**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| CARA O'KEEFE, AN INDIVIDUAL<br><br>Appellant,<br>vs.<br><br>STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES,<br><br>Respondent. | Case No. 68460 | Electronically Filed<br>Sep 25 2017 04:20 p.m.<br>Elizabeth A. Brown<br>Clerk of Supreme Court |

# RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Regulations**



**Other Authorities**

## ISSUES PRESENTED FOR REVIEW

In its Order Granting Petition for Review and Directing Supplemental Briefing, the Court set forth the two issues presented for review:

(1) Under what standard should a hearing officer review an appointing authority's disciplinary decision? *See, e.g.*, NRS 284.385; NRS 284.390; *Knapp v. State ex rel. Dep't. of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995) ("Generally, a hearing officer does not defer to the appointing authority's decision."); *Dredge v. State ex rel. Dep't of Prisons*, 105 Nev. 39, 42, 769 P.2d 56, 58 (1989) (indicating that a hearing officer must defer to the appointing authority's decision when security or safety are at stake, and discussing the hearing officer's role in reviewing disciplinary decisions); *Lapinski v. City of Reno*, 95 Nev. 898, 901, 603 P.2d 1088, 1090 (1979) (noting that the city council's role in reviewing an employment decision is to determine whether substantial evidence in the record supports the decision).

(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?

## I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The challenges facing the Executive Branch in employee disciplinary disputes are many and varied. Like employers in the private sector, when government employers make disciplinary decisions, they must weigh the nature of the employee's misconduct and the employee's rights against (among many other things) workforce demands, morale, productivity, efficiency, confidentiality, safety, security, and relationships with governmental entities, including law enforcement. But government employers are concerned with more than just making a business profit at the end of the day. They must also determine whether "the good of the public service will be served" by the disciplinary decision and, ultimately, whether the decision is in the best interest of the People of Nevada.

The statutory scheme in NRS Chapter 284 reflects this careful balance. "An 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." NRS 284.385(1)(a). If the employee contests the action and requests a hearing, the hearing officer may set aside the employer's decision if she "determines that the dismissal, demotion or suspension was without just cause" or was unreasonable. NRS 284.390(1), (6).

The statutory language—and this Court's decisions in *Lapinski* and *Southwest Gas*—indicate that the "just cause" or "reasonableness" evaluation limits hearing

officers to assessing whether substantial evidence exists to support the employer's decision. Specifically, hearing officers are limited to assessing (1) whether substantial evidence exists to support the employer's finding that the employee committed the charged misconduct; and (2) whether substantial evidence exists to support the employer's finding that the good of the public service will be served by the level of discipline imposed. A substantial evidence standard of review properly defers to Executive Branch disciplinary decisions because hearing officers do not have the same level of knowledge or expertise required to operate a governmental agency. And hearing officers are not "appointing authorities" and cannot exercise the employment powers reserved to the Executive Branch.

Granting hearing officers a roving commission to review *de novo* Executive Branch disciplinary decisions would upset the equipoise struck by the Legislature. A non-deferential standard of review would allow hearing officers to assume the position of a *super*-HR department with the authority to second guess every dismissal, demotion, or suspension without regard for the realities and concerns inherent in public service. Discipline would inevitably vary between hearing officers and cause inconsistent application of employee discipline within state agencies. A *de novo* review system would also unduly hamper the Executive Branch's ability to regulate the conduct of its employees and disrupt the functioning of governmental agencies to the eventual detriment of the People. Thus, the Court should affirm the District Court and Court

of Appeals, and clarify that hearing officers must use a substantial evidence standard of review.

## II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

### A. O'Keefe Commits Terminable Misconduct.

O'Keefe worked as a revenue officer for the DMV Motor Carrier Division from January 2006 until December 16, 2012, when she transferred to the Division of Insurance ("DOI"). AA012; AA0021-23. Shortly after transferring to DOI, two former co-workers reported that O'Keefe violated DMV policies by misrepresenting her official capacity to the Carson City Sheriff's Office as a favor for a personal friend. 1RA004. The co-workers separately reported that they overheard O'Keefe call the sheriff's office to discuss a "customer's" DUI and related driver's license revocation even though, as a motor carrier division employee, O'Keefe did not deal with driver's licenses, DUIs, or have "customers" at her desk. *See id.*; 2RA038-42; 2RA063-66. Even so, DMV did not investigate the allegations because O'Keefe was no longer a DMV employee. 1RA004. In fact, DMV does not pursue discipline after an employee transfers or write a specificity of charges for another division's employee. 1RA034.

Nine months after transferring, O'Keefe failed her probationary period at DOI and, as a result, she automatically reverted to her former position at DMV. 2RA132; NAC 284.462. "In light of [her] return to the department and due to the seriousness of the allegations brought forth in December 2012," DMV determined that "it became

pertinent to investigate the alleged conduct." 1RA004. After completing her re-hire paperwork on her first day back, DMV placed O'Keefe on paid administrative leave pending an investigation. *Id*; 2RA131-32; 2RA208. O'Keefe also received a "Notice of Employee Rights During an Internal Investigation." 1RA002.[1]

**B. DMV Terminates O'Keefe.**

On November 22, 2013, DMV served the Specificity of Charges detailing its investigative findings, formally charging her with misconduct, and notifying her of the proposed termination. 1RA003-10; NAC 284.656. The investigation confirmed—and O'Keefe admitted—that she called the Carson City Sheriff's Office "representing [her]self as an employee of the DMV, for personal reasons outside [her] normal scope of duty." 1RA004. O'Keefe conceded that she was helping a family friend "with a DUI situation" and she "clarified the help [she] provided was not Motor Carrier [Division] business." *Id.*

DMV's investigation also discovered that O'Keefe accessed DMV's confidential computer system (known as DMV CARRS) seven times to review her friend's records. *Id.* O'Keefe accessed the computer system three other times to review the records of her friend's wife. *Id.* O'Keefe failed to explain her reasons for accessing the wife's records. *Id.*

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[1] O'Keefe received a second Notice of Employee Rights During an Internal Investigation on October 8, 2013. *See* 1RA004.

DMV charged O'Keefe with violating NAC 284.650(6)'s prohibition on insubordination and willful disobedience, as well as NAC 284.650(18)'s ban on misrepresentation of official capacity or authority. 1RA009. DMV also charged her with numerous violations of its internal Prohibitions and Penalties. *Id.* [2] The chart below outlines the policy offenses and disciplinary ranges with which she was charged.

**Department of Motor Vehicles Prohibitions & Penalties**

| | 1st Offense | | 2nd Offense | | Additional | |
|---|---|---|---|---|---|---|
| | Min. | Max. | Min. | Max. | Min. | Max. |
| **B. Performance on the job** | | | | | | |
| 23. Disregard and/or deliberate failure to comply with or enforce statewide, department or office regulations and policies. | 2 | 5 | 3 | 5 | 4 | 5 |
| **C. Neglect of, or inexcusable absence from, the job.** | | | | | | |
| 4. Conducting personal business during working hours. | 1 | 2 | 3 | 5 | 3 | 5 |
| **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. | 5 | - | - | - | - | - |
| **H. Other acts of misconduct or incompatibility** | | | | | | |
| 4. Unauthorized or improper disclosure of confidential information. | 1 | 5 | 2 | 5 | 3 | 5 |
| 7. Acting in an official capacity without authorization. | 1 | 5 | 2 | 5 | 3 | 5 |

1RA006; 1RA013. The Personnel Commission approved these offenses and penalty

[2] DMV's Prohibitions and Penalties set forth, in part, the conduct DMV employees are expected to follow as well as a chart of offenses with corresponding classes of discipline. The Prohibitions and Penalties classify offenses as ranging from class-1 to class-5, with class-1 offenses being the least severe (punishable with an oral warning) and class-5 offenses being the most severe (punishable with dismissal). 1RA006; 1RA013; AA00121-22.

ranges. NRS 284.383; *see also* AA113-15.[3] The available disciplinary actions increase in severity from a class one-oral reprimand to a class five-termination. AA121-23. Termination was a possible disciplinary action for most of O'Keefe's charges, and it was the minimum disciplinary level for G(1) Misuse of Information Technology. 1RA006.

The Specificity of Charges recommended that DMV terminate O'Keefe. 1RA010. It stated that, when O'Keefe misrepresented her capacity and purpose, it "cause[d] the Department to lose credibility with the customers, the public and the other government entities with which [the Department] work[s]." *Id.* DMV's relationship with law enforcement played an important role in the recommendation. "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…confidentiality is breached." *Id.* The Specificity of Charges continued,

[3] In 2011, before O'Keefe transferred to DOI, DMV's Director issued a memo addressing computer misuse. AA129. O'Keefe received, signed, and understood the memo. 1RA027. The memo quoted Prohibition and Penalty G(1) and reminded employees 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 206.481.'" AA129. The memo reiterated that "[t]he first offense can result in termination." *Id.* (emphasis omitted). This statement is consistent with the Prohibitions and Penalties and did not change the available level of discipline. Nor could the memo override the Personnel Commission-approved policies. *Cf.* 1RA050-51. Even if, as O'Keefe contends, the discipline imposed is discretionary, that discretion belongs to the appointing authority—not the hearing officer.

"[i]f confidentiality of records and data is compromised for personal gain or use, then the state is at risk for liability for breach of confidentiality." *Id.* It concluded that "[b]ased on the severity of the violation and the failure to follow and adhere to Department policies it [was the] recommendation, for the good of the state, [O'Keefe's] employment be terminated." *Id.*

A pre-disciplinary hearing was held on December 6, 2013. 1RA012. After the hearing, the pre-disciplinary hearing officer agreed with the recommendation to terminate O'Keefe. 1RA015. The officer found that O'Keefe's conduct "was outside the scope of her responsibilities and was done for personal reasons….In addition, misuse of information technology is a terminable offense for a first time violation." *Id.*

Following the pre-disciplinary hearing, the Motor Carrier Division Administrator informed O'Keefe that it was his "determination, after review of the Specificity of Charges; [her] statements during the pre-disciplinary hearing; the recommendation of the [pre-disciplinary hearing officer]; and the recommendation of [her] supervisor, it is in the best interest of the State of Nevada to terminate [her] employment effective December 16, 2013." 1RA018. The Administrator informed O'Keefe of her appellate rights. *Id.*

**C. The Hearing Officer Applies an Incorrect Standard of Review.**

O'Keefe requested a hearing to challenge her dismissal. 1RA019. A hearing officer conducted an administrative hearing on March 24, 2014. 1RA022. The evidence

presented at the hearing confirmed DMV's investigative findings. *See* 1RA023-44. O'Keefe "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 [her friend's] driver's license…." 1RA028. She acknowledged that she identified herself "as Cara from Motor Carrier" when she called the sheriff's office. 1RA041. She also "stated that she accessed the confidential DMV database for her friend…and to look up his wife's records, and she had a discussion with both of them about accessing the records." 1RA028. O'Keefe further testified that Motor Carrier Division employees "do not deal with DUI's," the friend and his wife were not her customers, and she committed these acts during work hours. 1RA027-29.[4]

The Hearing Officer concluded that "[t]he reliable, substantial and probative evidence" supports finding that O'Keefe improperly accessed the DMV database on ten occasions and called the sheriff's office twice to assist a non-motor carrier customer and personal friend. 1RA047-48. The Hearing Officer found that substantial evidence supported disciplining O'Keefe for violating:

> NAC 284.650(1) – activity which is incompatible with employees conditions of employment or violates NAC 284.738 to NAC 284.711;
> NAC 284.650(6) – insubordination or willful disobedience;
> NAC 284.650(18) – misrepresentation of official capacity or authority;
> DMV Prohibition and Penalties:
> B(23) – performance on the job: disregard and/or deliberate failure to

[4] Other witnesses testified that the discipline sought against O'Keefe was "consistent with prior disciplinary cases," and that other employees who committed a G(1) technology violation were "either fired or allowed to resign." 1RA032-33.

> 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 official capacity without authorization.

1RA048.

Although the Hearing Officer found "reliable, substantial and probative evidence" supporting DMV's investigation and disciplinary decision, the Hearing Officer said that "[n]onetheless, 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)." 1RA0049. The Hearing Officer determined that she need not defer to the appointing authority. Instead, she was "mak[ing] *an independent determination* as to whether there is *sufficient* evidence showing that the discipline would serve the good of the public service." 1RA046-47 (emphasis added). She also rendered her own judgment on whether O'Keefe's misconduct was a "'serious violation of law or regulation.'" 1RA049 (quoting NRS 284.383(1)). Ultimately, the Hearing Officer held that, in her own judgment, terminating O'Keefe would not serve the good of the public service and she reversed DMV's decision. *Id.* 1RA051. The Hearing Officer imposed a thirty-day suspension without pay instead. *Id.*

**D. The Hearing Officer is Reversed.**

DMV filed a petition for judicial review. 1RA054-56. The District Court granted DMV's petition and set aside the Hearing Officer's decision. 1RA057-62. The District Court determined that "[a] hearing officer does not have authority to second-guess the DMV's Prohibitions and Penalties offense classification. If DMV proves an offense for which the Prohibitions and Penalties provide a minimum discipline of termination, a hearing officer has no discretion regarding just cause or reasonableness of the termination to exercise." 1RA061. Moreover, if substantial evidence supports an offense for which termination is the minimum discipline, then "just cause for termination is established and termination is reasonable as a matter of law." *Id.* Thus, the District Court correctly held that the Hearing Officer committed an error of law, and acted arbitrarily and capriciously, by determining that O'Keefe's violations were not serious enough to merit termination after simultaneously finding that substantial evidence supported DMV's decision. *Id.*

O'Keefe appealed the District Court's order, 1RA063, but the Court of Appeals affirmed. *O'Keefe v. State Dep't of Motor Vehicles*, No. 68460, 2017 WL 521770 (Nev. App. Jan. 30, 2017). The Court of Appeals agreed that the Hearing Officer abused her discretion when she ruled that DMV's Prohibitions and Penalties permitted discretionary discipline. *Id.* at *1. "Because the DMV's Prohibitions and Penalties mandated dismissal for O'Keefe's actions," the Court of Appeals deduced that "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." *Id.* at *2. The Personnel Commission had already determined that O'Keefe's conduct was a "serious violation[] of law or regulation justifying dismissal." *Id.* (quotation omitted). The Court of Appeals concurred with the District Court that the Hearing Officer's ruling was arbitrary and based on an error of law. *Id.* O'Keefe filed a Petition for Review and this Court granted the Petition and directed supplemental briefing.

## III. ARGUMENT

### A. Standard of Review.

This Court reviews a petition for judicial review in the same way a district court reviews a hearing officer's decision. *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010). This Court may set aside a hearing officer's decision if it is, among other things, affected by an error of law or "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3)(d), (f). A hearing officer abuses its discretion when it applies an incorrect legal standard. *See Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007). A hearing officer's conclusions of law—like questions of statutory interpretation—are reviewed *de novo*. *See City Plan Dev., Inc. v. Office of Labor Com'r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005); *Dykema v. Del Webb Communities, Inc.*, 132 Nev. Adv. Op. 82, 385 P.3d 977, 979 (2016) (statutory interpretation).

### B. Hearing Officers Should Review an Appointing Authority's Disciplinary Decision for Substantial Evidence.

NRS 284.390 sets forth the standard of review that hearing officers must apply when reviewing an executive branch agency's disciplinary decision. The relevant subsection states that "[i]f 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) (emphasis added). In turn, 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." (emphasis added).

When those provisions are read together, a hearing officer's review is limited to determining whether "just cause," NRS 284.390(6), supports the "appointing authority's" decision "that the good of the public service will be served" by the appointing authority's chosen disciplinary action. NRS 284.385(1)(a); *see also Hernandez v. Bennett-Haron*, 128 Nev. Adv. Op. 54, 287 P.3d 305, 316 (2012) (noting that this Court will read statutes in harmony). But what's the meaning of "just cause" in NRS 284.390(6)?

This Court defined "just cause" in the employee-termination context in *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995). There, after an extensive investigation, an employee was terminated for sexual harassment. *Id.* at 1065-68, 901

P.2d at 694-95. Later, the terminated employee sued for breach of contract contending that the company agreed that he could only be terminated for cause following progressive discipline. *Id.* at 1068, 901 P.2d at 695. The employee asserted that his conduct did not amount to "good cause" to terminate. *Id.* at 1073, 901 P.2d at 698. Eventually, a jury returned a verdict for the terminated employee and the company appealed. *Id.* at 1070-71, 901 P.2d at 697.

Before this Court, the parties disputed the role of the jury. *Id.* at 1073, 901 P.2d at 698. The company argued that the jury was limited to assessing whether the company had a "reasonable belief" that the employee committed sexual harassment. *Id.* at 1073-74, 901 P.2d at 698-99. On the other hand, the employee asserted that the lower court properly allowed the jury to review the employee's conduct *de novo* and determine whether he actually committed sexual harassment. *Id.* at 1073-74, 901 P.2d at 698-99. This Court sided with the company. It held that "the employer is the ultimate finder of facts constituting good cause for termination." *Id.* at 1075, 901 P.2d at 700.

Even though *Southwest Gas* involved a private employment dispute, the role of a civil jury and a hearing officer are similar because they both evaluate the employer's disciplinary decision. *Cf.* Appellant's Supp. Opening Br. 6.[5] In *Southwest Gas*, this Court

[5] O'Keefe attempts to distinguish *Southwest Gas* and *Lapinski* because they did not involve NRS Chapter 284 but then she offers a 1966 arbitration case from Hawaii instead. Appellant's Supp. Opening Br. 6 (citing *Enterprise Wire Co.*, 46 LA 359 (1966)). Given its vintage, posture, facts, and jurisdictional origin, *Enterprise Wire* has no

warned that allowing a jury to trump the good faith factual findings of the employer "would create the equivalent of a preeminent fact-finding board unconnected to the challenged employer that would have the ultimate right to determine anew whether the employer's decision to terminate an employee was based upon an accurate finding of misconduct…." *Id.* at 1075, 901 P.2d at 699. This Court continued, "[t]his ex officio 'fact-finding board,' unattuned to the practical aspects of employee suitability over which it would exercise consummate power, and unexposed to the entrepreneurial risks that form a significant basis of every state's economy, would be empowered to impose substantial monetary consequences on employers whose employee termination decisions are found wanting." *Id.* The Court ruled that, unless expressly stated in contract or statute, employers have not ceded to reviewing bodies the authority to define "serious misconduct." *See id.* at 1080, 901 P.2d at 703.

To guard against these concerns, this Court held "that a discharge for '*just*' or 'good' 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." *Id.* at 1078, 901 P.2d at 701 (emphasis added). Hence, a reviewing body is restricted to assessing whether the employer's decision was made in good faith and supported by substantial evidence. *Id.* at 1079, 901 P.2d at 702. Under

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persuasive value. *Southwest Gas* and *Lapinski,* on the other hand, involve very similar facts arising under Nevada law and they should be considered controlling.

that standard, this Court reversed the jury's verdict in favor of the terminated employee. *Id.* at 1079-80, 901 P.2d at 702-03.

Applying the *Southwest Gas* definition of "just cause" to NRS 284.390(6) is consistent with the statutory scheme and protects the same interests that the Executive Branch possesses as an employer. If hearing officers are allowed to sit as shadow-department heads with authority to overrule every disciplinary decision, state employers face the same dangers that private enterprises face from *de novo* jury review. Like a jury, hearing officers are unconnected to the challenges of state employment, are unattuned to the practical aspects of state employment conditions, and unexposed (at least directly) to the risks of keeping an unsuitable employee in state service. *See id.* at 1075, 901 P.2d at 699. The hearing officer's ability to Monday-morning quarterback employment decisions and power to levy significant monetary damages against the State should be constrained by limiting his or her review to the existence of substantial evidence. *See id.* Otherwise, the hearing officer would be improperly substituting his or her judgment for the employer's. Indeed, the Court of Appeals has rightly relied on *Southwest Gas* when reviewing other hearing officer decisions in state employment disputes. *See Morgan v. State, Dep't of Bus. & Indus., Taxicab Auth.*, No. 67944, 2016 WL 2944701, at *2 (Nev. App. May 16, 2016) (unpublished disposition) (citing *Southwest Gas* and affirming 80-hour suspension because the Administrator's decision was with "just cause" and supported by substantial evidence).

The *Southwest Gas* standard is also consistent with this Court's earlier case law. For instance, in *Lapinski v. City of Reno*, 95 Nev. 898, 603 P.2d 1088 (1979), a city employee was terminated and he sought a hearing before the city council to contest the decision. On appeal, this Court said that "[t]he determinative issue in this case is whether there was substantial evidence placed before the City Council from which it could have made a finding that legal cause existed to terminate [the employee's] employment with the City of Reno." *Id.* at 901, 603 P.2d at 1090. Again, the city council's function in *Lapinski* was akin to role of a hearing officer or a civil jury and this Court found that the city council was not to make a fresh factual determination. *See id.*[6]

Thus, under both *Southwest Gas* and *Lapinski*, any review of an adverse employment action is limited to assessing whether substantial evidence exists to support the employer's decision that misconduct occurred and that the disciplinary decision will serve the good of the public service. The inquiry is not whether the hearing officer would have made the same determination in the first place. Rather, the inquiry is whether substantial evidence supports the *appointing authority's* "good of the public service" decision. This standard mandates that the hearing officer give some deference to the appointing authority's view of the facts.

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[6] O'Keefe's citation to *Burson v. State of Nevada*, No. CV-N-92-289-ECR, 1992 WL 246915 (D. Nev. July 20, 1992) does not refute that a substantial evidence standard of review applies. Appellant's Supp. Opening Br. 4. *Burson* simply discusses whether "state employees enjoy a property interest in their jobs." *Id.* at *3. The case does not address the appropriate standard of review.

*Dredge v. State ex. rel. Department of Prisons* also supports giving deference to an appointing authority's disciplinary decision. Citing NRS 284.385 and NRS 284.390, the *Dredge* court held that "[i]t was the task of the hearing officer to determine whether NDOP's decision to terminate Dredge was based upon evidence that would enable NDOP to conclude that the good of the public service would be served by Dredge's dismissal." 105 Nev. 39, 42, 769 P.2d 56, 58 (1989). This is the same inquiry that *Southwest Gas* and *Lapinski* require.

But *Dredge* is most often cited for the next sentence: "Moreover, the critical need to maintain a high level of security within the prison system entitles the appointing authority's decision to deference by the hearing officer whenever security concerns are implicated in an employee's termination." *Id.* While security concerns may entitle the Department of Prisons or other "security programs" to an extra measure of deference in their employment decisions, nothing in *Dredge* or the statutory scheme indicates that hearing officers *only* give deference to the Department of Prisons or "security programs." And nothing in *Dredge* hints that hearing officers review *de novo* all other executive agency decisions.[7] The statutes mandate the same approach for all executive branch agencies and all agencies are entitled to deference when reviewing their

[7] *Contra Knapp v. State ex rel. Dep't of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 578 (1995) (declining to give deference to Department of Prison's disciplinary employment action when the agency did not charge the employee with a security violation); *see infra* pages 19 to 21 and the discussion about *Knapp*.

disciplinary decisions. The Court of Appeals has implicitly recognized this standard in some of its cases. For example in *State v. Malcic*, No. 70341, 2017 WL 1806807 (Nev. App. Apr. 28, 2017) (unpublished disposition), the Court of Appeals, while citing *Knapp* and *Dredge*, noted that "[i]t is *sometimes true* that in *non-security-related cases* a hearing officer *might not defer* to the appointing authority…." *Id.* at *1 (emphases added). The appellate court did not hold that non-security related agencies *never* get deference.

A non-deferential standard of review allows hearing officers to improperly preempt an appointing authority's disciplinary decisions and exercise functions that belong solely to the Executive Branch. *See State v. Costantino*, Case No. 65611 at 3 n.2 (Nev. May 31, 2016) (unpublished disposition) (Hardesty, J., dissenting). Under the statutory scheme, "[i]t is not the duty of the hearing officer to substitute its judgment for the employing agency's judgment." *Id.* (citing *see City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005)).

The Court's contrary statements in *Knapp v. State ex rel. Department of Prisons*, 111 Nev. 420, 892 P.2d 575 (1995) are misguided. Without discussing *Lapinski* or citing any authority at all, the *Knapp* Court proclaimed that "[g]enerally, a hearing officer does not defer to the appointing authority's decision." *Id.* at 424, 892 P.2d at 577. [8] The Court

[8] The *Knapp* Court's reliance on Justice Springer's dissent in *Dredge* was incorrect for the same reason. *See id.* at 424, 892 P.2d at 578. Justice Springer also neglected to cite authority for the statement that "[t]aking a new and impartial view of the evidence is exactly what personnel hearing officers are supposed to do." *Dredge*, 105 Nev. at 47,

said that "[a] hearing officer's task is to determine whether there is evidence showing that a dismissal would serve the good of the public service." *Id.* But this statement is directly contradicted by NRS 284.385(1)(a), which provides that demotion or dismissal is appropriate "when the *appointing authority* considers that the good of the public service will served thereby." (emphasis added). By statute, it is the appointing authority's task—not the hearing officer's—to decide whether dismissal serves the good of the public service. *Id.*; *see also Taylor v. Dep't of Health & Human Servs.,* 129 Nev. Adv. Op. 99, 314 P.3d 949, 950-51 (2013) (holding that hearing officers cannot exercise the powers of appointing authorities).

*Knapp* also quoted NAC 284.798's statement that "[t]he 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." 111 Nev. at 424, 892 P.2d at 577. Yet NAC 284.798 does not demonstrate that hearing officers should not give deference. NAC 284.798 is reconcilable with NRS 284.385 and NRS 284.390 because it simply

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769 P.2d at 62. Furthermore, taking a new and impartial view of the *evidence*, is significantly different from conducting a *de novo* review and substituting one's judgment for that of the employer. For the sake of argument, even if a hearing officer takes a new and impartial view of the evidence in making a determination of just cause, he or she must do so while adhering to the substantial evidence standard of review.

Similarly, the Court did not cite any authority for its statement in *State ex rel. Department of Prisons v. Jackson*, 111 Nev. 770, 773, 895 P.2d 1296, 1298 (1995) that "[g]enerally, we would defer to the hearing officer, were it not for *Dredge*, which requires deference to the appointing authority in cases of breaches of security." Again, NRS 284.385 and NRS 284.390 require hearing officers to give deference to *all* appointing authorities, not only those with security interests.

means that hearing officers should not make assumptions about the presence of substantial evidence of innocence or guilt. *See Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988) ("Administrative regulations cannot contradict or conflict with the statute they are intended to implement."). NAC 284.798 is not a license for hearing officers to thrust their own notions of employee discipline on state employers in conflict with the governing statutes. To the extent that *Knapp* or its interpretation of NAC 284.798 contradict NRS 284.385 and NRS 284.390, they should be overruled.

Even if this Court declines to overrule *Knapp*, it is factually distinguishable from this case. In *Knapp*, the Department of Prisons conceded before the district court "that dismissal was not appropriate absent the additional charges which the hearing officer had found unproven." *Knapp*, 111 Nev. at 425, 892 P.2d at 578. By contrast, DMV made no such concession here and the Hearing Officer actually found that substantial evidence existed to support DMV's finding that O'Keefe committed the misconduct. Therefore, if not overruled, the Court should limit *Knapp* to its facts.

O'Keefe relies heavily on NRS 284.390(1)'s reference to "reasonableness." That provision states that "a hearing before the hearing officer of the Commission [will] determine the reasonableness of the action." NRS 284.390(1). But "reasonableness" review is the equivalent of reviewing for substantial evidence. *See Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487, 490 (2014) (citing 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9:24[1] (3d ed. 2010) (explaining that "substantial

evidence" language most often conveys a reasonableness standard of review, leaving the decision-making power with the agency)); *Donaho v. FMC Corp.*, 74 F.3d 894, 900 & n.11 (8th Cir. 1996)[9] ("Our conclusion that 'substantial evidence' is only a quantified reformulation of reasonableness has support in the case law… That reasonableness and substantial evidence are really two formulations of the same standard is made more evident….").

When reviewing for substantial evidence, the Court asks 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) (cleaned up; emphasis added). In other words, "reasonableness" review and "substantial evidence" review are defined with reference to each other and there is no substantive distinction between the two. *See id.*; *see also* Richard A. Posner, *What is Obviously Wrong with the Federal Judiciary, Part I*, 19 GREEN BAG 2D 187, 198 (2016) (criticizing formulation of appellate standards of review and stating "the main ones are substantial evidence, abuse of discretion, clearly erroneous, arbitrary and capricious, reasonableness, and de novo. But all but the last are as a practical matter synonyms."); Judge Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think (2008)*, 108 MICH. L. REV. 859, 876 n.32 (2010) ("I agree with

[9] Abrogated on other grounds by *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, (2003).

Posner that there are essentially two types of standards of review--deferential and nondeferential--and the courts would do well to recognize as much.").[10] Therefore, hearing officers are limited to reviewing for substantial evidence even if the overarching rubric is "reasonableness" instead of "just cause."

In this case, the Hearing Officer improperly conducted "independent" non-deferential *de novo* determinations about whether O'Keefe's termination would serve the good of the public service and whether O'Keefe's misconduct was "serious" under NRS 284.383. 1RA047-52. However, because NRS 284.385(1)(a) vests only appointing authorities with the power to conduct the "good of the public service" assessment, and NRS 284.390(6) restricts hearing officers to reviewing the appointing authority's conclusion for "just cause"—defined in *Southwest Gas* and *Lapinski* as substantial evidence—the Hearing Officer applied an incorrect standard of review and did not properly defer to DMV's decision.

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[10] *Sch. Dist. of Wisc. Dells v. Z.S. ex rel. Littlegeorge*, 295 F.3d 671, 674 (7th Cir. 2002) (Posner, J.) ("[T]he cognitive limitations that judges share with other mortals may constitute an insuperable obstacle to making distinctions any finer than that of plenary versus deferential review. Maybe in judicial review two's a company and three's a crowd.") (citation omitted); *U.S. v. Hill*, 196 F.3d 806, 808 (7th Cir. 1999) (Posner, J.) ("We don't put much stock in the precise verbal formulations of standards of appellate review. Basically there is deferential review and non–deferential (plenary) review, and whether deferential review is denominated for 'abuse of discretion' or 'clear error' or 'substantial evidence' or any of the other variants (with the exception of 'mere scintilla of evidence') that courts use makes little practical difference.").

### C. Hearing Officers Do Not Have Authority to Determine *De Novo* that Discipline Does Not Serve the Good of the Public Service.

As described above, only appointing authorities have the power to decide that dismissal or demotion will serve the good of the public service. NRS 284.385(1)(a). Accordingly, hearing officers do not have authority to determine that appointing authority-imposed discipline that is consistent with a disciplinary policy adopted by the State Personnel Commission does not serve the good of the public service. This Court addressed the boundaries of a hearing officer's authority to impose discipline in *Taylor v. Department of Health & Human Services*., 129 Nev. Adv. Op. 99, 314 P.3d 949 (2013)—a case ignored by O'Keefe.

There, this Court explained how the role of a hearing officer is distinct from that of an appointing authority and rejected an employee's suggestion "that the hearing officer should make the decision about the appropriate level of discipline because the hearing officer is the 'fact finding tribunal…." *Id.* at 950. The Court held "that pursuant to the clear and unambiguous language of NRS Chapter 284, while hearing officers may determine the reasonableness of disciplinary actions and recommend appropriate levels of discipline, only appointing authorities have the power to prescribe the actual discipline imposed on permanent classified state employees." *Id.* at 950-51, 951-52. This is so because hearing officers are not within the regulatory definition of "appointing authority" and thus lack "explicit power to prescribe the amount of discipline to be imposed." *Id.* at 951 (citing NAC 284.022). "At best, then, a hearing officer's only

influence on the prescription of discipline in a matter on administrative appeal comes from his or her ability to determine the reasonableness[11]of the disciplinary decision and to recommend what may constitute an appropriate amount of discipline." *Id.* (citations omitted).

NRS 284.385(1)(a) NRS 284.390, and *Taylor* make clear that a hearing officer's only function is to determine if there was just cause *i.e.* substantial evidence before the appointing authority from which the appointing authority could conclude that the discipline imposed served the good of the public service. *See Lapinski*, 95 Nev. at 901, 603 P.2d at 1090; *Southwest Gas*, 111 Nev. at 1078, 901 P.2d at 701; *Costantino*, Case No. 65611 (unpublished disposition) (Hardesty J., dissenting). In O'Keefe's case, the only issue before the Hearing Officer was whether the appointing authority's decision to terminate was based on evidence that would enable the appointing authority to conclude that the good of the public service would be served by dismissal. *See* NRS 284.385(1)(a). The Hearing Officer did not have a blank slate to decide what discipline she would have imposed in the first place.

NRS Chapter 284 especially restricts a hearing officer's authority to reject the appointing authority's disciplinary action when the discipline is consistent with policies that the State Personnel Commission approved. NRS 284.383(1) provides that "[t]he

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11 *See supra* page 21 to 23 (discussing similarity between reasonableness and substantial evidence review).

Commission shall adopt by regulation a system for administering disciplinary measures against a 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). The Commission adopted a system for administering discipline against state employees in NAC 284.638 to NAC 284.6563.

NAC 284.646(1) allows an appointing authority to dismiss an employee for any cause set forth in NAC 284.650 if the agency has adopted policies governing dismissal or the seriousness of the conduct warrants dismissal. Here, DMV has adopted policies in the form of the Prohibitions and Penalties that correspond to NAC 284.650's categories. *See* NAC 284.650(1) (activity incompatible with conditions of employment); NAC 284.650(6) (insubordination or willful disobedience); NAC 284.650(18) (misrepresentation of official capacity); *see also* 1RA006; 1RA048. DMV's Prohibitions and Penalties prescribe termination as the only penalty for O'Keefe's violation of G(1) misuse of information technology. 1RA006. NAC 284.646(2)(b) similarly allows immediate dismissal for "[u]nauthorized release or use of confidential information."

The Personnel Commission approved DMV's policies and the designation of O'Keefe's conduct as "serious" first-time terminable offenses. *See* NRS 284.383; 1RA006; AA113-15. With the Personnel Commission's approval, DMV's disciplinary policies have the force and effect of law. *See Turk v. Nevada State Prison*, 94 Nev. 101,

103-04, 575 P.2d 599, 601 (1978). Consequently, administrative regulations and internal policy deem O'Keefe's conduct "serious" as a matter of law, and the Hearing Officer did not have the power to adopt her own definition of "seriousness" and override the considered judgment of not one, but *two*, governmental bodies. Once the Hearing Officer found (as she did) that substantial evidence existed to support DMV's conclusion that O'Keefe committed a "serious" offense, and the discipline imposed was within the guidelines set by DMV's policies, the Hearing Officer lacked the authority to set aside DMV's decision.

## IV. CONCLUSION

For these reasons, the District Court and Court of Appeals should be affirmed.

Dated: September 25, 2017.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 Garamond font.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,430 as calculated by the Microsoft Word Count function.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on this 25th day of September, 2017, I filed and served a copy of the foregoing **RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF** through the Supreme Court Electronic Filing System. A copy was served electronically to the following:

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