

BRIAN SANDOVAL
Governor

FRANK R. WOODBECK
Director

SHELLEY CHINCHILLA
Administrator



COMMISSIONERS
Patricia Cafferata, Chair
James Campos
Swadeep Nigam
Lauren Scott
Tiffany Young

Minutes
of the
Nevada Equal Rights Commissioners'
Meeting on January 24, 2013

1. Call to Order

Patricia Cafferata, Chair, called the meeting to order at 2:00 p.m.

2. Roll Call and Confirmation of Quorum, and Verification of Posting

Norma Delaney, Administrative Assistant III, called roll and confirmed that a quorum was present, and that the agenda had been posted and the certificates of posting are on file.

Members present: Patricia Cafferata, Chair; James Campos; Lauren Scott; Swadeep Nigam; Tiffany Young.

Staff present: Shelley Chinchilla, Administrator, Nevada Equal Rights Commission (NERC); Michael J. Baltz, Chief Compliance Investigator, NERC; Lila Vizcarra, Supervisory Compliance Investigator, NERC; RoseMarie Reynolds, Deputy Attorney General (DAG); Darrell Harris, Compliance Investigator I, NERC; Patrice Perez, Compliance Investigator I, NERC; Dina Melgar-Zuniga, Compliance Investigator I, NERC; Dennis Maginot, Compliance Investigator II, NERC; Javier Fernandez, Administrative Assistant II, NERC; and Norma Delaney, Administrative Assistant III, NERC.

Public Present: Dane Claussen, Executive Director, American Civil Liberties Union of Nevada (ACLU Nevada); and Jane Heenan, Gender Justice Nevada.

3. Introduction of new NERC Commissioner, Lauren Scott

Ms. Cafferata introduced Lauren Scott and stated that she met Ms. Scott last year during the campaign while she was running for the Assembly, but unfortunately she was not elected; that Ms. Scott had served in the Air Force and became involved in politics by being a lobbyist at the legislature.

Ms. Scott thanked Ms. Cafferata. She thanked Governor Sandoval for appointing her to the Commission and stated it is an honor and privilege to serve the Commission. She stated that when she relocated to Carson City in 2005, she and a friend were denied housing apparently due to their transgender status; that she contacted the Rainbow Place in Reno and was told "there were very few protections on the books for housing discrimination." She stated that she quickly realized there was no group focused entirely on supporting legislative issues relevant to the Lesbian, Gay, Bisexual and Transgender (LGBT) Community in Nevada; that as the founder and director of Equality Nevada, she has worked with groups/individuals in both the Democratic and Republican legislation in the 2009/2011 session to advance the equal rights for LGBT individuals and their families; that since 2009, Nevada has become significantly more inclusive and welcoming for LGBT individuals thanks to the tireless efforts of many; that with the passage of SB283 in 2009, domestic partners now have legal rights; that with the passage of AB211, SB331, and SB368 in 2011, no longer can individuals be denied employment, places of public accommodation, or housing due to their transgender status.

Ms. Scott concluded by stating that as a veteran, a small business owner, and a transgender woman, she looks forward to working with the Commission members and NERC staff in support of its mission and objectives in the coming years.

4. Public Comment

Dane Claussen, Executive Director of ACLU Nevada, stated as a follow-up to the July 31, 2012 meeting in which he was asked to give an impromptu response to a proposed definition of gender identity or expression which might be proposed by NERC, and was passed by the Connecticut state legislature, stated that his first impression was not bad except for the use of the phrase "improper purpose" at the end of the definition. He stated that in discussions with his staff and members of the community, the ACLU is no longer supportive of the definition, adding that the ACLU has a model definition of gender identity or expression which reads:

“Gender identity or expressions means transgender status or identity, actual or perceived gender identity; or gender related appearance, behavior, mannerisms, or other characteristics of an individual with or without regard to the individual’s assigned sex at birth.”

Mr. Claussen indicated that the definition has been shared with Ms. Chinchilla, NERC Administrator, and the ACLU is very interested to see if there would be any action with the upcoming legislative session. He concluded that the ACLU would welcome the opportunity to further advise and assist on this matter whether with legislation or a regulation brought forth by the Commission.

Jane Heenan stated she is here as a representative of Gender Justice Nevada; appreciates the opportunity to comment on the proposed changes in the Nevada Administrative Code (NAC) to include “sincerely held.” She stated that her testimony and that of Gender Justice Nevada is in opposition to the definition of “sincerely held.” Ms. Heenan read her statement into the record and provided written statement of the same (*see Attachment 1 - memo from National Gay and Lesbian Task Force Memo dated January 22, 2013*).

Ms. Chinchilla, NERC Administrator, commented that it sounded like Ms. Heenan’s opposition was to changes in the law with the bill draft request that was submitted (Ms. Heenan agreed). Ms. Chinchilla indicated that the bill draft request was not moving forward; that there is an agenda item to discuss instead, a possible regulation, and asked Ms. Heenan if she would have the same opposition if it were a regulation in the NAC as opposed to the Nevada Revised Statutes (NRS). Ms. Heenan responded that Gender Justice would have the same stance in NAC as they would in NRS.

Ms. Chinchilla asked Ms. Cafferata, Chair, if agenda item 8B could be taken out of order and discussed for those individuals in attendance for this particular portion of the meeting.

Ms. Cafferata agreed to take agenda items out of order, but moved to agenda item 5 due to the possibility of Commissioner Young having to leave early.

5. **Approval of the minutes of the July 31, 2012 Commission meeting**
Correction to be made as follows: page 5, second paragraph, correct spelling of the Grant Sawyer Building. Ms. Young made motion to approve minutes with correction; Mr. Nigam seconded – motion carried.

8. **Discussion to consider pursuing new regulations for NERC regarding:**
B. Clarification of the definition of Gender Identity or Expression
Ms. Chinchilla stated that the bill draft request that was submitted on behalf of NERC to clarify the definition as written (referencing Tab 7) did not move forward and is not being pursued. She stated that it is on the agenda for discussion as to 1) whether the Commissioners would like to pursue as a NERC regulation and clarify how NERC is interpreting the new protected category, and 2) while portions of the definition have been previously discussed, would the Commissioners want the same language or have suggestions for changes.

Ms. Cafferata asked for clarification if the bill draft did not go forward because it was not accepted, and now NERC wants to add the definition for clarification by regulation?

Ms. Chinchilla stated that since the new protected category became law in October 2011, NERC has had a few filings where someone has professed to be a certain gender identity to either gain access to a club by not paying a cover charge, or access to a restroom. She stated that NERC can interpret gender identity the same as religion cases - that NERC takes someone's religion at face value; however, if during the investigation the employer challenges that the individual is not really Catholic for example, and provides an explanation, then NERC would have to determine if that was truly their "sincerely held belief." She added that NERC would look at gender identity cases in the same way,

Ms. Chinchilla stated that in the training sessions she has conducted, several with Ms. Heenan, to employers and other groups regarding the new protected categories, that not a single time in doing the training did someone **not** (emphasis added) stand up and say, "So I can just say that my gender identity is such and such so I can use that restroom?" Ms. Chinchilla added that the way the law is currently written, that would be correct - a person could announce their gender identity and proceed to use that restroom. She added that there could be problems as a result of that and the definition/regulation would clarify how NERC interprets that part of the law.

Ms. Cafferata commented that this is what Ms. Heenan and Mr. Claussen spoke against, the "sincerely held belief," and asked if there were any comments.

Ms. Scott stated that she received a lengthy email from Ms. Heenan regarding this issue from the Gay and Lesbian Task Force (*see Attachment 2, three page memo from National Gay and Lesbian Task Force dated January 22, 2013 as previously mentioned*) which provides several definitions of defense as to why it should not be included, one which states:

"...the belief that there are a set of transgender people who are not sincere about their gender identity is highly offensive and fits with some of the worst stereotypes of transgender people, such as that they are not serious, that they are frivolous, or that they are deluding themselves due to mental illness. . ."

Ms. Scott stated that while this is a great defense and a very actionary [sic] argument, there are a lot of individuals, as Ms. Chinchilla referenced, who would claim to be transgender; who have not done anything to transition; have not changed their identity; have not talked to a therapist; are not taking hormones; and have done nothing to actually validate the fact that they are either gender transitioning or not - but there has to be something that throttles back the free-for-all that is currently in statute and that there is nothing to clarify what these terms mean. She added that she has met people who had started the transition and walked away from it/changed their mind; people who say "I think I'm trans today;" that when you are in the public space that is one thing - when in a private space that is something else.

Ms. Scott added that when you are in a public space (i.e., work space, place of public accommodation), there has to be some measure that is valid whether by NERC, law enforcement, or government, as to what that gender identity is for that situation. She stated that you cannot go to a public restroom without identification - the security officer has to have some way of measuring at that moment what your gender identity might be and if he has nothing to go by, how does he enforce the laws that are written right now?

Ms. Scott advised that in NV it is much easier to have your gender marker changed and that would be a measurable item; that if you are in a public place and you have your gender marker changed, while it can be challenged, it is not invasive; it is simply being asked for identification; the gender marker is changed by visiting your doctor - there is no DMV hassle, no surgery required. She added that one would expect that one would change their gender marker on their driver's license if they planned to live with "sincerely held belief" that they are the opposite sex. She stated that there are three laws that allow transgender inclusiveness in both private/public settings and there has to be some measures of those events as to what they mean from a public management point of view.

Ms. Scott stated that she does support the language to some degree and that NERC's regulations can be expanded to list what is a valid, genuine gender identification as opposed to sex at birth. She added that the "sincerely held belief" is all you need from a regulatory point of view, but for specifics of what that list may be, what is listed (in the NERC proposed definition) may be what you are looking for.

Ms. Scott concluded that pathways have been made to meet these criteria and if some people refuse to meet the criteria and do not want to have any kind of measurable sense of "sincerely held belief," she does not know how it can be regulated and the laws become meaningless at that point.

Ms. Chinchilla commented that the types of items that are listed (in the NERC proposed definition) are items that NERC would look for if the idea of "sincerely held" were challenged; that, like religion, NERC will assume that if a person says their gender identity is female, for example, NERC will not challenge it. But if it becomes part of a defense/challenge, these are what NERC would look at to try and determine whether it was "sincerely held" – whether that gender identity truly was that individual's gender identity.

Ms. Chinchilla stated that whether in NAC or not, these criteria (in the NERC proposed definition) are what NERC looks at; that by putting them in NAC, NERC is telling the public how NERC will look at/measure it and it will help businesses in regards to public accommodation, and will provide employers a perspective on how to look at it.

Ms. Chinchilla concluded that she firmly believes in the “sincerely held” part as NERC has had a charge filed that was not sincerely held and that was the only way NERC could dismiss the case.

Ms. Cafferata inquired as to the process of the regulation.

Ms. Reynolds, DAG, advised that in regards to the current meeting, should the Commissioners vote yes that they believe a regulation on this subject should go forward, next would be the scheduling of a public workshop which is the proper forum to discuss the language and/or changes and allow the public to also comment specifically on the draft (draft language as shown in packet, tab 7, or if Commissioners want to make changes). After the public workshop, the draft goes to the Legislative Counsel Bureau (LCB) to ensure language is consistent with NERC's empowering statutes; draft submitted to the Commissioners for formal adoption at a regular board meeting, allowing for public comment at the beginning/end of meeting; draft goes back to LCB for their final approval.

Ms. Reynolds advised that when the legislature is in session, any regulations that the Commission adopts are temporary – the permanent cycle beings on July 1, which the Commissioners can go forward with the workshop, but the regulation would not actually be adopted until July 1 as a permanent regulation.

Ms. Chinchilla commented that she would not be submitting the proposal until after July 1 as she has to submit the draft to the LCB first and wants to be sure the Commissioners: 1) want to pursue the regulation, and 2) it is more of a time commitment for the Commissioners as there will be one/possibly two workshops in addition to the regular meeting for adopting the regulation.

Ms. Cafferata asked for a motion; Ms. Scott made the motion to take a vote; Mr. Campos seconded the motion – motion carried.

Mr. Nigam made the motion that the Commissioners direct Ms. Chinchilla to move forward with drafting a regulation further clarifying the definition of gender identity or expression. Mr. Campos seconded the motion – motion carried.

Ms. Cafferata moved to agenda item 6.

6. Discussion regarding Administrator's report on:

A. Personnel - Staffing

Ms. Chinchilla introduced NERC's three new investigators: Darrell Harris, Partice Perez, and Dina Melga-Zuniga, and provided background information on each.

Ms. Chinchilla also referenced Tab 3, which is a spreadsheet of NERC's staff members from the time that the Governor Gibbons recommended NERC for closure in February 2010; the rebuilding of staff in April 2010; to current staffing levels. She advised that NERC currently has 8 permanent, non-probationary employees; 6 probationary employees; and 2 vacant positions – that 50% of positions are either vacant or on probation.

Ms. Chinchilla stated that in regards to the investigative staff, 3 are permanent, non-probationary employees; 5 are on probation; and 2 positions are vacant – that 70% of the investigator positions are probationary or vacant. She added that one of the vacancies include Mr. Davis' position as he is retiring February 1 after 18 years with NERC.

Ms. Chinchilla stated that in the past 36 months, 13 employees have left NERC – 3 did not pass probation; 5 left for other employment; 4 left for other reasons – of these 2 retired; and 1 cited the pay/workload for leaving.

Ms. Chinchilla added that NERC continues to struggle to meet its federal contract; that recruitment and hiring is ongoing (interviewing for Sparks investigator position mid-February), and she does not want to short change the training for new investigators as NERC has a great record of quality work and has not had any rejections from the Equal Employment Opportunity Commission (EEOC) in 3 years. She added that the wait time for scheduling intake appointments and cases waiting for reassignment has increased, which were inevitable based on current staffing levels.

Mr. Nigam asked about the process for upgrading positions as most employees leave due to pay/salary/benefit issues. Mr. Campos asked about desk audits.

Ms. Chinchilla responded that upgrades were approved by the 2005 legislature and not realized; that NERC had an audit in 2008 and was asked why the upgrades were not pursued; that she has asked multiple times for desk audits and has been unsuccessful in having anyone come out and sit with staff; that she has been pursuing upgrades without success, and; the upgrades are not in the Governor's recommended budget, but were submitted as an item for special consideration. She added that the Governor's budget for SFY 2014 reduced the furloughs from 6 days to 3 days and in SFY 2015 step increases return.

B. Federal Fiscal Year 2013 (FFY13) Equal Employment Opportunity Commission (EEOC) work sharing agreement

Ms. Chinchilla commented that based on a formula/rating period, NERC usually receives a preliminary contract, but due to federal budget issues, NERC does not yet have a preliminary contract from EEOC; that EEOC has accepted NERC's application, but it is unclear if NERC will receive payment for cases already closed, how much for each closure, or how many closures for FFY13 (federal contract is from October 1, 2012 to September 30, 2013). She added that she has received correspondence from Washington, D.C., but it is the same nationwide - when EEOC is advised of their allocation from the federal budget, they will advise the Fair Employment Practicing Agencies (FEPAs), which includes NERC.

C. Budget – State Fiscal Year 2013 (SFY13)

Ms. Chinchilla advised that the packet contains the November 2012 report and that a handout was provided which is the December 31, 2012 budget report, and that there were a couple items she wanted to bring to the Commissioners' attention.

Revenues - 3435 Federal EEOC Contract – The amount of \$361,950.00 was based on NERC's initial contract in FFY12 - 600 cases at \$600.00 each; 39 intake credits at \$50.00 each.

For FFY13, EEOC is projected to pay \$650.00 per case. Ms. Chinchilla stated that based on staffing, she is projecting NERC will close 580 cases, and receive 50 intake credits at \$50.00 each; and if EEOC continues to reimburse NERC for training, she estimates NERC will receive for \$380,900.00 for its FFY13 contract. She added that while it looks like NERC will earn in excess this year, it will not be

until SFY14, and the SFY14 budget has NERC at a higher allocation, so NERC will fall short.

Expenditures - 02 Out of State Travel – Ms. Chinchilla stated that NERC cannot access these funds if training is involved and there is no need for NERC to go out of state unless it was for training; that a work program will be done to move the funds into training; that last year the funds reverted back to the general fund and she would rather spend the funds on training due to the number of new employees.

Expenditures – 04 Operating - Ms. Chinchilla stated that it is projected NERC would be short \$9,000.00 due to the cost of armed security in Las Vegas, but due to the money NERC is vouchering from EEOC, it will be covered.

Expenditures – 30 Training - Ms. Chinchilla stated that NERC has not spent this money and it being held as EEOC was to do a technical assistance training in Las Vegas and she wants to send the investigative staff to the training; that the training is pretty in-depth and looks at case law regarding EEOC issues; that if the EEOC training does not get scheduled, she will look at other training venues.

Ms. Chinchilla advised that NERC is 50% in to the SFY13 and has spent 41% of the budget.

D. Performance Indicators/Statistics

Ms. Chinchilla advised that there are two pages in regards to the Performance Indicators (PIs) for SFY14 – first page in Tab 4 are current PIs, and the second page are proposed PIs. She stated that in regards to **PI #1**, NERC is recommending a change from **22 calendar days** to formalize charges of discrimination. It is not a realistic time period and in 5 years it was only met for a 3 month period in 2008 with 3 people doing intake full-time. NERC is recommending **35 calendar days**. She stated that she has been tracking NERC's progress and believes that 75% is doable provided NERC is fully staffed.

Ms. Chinchilla stated that in regards to **PI #2**, 180 days or less is a national benchmark and NERC tries to meet this, but that it is also another one that is not easily achieved and NERC is requesting it be dropped from **75% to 65%** 180 days or less.

In regards to **PI #4**, mediation, Ms. Chinchilla introduced Mr. Maginot who is NERC's mediator and stated that he is successful in at least 72% of mediations he facilitates; that when he first started conducting mediations in 2010, he averaged 11-12 mediations per month; that now he is averaging 16 per month and she attributes the confidence from employers for his higher success rate; that in 2012 he resolved cases in an amount of over \$1,000,000.00 and is on target to achieve that again this year.

Ms. Cafferata asked who sets the Performance Indicators, to which Ms. Chinchilla advised that the audit department within the Department of Employment, Training & Rehabilitation (DETR) works with each agency; that NERC was audited last year and between the audit recommendations, discussions with Dennis Perea, Deputy Director, DETR, and herself, PI recommendations were made, then filtered through Financial Management, and ultimately recommended to the legislature for approval.

Ms. Chinchilla stated that the national average from the time a case is formalized to case closure and/or resolution within 180 days, is 40% and NERC has been averaging 32%.

E. Outreach

Ms. Chinchilla provided a spreadsheet, Tab 5, that indicates dates of training, company, type of presentation, and number of participants. She added that NERC is doing more sessions but that the audiences have been smaller; NERC has been providing a lot of internal training within DETR to the Job Connect offices, DETR in general, and Voc Rehab. She added that Mr. Maginot occasionally provides training in Northern Nevada, but that most recently he was on a radio talk show discussing NERC's mediation program. She added that when training requests are received, for the most part she provides the training, but that Michael Baltz and Lila Vizcarra also provide training. She added that at a previous meeting, there was discussion regarding contacting the various Chambers but that she did not receive any responses; that she will possibly reissue the letters – commended Mr. Fernandez, Administrative Assistant II in Sparks for obtaining all the contact information/addresses.

F. Legislative Update

Ms. Chinchilla stated that in regards to AB57, NERC started with five bill draft requests which were consolidated to three; that only one is moving forward, AB57. AB57 is a housekeeping bill that indicates it is the **Administrator** who provides the biennial report to the Governor (copy handed out in meeting).

Ms. Chinchilla stated that there are several others that she is watching; specifically SB70 which effects NERC as it defines caregiver as a new protected category – NERC will be in support of this bill as NERC has this coverage to a certain degree under Title VII (based on sex) or the Americans with Disabilities Act (ADA). She added that she does not believe it will affect NERC's workload and/or have a financial impact as NERC is already addressing the complaints under Title VII or ADA.

Mr. Campos commented that whenever an agency takes on more responsibility, the agency will attach a fiscal note to the bill, and that perhaps NERC should not be shy and explore the matter.

Ms. Chinchilla stated that there are a few bills regarding illegal employment practices that she is monitoring and will send the Commissioners an email regarding the bill numbers.

Ms. Reynolds, DAG, stated she wanted to advise the Commissioners that if any are testifying before the legislature, you can identify yourself as a Commissioner with NERC, but you **cannot** (emphasis added) represent in your testimony that this is the official position of the Commission on a bill unless there has been a public meeting held, there is open discussion what the position of the Commission is going to be, and a vote to approve a representative to speak at the legislature. She added that if you identify yourself as a Commissioner with NERC, and you are testifying as a private citizen, you still need to make that statement.

Ms. Chinchilla commented that there have been cases in court in the last year that are showing transgender or gender identity cases can fall under Title VII. She added that she received official correspondence from EEOC in Washington, D.C., stating that these are now part of the contract and individuals should be counseled to know they now have federal protection as well; that gender identity or expression and

sexual orientation are both covered under a form of sex discrimination under Title VII as it is a form of sex stereotyping. She added that this will help individuals who are filing because now there are federal court remedies should they go to court; that NERC previously did not get paid for these cases as they were covered under state law only, but now will receive payment from EEOC.

7. Election of Commission Secretary pursuant to NRS 233.050

Ms. Cafferata advised that it is not required that the Commissioners have a secretary; that the duties have been to sign the minutes once completed and sign subpoenas should the Chair not be available. She added that when subpoenas are given for signature, there is a cover memo stating the facts and why the subpoena is required and the subpoena itself.

Discussion regarding nominations. Mr. Campos made motion for Ms. Young to be nominated secretary for the Commission; Ms. Scott seconded – motion carried.

9. Discussion to consider pursuing repeal of NERC regulation NAC 233.180 Depositions, as formal depositions are not required nor utilized by NERC

Ms. Chinchilla stated this came from her review of all NERC's regulations a year ago from the Governor's Executive Order 2011-01; that she was tasked with reviewing the regulations, writing a report recommending regulations that needed to be repealed, amended or clarified. She added that she recently had to do a filing with the Secretary of State in regards to a regulation review which she had already done, and was asked if there were any regulations to be repealed or amended; that she thought if NERC was going to pursue a regulation in a workshop they could be done at the same workshop. Ms. Chinchilla advised that as far as she knows, NERC has never utilized this regulation and that it would pertain to someone who could not attend a public hearing.

Ms. Cafferata commented that testimony could also be an affidavit which is a sworn written statement, someone who has been interviewed, or a recording of what a person was stating, but if it is not being utilized, it should be removed.

Ms. Reynolds stated that affidavits are one sided where you cannot ask questions, in a deposition you can/would ask questions.

Ms. Cafferata made the motion to pursue repeal of NERC regulation NAC 233.180 on depositions; Ms. Young seconded – motion carried.

Ms. Cafferata moved to agenda item 8A, as it was overlooked after earlier discussion regarding 8B.

8. Discussion to consider pursuing new regulations for NERC regarding:

A. Motions (in reference to Public Hearings)

Ms. Chinchilla stated that she included the only reference she could find in NAC 233 regarding hearing motions, referencing NAC 233.145 subsection 4, “. . . Following the filing of briefs and after deciding contested motions, the Commission may . . .” which assumes the Commission hears motions. She added that 281A.265 is part of the Ethics Commission law and that NERC could adopt the regulation with minor changes if the Commissioners wanted a regulation regarding motions.

Ms. Reynolds stated that the discussion on motions came up in regards to a public hearing NERC was going to have in the fall; that the Clark County School District (CCSD) filed a motion to dismiss, although it was the opinion of the DAG's office (Ms. Reynolds and Ms. Long who was advising the Commissioners) that the Commissioners could consider a motion to dismiss, but there was some confusion. Ms. Reynolds stated to clarify the matter, the Commissioners could pass a regulation as to the way in which you would consider a motion. She added that the Ethics Commission is a unique body, but that there are other agencies that have regulations on motions that she believes would be better suited for NERC. Ms. Reynolds referenced NRS 622A.360 on motions and indicated that this procedure is followed by licensing bodies when they do licenses; disciplinary hearings with respect to licenses; the types of motion that may be filed; timely, for when they are due; how they are going to be heard – that this NRS may be something that the Commissioners may want to consider.

Ms. Cafferata stated that at the last meeting when there was discussion regarding a possible public hearing and a motion was presented to the Commissioners, it was unclear whether or not the Commissioners had the authority and under what NAC/NRS to make a motion. She added that she was aware that the Ethics Commission had authority for considering motions and agreed that there may be other agencies that have regulations

as Ms. Reynolds indicated, and believes that the Commissioners should proceed with the workshop to include discussion on adopting a regulation.

Mr. Nigam made the motion to instruct Ms. Chinchilla look at drafting a regulation on motion practices before the Commissioners; Ms. Scott seconded. Motion carried.

**10. Discussion to consider pursuing amendments of NERC regulations:
A. NAC 233.135 Stipulations (Remove subsection 3 as it is contrary to subsections 1 & 2).**

Ms. Chinchilla stated that in her review of regulations as previously stated, it was discovered that subsection 3 is contrary to subsections 1 and 2.

Ms. Scott made motion to direct staff to pursue the removal of subsection 3 from NAC 233.135; Mr. Campos seconded. Motion carried.

B. NAC 233.250 Petition for Advisory Opinion (Allow 60 days to issue the advisory opinion rather than 30 days, which would be consistent with NAC 233.260 Petition for Declaratory Order).

Ms. Chinchilla stated in making the change from 30 days to 60 days to provide a response, allows both Ms. Reynolds and herself the time to properly address any concerns and to conduct a hearing/schedule meeting.

Ms. Reynolds stated that NAC 233B.120 references petitions for declaratory orders and advisory opinions but does not contain any type of deadlines, but indicates each agency shall provide by regulation to the filing and prompt disposition of petitions for declaratory orders and advisory opinions.

Mr. Nigam made the motion to send potential amendment/consider a workshop to allow 60 days to respond versus 30 days; Mr. Campos seconded motion. Motion carried.

11. Discussion regarding location and time of next meeting and agenda items.

Discussion regarding whether Commissioners want to meet in April for a legislative update while session still in, or in June after the session has ended. She added that her availability in May is limited due to providing testimony in front of the legislature.

Ms. Delaney will contact the Commissioners via e-mail for date in June to be conducted via video-conference.

Ms. Reynolds added that during the legislative session, should a bill draft become finalized and something comes up where Ms. Chinchilla would need input from the Commissioners, as long as there is 3 days notice to comply with the open meeting law, the meeting can be held via telephone.

Mr. Campos had asked that if information is provided on the same day as the meeting or during the meeting, is it possible that the Commissioners can break away or does any discussion have to be discussed in an open forum?

Ms. Reynolds advised that if something is presented on the agenda that day, it can always be tabled to gather more information or the information can be discussed over several meetings – that as far as a side meeting, the answer is no.

Ms. Chinchilla added that the Commissioners can call a meeting, too, if there is something that really needs to be discussed.

12. Public Comment

Ms. Heenan, Gender Justice Nevada, stated she would like to respond to some of the discussion regarding the proposed changed to NAC on gender identity or expression; that in regards to Mr. Nigam's comment "important to the transgender community" – that she has been a member of this community and as an advocate for over 15 years, as a therapist who has seen hundreds of transgender people for many years, any proposed changes in this language is opposed by the transgender community that she knows and represents. She added that in leading up to the session in 2011, we worked hard for over four years to get good language that we felt was representative of our community's needs. She added that there is

no "free-for-all to have to throttle back" as Commissioner Scott describes it; that most transgender individuals she knows are far too fearful to be filing claims as they do not believe they will be treated fairly and in her experience, is a direct contradiction to what Commissioner Scott stated. She added that Commissioner Scott was clearly correct in that the driver's license procedure has helped, but it is far from easy for trans folk; that lots of trans folk struggle to afford the process of having a medical professional complete the paperwork, even finding a medical professional to complete the paperwork can be a considerable burden. She stated that the trans person's average income is about \$10,000.00, according to research done by the National Gay & Lesbian Task Force and the National Center for Trans Equality; that the weeks of unemployment and under-employment are considerably higher, particularly for a trans person of color; that to say that a driver's license will suffice and is an easy way to check, they are not very well informed about the living experience of trans people. Ms. Heenan concluded and thanked the Commission for allowing her the opportunity to speak. (See Attachment 2 submitted after meeting concluded)

XIII. Adjournment.

Ms. Cafferata thanked the public/staff for participating and adjourned the meeting at approximately 3:40 p.m.

Respectfully Submitted:



Tiffany Young
Secretary/Commissioner

7/8/13
Date

Attachment 1

Date: January 22, 2013
To: Jane Heenan, Gender Justice Nevada
From: Alex Garnick, Law Fellow, and Lisa Mottet,
Director of the Transgender Civil Rights
Project
Subject: Analysis of Proposed "Sincerely Held"
Language

National Gay and Lesbian
Task Force

MEMO



The following is analysis of the proposal to add "sincerely held" in the definition of gender identity in the following manner: "Gender identity or expression" means a gender-related identity, appearance, expression or behavior of a person that is sincerely held, regardless of the person's assigned sex at birth."

I. Including the phrase "that is sincerely held" is not legally necessary because sincerity of a person's identity is inherent in the existing statutory language

The fact that one's gender identity must be sincerely held in order to be protected can be shown by looking to interpretations of "religion," as protected by Title VII of the Civil Rights Act of 1964. Although Title VII also does not contain the phrase "sincerely held," in the definition of religion¹ or elsewhere, courts consistently acknowledge that the claimant must have a sincerely held religious belief in order to assert a claim of religious discrimination.

In those cases where an employer believes a person's religious belief to not be sincere, an employer may assert a defense claiming that it was not required to provide accommodations because the employee's beliefs were not sincerely held. At that point, a claimant will generally demonstrate a sincerely held belief by proving compliance with religious mandates over a period of time.² Courts also look to factors that might undermine an employee's assertion of a sincerely held belief, the most common of which is inconsistent behavior.³ Inconsistent behavior, however, does not automatically disprove a claimant's assertion of a sincerely held belief. The court has acknowledged that people's beliefs can evolve and change over time.⁴ Additionally, the

¹ The definition of religion in Title VII is "(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e-Definitions.

² For two examples outside of the employment context, see, *Roy v. Cohen*, 590 F. Supp. 600, 610 (M.D. Pa. 1984) (analyzing objective manifestations of religious belief to determine that the claimant's testimony was credible); *Gallahan v. Hollyfield*, 516 F. Supp. 1004, 1006 (E.D. Va. 1981) (finding that a Native American prisoner held a sincere religious belief that he must wear long hair because the prisoner had practiced his beliefs since he was five years old).

³ See, e.g., *Hansard v. Johns-Manville Prods. Corp.*, 1973 WL 129 (E.D. Tex. Feb. 16, 1973) (employee's contention that he objected to Sunday work for religious reasons was undermined by his very recent history of Sunday work).

⁴ See, e.g., *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997) (en banc) (Jewish employee proved her request for leave to observe Yom Kippur was based on a sincerely held religious belief even though she had never sought leave from work for a religious observance, and conceded that she generally was not a very religious person; the evidence showed that certain events in her life had strengthened her religious beliefs over the years); *EEOC v.*

court also has recognized that a claimant's religious practices may differ from the religion's norms and traditions.⁵

The courts have used the embedded, inherent requirement of "sincerely held" though it is not in the statutory language to effectively to dismiss fraudulent religious discrimination claims.⁶ For example, in *Tiano v. Dillard Department Stores, Inc.*, the Ninth Circuit found that the timing of the claimant's religious pilgrimage was a matter of personal preference rather than part of a bona fide religious belief, and that the employer therefore did not violate Title VII by terminating her for going on a pilgrimage during its busy holiday season.⁷

Because the concept of "sincerely held" is inherent in the meaning of protected characteristics, it is not legally necessary to include the phrase with regard to gender identity.

II. Including the phrase "sincerely held" as part of gender identity or expression would cast doubt on whether NERC can check for sincerity of belief related to claims of religious discrimination.

As detailed above, although the phrase "sincerely held" is not within the language of Title VII, the courts routinely assume the phrase is inherent. If the phrase "sincerely held" is incorporated within the Nevada statute only with regard to gender identity or expression, this creates the implication that sincerity of belief is not required with regard to religious protections. To put it another way, if there is an explicit requirement in one area of the law, then its absence in another area of law can be taken to mean that there is no such requirement. This would open the door to NERC not being able to investigate the sincerity of religious belief when it is called into question by an employer or other entity covered by the law.

III. A Proposed Solution without a Clear Explanation of the Problem, Could Cause Victimization

Generally, changes to statutory language should only be pursued when there is an articulable problem caused by the existing language. As we have not been part of these conversations in Nevada, we are not sure what the problem this language is meant to solve. Without an articulated problem that this is meant to solve, for purposes of this memorandum, we can only guess what

IBP, Inc., 824 F. Supp. 147 (C.D. Ill. 1993) (Seventh-day Adventist employee's previous absence of faith and subsequent loss of faith did not prove that his religious beliefs were insincere at the time that he refused to work on the Sabbath).

⁵ See, e.g., *Rivera v. Choice Courier*, 2004 WL 1444852 (S.D.N.Y. June 25, 2004) (the statutory language providing that Title VII encompasses "all aspects of religious observance and practice, as well as belief," means that Title VII "protects more than . . . practices specifically mandated by an employee's religion").

⁶ See, e.g., *EEOC v. Union Independiente De La Autoridad De Acueductos*, 279 F.3d 49, 56 (1st Cir. 2002) (finding that a Seventh-day Adventist employee had acted in ways inconsistent with the tenets of his religion, for example that he worked five days a week rather than the required six, had lied on an employment application, and took an oath before a notary upon becoming a public employee, can be relevant to the evaluation of sincerity but is not dispositive).

⁷ *Tiano v. Dillard Dept. Stores, Inc.*, 139 F.3d 679 (9th Cir. 1998).

problem this language is meant to resolve. We can think of two reasons NERC might feel this language is necessary:

First, NERC may think it does not have authority to investigate the sincerity of identity when it is called into question. This is unlikely to be the case and if true, NERC should reconsider, for two reasons:

- The case law is clear under religion, as explained above, that the law does not apply when a person is not *sincerely* expressing the protected trait.
- Furthermore, as a more general matter, the legislature does not need to write “bona fide,” “true,” “sincere,” or other words meaning “not fake” in regards to the words in the statutory code in order for the statute to only apply to real/actual/sincere items/characteristics. For example, the Nevada law does not need to say that only real burglaries, not faked burglaries, cause a victim to be eligible for victim’s compensation, or that a person’s real/actual income is to be taxed, not whatever amount the person falsely claims their income to be. In short, the realness, accurateness of all terms used the Nevada statutes are presumed – all statutes only apply in situations where conditions/terms are real and genuine, not faked. Thus, if an employer or other entity asserts that the person is stating a false gender identity, then NERC absolutely has the power to investigate.

Second, NERC may want to investigate sincerity in all cases presumably because either it believes that there are a) set of transgender people who are not serious or sincere about their identity and thus do not deserve protection of the law, or b) that there are a set of non-transgender people who would falsely state their gender identity who would go undetected unless NERC questions each person’s sincerity.

With regard to (a), the belief that there are a set of transgender people who are not sincere about their gender identity is highly offensive and fits with some of the worst stereotypes of transgender people, such as that they are not serious, that they are frivolous, or that they are deluding themselves due to mental illness. Certainly NERC does not want to be suggesting that it believes these stereotypes. Second, also with regard to (a), it should be noted that questioning the sincerity of all complainants, with no reason or evidence, is also an unpleasant process where the victim of discrimination is being treated like a perpetrator of a fraud, being victimized again. This procedure is incredible invasive, likened to an “inquisition” by at least one scholar.⁸

With regard to (b) presumably, there have not been any non-transgender complainants who have been discovered to falsely be stating a gender identity. If that was to happen in the future, NERC would have authority to dismiss the case (as discussed above) after an entity brought the suspected falseness of the identity to NERC’s attention. It is highly improbable that NERC must make affirmative determinations that a person’s gender identity is sincere – as a pure practical matter, the entity will say that it does not believe that the identity is sincere.

⁸ See Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 954 (1989) (stating that “the inquiry into sincerity cannot completely escape the distinctly bad aroma of an inquisition.”)

Ultimately, in order to say that there is a legal reason that this language is necessary, the courts in Nevada or elsewhere else would have to decide that a person is entitled to protection even if they falsely state their gender identity, or that a person has a right not to be asked about their gender identity when it is called into question by an entity covered by the law, both of which are incredibly unlikely given the case law on religion, as well as general rules of statutory interpretation discussed above.

IV. Conclusion

In sum, including the term “sincerely held” is both legally unnecessary as well as brings with it the risk that transgender people who are experiencing real discrimination at work or by other covered entities to be put under questioning just for being who they are. Unlike questioning with regard to what the entity did and what evidence the complainant has that the entity had bias as its motivation, this type of questioning gets to the heart of who an individual is and could cause them to be re-victimized in the complaint process by the very entity that should be alleviating them from the effects of discrimination. Thus, the “sincerely held” language being considered for addition in the definition of gender identity or expression should not be pursued and is ill-advised.

We can be reached for further discussion or comment through Lisa Mottet, at lmottet@thetaskforce.org, (202) 639-6308 (direct), and/or (202) 498-0851 (mobile).

Attachment 2

Gender Justice

- NEVADA -



Gender Justice Nevada champions justice, dignity, and respect for Nevada's diverse trans and gender non-conforming persons and communities by offering innovative education, health, legal, outreach, and direct service programs.*

708 S. 6th Street * Las Vegas, NV 89101
702.425.7288 * info@gjnv.org

28 January 2013

Why the definition of "Gender Identity or Expression" should remain as it is, without adding the clause "that is sincerely held" in the Nevada Administrative Code

Singling out "Gender Identity or Expression" for such restriction is unfair. There are no similar written restrictions on the definition of religion, for example. Indeed, we would likely all agree that having such written restrictions on religion would be offensive. Further, to add this language only further harms our state's transgender persons, who are arguably our state's most vulnerable citizens, suffering more widespread and egregious civil rights violations more often than members of any other definable group. As such, they deserve the widest possible protections. To restrict this definition would cause undue confusion and fear among persons in this already_disempowered group.

we would also argue that this language is not actually about transgender persons or about protecting transgender persons (which IS the explicit desire of the existing statutory definition). Rather, this additional language is about non-transgender persons who may make claims of discrimination under the existing language. As a result, the proposed "solution" of restricting the definition of gender identity or expression causes members of our transgender communities to bear the burden of these persons' illegal claims, which is clearly unfair. A much more fair solution is to have investigators trained sufficiently to identify cases where persons are not making legal claims and to exclude those claims from going forward, as is the case regarding claims in other protected categories.

To address statements made by sitting commissioners, we would strongly challenge Commissioner Nigam's statement that this change is "important to the transgender community." Indeed, any change to the existing definition is strongly opposed by all members of our transgender communities that we are in contact with (and as an organization with more than 40 years collective experience working, playing, and crying with members of our transgender communities, we believe we are in a better position than Commissioner Nigam to comment on what is important to our transgender communities).

In addition, there is no "free for all" to have to "throttle back" as Commissioner Scott describes. It is our clear and ongoing experience that transgender persons who are survivors of employment

and public accommodations discrimination are fearful of filing claims, believing that they will only suffer further at the hands of state bureaucrats who will question their gender expression and minimize their claims of harm. The commission must understand how fearful members of our transgender communities are as a result of the regular harmful treatment they receive in our gender binary culture.

The assertion by Commissioner Scott that it is “easy” for persons to access name and gender marker changes on driver licenses is both untrue and is dismissive of class and race barriers which are present in our culture. While it is true that in 2010 we were successful in making changing gender markers on driver licenses easier, it remains problematic at best for most transgender persons to make such changes. Cost is the primary barrier, as the average cost for a “do-it-yourself” name/gender marker change is around \$600. Having an attorney assist in the process can double or triple the cost. Transgender persons suffer from extraordinary and pervasive economic discrimination, with transgender persons of color significantly greater barriers (please see accompanying document, “Injustice at Every Turn,” a large national survey of transgender persons’ experiences, published in 2011 by the National Center for Transgender Equality and the National Gay and Lesbian Task Force). Clearly, it is far from “easy” for most transgender persons to make document changes.

Finally, there is no precedent for restricting access in writing to civil rights protections in Nevada. The intent in 2011 of the legislature and governor was clear: *transgender citizens of Nevada deserve equal protection under the law*. Indeed, bipartisan votes in both houses and the governor's signature firmly support the existing definition. Such support was more recently reaffirmed in the governor's decision not to send NERC-proposed BDR on to legislature (while we are not privy to the exact language of this proposed BDR, it seems likely that it included “sincerely held belief” as part of its text).

Thank you for your time in consideration of our words. And, thank you for your service to persons in our state.