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NEVADA BOARD OF PAROLE COMMISSIONERS

MINUTES

**Meeting of the
Board of Parole Commissioners**

July 28, 2021

NOTE: The following minutes have not been approved and are subject to revision at the next meeting of the Board.

The Board of Parole Commissioners held a public meeting on July 28, 2021, beginning at 1:00 PM at the following locations:

Conference room at the central office of the Board of Parole Commissioners, located at 1677 Old Hot Springs Road, Ste. A, Carson City, NV and video conference at the Parole Board Office, 4000 S. Eastern Avenue, Ste. 130, Las Vegas, NV.

I. Open Meeting, call to order, roll call 1:00 PM.

The meeting was called to order by Chairman DeRicco. Present in Carson City were Chairman DeRicco, Commissioner Jackson, Commissioner Baker, and Commissioner Weisenthal. Present in the Las Vegas office was Commissioner Bailey. Commissioner Christiansen and Commissioner Verchio were marked absent, excused by Chairman DeRicco.

Support staff in attendance:

- Darla Foley, Hearing Examiner I
- Mary Flores, Administrative Assistant III
- Katie Fraker, Administrative Assistant III
- Kelly Mellinger, Hearing Examiner II

Members of the public present in Carson City included:

Katie Brady, Deputy Attorney General

Members of the public present in Las Vegas included:

None

II. Public Comment. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2) of NRS 241.020.

Public comment – Carson City, NV

No public comment.

Public comment – Las Vegas, NV
No public comment.

III. **For possible action:** Review/Approval of minutes from the June 28, 2021 Board meeting.

Motion:	Approval of minutes from the June 28, 2021 Board meeting.
Made:	Commissioner Jackson
Seconded By:	Commissioner Bailey
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion passed

IV. **For possible action:** The Board will discuss and may take action to update/modify the “Operation of the Board” document that outlines the procedural functioning of the Board. This document may be updated and modified in the future as needed.

Chairman DeRicco discussed the Boards ongoing project of updating and reviewing selected sections in the Operation of the Board manual as discussed at the June 28, 2021 Board meeting.

Chairman DeRicco introduced the first section for review, Disclaimer, Mission and Vision statement. He referred to the suggested changes as noted in the handout “Disclaimer Mission Vision.” Board members agreed that the proposed language changes were appropriate.

Motion:	Approve the Disclaimer, and Mission and Vision statement as distributed.
Made:	Commissioner Weisenthal
Seconded By:	Commissioner Baker
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion Passed

Chairman DeRicco introduced the second section for review, Parole Decisions. He referred to the suggested changes as noted in the handout “Parole Decisions.” Board members agreed that the suggested language changes were appropriate as distributed.

Motion:	Approve the newly developed Parole Decision section.
Made:	Commissioner Bailey
Seconded By:	Commissioner Weisenthal
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion Passed

Chairman DeRicco introduced the final section for review, Parole Hearings. He referred to the suggested changes as noted in the handout “Parole Hearings.” Board members agreed that the suggested language changes were appropriate as distributed.

Motion:	Approve the newly developed Parole Hearing section.
Made:	Commissioner Jackson
Seconded By:	Commissioner Baker
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion Passed

- V. **For possible action:** The Board will discuss and may take action to approve and/or modify the proposed “Waiver of Counsel Canvas” and the “Waiver of Right to Counsel at Parole Violation Hearing” documents, which were developed for parolees who may wish to waive counsel at violation proceedings.

Chairman DeRicco introduced the “Waiver of Counsel Canvas” and the “Waiver of Right to Counsel at Parole Violation Hearing” documents and referred to the handouts of the same name. As discussed at the June 28, 2021, meeting, Commissioner Baker developed the form to use at violation proceedings when an inmate waives counsel. The form would be initialed and signed by a parolee before a revocation hearing when a parolee requests to waive counsel. Chairman DeRicco asked if there were any questions concerning the documents. The Board had no comment or questions.

Motion:	Approve the "Waiver of Counsel Canvas" language and the "Waiver of Right to Counsel at Parole Violation Hearings" document as submitted.
Made:	Chairman DeRicco
Seconded By:	Commissioner Jackson
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion Passed

- VI. **For possible action:** The Board may discuss and take action to appoint an Executive Secretary, who is in the unclassified service of the State per NRS 213.1085.

Chairman DeRicco opened up the next item of appointing a new Executive Secretary to the Board. An announcement for this position was opened and has since closed. Chairman DeRicco provided that Katie Fraker was the only qualified applicant. Chairman DeRicco referred to the handout as the “Fraker Resume” and provided that per NRS 213.1085, the Board shall appoint an Executive Secretary who is in the unclassified service of the State. The Board must select the Executive Secretary based on their training, experience, capacity, and interest in correctional services. Under this position, the Executive Secretary shall perform such duties including, but not limited to, duties outlined in NRS 213.1085.

The Board members discussed Katie Fraker experience and performance while working with the Board and praised her work ethic.

Motion:	Appoint Katie Fraker as the Executive Secretary of the Board of Parole Commissioners.
Made:	Commissioner Jackson
Seconded By:	Chairman DeRicco
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion Passed

VII. For possible action: Review of Petitions submitted by Evan Grant, for Adoption, Filing, Amendment, or Repeal of Regulations for NAC 215.512, NAC 213.514, NAC 213.516, NAC 213.518, and NAC 213.522 per NRS 233B.100. The Board to consider the petitions and shall either deny the petitions in writing, stating its reasons, or initiate regulation-making proceedings.

Chairman DeRicco noticed a typographical error in agenda item VII and noted NAC 215.512 should be NAC 213.512. For the record, Chairman DeRicco corrected the error.

Chairman DeRicco stated of the documents submitted by Mr. Grant, there appears to be five separate NACs that Mr. Grant alleges violate a controlling statute, Nevada Constitution, and/or the Nevada and United States Supreme Court precedent. These NACs are 213.512, 213.514, 213.516, 213.518, and 213.522.

Chairman DeRicco introduced Katie Brady of the Attorney General’s Office (DAG) to provide clarification. Chairman DeRicco noted that he felt that the best way to address Mr. Grant’s concerns was to review Mr. Grant’s petitions individually per the specific NAC and have a discussion on them individually and then entertain a motion, and then vote on the proposed motion prior to moving on to the next one, rather than hearing everything at once and just having one motion on everything after the discussion.

Katie Brady (DAG) began with Mr. Grant’s petition on NAC 213.512. Ms. Brady provided that Mr. Grant seeks the repeal of NAC 213.512 in its entirety, arguing that it is illegal and unconstitutional and that it violates Article 4, Section 20 of the Nevada Constitution as a local and special law that punishes crimes and misdemeanors. Ms. Brady provided that pursuant to her research, there is legal support for the conclusion that NAC 213.512 is a general law that has applicability with uniform operation throughout the State. Mr. Grant further argues that the Legislature did not authorize the Board to look beyond the statutes to the Nevada Department of Corrections (NDOC) assessment when considering the severity of the crime committed. Ms. Brady provided that typically one does not read words into a statute when looking at the rules of statutory construction and that in her opinion, Mr. Grant’s argument would read words into NRS 213.10885. She provided that if the Legislature had specifically intended that the Board would only be able to look to NRS 193.130 or 193.330, the Legislature could have indicated that to the Board in the statute. Ms. Brady pointed out that Mr. Grant has not cited any law that provides that the Board cannot look to the validated NDOC assessment for the offense severity score. Ms. Brady stated that after speaking with Chairman DeRicco, it is her understanding that the NDOC assessment completed under NRS Chapter 209 has a separate offense severity score that corresponds with the score being used by the Board and that the Parole Board is not using the NDOC assessment as a whole, the Board is only using the specific offense severity score.

Ms. Brady provided that Mr. Grant contends that because the term “shall” was used that the Board is required to consider the severity of the crime committed but argues that NRS 209.341 does not address the severity level. Ms. Brady discussed that there is a severity level component within the assessment and that is the piece that is currently being used by the Board.

Ms. Brady provided options to the Board. Ms. Brady provided the Board could decline to change NAC 213.512, repeal and revert to the 2004 regulation in which the Board used the specific types of offenses such as category A, B, C felonies and broke it down that way; or repeal and enact a new regulation.

Chairman DeRicco discussed the three options the Board could act on regarding NAC 312.512. Decline to change NAC 213.512, Repeal and revert to the 2004 regulation; or repeal and enact a new regulation.

Motion:	Decline the change to NAC 213.512
Made:	Commissioner Jackson
Seconded By:	Commissioner Baker
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion passed

Ms. Brady provided that Mr. Grant’s petition regarding NAC 213.522 contained the same arguments that he made in the petition for NAC 213.512. Mr. Grant seeks the amendment of NAC 213.522 to remove Section 1(a) and Section 2.

Ms. Brady’s suggested that the Board’s options were to decline to change NAC 213.522, or remove sections 1(a) and 2 of NAC 213.522.

Chairman DeRicco commented that as the arguments for NAC 213.522 are the same as NAC 213.512, and the Board declined to change NAC 213.512, that he was not sure that any changes should be made to NAC 512.522. Chairman DeRicco discussed the two options suggested by Ms. Brady that the Board could decline to change NAC 213.522; or remove sections 1(a) and 2 from NAC 213.522.

Motion:	Decline the change to NAC 213.522
Made:	Commissioner Baker
Seconded By:	Commissioner Weisenthal
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion passed

Ms. Brady provided that in Mr. Grant’s petition on NAC 213.518, he seeks an amendment to NAC 213.518. Mr. Grant argues that NAC 213.518 is subjective and is subject to conditional execution and capricious subjectivity. Mr. Grant contends that pursuant to the Anselmo Nevada Supreme Court case, inmates have a statutory right to proper application of the standard set forth in NAC 213.518. Mr. Grant specifically argues that NAC 213.518 violates NRS 213.10885 in three ways: (1) NRS 213.10885 provides that the Board “shall” consider relevant factors and that the adoption of the word “may” in NAC 213.518(1) affords impermissible discretion in the Board’s

consideration of the NRS 213.10885(2) factors. Mr. Grant seeks the amendment in NAC 213.518(2) to remove the permissible “may consider” language and replace the language with “shall consider relevant” language. This would indicate that the Board shall consider all relevant aggravating and mitigating factors.

(2) Mr. Grant contends that having the consideration of the NAC 213.518 factors be dependent upon direction from NAC 213.516 impermissibly violates NRS 213.10885(2). Mr. Grant seeks the amendment to remove the prefatory language that states: “after establishing and initial assessment regarding whether to grant parole pursuant to NAC 213.516.”

(3) Mr. Grant contends that the requirement that the NRS 213.10885(1) standards must be based on objective criteria is not being met because there is no specific language in the NAC that provides for how the aggravating and mitigating factors are to be considered. Mr. Grant argues that the current subjective process results in inconsistent and unpredictable consideration of any given factor. Mr. Grant seeks the amendment of NAC 213.518 to add a “yet to be determined” section detailing how the aggravating and mitigating factors are to be considered.

Ms. Brady provided that Mr. Grant is requesting NAC 213.518(1) be amended and that there are three alternate ways that Mr. Grant’s first argument can be addressed. She provided that NAC 213.518(1) could be amended to alter the language to add language concerning the mandatory factors contained in NRS 213.10885. Ms. Brady noted that there are also mandatory factors contained in NRS 213.1099 so the Board could also add language into NAC 213.218(1) to include those two provisions to make it exceptionally clear the Board does consider those mandatory factors. She provided that currently NAC 213.518(1) contains both mandatory and non-mandatory aggravating and mitigating factors, which is why the word “may” is used, but that could be broken out by more specific language.

Option 1 –The NAC could be amended to read that “After establishing and 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.”

Option 2 – The Board could remove the factors that the Board is required to consider and make two sections. One section for the discretionary aggravating and mitigating factors and one for the mandatory.

Option 3 – The Board could take Mr. Grant’s suggestion that the Board remove the “may consider” language and replace it with “shall consider relevant aggravating and mitigating factors.”

Ms. Brady further provided that Mr. Grant also seeks amendment to remove the language “after establishing an initial assessment regarding whether to grant parole pursuant to NAC 213.516.” Ms. Brady felt that if this language was removed, the Board would need to make it clear how the NACs function together.

Ms. Brady also provided that Mr. Grant seeks that NAC 213.518 to be amended to add language detailing how aggravating and mitigating factors are to be considered. Ms. Brady provided that she is unsure what language Mr. Grant is requesting for this section.

Ms. Brady indicated the last option for the Board is to decline to amend NAC 213.518.

Chairman DeRicco confirmed with Ms. Brady that there are three options within the first part of Mr. Grant’s petition on NAC 213.518. Ms. Brady concurred.

Commissioner Weisenthal questioned if one of the options was making the aggravating and mitigating factors for both mandatory and discretionary parole hearings. Ms. Brady clarified that in NRS 213.10885, there are certain aggravating and mitigating factors that must be considered. Ms. Brady's suggestion was to consider an option that made it clear that some of the aggravating and mitigating factors are mandatory and some are discretionary. Ms. Brady provided that she believes Mr. Grant's issue is not an issue in actual application but is based on the language in NAC 213.518.

Chairman DeRicco motioned that in the first section of Mr. Grant's petition on NAC 213.518 that the Board amend the NAC to alter language in section (1) to add language concerning the mandatory factors contained in NRS 213.10885 and NRS 213.1099 and to move through the regulation process.

Motion:	Amend the NAC to alter language in NAC 213.518(1) to add language concerning the mandatory factors contained in NRS 213.10885 and NRS 213.1099 Such as: "1. 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 and to move through the regulation process to make the change to NAC 213.518(1).
Made:	Chairman DeRicco
Seconded By:	Commissioner Jackson
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion passed

Chairman DeRicco then made a motion to decline to make other changes.

Motion:	Decline to change any other sections in NAC 213.518 other than already previously approved by the Board
Made:	Chairman DeRicco
Seconded By:	Commissioner Weisenthal
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion passed

The Board adopted the motion that the Board decline to change any other requested changes to NAC 213.518 other than the decision to approve the changes to NAC 213.518(1).

Chairman DeRicco indicated the language proposed in the approved motion is suggested language and that once changes to NAC 213.518 move through the regulation process, that the language may change, but that the Board knows what their intent is to amend NAC 213.518.

Chairman DeRicco asked if any members of the Board had any discussion regarding the remaining arguments in Mr. Grant's petition on NAC 213.518. There was no request for discussion.

Katie Brady provided that Mr. Grant also seeks the repeal of NAC 213.516. Mr. Grant argues that NAC 213.516 violates NRS 213.10885; Article 4, Section 20 of the Nevada Constitution; and Nevada Supreme Court precedent. Ms. Brady provided that Mr. Grant makes essentially two arguments. The first being that the statutory mandate in NRS 213.10885(2) that the Board shall consider relevant factors creates a liberty interest by citing the Anselmo case from the Nevada Supreme Court and the US Supreme Court case of Olim. Mr. Grant argues that the table in NRS 213.516 circumvents the consideration of the mandatory relevant NAC 213.518 factors resulting in a subjective and capricious decision. Ms. Brady provided that she reviewed the case law and that she does not believe that the cited cases support Mr. Grant’s argument that there is a constitutional right that is created. She provided that the Anselmo case determined that it was a statutory and not a due process right and that Olim and the cases that followed only support that a liberty interest is created when there is a clear limit on the Board’s discretion such as for mandatory parole.

Ms. Brady provided that the second argument is that Mr. Grant contends that NAC 213.516 must be repealed because it violates Article 4, Section 20 of the Nevada Constitution as it constitutes a local or special law for the punishment of crimes and misdemeanors due to the use of NAC 213.512 severity levels. Ms. Brady noted that Mr. Grant is using the same arguments that he made in his first and second petitions.

Ms. Brady provided four options for the Board: The Board can (1) decline to change NAC 213.516, (2) repeal NAC 213.516, (3) modify NAC 213.516 to clarify that NRS 213.10885(2) factors are always considered, or (4) amend NAC 213.516 to refer to the mandatory factors contained in NRS 213.10885 and NRS 213.1099.

Chairman DeRicco reiterated the four options for the Board’s action on NAC 213.516.

Motion:	Decline to change to NAC 213.516
Made:	Commissioner Weisenthal
Seconded By:	Commissioner Bailey
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion passed

Katie Brady provided that Mr. Grant seeks the amendment of NAC 213.514 to remove subsection (4) to conform with his requested removal of NAC 213.516.

Ms. Brady provided the Board’s options, to: (1) decline to remove NAC 213.514(4); (2) remove subsection 4, but she pointed out that would not correspond with the Board’s decision rendered on NAC 213.516; or (3) remove subsection 4 and replace it with new language.

Motion:	Decline to remove NAC 213.514(4)
Made:	Commissioner Baker
Seconded By:	Chairman DeRicco
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion passed

VIII. Public Comment. No action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2) of NRS 241.020.

Public comment – Carson City, NV
No public comment.

Public comment – Las Vegas, NV
No public comment.

IX. For possible action: The Board may act to adjourn the meeting.

Motion:	To adjourn the July 28, 2021 meeting of the Nevada Board of Parole Commissioners
Made:	Commissioner Jackson
Seconded By:	Commissioner Baker
Votes in Favor:	DeRicco, Jackson, Baker, Weisenthal, Bailey
Votes Opposed:	None
Results:	Motion passed