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RE: NAC 213.518(1) Workshop Comments

Nevada Board of Parole Commissioners:

Thank you for holding this NAC 213.518(1) workshop in response to my NAC 213.518 NRS 233B.100 Petition. I have reviewed the proposed NAC 213.518(1) language and, while it is a step in the correct direction, the amendment falls short of what is needed to correct the legal issues within NAC 213.518(1).

NRS Chapter 233B grants the Board authority to adopt, file, amend and repeal Nevada Administrative Codes. NRS 233B.040(1) provides:

To the extent authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions. ... In every instance, the power to adopt regulations to carry out a particular function is limited by the terms of the grant of authority pursuant to which the function was assigned.

Under the proposed amendment, NAC 213.518(1) would read:

After establishing an initial assessment regarding whether to grant parole pursuant to NAC 213.516, the Board will consider the factors contained in NRS 213.10885 and NRS 213.1099 and may consider additional aggravating and mitigating factors to determine whether to grant parole to a prisoner.

In three unique ways, the proposed NAC 213.518(1) language exceeds the grant of authority given to the Board in NRS 213.10885.

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First, NAC 213.518(1) would still rely on the NAC 213.516 initial assessment to determine when the Board can execute NAC 213.518. 10 of the 15 NAC 213.516 initial assessment results grant or deny parole without any execution of NAC 213.518. The issue pertaining to NAC 213.518(1)'s dependency on NAC 213.516 lies in NRS 213.10885. NRS 213.10885 is an enabling statute of NAC 213.518 and provides in pertinent part:

2. In establishing the standards, the Board shall consider ... all other factors which are relevant in determining the probability that a convicted person will live and remain at liberty without violating the law if parole is granted or continued. The other factors the Board considers must include, but are not limited to:

- (a) The severity of the crime committed;
- (b) The criminal history of the person;
- (c) Any disciplinary action taken against the person while incarcerated;
- (d) Any previous parole violations or failures;
- (e) Any potential threat to society or to the convicted person; and
- (f) The length of his or her incarceration.

By stating "[T]he Board shall...", NRS 213.10885(2) mandates the Board consider "[A]ll other factors which are relevant..." In the case of Anselmo v. Bisbee, 396 P.3d 848 (Nev. 2017), the Nevada Supreme Court defined "relevant" as meaning "applicable". Therefore, any factor that applies to a prisoner must be considered by the Board.

Under the current and proposed language, NAC 213.518(1) being dependent upon NAC 213.516 does not conform to the Legislature's NRS 213.10885(2)-(2)(f) mandate. Every time the NAC 213.516 initial assessment does not order NAC 213.518 factor consideration, NAC 213.518(1) impermissibly allows for the Board

to skip consideration of every applicable NAC 213.518(2) & (3) factor, and, with the amendment, all 6 of the enumerated factors contained in NRS 213.10885(2)(a) - (f).

Per NRS 233B.040(1), the Board is limited in its authority to adopt regulations pursuant to the requirements of applicable statutes. NRS 213.10885(2) is applicable and requires the Board to consider all relevant factors, including those contained in NRS 213.10885(2)(a) - (f). For these reasons, the Board must consider every NAC 213.518 factor that applies to a prisoner every time that prisoner is considered for parole.

To fix this issue, NAC 213.518(1)'s dependency on the NAC 213.516 initial assessment must be repealed.

Second, the NAC 213.518(1) amendment would continue to leave NAC 213.518(2) & (3) factor consideration discretionary when the Board executes NAC 213.518. By retaining the NAC 213.518(1) language, "[M]ay consider additional aggravating and mitigating factors...", the Board leaves consideration of those factors as a choice.

As previously stated, NRS 213.10885(2) states that all relevant factors shall be considered, therefore, the Board does not get to choose which NAC 213.518(2) & (3) factors it wishes to consider or not consider. If an NAC 213.518 factor is relevant, meaning applicable, the Board does not legally have a choice. The factor must be considered. Again, per NRS 233B.040(1), the Board is limited in its authority to adopt regulations pursuant to the requirements of applicable statutes.

To fix this issue, the words "may consider additional" in NAC 213.518(1) should be replaced with "relevant".

Third, NRS 213.10885(1) provides, in part: "The [Board's] standards must be based upon objective criteria for determining the person's probability of success on parole." Presently and under the proposed amendment, as use of the word "may" makes NAC 213.518(2) & (3) factor consideration absolutely discretionary, NAC 213.518 does not contain language stating when or how the Board considers any NAC 213.518(2) or (3) factor.

Discretionary factor consideration is subjective, the opposite of objective. Per the Legislative intent of NRS 213.10885(1), any interested person should be able to read the Board's NACs and determine whether a prisoner should be granted or denied parole. Without specifying when or how any NAC 213.518(2) or (3) factor is to be considered, it is literally impossible for anyone, including the Board at large, to determine if a prisoner should be granted or denied parole as each parole consideration will be influenced by the subjective bias of the participating Board members. Once again, per NRS 233B.040(1), the Board is limited in its authority to adopt regulations pursuant to the requirements of applicable statutes.

To fix this issue, the Board must adopt NAC 213.518 language specifying when and how NAC 213.518 factors are to be considered.

Ultimately, the Board recognizing that there are mandatory elements to NRS 213.10885 and NRS 213.1099 is an improvement in NAC 213.518(1)'s language. However, for the reasons discussed in this submission, it is insufficient. The Legislature decides what the Board is required to do. The current and proposed NAC 213.518(1) language does not meet those requirements. The Board

has a duty to comply with its statutory obligations. Judging law breakers through a process, which itself, breaks laws, does not bring justice to Nevada's victims, it only creates more.

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