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

District Court Case No. 14 0C 00103 1 B

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

In Conjunction With Legal Aid Center of Southern Nevada

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the Appellant Cara O'Keefe is an individual and she has no corporate affiliation. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF ISSUES

On June 27, 2017, this Court granted O'Keefe's Petition for Review and directed supplemental briefing on the following two issues: (1) Under what standard should a hearing officer review an appointing authority's disciplinary decision? and (2) Does a hearing officer have authority to determine that discipline imposed consistent with a disciplinary policy adopted by the State Personnel Commission does not serve the good of the public service and therefore was without just cause? This Supplemental Brief addresses these issues.

NRS Chapter 284 sets forth statutes concerning employment of state personnel. O'Keefe was a state employee. Hearing officers are created by statute and their authority is defined by statute.

ARGUMENT

A. A Hearing Officer Does Not Defer To The Appointing Authority's Decision

NRS 284.390(1) provides as follows:

> Within 10 working days after the effective date of an employee's dismissal, demotion or suspension pursuant to NRS 284.385, the employee who has been dismissed, demoted or suspended may request in writing a hearing before the hearing officer of the Commission **to determine the reasonableness of the action**.

(Emphasis added.) 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 the employee must be reinstated, with full pay for the period of dismissal, demotion or suspension.**

(Emphasis added.) NRS 284.390(7) provides:

> The decision of the hearing officer is binding on the parties.

Thus, the statute itself defines the standard under which a state hearing officer reviews an appointing authority's disciplinary decision. The hearing officer determines "the reasonableness of the action."

The hearing officer further decides whether the dismissal was without just cause, which is statutorily defined in NRS 284.385(a)(1) as whether "the good of the public service will be served thereby." O'Keefe's supervisor said O'Keefe "**fabulously** handled her accounts." RA, Vol. II, p. 143. Thus, the good of the public service will not be served by O'Keefe's dismissal. The decision of the hearing officer is binding on the parties.

Finally, NAC 284.798, which has been in existence since 1984, provides, "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." Thus, by law, the hearing officer determines the weight of the evidence, the reasonableness of the dismissal and whether the dismissal served the good of the public service.

In *Knapp v. State ex. rel. dept. of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995), the Nevada Supreme Court interpreted these same statutes and regulation and held:

> 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.... A hearing officer "determine[s] the reasonableness" of a 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 284.798.

111 Nev. at 424, 892 P.2d at 577. The Court distinguished *Dredge v. State ex. rel. Dep't*, 105 Nev. 39, 43, 769 P.2d 56, 58 (1989),[1] by stating that no security concerns were raised at the hearing. 111 Nev. at 424, 892 P.2d at 578. The same is true here. No security concerns were implicated in O'Keefe's termination and none were raised at the hearing.

According to *Knapp*, no deference is owed to DMV's decision. In *Knapp*, the hearing officer considered each charge against Knapp and found that Knapp

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[1] In *Dredge*, the Court held that the critical need to maintain a high level of security within the prison system entitled the appointing authority's decision to deference by the hearing officer. 105 Nev. at 42, 769 P.2d at 58. The Court cited NAC 284.650(3) which **specifically** provided that cause exists for discipline if "in the considered judgment of the appointing authority," the employee endangers the security of the institution administering a security program. DMV is not such an institution. The regulation provided specifically for deference to the Department of Prisons. That regulation is not applicable to O'Keefe's employment by DMV.

had engaged in activity conflicting with his employment duties. *Id.* The hearing officer next considered whether dismissal was appropriate in Knapp's case and cited NRS 284.383 which provides for the adoption of a system of progressive discipline of state employees in which severe discipline is imposed if less severe measures have failed. *Id.* The hearing officer looked at NRS 284.383 and concluded that dismissal was too severe a penalty for Knapp's violations. 111 Nev. at 425, 892 P.2d at 578. The hearing officer found that Knapp's past work performance had been generally satisfactory or above and that DOP had not shown that Knapp's actions had significantly or permanently affected his ability to perform his work duties. These were Knapp's first offenses. *Id.* The same is true for O'Keefe. DMV did not show that O'Keefe's actions had significantly or permanently affected her ability to perform her work duties.

In *Burson v. State of Nev.*, 1992 WL 246915, at *3-4 (D. Nev. Jul 20, 1992), the federal district court analyzed NRS Chapter 284 and held that taken as a whole, the Nevada statutory and regulatory scheme indicates that state employees are more than "at-will" workers and that they may be fired only for just cause. Here, the Hearing Officer concluded that the reliable, substantial and probative evidence did not establish that O'Keefe's termination would serve the good of the public service and reversed her termination. RA Vol. I, p. 51.

Lapinski v. City of Reno, 95 Nev. 898, 901, 603 P.2d 1088, 1090 (1979), is **not** applicable to state employees or state hearing officers. There, the Nevada Supreme Court was not interpreting or applying NRS 284.390. The only issue in *Lapinski* was whether there was substantial evidence placed before the City Council from which it could have made a finding that legal cause existed to terminate Lapinski's employment with the City of Reno. 95 Nev. at 901, 603 P.2d at 1090. In *Lapinski*, the Court discussed what constituted legal cause for termination of the City Engineer and concluded that the facts in the record did not constitute legal cause for termination. 95 Nev. at 904, 603 P.2d at 1092. No state employee was involved and no state statute was interpreted. *Lapinski* simply does not apply to disciplinary decisions concerning state employees.

Here, specific state statutes and regulations define the standard a state hearing officer should use in reviewing an appointing authority's disciplinary decision. The hearing officer is tasked with determining the reasonableness of the dismissal. By law, no deference is due an appointing authority's disciplinary decision. It is the hearing officer's job, and the hearing officer alone, who is to determine the reasonableness of the disciplinary decision. *See Turk v. Nevada State Prison*, 94 Nev. 101, 103, 575 P.2d 599, 601 (1978).

DMV relies on *Southwest Gas Corp. v. Vargas,* 111 Nev. 1064, 901 P.2d 693 (1995), to define just cause for termination.[2] However, that case also did not arise in the context of specific state statutes applicable to the dismissal of a state employee. The sole definition of "just cause as provided in NRS 284.385" is "the good of the public service." No other definition controls because state employment is governed by NRS Chapter 284. Here, there is a statutory definition of "just cause" which the hearing officer is directed to apply. Neither she nor the courts should consider a definition arising in other contexts which are not applicable to state employment.

B. A Hearing Officer Has the Sole Authority to Determine That Discipline Does Not Serve the Good of the Public Service

The State Personnel Commission has limited authority. According to NRS 284.065, the Personnel Commission has only such powers and duties as are authorized by law. The Commission specifically has the authority to adopt regulations to carry out the provisions of NRS Chapter 284. There is no statute specifically granting the State Personnel Commission authority to adopt specific disciplinary policies.

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[2] In *Enterprise Wire Co.*, 46 LA 359 (1966), Arbitrator Daugherty set forth a 7-part test of "just cause" for labor arbitrations in the private sector. While these standards do not specifically apply here, labor arbitrators, like the Hearing Officer here, determine whether rules were applied fairly and without discrimination and whether the degree of discipline was reasonably related to the seriousness of the employee's offense and the employee's past record.

NAC 284.646 authorizes dismissal of an employee if the agency with which the employee is employed (here DMV) has adopted any rules or policies which authorize the dismissal of an employee for such a cause or the seriousness of the offense or condition warrants such dismissal. NAC 284.646(1). However, pursuant to NRS 284.390, only the hearing officer can decide whether the dismissal is reasonable and whether it served the good of the public service.

The Hearing Officer here addressed these issues. The Hearing Officer concluded that 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 said:

> 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.

RA Vol. I, p. 49.

In this case, the Court of Appeals misquoted NRS 284.383(1). Specifically, NRS 284.383(1) provides:

> The Commission shall adopt by regulation **a system** for administering disciplinary measures against the state employee in which, except in cases of serious violations of law or regulations, less severe measures are applied at first, after which more severe measures are applied only if less severe measures have failed to correct the employee's deficiencies.

(Emphasis added.) That statute does not require that the Commission adopt measures for disciplining state employees. That statute is a requirement for progressive discipline which O'Keefe was not given. Adopting by regulation a system for administering disciplinary measures is **not** the equivalent of a requirement that "the Commission adopt measures for disciplining state employees."

The Commission did adopt by regulation a system for administering disciplinary measures against state employees which provide for progressive discipline. Those regulations are contained in NAC 284.638 through 284.656(3).

Because of its misconstruction of NRS 284.383(1), the Court of Appeals erred in its Order of Affirmance.

In *State ex. rel. Dep't. of Business and Industry/Taxicab Authority v. Costantino*, Exhibit 3 to Appellant's Petition for Review by the Supreme Court, filed February 21, 2017, the issue before the hearing officer was not whether substantial evidence existed to support the finding of dishonesty. The issue before the hearing officer pursuant to NRS 284.390(1) was whether the employee's dismissal was reasonable. By law, the hearing officer was to consider whether the dismissal served the good of the public service. Even if Costantino was dishonest, by law it was the hearing officer's task to determine whether the dismissal was reasonable and whether the dismissal served the good of the public service. *Lapinski* is irrelevant to the dismissal of a state employee. A state employee's dismissal is governed by statute and there is nothing in the statutes or regulations which apply in this case or *Constantino* which require any deference to the appointing authority's disciplinary decision.

The state legislature and Personnel Commission through specific statutes and regulations created this system. The statutes essentially provide that the hearing officer can second guess the appointing authority's decision if the hearing officer determines that the dismissal decision was unreasonable or did not serve the good of the public service.

The notice of DMV's policy on access to DMV records which was given to O'Keefe said, "Appropriate disciplinary action will be taken if violations of policy occur as they concern DMV records." RA, Vol. I, p. 1. The Hearing Officer determined that the policy provided for discretionary discipline. RA, Vol. I, p. 33. She found that DMV 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 an inconsistency between DMV's policy on misuse of information technology and the memorandum regarding this offense from then-DMV Director Bruce Breslow. RA, Vol. I, pp. 50-51. The Hearing Officer concluded that a thirty-calendar day suspension was more appropriate for O'Keefe's conduct particularly considering the nature of the offense, **including 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[3] and take immediate corrective action. RA, Vol. I, p. 51 (emphasis added). The Hearing Officer's decision complied with all

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[3] The Hearing Officer was greatly concerned about the lack of due process in O'Keefe's dismissal. RA, Vol. I, p. 50. O'Keefe's explanation of what she did (RA, Vol. I, p. 28) would have been supported by recordings from the Sheriff's office if she had promptly received notice of the proposed discipline.

statutes and regulations applicable to O'Keefe's dismissal. It should be affirmed by this Court.

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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 2,371 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.

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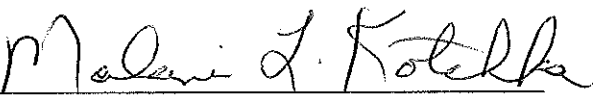
By: 

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **APPELLANT'S SUPPLEMENTAL OPENING BRIEF** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 10th day of August, 2017, to the following:

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And a true and correct copy of the forgoing **APPELLANT'S SUPPLEMENTAL OPENING BRIEF** was mailed on this 10th day of August, 2017, by U.S. first class mail, postage prepaid, to the following:

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An Employee of Hejmanowski & McCrea LLC