

BRIAN SANDOVAL
Governor

FRANK R. WOODBECK
Director

SHELLEY CHINCHILLA
Administrator



COMMISSIONERS
Patricia Cafferata
Swadeep Nigam
Lee Plotkin
Tiffany Young
Scott Youngs

Minutes
of the
Nevada Equal Rights Commissioners'
Meeting on December 6, 2011

I. Call to Order

Patricia Cafferata, Chair, called the meeting to order at 2:33 p.m.

II. 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; Lee Plotkin; Swadeep Nigam, Tiffany Young.

Staff present: Shelley Chinchilla, Administrator, Nevada Equal Rights Commission (NERC); Rose Marie Reynolds, Deputy Attorney General (DAG); Frank Woodbeck, Director, Dept. of Employment, Training & Rehabilitation (DETR); Dennis Perea, Deputy Director, DETR; Cedric Cole, Compliance Investigator I, NERC; Anna Caputo, Compliance Investigator I, NERC; Kahaterina Mallory, Administrative Assistant I, NERC; Javier Fernandez, Administrative Assistant I, NERC; and Norma Delaney, Administrative Assistant III, NERC.

Ms. Chinchilla advised that Scott Youngs, Commissioner, indicated in an e-mail that his term has expired and he will not be asking to remain as a Commissioner and will send in a resignation letter to the Governor.

Public present: Anthony Rogers, Southern NV Building & Construction Trades; Staci Pratt, American Civil Liberties Union (ACLU) of Nevada; Katrina Rogers, ACLU of Nevada.

III. Introduction of the new Director of the Department of Employment, Training and Rehabilitation

Ms. Chinchilla introduced Mr. Woodbeck and stated that prior to coming to DETR, Mr. Woodbeck was the Director of Las Vegas Operations and Workforce Initiatives with the Nevada Commission on Economic Development; that he was responsible for economic development and for providing advice and guidance to create employment and training opportunities for new and emerging companies throughout the state; that he served as a Commissioner on the Nevada Commission on Economic Development, appointed by Governor Gibbons in July 2007, until he stepped down in October 2009 to accept a staff role with the Nevada Commission on Economic Development.

Ms. Chinchilla added that Mr. Woodbeck has a 36-year background in the communications industry; that he was a senior sales manager for two of the world's leading communications companies, Capital Cities/ABC and the Washington Post.

Ms. Chinchilla concluded by stating Mr. Woodbeck is a native of Buffalo, New York, currently residing in Las Vegas with his wife Suzan, and that he is a graduate of the University of Buffalo with a Bachelor of Science Degree in Business Management and also studied graduate courses at Harvard University, and is a veteran of the U.S. Air Force.

Mr. Woodbeck advised that he is looking forward to working with NERC staff and the Commissioners; that NERC has had some terrific leadership including Ms. Chinchilla, Maureen Cole, and Dennis Perea who is currently the Deputy Director with DETR; that in terms of NERC's "rebirth" everything has been going along fine and he is looking forward to supporting the agency in what needs to be accomplished.

IV. Public Comment

Katrina Rogers identified herself and stated that she is a legal fellow at the American Civil Liberties Union (ACLU) in Las Vegas, and Staci Pratt, Legal Director of the ACLU, and indicated that they wanted to bring before the Commission notice that the ACLU intends to file a petition and ask the proper process of how to file a petition to have NERC issue an advisory opinion regarding the definition of public accommodation; that it

has been brought to the attention of the ACLU, since the adoption of the new non-discrimination laws on October 1, 2011, that there is some confusion defining public accommodation when it comes to educational institutes –NV statute 651.050, subsection 2, subsection K, defines public accommodation that includes nurseries, private schools and universities, and an open-ended definition that basically says any other educational institutions.

Ms. Rogers advised that the ACLU receives questions as to whether public schools are considered a place of public accommodation; that she has material that can be provided to the Commission, CCSD vs Buchanan, where the Nevada Supreme Court has explicitly defined public elementary schools to be places of public accommodation - that the ACLU is seeking an advisory opinion of the NERC extending that definition to include public schools, not only the elementary level, but any public school or institution.

Ms. Rogers stated that the ACLU believes that if NERC was to issue an advisory opinion to that affect, it will not only help the definition of the statute that seems to be a little vague, but will also help aid NERC in the implementation of enforcement of the new non-discrimination policies that went into effect on October 1, 2011; that if the Commission does not wish to issue an advisory opinion, the ACLU asks that the Commission seek the opinion of the Attorney General's Office to see if they would issue an advisory opinion regarding their definition of NRS 651.050.

Ms. Pratt added that the ACLU is seeking this in relation to SB331 which took effect on October 1, 2011, and that this bill establishes that a transgender individual has protection in places of public accommodation; that the ACLU believes that based on the plain language of the statute, as well as case law in Nevada, that it does extend to public schools and that it is within NERC's jurisdiction to have enforcement in those arenas, and; that the ACLU plans to file a formal petition in that regard and seek to have an actual advisory opinion or declaratory order that indicates NERC's position on this issue.

Rose Marie Reynolds, DAG, stated that members of the public cannot petition the Attorney General's Office directly to issue advisory opinions; that the Attorney General's Office only does that on behalf of a state

agency; that the petition needs to be in writing and suggested that they review NAC 233.250 which talks about the process the Commission follows for issuing advisory opinions; that the Commission cannot act on an oral request, it must be in writing with specific questions to address; to include in the petition a statement that the issue you are seeking advice about is not a pending case as it is specifically prohibited by NAC 233.250.

Ms. Cafferata asked Ms. Reynolds if the advisory opinion that the ACLU just addressed will be in a public format or closed session, to which Ms. Reynolds advised it will **not** (emphasis added) be a closed session whether the five Commissioners or the agency as a Commission issues the opinion.

V. Approval of minutes of June 29, 2011 Commission meeting

Corrections are as follows: page 1, add Javier Fernandez, Administrative Assistant I, and Maia Ramirez Finholm, Compliance Investigator II, to staff present; page 8, third paragraph, change the word “acknowledge” to “recognized” Rose Marie Reynolds, DAG; page 15, fourth paragraph, Ms. Cafferata asked that agenda items IX and X that will be on the following meeting’s agenda, be spelled out for clarification. Ms. Cafferata asked for a motion to approve the minutes – Mr. Plotkin made motion to approve with changes; Mr. Nigam seconded; motion carries.

VI. Election of Commission Secretary pursuant to NRS 233.050

Ms. Cafferata asked Mr. Plotkin to explain the duties of the position of secretary that he has been performing. Mr. Plotkin advised that state law directs that a secretary be appointed by the Commissioners; that the position has been to sign minutes for public record once approved, and that in absence of the Chair, he has signed subpoenas. Mr. Plotkin advised that he would be happy to continue with these duties, provided he is reappointed as his term has expired. Ms. Cafferata asked for a motion to re-elect Mr. Plotkin as secretary; Mr. Nigam made the motion; Ms. Young seconded; motion carries.

VII. Discussion regarding Administrator’s report

a. Budget

Ms. Chinchilla referenced Tab 3, State Fiscal Year 2011 (SFY 11) budget report dated October 31, 2011, and provided the following information:

Revenues:

3435, Federal EEOC Contract - based on 600 cases at \$600 each and 39 intake credits at \$50 each and while she is confident NERC can meet the contract amount of 600, she has requested the next contract be for 800 cases; that she has not received a response regarding her request but if the contract is for 600, NERC can request a contract modification.

4254 Miscellaneous Revenue - last column, the total listed is for subpoenas and that she is unclear why this amount is so high as typically this amount has been approximately \$800 in revenue, but that the balance can be made up in budget.

Expenditures:

01, Personnel Services - NERC is budgeted for 22 staff members – 16 full-time and 5 Commissioners; there is 1 vacant intermittent position that has not been filled since 2008 and the others listed have been removed as of July 1-2011; under column 8, same line, NERC is approximately \$10,000 short for the year in what has been spent so far and what is projected; there has been some salary saving and will continue to be salary savings due to the vacant position and several positions which are currently under-filled; NERC has spent approximately \$2,800 in overtime to meet federal contract; this amount is included in the \$10,000 shortage and can be recovered as well.

02, Out of State Travel – column 6, there are enough funds for both Administrator and the Chief Compliance Investigator to attend the EEOC/FEPA conference – EEOC reimburses NERC \$1,900.

03, In State Travel – due to new staff and no supervisory position in Northern Nevada, either she or Michael Baltz, Chief Compliance Investigator, travel quarterly to Northern Nevada to meet/work/train staff and also schedule any outreach that has been requested in Northern Nevada; that she is also planning on bringing down the northern staff members in a few months for additional training; there may be some excess in this fund that may be reverted back to the General Fund.

04, Operating Expenses – this amount is high due to the amount of money the Legislative Counsel Bureau (LCB) gave NERC for the Las

Vegas office to move, \$85,665; total received is approximately \$106,000, therefore Category 04 is actually \$10,000 more than last year's budget.

05, Equipment – this amount is also from the LCB for the Las Vegas move, and is for large items NERC will need to purchase such as a conference room table, 5 desks, chairs, bookcases.

26, Information Services – after subtracting costs from DoIT (Department of Information Technology), NERC has approximately \$4,500 to spend on computer equipment; NERC will inherit some very nice two-year old computers and with the \$4,500, she plans to purchase four new computers to replace the four oldest as NERC has not been keeping up with the replacement schedule.

30, Training – NERC also received extra money from the LCB due to so many new employees, specifically investigators; staff has been attending training and she believes staff speaks for itself in how well they are doing and how much confidence the EEOC has with staff – there have been no rejections from EEOC in over a year and a-half – the training money is being put to good use.

Mr. Nigam commented that with NERC currently closing 600 cases, and with Ms. Chinchilla asking for an upgrade to 800 cases, there will be a surplus of approximately \$200,000 and asked about the impact on staff.

Ms. Chinchilla responded that if NERC is able to get the contract of 800 cases and meet it, there will be a surplus and she will be able to go to the LCB and possibly get some upgrades; that she is not sure about hiring another investigator – rather, she is looking at upgrading the vacant investigator position to a supervisory position; that this position will carry an abbreviated case load and also perform other supervisory duties and hopefully make up the difference for losing the Deputy Administrator position; that if the workload was there and NERC had the funds to bring in another investigator, she would certainly look into hiring another investigator but she would first look at upgrading the investigative positions which was recommended in an LCB audit approximately five years ago.

Ms. Chinchilla commented that if NERC gets the contract of 800 cases, NERC will be ahead, but she will not know until either March or April

2012 what the contracted amount is, but that NERC is working as if that is the contracted amount. She added that the contract will be retroactive and is tied to the federal budget which may be part of the reason it is received by NERC six months into the contract.

b. Performance Indicators

Ms. Chinchilla, still referencing Tab 3, referenced copies of the monthly reports she provides to the Commissioners, SFY 11 and 12; that in looking at closures for September 2011, this was the last big push for closures and NERC closed 110 cases, normally an average of 50 cases; NERC did meet contract and submitted 605 cases for contract credit.

Ms. Chinchilla stated that in regards to inventory, she thought it was dropping off, but it is pretty consistent with prior years; that in regards to state only cases regarding employment, this number dropped based on the previous year and she believes that some of the sexual orientation basis also have federal coverage to include Title VII, gender stereotyping, and if this is the case, they will not show up on the report as state only.

Ms. Young, Commissioner, asked Ms. Chinchilla if there was a way to determine how many complaints on sexual orientation were also under federal coverage. Ms. Chinchilla stated she can provide that information to the Commissioners and would use the current/previous year.

In regards to housing complaints, Ms. Chinchilla stated that this number has not changed much, but that she feels there will be an increase of housing complaints due to the two new protected categories added under housing in state statues, sexual orientation and gender identity or expression; that these basis are not federally covered and individuals have no other recourse but to go to NERC; to date, individuals filing housing complaints have gone to HUD (Housing and Urban Development) as there is more remedy in federal court.

Ms. Chinchilla pointed out that the reports also show the settlement benefit amounts NERC has reached in the resolution of cases – for SFY 11, \$735,183 and so far for SFY 12, \$233,605 and added that NERC is settling more cases.

Ms. Chinchilla stated that she has provided two sets of Performance Indicators – one set is what she currently reports internally to DETR and to the LCB and the other set is *Proposed* Performance Indicators that she is tracking to see if it is worthwhile to propose the changes to the LCB; that there has been discussion regarding Performance Indicator 1, formalizing charges within 22 days, when it takes 6 weeks to get the actual intake appointment, it is impossible to meet; that while she is going to change the process regarding intake, there are other factors that must happen first.

Ms. Chinchilla referenced cases open 180 days or less, and stated that on the *Proposed* Performance Indicators page, the number of days is 280 days or less; that this number is gradually increasing whereas the 180 days or less is averaging 50% - this means that NERC is closing the older cases and they happen to be in the range of 280 days; that NERC is getting the older cases out and you can see the progress.

Mr. Plotkin asked what type of an impact does Ms. Chinchilla think filling the vacant position would have on the open case days. Ms. Chinchilla stated that this person would have an abbreviated case load, close between 4-5 cases per month, and while this would not be a big contribution, this person would free up both her time and Michael Baltz' time for other duties such as outreach, be a backup for conciliations/mediations, help with the training of staff and moving cases forward.

c. Federal Fiscal Year 2012 (FFY 12) Equal Employment Opportunity Commission (EEOC) work sharing agreement and contracting principles

Ms. Chinchilla referenced Tab 4 and advised that even though NERC does not have a contract, NERC does have a work sharing agreement and a set of contracting principles; that every three years NERC has to submit an entire package as a FEPA (Fair Employment Practices Agency) and that NERC has been accepted as a FEPA – all documents have been signed by herself and Olophius Perry, District Director, EEOC on September 28, 2011.

Ms. Cafferata commented that in the work sharing agreement, page 4, it states in part “. . . FEPA is a party to a Conciliation Agreement or a Consent Decree. . . FEPA will provide the EEOC with an on-going list

of all agreements. . .” and asked if there is a list of these and if so, how many?

Ms. Chinchilla advised that NERC has settlement agreements and conciliations and does not sign as a party to the agreement; that NERC proctors the agreement but does not administer it; that in regards to the Consent Decree, NERC does not litigate so there are none.

d. Update on Gender Identity or Expression protection in employment, housing and public accommodation (as per AB211, SB331 and SB368)

Ms. Chinchilla advised that at the last meeting she was asked to provide information as to what type of training she would provide to staff. She advised that she has provided a total of three hours over two days; that on September 28, 2011, video-conferencing the staff in Northern Nevada, a joint presentation was provided by herself and Jane Heenan, Executive Director of Equality Nevada, and Mel Goodwin, Youth & Volunteer Service Director of the LGBT (Lesbian, Gay, Bisexual, Transgender) Center – that both these individuals spoke more from the prospective of that community, experiences in that community, what to look for, and how it affects them.

Ms. Chinchilla stated that in researching, she spoke more on how other jurisdictions that have this protection are doing; how NERC will proceed so staff will know what to look for as complaints start to come in – this was 2 hours and had to be continued to October 11 for an hour. She advised that on October 11, discussions included the definition under the law; what was required for gender identity or expression; looked at other jurisdictions and issues such as religious accommodations; use of bathrooms; use of other segregated facilities; grooming standards and dress code; misuse of pronouns; proof of gender never required; name change; and looked at case laws from other jurisdictions or Title VII, as gender stereotyping; housing impact and how it is different; impact on NERC and how many cases she thought NERC could expect.

Ms. Chinchilla advised that on October 14, 2011, training was provided for an hour and a-half with Katherine Knister, Executive Director of Silver State Fair Housing Council, who provided

information and spoke to staff, north and south; that Silver State Fair Housing helps people file housing complaints and NERC wants to partner with them because with the new protected categories, Ms. Knister needs to know she can send people to NERC and under what guidelines; that Ms. Knister was provided a copy of NERC's housing complaint form based on sexual orientation and/or gender identity or expression.

Ms. Chinchilla added that the NERC's web site had changes made, including new fact sheet, identifying the new protected categories which took effect October 1, 2011, and that all intake forms have been updated too.

Mr. Plotkin advised Ms. Chinchilla that he appreciates the follow-up and as he stated in the last meeting, with the new changes it is important for staff to get both perspectives; that when Ms. Heenan and he provided diversity training to Metro (Las Vegas Metropolitan Police Department) and the FBI (Federal Bureau of Investigations), Ms. Heenan was able to explain from a more personal side where he was more what is/is not discrimination.

e. Outreach

Ms. Chinchilla referenced Tab 5, and advised that when NERC knew the new laws were signed, whenever NERC provided outreach the new protected categories were addressed; that she had done presentations with Ms. Heenan to get the word out on the new laws; that any training prior to October 1, 2011, she advised when the new laws were to go into effect. She added that NERC has done 18 training sessions or events, reaching approximately 629 individuals; that she took the Commissioners' advice and a created spreadsheet of contacts and sent 75 letters offering NERC's service for outreach training to chambers, union groups/trades, professional organizations; that while the response has been very little, she advised she would like to send letters to the larger employers to see if they are interested; that she plans to do outreach training with autoworkers in February.

Ms. Chinchilla also advised that in the packet was a copy of an article that Michael Baltz, Chief Compliance Investigator, had written for publication in regards to the new protected categories in the "Nevada Lawyer," October edition, titled "Recent Development in Nevada's

Discrimination Laws,” with regards to gender identity or expression; that NERC is proud of him for that accomplishment. Ms. Cafferata added that he had completed the article with less than a week’s notice.

Mr. Plotkin had asked if the article was available for reprint and whether it would violate copyright laws or possibly Mr. Baltz/Ms. Chinchilla could do a similar article specific to minority publications that might identify certain elements of what is/is not considered work place discrimination. Ms. Cafferata advised that she would be happy to contact the Nevada State Bar about republication. Ms. Chinchilla stated that if NERC was to receive a request, as long as it was an article where NERC did not have to take a position, but an information-type article, that NERC would write an article for that organization. Ms. Chinchilla added that she was surprised that NERC did not receive any media contact other than a newspaper article where she was misquoted; that the only media contact she had was when she participated in a live NPR segment.

f. Report pursuant to Governor’s Executive Order 2011-01

Ms. Chinchilla advised that she provided a handout as to what the Governor has asked be reviewed regarding regulations under NAC 233, and referred to number 2, items a-h in the handout.

She added that in regards to clarity regarding the Commission, she has found very few changes; that in changing the NAC, it would not be congruent with the NRS, and that the changes would need to be made in the law, and currently the definitions are clear and match. She added that there were two possible changes and provided the Commissioners with her recommendations.

NAC 233.080, subsection 1, provides in part, “Upon receipt of a complaint alleging discrimination, the *Commission* will designate the complaint as one of the follow types of cases . . .” and the definition of a category A, B, or C case is defined – Ms. Chinchilla stated that this is something she does alone as the Administrator, and believes the wording of Commission can be changed to *Administrator*.

NAC 233.110, Investigation of discriminatory practices – in all sections except 2, in sections 1, 3, and 4, she thinks it would be appropriate to reverse the wording and say *Commission* as opposed to *Administrator* due to the fact that it is the Commission, not the Administrator alone performing each function.

Ms. Chinchilla added that some assumptions can be made on how these are written and, as the Administrator, she has the authority to delegate the work to staff – these are the recommendations she made for clarity.

Mr. Plotkin asked if NERC's Commission is on the Governor's Sunset Committee radar, to which Ms. Chinchilla stated she understands the decisions have already been made and NERC is not on it.

g. **Personnel – Staffing**

Ms. Chinchilla advised that she already updated the Commissioners regarding the proposed upgrade and wanted to introduce two additional investigators who were not present at the last meeting. Ms. Chinchilla introduced Cedric Cole and Anna Caputo.

Ms. Chinchilla concluded the Administrator's report.

VIII. Discussion regarding the criteria for the Administrator to consider when selecting cases for possible public hearing by the Commission pursuant to NRS 233.150(4) and NRS 233.170(3). Discussion may additionally reference NAS 233.130, NAC 233.160, NAC 233.200, NAC 233.210, and NAC 233.220, but is not limited to these statutes and regulations

Ms. Chinchilla advised that when NERC is looking at a case for possible public hearing, the scope is quite narrow; that when NERC makes a finding of probable cause, this means there is enough evidence to support that discrimination occurred; that probable cause findings are 9% of NERC's caseload; that she feels if the case has federal coverage, it is in the best interest of the Charging Party to let the case go to the EEOC – that every probable cause finding NERC sends to EEOC, they scrutinize the case very closely and decide if they want to hold their own conciliation, investigate further, litigate or close the case and issue a right-to-sue; in

addition, the remedies available in federal court are so much greater than state court. She added that this leaves cases covered under state law only, which includes housing, public accommodation and employment, and is about 8% of NERC's caseload.

Ms. Chinchilla stated that in doing the math, 9% of probable cause cases and 8% are state only, the portion of probable cause cases would be 6 a year that could potentially go to public hearing – of those cases, the Charging Party has to agree as NERC does not want to drag the Charging Party's name into a public forum without their approval. She advised that she just had a case and the Charging Party did not want to go into a public arena; that NERC also goes on advice of counsel as to whether there is sufficient evidence to submit in a public forum.

Further, she advised that the aforementioned criteria is why there have been very few public hearings and discussion can be made as to what should come before the Commissioners; that each public hearing costs approximately \$1,000 and that she has estimated 1 or 2 public hearings a year. She added that the remedies are extremely limited under public hearings – there is no cash settlement amount under public hearing.

Ms. Reynolds added that statute limits back pay to two years; that there is no ability for this Commission to award any type of compensatory or punitive damages – those are available in federal court which is why Charging Parties are looking toward federal courts for their remedy.

Mr. Plotkin asked that in regards to cases that may be brought before the Commission, specifically public accommodation cases, is there a process to prevent high media sensationalism. Ms. Chinchilla responded that if the case meets all the criteria, then it should be considered for public hearing; that she did not know if media attention is bad as it gets people talking, gets the issues in front of the public; that it is not NERC's intent to create a media circus, but the same criteria will be used regardless of the type of case to bring before the Commissioners – the Commissioners have the option of saying whether it is something you want to hear or not.

Ms. Cafferata advised that Ms. Chinchilla has established very good criteria and just because there is a probable cause finding does not mean there is sufficient evidence to go forward and be proven.

There was open discussion regarding how the DAG and/or Attorney General's office is paid by a state agency; whether or not costs for a public hearing can be recoverable.

Mr. Plotkin asked Ms. Chinchilla if that is one of the changes she is looking at in regards to the Governor's Executive Order. Ms. Chinchilla advised it is not as she is only reviewing the regulations in regards to NAC; that there would have to be a bill draft and someone would have to sponsor it and get through the LCB to change NRS; that she could write a bill draft request and see if someone would pick it up; that she needs to check on whether there is a limit on the number of bill draft requests, as Governor Gibbons had put a limit and she is unclear if Governor Sandoval has done so. Mr. Plotkin asked that for the 2013 Legislative session, when would the Commission need to address possible bill draft requests as they meet every three months. Ms. Chinchilla stated sometime between March and June 2012.

Ms. Cafferata indicated that she is sure Ms. Chinchilla has a list of possible potential changes for future use and asked that she add this to her list. She also asked that this be put on the agenda for the next meeting (bill draft requests).

Ms. Cafferata asked for a motion that the Commissioners establish criteria for public hearings in that the Charging Party has to agree and there has to be sufficient evidence to prove the case and is limited to state coverage only. Mr. Plotkin made the motion; Mr. Nigam seconded; motion carries.

Ms. Cafferata also asked that Ms. Chinchilla look into a more complete answer as to the advisory opinion – it will be in a public forum and will be issued by either the Commissioners/Ms. Chinchilla, Administrator/NERC as an agency.

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

Ms. Cafferata stated that the legislative issues regarding bill draft requests; more information regarding the advisory opinion.

Discussion regarding the next meeting date/time - Ms. Chinchilla advised that the Las Vegas office will be moving but it is unclear if the move will be in February or March and gave dates she will not be available. Meeting

to be held in February and Ms. Delaney will be in contact with all parties regarding availability.

Ms. Cafferata thanked the NERC staff for providing copies of the prior minutes. Ms. Chinchilla introduced Kahaterina Mallory as the Administrative Assistant I who made all the copies, to which Ms. Cafferata thanked her.

X. Public Comment

None.

XI. Adjournment

Ms. Cafferata adjourned the meeting at approximately 4:10 p.m.

Respectfully Submitted,

Lee Plotkin
Secretary/Commissioner

Date