IN THE SUPREME COURT OF THE STATE OF NEVADA

CARA O'KEEFE, AN INDIVIDUAL,

Appellant,

vs.

STATE OF NEVADA
DEPARTMENT OF MOTOR
VEHICLES,

Respondent.

Case No.: 68460

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APPELLANT'S SUPPLEMENTAL REPLY 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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INTRODUCTION

The powers of the Government of the State of Nevada are divided into three separate branches: the Legislative, the Executive and the Judicial. *Nevada Yellow Cab Corporation v. Eighth Judicial District Court*, 132 Nev. Adv. Op. 77, 383 P.3d 246, 250 (2016). In *Nevada Yellow Cab,* this Court held:

> "[L]egislative power is the power of law-making representative bodies to frame and enact laws, and to amend or appeal them. This power is indeed very broad." *Galloway v. Truesdell,* 83 Nev. 13, 20, 422 P.2d 237, 242 (1967); *see also Harper*, 509 U.S. at 107, 113 S.Ct. 2510 (Scalia J., concurring) (stating that it is "the province and duty of the judicial department to say what the law *is*, not what the law *shall* be") (internal quotations and citation omitted)).

383 P.3d at 251. This Court does not create the law. It simply says what the law is.

DMV's Supplemental Answering Brief addresses solely what it wishes the law would be and not what the law is. This Court directed supplemental briefing on two issues: (1) Under which standard should a hearing officer review an appointing authority's disciplinary 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? The answer to the first question is de novo or nondeferential review and the answer to the second question is yes,

although the disciplinary policy was adopted by DMV, **not** the State Personnel Commission. DMV's Supplemental Answering Brief goes far beyond these two issues and addresses what it wishes the law would be for the Executive Branch of the State, not what the law is.

When O'Keefe worked for the DMV, "She **fabulously** handled her accounts." RA, Vol. II, p. 143 (emphasis added). O'Keefe brought in above-average revenue for delinquent licensing fees and taxes. RA, Vol. I, pp. 39-40; RA, Vol. II, pp. 21-22, 205. As the Hearing Officer found, the "good of the public" would be served by retaining this **fabulous** seven-year permanent classified employee who had **never** received any prior discipline while employed by the State.

ARGUMENT

I. The Legislature Decided That A Hearing Officer Does Not Defer To The Appointing Authority's Decision

The Hearing Officer determines the reasonableness of a permanent classified employee's dismissal. NRS 284.390(1). If the Hearing Officer determines that the dismissal 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. . . ." NRS 284.390(6). "The decision of a hearing officer is binding on the parties." NRS 284.390(7).

NRS 284.385(1) defines just cause as "the good of the public service will be served thereby." Before DMV could dismiss permanent classified employee O'Keefe, it had to consider "that the good of the public service would be served thereby." NRS 284.385(1)(a). After DMV decided to dismiss permanent classified employee O'Keefe, it was up to the Hearing Officer "to determine the reasonableness of the action" and if the dismissal would serve the good of the public. O'Keefe's Hearing Officer determined that her dismissal was without just cause as provided in NRS 284.385 and would not serve the good of the public. Therefore, by law O'Keefe's dismissal "must be set aside" and she "must be reinstated, with full pay for the period of dismissal . . . ." The Hearing Officer's decision is binding on O'Keefe and DMV.

DMV wants the Executive Branch to have more power to terminate its permanent classified employees who have property rights to their employment and wants hearing officers to defer to DMV. However, the Nevada Legislature has not given DMV that power. Under the statutory scheme enacted in NRS Chapter 284, the Hearing Officer has the ultimate authority to determine whether there has been just cause as defined in NRS 284.385 for the dismissal of a permanent classified employee of the State.

DMV argues on pages 22 to 23 of its Supplemental Answering Brief that there are two types of standards of review: deferential and non-deferential. The

Hearing Officer's standard of review of DMV's disciplinary decision is non-deferential. NAC 284.798 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.

That is the essence of a de novo or non-deferential standard of review.

In contrast, NAC 284.650(3) provides deference to the "considered judgment of the appointing authority" "of an institution administering a security program" when the employee "violates or endangers the security of the institution." This regulation accounts for the difference in the *Knapp* and *Dredge* decisions. *Knapp*, 892 P.2d at 577; *Dredge*, 769 P.2d at 58. Appointing authorities with security concerns are entitled to deference. In contrast, DMV, like other executive appointing authorities, are not. *Knapp*, 892 P.2d at 577-78.

Here, the Hearing Officer trumps the DMV because the Nevada Legislature decided to put the ultimate decision of whether "the good of the public service would be served" by the dismissal of a permanent classified employee in the hands of the Hearing Officer. DMV did not convince the Hearing Officer that the dismissal of a seven-year permanent classified employee who **fabulously** handled her accounts would serve the good of the public.

The Hearing Officer is the preeminent fact-finding person created by law. NAC 284.798. The Hearing Officer's job is to substitute her judgment for DMV's

if the Hearing Officer believes that the dismissal does not serve the good of the public. In *Taylor v. Dep't of Health and Human Services*, 129 Nev. Adv. Op. 99, 314 P.3d 949, 950 (2013), this Court upheld the hearing officer's decision setting aside Taylor's dismissal. This Court said, "Accordingly, if the hearing officer's interpretation of NRS Chapter 284 and its associated regulations is 'within the language of the statute,' this court will defer to that interpretation." 314 P.3d at 951.

The Hearing Officer has been given by statute the authority to second guess the discipline of DMV. That is why Hearing Officers were created. They serve as administrative law judges to determine whether the dismissal of a permanent classified employee of the State serves the good of the public. *See Lambert v. Andrews*, 79 Fed. Appx. 983, 984 (9th Cir. 2003). In *Snow v. Nevada Department of Prisons*, 543 F. Supp. 752, 756 (1982), the federal district court interpreted NRS 284.385 and 284.390 and found, "The hearing officer exercises quasi-judicial powers."

DMV confuses the standard of review by the Hearing Officer and the standard of review by this Court. The Hearing Officer's review of DMV's dismissal decision of a permanent classified employee is de novo or non-deferential. NRS 284.390; NAC 284.798; *Gandy v. State ex rel. Division of Investigation and Narcotics*, 96 Nev. 281, 283, 607 P.2d 581, 583 (1980). Then,

judicial review of the decision of the Hearing Officer is governed by NRS Chapter 233B. NRS 284.390(8); *Snow*, 543 F. Supp. at 756.

NRS 233B.135(3) provides, "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact." The agency referred to is the Hearing Officer, **not** DMV.[1] Thus, the Court's review of the Hearing Officer's decision is a deferential one. *Dredge v. State ex rel., Dept. of Prisons*, 105 Nev. 39, 43, 769 P.2d 56 (1989); *Gandy v. State ex rel. Division of Investigations and Narcotics*, 96 Nev. 281, 283, 607 P.2d 581, 582 (1980); *accord Pogue v. U.S. Dept. of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1980). By law, the Court shall not substitute its judgment for that of the agency, the Hearing Officer, as to the weight of evidence on a question of fact. NRS 233B.135(3). The District Court and the Court of Appeals applied the wrong standard of review. This Hearing Officer did have the discretionary authority to second guess the DMV's dismissal decision of a permanent classified employee whose dismissal did not serve the good of the public. *Gandy*, 96 Nev. at 284-85. The courts must defer to the Hearing Officer's determination of the "weight of evidence on a question of fact."

[1] To be arbitrary and capricious, the decision of an administrative agency (the Hearing Officer) must be in disregard of the facts and circumstances involved. *Meadow v. Civil Service Board of Las Vegas Metropolitan Police Dept.*, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989).

II. The Hearing Officer Weighed The Evidence

The Hearing Officer found:

(1) It was 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);

(2) 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 involving 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);

(3) DMV did not take immediate corrective action when it learned about the alleged conduct in December 2012 (RA, Vol. I, p. 50);

(4) DMV did not notify O'Keefe about the investigation prior to the day she thought that she was returning to work on September 16, 2013 (RA, Vol. I, p. 50);

(5) O'Keefe's 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);

(6) There was an inconsistency between DMV's Prohibition and Penalty G(1) Misuse of Information Technology and the memorandum regarding this offense from then DMV Director Bruce Breslow. The memorandum suggested that the level of discipline for this offense was discretionary (RA, Vol. I, pp. 50-51); and

(7) Termination would not serve the good of the public service and the decision to terminate O'Keefe should be reversed. A thirty-calendar-day suspension without pay was more appropriate for O'Keefe's conduct considering the nature of the offense, 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 the matter and take immediate corrective action (RA, Vol. I, p. 51).

In *City Plan Development, Inc. v. Office of Labor Comm'r*, 121 Nev. 419, 426, 117 P.3d, 182, 186-87 (2005), this Court held that a hearing officer's conclusions of law, which will necessarily be closely tied to the hearing officer's view of the facts, were entitled to deference on appeal. Thus, the Hearing Officer's conclusions are entitled to deference.

DMV confuses the role of the jury in *Southwest Gas* and the role of the Hearing Officer. By law, the Hearing Officer is the preeminent factfinding entity when a permanent classified employee of the State is dismissed. NRS 284.390;

NAC 284.798. Unlike the jury in *Southwest Gas*, the Hearing Officer is not required to defer to DMV, but instead is required by law to "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. *Southwest Gas* involved a private employer, a breach of contract and no statutory system regarding the termination of a State employee. Private employers are not governed by NRS Chapter 284. DMV is.

In 1966, Arbitrator Daugherty developed seven tests for just cause in the context of a labor agreement between a private employer and an employee who was represented by a union. The tests developed were:

(1) Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

(2) Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

(3) Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

(4) Was the company's investigation conducted fairly and objectively?

(5) At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

(6) Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

(7) Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Enterprise Wire Company, 46 LA 359 (1966).

In her decision, the Hearing Officer considered similar factors. She disagreed with the degree of discipline imposed by DMV, as did the hearing officer in *Knapp*, 892 P.2d at 578. *Accord Eng v. County of Los Angeles*, 2010 WL 11507454, at *3 (C.D. Cal. June 14, 2010). The Hearing Officer's view of the facts and her conclusions of law are entitled to deference by the courts.

III. This Court Should Follow The Doctrine of Stare Decisis

This Court, like other courts, has held that it will not overturn precedent under the doctrine of stare decisis absent compelling reasons for doing so. Mere disagreement does not suffice. *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008); *Kimble v. Marvel Entertainment, LLC*, 135 S.Ct. 2401, 2409 (2015). As the *Kimble* court held, stare decisis carries enhanced force when a prior decision interprets a statute. Critics of the court's ruling can take their objections across the street and Congress can correct any mistake it sees. *Id.* This Court's prior *Knapp* decision is settled precedent. The Nevada Legislature has never

corrected any alleged mistake by the Court. Therefore, the Nevada Legislature presumably agrees with the *Knapp* court. DMV has shown no reason to reverse established precedent.

IV. DMV's Dismissal Of O'Keefe Was A Pretext For Not Returning Her To Her Prior Position

In late December 2012, two employees told O'Keefe's supervisor about some conversations they had overheard O'Keefe make to the Carson City Sheriff's Department on behalf of a family friend. RA, Vol. II, pp. 39, 42, 63.[2] Even though O'Keefe had transferred to a management analyst position at the Nevada Division of Insurance and was still working for the State of Nevada, O'Keefe's supervisor decided **"It was not necessary to investigate the allegations."** RA, Vol. I, p. 4 (emphasis added); RA, Vol. II, p. 128. If DMV had considered O'Keefe's conduct to be cause for discipline, it had to take disciplinary action immediately to prevent O'Keefe from returning to DMV pursuant to NAC 284.462(2).

Pursuant to NAC 284.462(2), O'Keefe had the right to return to DMV and DMV discovered that she was going to return in the middle of August 2013. RA, Vol. II, pp. 130, 149; AA, p. 142. DMV did not consider the conduct serious because it took no action until O'Keefe was scheduled to return to DMV.

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[2] O'Keefe said she did not act in an official capacity and that it was a reflex/knee jerk reaction to say, "Cara with Motor Carrier." AA 133.

O'Keefe's supervisor knew she "had to make room for" O'Keefe. RA, Vol. II, pp. 132-33; AA, p. 11. As a permanent classified State employee, O'Keefe had a property interest in her employment. When DMV learned she was returning, O'Keefe's supervisor's supervisor Dawn Sheets told O'Keefe's supervisor "that we must revisit the issue of the witnesses coming forward about misrepresentation . . . ." RA, Vol. II, pp. 130, 155; RA, Vol. I, p. 51. The timing of DMV's investigation and its dismissal of O'Keefe was clearly a pretext for not giving O'Keefe her position back to which she was clearly entitled pursuant to the law, NAC 284.462(2).

Despite DMV's allegations on pages 7 and 8 of its Supplemental Answering Brief, there was no evidence that O'Keefe's conduct caused DMV to lose credibility with customers, the public or other governmental entities. There was also no evidence of mistrust between DMV and law enforcement agencies. If O'Keefe's misconduct was so bad, surely DMV would have disciplined her earlier so that the Department of Insurance would not have such an alleged reprehensible employee working for it. The Department of Insurance is also part of the Executive Branch of the State. If O'Keefe had never exercised her right to return to her job at DMV, her alleged misconduct[3] would never have been investigated and no discipline would ever have been issued.

[3] AA 134; RA, Vol. I, pp. 10-12.

V. The State Personnel Commission Did Not Adopt DMV's Disciplinary Policy

On page 26 of its Supplemental Answering Brief, DMV admits that it adopted its disciplinary policies. There is no showing in this record that the Personnel Commission approved the adoption of DMV's policies. AA 113-15 is DMV's Supervisor's Guide. This Guide provided, "You, as a Supervisor, are charged with the responsibility for promptly taking corrective disciplinary action when it is appropriate for employees under your direction. . . . The administration of prompt, fair, and effective corrective disciplinary action is just as essential to effective operations and good employee relations as is the commendation of employees for work well done." AA 119. Clearly, DMV did not take prompt corrective disciplinary action in regard to O'Keefe.

CONCLUSION

The Hearing Officer's decision that a 30-day suspension was the appropriate discipline was based on her weighing of the evidence which was in the scope of her de novo or nondeferential review. The suspension would get O'Keefe's attention. O'Keefe learned from this process that she "certainly wouldn't help anybody outside of Motor Carrier ever again" and that she would forward people's questions on to someone else. RA,Vol. II, p. 228. That is the purpose of progressive discipline.

DMV testified before the Hearing Officer that contrary to DMV's assertion on page 26 that termination was the only penalty for O'Keefe's violation of the misuse of information technology policy, the discipline for that policy was discretionary, not mandatory. RA, Vol. II, p. 180; AA, p. 129; RA, Vol. II, pp. 78, 88, 92; RA, Vol. I, p. 33; RA, Vol. I, p. 38. O'Keefe did not manipulate or disclose data. DMV did not prove that it had terminated any permanent classified employee under similar circumstances.

DMV's investigation and dismissal of O'Keefe was a pretext for refusing to reemploy O'Keefe when DMV had a legal obligation to do so. DMV did not give O'Keefe progressive discipline even though she **fabulously** handled her accounts. The Hearing Officer followed the law and nondeferentially reviewed DMV's decision to dismiss seven-year permanent classified employee O'Keefe over a year after her alleged misconduct. The check on the appointing authority's judgment is the Hearing Officer. DMV did not prove to the Hearing Officer how the public was hurt. The Hearing Officer had the statutory authority to determine that

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DMV's dismissal of O'Keefe did not serve the good of the public and was without just cause. Her decision is entitled to deference by the courts.

HEJMANOWSKI & McCREA LLC

By: [signature]

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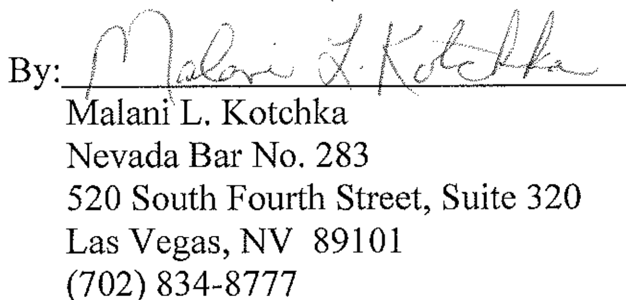
CERTIFICATE OF COMPLIANCE

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) 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 3,213 words.

Finally, I hereby certify that I have read this Supplemental Reply, 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. 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: 

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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 REPLY BRIEF** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 3rd day of November, 2017, to the following:

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And a true and correct copy of the forgoing **APPELLANT'S SUPPLEMENTAL REPLY BRIEF** was mailed on this 3rd day of November, 2017, by U.S. first class mail, postage prepaid, to the following:

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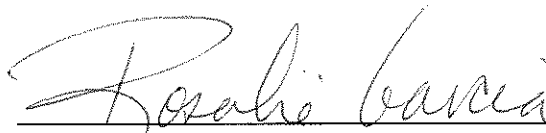

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