IN THE SUPREME COURT OF THE STATE OF NEVADA

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CARA O'KEEFE, AN INDIVIDUAL, Appellant, vs. THE STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES, Respondent.	**Case No.: 68460**

EXHIBITS 1 THROUGH 5 TO APPELLANT'S PETITION FOR REVIEW BY THE SUPREME COURT

In Conjunction With Legal Aid Center of Southern Nevada

Malani L. Kotchka
Nevada Bar No. 283
HEJMANOWSKI & McCREA LLC
520 South Fourth Street, Suite 320
Las Vegas, NV 89101
(702) 834-8777

Attorneys for Appellant
Cara O'Keefe
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **EXHIBITS 1 THROUGH 5 TO APPELLANT'S PETITION FOR REVIEW BY THE SUPREME COURT** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 17th day of February, 2017, to the following:

Jordan T. Smith
Assistant Solicitor General
Office of the Attorney General
555 E. Washington Avenue, Suite 3900
Attorneys for Respondent

And a true and correct copy of the forgoing **EXHIBITS 1 THROUGH 5 TO APPELLANT'S PETITION FOR REVIEW BY THE SUPREME COURT** was mailed on this 17th day of February, 2017, by U.S. first class mail, postage prepaid, to the following:

Sara Feest
Legal Aid Center of Southern Nevada
725 E. Charleston Blvd.
Las Vegas, NV 89104

An Employee of Hejmanowski & McCrea LLC

EXHIBIT 1

EXHIBIT 1

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARA O'KEEFE, AN INDIVIDUAL,
Appellant,
vs.
THE STATE OF NEVADA
DEPARTMENT OF MOTOR VEHICLES,
Respondent.

No. 68460

FILED

JAN 30 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order granting a petition for judicial review and setting aside a hearing officer's decision. First Judicial District Court, Carson City; James E. Wilson, Judge.

Appellant Cara O'Keefe was dismissed by the Department of Motor Vehicles ("DMV") for violating several policies, including a policy prohibiting employees from accessing or using information outside their scope of responsibilities for non-business reasons.[1] Under the DMV's Prohibitions and Penalties, a violation of this policy requires dismissal. O'Keefe appealed her dismissal, and a hearing officer found that discretionary discipline was allowed. The hearing officer reversed O'Keefe's dismissal, finding a lesser disciplinary action was appropriate. The hearing officer also noted due process concerns with the timing of the DMV's investigation into O'Keefe's conduct. The DMV filed a petition for judicial review and the district court set aside the hearing

[1]We do not recount the facts except as necessary to our disposition.

17-900170

officer's decision, concluding dismissal was mandatory under the DMV's Prohibitions and Penalties, and therefore, the hearing officer's decision was arbitrary and capricious.

In this appeal, O'Keefe contends the hearing officer's decision was within the hearing officer's statutory authority and the DMV's dismissal of O'Keefe violated her due process rights.

A hearing officer's role is to "determine the reasonableness of a dismissal, demotion, or suspension." NRS 284.390(1); *Taylor v. Dep't of Health and Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 950-51 (2013). A dismissal is "reasonable" if it would "serve the good of the public service." NRS 284.385(1)(a); *Knapp v. State ex rel. Dep't of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995). "When reviewing a district court's [order regarding] a petition for judicial review of an agency decision, this court engages in the same analysis as the district court." *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010). Thus, we "review the evidence presented to the administrative body and ascertain whether that body acted arbitrarily or capriciously, thus abusing its discretion." *Gandy v. State ex rel. Div. Investigation*, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980). *See Morgan v. State, Dep't of Bus. & Indus., Taxicab Auth.*, No. 67944, 2016 WL 2944701 (Ct. App. May 16, 2016). This court may set a hearing officer's decision aside if it rests on an error of law or constitutes an abuse of discretion. *State v. Tatalovich*, 129 Nev. 588, 590, 309 P.3d 43, 44 (2013). We review de novo the hearing officer's conclusions of law, insofar as they concern purely legal questions. *Knapp*, 111 Nev. at 423, 892 P.2d at 577.

In this case, the hearing officer abused her discretion by ruling that the DMV's Prohibitions and Penalties allowed for discretionary discipline for O'Keefe's actions. The DMV's disciplinary procedures were approved by the Personnel Commission pursuant to NRS 284.383(1), which requires that the Commission adopt measures for disciplining state employees. The inconsistency in the internal memorandum by the DMV did not change a disciplinary policy that had been adopted by the Personnel Commission.

Because the DMV's Prohibitions and Penalties mandated dismissal for O'Keefe's actions, there is not substantial evidence in the record to support the hearing officer's determination that O'Keefe's dismissal would not serve the good of the public service. By adopting the DMV's Prohibitions and Penalties, the Personnel Commission effectively determined that O'Keefe's conduct is a "serious violation[] of law or regulation" justifying dismissal. *See* NRS 284.383(1). The hearing officer's ruling to the contrary was arbitrary and based on an error of law.

Additionally, the hearing officer's due process "concerns" are without legal significance as no findings of fact or conclusions of law were made. Additionally, the DMV followed the proper procedure in investigating O'Keefe' conduct. The delay was due to O'Keefe transfer-

ring to a different department, at which point the DMV lost the ability to discipline or investigate O'Keefe.[2] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. James E. Wilson, District Judge
Cara O'Keefe
Attorney General/Carson City
Brandon R. Price
Attorney General/Reno
Carson City Clerk

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[2]NAC 284.638(1) states a "supervisor" must promptly inform an employee about a violation. At the time that the DMV learned of O'Keefe's conduct, her supervisor would have been someone within the Division of Insurance. In addition, there is no support in statutes or caselaw for O'Keefe's assertion that an agency may use its policies to discipline an employee once the employee leaves the agency.

EXHIBIT 2

EXHIBIT 2

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARING OFFICER

CARA O'KEEFE,

Petitioner-Employee,

Case No.: CC-07-13-JG

vs.

STATE OF NEVADA, *ex. rel.*, its DEPARTMENT OF MOTOR VEHICLES,

Respondent-Employer.

_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

THIS MATTER CAME on for an administrative hearing before the undersigned Administrative Hearing Officer for the Nevada State Personnel Commission on the 25th day of March, 2014, pursuant to the Petitioner-Employee's appeal from termination from State employment. Petitioner-Employee was present and represented by Jeffrey S. Blanck, Esq. Respondent-Employer was represented by Cynthia R. Hoover, Esq., Deputy Attorney General. The evidence of record consists of testimony from ten witnesses, Respondent-Employer's exhibits marked A through C, and Employee-Petitioner's exhibits marked 2 and 3.

The undersigned Administrative Hearing Officer, having heard the testimony presented, and considered the exhibits offered and the arguments of the parties, does hereby make the following Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

Cara O'Keefe (hereinafter referred to as "Employee") was employed as a revenue officer for the DMV Motor Carrier Division. **[Specificity of Charges, Employer's Exhibit A]**. Employee was initially hired with the DMV from December 11, 2006 until December 5, 2012, and then rehired on September 16, 2013. **[Exhibit A]**. She has not had any prior disciplinary actions.

As set forth in the Specificity of Charges, Employee has received the following performance evaluations:

12/11/11 Exceeds Standards
12/11/10 Exceeds Standards
12/11/09 Exceeds Standards
12/11/08 Exceeds Standards
11/11/07 Meets Standards
07/11/07 Exceeds Standards
03/11/07 Meets Standards

On September 16, 2013, Employee received the Notice of Employee Rights During an Internal Investigation ("Notice"). **[Exhibit A. p. 11]**. The Notice states that Employee is the subject of internal administrative investigation relevant to a violation of the Department of Motor Vehicles Computer Usage policy:

Information Abuse
As found in NRS 242.105, NRS 281 section 1, and NAC 284.650:
Information contained in DMV system record is for use only for Departmental business and is proprietary information. Information from the DMV System should not be used for any

purpose other than for completing authorized transactions for customers.

1. The use, or manipulation of, production data or information outside the scope of one's job responsibilities, or for non-business or personal reasons, is strictly prohibited and may be subject to prosecution under NRS 205.481.

The Notice also informed Employee of her questioning session on September 18, 2013, and her right to have counsel present. Also on September 16, 2013, Employee received notice that she is being placed on paid administrative leave, effective that day. **[Exhibit A, p. 13]**. On October 8, 2013 Employee received another Notice of Employee Rights, reiterating the same allegations, and informing her of a scheduled questioning on October 10, 2013. **[Exhibit A, p. 15]**

On November 22, 2013, Employee received the NPD-41 ("Specificity of Charges"), in which Karen Stoll, Revenue Officer III of the DMV, informed Employee that it is in the best interest of the State of Nevada to terminate her State service.[1] The Specificity of Charges references the following causes for disciplinary action under Nevada Administrative Code (NAC) 284.650:

1. Activity which is incompatible with an employee's conditions of employment established by law or which violates provisions of NAC 284.653 or 284.738 to 284.771, inclusive.
6. Insubordination or willful disobedience.
18. Misrepresentation of official capacity or authority.

[1]Employer's Exhibit A.

The Specificity of Charges further references the following Department of Motor Vehicles Prohibitions and Penalties ("DMVPP") as follows:

B. PERFORMANCE ON THE JOB

23. Disregard and/or deliberate failure to comply with or enforce statewide, department or office regulations and policies.

C. NEGLECT OF, OR INEXCUSABLE ABSENCE FROM, THE JOB

4. Conducting personal business during working hours.

G. MISUSE OF INFORMATION TECHNOLOGY

1. The use, or manipulation of production data or information outside the scope of one's job responsibilities, or for non-business or personal reasons, is strictly prohibited and may be subject to prosecution under NRS 205.481.

H. OTHER ACTS OF MISCONDUCT OR INCOMPATABILITY

4. Unauthorized or improper disclosure of confidential information.

7. Acting in an official capacity without authorization.

The basis for the suspension is set forth in the "Summary of Facts" section on page 2 of the Specificity of Charges, which includes the following:

The results of the investigation, validated by your own admission and the information obtained through the DMV CARRS (formerly known as DMV Application) access reports for your user ID, confirm you accessed the confidential DMV database information for reasons outside the scope of duty.

The CARRS report shows that you accessed the records of a male citizen on 7 occasions. You identified your relationship with the male friend as a family friend. You reported having helped the citizen with a DUI situation and reported the reason for accessing his records on two occasions was to obtain a date from the record and to look up his address.

The CARRS report shows you accessed the records of a female citizen on 3 occasions. You identified the female citizen as the wife of the male citizen and provided many

details about the two's personal lives, demonstrating a familiar relationship with both.

In addition to the CARRS report, information obtained during the course of the investigation and by your own admission, supports you also discussed information related to the male citizen with the Carson City Sheriff, representing yourself as an employee of the DMV, for personal reasons outside the normal scope of duty.

Based on the above, Employer concluded as follows on page 8 of the Specificity of Charges (NPD-41):

As a state employee, you represent the state of Nevada; your actions and your negligence are the actions of the agency and this causes the Department to lose credibility with the customers, the public and the other government entities with which we work. If confidentiality of records and data is compromised for personal gain or use, then the state is at risk for liability for breach of confidentiality. If working relationships with law enforcement agencies are breached by misrepresenting the authority you have to obtain information, then the trust between these agencies is violated and again confidentiality is breached.

On December 6, 2013, Terri Carter, Administrator, Management Services and Programs, DMV, held a pre-disciplinary hearing. **[Employer's Exhibit B, pp. 49-52]**. Ms. Carter noted that the act was outside the scope of her responsibilities and was done for personal reasons, and concurred with the recommendation to terminate Employee. On December 13, 2013, Troy Dillard, Director, DMV, stated in that "[i]t is my determination, after review of the Specificity of Charges; your statements during the pre-disciplinary hearing; the recommendation of Ms. Carter; and the recommendation of your supervisor, it is in the best interest of the State of Nevada

to terminate your employment." **[Employer's Exhibit C, pp. 61-63]**. Employee filed a timely appeal.

Following opening statements at the hearing on March 25, 2014, Employer called Cara O'keefe (Employee) as its first witness. Employee stated that she had worked as a revenue officer for the motor carrier division of the DMV for seven years. She said that she left the DMV on December 5, 2012, and went to work for the Division of Insurance for seven months. She also said that she was rejected from probation at the Division of Insurance, so the DMV had to take her back. She stated that her job duties at the DMV involved licensing, registration, taxes for big rigs and personal vehicles, collection of delinquent accounts, sending out letters, locating debtors, and filing tax liens. Employee further testified that Motor Carrier employees have no authority to issue drivers licenses, and they do not deal with DUI's. If they get those calls they refer them to another DMV division. Employee stated that Motor Carrier employees may use the confidential database, but not for personal or non-business reasons, and DMV Policy prohibits employees from conducting personal transactions. Employee acknowledged that she signed and understood the Memorandum from then DMV Director Bruce Breslow, which states that a first offense of the Prohibition

and Penalty G(1) "can result in termination."[2] **[Exhibit A, p. 48]**. Employee said that there is nothing in this document that permits an employee to look up documents even if a friend gives them permission. Employee also referenced the DMV Computer Usage Policy Manual, dated September 15, 2011 **[Exhibit A, pp. 19, 44]**, which provides that [i]nformation from the DMV System should not be used for any purpose other than for completing authorized transactions for customers." Employee stated that she accessed the confidential DMV database for her friend Daniel and to look up his wife's records, and she had a discussion with both of them about accessing the records. Employee acknowledged that **Exhibit A, p. 17** is a log of when she accessed their records, which indicates that she accessed Daniel's records in July, August, September and November of 2012. She admitted that she first called the Carson City Sheriff's Office and asked them about the process after a DUI, and she provided them with Daniel's driver's license, which she obtained from him and not the DMV Database. She said that she accessed Daniel's records from the database because he asked her information and she was helping him fill out paperwork. She admitted that she "could and should" have referred him to Field

[2]Prohibition and Penalty G(1) provides that "[t]he use, or manipulation of, production data or information outside the scope of one's job responsibilities, or for non-business or personal reasons, is strictly prohibited and may be subject to prosecution under NRS 205.481."

Services or Central Services. She also said that Daniel was not getting his paperwork, but he was too embarrassed to go to the DMV because he knew some of the people there. Employee acknowledged that Daniel and his wife were not her customers. She did not recall telling the investigator that she did not access Daniel's wife's records. She said that she called the Sheriff's Office during her break, but she looked at the records during her work hours while she was not conducting official business.

Next, Employer called DMV Revenue Officer Angie Messman as a witness. She stated that she worked for four years in the Motor Carrier Division of the DMV as a Revenue Officer 2. She assesses fines if carriers are late on assessments and previous fines. Ms. Messman said that she was Employee's coworker for several years, and they sat next to each other, with a partition in between, but they could still hear each other. Ms. Messman testified that in August of 2012 she heard Employee make a phone call, ask to talk to Erica, identify herself as a DMV employee, and state that a "customer had returned again." Ms. Messman said that she heard Employee say that there was a fax regarding a driver's license that had not been returned or received, but she did not recall if she mentioned a DUI. Ms. Messman further testified that they do not deal directly with customers, or licensing for customers, or DUI issues. She said

that they may check licenses to make sure they have the correct person responsible for the vehicle in order to put a lien on a vehicle, but if someone called them with a license issue she would refer them to the License Division. Sometime in December of 2012 she reported this phone call to Karen in Management. Ms. Messman added that she did not immediately go to Karen after the phone call because in the past she had complained to Karen about Employee regarding a procedure, and Karen had said that Employee's conduct was okay.

On cross-examination Ms. Messman said that her job function includes reporting on co-workers, but there is nothing in writing about this duty. She also said that they do not need to go into the same system when they are filing a lien, and they do not see a license when filing a lien. For a lien they fill out a form and go to the County Recorder. Ms. Messman said that after August 10th there were no other incidents with Employee.

On redirect Ms. Messman said that she remembers this incident because she wrote down the details on a sticky pad since Employee misrepresented herself to another agency, and stated that the "customer had returned" even though he [Daniel] was not her customer.

In response to a Hearing Officer question, Ms. Messman said that they only have to log into the System to get a

Services or Central Services. She also said that Daniel was not getting his paperwork, but he was too embarrassed to go to the DMV because he knew some of the people there. Employee acknowledged that Daniel and his wife were not her customers. She did not recall telling the investigator that she did not access Daniel's wife's records. She said that she called the Sheriff's Office during her break, but she looked at the records during her work hours while she was not conducting official business.

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driver's license if there is non-compliance, but they do not do this for every single lien.

Employer called Michelle Schober as their next witness. Ms. Schober said that she has worked for the DMV for 21 years, and eight to nine of those years have been with the Motor Carrier Division. She has been an Auditor 2 since April of 2013. She said that she was previously a revenue officer with Employee, and her cubicle was across from Employee's cubicle. Ms. Schober testified that she overheard Employee's conversation in 2012 when she called the Sheriff's Office and implied that she works in the driver's license division, taking care of licenses. During the conversation on August 10, 2012, she overheard Employee ask to talk to Erika, that a "customer had been at the counter", and he was trying to get a restricted license but the DMV had not sent the forms. Ms. Schober said that she agonized over whether to report the conversation to her supervisor, but she told Karen [Stoll] about the conversation after her co-worker, Angie, asked her to come forward. She was also waiting to see if there was another incident before she told her supervisor. Ms. Schober further stated that the Carrier Division does not deal with customer driver's license issues.

On cross-examination Ms. Schober said that she heard Employee make another call to the Sheriff's Office, but she

could not hear the person on the other end of the phone. Ms. Schober acknowledged that she did not report Employee's call to her supervisor until December of 2012, but she did think that it was serious, taking notes on both calls.

Employee's next witness was Ann Yukish-Lee, a DMV Central Services Manager 2. Ms. Yukish-Lee said that she manages the driver's license group at the DMV. She explained that her employees do not have occasion to call the courts or the sheriff's office for DUI revocations. Ms. Yukish-Lee further stated that if a Motor Carrier employee gets a call about a DUI revocation they refer the call to her office, and their office is the only unit that deals with DUI revocations. On cross examination Ms. Yukish-Lee examined Employee's **Exhibit 3**, the Supervisor's Guide to Prohibitions and Penalties, and stated that she does not know if this has been updated since 2003.

Employee next called Alys Dobel, the DMV Human Resources Administrator, who testified that she has worked in human resources for the state for over 20 years. Part of her current job is to review disciplinary actions, looking at NAC 284.646 and the DMV Prohibitions, and comparing the actions with prior cases. Ms. Dobel opined that the discipline in this case is consistent with prior disciplinary cases. She noted that although the cases are never exactly the same, this is their fifth case involving the same violation[s], and the discipline

has been consistent for the last four years while she worked at the DMV. All of the employees signed the Memorandum from the then-DMV Director, acknowledging that information technology violations can result in termination. **[Exhibit A, p. 48]**. She added that a first offense information technology violation under the DMV Prohibitions and Penalties Section G(1) is a level 5, and in the prior cases the employees were either fired or allowed to resign. **[Exhibit A, p. 4]**.

On cross examination Ms. Dobel said that she helped draft the Memorandum, and acknowledged that it says that a first offense "can" result in termination, leaving discretion, despite the fact that termination is recommended for G(1) violations of the Prohibitions and Penalties. Ms. Dobel said that prior to 2011, employees were not terminated for this offense, and she recalled an incident where an employee accessed DMV information to stalk her ex-boyfriend, and that employee only received a suspension. She said that the purpose of the Memorandum was to emphasize the rules because they were being broken.

Ms. Dobel examined Employee's file **[Exhibit 2]**, and noted that her next evaluation was due on December 11, 2012, but it was not done. She does not recall ever seeing the Supervisor's Guide **[Exhibit 3]**. Ms. Dobel acknowledged that the Guide states that "prompt action" is required for discipline, they are to

consider an employee's prior discipline, and all discipline should be preceded by communication. **[Exhibit 3, pp. 6, 7]**. Ms. Dobel further acknowledged that Employee was never accused of perpetrating fraud on the system or her supervisors, and the goal is to keep employees employed. Ms. Dobel also stated that H(4) and G(1) overlap, but H(4) is a level 1-5 offense. Ms. Dobel also stated that in the past they have not pursued discipline after an employee transfers out, and she has never written a specificity of charges for an employee in another department.

On redirect Ms. Dobel noted that the Supervisor's Guide within **Employee's Exhibit 3** does not state an effective date. She also testified that she was not working at the DMV when the alleged stalking incident took place with another employee, which was in February of 2010, but since she has worked there the discipline has been consistent, although nobody has been charged with forgery. Ms. Dobel said that the Notice of Employee Rights **[Exhibit A, p. 15]** was provided to Employee two days before the interview, as required by statute and regulation. Ms. Dobel said that NAC 284.650 covers unauthorized "use" of confidential data, and that can include just accessing the information and looking at documents. She is unaware of any written policy or regulation that would allow her to go to

another state agency and inform them that there was a potential violation by one of their current employees.

Next, Karen Stoll testified for Employer, initially stating that she is a DMV Motor Carrier Officer 3, and she supervises revenue officers, including Employee. Ms. Stoll said that in December of 2012 she learned about Employee's conduct when two employees separately expressed concern that she may have used information in the CARRS database. In August when she learned that Employee was coming back to the DMV, they determined that they should revisit the alleged conduct. She said that she went through the DMV records, looking up queries in the software and activity logs, but she did not find the two individuals [Daniel and his wife Jacqueline] in the activity logs. They determined that this had to be investigated, and proceed to the next step. Ms. Stoll noted that they gave Employee the proper notice that she was being investigated.

Ms. Stoll further testified that between July 23, 2012 and November 8, 2012, the computer records show that Employee accessed Daniel's records seven times, and Jacqueline's records three to four times. **[Exhibit A, p. 17]**. Ms. Stoll said that Motor Carrier employees do not have detailed information about driver's licenses, and those inquires should be referred to the Driver's License Division, because they need to be doing their job collecting. She added that revenue officers only need to

access driver's license database to confirm an identity or verify a debt, and not for DUI's. She further stated that even if a person gives an employee permission, there are no rules or regulations permitting access for this purpose. Ms. Stoll said that she looked to see if the names were motor carrier customers, or partners to a LLC, but she could not find an account that had to do with a motor carrier. Ms. Stoll stated that Employee was not a good employee, but she also said that Employee "fabulously" handled her accounts. After Employee left Ms. Stoll said that she had to spend time on three to four of her accounts per month that had to be resolved. Overall Ms. Stoll said that Employee worked outside the scope of her job when she accessed the database, and a supervisor should know about this because it was against policy and procedure.

On cross-examination Ms. Stoll said that she was not aware of the other incident with another employee stalking he ex-boyfriend after accessing DMV confidential information. Her supervisor, Dawn Sheets, gave her the directive to investigate this incident. She does wish that the other employees had told her about this sooner. Ms. Stoll also said that once someone logs onto the computer all information accessed is considered confidential. Ms. Stoll also acknowledged that before Employee left she never had a conversation with her about being displeased about her performance. She said that she has never

seen the Supervisor's Guide in **Exhibit 3**, but the DMV has adopted policies and procedures dealing with discipline in a prompt manner.

On redirect examination Ms. Stoll said that she emailed Employee before she returned, but there was no reason for her to call her to let her know of the investigation, particularly since she was not sure if it would lead to a specificity of charges. Lastly, Ms. Stoll said that she recommended termination of Employee because she accessed proprietary information on non-customers, the other employees came forth with the information, and she used computers for personal use outside the scope of her job.

Next, Wayne Seidel, Administrator for the Motor Carrier Division of the DMV, testified on behalf of Employer. He stated that he has been in this top position for the Motor Carrier Division since January of 2011. He signed the SOC and approved the termination based on the information that he reviewed, including the fact that she accessed accounts for Daniel and Jacqueline on numerous occasions, and she contacted the Sheriff's Office for a driver's license issue, which is outside of her job duties. Mr. Seidel recalled a prior case in which an employee sent out a confidential file to her boyfriend's computer, and they recommended termination, and the employee

ultimately resigned. Mr. Seidel said that they have a zero tolerance policy that was set under Director Breslow.

On cross-examination Mr. Seidel said that when he reviewed this case he relied on staff reports, without any independent information. Mr. Seidel stated that they have a progressive discipline policy. Mr. Seidel further testified that not all employees have been terminated for unauthorized access to DMV data, and he was unfamiliar with the 2009 stalking case. Mr. Seidel acknowledged that Mr. Breslow's Memorandum used discretionary language for computer usage violations when it states that a first offense "can result" in termination, and "[a]ppropriate disciplinary action" will be taken. **[Exhibit A, p. 48]**. Mr. Seidel acknowledged that the earlier case he discussed involved an employee who actually took the information and sent it to someone else.

Employee's first witness was Tammy Holt, who testified that she worked for the DMV for 23 years until she retired in August of 2012. Ms. Holt stated that she overheard "Jennifer" telling Nicole Baker in the breakroom that she only received a two week suspension for accessing information to obtain her ex-husband's address.

On cross-examination Ms. Holt said that she only overheard this conversation, which was sometime around 2010, two years before she left, and there was no mention of a TPO in this

conversation. Ms. Holt said that she never looked into this other incident or saw the SOC.

Next, Employee called Lisa Fredley, who said that she worked as an administrative assistant in Licensing for the DMV for eight years prior to taking a job with Employment Training. Ms. Fredley stated that she had a conversation with Jennifer Irving, whereupon she [Irving] bragged that she looked up her ex-husband's girlfriend's address and called her a couple hundred times at work, and she also went to the girlfriend's house before she obtained a TPO. Ms. Fredley said that Ms. Irving only received a suspension for two to three weeks, which was consecutive so that she would not lose her benefits. Ms. Fredley also said that if customers asked her questions that she could not answer she would transfer them to another department.

On cross-examination Ms. Fredley said that she is good friends with Employee, and they have seen each other outside of work. She acknowledged that she never saw the SOC in the Irving case.

Next, Ms. O'Keefe testified on her behalf. She initially stated that she has been a revenue officer for the DMV during her seven years in the Motor Carrier Division. She said that she was not informed of the alleged misconduct in this case before she left on December 5, 2012, to work at the Nevada

Division of Insurance. Employee further stated that while she worked for the DMV she was told that she brought in above average revenue for delinquent licensing fees and taxes. She said that before she went back to work for the DMV she was considering working for the Medicaid Department, but she decided to return to the DMV because her husband had recently been promoted, the DMV was closer to her home, and she liked the people at the DMV. She recalled sending two email to Ms. Stoll prior to returning to work there. She also recalled talking to Ms. Stoll on the phone about what time she should be there for work.

Employee further testified that had she been told about the investigation she would have taken the Medicaid job instead. When she came in for work she signed the paperwork, and then she was told to leave. She said that she was interviewed, but nothing was explained to her and there was nothing in writing. Employee further testified that she had heard that an employee could still be disciplined even if they left to work for another state agency. She felt like she was never given an opportunity to defend herself. She said that Director Breslow made a big deal about helping customers, which included helping motor carriers who she had developed a rapport with after many years of working together. She said that she was just looking at the screen, and she never provided

information to Daniel, the Sheriff's Office or Daniel's wife. She viewed herself as a DMV employee, not just a Motor Carrier employee, and others had the same view. When she called the Sheriff's Office she admittedly identified herself as Cara from Motor Carrier. She said that the Sheriff's Office had to send the citation to the DMV, and she asked how long it would be for them to send the citation because the DMV had not received it. The second time that she called the Sheriff's Office she said that she still had not received the citation, but again she did not provide them with any information. The Memorandum [**Exhibit A, p. 48**] suggests that such a violation does not mean automatic termination. She feels that accessing the information was for DMV business purposes, and she did not send any information to someone else. She said that she never misrepresented her authority to the Sheriff's Office, or represented that she worked in the Licensing Division. She also said that she is aware of other employee who have not been terminated for the same conduct.

Employee examined **Exhibit B, p. 60**, which is a letter from Mr. Cunningham stating that he authorized her to access his records, which she provided because they asked for this during the investigation. She further said that Policies and Procedures G(1) does not apply to her because the information was not used for non-business or personal use, and she did not

manipulate information. She said that her supervisor was aware that she would receive a broad range of question in telephone calls, not necessarily Motor Carrier calls. She said that she only pulled up Daniel's wife's screen to see if her address was listed as the same as his, because she heard that if her address was different there was a possibility that the information from the Sheriff's Office had gone to her address in error.

On cross-examination Employee stated that she only turned down an interview with the Medicare Division, and not a job offer. She said that she was totally in the dark about why she was being investigated. Employee acknowledged that they could have asked her about Daniel Cunningham during her first interview, but she does not recall. She said that they did ask about Daniel Cunningham during her second interview. Employee stated that she was not provided enough information even though both of the Notice of Employee Rights stated that the investigation was with regards to an alleged violation of Department of Motor Vehicle Computer Usage policy. **[Exhibit A, pp. 11, 15]**. During the Pre-Disciplinary Hearing Employee had said that she called the Sheriff's Office during her break, but now she does not recall if it was done during her break or while she was working. She further testified that prior supervisors, including Kelly Quintero, had told her that if an

employee goes to work for another state agency they can still be disciplined. She said that she just asked the Sheriff's Office about the process and procedure, and she did provide them with Daniel's drivers license number. Employee also said that she helped Daniel because he is a friend but she would have done the same for her trucker customers. She said that she did not misrepresent her authority when she just asked them about the process for issuing DUI's, and how long before they mail the citation to the DMV, and whoever she talked to at the Sheriff's Office said they would call her back. Employee said that she looked up Daniel's account in November simply to see if they had received the records from the Sheriff's Office. She did this on her own, and not after a call from Daniel. She said that she basically wanted to find out how long it takes for the DMV to receive the citation from the Sheriff's Office because Daniel wanted to fill out an application for a restricted license.

In response to a Hearing Officer question, Employee said that she did not recall if she made the calls and inquiries during her breaks, but she acknowledged that the log within **Exhibit A, p. 17** indicates that some of the times were not done during her breaks.

Employer then recalled Alys Dobel as a rebuttal witness. Ms. Dobel stated that other employees have been disciplined

since the 2011 Memorandum, but not for technology issues. She again stated that she is not familiar with the Supervisor's Guide within Employee's **Exhibit 3.**

On cross-examination Ms. Dobel said that she did not start working in Human Resources until 2010. She did not recall if she told Ms. Stoll not to discuss the investigation with Employee.

And finally, Employer called Doreen Rigsby as a rebuttal witness. Ms. Rigsby stated that she works for Central Services for the DMV, and she was the investigator on this case. Ms. Rigsby said that during her first interview with Employee she specifically asked Employee if she represented herself as a DMV employee during a phone call, and also if she knew Daniel Cunningham.

At the conclusion of the testimony of the witnesses the parties presented oral arguments and this matter was submitted for a decision.

If any Findings of Fact set forth above is more correctly deemed a Conclusion of Law, it shall be deemed as such.

CONCLUSIONS OF LAW

Employee's appeal to undersigned Administrative Hearing Officer of the State of Nevada Department of Personnel was timely filed and the determination of the merits of said appeal

is properly within the jurisdiction of the undersigned Administrative Hearing Officer.

In Whalen v. Welliver, 60 Nev. 154, 104 P.2d 188 (1940), the Court held that the discipline of a permanent classified employee necessitates a showing of "legal cause", which is defined as follows:

> The cause must be one which specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or the performance of his duties, showing that he is not a fit or proper person to hold the office. Id. at 159.

In reviewing the actions taken by the employer against the employee, it is the duty of the Administrative Hearing Officer to ascertain if there is substantial evidence of legal cause, and to ensure that the employer did not act arbitrarily or capriciously, thus abusing its discretion. Board of Chiropractic Examiners v. Babtkis, 83 Nev. 385, 432 P.2d 98 (1967); Gandy v. State of Nevada ex. rel. It's Div. of Investigations, 96 Nev. 281, 601 P.2d 975 (1980).

Substantial evidence has been defined as evidence which a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389 (1971); State Emp. Security v. Hilton Hotels, 102 Nev. 606, 792 P.2d 497 (1986). Evidence sufficient to support an administrative

decision is not equated with a preponderance of the evidence, as there may be cases wherein two conflicting views may each be supported by substantial evidence. Robinson Transp. Co. v. P.S.C., 159 N.W. 2d 636 (Wis. 1968).

In Meadow v. The Civil Service Board of LVMPD, 105 Nev. 624, 781 P.2d 772 (1989), the Nevada Supreme Court held that "[to] be arbitrary and capricious, the decision of the administrative agency must be in disregard to the facts and circumstances involved."

As stated in Dredge v. State ex.rel. Dep't of Prisons, 105 Nev. 39, 769 P.2d 56 (1989):

> It was the task of the hearing officer to determine whether the NDOP's decision to terminate Dredge was based on evidence that would enable NDOP to conclude that the good of the public service would be served by Dredge's dismissal. *See* NRS 284.390(5); Oliver v. Spitz, 76 Nev. 5, 348 P.2d 158 (1960). Moreover, the critical need to maintain a high level of security within the prison system entitles the appointing authority's decision to deference whenever security concerns are implicated in an employee's termination.[3]

NRS 284.385 allows an appointing authority to discipline a permanent classified employee with the State of Nevada "when he considers the good of the public service will be served thereby." Thus, in reviewing the actions taken by the employer against the employee, it is the duty of the administrative

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[3]Undersigned Hearing Officer acknowledges that in this proceeding there are no allegations regarding security violations, and therefore such deference is not required.

hearing officer to make an independent determination as to whether there is sufficient evidence showing that the discipline would serve the good of the public service. As set forth in Knapp v. State Dep't of Prisons, 111 Nev. 420, 892 P.2d 575 (1995):

> The district judge adopted the hearing officer's findings of fact and accepted his conclusions as to the offenses proven, but reversed the officer's reversal of Knapp's dismissal. The judge erroneously assumed the DOP's decision to fire Knapp was entitled to deference and concluded the hearing officer had acted arbitrarily and capriciously by substituting his judgment for the DOP's.
>
> Generally a hearing officer does not defer to the appointing authority's decision. A hearing officer's task it to determine whether there is evidence showing that the dismissal would serve the good of the public. Dredge, at 42, 769 P.2d at 58 (citing NRS 284.385(1)(a)). A hearing officer 'determines the reasonableness' of the dismissal, demotion, or suspension. NRS 284.390(1). 'The hearing officer shall make no assumptions of innocence or guilt but shall be guided in his decision by the weight of the evidence as it appears to him at the hearing.' NAC 284.788.

Furthermore, discipline must comply with the principles of progressive discipline. NRS 284.383(1) specifically provides that "except in cases of serious violations of law or regulations, less severe measures are applied first after which more severe measures are applied only if less severe measures have failed to correct the deficiencies."

The reliable, substantial and probative evidence supports a finding that on at least ten occasions between July and

November of 2012, Employee accessed the DMV database to look up the driver's license records of two non Motor Carrier customers.

The reliable, substantial and probative evidence also supports a finding that in August of 2012 Employee called the Carson City Sheriff's Office on two occasions in order to assist a non-Common Carrier customer and family friend, identifying herself as a DMV employee.

The reliable, substantial and probative evidence establishes the Employee should be disciplined for violations of NAC 284.650(1), Activity Which is Incompatible with Employees Conditions of Employment or Violates NAC 284.738 to NAC 284.771, NAC 284.650(6), Insubordination or Willful Disobedience, NAC 284.650(18), Misrepresentation of Official Capacity or Authority. The reliable, substantial and probative evidence also establishes that Employee should be disciplined for the following Department Prohibitions and Penalties: B(23), Performance on the Job: Disregard and/or Deliberate Failure to Comply with or Enforce Statewide, Department or Office Regulations and Policies, C(4), Conducting Personal Business During Work Hours, G(1) Misuse of Information Technology, and H(7), Acting in an Official Capacity Without Authorization.

Nonetheless, this Hearing Officer concludes that Employee's conduct was not a "serious violation of law or regulation" to merit termination prior to imposition of less severe disciplinary measures. **NRS 284.383(1)**. It is undisputed that Employee's supervisor did not learn about Employee's conduct until December of 2012, and several of Employer's witnesses testified that they cannot pursue discipline on a DMV Employee who no longer works for them. Nonetheless, there is no written policy in this regard. Moreover, it seems disingenuous that the DMV considered this a "serious" offense on the one hand, but did not initiate disciplinary action until nearly nine months after it learned of the alleged violations, and after Employee was scheduled to return to work at the DMV. Furthermore, although Employer argued that Employee's termination was commensurate with disciplinary action imposed on five other DMV employees involved in similar incidents, Employer did not provide any specific evidence to corroborate this assertion. In fact there was credible testimony by both parties' witnesses that prior to 2011, employees were not terminated for similar conduct, including an incident where an employee accessed DMV information to stalk her ex-husband, and that employee only received a suspension.

This Hearing Officer also notes that NRS 284.387 sets forth the procedural rights of employees in disciplinary

actions, including the right to written notice of allegations before questioning, the right to have an attorney present when they are questioned regarding the allegations, and deadlines for the completion of an internal investigation. The plain language in NRS 284.387 suggests legislative intent to provide state employees with due process and fundamental fairness, which includes prompt adjudication of possible disciplinary actions and notice of the allegations. The reliable, substantial and probative evidence supports a finding that Employer did not take immediate corrective actions when it learned about the alleged conduct in December of 2012. Moreover, undersigned Hearing Officer has Due Process concerns about the fact that DMV staff did not notify Employee about the investigation prior to the day she thought that she was returning to work, on September 16, 2013, when they informed her that she was **not** returning to work but rather she was being placed on administrative leave. Moreover, her first questioning session was not until September 18, 2013, more than 9 months after her supervisor was informed by her co-workers about the incident.

The reliable, substantial and probative evidence also indicates an inconsistency between Prohibition and Penalty G(1), Misuse of Information Technology, and the Memorandum regarding this offense from then-DMV Director Bruce Breslow.

[Exhibit A, p. 48]. Whereas Prohibition and Penalty G(1) is a Class 5 violation which strictly prohibits the "use, or manipulation of production data or information outside the scope of one's job responsibilities, or for non-business or personal reasons", the Memorandum merely states that a first offense of the Prohibition and Penalty G(1) "can result in termination" and "[a]ppropriate disciplinary action" will be taken if violations of this policy occur, suggesting that the level of discipline for this offense is discretionary.

In light of the above, this Hearing Officer concludes that the reliable, substantial and probative evidence does not establish that termination will serve the good of the public service, and therefore the decision to terminate Employee should be reversed. A thirty (30) calendar suspension without pay is more appropriate for this conduct, particularly considering the nature of the offense, including the fact that Employee did not manipulate data or disclose data, Employee's seven years of state service without prior discipline, and the DMV's failure to promptly investigate this matter and take immediate corrective action. Therefore, it is the opinion of this Hearing Officer that discipline commensurate with these violations should be imposed.[4]

[4]Although Employee argued that her conduct did not rise to the level of criminal forgery, and therefore she should not be punished for the G(1)

If any Conclusion of Law set forth above is more correctly deemed a Finding of Fact, it shall be deemed as such.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and

GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the action of Employer to terminate Employee Cara O'Keefe from State Service should therefore be and hereby is REVERSED, with a recommendation that Employee be returned to state employment and given a thirty (30) calendar day suspension without pay.

DATED this 22nd day of April, 2014.

By: Jill I. Greiner, Esq.
ADMINISTRATIVE HEARING OFFICER

violation, this argument is without merit because G(1) merely states that an employee may be subject to criminal prosecution for such conduct, but it does not require proof of forgery that amounts to a criminal offense.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on the 22nd day of April, 2014, I deposited for mailing at Reno, Nevada, postage prepaid, a true copy of the attached document addressed as follows:

Cynthia R. Hoover, Esq.
Deputy Attorney General
Attorney General's Office
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

Jeffrey Blank, Esq.
485 West 5th Street
Reno, Nevada 89504

Krista L. Heald
Clerk to the Hearing Officers
Division of Human Resource Management
100 North Stewart Street, Suite 200
Carson City, Nevada 89701

Jill I. Greiner

EXHIBIT 3

EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY/TAXICAB AUTHORITY,
Appellant,
vs.
AMERICO COSTANTINO, AN INDIVIDUAL,
Respondent.

No. 65611

FILED

MAY 31 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION FOR REVIEW

This is a petition for review, pursuant to NRAP 40B, challenging an order of affirmance entered by the Nevada Court of Appeals on an appeal from a district court's denial of a petition for judicial review in an employment dispute.[1]

Appellant Nevada Department of Business and Industry Taxicab Authority employed respondent Americo Costantino as a senior investigator. Costantino was injured in an incident unrelated to his employment, and he was assigned to a light duty status at work. During this time, he participated in a wrestling event at a local gym, in which he demonstrated physical abilities beyond those he claimed in documentation submitted to the Taxicab Authority. As a result, the Taxicab Authority conducted an internal investigation and concluded that termination was

[1]The Honorable Robert E. Rose, Senior Justice, was appointed by the court to sit in place of the Honorable Mark Gibbons, Justice, who voluntarily recused himself from participation in the decision of this matter. Nev. Const. art. 6, § 19; SCR 10.

appropriate because of Costantino's perceived dishonesty regarding his ability to work. After this, Commissioner Westrin, from the Mortgage Division in the Nevada Department of Business and Industry, conducted a pre-disciplinary hearing, affirming the decision to terminate Costantino. Then, Costantino appealed this decision to a Department of Personnel hearing officer, who reversed the termination on the grounds that there was a lack of factual basis demonstrating just cause to support the termination. The Taxicab Authority filed a petition for judicial review in the Eighth Judicial District Court. The district court denied the petition, and the Taxicab Authority appealed. On August 31, 2015, the Nevada Court of Appeals affirmed the district court's decision. This petition for review follows.

A petition for review is a matter of judicial discretion, and this court considers various factors in exercise of that discretion, including: 1) whether the petition raises a question of first impression of general statewide significance; 2) whether the decision of the Nevada Court of Appeals is in conflict with another Nevada Court of Appeals decision or decisions of this court or the United States Supreme Court; and 3) whether the case involves fundamental issues of statewide public importance. NRAP 40B(a).

In its petition, the Taxicab Authority presents three contentions. First, the Taxicab Authority argues that the Nevada Court of Appeals erred in concluding that the hearing officer applied the correct standard of review in reaching his decision. Second, the Taxicab Authority argues that the Nevada Court of Appeals erred in determining that the Taxicab Authority did not establish just cause for terminating Costantino. Third, the Taxicab Authority argues that this court should

review the decision of the Nevada Court of Appeals because this case involves fundamental issues of statewide public importance. We conclude that these contentions lack merit, and we decline to exercise our judicial discretion in this matter. Accordingly, we

ORDER the petition DENIED.[2]

Douglas, J.

Cherry, J.

Saitta, J.

Rose, Sr.J.

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[2]The Honorable Justice Hardesty, with whom the Honorable Chief Justice Parraguirre and the Honorable Justice Pickering agree, argues, in dissent, that the hearing officer applied the wrong standard of review. Thus, they conclude that the district court and the Nevada Court of Appeals erred in determining that the hearing officer's decision is entitled to deference. However, a hearing officer generally "does not defer to the appointing authority's decision," as a hearing officer's duty "is to determine whether there is evidence showing that a dismissal would serve the good of the public service." *Knapp v. State ex rel. Dep't of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995). Further, "[t]he hearing officer shall make no assumptions of innocence or guilt but shall be guided in his or her decision by the weight of the evidence as it appears to him or her at the hearing." *Id.* (citing NAC 284.798). This is the standard that was applied in this case, which we conclude is the correct standard.

cc: Hon. Mark R. Denton, District Judge
Lansford W. Levitt, Settlement Judge
Attorney General/Las Vegas
Morris Polich & Purdy, LLP/Las Vegas
Eighth District Court Clerk

HARDESTY, J., with whom PARRAGUIRRE, C.J., and PICKERING, J., agree, dissenting:

I dissent because the hearing officer applied the wrong standard of review.

NRS 284.385(1)(a) provides that "[a]n appointing authority may . . . [d]ismiss or demote any permanent classified employee when the appointing authority considers that the good of the public service will be served thereby." One of the causes for "disciplinary or corrective action" set forth in NAC 284.650 is dishonesty. NAC 284.650(10). NAC 284.646(1)(b) provides that "[a]n appointing authority may dismiss an employee for any cause set forth in NAC 284.650 if . . . [t]he seriousness of the offense or condition warrants such dismissal." If an employee contests a dismissal, a hearing officer reviews the case to determine whether there was just cause for the dismissal. NRS 284.390(6).

On review, the only issue before the hearing officer was whether substantial evidence existed to support the finding of dishonesty.[1] *See Lapinski v. City of Reno*, 95 Nev. 898, 901, 603 P.2d 1088, 1090 (1979). Evidence is substantial if "a reasonable person could accept [it] as adequate to support a conclusion." *Nev. Serv. Emps. Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 679, 119 P.3d 1259, 1262 (2005) (internal quotation marks omitted). Here, the Taxicab Authority was compensating Costantino for supervisory duties when he was not acting in that capacity and was postponing Costantino's return to work until he was ready. In

[1]Whether the Taxicab Authority is "a security program" pursuant to NAC 284.650(3) is irrelevant, so *Dredge v. State ex rel. Department of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989), is also irrelevant.

return, Costantino failed to disclose his wrestling activities to his physician and the Taxicab Authority through his Ability to Work forms. Indeed, on November 9, 2012, Costantino provided the Taxicab Authority with an Ability to Work form that stated he was "restricted from combat/altercation activities." That same day he participated in the wrestling event. Not only was there video footage of Costantino wrestling at a public event, he also admitted that he failed to disclose this fact to the Taxicab Authority. The Taxicab Authority terminated Costantino based on this omission.

Because an omission is a form of dishonesty and the omission undermined the Taxicab Authority's trust in Costantino, there was just cause for the dismissal. *See* NAC 284.646(1)(b); NAC 284.650(10).

The hearing officer accepted Costantino's explanation that he participated in the wrestling event for charitable purposes, but he also found that Costantino did not inform his physician or the Taxicab Authority of his participation in the event. The hearing officer then recites numerous alternative standards of review before determining that its "duty is [to] consider the matter anew as in de novo fashion, not as a deferential appellate review." The hearing officer ultimately determined that "Costantino was not terminated with required consideration of progressive discipline or with cause to sustain his termination on any other basis." Similarly, the district court and the court of appeals determined that the hearing officer's decision—not the employer's decision—is entitled to deference. These determinations by the hearing officer, district court, and court of appeals are contrary to *Lapinski*, which

only requires the hearing officer to find substantial evidence in order to support an employer's decision to dismiss.[2] 95 Nev. at 901, 603 P.2d at 1090. Thus, pursuant to our authority to review decisions of the court of appeals under NRAP 40B(a), I conclude that the court of appeals abused its discretion, and the Taxicab Authority's decision to dismiss Costantino should have been affirmed.

Accordingly, because the hearing officer applied the wrong standard of review, I would reverse the judgment of the court of appeals and remand this case to the district court to reverse the decision of the hearing officer.[3]

_____, J.
Hardesty

We concur:

_____, C.J.
Parraguirre

_____, J.
Pickering

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[2]These determinations impact more than just this case. They inhibit an employer's ability to rely on the documents its employees submit, and they set a precedent that a hearing officer is able to second guess the decisions of the executive branch. It is not the duty of the hearing officer to substitute its judgment for the employing agency's judgment. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (stating that the review of agency action "involves deferential consideration of matters within an agency's expertise").

[3]I also note that this is not a case requiring progressive discipline. Less severe sanctions are not required if a violation is serious. *See* NRS 284.383(1). Because this omission effectively damaged the trust relationship between the Taxicab Authority and Costantino, I believe the omission was serious and less severe sanctions were not required.

EXHIBIT 4

EXHIBIT 4

2015 WL 5176581
Only the Westlaw citation is currently available.

Court of Appeals of Nevada.

STATE of Nevada, Department of Business and Industry/Taxicab Authority, Appellant,
v.
Americo COSTANTINO, an Individual, Respondent.

No. 65611.
|
Aug. 31, 2015.

Attorneys and Law Firms

Lansford W. Levitt, Settlement Judge.

Attorney General/Las Vegas.

Morris Polich & Purdy, LLP/Las Vegas.

Before GIBBONS, C.J., TAO and SILVER, JJ.

ORDER OF AFFIRMANCE

*1 Appeal from a district court order denying a petition for judicial review in an employment matter. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Appellant Nevada Department of Business and Industry Taxicab Authority employed Respondent Americo Costantino as a senior investigator. Costantino was injured in a non-work related incident. His injury resulted in a rupture of his left quadriceps tendon, which necessitated surgical repair. While he recovered from his injury, Costantino obtained several various Ability to Work forms from his treating physician, Dr. Craig Tingey, which Costantino then provided to the Taxicab Authority. Based upon these Ability to Work forms, the Taxicab Authority assigned Costantino to a light duty status. During the time period when he was assigned to light duty, Constantino participated in a promotional wrestling event at a Las Vegas area gym, Future Stars of Wrestling, in which he demonstrated physical abilities beyond those recounted in the Ability to Work forms presented to the Taxicab Authority. The Taxicab Authority conducted an internal investigation and concluded that termination was appropriate based upon Costantino's perceived dishonesty regarding his ability to work.

As a result of the investigation, Costantino was served with a specificity of charges. Commissioner Westrin, of the Mortgage Division in the Nevada Department of Business and Industry conducted the required pre-disciplinary hearing, and affirmed Taxicab Administrator Harveys decision to terminate Costantino. Costantino was terminated from the Taxicab Authority effective April 11, 2013. Costantino appealed the decision to a Department of Personnel hearing officer who reversed the termination, saying that the State failed to prove a factual basis constituting just cause supporting the termination. The Taxicab authority brought a petition for judicial review in the Eighth Judicial District Court. The district court denied the petition and this appeal followed.

On appeal, the Taxicab Authority first argues that its appeal is not governed by the Administrative Procedures Act, NRS Chapter 233B, whose provisions require the district court to give deference to the factual findings of the hearing officer. Instead, the Taxicab Authority argues that it is an "institution administering a security program" under NAC 284.650(3), and consequently the district court erred in failing to give due deference to its hiring and termination decisions. NAC 284.650 states in pertinent part as follows:

> **NAC 284.650 Causes for disciplinary action.** (NRS 284.065, 284.155, 284.383) Appropriate disciplinary or corrective action may be taken for any of the following causes:
>
> 3. The employee of any institution administering a security program, in the considered judgment of the appointing authority, violates or endangers the security of the institution.

In *Dredge v. State ex rel. Dep't Prisons,* 105 Nev. 39, 769 P.2d 56 (1989), the Nevada Supreme Court held that the Nevada Department of Corrections is an "institution administering a security program" under NAC 284.650(3). Furthermore, the court held that when the NDOC imposed discipline upon a corrections officer for a breach of security (for allowing civilians to wander through prison offices unescorted in violation of prison regulations), the need to maintain proper security within

the prison system entitled the appointing authority (NDOC), rather than the hearing officer or appeals officer, to deference. *See State v. Jackson,* 111 Nev. 770 773, 895 P.2d 1296, 1298 (1995) ("Generally, we would defer to the hearing officer, were it not for Dredge, which requires deference to the appointing authority in cases of breach of security").

***2** Here, the Taxicab Authority argues that, because it is a law-enforcement agency and its investigators possess lawful arrest power, it is such an "institution administering a security program" and Costantino's conduct implicated "security concerns" and therefore deference should be given to it rather than to the hearing officer. However, the Nevada Supreme Court has never held that a law-enforcement agency "administers" a "security program" merely because it is engaged in law-enforcement work. *See Bisch v. Las Vegas Metro Police Dept.,* 129 Nev. ——, ——, 302 P.3d 1108, 1115 (2013) (giving deference to hearing officer under NRS 233B, not to agency under NAC 284.650(3), when reviewing disciplinary action imposed upon police officer by the Las Vegas Metropolitan Police Department). Moreover, NAC 284.650(3) uses the language "institution administering a security program" while NAC 289.060 refers to "peace officers" and NAC Chapter 248 refers to local sheriffs. Applying settled rules of construction leads to the conclusion that NAC 284.650(3) was never intended to broadly encompass law-enforcement agencies such as the Taxicab Authority, local police departments, or sheriffs offices. We therefore apply the provisions of NRS Chapter 233B and give deference to the findings of the hearing officer.

"When reviewing a district court's denial of a petition for judicial review of an agency decision, this court engages in the same analysis as the district court." *Rio All Suite Hotel & Casino v. Phillips,* 126 Nev. 346 ——, 240 P.3d 2, 4 (2010). The function of this court "... is to review the evidence presented to the administrative body and ascertain whether that body acted arbitrarily or capriciously, thus abusing its discretion." *Gandy v. State ex rel. Div. Investigation,* 96 Nev. 281, 282, 607 P.2d 581, 582 (1980). This court will generally defer to a hearing officer's findings of fact and conclusions of law "where those conclusions are closely related to the agency's view of the facts" and are supported by substantial evidence. *State v. Tatalovich,* 129 Nev. ——, ——, 309 P.3d 43, 44 (2013). This court may set a hearing officer's decision aside only if it rests on an error of law or constitutes an abuse of discretion. *Id.* We review the hearing officer's conclusions of law, insofar as they concern purely legal questions, *de novo. Knapp v. State ex rel. Dep't of Prisons,* 111 Nev. 420, 423, 892 P.2d 575, 577 (1995).

The Taxicab Authority argues that, even under NRS 233B, the hearing officer applied an incorrect standard of review, and that his factual findings are arbitrary and capricious constituting an abuse of discretion. We disagree.

The Nevada Administrative Code governs the hearing officer's standard of review, stating, "The hearing officer shall make no assumptions of innocence or guilt but shall be guided in his or her decision by the weight of the evidence as it appears to him or her at the hearing." NAC 284.798. "Generally, a hearing officer does not defer to the appointing authority's decision. A hearing officer's task is to determine whether there is evidence showing that a dismissal would serve the good of the public service." *Knapp,* 111 Nev. at 424, 892 P.2d at 577 (1995). Having reviewed the record on appeal, we conclude that the hearing officer applied the correct standard of review, looking at the facts as a whole from a neutral perspective to determine if there was a factual basis supporting termination.

***3** Having determined that the hearing officer applied the correct standard of review, we now review the hearing officer's findings of fact. To be arbitrary and capricious, the decision of an administrative agency must be in disregard of the facts and circumstances involved. *Meadow v. Civil Serv. Bd. of Las Vegas Metro. Police Dep't,* 105 Nev. 624, 627, 781 P.2d 772, 774 (1989) (citing *State v. Ford,* 110 Wash.2d 827, 755 P.2d 806, 808 (Wash.1988)). Put differently, "[i]f the decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary or capricious." *Bisch v. Las Vegas Metro Police Dep't,* 129 Nev. ——, 302 P.3d 1108, 1113 (2013) (citing *City of Reno v. Reno Police Protective Ass'n,* 118 Nev. 889, 894, 59 P.3d 1212, 1216 (2002)). "Substantial evidence is evidence that a reasonable person would accept as adequate to support a conclusion." *Id.*

In the hearing below, Costantino testified that his injury prevented him from performing his normal job duties, and that his participation in wrestling was merely part of his ongoing rehabilitation. His treating physician, Dr. Craig Tingey, also testified that Costantino's participation in the wrestling match could not be scientifically compared to his ability to work as an investigator. While the hearing officer also heard considerable testimony to the contrary, including medical and scientific testimony presented by the Taxicab Authority, the hearing officer found Costantino's version of events to be credible. The hearing officer also found that Costantino's light duty assignment was warranted and that his alleged misrepresentations

were not willful or intentional.

Questions of credibility are for the hearing officer who heard the testimony and saw the witnesses as they testified, and on appeal we do not re-weigh the evidence presented. This Court's role is strictly limited by NRS 233B.135(3). The only inquiry before us is whether the hearing officer's findings were supported by substantial evidence. Here, the testimony of Costantino and his treating physician provided a substantive basis for the hearing officer's conclusions. Therefore, substantial evidence exists supporting the hearing officer's conclusion that there was no factual basis to support Costantino's termination.

Based upon the foregoing, we

AFFIRM the judgment of the district court.

All Citations

Slip Copy, 2015 WL 5176581

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EXHIBIT 5

EXHIBIT 5

2016 WL 2944701
Only the Westlaw citation is currently available.

Court of Appeals of **Nevada**.

Joseph **MORGAN**, Appellant,
v.
STATE of Nevada, DEPARTMENT OF **BUSINESS** AND **INDUSTRY, TAXICAB AUTHORITY**, Respondent.

No. 67944.
|
May 16, 2016.

Attorneys and Law Firms

Morris Polich & Purdy, LLP/Las Vegas.

Attorney General/Carson City.

Attorney General/Las Vegas.

Before GIBBONS, C.J. and TAO, J.

ORDER OF AFFIRMANCE

*1 This is an appeal from a district court order denying a petition for judicial review in a labor matter. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge,

Joseph **Morgan** appeals from a district court order denying his petition for judicial review of an administrative hearing officer's decision affirming an 80–hour suspension imposed by his employer, the **Taxicab Authority**.[1] This court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 **Nev.** ——, ——, 312 P.3d 479, 482 (2013). Consequently, we are limited to the record before the agency and cannot substitute our judgment for that of the agency on issues concerning the weight of the evidence on questions of fact. *Bob Allyn Masonry v. Murphy*, 124 **Nev.** 279, 282, 183 P.3d 126, 128 (2008). We review an administrative agency's factual findings for clear error or an abuse of discretion, and will only overturn those findings if they are not supported by substantial evidence. NRS 233B.135(3)(e), (f); *Elizondo v. Hood Mach., Inc.*, 129 **Nev.** at ——, 312 P.3d at 482. In addition, although we review purely legal issues de novo, we ordinarily defer to an agency's conclusions of law that are closely related to the facts if they are supported by substantial evidence. *Elizondo v. Hood Mach., Inc.*, 129 **Nev.** at ——, 312 P.3d at 482; *Grover C. Dils Medical Center v. Menditto*, 121 **Nev.** 278, 283, 112 P.3d 1093, 1097 (2005).

Morgan asserts several points of error. First, **Morgan** contends the **Taxicab Authority** failed to comply with NRS 284.387(2)[2] because, although the **Taxicab Authority** timely provided **Morgan** with a Specificity of Charges in which the Administrator proposed an 80 hour suspension, the **Taxicab Authority** did not notify **Morgan** of its final, appealable decision imposing discipline within 90 days of notifying **Morgan** that he was under investigation for alleged misconduct. **Morgan's** argument is without merit. Because service of a Specificity of Charges is a necessary step in the process of imposing discipline and puts the employee on notice that the appointing **authority** is, in fact, pursuing disciplinary action against him, *see* NAC 284.656–.6561, service of the Specificity of Charges constitutes notice of "any disciplinary action" under NRS 284.387(2). Thus, we conclude the **Taxicab Authority** complied with NRS 284.387(2) when it provided **Morgan** with a Specificity of Charges within the 90–day time period.

Next, **Morgan** argues his substantial rights were prejudiced and the hearing officer's decision made upon unlawful procedure because he did not receive proper notice under NRS 289.060(2) that the alleged misconduct for which he was being investigated included his inappropriate comments during an arrest because the relevant Notice of Peace Officer Rights During an Internal Investigation did not specifically reference the comments. We conclude the notice provided was sufficient to alert **Morgan** that he was under investigation and could be subject to discipline for his conduct in connection with the arrest. Moreover, even if more detail was required, **Morgan** fails to explain how he was prejudiced by the purported deficiency in the notice.

*2 Third, **Morgan** argues that the hearing officer's decision to affirm the suspension was arbitrary, capricious, or characterized by an abuse of discretion because the pre-disciplinary hearing resulted in a recommendation that the suspension be reduced, the hearing officer found several of the underlying charges

were not supported by sufficient evidence, and neither the Administrator nor the hearing officer specified how many hours of the suspension were related to each charge. In reviewing an appointing **authority's** decision to dismiss, demote, or suspend an employee, the hearing officer is tasked with determining "the reasonableness of the action." NRS 284.390(1). "If the hearing officer determines that the dismissal, demotion or suspension was without just cause as provided in NRS 284.385, the action must be set aside and the employee must be reinstated, with full pay for the period of dismissal, demotion or suspension." NRS 284.390(6). A discharge for just cause "is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence, and (2) reasonably believed by the employer to be true." *Southwest Gas Corp. v. Vargas,* 111 Nev. 1064, 1078, 901 P.2d 693, 701 (1995). We conclude the hearing officer did not err by affirming the suspension, as substantial evidence supports the hearing officer's findings that **Morgan** improperly arrested one person without probable cause and engaged in inappropriate conduct in connection with the arrest of a second person, which facts provided the basis for the Administrator's decision. Although the hearing officer found some of the infractions set forth in the Specificity of Charges were not supported by sufficient evidence, all of the charges arose out of the same course of conduct and the charges the hearing officer affirmed are substantial. Under these facts, we cannot say the suspension was without just cause.

Finally, **Morgan** argues the hearing officer erred by affirming his suspension because the Administrator failed to apply progressive discipline. However, in light of the hearing officer's findings concerning the underlying misconduct, we conclude the Administrator's decision to suspend **Morgan** without first applying less severe measures is justified. *See* NAC 284.642(1) ("[I]f the seriousness of the offense or condition warrants, an employee may be: (a) Suspended without pay for a period not to exceed 30 calendar days for any cause set forth in this chapter....").[3]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[4]

All Citations

Slip Copy, 2016 WL 2944701

Footnotes

1 We do not recount the facts except as necessary to our disposition.

2 Under NRS 284.387(2), "[a]n internal administrative investigation that could lead to disciplinary action against an employee pursuant to NRS 284.385 and any determination made as a result of such an investigation must be completed and the employee notified of any disciplinary action within 90 days after the employee is provided notice of the allegations pursuant to paragraph (a) of subsection 1."

3 We have considered **Morgan's** remaining arguments and conclude they are without merit.

4 The Honorable Abbi Silver, Judge, voluntarily recused herself from participation in the decision of this matter.

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

CARA O'KEEFE, AN INDIVIDUAL, Appellant, vs. THE STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES, Respondent.	**Case No.: 68460**

APPELLANT'S PETITION FOR REVIEW BY THE SUPREME COURT

In Conjunction With Legal Aid Center of Southern Nevada

Malani L. Kotchka
Nevada Bar No. 283
HEJMANOWSKI & McCREA LLC
520 South Fourth Street, Suite 320
Las Vegas, NV 89101
(702) 834-8777

Attorneys for Appellant
Cara O'Keefe

I. INTRODUCTION

Pursuant to NRAP 40(B), Appellant Cara O'Keefe ("O'Keefe") petitions this Court for review of the Court of Appeals' Order of Affirmance in which the Court of Appeals overturned a Hearing Officer's decision regarding O'Keefe's termination using the wrong standard of review. Review is warranted because state employees and hearing officers must know what standard of review will be applied. O'Keefe was terminated by the Department of Motor Vehicles ("DMV"). The Hearing Officer's decision reversed the termination of O'Keefe. The First Judicial District Court reversed the Hearing Officer and on January 30, 2017, the Court of Appeals affirmed the decision of the District Court. Although O'Keefe's counsel appeared at oral argument on her behalf, the Court of Appeals did not send a copy of its Order of Affirmance to her counsel. Instead, it sent the Order directly to O'Keefe. Exhibit 1. The Court of Appeals did not apply the standard set forth in *Knapp v. State ex. rel. Dep't of Prisons,* 111 Nev. 420, 892 P.2d 575 (1995), to its review of the Hearing Officer's decision. Exhibit 2. The Court of Appeals' Order of Affirmance should be reviewed and reversed.

II. FACTORS TO CONSIDER

Pursuant to NRAP 40(B), this Court will consider the following factors in deciding whether to exercise discretion over O'Keefe's Petition for Review:

(1) The issue of whether the Hearing Officer abused her discretion by ruling that the DMV's Prohibitions and Penalties on Misuse of Information Technology allowed for discretionary discipline for O'Keefe's actions is one of first impression of general statewide significance to State employees;

(2) The Decision of the Court of Appeals conflicts with the prior decision of the Supreme Court in *State of Nevada v. Americo Costantino,* Exhibit 3. The Court of Appeals' decision in this case also conflicts with prior decisions of the Court of Appeals in *State of Nevada v. Costantino*, 2015 WL 5176581 (Nev. Ct. App. Aug. 31, 2015), Exhibit 4, and *Morgan v. State of Nevada, Dep't of Bus. & Indus., Taxicab Auth.*, 2016 WL 2944701 (Nev. Ct. App. May 16, 2016), Exhibit 5; and

(3) This case involves fundamental issues of statewide public importance to state employees whose employment is statutorily regulated pursuant to NRS and NAC Chapter 284.

III. FACTS

O'Keefe was employed by the State of Nevada from January 2006 through December 16, 2013. RA, Vol. I, pp. 16-18; AA, pp. 12-14.[1] She was employed

[1] "RA" refers to Respondent's Appendix, Volumes I, II or III followed by the applicable page numbers. "AA" refers to Appellant's Appendix followed by the applicable page numbers. NRAP 40(B)(g) provides, "The Supreme Court's review on the grant of a petition for review shall be conducted on the record and briefs previously filed in the Court of Appeals, ..."

as a Revenue Officer for the DMV Motor Carrier Division from December 11, 2006 until December 5, 2012 and then rehired on September 16, 2013. RA, Vol. I, pp. 1, 6, 23; RA, Vol. II, pp. 20, 203.

DMV has a slogan that it wants to be helpful to all its clients. RA, Vol. III, p. 153. DMV employees wear buttons with the statement, "Yes, I Can Help You With That" emblazoned on them. AA, pp. 134-35. O'Keefe was regularly stopped by customers "asking all sorts of DMV related questions." AA, p. 134. O'Keefe did not transfer phone calls and aggravate customers further. She found out what they needed and tried to assist them. AA, p. 134.

While O'Keefe worked for the DMV, she was told that she brought in above-average revenue for delinquent licensing fees and taxes. RA, Vol. I, pp. 39-40; RA, Vol. II, pp. 21-22, 205. Her supervisor, Karen Stoll ("Stoll") said, "When she was there she always handled her accounts. She **fabulously** handled her accounts." RA, Vol. II, p. 143 (emphasis added). O'Keefe had not had any prior disciplinary action and all of her performance evaluations except for two in 2007 were "Exceeds Standards". RA, Vol. I, pp. 6-7, 23; AA, pp. 6-7.

On May 3, 2011, Director Bruce Breslow sent a memo to all DMV employees stating that "Department records have been accessed for non-business or personal reasons. I want to remind each of you that querying DMV records for a purpose other than DMV business is strictly forbidden. In addition, you may

not process transactions on your own records or records of family, friends or acquaintances." RA, Vol. I, p. 1. In this memo he states, "The first offense can result in termination." *Id.* He also said, "Appropriate disciplinary action will be taken if violations of policy occur as they concern DMV records." *Id.*

On several occasions from July through November 2012, O'Keefe **accessed** the DMV database on behalf of a family friend who had asked for help. O'Keefe had the permission of the family friend to look at his information. AA 141. O'Keefe did not use the information, she did not manipulate the information and she did not perform any transaction with the information.

On December 5, 2012, O'Keefe left DMV to work as a management analyst at the Nevada Division of Insurance. RA, Vol. I, p. 4; RA, Vol. II, pp. 20, 204; AA, pp. 21, 23. In late December 2012, two employees told Stoll about some conversations they had overheard O'Keefe make to the Carson City Sheriff's Department on behalf of the family friend. RA, Vol. II, pp. 39, 42, 63. Even though O'Keefe was still working for the State of Nevada, Stoll decided "**it was not necessary to investigate the allegations**." RA, Vol. I, p. 4 (emphasis added); RA, Vol. II, p. 128.

Stoll became aware that O'Keefe was returning to DMV around the middle of August pursuant to her right to do so under NAC 284.462(2). RA, Vol. II, pp. 130, 149. DMV was notified on August 12, 2013 that O'Keefe would be

returning. AA, p. 142. Stoll was aware that O'Keefe was returning and she knew that O'Keefe had "that security to come back to that position" and that Stoll "had to make room for her." RA, Vol. II, pp. 132-33; AA, p. 11. Although DMV never identified the source of this policy, Stoll testified that she "was instructed by my supervisor that we must revisit the issue of the witnesses coming forward about misrepresentation. . . ." RA, Vol. II, pp. 130, 155.

When she returned to DMV on September 16, 2013, O'Keefe received a notice informing her that she was the subject of an internal administrative investigation relevant to a violation of DMV's Computer Usage Policy. RA, Vol. I, pp. 2, 23; RA, Vol. II, pp. 131-32, 150-51, 208.

On November 22, 2013, more than two months after she had returned to DMV, O'Keefe received the Specificity of Charges. RA, Vol. I, p. 3; RA, Vol. II, p. 212. She was charged with conduct which occurred **15 months earlier**. She was charged with "**accessing** the confidential DMV database information for reasons outside her scope of duty" in July, August, September, October and November 2012, **ranging from 16 months to more than one calendar year** prior to her receipt of the Specificity of Charges. RA, Vol. I, p. 4 (emphasis added). She was informed she had signed the Bruce Breslow memo. RA, Vol. 1, pp. 1, 5.

O'Keefe had assisted other non-motor carrier customers and she considered her review of the DMV database on behalf of the family friend to be DMV business. RA, Vol. II, pp. 215, 221, 225. Nevertheless, on December 13, 2013, the Director of DMV terminated O'Keefe for the unauthorized release or use of confidential information and "misuse of information technology." RA, Vol. I, pp. 16-18. The Director of DMV appreciated O'Keefe's "effort to provide good customer service" but said using the DMV records database to obtain information violated the Computer Usage Policy. RA, Vol. I, p. 17. He concluded "it was in the best Interest of the State of Nevada" to terminate her employment and copied Wayne Seidel and Alys Dobel on the letter. RA, Vol. I, p. 18.

When O'Keefe appealed her termination. the Hearing Officer reversed her termination with a recommendation that she be returned to state employment and given a thirty-calendar day suspension without pay." RA, Vol. I, p. 52; Exhibit 2, p. 31. At the hearing before the Hearing Officer, DMV's Administrator, Wayne Seidel, said the policy pursuant to which O'Keefe was terminated was discretionary, **not zero tolerance**. RA, Vol. II, p. 180; AA, p. 129. The human resources administrator at DMV Alys Dobel agreed that a first offense "can" result in termination, leaving the decision discretionary. RA, Vol. II, pp. 78, 88, 92; RA, Vol. I, p. 33. The Hearing Officer found that Dobel said she helped draft

the Breslow memorandum which left discretion for violations of the computer use policy despite the fact that termination was recommended. RA, Vol. I, p. 33. Dobel told the Hearing Officer prior to 2011 employees were not terminated for this offense and she recalled an incident where an employee accessed DMV information to stalk her ex-boyfriend and that employee only received a suspension. RA, Vol. I, p. 33. The Hearing Officer found that Wayne Seidel recalled a prior case in which an employee sent out a confidential file to her boyfriend's computer and they recommended termination and the employee ultimately resigned. RA, Vol. I, pp. 37-38. The Hearing Officer found that Seidel acknowledged that they had a progressive discipline policy and not all employees had been terminated for unauthorized access to DMV data. RA, Vol. I, p. 38. The Hearing Officer found that Dobel said that other DMV employees had been disciplined since the 2011 memorandum but not for technology issues. RA, Vol. I, pp. 43-44. DMV stated in its brief to the Hearing Officer that the Hearing Officer's authority was to determine whether DMV had just cause to support its decision. AA, p. 144.

IV. HEARING OFFICER'S DECISION

The Hearing Officer said it was her duty to make an independent determination as to whether there was sufficient evidence showing that the discipline would serve the good of public service. RA, Vol. I, pp. 46-47. She

said discipline must comply with the principles of progressive discipline and cited NRS 284.383(1). RA, Vol. I, p. 47. The Hearing Officer concluded that O'Keefe should be disciplined for violations of various policies including misuse of information technology but she said O'Keefe's conduct was not a serious violation of law or regulation to merit termination prior to imposition of less severe disciplinary measures. RA, Vol. I, pp. 48-49. She cited NRS 284.383(1). She said there was no written policy that said DMV could not pursue discipline on a DMV employee who no longer worked for them. She said it seemed disingenuous that the DMV considered this a "serious" offense on the one hand but did not initiate disciplinary action until nearly nine months after it learned of the alleged violations and after O'Keefe was scheduled to return to work at the DMV. RA, Vol. I, p. 49.

She found that DMV did not provide any specific evidence to corroborate their assertion that O'Keefe's termination was commensurate with disciplinary action imposed on five other DMV employees involved in similar incidents. Both parties' witnesses said that prior to 2011 an incident occurred where an employee accessed DMV information to stalk her ex-boyfriend and that employee received only a suspension. RA, Vol. I, p. 49.

The Hearing Officer held that the plain language in NRS 284.387 suggested legislative intent to provide state employees with due process and

fundamental fairness which included prompt adjudication of possible disciplinary actions and notice of the allegations. She found that DMV did not take immediate corrective actions when it learned about the alleged conduct in December 2012. RA, Vol. I, p. 50. The Hearing Officer had due process concerns about the fact that DMV staff did not notify the employee about the investigation prior to the day she thought that she was returning to work on September 16, 2013, when they informed her that she was not returning to work, but rather she was being placed on administrative leave, RA, Vol. I, p. 50. Her first questioning session was not until September 18, 2013, more than nine months after her supervisor was informed by her co-workers about the incident. RA, Vol. I, p. 50.

The Hearing Officer found that the reliable, substantial and probative evidence indicated an inconsistency between Prohibition and Penalty G(1) Misuse of Information Technology and the memorandum regarding this offense from then-DMV Director Bruce Breslow. The memorandum provided for appropriate disciplinary action, suggesting that the level of discipline for this offense is discretionary. RA, Vol. I, pp. 50-51.

The Hearing Officer concluded that the reliable, substantial and probative evidence did not establish that termination would serve the good of the public service and therefore the decision to terminate O'Keefe should be reversed. She

said a thirty-calendar day suspension without pay was more appropriate for this conduct particularly considering the nature of the offense, including the fact that O'Keefe did not manipulate data or disclose data, her seven years of state service without prior discipline, and the DMV's failure to promptly investigate this matter and take immediate corrective action. The Hearing Officer decided that discipline commensurate with these violations should be imposed. RA, Vol. I, p. 51.

V. ARGUMENT

The standard of review is set forth in the Nevada Supreme Court's decision in *Knapp v. State ex. rel. Dep't of Prisons,* 111 Nev. 420, 892 P.2d 575, 577-78 (1995). In that case the Nevada Supreme Court held that the Hearing Officer did not err in reversing the employee's termination after concluding that termination was too severe. This Court agreed with the Department of Prisons, the hearing officer and the district court that Knapp's misconduct was serious, showed shocking misjudgment and warranted discipline. **The only dispute was over the degree of that discipline**. 111 Nev. at 425, 829 P.2d at 578. The hearing officer in *Knapp* considered that Knapp's past work performance had been generally satisfactory or above and that the Department of Prisons had not shown that Knapp's actions had significantly or permanently affected his ability to perform his work duties. These were also Knapp's first offenses. Accordingly, the

Nevada Supreme Court reversed the order of the district court and affirmed the decision of the hearing officer. *Id.*

For some reason the Court of Appeals has decided not to follow *Knapp*. The Court of Appeals states, "The inconsistency in the internal memorandum by the DMV does not change a disciplinary policy that had been adopted by the Personnel Commission." Exhibit 1, p. 3. But it does. Director Bruce Breslow's memo was the notice to O'Keefe of the policy. He said, "appropriate disciplinary action will be taken if violations of policy occur as they concern DMV records." RA, Vol. I, p. 1. Not only does Breslow, through his memo, state that the discipline for violation of the policy is discretionary but two DMV employees testified in the hearing before the Hearing Officer that discipline for violation of the policy was discretionary. Neither cited a similar case where an employee had **accessed** computer information but had not manipulated or used any of the computer information.

Approval of DMV's disciplinary procedures by the Personnel Commission pursuant to NRS 284.383(1) does not negate the Hearing Officer's authority pursuant to NRS 284.390(1) to determine the reasonableness of the action. Moreover, NRS 284.383(1) provides for progressive discipline. NRS 284.390(6) provides:

> If the hearing officer determines that the dismissal, demotion or suspension was without just cause as

> provided in NRS 284.385, the action must be set aside and employee must be reinstated, with full pay for the period of dismissal, demotion or suspension.

It is not up to either the district court or the Court of Appeals to determine, "The inconsistency in the internal memorandum by the DMV did not change a disciplinary policy that had been adopted by the Personnel Commission." Exhibit 1, p. 3. DMV relied on Bruce Breslow's April 25, 2011 memorandum. It is the first page of their Appendix. It was the only notice of DMV's policy on its records received by O'Keefe. RA, Vol. I, p. 1.

The inconsistency does change the policy. Furthermore, DMV applied the policy inconsistently. DMV told its employees and Seidel and Dobis concurred that the discipline would be appropriate and discretionary.

The Court of Appeals erred when it said the DMV's Prohibitions and Penalties mandated dismissal for O'Keefe's actions. That is not true. The Prohibitions and Penalties permitted discretionary discipline. Moreover, the Personnel Commission does not have the authority under NRS 284.383(1) to determine that O'Keefe's conduct is a serious violation of law or regulation justifying dismissal. That determination is up to the Hearing Officer. NRS 284.390(1) and 6; NRS 284.385. Moreover, no policy of the DMV prohibited employees from "accessing" only information.

If DMV had investigated O'Keefe's conduct promptly in December 2012 when Stoll was made aware, then arguably O'Keefe may have lost her right under NAC 284.462(2) to be restored to the position from which she was promoted. Because DMV did not investigate the conduct or propose any discipline, O'Keefe had the right pursuant to NAC 284.462(2) to return to her job at DMV. It is clear that DMV used termination as a subterfuge for not restoring O'Keefe to her former position at DMV.

Finally, at the oral argument, DMV counsel and the Court of Appeals engaged in a discussion of this Court's decision in *State v. Costantino*, Exhibit 3. However, in denying the petition for review on May 31, 2016, the majority concluded:

> However, a hearing officer generally "does not defer to the appointing authority's decision," as a hearing officer's duty "is to determine whether there is evidence showing that a dismissal would serve the good of the public service." *Knapp v. State ex. rel. Dep't of Prisons,* 111 Nev. 420, 424, 892 P.2d 575, 577 (1995). Further, "[t]he hearing officer shall make no assumptions of innocence or guilt but shall be guided in his or her decision by the weight of the evidence as it appears to him or her at the hearing." *Id.* (citing NAC 284.798). This is the standard that was applied in this case, which we conclude is the correct standard.

Exhibit 3, p. 3 n. 2.

If the standard is going to be changed, then state employees and hearing officers are entitled to notice by this Court. Hearing officers will continue to

apply *Knapp* unless this Court changes the standard of review. If the standard is going to change, O'Keefe respectfully requests that the standard be changed prospectively and not apply to the Hearing Officer's decision which was rendered on April 22, 2014. O'Keefe respectfully requests that this Court grant O'Keefe's Petition for Review.

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka

Malani L. Kotchka
Nevada Bar No. 283
520 South Fourth Street, Suite 320
Las Vegas, NV 89101
(702) 834-8777

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)94), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as it is prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size and Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 37(a)(7) because, excluding parts of the brief excepted by NRAP 32(a)(7)(C), it does not exceed 3,125 words.

Finally, I hereby certify that I have read this Petition for Review, and to be best of my knowledge, information, and belief, it is not frivolous or interposed for any proper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka

Malani L. Kotchka
Nevada Bar No. 283
520 South Fourth Street, Suite 320
Las Vegas, NV 89101
(702) 834-8777

Attorneys for Appellant

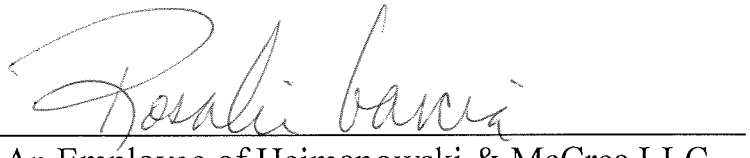
CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **APPELLANT'S PETITION FOR REVIEW BY THE SUPREME COURT** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 17th day of February, 2017, to the following:

Jordan T. Smith
Assistant Solicitor General
Office of the Attorney General
555 E. Washington Avenue, Suite 3900
Attorneys for Respondent

And a true and correct copy of the forgoing **APPELLANT'S PETITION FOR REVIEW BY THE SUPREME COURT** was mailed on this 17th day of February, 2017, by U.S. first class mail, postage prepaid, to the following:

Sara Feest
Legal Aid Center of Southern Nevada
725 E. Charleston Blvd.
Las Vegas, NV 89104



An Employee of Hejmanowski & McCrea LLC