litigation as the instant case. The Court explained as follows:

“Enacted in 1938, the FLSA established a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek.”



*Integrity Staffing*, 135 S.Ct. at 516. “The Act did not, however, define the key terms ‘work’ and ‘workweek.’” *Sandifer v. U.S. Steel Corp.*, — U.S. —, 134 S.Ct. 870, 875, 187 L.Ed.2d 729 (2014). Absent congressional guidance, the Supreme Court interpreted these terms broadly. *Integrity Staffing*, 135 S.Ct. at 516. “It defined ‘work’ as ‘physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.’” *Id.* (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944)). Only months after *Tennessee Coal*, the Court expanded the definition further, “clarif[ying] that ‘exertion’ was not in fact necessary for an activity to constitute ‘work’ under the FLSA,” for “an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.” *IBP*, 546 U.S. at 25, 126 S.Ct. 514 (quoting *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944)). “Readiness to serve may be hired, quite as much as service itself,” and must therefore also be compensated. *Armour*, 323 U.S. at 133, 65 S.Ct. 165.

The Court took a similar approach with “the statutory workweek,” which “include[d] all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–91, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). “That period, *Anderson* explained, encompassed time spent ‘pursuing certain preliminary activities after arriving, such as putting on aprons and overalls and removing shirts.’” *Sandifer*, 134 S.Ct. at 875 (quoting *Anderson*, 328 U.S. at 692–93, 66 S.Ct. 1187) (ellipsis and brackets omitted). Per *Anderson*, these preparatory efforts “‘are clearly work’ under the Act.” *Id.* (quoting *Anderson*, 328 U.S. at 693, 66 S.Ct. 1187).

Together, these holdings led to decisions requiring compensation for nearly every minute an employer required its employees to be on the employer’s premises, including “the time spent traveling between mine portals and underground work areas,” and “walking from timeclocks to work benches.” *Integrity Staffing*, 135 S.Ct. at 516 (citing *Tenn. Coal*, 321 U.S. at 598, 64 S.Ct. 698, and *Anderson*, 328 U.S. at 691–92, 66 S.Ct. 1187). They also “provoked a flood of litigation,” including 1,500 FLSA actions filed within six months of the Court’s ruling in *Anderson*. *Id.*

“Congress responded swiftly.” *Id.* Finding the Court’s decisions had “creat[ed] wholly unexpected liabilities” with the capacity to “bring about financial ruin of many employers,” it enacted the Portal-to-Portal Act of 1947. *Id.* at 516–17 (quoting 29 U.S.C. § 251(a)–(b)). The Act excepted two activities the Court previously deemed compensable: “walking on the employer’s premises to and from the actual place of performance of the principal activity of the employee, and activities that are ‘preliminary or postliminary’ to that principal activity.” *IBP*, 546 U.S. at 27, 126 S.Ct. 514; *see also Integrity Staffing*, 135 S.Ct. at 516–17 (detailing history). Under the Portal-to-Portal Act then, an employee’s

principal activities are compensable, while conduct he engages in before and after those activities (i.e., preliminary and postliminary acts) is not.

“[P]rincipal activity” refers to the activity “an employee is employed to perform.” *Integrity Staffing*, 135 S.Ct. at 517, 519. “[T]he term principal activity . . . embraces all activities which are an integral and indispensable part of the principal activities.” *IBP*, 546 U.S. at 29–30, 126 S.Ct. 514 (internal quotation marks and citation omitted). An activity is “integral and indispensable” to the principal activities an individual is employed to perform “if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.” *Integrity Staffing*, 135 S.Ct. at 517. In other words, an activity is integral and indispensable to the work an employee was hired to do if it is a component of that work, and he cannot complete the work without it. *Id.*

Applying these terms, the *Integrity Staffing* Court held that post-shift security screenings were neither the principal activity Amazon hired its employees to perform, nor “integral and indispensable” to that activity:

To begin with, the screenings were not the “principal activity or activities which [the] employee is employed to perform.” *Integrity Staffing* did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers.

The security screenings also were not “integral and indispensable” to the employees’ duties as warehouse workers. . . . The screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. And *Integrity Staffing* could have eliminated the screenings altogether without impairing the employees’ ability to complete their work.

*Id.* at 518 (citation omitted). The screenings were therefore “postliminary” to the employees’ principal activities and excluded from compensation pursuant to the Portal-to-Portal Act.

852 F.3d at 608–09.

Thus, Plaintiffs’ claims for compensation would fail and have failed under federal law. The question on appeal is whether they also fail under Nevada and Arizona state law.

## 2. Interpreting Statutes under Nevada and Arizona State Law

### a. Nevada

In Nevada, the first rule in construing statutes “is to give effect to the legislature’s intent.” *Salas v. Allstate Rent-A-Car, Inc.*, 14 P.3d 511, 513 (Nev. 2000) (citing *Cleghorn v. Hess*, 853 P.2d 1260, 1262 (Nev. 1993)). “In so doing, we first look to the plain language of the statute. Where the statutory language is ambiguous or otherwise does not speak to the issue before us, we will construe it according to that which ‘reason and public policy would indicate the legislature intended.’” *Id.* at 513–14 (quoting *State, Dep’t of Mtr. Vehicles v. Lovett*, 874 P.2d 1247, 1249–50 (Nev. 1994)). “In such situations, legislative intent may be ascertained by reference to the entire statutory scheme.” *Id.* at 514 (citation omitted).

“When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. This rule of [statutory] construction is applicable, however, only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent.” *Century Steel, Inc. v. State, Div. of Indus. Rel., Occupational Safety and Health Section*, 137 P.3d 1155, 1158–59 (Nev. 2006) (adopting a federal construction where the “state and federal statutes [were] nearly identical” and “the state statute [did] not reflect a legislative intent contrary to the federal statute”).

Thus, when interpreting state provisions that have analogous federal counterparts, Nevada courts look to federal law unless the state statutory language is “materially different” from or inconsistent with federal law. *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 900–01 (9th Cir. 2013); see *Terry v. Sapphire Gentlemen’s Club*, 336 P.3d 951, 955–56 (Nev. 2014) (endorsing the rule in *Rivera*). Nonetheless, the Nevada Supreme Court “has signaled its willingness to part ways with the FLSA where the language of Nevada’s statutes has so required.” *Terry*, 336 P.3d at 955–56.

**b. Arizona**

Similarly, when interpreting Arizona law, “one of the fundamental goals of statutory construction is to effectuate legislative intent.” *Canon Sch. Dist. No. 50 v. W.E.S. Const. Co.*, 869 P.2d 500, 503 (Ariz. 1994) (citing *Automatic Registering Mach. Co. v. Pima County*, 285 P. 1034, 1035 (Ariz. 1930)). “Yet, ‘[e]qually fundamental is the presumption that what the Legislature means, it will say.’” *Id.* (quoting *Padilla v. Industrial Comm’n*, 546 P.2d 1135, 1137 (Ariz. 1976)). “For this reason, [Arizona courts] have often stated that the ‘best and most reliable index of a statute’s meaning is its language,’ and where the language is plain and unambiguous, courts generally must follow the text as written.” *Id.* (quoting *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991)).

Arizona courts may look to federal interpretations for guidance where an Arizona statute is “patterned after” a federal statute and where “Arizona courts have not addressed the issue presented.” *See Rosier v. First Fin. Capital Corp.*, 889 P.2d 11, 13–14 (Ariz. Ct. App. 1994).

**3. Time spent undergoing security screenings is “work” under Nevada and Arizona law**

Plaintiffs brought claims under Nev. Rev. Stat. §§ 608.016, 608.018, 608.140, 608.020–.050, and the Nevada Constitution. They also brought claims under Ariz. Rev. Stat. § 23-363 *et seq.*, the statutory codification of the Raise the Arizona Minimum Wage for Arizonans Act, and Ariz. Rev. Stat. § 23-353 *et seq.* Each of these claims turns on whether Plaintiffs were uncompensated for some “work” they performed. *See, e.g.*, NRS § 608.016 (“An employer shall pay to the employee wages for each hour the employee works.”).

Plaintiffs contend that “[t]here has never been any dispute that the time spent undergoing the anti-theft security screening is ‘work’ under either federal or the various state wage-hour laws.” (Brief for Appellants at 12.) Defendants, however, argue that “there absolutely *has* been such a dispute throughout the entirety of the case, because time spent passing through security screening *is not work* under either federal, Nevada, or Arizona law.” (Brief for Appellees at 6 (emphasis in original).)



Thus, and perhaps unsurprisingly, the first step for this Court in determining whether time spent undergoing mandatory security screenings is compensable is to determine whether such time constitutes “work” under Nevada and Arizona state law.

**a. Nevada**

Under the Nevada Administrative Code, “hours worked” includes “all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee.” Nev. Admin. Code § 608.115(1). However, the Nevada legislature has not defined what constitutes “work.” Thus, in this instance, it is appropriate to look to the federal law for guidance. *See Rivera*, 735 F.3d 900-01; *Terry*, 336 P.3d 955–56. Under the FLSA, work is defined broadly as any activity “controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *see Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

Putting aside the Portal-to-Portal Act for a moment, time spent waiting in line and then undergoing mandatory security screenings clearly seems to fit the federal definition of “work.” The screenings surely are “required by the employer,” and Plaintiffs have alleged that the screenings are “solely for the benefit of the employers and their customers.” (R. 134, Third Amend. Compl., PageID # 2351.)

Nonetheless, Defendants put forth two arguments for why time spent undergoing mandatory security screenings is not “work” under Nevada law: (1) the Portal-to-Portal Act amended the FLSA to exclude postliminary activities from the federal definition of “work;” and (2) for an activity to be considered work, it must involve “exertion” and Plaintiffs have not alleged any exertion. We find neither argument persuasive.

First, Defendants misread what the Portal-to-Portal Act accomplished. Defendants argue that it amended the Supreme Court’s definition of “work.” (*See, e.g.*, Brief for Appellees at 12.) (“Congress had swiftly disagreed with that Supreme Court holding and clarified that the term ‘work’ in the FLSA excluded, among others, preliminary and postliminary activities.”) But that is not so.

The Portal-to-Portal Act provides, in relevant part, as follows:

[N]o employer shall be subject to any liability . . . under the Fair Labor Standards Act . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

- (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
- (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a); 29 C.F.R. § 785.50.

As we read this language, the Portal-to-Portal Act excludes certain work activities from being compensable; it does not, however, redefine the Supreme Court’s earlier definitions of “work.”<sup>2</sup> This view finds some support in the Supreme Court’s decision in *IBP, Inc.*, where it explained:

Other than its express exceptions for travel to and from the location of the employee’s “principal activity,” and for activities that are preliminary or postliminary to that principal activity, the Portal-to-Portal Act does not purport to change this Court’s earlier descriptions of the terms “work” and “workweek,” or to define the term “workday.” A regulation promulgated by the Secretary of Labor shortly after its enactment concluded that the statute had no effect on the computation of hours that are worked “within” the workday.

*IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005). This view also seems to comport with 29 C.F.R. § 785.7, which provides:

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued

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<sup>2</sup>Defendants, at least on some level, seem to recognize the intuitive appeal of this reading. Indeed, before this Court they argue that “[t]he Portal-to-Portal Act and its exclusion of what otherwise might be considered ‘work’ under federal and state law is not even implicated in this case unless and until a determination is made that the underlying activity at issue rises to the level of ‘work.’” (Brief for Appellees at 33.)

necessarily and primarily for the benefit of the employer and his business.” (*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U. S. 590 (1944)) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that “an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer.” (*Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift*, 323 U.S. 134 (1944)) The workweek ordinarily includes “all the time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed work place”. (*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)) *The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities.* See § 785.34.

29 C.F.R. § 785.7 (emphasis added).

Nothing in the Supreme Court’s decision in *Integrity Staffing* changed this definition of “work” or the recognition in *IBP, Inc.* and § 785.7 that the Portal-to-Portal Act did not change the Court’s longstanding definition of “work.” Instead, *Integrity Staffing* was solely concerned with whether undergoing security screenings fell within the Portal-to-Portal Act’s exception for “postliminary” activity; it did not opine on whether such activity constituted work. In short, the Portal-to-Portal Act excludes some “work” from its bucket of what is compensable activity, but that does not mean it is not “work.”

Second, Defendants argue that time spent waiting to undergo security screenings is not “work” because “it involves no exertion.” (Brief for Appellees at 7.) This argument is highly dubious for a number of reasons, not the least of which is that undergoing security screening clearly does involve exertion. Further, it is not at all clear that Nevada and Arizona’s definitions of “work” require “exertion” even if they incorporate the federal definition because even the federal definition no longer requires “exertion.” See 29 C.F.R. § 785.7.

Defendants cite to the Supreme Court’s decision in *Tennessee Coal*, which, in addition to providing the current definition of “work,” held that in order for an activity to be “work” it must involve “physical or mental exertion (whether burdensome or not).” 321 U.S. at 598. However,

as this Court recognized in *Vance*, “[o]nly months after *Tennessee Coal*, the Court expanded the definition further, ‘clarif[ying] that “exertion” was not in fact necessary for an activity to constitute “work” under the FLSA,’ for ‘an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.’” *Vance*, 852 F.3d at 608 (quoting *IBP, Inc.*, 546 U.S. at 25.) It may “strain the bounds of reason to argue that the Supreme Court in *Armour* somehow overruled *Tennessee Coal* (decided only 9 months earlier) without saying it was doing so,” (Brief for Appellees at 34), but on this particular point, that is precisely what the Supreme Court has recognized. See *IBP, Inc.*, 546 U.S. at 25 (explaining that “[t]he same year [as *Tennessee Coal*], in *Armour & Co. v. Wantock* . . . we clarified that ‘exertion’ was not in fact necessary for an activity to constitute ‘work’ under the FLSA.”). Thus, “Appellants completely ignore[d] this ‘physical or mental exertion’ requirement,” (Brief for Appellees at 33), because there is no such requirement.

In sum, Nevada law incorporates the federal definition of “work,” and this broad definition encompasses the type of activity at issue in this case.<sup>3</sup>

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<sup>3</sup>Before proceeding to a discussion of Arizona law and whether the Portal-to-Portal Act applies to these state claims, we can decide whether Plaintiffs state a claim under Nevada law based on their allegations that the mandatory security screenings robbed them of their full lunch time. Plaintiffs alleged that the security screenings that they were required to undergo before taking their lunch breaks resulted in them being “significantly delayed and [] unable to take a full 30-minute uninterrupted lunch period.” (R. 134, Third Amend. Compl., PageID # 2352.) Under Nevada law, “[a]n employer shall not employ an employee for a continuous period of 8 hours without permitting the employee to have a meal period of at least one-half hour.” Nev. Rev. Stat § 608.019. The law further provides that “no period of less than 30 minutes interrupts a continuous period for work for the purposes of this subsection.” *Id.* Thus, because time spent undergoing the security screenings is “work,” the Nevada plaintiffs were required to work during their lunch break; thus, they were not given an uninterrupted half-hour, and they should have been paid for their lunch.

The district court dismissed all of Plaintiffs’ Nevada wage claims on the grounds that they were noncompensable under the Portal-to-Portal Act. However, even if the Portal-to-Portal Act does apply to Nevada wage claims generally, it does not apply to Plaintiffs’ claims relating to their pre-meal security screenings. This is because “[a]s the statute’s use of the words ‘preliminary’ and ‘postliminary’ suggests, § 254(a)(2), and as our precedents make clear, the Portal-to-Portal Act of 1947 is primarily concerned with defining the beginning and end of the workday.” *Integrity Staffing*, 135 S. Ct. at 520 (Sotomayor, J., concurring) (citing *IBP, Inc.*, 546 U.S. at 34-37). On this reasoning, the Portal-to-Portal Act does not apply to claims that employees were uncompensated for time spent *during* the workday. Therefore, if undergoing security screenings is “work” under Nevada law, then the district court erred in dismissing the Nevada plaintiffs’ claims relating to their shortened meal-periods.



### **b. Arizona**

Like Nevada, Arizona also fails to define “work.” Therefore, it is again appropriate to turn to the federal law for a definition of “work.” *See Rosier*, 889 F.2d at 13–14. And, as the analysis above shows, time spent undergoing mandatory security screenings is “work” under federal law and, thus, under Arizona law. But the case under Arizona law may be even stronger.

Arizona law also provides a definition for “hours worked,” which states as follows: “‘Hours worked’ means all hours for which an employee covered under the Act is employed and required to give to the employer, including all time during which an employee is on duty or at a prescribed work place and all time the employee is suffered or permitted to work.” Ariz. Admin. Code R20-5-1202(19). “On duty,” in turn, means “time spent working or waiting that the employer controls and that the employee is not permitted to use for the employee’s own purpose.” Ariz. Admin. Code R20-5-1202(22).

Arizona’s broad definition of “hours worked” makes it even clearer than Nevada law that time spent undergoing mandatory security screenings is “work.”

## **4. Neither Nevada nor Arizona incorporate the federal Portal-to-Portal Act**

### **a. Nevada**

Upon concluding that time spent undergoing mandatory security screenings is “work” under Nevada law, the next question is whether the Nevada legislature has exempted this “work” from being deemed “compensable” under their state wage-hour statutes, as Congress did in enacting the Portal-to-Portal Act.

The district court dismissed both Plaintiffs’ Nevada statutory claims and Nevada constitutional claims on the grounds that Nevada had adopted the Portal-to-Portal Act. It concluded that Nevada had adopted the Portal-to-Portal Act because Plaintiffs were unable to “identify any Nevada law that is irreconcilable with the Portal-to-Portal Act.” (R. 236, Order PageID # 4695.) The district court reasoned that because Nevada and Arizona wage-hour statutes do not define “work,” it must turn to the federal law for a determination of what is “compensable work” and this included the Portal-to-Portal Act. But there is the error of the

district court's analysis: it conflated two independent questions, which we have tried to separate: (1) whether time spent undergoing mandatory security screenings is work, and (2) whether such time is compensable.

Plaintiffs argue that it was appropriate for the district court to look to the federal law's definition of "work," for the reasons we have given above. (Brief for Appellants at 20.) But Plaintiffs also argue that it was inappropriate for the district court to look to the Portal-to-Portal Act to decide the compensability of certain activities. We agree. Absent any affirmative indication that the Nevada legislature intended to adopt the Portal-to-Portal Act, there is no reason to assume that it did.

As mentioned above, the Portal-to-Portal Act provides as follows:

[N]o employer shall be subject to any liability . . . under the Fair Labor Standards Act . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

- (3) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
- (4) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a).

Plaintiffs argue that Nevada has not adopted "the Portal-to-Portal Act or any comparable legislation." (Brief for Appellants at 13.) Their primary piece of evidence is the absence of evidence that the Nevada legislature did so. They argue that "[t]he problem for Amazon and the District Court is that there are no 'portal-to-portal like' statutes, regulations, or constitutional amendments under Nevada and/or Arizona wage-hour law" and "[t]his fact alone should be the end of the inquiry." (*Id.* at 22–23.)

But Plaintiffs also identify several Nevada laws that they claim are “in direct conflict with the Portal-to-Portal Act.” (*Id.* at 23.) For instance, NRS § 608.016 provides that “an employer shall pay to the employee wages for each hour the employee works” and “[a]n employer shall not require an employee to work without wages during a trial or break-in period.” Pursuant to this section, Nevada’s administrative regulations further provide that “[a]n employer shall pay an employee for all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee.” Nev. Admin. Code § 608.115.

Further, the Nevada legislature expressly included references to federal regulations in multiple parts of NRS Chapter 608. *See, e.g.*, NRS § 608.060(3) (referring to 29 C.F.R. §§ 541.1, 541.2, 41.3, § 541.5, 152); NRS § 608.018(3)(f) (referring to the Motor Carrier Act of 1935); NRS § 608.0116 (29 C.F.R. § 541.302; *see also* NAC § 608.100(3)(c) (stating that the Nevada minimum wage provisions do not apply to “[a] person employed as a trainee for a period not longer than 90 days, as described the United States Department of Labor pursuant to section 6(g) of the Fair Labor Standards Act”). That the Nevada legislature expressly adopted some federal regulations indicates that its failure to adopt others was intentional. *See State Dep’t of Taxation v. DaimlerChrysler*, 119 P.3d 135, 139 (Nev. 2005) (“[O]missions of subject matters from statutory provisions are presumed to have been intentional.”).

There are two Nevada statutes or regulations that bear some resemblance to provisions in the Portal-to-Portal Act. Upon closer examination, however, they are entirely distinct. The first is NRS § 608.200, which limits the 8-hour work requirement to “time actually employed in the mine and does not include time consumed for meals or travel into or out of the actual worksite.” Nev. Rev. Stat. § 608.200. But, significantly, this provision applies only to mineworkers, and it includes no mention of “preliminary” and “postliminary” activities. The second is NAC § 608.130, which generally provides payment for travel and training but excludes time the employee spends traveling between work and home. Nev. Admin. Code § 608.130(2)(b). This regulation also omits any reference to “preliminary” and “postliminary” activities. Thus, neither of these provisions can be read to imply that the Nevada legislature intended to adopt the Portal-to-Portal Act. Indeed, if it had adopted the Act, there would be no need to pass NRS § 608.200

or for the Commissioner to issue the regulation § 608.130(2)(b) to exclude time spent traveling to or from a place of work.

Defendants make multiple references to places where Nevada wage-hour law parallels the FLSA, and they refer the Court to cases holding that Nevada courts will interpret a provision of Nevada law the same as its parallel provision in the FLSA. None of that is surprising. But this reasoning is simply irrelevant where Nevada law has no provision parallel to a particular FLSA provision.

Defendants also argue that “there is no Nevada law . . . obviating the Portal-to-Portal amendments to the FLSA.” (Brief for Appellees at 23.) True enough. But there is no reason to think such a law would be necessary. Instead, the Nevada legislature has chosen not to affirmatively adopt the law anywhere in the Nevada state code. If, at some point, the Nevada legislature decides to explicitly incorporate the Portal-to-Portal Act into its Code, it can do so.

Furthermore, despite the apocalyptic implications that Defendants seem to believe rejecting the Portal-to-Portal Act in the state of Nevada would have, both California and Washington have declined to incorporate it into their state codes and they seem to be doing fine. *See, e.g., Morillion v. Royal Packing Co.*, 995 P.2d 139 (Ca. 2000) (finding that state labor codes and wage orders “do not contain an express exemption for travel time similar to that of the Portal-to-Portal Act” and holding that “[a]bsent convincing evidence of the [Industrial Wage Commission]’s intent to adopt the federal standard of determining whether time spent traveling is compensable under state law, we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication”); *Anderson v. State, Dep’t of Soc. & Heath Servs.*, 63 P.3d 134, 136 (Wash. Ct. App. 2003) (“We are not persuaded that the Legislature intended to adopt the Portal to Portal Act; and we do not hold that it was adopted.”).

In sum, because there is no reason to believe that the Nevada legislature intended to adopt the Portal-to-Portal Act, we are reluctant to infer an entirely unsupported legislative intent.



**b. Arizona**

As for Arizona, Plaintiffs argue that it too has not “adopted the Portal-to-Portal Act or any comparable legislation.” (Brief for Appellants at 13.) The district court, however, held that “[t]he Arizona plaintiffs’ claims fail for similar reasons” as the Nevada plaintiffs, (R. 236, Order, PageID # 4699), namely, that Plaintiffs were unable to “identify any [Arizona] law that is irreconcilable with the Portal-to-Portal Act.” (*Id.* at PageID # 4695.) As with the Nevada claims, Plaintiffs’ argument is that there is no evidence that the Arizona legislature adopted the Act. Indeed, nothing in the Arizona code seems to parallel or incorporate the Portal-to-Portal Act.

Arizona law also seems inconsistent with the Portal-to-Portal Act. For instance, the Industrial Commission<sup>4</sup> has promulgated regulations that state that “no less than the minimum wage shall be paid for *all hours worked*, regardless of the frequency of payment and regardless of whether the wage is paid on an hourly, salaried, commissioned, piece rate, or any other basis.” *See* Ariz. Admin. Code R20-5-1206(A) (emphasis added). And as explained above, “hours worked” is defined under Arizona law as “all hours for which an employee covered under the Act is employed and required to give the employer, including *all time during which an employee is on duty or at a prescribed work pace and all time the employee is suffered or permitted to work.*” Ariz. Admin. Code R.20-5-1202(9) (emphasis added). And “on duty,” means “time spent working or waiting that the employer controls and that the employee is not permitted to use for the employee’s own purpose.” Ariz. Admin. Code R20-5-1202(12). Plaintiffs thus characterize the Arizona Commission’s definitions as creating something of an “‘anti’ portal-to-portal act.” (Brief for Appellants at 29.) Whether or not this is a fair characterization, the language of the regulations strongly suggests that Arizona law is more inclusive than the Portal-to-Portal Act in the types of work it compensates.

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<sup>4</sup>The Arizona Industrial Commission is the agency tasked with enforcing and implementing Arizona’s wage statute.

Defendants point to an advisory statement from the Commission as evidence that Arizona has adopted the FLSA. As cited by Defendants, that statement reads:

For purposes of enforcement and implementation of [the Arizona Wage Act], in interpreting and determining “hours worked” under this Act . . . the Industrial Commission of Arizona will be guided by *and rely upon* 29 CFR Part 785 – Hours Worked Under the Fair Labor Standards Act . . . .

(Brief for Appellees at 26 (alteration and emphasis in Appellee’s brief).) Part 785 includes subpart 785.50, which is the codification of the federal Portal-to-Portal Act. 29 C.F.R. § 785.50. But Defendants’ version of the statement omits important qualifying language. Indeed, the ellipses Defendants introduce after the word “Act” and before “the” obscure the full meaning. The unaltered statement reads as follows:

For purposes of enforcement and implementation of this Act, in interpreting and determining “hours worked” under this Act, *and where consistent with A.A.C. R20-5-1201 et seq. (Arizona Minimum Wage Act Practice and Procedure)*, the Industrial Commission of Arizona will be guided by and rely upon 29 CFR Part 785 – Hours Worked Under the Fair Labor Standards Act of 1938.

Substantive Policy Statement Regarding Interpretation of “Hours Worked” For Purposes of the Arizona Minimum Wage Act, available at <https://www.azica.gov/labor-substantive-policy-hours-worked.aspx> (last visited May 31, 2018) (emphasis added). The unaltered statement, rather than adopting the FLSA’s interpretation in its entirety, merely sets forth the same principle discussed above: namely, that Arizona, like Nevada, looks to the federal law for guidance where it has parallel provisions. Where Arizona law does not have a parallel provision, this statement is not a license to create one.

In sum, there is nothing to suggest that the Arizona legislature intended to adopt the federal Portal-to-Portal Act into its Code. As with Nevada, we refuse to read-in such a significant statute by inference or implication.

### **C. The Fair Labor Standards Act’s “workweek requirement”**

The district court dismissed Plaintiffs’ Nevada and Arizona claims for the additional reason that they “do not allege that there was a week for which they were paid less than minimum wage.” (R. 236, Order, PageID # 4698 (citing *Richardson v. Mountain Range*

*Restaurants LLC*, No. CV-14-1370-PHX-SMM, 2015 WL 1279237 (D. Ariz. March 20, 2015).) Again, the district court based its conclusion largely on the assumption that Nevada and Arizona incorporate the FLSA.

“The FLSA mandates that ‘[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce’ a statutory minimum hourly wage.” *Stein v. HHGREGG, Inc.*, 873 F.3d 523, 530 (6th Cir. 2017) (citing 29 U.S.C. § 206(a)). “In addition, if an employee works in excess of forty hours a week, the employee must ‘receive[ ] compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.’” *Id.* at 536 (quoting 29 U.S.C. § 207(a)). “The ‘regular rate’ is ‘the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed,’ and is ‘computed for the particular workweek by a mathematical computation in which hours worked are divided into straight-time earnings for such hours to obtain the statutory regular rate.’” *Id.* at 536–37 (quoting 29 C.F.R. § 779.419). “Assuming a week-long pay period, the minimum wage requirement is generally met when an employee’s total compensation for the week divided by the total number of hours worked equals or exceeds the required hourly minimum wage, and the overtime requirements are met where total compensation for hours worked in excess of the first forty hours equals or exceeds one and one-half times the minimum wage.” *Id.* at 537 (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n.16 (1942); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960)).

Thus, under federal law, Plaintiffs would be required to identify a particular workweek in which, taking the average rate, they received less than the minimum wage per hour. Plaintiffs argue that Nevada and Arizona law does not calculate the wage requirement in the same way, but that, instead, they only require a plaintiff to allege an hour of work for which she received less than the statutory minimum wage. We agree that there is no basis for concluding that Nevada incorporates the federal workweek requirement. However, we also conclude that Arizona does have an analogous requirement that bars Plaintiffs’ claims for minimum wage violations under Arizona law.

### 1. Nevada Law

The district court held that Plaintiffs' Nevada minimum-wage claims failed for the additional reason that "[u]nder the FLSA, 'the workweek as a whole, not each individual hour within the workweek, determines whether an employer has complied with' the minimum-wage requirement; 'no minimum wage violation occurs so long as the employer's total wage paid to an employee in any given workweek divided by the total hours worked in the workweek equals or exceeds the minimum wage rate.'" (R. 236, Order, PageID # 4697 (quoting *Richardson*, 2015 WL 1279237, at \*13–14).) The district court rejected Plaintiffs' argument there was a relevant difference between FLSA and Nevada law.

But there is no basis for the conclusion that Nevada has adopted the FLSA's workweek requirement. Indeed, Nevada's statutes would seem to be inconsistent with such a requirement. NRS § 608.016, for example, provides that an employee must be paid "wages of each *hour* the employee works." Nev. Rev. Stat. § 608.016 (emphasis added). Or Nevada's overtime statute, NRS § 608.018(1)(b), provides that an employer shall pay 1 ½ times an employee's regular wage whenever an employee works "[m]ore than 8 hours in any workday." Nev. Rev. Stat. § 608.018. Further, although Nevada regulations require an employer to "pay an amount that is at least equal to the minimum wage when the amount paid to the employee in a pay period is divided by the number of hours worked by the employee during the pay period," which looks like the FLSA standard, that section explicitly applies only to employees paid "by salary, piece rate or any other wage rate *except for a wage rate based on an hour of time*." Nev. Admin. Code § 608.115(2). The import of § 608.115(2) is clearly that only the minimum wages of *non-hourly* paid employees may be calculated on a per-pay-period basis to determine whether there is a minimum wage violation. Such a regulation is completely inconsistent with the FLSA's workweek requirement.

The cases cited by Defendant for the proposition that Nevada incorporates the federal workweek requirement are not availing. For instance, *Levert v. Trump Ruffin Tower I, LLC*, No. 2:14-cv-01009-RCJ-CWH, (D. Nev. Jan. 9, 2015), actually does not address claims brought under Nevada law. Instead, it holds that Plaintiffs could not bring their FLSA claims because they failed to satisfy the workweek requirement, and then it declined to exercise supplemental



jurisdiction over the Nevada claims. *Id.* at \*5. It is not surprising that one needs to satisfy the FLSA's requirements to bring an FLSA claim, but that is hardly relevant here. In *Johnson v. Pink Spot Vapors, Inc.*, No. 2:14-CV-1960 JCM (GWF), 2015 WL 433503 (D. Nev. Feb. 3, 2015), another unpublished district court decision, the court dismissed the plaintiff's FLSA claims for failing to satisfy the workweek pleading requirement and then found that "its analysis of plaintiffs' FLSA claims [was] also applicable" to the plaintiff's state claims. *Id.* at \*6. Although this decision nominally supports Defendants' argument, the district court did not give any explanation as to why the FLSA's workweek requirement applied to Nevada state claims.

On balance, we conclude that there is insufficient reason to hold that Nevada adopted the federal workweek requirement.

## 2. Arizona Law

As for the Arizona plaintiffs, however, we conclude that Arizona does apply a "workweek requirement" analogous to that provided by the FLSA.<sup>5</sup> The district court noted that there was a "dearth of precedent" on whether Arizona adopted the federal workweek standard. (R. 236, Order, PageID # 4701.) However, the regulation is clear:

(B) If the combined wages of an employee are less than the applicable minimum wage for a work week, the employer shall pay monetary compensation already earned, and no less than the difference between the amounts earned and the minimum wage as required under the Act.

(C) The workweek *is the basis for determining an employee's hourly wage*. Upon hire, an employer shall advise the employee of the employee's designated workweek. Once established, an employer shall not change or manipulate an employee's workweek to evade the requirements of the act.

Ariz. Admin. Code R20-5-1206 (emphasis added).

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<sup>5</sup>Additionally, the district court dismissed the Arizona plaintiffs' claims for the recovery of overtime pay under Arizona law on the grounds that Arizona provides no mechanism for the recovery of overtime pay. (R. 236, Order, PageID # 4699) (citing *Reyes v. Lafarga*, No. CV-11-1998-PHX-SMM, 2014 WL 5431172 (D. Ariz. Nov. 20, 2013) ("Arizona does not have an overtime law; consequently, the only overtime protections for Arizonan employees come from the FLSA."). And Plaintiffs have failed to address this issue in their briefs on appeal. Therefore, they have forfeited their claims for overtime pay under Arizona law.

Guidance from the Arizona Industrial Commission is also unhelpful to the Arizona plaintiffs. On its website answering the question, “Is an employer subject to Arizona’s minimum wage laws required to pay at least minimum wage for all hours worked?,” the Commissioner responds as follows:

Yes. Minimum wage shall be paid for all hours worked regardless of the frequency of payment *and regardless of whether the wage is paid on an hourly, salaried, commissioner, piece rate, or any other basis.* If in any *workweek* the *combined wages* of an employee are less than the applicable minimum wage, the employer shall pay, in addition to sums already earned, no less than the difference between the amounts earned and the minimum wage.

Industrial Commission of Arizona, Frequently Asked Questions, available at: <https://www.azica.gov/frequently-asked-questions-about-wage-and-earned-paid-sick-time-laws> (last visited May 31, 2018) (emphasis added).

Thus, because the Arizona plaintiffs have failed to allege a workweek in which they failed to receive the minimum wage, they have failed to plead a violation of Arizona minimum wage law.

## CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court’s dismissal of Plaintiffs’ Arizona claims and **REVERSE** the district court’s judgment with regard to the Nevada claims in part and **REMAND** for further proceedings consistent with the opinion of this court.

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**CONCURRING IN PART AND DISSENTING IN PART**

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ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part. “As a federal court applying state law, we anticipate how the . . . state’s highest court would rule in the case and . . . [i]f [that] court has not yet addressed the issue, . . . render a prediction by looking to all the available data.” *Vance v. Amazon.com*, 852 F.3d 601, 610 (6th Cir. 2017) (quotation marks and citations omitted). In this case, I would expect the Nevada Supreme Court to find that Nevada’s wage-and-hour statutes do not differ materially from the FLSA, so they implicitly incorporate the Portal-to-Portal Act’s exclusions, and therefore time spent undergoing security checks is not compensable. Because the majority sees this differently, I must respectfully dissent from its analysis of the Nevada-law claims. I otherwise concur in the judgment.

In deciding wage-and-hour issues, Nevada courts look to the FLSA unless Nevada’s statutory language is materially different from or inconsistent with it. *Terry v. Sapphire Gentlemen’s Club*, 336 P.3d 951, 955-56 (Nev. 2014); *id.* at 958 (harmonizing a state minimum wage law with the FLSA because “the [Nevada] Legislature has not clearly signaled its intent . . . [to] deviate from the federally set course”). To be sure, the Nevada Supreme Court “has signaled its willingness to part ways with the FLSA where the language of Nevada’s statutes has so required,” *id.* at 956, but it appears to limit that willingness to situations in which it finds “substantive reason to break with the federal courts,” *id.* at 957. I find no such reason here.

In *Csomos v. Venetian Casino Resort, LLC*, 381 P.3d 605, \*3 (Nev. 2012) (Table), the Nevada Supreme Court found that NRS § 608.018 tracks the FLSA, and has since 2005, because, in amending the provision, the Nevada Legislature expressly intended to “mirror federal law”; citing to comments at the bill’s public hearing in 2005 (including “comments from the [Nevada] Labor Commissioner that the exceptions under NRS 608.018 generally track the exceptions that are in the Fair Labor Standards Act”), a Nevada Attorney General Opinion, and further comments during public hearing on a subsequent amendment in 2009. Thus, as the *Csomos* Court put it, NRS § 608.018’s “legislative history demonstrates that, although the 2005-2009

version of the statute [wa]s not as clearly worded as the [subsequent] version, the Nevada legislature intended [its overtime law] to track federal law beginning in 2005.” *Id.*

Also, in *Rite of Passage v. Nevada Department of Business and Industry*, No. 66388, 2015 WL 9484735, at \*1 (Nev. Dec. 23, 2015), the Nevada Supreme Court considered the meaning of the term “work” in NRS § 608.016 and began by citing *Terry*, 336 P.3d at 955-56, for the proposition that, because “Nevada law provides little guidance on this issue, we turn to the federal courts’ interpretation of hours worked under the [FLSA].” Consequently, the Nevada Supreme Court decided the meaning of “work” based on the FLSA and federal case law. *Id.*

I recognize that, pursuant to Nevada’s Rules of Court, unpublished Nevada Supreme Court opinions do not establish mandatory precedent, Nev. R. App. P. 36(2), and that a party could not even cite *Csomos* or *Rite of Passage* for its persuasive value, *id.* at 36(3). But given that this court is not a “party,” and therefore not strictly subject to that limitation, and that our peculiar task is to anticipate or predict the Nevada Supreme Court’s opinion “by looking to all the available data,” *see Vance*, 852 F.3d at 610, these cases—or at least the underlying support and reasoning therein, even without their explicit holdings—are certainly informative. Regardless, even ignoring them, *Terry* is likely sufficient on its own to establish that the Nevada Supreme Court would follow the FLSA on this issue rather than differentiate it.

For these reasons, I respectfully dissent from the majority’s decision as to the Nevada law claims and would instead affirm the judgment of the district court in its entirety.



# **EXHIBIT B**

EMC Decision No. 02-21

# **EXHIBIT B**

BEFORE THE STATE OF NEVADA  
EMPLOYEE-MANAGEMENT COMMITTEE

In re: Grievance of David Eckard,

**Decision # 02-21**

Grievance #5908

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND DECISION**

This matter came on for hearing before the Employee-Management Committee<sup>1</sup> (“EMC”) on February 4, 2021 pursuant to NAC 284.695 and NAC 284.6955, regarding Grievance No. 5908, filed by State of Nevada, Department of Corrections (“NDOC”) Correctional Officer David Eckard (“Grievant” or “Officer Eckard”). Officer Eckard’s grievance was heard simultaneously with NDOC Officer Jesse Haines (“Officer Haines”) Grievance Nos. 6050 and 6123. Officers Haines and Eckard were represented by Josh Hendrickson, Esq. The agency-employer, the State of Nevada, Department of Corrections (“NDOC”), was represented by State of Nevada, Office of the Attorney General Deputies Attorney General (“DAG”) Gerald Tan and Scott Husbands.

Associate Warden Robert Hartman (“A.W. Hartman”), Associate Warden Jeremy Bean (“A.W. Bean”), Officer Haines and Office Eckard was sworn in and testified at the hearing. There were no objections to the exhibits.

**STATEMENT OF THE CASE**

Officer Eckard testified that he was a correctional officer who had worked at High Desert State Prison (“HDSP”) for 7 years. Officer Eckard further testified that he was currently working a straight 40-hour shift, and had last worked a variable shift during 2018, which he had worked for one year.

Officer Eckard indicated that his daily shift generally started when he reach his post (assigned duty location), but before reaching his post had to go through the muster process of checking in with the supervisor to get assigned locations and perform a uniform inspection. Officer Eckard stated that he did not start to receive payment until he was at his post at the scheduled start time of his shift.

<sup>1</sup> The Committee members present representing a quorum were: Pauline Beigel (NDOT), who chaired the meeting; Jennifer Bauer (SPCSA), Sherri Thompson (DETR) and Stephanie Parker (UNR). Counsel for the EMC, Senior Deputy Attorney General David Gardner, Breece Flores, EMC Coordinator in the North, and Ivory Wright, EMC Administrative Clerk for Southern Nevada were also present.

1 Officer Eckard testified that he arrived at his work premises approximately 30 minutes before his  
2 shift started, and that the first thing he did when arriving at work was to check in with the supervisor  
3 performing muster check in, which was performed before passing through security, and that muster was  
4 performed in the gatehouse. This involved checking in with the supervisor who performed uniform  
5 inspection and assigned duty locations for the day. Officers might also receive a briefing of what had  
6 happened during the day at muster, such as incidents that happened on the yard. The briefing sometimes  
7 might concern potential safety issues, according to Officer Eckard. Officer Eckard also testified that if  
8 an officer were assigned to search and escort the officer would be assigned gear, and would have to check  
9 in with operations to get pepper spray, radio and keys. The officers would then go to the search and  
10 escort office.

11 Officer Eckard indicated that as he was not in search and escort, after muster he would go to his  
12 assigned duty location, which could vary if his post changed. Officer Eckard explained that a post he  
13 had held last year, sick and annual, involved covering for any officer off for sick or annual leave. Thus,  
14 according to Officer Eckard, he could have ended up at any post in HDSP.

15 Once he arrived at his post, Officer Eckard stated that the first thing he did was receive a briefing,  
16 which concerned what went on that day or any incidents or issues, from the officers leaving the post, and  
17 picked up his radio and keys from the unit officer. Officer Eckard indicated that the briefing was to allow  
18 the oncoming officer to man the post safely. Then, according to Officer Eckard, the arriving officer  
19 assumed the post and shift.

20 For the actions described, such as picking up keys and receiving the briefing, Officer Eckard  
21 stated that he was not paid for any of the time spent performing those actions, and that completing those  
22 tasks could take approximately 20 minutes each morning, depending on where the officer was assigned,  
23 with an average time of 10-15 minutes.

24 Following the end of shift, Officer Eckard testified that the officers were required to provide a  
25 pass-down of information, and that one of the officers at the briefing would be doing so off the clock.  
26 Following the pass down according to Officer Eckard, he walked back through the yard to the front of  
27 the facility, and that this averaged about 15 minutes one way. Officer Eckard further testified that if an  
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1 officer saw any incidents on the yard they were required to respond, and so would be considered on duty  
2 if any incident arose.

3 Officer Eckard stated that equipment picked up at the start of the day was returned at the end of  
4 the day, and that these activities took about 10 minutes to complete at the end of his regularly scheduled  
5 shift. Officer Eckard testified that he spent on average approximately 30 minutes performing work off  
6 the clock for which he was not compensated. Officer Eckard stated that he had never requested pay for  
7 that time because it was his understanding that NDOC policy would not allow payment for that time, but  
8 that he had filed this grievance in order to be paid for that time.

9 Upon cross examination, Officer Eckard testified that he had never submitted a timesheet or made  
10 a formal request to be paid for overtime for the time in question. Officer Eckard stated that in the past  
11 he had only been paid overtime if he had been relieved late, and that he had been paid this time by  
12 submitting a Form DOC 1000.

13 Officer Haines testified that he worked at Northern Nevada Correctional Center ("NNCC") for  
14 over 6 years. Officer Haines stated that he had worked 5 days a week, 8 hours a day, and had worked  
15 that schedule for 4 or 5 years. Officer Haynes testified that it was his understanding that he was paid  
16 from the time of his scheduled shift, as opposed to the time he spent completing other actual activities.

17 Officer Haines stated that he was required to be at his post at the start of his shift, and that he was  
18 required to complete all of the activities referenced by Officer Eckard prior to the start of his shift, such  
19 as muster and roll call, and complete the activities at the end of his shift. With respect to the briefing,  
20 Officer Haines stated that it was definitely beneficial to know certain information, as he might choose to  
21 add certain equipment to his duty belt which he might not normally carry.

22 Officer Haines also stated that if an officer were on search and escort the officer would be required  
23 to collect keys, radio and possibly other equipment. Officer Haines further stated that after he collected  
24 any assigned gear he went to his assigned post, and that while crossing the yard the officers were required  
25 to respond to any incidents that might occur. Once at his post, Officer Haines was required to go through  
26 a pass down with the officer he was relieving, and that he was not paid for those activities.

27 Officer Haines also had a pass down at the end of the shift, and that there was no overlapping of  
28 the scheduled shifts that would allow both offices to be paid, so one officer was doing the pass down off



1 the clock at every shift. Following the pass down Officer Haines crossed the yard back to the front, and  
2 that while crossing he would need to respond to any incidents in the yard, which he said has happened  
3 with him. Officer Haines also stated that he returned any equipment he had picked up before leaving the  
4 facility.

5 Officer Haines said that he had put these activities on his timesheet two years ago but that NDOC  
6 just changed his timesheet, and that it was his understanding that it was NDOC policy not to pay for that  
7 time. Officer Haines further indicated that one of the reasons he filed his instant grievances was to be  
8 paid for this time. Officer Haines stated that he spent approximately 30 minutes performing the activities  
9 in question beginning when he showed up for muster until the start of his shift, and then after his shift,  
10 until all equipment was returned and all paperwork was finished.

11 Officer Haines testified that his current assigned post was for Unit 8, and that there were different  
12 posts in that unit, as it was a building. Officer Haynes said that the building was large, two stories high  
13 and was about 150 yards long. Officer Haines stated that in 2020 he had been assigned to Unit 6, but  
14 that it was shut down so he was put in a COVID quarantine unit, which was Unit 5. Officer Haynes was  
15 also assigned to offhand units during 2020. Officer Haines testified that if he were assigned a different  
16 post than Unit 8 he would still go through the gatehouse to get his shift from the supervisor. Officer  
17 Haynes said that he has requested overtime from NDOC other than the instant grievance.

18 Member Parker asked both Grievants if the activities were codified in policy within NDOC for  
19 the pre- and post-activities described. Officer Eckard stated that he remembered there was a procedure  
20 for muster that included compensation for the work-related duties, though it had been removed from the  
21 operational procedures. Officer Haines stated that the activities were codified in AR 301, he thought,  
22 where there was a paragraph that said that an officer had to be at his or her unit in time for the  
23 briefing/debriefing. Attorney Hendrickson also stated that at least several of the activities testified to  
24 were codified in the AR's. The activity which Grievants were contending was the principal activity was  
25 muster, and specifically concerning that activity was AR 326, which read all correctional staff would  
26 report to the shift sergeant upon arrival to ensure their status if required to work mandatory overtime, and  
27 that there was AR 350, which provided for the uniform inspection. Attorney Hendrickson stated that  
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1 beyond the AR's it was his understanding that the correctional officers were instructed that these  
2 activities were required, and it was a matter of policy that they be performed on a daily basis.

3 Member Thompson stated that the back of Exhibit F of Officer Eckard's exhibits had the  
4 applicable AR's. Member Parker asked Officer Haines about his testimony where he stated there had  
5 been instances he had to respond to that occurred after his shift, and asked if he was paid overtime for  
6 those responses. Officer Haines replied that he was not paid overtime for the response. Chair Beigel  
7 asked Officer Haines if he had requested to be paid for that incident, to which he responded that he did  
8 not think so because he was coming into shift.

9 Officer Eckard was asked the same question as Officer Haines concerning pre or post shift  
10 response to incidents, and he responded that he had not had any incidents that he had to respond to post  
11 or pre shift.

12 Member Bauer asked Officer Eckard if NDOC were to shift the pre-activity requirements to being  
13 completed upon arrival at assigned post, would there be a detriment to safety and security? Officer  
14 Eckard said it was just NDOC policy that the supervisor was required to check in the officers at the  
15 gatehouse prior to the beginning of their shift and arrival at posts so that the officers could receive their  
16 assigned duty location for the day and pick up equipment if necessary.

17 Officer Haines responded to Member Bauer's question that with respect to the muster, and that if  
18 the officers did not know where they were going they needed to check in first. Officer Haines also said  
19 that the officers needed to know where they would be assigned in order to pick up necessary equipment.  
20 Officer Haines further stated that when the officers check in with a supervisor it let them know who was  
21 on the yard in case of a riot, so that staff could be accounted for.

22 Attorney Hendrickson asked Grievants if the information they received during muster was  
23 information that they needed to know at that time before they crossed the yard so that the officers could  
24 cross the yard safely and maintain the security of the inmates in the facility during transit over to the their  
25 assigned posts, to which Officer Eckard responded yes. Officer Haines responded that it was important  
26 to know if the yard was on a complete lockdown because there was a staff assault at a different facility  
27 and that whole facility had been placed on lockdown, and that the information received at muster was  
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1 necessary for the safety and security of himself, fellow officers and inmates. Officer Haines also stated  
2 that his underlying concern was that he be paid for the activities regardless of where they occurred.

3 Member Thompson asked what was the start date from which the officers wanted to be paid from?  
4 Attorney Hendrickson responded that the instant grievances were similar to previous grievances heard  
5 by the EMC where the EMC had decided to go back and award 20 days before the date of the filing of  
6 the grievance, which Attorney Hendrickson thought was the minimum, and that in actuality, per the state  
7 law that provided for relief, Grievants should be able to recover back pay back to a date of three years  
8 before the filing of their grievance, and that there was nothing in the law that would prevent pay from  
9 being awarded for that entire period or that limited payment to those 20 days. Attorney Hendrickson also  
10 argued that the nature of the violation was one that was continuous and ongoing, and that generally when  
11 you had a continuous violation it was backdated to the start of the violation as far as the statute of  
12 limitation reaches, which was three years, and that was what Grievants were seeking in this situation.  
13 Attorney Hendrickson clarified in response to Member Thompson's question that the start date from  
14 which Grievants were seeking damages was August 26, 2018, the date on which the grievances were  
15 filed.

16 A.W Bean testified that he was currently employed at High Desert State Prison ("HDSP"), and  
17 had held his position since December 2017. A.W. Bean stated that he had worked for NDOC since April  
18 2001. A.W. Bean described the organizational structure at HDSP as it related to chain of command.  
19 There were several ranks in NDOC's chain of command. The chain started with the correctional officer  
20 trainee, who had not been through pre-service training, but who were still considered correctional officers  
21 in a probationary status. Then there were correctional officers, senior correctional officers, correctional  
22 sergeant, correctional lieutenant, associate warden and warden.

23 As an associate warden, A.W. Bean's job duties and responsibilities included overseeing all  
24 security operations and all custody staff responsibilities, including post assignments, shift bidding,  
25 anything supervising custody staff, supervising maintenance, and culinary operations. A.W. Bean stated  
26 that he was familiar with NDOC regulations and policies and procedures. There were 650-700 employees  
27 who worked at HDSP, but not all employees fell under his chain of command. A.W. Bean said 494  
28

1 employees were custody staff members (which included correctional officers) and 80 were non custody  
2 staff members.

3 According to A.W. Bean, correctional officers worked on shifts, and there were quite a few  
4 different shifts at HDSP. Currently most shifts were from 5:00 am to 1:00 pm, 1:00 pm to 9:00 pm, and  
5 9:00 pm to 5:00 am. To the extent the correctional officer worked outside of those shifts, according to  
6 A.W. Bean, it would be considered overtime, and the officer would be paid for that overtime. A  
7 correctional officer was paid for overtime, according to A.W. Bean, by first having it authorized and  
8 recorded by the shift commander, so the correctional officer would first have to make notification of the  
9 overtime event, and fill out a DOC 1000. Following this, the correctional officers would submit their  
10 time sheet with the overtime on it, the supervisor would verify the DOC 1000 against NDOC's staffing  
11 system to verify the overtime, and that it had been reported, and then the overtime would be approved or  
12 denied based on those facts.

13 In looking at Exhibit B, page 18, in the Employer Packet, Officer Eckard had signed an NDOC  
14 variable work schedule, a 40-hour, 80-hour work variable schedule. According to A.W. Bean, these  
15 schedules were signed and agreed to every year at shift bid. With respect to overtime and whether there  
16 was a difference between a variable schedule and a standard workweek schedule, A.W. Bean stated that  
17 ultimately the 40 hour variable or innovative work schedule meant an employee had to be in a paid status  
18 40 hours or more prior to the approval of overtime. Thus, according to A.W. Bean, if an employee had  
19 an LWOP or AWOL, and was in unpaid status for any part of the 40 hours, if the employee were to work  
20 any overtime, however many hours of that LWOP or AWOL were on the officer's timesheet, that many  
21 hours would go from the overtime to offset that 40 hour requirement. An 80-hour work week was handled  
22 in the same manner, according to A.W. Bean, except that it was on a bi-weekly basis, and not a weekly.

23 In looking at the first full paragraph where Officer Eckard had placed an "x", and provided he did  
24 not exceed 40 hours in a work week without supervisory approval, A.W. Bean was asked if that was  
25 saying essentially that no NDOC employee shall work overtime unless it was approved, A.W. Bean stated  
26 yes, and that all overtime required pre-approval.

27 In looking at Exhibit D, page 22, AR 320, A.W. Bean noted that AR 320 covered salary  
28 administration and went over overtime requirements and the approval process in awarding overtime.



1 A.W. Bean further noted that AR 320 contemplated correctional officers submitting their overtime  
2 through NEATS. In looking at 320.06, on page 26 of Exhibit D, there was reference to an exception  
3 reporter, which according to A.W. Bean meant that as an employee of the State of Nevada would be paid  
4 their standard 80 hour pay regardless, and the only time the employee's pay would differ is if the  
5 employee put an exception in his or her timesheet. An exception, such as sick leave, would need to be  
6 annotated in the employee's timesheet, as would overtime. If the employee did not go through that  
7 process, according to A.W. Bean, the employee would only receive the employee's standardized pay,  
8 and any deductions the employee utilized for their leave categories would not be taken. AR 320 also  
9 contemplated that employees could be disciplined for falsifying a timesheet. A.W. Bean also noted that  
10 AR 326, posting of shifts and overtime, governed overtime for employees, and he believed that AR 301  
11 might touch slightly on overtime, and that AR 322, Types of Leave and Procedures (Exhibit E), also  
12 talked a little bit about the overtime process.

13 A.W. Bean stated that he had met Officer Eckard a few times, and that they had a professional  
14 relationship. A.W. Bean stated that there were reasons a correctional officer might work overtime,  
15 including the reasons the two Grievants had stated earlier, and if there was a correctional officer who  
16 failed to appear at the start of his or her shift, or other officers might be ill and report that fact late, or a  
17 staff member may need to respond for safety and security reasons.

18 A.W. Bean reviewed Officer Eckard's records concerning overtime, and testified that Officer  
19 Eckard had been paid overtime in the past, and that since June 23, 2020 Officer Eckard had been paid for  
20 over 64 hours of overtime, and that there were 20 different bouts, and in those bouts it appeared that 10  
21 of them were mandated or scheduled overtime. A.W. Bean further testified that Officer Eckard had not,  
22 to his knowledge, ever put in for overtime and been refused that overtime. A.W. Bean stated that a  
23 correctional officer might request overtime and not be paid for that overtime if 3-4 days after the fact the  
24 employee put down the overtime in his or her timesheet which the employee never reported to the  
25 supervisor, and for which there was no record. A.W. Bean stated that if NDOC could not verify that an  
26 employee had worked overtime then that overtime which the employee requested would be denied as  
27 unverifiable.

1 With respect to pre-shift muster, A.W. Bean said that staff was required to be at their post at the  
2 start of their shift. A.W. stated that about 30-45 minutes prior to the start of a shift the shift supervisor  
3 would go up to the gatehouse, and start checking people off as they come through the gatehouse. The  
4 supervisor would identify the correctional officer, check off who they were, tell the officer what their  
5 assignment was, and send them to their post.

6 According to A.W. Bean, any gear that the employee needed to use was generally kept in the  
7 housing assignment or the post the officer was assigned to, the exception being the search and escort  
8 officers or core service positions. A.W. Bean stated that search and rescue generally had responsibility  
9 over the entire institution, and could be required to respond from one place to another in the facility based  
10 on the need for a security presence. A.W. Bean also stated that the core services officers were not  
11 relieved, nor do they relieve other employees. A.W. Bean further stated that some items, such as the  
12 baton and handcuffs, the officers keep with them and took home with them.

13 With respect to pass-downs, A.W. Bean testified that there was no mandate for pass-downs, and  
14 as far as he was aware they were not being conducted. A.W. Bean stated that as the officers came through  
15 the gatehouse the supervisor might make a statement that the yard was locked down, but that he would  
16 not necessarily consider that a pass-down. At HDSP, A.W. Bean said they had shift to shift briefings,  
17 which were sent out by email, and that the emails indicated the status the institution was in. A.W. Bean  
18 further testified that there was no mandated pass down of information for officers coming off of shift.

19 With respect to gear that needed to be returned, A.W. Bean, using housing units as an example,  
20 testified that generally what occurred was that all of the gear was stored in the central control post of the  
21 housing unit. The exchange of equipment generally occurred by the relieving officer, if the officer to be  
22 relieved was in the control post, going to the control post, retrieving the equipment from the officer who  
23 had the equipment, signing the equipment to himself or having the control officer do that, or the relieving  
24 officer would go to the floor officer where the assignment was actually located, and they would hand off  
25 the equipment and annotate it after the exchange.

26 A.W. Bean stated that the only mandate that he was aware of that applied to officers at the start  
27 of their shift was that they arrive at the institution in time to report to their posts at the start of their shift,  
28

1 which was in AR 326. A.W. Bean also stated that there was no written mandate for the muster proceeding  
2 as described by Officer Eckard.

3 A.W. Bean stated that if Officer Eckard was leaving and an incident happened, there was a chance  
4 he might get called back to duty, and that he would be paid for that time. On cross examination, in  
5 testifying about Exhibit C, the variable work schedule request, which stated that if an officer were on a  
6 40 hour variable, overtime would be considered only after working 40 hours in one week, A.W. Bean  
7 stated that it was NDOC's position that if an officer were on a 40 hour variable week and the officer  
8 worked more than 40 hours that week the officer would be entitled to overtime that week. If an officer  
9 were on an 80-hour variable work week, according to A.W. Bean, and the Officer worked more than 80  
10 hours the officer would be entitled to overtime for those hours.

11 A.W. Bean testified that generally Officer Eckard was scheduled for a 40-hour work week. A.W.  
12 Bean stated that Officer Eckard's scheduled time would not include activities like muster and walking  
13 across the yard, and that the officer would not be paid for those activities. A.W. Bean also stated that  
14 before passing through security a correctional officer was required to participate in roll call, and that an  
15 officer's posts might change due to facility needs.

16 A.W. Bean stated that if there was a safety issue specific to a particular shift that would not be  
17 communicated to the officer during muster, unless it was an utterance by a supervisor as the officer passed  
18 through. The communication emails referenced by A.W. Bean were generally sent out at the start of  
19 every shift. A.W. Bean testified that there were a couple of different processes for disseminating  
20 information. A.W. Bean stated that there were supervisory personnel assigned to each quad, and that  
21 each quad had four housing units, and that the supervisor was responsible for conducting operations in  
22 those four housing units and relaying information back and forth to staff that was pertinent to the  
23 operations of that area. A.W. Bean stated that the email system briefing process had been reinstated after  
24 being discontinued for several years. A.W. Bean also stated that muster had not been conducted for quite  
25 some time at HDSP, and one had not taken place as long as he could remember. A.W. Bean testified that  
26 there were shift logs in every housing unit, and there was the NOTIS system that had shift logs where  
27 issues that were occurring would be reported, and that generally was the process for officers  
28

1 understanding what was going on at their posts. A.W. Bean did not believe there was anything to alert  
2 officers of safety concerns prior to the officers arriving at their posts.

3 The email referred to by A.W. Bean would be sent out on the previous shift, prior to the oncoming  
4 shift reporting, and that the reporting officers would review the email once they arrived at their posts.  
5 With respect to gear that needed to be collected for search and escort, A.W. Bean stated that because  
6 those officers were generally responsible for the entire institution, most of their equipment was checked  
7 out from the central control post, which only occurred on the 5:00 to 1:00 shift change. A.W. Bean  
8 further stated that the rest of the equipment was handed off staff member to staff member, and that the  
9 only thing officers would be checking out would be keys, a radio and an MK 9 OC or pepper spray  
10 canister. If Officer Eckard was on search and rescue, then he might be required to pick up equipment at  
11 the control station.

12 A.W. Bean stated that the perimeter at HDSP was 2.2. miles, and that it would take an estimated  
13 10-12 minutes to walk from the gatehouse to the farthest point of the yard if there were any incidents on  
14 the yard. With respect to the DOC 1000, A.W. Bean stated that it was part of the process that an officer  
15 would follow to request overtime. A.W. Bean further explained that the idea with exception reporting  
16 was that the officers were scheduled for 40 hours and any exception to that scheduled work, including  
17 work on top of the 40 hours, had to be reported. A.W. Bean also testified that the officers were required  
18 to walk through the gatehouse, receive their assignments for the day and pick up necessary equipment  
19 prior to the start of the officers' shift, with the exception of search and escort, as when search and escort  
20 checked out their gear they were considered on duty. A.W. Bean stated that the officers were not paid  
21 for the time between muster/receiving the officer's assignment and going to the officer's post.

22 A.W. Bean also stated that if he received a request for overtime for any pre-shift activity he would  
23 research it to find out why the request was submitted, but that if he could not verify it he personally would  
24 not approve such a request. A.W. Bean also stated that he did not know if he would consider checking  
25 in a work function, and that NDOC had not in the past to his knowledge paid out for an officer checking  
26 in at the gatehouse, receiving his or her assignment and then going to the officer's post, but did not know  
27 if he had seen a lot of requests for payment for these activities.

28



1 A.W. Bean also testified that even though the work in question was performed everyday it would  
2 still be an exception on the officer's time sheet because it would be in excess of 40 hours. A.W. Bean  
3 stated that NDOC did not log in the time at which the officers arrived at the gatehouse or for muster, and  
4 that a record was kept concerning who was on the facility. A.W. Bean stated that NDOC kept records  
5 that would be estimated to the start of an officer's shift, although he further stated that it was possible to  
6 keep a log of when officers actually arrived at the gatehouse. A.W. Bean also noted that sometimes  
7 officers arrive an hour before their regularly scheduled shift, but that relief was not allowed until 15  
8 minutes prior to the end of a shift, as whoever was being relieved was still on shift as far as the records  
9 went.

10 Member Thompson asked what method NDOC used to log in correctional officers. A.W. Bean  
11 stated that the log in process was a combination of both electronic and paper, and that there was an  
12 electronic system for staffing called the CHRONOS system. A.W. Bean further stated that NDOC  
13 sergeants were responsible for posting the shift and were offset from the shift by one hour. The shift  
14 sergeant would do the roster in the electronic form annotating whoever is on and where. The shift  
15 sergeant may also move people from different positions, annotate sick leave, and notify anyone that was  
16 required to work overtime in order to fulfill minimum staffing, according to A. W. Bean. Once all this  
17 was done, according to A.W. Bean, the shift sergeant would print the roster out and take it to the  
18 gatehouse. As the staff members came through to report for work the sergeant would check the staff  
19 member off on the paper roster, and then after that would go back down and annotate any discrepancies  
20 in the computer.

21 Member Parker asked if the supervisor went to the gatehouse about 20 minutes prior to the  
22 beginning of the shift to be able to hand out the assignments, to which A.W. Bean answered the  
23 supervisors went out 35-40 minutes in advance.

24 Member Bauer asked to confirm for the record if all that was required currently or in the past year  
25 of staff is that they show up at the gatehouse, ensure that the supervisor checks them off to make sure  
26 they are logged as present, receive their assignment and then cross the yard to their post? A.W. Bean  
27 answered that this was accurate in part, and that the officers did have to clear the metal detector and items  
28 had to be screened. A.W. Bean, in response to Member Bauer's question, stated that this screening was

1 required of anyone that came to the institution. A.W. Bean also testified that the correctional officer  
2 encountered their shift supervisor before any of the screening took place, and that the process was a  
3 moving process.

4 A.W. Hartman testified that he was currently an associate warden at NNCC. A.W. Hartman  
5 testified his duties were similar to A.W. Bean's, and that his main focus was custody, and all managing  
6 aspects at NNCC fell under his purview. A.W. Hartman stated that he had been an associate warden for  
7 a little less than two years, and had been a lieutenant for 8 years before that. A.W. Hartman felt that he  
8 understood the day to day duties of correctional officers at NNCC.

9 With respect to muster at NNCC, A.W. Hartman testified that the muster was not a formal muster  
10 or codified in any document. A.W. Hartman testified that at NNCC screening was performed, and after  
11 that the officers came into the gatehouse and saw their shift sergeant, so that was a little different than  
12 HDSP. A.W. Hartman stated that the sergeant checked the officer off a roster and assigned the officer to  
13 shift, and that there was no formal briefing, although information was passed on occasion, and that 99%  
14 of it was casual talk among co-works while entering.

15 A.W. Hartman testified that a "good percentage" of correctional officers had the same post  
16 assigned to them throughout the year, although officers could be posted at different posts. The process  
17 of providing information on where officers would be assigned for the day took about three seconds, and  
18 that any information on the current day's happenings might be conveyed to an officer at that time. A.W.  
19 Hartman also felt that the need to respond to incidents pre or post shift had been exaggerated, and the  
20 need to do so was few and far between, and that most inmate fights only lasted a few minutes, and that  
21 such information was not integral to knowing prior to the start of a shift. Generally, unless there was a  
22 significant incident, according to A.W. Hartman, this information was quite miniscule.

23 A.W. Hartman stated that NNCC did not perform formal uniform inspections at the gatehouse,  
24 although he hoped a supervisor would notice if what an officer was wearing was appropriate, and the  
25 process would take seconds. With respect to gear collection prior to a shift, according to A.W. Hartman  
26 the only gear collection that was required prior to starting shift were the radio and keys, and that this  
27 equipment was at the working location. Everything else such as pepper spray and handcuffs were issued  
28 to individual officers when they started working at the facility and were taken home by the officers.

1 A.W. Hartman also testified that the officers were able to reach their posts without a radio and  
2 keys. With respect to a pass down or briefing from the outgoing officers, this process again was not  
3 formalized or in any document, according to A.W. Hartman, but when an officer arrived on post to relieve  
4 the outgoing officer generally as the equipment was exchanged information might be briefly passed,  
5 which took 5 to 10 seconds most days, and just concerned information about what was currently going  
6 on in the unit. Altogether, according to A.W. Hartman, including the activities at the gatehouse,  
7 collecting gear, and getting the brief information from the outgoing officer, generally this only took up  
8 to a couple of minutes, if that.

9 A.W. Hartman testified that NNCC's perimeter was about a mile in extent, and it took him 5 and  
10 a half minutes to walk across the facility. A.W. Hartman stated that he expected a correctional officer  
11 who was walking to their post prior to shift starting to respond to an incident if they saw one, and if that  
12 caused them to work additional time that would justify overtime, and that again these incidents occurring  
13 while an officer was arriving or leaving shift were few and far between. According to A.W. Hartman,  
14 NNCC had the same procedure for requesting overtime as HDSP. A.W. Hartman would also expect an  
15 officer working overtime in such a situation to verbally notify the supervisor on duty of such an event.

16 In looking at post shift activities, A.W. Hartman testified that the pass down time was very brief,  
17 and occurred when equipment was being handed to the relieving officer, and was just a quick update on  
18 the current activities in the unit, and most of the time was a 30 second activity, and was not required by  
19 NDOC.

20 According to A.W. Hartman, after shift there was no equipment to return, as the officers were  
21 relieved at their posts and exchanged equipment there, unless there was no relief, in which case the  
22 equipment was located in locked key boxes and were checked in on the officer's way out of the facility.

23 Attorney Hendrickson asked A.W. Hartman whether if an officer went through screening after  
24 arriving at the facility at the start of the day, and they were required to go into the gatehouse, check in  
25 with the shift lieutenant, whether the officer was assigned to a post and checked off on a roster, to which  
26 A.W. Hartman responded that this was correct.

27 A.W. Hartman also stated that that even officers who were generally assigned to the same post  
28 could be assigned to a different post depending upon the needs of the facility, and that this information

1 would be communicated to the officer at the start of his or her shift. A.W. Hartman testified that he was  
2 familiar with the class specification documents for lieutenant and correctional sergeant. A.W. Hartman  
3 further testified that the job duties of at least one of those positions included taking roll, verifying  
4 attendance at the beginning of each shift to ensure sufficient officers were available, and were  
5 authorization to recommend overtime when necessary by assessing institutional facility needs and  
6 availability of personnel to provide adequate security staffing. A.W. Hartman also added that the  
7 definition of roll call could be interpreted in different ways.

8 A.W. Hartman also testified that there was not an everyday general briefing at muster, and did  
9 not occur unless there was a significant issue with the prison. In explaining this, A. W. Hartman stated  
10 that there was nothing mandated, nothing documented that NDOC pass down information as staff came  
11 in, and there was no set briefing time or anything designating what must be said by the shift sergeant or  
12 lieutenant. If there was a serious incident on the yard that might affect officer safety as the officer passed  
13 through the yard that information might be casually communicated to the officers, according to A.W.  
14 Hartman. If there was a major incident that everyone needed to be made aware of, A.W. Hartman stated  
15 that NDOC would ensure that everyone was aware of the major incident by sending out an email to all  
16 staff, and/or perhaps performing a phone briefing when everyone for sure was on shift. If a matter  
17 affected one employee that employee might be individually told about the matter.

18 A.W. Hartman further noted that if an officer saw an incident happening on the yard he would  
19 expect for that officer to respond to the incident, and that it is expected officers be on alert for potential  
20 incidents. A.W Hartman stated that every officer is expected to go into the gatehouse, check in with the  
21 shift lieutenant, receive their post assignment, walk to their posts and be at their posts by the scheduled  
22 start time for their shift. A.W. Hartman testified that he would expect an officer to arrive at their post by  
23 the time they were scheduled to work, and so arrive at the facility by 452-454 am (if starting shift at 5:00  
24 a.m.), which allowed time for the officers to walk through the gatehouse and walk to their posts. A.W.  
25 Hartman felt that in leaving their shift the officers would take a similar amount of time, so that the  
26 activities took 5-8 minutes at the beginning of an officer's shift and at the end of an officer's shift, and  
27 that the officers were not paid for that time, and that if an officer submitted a request for payment he  
28 would not expect the officer to be paid for that time, as they were not on duty at that time. A.W Hartman



1 stated that NDOC was aware that the officers were completing the activities of walking through the  
2 gatehouse and yard, and not being paid for doing so.

3 Chair Beigel asked if an officer were late, whether that would be logged into CHRONOS, to  
4 which A.W. Hartman said that an officer being late would be logged into CHRONOS, and backed up by  
5 the timesheets in NEATS. Member Thompson asked when officers left whether they signed out, to which  
6 A.W. Hartman responded that the officer did not sign out when leaving, and are assumed to be relieved  
7 because the next shift would assign an officer to a unit and would make that checkoff, so if there was no  
8 one to fill one of those positions then overtime would be used.

9 Member Parker asked when did the shift supervisor report to the gatehouse to give assignments,  
10 to which A.W. Hartman stated about a half hour before shifts began, and that officers could not report to  
11 their posts more than 15 minutes prior to the start of their shift. A.W. Hartman also stated that his facility  
12 had search and escort assignments. A.W. Hartman further stated that as soon as the officers picked up  
13 their keys and radio they were considered on duty, even if it was 10 minutes before the officers shift  
14 began, and that was when the officer would begin to be paid, and that he would assume the relieved  
15 search and escort officer would leave at that time.

16 A.W. Hartman explained that some post such as hospital were only staffed for part of the day, so  
17 that at the end of the shift of the officer who worked that post, such as Unit 8, there was an electronic  
18 lock box and the officer would electronically check in their keys there when leaving, and that the officers  
19 were not paid after checking in their keys.

20 Member Thompson asked in an officer who arrived 10 minutes early, would the officer receive  
21 10 minutes extra pay if the officer left at the end of his or her normal shift, to which A.W. Hartman said  
22 that the officer would not receive 10 minutes of overtime, as they are not required to be on duty until the  
23 officer's start time, so if an officer chose to relieve another officer early, that action was not approved,  
24 although it likely took place.

25 Attorney Hendrickson argued in substance that NDOC knew its employees were completing the  
26 tasks before and after their shift, and were requiring its officers to complete the tasks, and that there was  
27 no dispute about that. The tasks constituted work, according to Attorney Hendrickson, and NDOC  
28 tracked when employees arrived for muster and roll call, and that the time was being tracked, and not

1 paid. According to Grievants, they completed 30 minutes or more of the activities every day. In turning  
2 to Exhibit 2, the declarations from similarly situated class members who had the same experience,  
3 according to Attorney Hendrickson these corroborated that the estimates provided by the two Grievants  
4 were reasonable and reflective of the actual time spent by the Grievants in performing the tasks.

5 Attorney Hendrickson further argued that with respect to the two wardens who testified about the  
6 time they expected activities to take, they never testified to the amount of time actually taken by the  
7 Grievants, and spoke to the situation as a whole. Attorney Hendrickson noted that the shift supervisor  
8 went to the gatehouse 30-45 minutes in advance because they were aware officers were arriving for work,  
9 and that they would have to complete some tasks connected to the arrival of officers, which supported  
10 the conclusion that this was taking longer than the assistant wardens believed. Attorney Hendrickson  
11 argued that officers were required to attend roll call, were assigned duties for the day at roll call, their  
12 attendance was tracked, they were assigned posts, after which the officers were required to walk to their  
13 assigned posts for the day. All these activities were required to be completed prior to the start of shift,  
14 stated Attorney Hendrickson, and were uncompensated.

15 Attorney Hendrickson argued that it was clear and unequivocal that the officer should be paid for  
16 the activities, and the compensability arguments were covered on page 9-11 of the employee packet.  
17 Those sections briefly summarized, according to Attorney Hendrickson, that the Department of Labor  
18 had recognized roll call was an example of a compensable work activity for law enforcement activities,  
19 and it was critical for NDOC to know who was present at a given time. Attorney Hendrickson stated that  
20 showing up for roll call was an activity that constituted work, it was a required activity, and it started the  
21 workday, and it followed that any activity after that was a compensable activity.

22 Attorney Hendrickson noted that receiving assignments had likewise been recognized as a  
23 compensable activity by case law, in the *Dolby* case, and that NDOC knew these compensable work  
24 activities were being performed, and were simply not paying its employees for the tasks.

25 Attorney Hendrickson stated that the half hour of work activity alleged by Grievants was  
26 corroborated by the declarations and by the fact that the shift supervisors went to the gatehouse 30-40  
27 minutes before the scheduled shift changes. Attorney Hendrickson also noted that it was 10-16 minutes  
28 in A.W. Hartman's estimation, and that A.W. Bean testified that the walk alone took 10-12 minutes each

1 way, so that without considering muster the estimations of the associate wardens tracked what the  
2 Grievants had stated with respect to time spent completing the activities.

3 Attorney Hendrickson stated that Grievants were seeking with their grievances to be paid for  
4 work compensable under state law, not federal law, and that many of NDOC's defenses only applied in  
5 the context of federal law, and that the argument that the State was immune to FLSA claims was  
6 irrelevant, and had no bearing on whether Grievants were entitled to relief under state law, and that issue  
7 had already been resolved in the Butler and Jones grievances. Attorney Hendrickson also argued that an  
8 argument that the amount of work performed was de minimis was a defense to federal and not state law,  
9 and that under Nevada law an employee was required to be compensated for all hours worked, regardless  
10 if the time worked was one minute, and that in any event 10 minutes or a half hour was not a de minimum  
11 amount of time.

12 Attorney Hendrickson noted that NDOC could have easily tracked and paid out the time in  
13 question, and that NDOC tracked when an employee was late and deducted for that time, and that NDOC  
14 simply did not want to pay for the time.

15 With respect to the Portal to Portal doctrine precluding relief because some of the activities might  
16 not be indispensable, Attorney Hendrickson argued that was again a federal specific defense inapplicable  
17 to state law claims, and that Nevada had never adopted to Portal to Portal limitation. With respect to the  
18 grievances not including dates and time, Attorney Hendrickson noted that Grievants were actually  
19 specific about that, and that the dates and times would be every shift they worked, and they were specific  
20 in the estimations of their time spent in completing those tasks, and so they should be paid for those tasks.  
21 There was some suggestion, according to Attorney Hendrickson that Grievants should have submitted a  
22 DOC 1000 to obtain payment, and that Grievants were required to request this overtime before and after  
23 every shift, but then NDOC said even if requested the overtime would not have been granted. Attorney  
24 Hendrickson stated that Officer Haynes specifically requested overtime and submitted a DOC 1000 and  
25 was denied, and so the proper route at that point was to file a grievance.

26 Attorney Hendrickson argued that both Grievants were required to complete the work in question,  
27 and that both wardens testified that the roll call, muster, assignment of posts and transit to the assigned  
28 posts were required to be completed before and after the assigned shift, and were not optional. Attorney

1 Hendrickson also stated that the standard for payment of work was not whether the work was required  
2 by an employer, but whether it was suffered or permitted to be performed by the employer. In this case,  
3 Attorney Hendrickson argued that NDOC clearly knew about the activities Grievants were performing  
4 and made no effort to stop it from occurring, and really required it but did not want to pay for it. With  
5 respect to the variable work schedule, as testified by the wardens and Exhibit B, Attorney Hendrickson  
6 argued, Nevada provided for overtime for work that was over 80 hours worked on an 80 hour variable  
7 schedule, and that in any event that argument would not apply as the Grievants had been working straight  
8 work schedules for the past few years.

9 Attorney Hendrickson pointed out that Grievants were requesting relief on behalf of all  
10 correctional officers who were similarly situated and asked that the grievances be allowed to proceed on  
11 behalf of all similarly situated correctional officers.

12 NDOC argued that what the FLSA and similar statutes were designed to do was compensate  
13 employees when they were required to exert a substantial amount of time or effort, and was "designed to  
14 avoid the evils of overwork." Grievants, according to NDOC, were seeking compensation for no work  
15 at all. NRS 281.100(2) defined when the workday started, according to NDOC. The point at which  
16 Grievants were defining their start of day, was taking charge of equipment, according to NDOC. NDOC  
17 noted that, with the exception of search and escort duty, the officers obtained keys and radios from the  
18 posts. Thus, NDOC argued that the point at which the employment clock started was when the officers  
19 arrived at the posts.

20 NDOC argued that when incidents happened there might be an expectation that correctional  
21 officers would be paid for activities they were required to perform, but that those instances were rare.  
22 Additionally, it was pointed out that NDOC would be unaware of each of these incidents unless the time  
23 was reported in the appropriate manner, so it was impossible that NDOC knowingly permitted or suffered  
24 the activities to occur, and that only one Grievant, Officer Haines had reported the activity one time.

25 NDOC further argued that even if the EMC found that these pre or post shift activities were  
26 compensable, what the federal courts have said is that they will not compensate for de minimis amount  
27 of time, and that was what occurred here, as going through muster and roll call involved receiving  
28 assignments and receiving facility information that took seconds. With respect to debriefing, that process



1 normally took mere seconds, and so Grievants wanted to be compensated for the walk from the gatehouse  
2 to their posts, which took a few minutes, while having taken charge of no equipment from NDOC. NDOC  
3 argued that it was unreasonable under federal and state law that simply walking to your post was  
4 compensable time.

5 With respect to the time limits, NDOC said that the EMC had already decided the issue in the  
6 Prost decision, Decision No. 23-18, and that these types of claims are limited to 20 working days prior  
7 to the grievance. Finally, NDOC argued that the grievance process was limited to the particular  
8 Grievants, and that this fact came from language the NAC which defined a grievance, and that the  
9 grievance must affect the particular employee.

10 Attorney Hendrickson responded that the work day for correctional officers began when they  
11 started working, not when they picked up equipment, and in this case what started the work day was the  
12 roll call and post assignments, and after that everything must be paid. Attorney Hendrickson also noted  
13 that Grievants were performing tasks for the benefit of NDOC. Attorney Hendrickson also stated that in  
14 walking across the yard one of the things that officers were paid for as a correctional officer was to be on  
15 guard and ready to respond to an incident, and that there was no dispute that the officers were required  
16 to respond to any incidents they encountered on their walk across the yard. Attorney Hendrickson also  
17 stated that being entitled only to pay for a substantial amount of work was a federal standard in the Portal  
18 to Portal Act, and that the limitations there did not apply to state law.

19 Attorney Hendrickson also argued in substance that the suggestion that if Grievants would have  
20 submitted the DOC 1000 they would have been paid was not true, as Officer Haines had submitted that  
21 form and had not been paid, and that Officer Eckard had asked if he should submit the form for the  
22 activities in question and had been told no. According to Attorney Hendrickson, NDOC had the  
23 obligation to either pay their correctional officers for the work they performed or stop them from  
24 performing the work in question.

25 NDOC responded that the reality was that the roll call claimed by Grievants was something where  
26 information was obtained by the officers passively walking through an entrance, and that the officers had  
27 to go through that entrance regardless of whether they received any information. Additionally, NDOC  
28 stated that although officers were expected to be on guard, the team that the wardens expect to respond

1 to incidents was the team that was on shift, not the officer leaving shift, and asked that the EMC deny the  
2 grievances.

3 The EMC deliberated on the grievances. Member Parker noted that both assistant wardens'  
4 testimony reflected that there was a requirement to appear at the gatehouse to receive check in shift  
5 information, and that A.W. Hartman expected that someone would show up 15 minutes prior to the start  
6 of their shift to perform these activities, so that there was an expectation that the officers would arrive  
7 early to perform work, and that this was required. Member Parker also noted that both A.W.'s alluded to  
8 the fact that if an officer had put in for overtime for any of these activities they would not approve the  
9 pre and post activities as overtime, which supported the expectation that the officer would not be paid for  
10 these activities.

11 Member Parker mentioned that DAG Tan had referenced Decision No. 23-18, in stating the  
12 restrictions in the amount of time which could be covered for the Grievants being limited to 20 days, and  
13 Member Parker agreed with that determination.

14 Member Thompson stated that she agreed with Member Parker, and that the EMC could not go  
15 back three years, and that she did not believe the EMC could hear all officer grievances as though it were  
16 a class action. Chair Beigel also voiced her opinion from EMC training that grievances were between an  
17 employer and employee. Member Thompson also stated that because the officers were required to be at  
18 roll call, and because they were required to receive their assignments there the officer should be paid  
19 from that point.

20 Member Bauer stated that NRS 284.384 specifically defined a grievance, read the definition, and  
21 noted that typically the EMC did not act upon matters that were like class actions, and that the instant  
22 procedure was an administrative procedure, not a court procedure, and so the EMC could only  
23 specifically act upon the two Grievants' matters.

24 Member Bauer stated that when she compared the instant case to the Jones, Butler and Prost  
25 decisions, that notwithstanding the legal argument as to whether or not Nevada has waived sovereign  
26 immunity, that in Jones, Butler and Prost they took charge of equipment, and picked up keys and were  
27 responsible for working with keys in hand, from the time the keys were picked up at the gatehouse until  
28

1 the employee arrived at the medical building, and so in looking at NRS 281.100, taking charge of  
2 equipment was a major part of those prior grievances which was not part of the present grievances.

3 Member Bauer stated that she was not persuaded that walking through a gatehouse, which  
4 everyone was required to do, constituted work, and if in fact Grievants and employees were just  
5 continuing to walk from the gatehouse to their posts and the supervisor checked them off as present and  
6 told the officers their assignments she was unsure those activities necessarily constituted work. Member  
7 Bauer further stated that she was using as a definition for work a physical or mental exertion. Member  
8 Bauer also stated that although she was remotely working now, that remote work was demonstrated by  
9 log able time. Member Bauer reiterated that the issue for her was whether or not walking through the  
10 gatehouse and metal detector constituted work and whether the Grievants were entitled to compensation  
11 under the NRS', and she was inclined to think the answer was no.

12 Member Parker stated that on the attributable work time she thought that the supervisors gathered  
13 information to determine whether or not an employee showed up, and because of the activities were  
14 required to show up at least 15 minutes early, and that if the officers could show up two minutes before  
15 their shift at the gatehouse and not be docked time for not making it to their post by the start of their shift  
16 she would agree with Member Bauer. Member Parker also believed that if a supervisor was checking in  
17 officers it would only take a second or two to note what time the offices came in. Member Parker agreed  
18 with the other two EMC members that the EMC could not hear and decide anything like a class action.

19 Member Bauer stated that after the Prost decision each case was dealt with separately, and a  
20 decision made separately on each grievance, so that was not a class action situation.

21 Member Bauer also stated she heard testimony from the associate wardens that the employee was  
22 not exerting effort, that the employee was walking while the supervisor noted the employee was present,  
23 because the employee had reported to work and because the employee was on premises for safety and  
24 security purposes.

25 Attorney Hendrickson stated that Nevada law tracked federal law in what constituted work, and  
26 that Nevada law recognized as hours worked all time that an employee must be on duty, or on the  
27 employer's premises or at any other proscribed place of work, and that work was not limited to physical  
28 or mental exertion.

1 Chair Beigel noted that if she parked across the parking lot at the Grant Sawyer Building, had to  
2 then walk across the lot, and had to wait for the elevator to get to her floor she equated that travel time to  
3 the present grievances, and whether or not the Grievants were in actual work status.

4 DAG Tan said the EMC did not need to rely on federal law, that NRS 281.100 told us when the  
5 workday started, which was when the employee took charge of equipment.

6 Member Parker stated that she wanted to bring up that in the two different situations, in Grievance  
7 No. 5908 it sounded like there was the pickup of equipment prior to, so that "muddied the water, a little  
8 bit" if the workday started when officers took control of equipment. Member Parker also stated that if  
9 there was a requirement to meet before an officer's shift started, she would expect payment, and the  
10 meeting was not at someone's desk, it was at a specific location.

11 Chair Beigel asked when was equipment picked up, and whether it was different in the two  
12 different prisons, as picking up equipment triggered the EMC in Prost, Butler and Jones, and whether the  
13 EMC wanted to consider that in this situation.

14 Member Bauer stated that the difference she heard between the associate wardens' testimony was  
15 where the supervisor would check in the employee at HDSP, where the employee would be checked in  
16 prior to going through the metal detector, and at NNCC the employee was checked in after going through  
17 the metal detector, but the employee was still checked in by a supervisor and it was still a brief process,  
18 and that the only difference was that the search and escort staff would pick up their equipment, keys and  
19 radio, closer to the gatehouse, or at some point ultimately other than their final post. However, for an  
20 average custody officer, Member Bauer said, they would still get their keys and radio at the time they  
21 arrived at their assigned post, and central command or the central area would give them their keys and  
22 radio.

23 Chair Beigel stated that if the officers were picking up keys at the very beginning as in prior  
24 grievances the issue would be more clear cut, but that she was leaning toward the time in  
25 question/activities not being compensable.

26 Member Bauer stated that to her without picking up equipment or without some of the provisions  
27 in NRS 281.100(2), it was almost like officers walking to assigned posts was part of their commute, so  
28 that without officers taking charge of equipment or entering into any conveyance, it was like once the

1 officers went through the gatehouse and metal detector it was almost an extension of their commute until  
2 they arrived at their posts, while in the past grievances there had been demonstrated work and  
3 demonstrated taking charge of equipment.

4 Member Thompson added that what Member Bauer made sense to her.

5 Member Parker agreed that what Member Bauer said made sense in one grievance, but not the  
6 other, and if it took 15-20 minutes pre-shift to go closer to the gatehouse to get the equipment, rather than  
7 at NNCC, where it could only take 5 minutes, that those were two different scenarios, because the officers  
8 were taking charge of equipment, so that did mean only search and escort was implicated?

9 Member Bauer stated that she thought if the issues Member Parker brought up were looked at, if  
10 one were looking at the amount of time that someone was on premises before he or she arrived at the  
11 assigned duty post, that went to the argument, in favor or opposed to, whether it was de minimis, which  
12 could be part of a federal claim, so maybe the line was being blended between federal law vs. Nevada  
13 law, and that there was already a Supreme Court ruling that discussed integral and indispensable  
14 situations, and the de minimis situation, so that if the EMC were looking at whether something was  
15 compensable in Nevada, to her it was compensable whether one minute was involved or 20 minutes were  
16 involved.

17 Member Parker stated that Grievance No. 5908 sounded like there was more than a minute from  
18 the time that the officers took control of the equipment, and that if that was the impetus for making the  
19 decision in Grievance No. 23-18, then that rationale should be applied to No. 5908, at least.

20 Member Bauer stated that in the Prost, Butler and Jones Grievances, she recalled when  
21 compensable activity was discussed what was meant was taking charge of keys and signing into a  
22 logbook. That action, for those grievances, occurred at the gatehouse, where with the present grievances  
23 she heard no testimony that there was taking possession of keys or radio or anything, or signing a logbook  
24 at the gatehouse.

25 Member Parker asked if the EMC could ask for clarification on Grievance No. 5908, the location  
26 of where the officers were checking out the equipment, which was testified to. Attorney Hendrickson  
27 deferred to Officer Eckard, who testified that after he checked in with the supervisor at the gatehouse  
28 before going to the yard he had to go to operations to check out equipment from main control if he was



1 assigned to search and escort. Officer Eckard testified that if he was assigned to a different area he would  
2 not follow that procedure. Member Parker asked how frequent was the assignment to search and escort?  
3 Officer Eckard stated that it varied. Officer Eckard noted that search and escort could be a biddable  
4 position, although currently it was an exempt post at HDSP.

5 Officer Haines stated that his current position changed every year, due to shift bidding, and  
6 currently the keys were in Unit 8, which was across the yard. If he was on search and escort, Officer  
7 Haines stated that he would pick up radio and keys, and possibly a metal wand. Before Officer Haines  
8 could get the keys, he said he had to check in.

9 A.W. Hartman stated that their search and escort officers picked up their keys and radio from the  
10 control post which was about 50' from the gatehouse, and that when the keys and radios were picked up  
11 the officers were on duty. A.W. Hartman also testified that the keys were timestamped, so that when  
12 they were checked out and returned could be tracked, but that the radios were signed in and out from a  
13 control officer, who wrote in the time the radios were checked out.

14 Member Beigel stated that if officers were performing search and escort they may have had  
15 compensable time if they picked up equipment, but the other positions not necessarily, and that was how  
16 she was feeling.

17 Attorney Hendrickson stated that picking up keys and other equipment was clearly not the only  
18 activities which constituted work in Nevada, and picking up keys was not the only activity that could  
19 start a workday, and that the performance of any work task started a workday, such as being in the  
20 gatehouse for roll call 20 minutes before shift to complete activities for the benefits of their employer.  
21 Attorney Hendrickson stated that the officers were required to be on the premises, on duty and to  
22 complete tasks for the benefit of their employer 20 minutes early, and that the officers did this every day.  
23 Attorney Hendrickson argued that this was not part of the officers' commute, it was after they went  
24 through security, entered the facility and were on premises performing tasks for the benefit of their  
25 employer. Thus, under either Nevada or Federal law the performance of those activities, according to  
26 Attorney Hendrickson, in his opinion would constitute work, which should be compensated.

27 DAG Tan stated that the workday was defined by statute, and that the EMC could defer to that  
28 definition. DAG Husbands stated that Attorney Hendrickson was prescribing a formality to the

1 proceedings that the evidence did not support, and there was no formal meeting, muster or roll call that  
2 occurred.

3 Member Bauer stated that when she looked at NRS 281.100 that statute specifically governed  
4 hours of service of employees of state and political subdivisions, so Member Bauer was wondering if  
5 that statute had a further role in the grievances, as the statute was specifically intended to govern state  
6 employees.

7 Member Parker stated that it sounded like both facilities were able to track when equipment and  
8 keys were checked in and out, so it would not be hard for NDOC to identify specific times being discussed  
9 based on officer assignment.

10 Chair Beigel stated that she was stuck going with the grievances, as in substance what they had  
11 done was too vague, and if the grievances were to be denied in their entirety it did not seem right, but  
12 granting the grievances in their entirety also did not seem right, which Member Parker agreed with.  
13 Member Parker stated that if the EMC were going with 281.100(2), when the officers took charge of any  
14 type of state equipment once they reported to work, then those would be the only officers who could be  
15 tracked, and then for only 20 days prior to the filing of the grievances until present, which Chair Beigel  
16 stated was 2.5 years.

17 Member Bauer asked if since the event date of the grievance did anyone know if Grievants were  
18 assigned to search and escort? Officer Eckard stated that he was assigned to search and escort since the  
19 grievance had been filed, but was unsure of how many times he had been. Officer Haines said he also  
20 had been assigned search and escort duty since his grievances were filed, but was unsure of how many  
21 times.

22 Member Bauer stated that she sympathized with the Grievants. Member Bauer also stated that if  
23 the EMC were to grant the grievances in part based on verifiable shifts where the Grievants worked  
24 search and escort, that became complex because she wanted to make sure that Grievants were  
25 compensated appropriately, but that might need some collaboration by the employers.

26 Member Beigel asked the associate wardens if when officers were assigned to search and escort  
27 if that was notated in CHRONOS, so that a report could be ran showing when an officer was in search  
28 and escort? A.W. Hartman said that NDOC had such archives.

1 Member Bauer stated that the employer would need to bring forth that amount, that it had to be  
2 verified and that there must be a determination by the Governor's Finance Office that sufficient budget  
3 authority existed to pay the claim.

4 A.W. Hartman stated that going back to determine when officers worked search and escort would  
5 be a labor intensive, time consuming process.

6 Member Thompson stated that she wished she knew how many days each officer worked search  
7 and escort, as the information which the EMC had was limited, and wanted to be fair in making a decision.  
8 Member Thompson suggested tabling the grievances to get the dates on which the officers worked search  
9 and escort. Chair Beigel stated that she was not sure that the EMC really needed that information in  
10 making a decision.

11 Member Parker asked in substance if the EMC was considering compensation only for search and  
12 escort or if the EMC were looking at other assignments that required the officers to pick up essential  
13 equipment, such as keys and radios.

14 Member Thompson stated that she thought if the officers had to pick up any equipment at all other  
15 than at their posts they should be compensated.

16 Member Bauer asked if a motion was not narrowed down to search and escort could the employer  
17 go back in the records and determine when any shift would have been that required equipment pick up  
18 other than at the assigned post? Member Bauer also asked A.W. Hartman if a search and escort shift  
19 required that the keys be picked up and if that was when the employee started work, how different was  
20 that from the scheduled shift?

21 A.W. Hartman felt there was no difference, and that rather than say working in Unit 1, where an  
22 officer would pick up his keys and radio, and the officer was assigned to Unit 1, an officer were instead  
23 picking up his or her keys and radio at a central control office area and then were on duty from that time,  
24 as an officers duty location could be all over the yard, but the officer was on duty at that moment, and  
25 that if that differed from the time an officer was scheduled that it was not required to differ.

26 Member Bauer felt the same question should be asked of Grievants, and if one were looking at a  
27 search and escort post for a shift assignment, how different was it from the time an officer picked up keys  
28 and radio for search and escort than it would be from a regular shift?

1 Officer Haines stated that either way one looked it, no matter if an officer worked a unit or search  
2 and escort position, an officer still had to be there before the start of shift. Officer Haines stated that if  
3 he showed up straight at 5:00 am, the start of his shift, and the inmates left for culinary at 5:00 am, he  
4 would be unable to ensure that he had an accurate count of inmates. Officer Haines also asked, if he was  
5 required to check in with his sergeant, and failed to do so, and could be reprimanded for not doing so,  
6 but was not paid for checking in could he still be reprimanded?

7 Officer Eckard added that he worked culinary post many times at HDSP which required pick up  
8 of keys from main control, after which he had to walk about 10 minutes to get to his assigned post.

9 Member Beigel asked Senior DAG Gardner how a further court decision may affect the EMC's  
10 decision here, and whether it had any bearing on what the EMC decided today? Senior DAG Gardner  
11 stated that the EMC could make its decision like a court would, acting under its own authority, and that  
12 the EMC needed to follow binding law.

13 Member Bauer stated that it was her impression that the EMC's authority to decide cases fell  
14 under the Administrative Procedure Act. Member Parker asked the EMC members if they were thinking  
15 in line with NRS 281.100, maybe any position that required a check in or check out of any equipment  
16 would be eligible during those time frames? Member Beigel stated that her thought would be considering  
17 when equipment was checked in or checked out not at the location where the officer ended up, but where  
18 one actually had to walk first to get the equipment, because if one went to an assignment and picked up  
19 their keys and checked them out upon arrival that did not really count.

20 Member Thompson stated that she agreed with both Member Parker and Chair Beigel.

21 Member Bauer stated that she was struggling with how to clearly delineate so that any potential  
22 disagreement between employer and employee could be mitigated with respect to coming up with an  
23 actual dollar amount. Member Bauer further stated that her concern was what days did Grievants work  
24 qualifying shifts, and of those days how many minutes were qualified pursuant to any motion or any  
25 decision made today for compensation, and would the compensation be straight pay base pay or  
26 overtime?

27 Chair Beigel voiced she thought that the compensation would be overtime. Member Parker  
28 thought the EMC would need to match the payroll records with records showing the check in and check

1 out of the equipment, so that it would not just be search and escort, it would be other duties that required  
2 officers to pick up equipment somewhere else where they had to check it out and check it back in. Thus,  
3 according to Member Parker, there would be two sets of records that would confirm each other.

4 Chair Beigel asked Member Bauer why she thought the pay in question may not be overtime, to  
5 which Member Bauer responded that she was thinking the someone would need to verify if the pay in  
6 question would be overtime, and then someone would need to make sure there were no disqualifying  
7 events that did not preclude 40 hours, and that this would be quite a task for Grievants and the employer  
8 to determine.

9 DAG Husbands stated that such a task would be multifaceted, and involve looking at what the  
10 officer was doing, and did the task require the checkout of equipment, when was it checked out, and  
11 would the time spent with the equipment qualify the office for overtime in the given pay period?

12 A.W. Hartman stated that he was guessing NDOC would need to know the exact time the officer  
13 checked out equipment, and what time it was turned in, and that he could not with certainty say if that  
14 could possibly be done, and that someone would need to be on that project full time for two months if  
15 that were to be done.

16 Chair Beigel asked if the EMC used an average number of minutes, could they say that the officer  
17 received 30 minutes of overtime that day the officer checked out equipment, and if that made sense?

18 Member Parker asked if they were talking about identifying 20 working days for three different  
19 incidents, would that really take a long time? Chair Beigel pointed out that the EMC had to go back 20  
20 working days before the grievance was filed up until the day of the hearing.

21 Member Thompson felt that the EMC did not need to know exactly how many minutes the officers  
22 worked for each shift or each position, and that the EMC just needed to know the officer worked that  
23 day, and the officer would receive whatever time the EMC thought was fair.

24 Member Parker asked about tabling the grievance to have NDOC come back with time  
25 calculations. Chair Beigel stated that she did not want to table the grievances at that time.

26 Member Bauer asked if the EMC was leaning towards a motion that would clearly delineate which  
27 post Grievants worked which would be a qualifying event for a number the EMC chose in overtime.  
28 Chair Beigel stated she was leaning in that direction.



1 Member Bauer stated that her understanding of the testimony was that a custody officer would  
2 check out or be given keys and a radio, regardless of whether the officers obtained it at the central  
3 command area of their assigned post or whether they received them in an administrative building, which  
4 could be a 7 minute walk away from their duty post. Member Bauer stated that she was still concerned  
5 about a motion being ambiguous, though.

6 Member Thompson suggested instead of using keys and radio why not say equipment. Member  
7 Bauer agreed that could be done. DAG Husbands opined equipment might become ambiguous, while  
8 saying keys and radio would not be. Member Thompson stated she was concerned with limiting the term,  
9 as testimony had brought forth other equipment being involved, such as officers picking up batteries.

10 Member Bauer stated she shared Member Thompson's concern, but thought that the battery being  
11 picked up was prior to the grievance date.

12 A.W. Hartman suggested the use of the term "institutionally issued equipment," in case a situation  
13 was missed where equipment was picked up away from the officer's duty station. Member Bauer asked  
14 if institutionally issued would also cover equipment such as batons, which the officers always had with  
15 them, to which A.W. Hartman stated that such equipment probably would be covered under such a  
16 definition, and suggested using a term such as institutional equipment issued at the beginning of shift,  
17 and returned at the end of shift.

18 In response to Member Bauer's question, Officer Eckard and Officer Haynes both stated that they  
19 had signed a variable work week agreement for 40 hours.

20 Member Bauer motioned that for any assigned post that required institutional equipment be issued  
21 at the beginning of a shift and returned at the end of a shift at a location other than the assigned post,  
22 Grievant shall be retroactively compensated to\_\_\_\_\_. Retroactive compensation shall be at  
23 the then base rate of pay or overtime rate of pay based on eligibility per hours worked in that 40-hour  
24 time period.

25 Member Thompson made suggested changes concerning Member Bauer's motion before it was  
26 seconded, as did Chair Beigel and DAG Scott Husbands. Attorney Hendrickson added that he agreed  
27 with DAG Husbands in that he believed that the award should be tied to work actually performed, with  
28

1 the caveat that it should include all work, including the work that was performed on days that did not  
2 involve picking up keys.

3 Member Bauer stated that she had a concern that the Director of the Governor's Finance Office  
4 was fiscally conservative, and that she would question the 30 minutes, and asked if the EMC was making  
5 a potential overreach. DAG Husbands expressed concern about the accuracy of the information, and that  
6 if the officers were performing a basic half hour per shift worked when the officers did have to pick up  
7 equipment from outside the duty station there was a risk on the employee's side that there might be  
8 potential undercutting of the time the employees had put in, and that on the employer side he thought that  
9 there was a risk that the State would be paying quite a bit more than would be compensable, but that he  
10 was sensitive to time being an issue. DAG Husbands added that it was unknown what extent of  
11 information was really being looked at, such as how many shifts were implicated, how many days were  
12 in question, how much time, where the information was stored, and how easily accessible the information  
13 was, so that the matter was a bit of a challenge.

14 Member Bauer stated that based on previous hearings she remembered there was testimony  
15 about logbooks and manual processes, her concern was that even with an automated agency the  
16 calculations would take a significant amount of time. Member Bauer's concern for NDOC was that it  
17 would take a significant amount of time, but would not want the Grievants to be undercompensated, but  
18 would not want NDOC to overcompensate, and asked what it would look like if the EMC returned after  
19 30 days after determining the amount of time and effort it would take from NDOC to make the necessary  
20 calculations.

21 DAG Gardner, in responding also opined that a hearing might be needed to precisely determine  
22 the amount of time the employees would be compensated at.

23 Member Parker stated that one of the concerns she heard was what was the justification for the  
24 30 minutes when there was a difference in the distance the officers went for picking up the keys. Chair  
25 Beigel agreed with Member Parker, and said that her proposed changes would result in a more generic  
26 motion that was "out of the weeds." Chair Beigel stated that the proposed motion was similar to what  
27 the EMC had done in Prost, finding that compensable time was required for posts that required that  
28 institutional equipment be issued at the beginning of a shift and returned at the end of a shift other than

1 to the assigned post, and that decision was pursuant to NRS 281.100(2), and that the Grievant should  
2 receive payment for such compensable time, beginning 20 working days prior to the event date of the  
3 grievance forward.

4 Member Bauer still had concerns for the employer and Grievants that the lack of clarity offered  
5 no remedy, and stated that if the EMC did not make the decision clear, and there was disagreement  
6 between the parties, what would the process look like?

7 DAG Gardner opined that while he thought that the proposed motion was fine it left out what the  
8 calculation of what the grievance was, which was ambiguous, and that the parties would have to decide  
9 what the actual dollar amount was with some guidance but not a lot of guidance.

10 Member Parker thought that there was no way around the matter other than basing the decision  
11 on documentation on when the officers checked in and checked out the specified equipment.

12 Member Beigel expressed concern that the amount of time and money to determine the amount  
13 of compensation owed to officers might be very high considering the amount actually owed, or that  
14 NDOC might not have the records to even make the calculations.

15 Member Parker stated that she agreed with adding the actual minutes per qualifying shift  
16 language, but thought that the motion needed to be more specific, and that while she emphasized with  
17 NDOC for having to perform the calculations to determine the amount of compensation owed that fact  
18 should not influence the EMC's decision.

19 Member Bauer said she was looking for the event date of grievance No. 5908. Member Bauer  
20 stated that she had August 26, 2018. Member Bauer made a motion to deny in part and grant in part  
21 pursuant to NRS 281.100 Grievance No. 5908 for any assigned post that requires institutional equipment  
22 issued at the beginning of a shift and returned at the end of a shift at a location other than the assigned  
23 post. Grievant shall be retroactively compensated to August 26, 2018. Compensation shall be at the  
24 actual minutes per qualifying shift multiplied by the applicable base rate of pay or overtime rate of pay  
25 based on eligibility per hours worked in that 40-hour work week. Grievance No. 5908 is denied for all  
26 other shifts that do not require institutional equipment issued at the beginning of a shift and returned at  
27 the end of a shift at a location other than the assigned post.

1 Chair Beigel suggested adding 20 working days prior to August 26, 2020. Member Bauer stated  
2 that in the Butler and Jones grievances it was noted that the EMC could only award damages back to the  
3 event date of the grievance.

4 Member Thompson seconded the motion. The motion carried unanimously.

5 Grievance No. 6050 and No. 6123 were considered separately. Member Parker stated that the  
6 two grievances were 20 days apart, so would not the EMC go retroactive to the first event date of the  
7 11/7/18, and then go forward to cover the 11/27/18 date? DAG Gardner noted that Grievance Nos. 6050  
8 and 6123 involved the same exact concerns, so that doing a motion and choosing the earlier of the two  
9 dates made sense.

10 Member Baur motioned to deny in part and grant in part grievances No. 6050 and No. 6123  
11 pursuant to NRS 281.100. For any assigned post that requires institutional equipment issued at the  
12 beginning of a shift and returned at the end of a shift at a location other than the assigned post, Grievant  
13 shall be retroactively compensated to November 7, 2018. Compensation shall be at the actual minutes  
14 per qualifying shift multiplied by the applicable base rate of pay or overtime rate of pay based on  
15 eligibility for hours worked in that 40-hour work week. Grievance Nos. 6050 and 6123 are denied for  
16 all other shifts that do not require institutional equipment issued at the beginning of a shift and returned  
17 at the end of a shift at a location other than the assigned post.

18 Member Parker seconded the motion. The motion carried unanimously.

### 19 **FINDINGS OF FACT**

20 Based upon the testimony of the witnesses, the arguments made by the parties, the briefs,  
21 evidence, and documents on file in this matter, the EMC makes the following findings of fact. All  
22 findings made are based upon a preponderance of the evidence.

- 23 1. Grievant was a non-exempt State of Nevada employee.
- 24 2. Grievant was employed by NDOC on August 26, 2018, at HDSP.
- 25 3. Grievant was required to be at his post at the time his shift started pursuant to AR 326.
- 26 4. Prior to reaching his post Grievant was required to perform certain activities.
- 27 5. These required activities included going to the gatehouse, screening, muster/checking in  
28 with supervisor, and receiving assignments for the day, including where he would be posted.

6. Grievant then walked to his assigned post. The time of the walk varied, depending on where Grievant was posted, and could take up to 20 minutes. Grievant stated on average the pre-shift activities took 10-15 minutes.
7. Grievant was not paid until he reached his assigned post and picked up the radio and keys, whether it be search and escort or another post at the facility.
8. Grievant would walk across the yard, where it was expected, if Grievant saw an incident occurring involving inmates, that Grievant would take action to address the incident.
9. If Grievant was assigned to search and escort duty Grievant would be required to collect a radio, keys and possibly other equipment from operations.
10. If Grievant was not on search and escort duty then, at least for the relevant time of the grievances, keys, radio and other equipment not personally assigned to Grievant were kept at the posts at HDSP.
11. Officer Eckard would receive information about what was occurring in the unit, although this exchange of information was not required by NDOC, and he would pick up equipment (keys and radio) with the unit officer when not on search and escort duty.
12. It was after receiving the briefing from the officer being relieved that Grievant began his shift.
13. Upon the end of his shift, Grievant would perform the same activities, but in substance in reverse.
14. Grievant estimated that his post shift activities took about 15 minutes to complete, so that in total he spent approximately 30 minutes performing pre and post shift activities for which he was not compensated by NDOC.

#### CONCLUSIONS OF LAW

1. For this grievance, it was Grievant's burden to establish by a preponderance of the evidence that NDOC was required to pay him for pre and post shift activities Grievant performed at HDSP back to August 26, 2018, until the date of his grievance hearing, February 4, 2021.



2. A grievance is any act, omission or occurrence which an employee who has attained permanent status feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee. NRS 284.384(6).

3. NRS 281.100 states in relevant part that:

**NRS 281.100 Hours of service of employees of State and political subdivisions; exceptions; penalty.**

1. Except as otherwise provided in this section and NRS 284.180, the services and employment of all persons who are employed by the State of Nevada, or by any county, city, town, township or other political subdivision thereof, are limited to not more than 8 hours in any 1 calendar day and not more than 40 hours in any 1 week.

2. The period of daily employment mentioned in this section commences from the time the employee takes charge of any equipment of the employer or acts as an assistant or helper to a person who is in charge of any equipment of the employer, or enters upon or into any conveyance of or operated by or for the employer at any camp or living quarters provided by the employer for the transportation of employees to the place of work.

4. Grievant, when working search and escort duty, at the beginning of his shift, took charge of keys and radio, at a location other than his assigned post, and returned the keys and radio to a location other than his assigned post at the end of his shift.

5. Thus, Pursuant to NRS 281.100(2), Grievant took charge of equipment and thus began his daily employment with NDOC. Grievant's workday ended when he returned that equipment to a location other than his post when his shift ended.

6. All other shifts that do not require institutional equipment be issued at the beginning of a shift and returned at the end of a shift at a location other than the assigned post do not fall within NRS 281.100 as commencing the period of daily employment, and are therefore denied.

**DECISION**

Grievance Number 5908 is GRANTED in part and denied in part pursuant to NRS 281.100. For any assigned post that requires institutional equipment issued at the beginning of a shift and returned at the end of a shift at a location other than the assigned post, Grievant shall be retroactively compensated to August 26, 2018. Compensation shall be at the actual minutes per qualifying shift multiplied by the

1 applicable base rate of pay or overtime rate of pay based on eligibility for hours worked in that 40-hour  
2 work week.

3 Grievances No. 5908 is DENIED for all other shifts that do not require institutional equipment  
4 issued at the beginning of a shift and returned at the end of a shift at a location other than the assigned  
5 post.

6 DATED this 1st day of April 2021.

7  
8 EMPLOYEE MANAGEMENT COMMITTEE

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10 

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12 \_\_\_\_\_  
PAULINE BEIGEL, CHAIR

**CERTIFICATE OF MAILING**

I hereby certify that on the 1<sup>st</sup> day of April 2021, I deposited for mailing at Carson City, Nevada,  
a true copy of the attached document, sent via Certified U.S. Mail to:

Joshua Hendrickson, Esq.  
Thierman Buck Law Firm  
[REDACTED]

and via interdepartmental mail to:

Deputy Attorney General Gerald Tan, Esq.  
Deputy Attorney General Scott Husbands, Esq.



Breece Flores  
EMC Coordinator  
Division of Human Resource Management

cc:

Charles Daniels, Director, Department of Corrections  
Christina Leathers, Chief of Human Resources, Department of Corrections  
Cameron Vandenberg, Chief Deputy Attorney General, Office of the Attorney General  
Kahra Stenberg, Legal Secretary Supervisor, Office of the Attorney General  
Anela Kaheaku, Legal Secretary II, Office of the Attorney General  
Tori Sundheim, EMC Counsel, Deputy Attorney General  
Robert A. Whitney, EMC Counsel, Deputy Attorney General  
EMC File