IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARA O'KEEFE, an Individual,

Appellant,

vs.

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

Respondent.

Court of Appeals Case No. 68460

Dist. Court Case No. 14 OC 00103 1 B

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Codes

Appellant STATE OF NEVADA, *ex rel.*, its DEPARTMENT OF MOTOR VEHICLES (DMV), by and through its attorneys, ADAM PAUL LAXAT, Attorney General, and DOMINIKA BATTEN, Deputy Attorney General, files this Supplemental Answering Brief as directed by the Court's Order Setting Supplemental Briefing Schedule. The Brief is made and based on all papers, pleadings, documents, and record on appeal on file in this matter and the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUES

DMV's Prohibitions & Penalties permit DMV to terminate employees for violating DMV Prohibitions & Penalties G(1), H(7), and B(23). The hearing officer found that Petitioner violated these Prohibitions and Penalties, including DMV Prohibition & Penalty G(1), a class-5 offense recommending termination as the minimum discipline, when she assisted her friend with a personal DUI matter while at work, yet the hearing officer reversed the termination. Did the district court properly reverse the hearing officer's decision?

II. STATEMENT OF THE CASE

DMV terminated Cara O'Keefe (Appellant), a former DMV employee, because she committed misconduct that DMV's Prohibitions and Penalties classify as terminable. Appellant appealed her termination to an administrative hearing officer pursuant to NAC Chapter 284 and the hearing officer found that Appellant

was guilty of the terminable misconduct,[1] yet she determined that termination was excessive. The district court granted DMV's petition for judicial review, explaining that the hearing officer had no authority to overturn Appellant's termination after finding she committed a terminable class-5 offense. Appellant appealed to the Court of Appeals.

III. STATEMENT OF THE FACTS

A. Appellant's State of Nevada Employment and Her Terminable Misconduct.

Appellant was first hired by DMV on December 11, 2006. RA, Vol. II, p. 19–p. 22.[2] She worked as a revenue specialist for DMV's Motor Carrier Division until December 5, 2012, when she voluntarily left DMV for a State of Nevada, Division of Insurance, position. RA, Vol. I, p. 4; RA, Vol. II, p. 20.

While Appellant was employed with the Division of Insurance, two of her former co-workers at DMV advised DMV that during Appellant's previous tenure with DMV, Appellant made questionable and concerning telephone calls to the Sheriff's Office. RA, Vol. I, p. 4; RA, Vol. II, p. 129. They reported that while at their cubicles, they overheard Appellant discussing someone's driver's license with

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[1] The hearing officer upheld all charges except one, DMV Prohibition and Penalty H(4) *Unauthorized or improper disclosure of confidential information.*

[2] DMV cites to the Respondent's Appendix (RA), submitted previously with its response to Appellant's civil appeal statement. DMV also cites to Appellant's Appendix (AA), submitted with Appellant's Supplemental Opening Brief (Supp. Brief).

the Carson City Sheriff's Office on the telephone, identifying herself as a DMV employee, and claiming that a customer was at her counter. RA, Vol. II, p. 39, p. 63–65. The coworkers questioned and took note of Appellant's conversations with the Sheriff's Office because Appellant's representations to the Sheriff's Office were disingenuous: despite Appellant's portrayal of the transaction to the Sheriff's Office, no customer was present at Appellant's cubicle and also, Motor Carrier Division employees do not handle DUI revocations or customer driver's license issues. RA, Vol. II, p. 22, p. 39, p. 52, p. 66, p. 138. By the time the DMV received the co-workers' reports, Appellant was no longer employed with DMV and therefore, the DMV did not take an action against Appellant as a result of the reports. RA, Vol. I, p. 4; RA, Vol. II, pp. 116–119, pp. 123–124, p. 129.

About nine months after Appellant resigned from DMV, the Division of Insurance rejected Appellant from her Division of Insurance position. RA, Vol. II, p. 20, p. 132. The Division of Insurance's rejection of Appellant reverted Appellant back to her previous DMV employment as a matter of statute. RA, Vol. II, p. 20, p. 23, p. 132. *See* NAC 284.462.

With Appellant returning to work at DMV, DMV proceeded to investigate the co-workers' reports about Appellant's calls to the Sheriff's Office while she was previously with DMV. RA, Vol. I, p. 2, p. 4; RA, Vol. II, p. 119, p. 130. From the investigation, DMV learned that Appellant indeed committed misconduct

when she called the Sheriff's Office because she falsely portrayed herself as a DMV employee assisting a customer with a DMV business matter, when she was really calling in a personal favor for Daniel, who was not a Motor Carrier Customer, but Appellant's personal friend. RA, Vol. I, p. 4. The investigation further revealed that not only did Appellant make misleading calls to the Sheriff's Office, she also improperly accessed Daniel's and his wife's records via the DMV's proprietary database on at least ten occasions. RA, Vol. I, p. 4; RA, Vol. II, p. 134.

Accessing DMV's database unauthorized and misrepresenting official DMV capacity, as she did here, are terminable offenses. RA, Vol. I, p. 3-11. Under DMV's Prohibitions and Penalties, misrepresenting one's official DMV capacity to another agency is a class 1-5 offense, punishable up to, and including, termination. RA, Vol. I, p. 3–11. Accessing DMV's proprietary database—an information system *strictly* for *official* DMV-customer business—to perform favors for friends is a class-5 terminable offense, punishable with a minimum penalty of termination, even for a first time offense. RA, Vol. I, p. 3–11; RA, Vol. II, p. 81.

1. DMV's Policy Against Using the Database for Non-Business Reasons.

DMV employees know that they can lose their jobs for doing personal tasks for themselves or favors for their friends on DMV's database. DMV's Prohibition and Penalty G(1), *Database misuse*, is a class-5 terminable offense, subjecting

DMV employees to termination as the minimum penalty for a first time offense. RA, Vol. I, p. 6; RA, Vol II, p. 177. DMV's *Computer Usage Policy* further reiterates DMV's prohibition against using the database for personal use; it bars DMV employees from using the database "for any purpose other than for completing authorized transactions for customers." RA, Vol. I, p. 6.

In addition, in April of 2011, then-DMV director, Bruce Breslow, sent a memorandum to all DMV employees reminding them to abide by DMV's strict policy against database misuse. RA, Vol. I, p. 1. Mr. Breslow sent the memorandum after DMV records had been accessed improperly. RA, Vol. I, p. 1; RA, Vol. II, pp. 84–85, p. 135, pp. 178–179. Citing DMV's Prohibition and Penalty G(1) and DMV's *Computer Usage Policy*, Mr. Breslow firmly reminded all employees that the DMV database contains proprietary information for processing authorized DMV customer transactions *only*. RA, Vol. I, p. 1. He specifically warned DMV employees against using DMV's database to access their own records or records of their family, friends, or acquaintances. RA, Vol. I, p. 1. In bold, underlined writing, Mr. Breslow cautioned that "a first offense can result in termination." DMV supervisors discussed Mr. Breslow's memo with their employees to ensure all DMV employees understood DMV's policy. RA, Vol. I, p. 1; RA, Vol. II, pp. 135–136.

Appellant met with her supervisor, Karen Stoll, and on May 3, 2011, signed her name under Mr. Breslow's memorandum, indicating that she understood DMV's policy prohibiting her from using the DMV database for friends, and for any personal or nonbusiness reasons, as explained by Mr. Breslow in the memorandum. RA, Vol. I, p. 1; RA, Vol. II, pp. 24–29, pp. 135–136. Yet Appellant blatantly ignored this directive and performed a personal favor for "a family friend" on DMV's database in the very manner that Mr. Breslow clearly stated was prohibited. RA, Vol. I, p. 1, p. 4; RA, Vol. II, p. 30.

B. Appellant's Termination from State Service

Following the investigation, DMV issued a Specificity of Charges to Appellant for violating the following Nevada statutes and DMV policies: RA, Vol. I, p. 3–11.

Nevada Administrative Code

1) NAC 284.646(1) *an appointing authority may dismiss an employee for any NAC 284.650 cause if the agency has adopted any rules or policies which authorize the dismissal or the seriousness of the offense warrants such dismissal*;

2) NAC 284.646(2)(b) *unauthorized release or use of confidential information*;

3) NAC 284.650(1) *Activity which is incompatible with an employee's conditions of employment established by law or which violates a provision of NAC 284.653 or 284.738 to 284.771 inclusive*;

4) NAC 284.650(6) *Insubordination or willful disobedience*;

5) NAC 284.650(18) *Misrepresentation of official capacity or authority*;

DMV Prohibitions & Penalties

1) DMV PROHIBITIONS AND PENALTIES PERFORMANCE ON THE JOB B(23) *Disregard and/or deliberate failure to comply with or enforce statewide, department or office regulations and policies*, Class 2–5 for a first offense;

2) NEGLECT OF, OR INEXCUSABLE ABSENCE FROM, THE JOB C(4) *Conducting personal business during working hours,* Class 1–2 for a first offense;

3) MISUSE OF INFORMATION TECHNOLOGY G(1 *The use, or manipulation of production data or information outside the scope of one's responsibilities, or for non-business or personal reasons, is strictly prohibited and may be subject to prosecution under NRS 205.481* Class 5 for a first offense;

4) OTHER ACTS OF MISCONDUCT OR INCOMPATIBILITY H(4) *Unauthorized or improper disclosure of confidential information,* Class 1–5 for a first offense; *and*

5) H(7) *Acting in an official capacity without authorization,* Class 1–5 for a first offense.

DMV Policies & Procedures

Computer Usage Policy DMV 2.19.6 Information Abuse *As found in NRS 242.105, NRS 281 section 1 and NAC 284.650, DMV system records information is for Departmental use only and is proprietary information and should not be used for any purpose other than completing authorized transactions for customers*

ROA, Vol. I. p. 293–p. 294.

The Specificity of Charges recommended Appellant's termination because in completing a personal favor for her friend, Daniel, she misused DMV's propriety database and mispresented her official DMV capacity to another governmental agency. RA, Vol. I, p. 3–11; RA, Vol. II, pp. 166–168, pp. 175–176.

The recommendation for termination was consistent with DMV's Prohibitions and Penalties. Those Prohibitions and Penalties designate discipline for offenses ranging from class 1–an oral warning–to class 5– a dismissal. RA, Vol. I, p. 5. In Appellant's case, the Prohibitions and Penalties designated termination as the *only* penalty for violating Prohibition and Penalty G(1) *Accessing the database without authority ("Database misuse").* RA, Vol. I, p. 6. DMV's Prohibitions and Penalties further designated termination as an available penalty for violating the three following offenses charged:

> Prohibition and Penalty B(23) *Disregard and/or deliberate failure to comply with or enforce statewide, department or office regulations and policies ("Failure to follow policy"),*
>
> (H4) *Unauthorized or improper disclosure of confidential information,*
>
> and H(7) *Acting in an official capacity without authorization ("Misrepresenting official capacity").*

RA, Vol. I, p. 6. For a violation of Prohibition and Penalty C(4) *Conducting personal business during working hours*, the Prohibitions and Penalties designated a range of discipline from an oral warning to written reprimand RA, Vol. I, p. 6. Accordingly, DMV's Prohibitions and Penalties provided that the appropriate discipline for Appellant's conduct was termination.

Following the Specificity of Charges, Appellant attended and participated in a pre-disciplinary hearing. RA, Vol. I, p. 12–15; RA, Vol. II, p. 169. She entered

the hearing with a pre-written statement about the transaction she did for Daniel. AA, Vol. I, p. 134–136. At the hearing, Appellant admitted that she looked at a family friend's personal records to assist him with a DUI issue. AA, Vol. I, p. 134. She tried to portray the transaction as a business transaction on the one hand, insisting that she assisted her friend, Daniel, as "an employee and representative of the DMV." AA, Vol. I, p. 134. Yet, she admitted that Daniel was a family friend and also claimed that she called the Sheriff's Office on Daniel's behalf during her own time while on lunch or break. AA, Vol. I, pp. 134–135; RA, Vol. II, pp. 237–238, pp. 245–246.

The pre-disciplinary officer recommended termination because Appellant helped Daniel for a "personal reason." Appellant acted "outside the scope of her responsibilities" and because "misuse of information technology is a terminable offense for a first time violation." RA, Vol. I, pp. 12–15. The ultimate decision to terminate was made by the DMV Director, who terminated Appellant effective December 13, 2013. RA, Vol. I, pp. 16–18. The Director stated he could not excuse clear and deliberate deviations from DMV policies and procedures. RA, Vol. I, p. 17.

C. Appellant's Administrative Appeal.

Appellant appealed her termination to the hearing officer, who upheld all but one of the offenses Appellant was charged with in the Specificity of Charges. RA,

Vol. I, p. 19–20. Importantly, the hearing officer found that Appellant committed terminable offenses, including Prohibition and Penalty G(1)—a class 5 offense which provides for a minimum discipline of termination for a first offense. RA, Vol. I, p. 47–52. The hearing officer further found Appellant committed offenses under Prohibitions and Penalties B(23) and H(7)—each which provide for termination as an available penalty. *See* Hearing Officer's Decision, upholding Prohibitions and Penalties G(1) *Database misuse*, B(23) *Failure to follow policy*, H(7) *Misrepresenting official capacity* and C(4) *Conducting personal business during working hours.* RA, Vol. I, p. 47–52. The hearing officer further affirmed all three NAC 284.650 state regulations charged. *See* Hearing Officer's Decision upholding NAC 284.650(1) *Activity which is incompatible with employee's conditions of employment or violates NAC 284.738 to NAC 284.771*, NAC 284.650(6) *Insubordination or willful disobedience*; and NAC 284.650(18) *Misrepresentation of official capacity and authority.* RA, Vol. I, p. 47–52. The hearing officer found that these violations arose out of multiple incidents concerning Daniel's DUI. RA, Vol. I, p. 47–48. Despite finding that Appellant violated these terminable offenses, the hearing officer reversed the dismissal that DMV had lawfully imposed and instead, recommended Appellant receive a suspension. RA, Vol. I, p. 49–52

D. DMV's Appeal to the District Court.

DMV filed a petition for judicial review, seeking relief from the hearing officer's decision. RA, Vol. I, p. 54–56. Both parties, via their attorneys, submitted briefs and delivered oral argument before the district court. The district court granted DMV's petition and Appellant now appeals to the Court of Appeals. RA, Vol. I, p. 57–64.

IV. SUMMARY OF THE ARGUMENT

The district court properly reversed the hearing officer's decision because DMV terminated Appellant pursuant to its Prohibitions and Penalties. Specifically, Appellant committed a violation of the prohibition against *Database misuse*, which imposes a minimum discipline of a termination, even for a first offense. She further committed violations of the prohibitions against *Misrepresenting official capacity* and *Failure to follow policy*, both of which impose a range of discipline, up to, and including, termination. She further committed a violation of the prohibition against conducting personal business while at work. The hearing officer found that Appellant was indeed guilty of these terminable charges, yet the hearing officer reversed Appellant's termination; this conclusion is wholly inconsistent with the hearing officer's findings. Nevada law permits a hearing officer to determine whether the appointing authority had just cause for discipline, but the hearing officer exceeded her authority and went well-

beyond determining just cause when she reversed Appellant's termination despite finding her guilty of the misconduct classified as terminable by DMV's Prohibitions and Penalties.[3]

Despite Appellant's claims in her Supplemental Brief (Supp. Brief, pp. 16–25), the district court properly reversed the hearing officer's decision in line with Nevada legal jurisprudence. Appellant's claim that DMV did not promptly investigate (Supp. Brief, pp. 25–26) lacks merit and is irrelevant because the hearing officer found Appellant committed terminable misconduct despite such a finding.

Finally, Appellant's claim that DMV violated NAC 284.462 because DMV allegedly did not restore Appellant to DMV after she failed probation at the Division of Insurance (Supp. Brief, pp. 27–28) is not properly before the Court because Appellant brings this argument for the first time on appeal and because an alleged NAC 284.462 violation has nothing to do with the issue before the Court pursuant to DMV's petition for judicial review under NRS 233B: whether just cause existed for Appellant's termination. Nevertheless, this claim lacks merit because DMV indeed reinstated Appellant to DMV employment.

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[3] Appellant argues that because DMV "conceded" before the hearing officer that the hearing officer determines just cause, the district court should therefore have not have considered the argument that a hearing officer could not reverse termination after upholding terminable misconduct. Supp. Brief, p. 18, fn 8. This is without merit, including because the hearing officer indeed determines just cause.

Accordingly, this Court should affirm the district court's decision because the hearing officer's decision prejudices DMV's substantial rights to discipline its employees in accordance with Nevada law.

V. ARGUMENT

A. Standard of Review.

The issue on appeal is whether the district court properly reversed the hearing officer's decision upon DMV's petition for judicial review. When an order deciding a petition for judicial review has been appealed, this Court reviews the administrative decision in the same manner as the district court. *Elizondo v. Hood Mach, Inc.*, 129 Nev. __, __, 312 P.3d 479, 482 (Nev. Adv. Op. 84, November 7, 2013); *Turk v. Nevada State Prison*, 94 Nev. 101, 103, 575 P.2d 599, 601 (1976). NRS 233B sets forth the standard of review for evaluating an administrative hearing officer's decision. It provides that courts may reverse or modify an agency's decision that prejudices the aggrieved party when the final decision of the agency is:

> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.

NRS 233B.135(3).

The standard of review varies depending on whether the subject of the petition is a hearing officer's legal conclusions or factual findings. The courts generally review a hearing officer's conclusions of law *de novo*, but will uphold the hearing officer's findings of fact if substantial evidence supports the findings. *Taylor,* 129 Nev. ___, ___, 314 P.3d 949, 951 (2013)*; see also* NRS 233B.135(3). Substantial evidence is that evidence "a reasonable mind might accept as adequate to support a conclusion." *State, Emp. Sec. v. Hilton Hotels*, 102 Nev. 602, 608, 792 P.2d 497 (1986).

B. The District Court Properly Reversed the Hearing Officer's Decision Because Termination Is the Minimum Discipline for Using the DMV Database and Misrepresenting Official DMV Capacity to Another Agency in Order to Perform Personal Favors For Friends.

Because the hearing officer found that Appellant was guilty of the terminable misconduct, she had no further authority to reverse the termination. Such a conclusion by the district court is pursuant to Nevada law, despite Appellant's claims to the contrary.

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1. DMV Had Just Cause to Terminate Appellant Because the Hearing Officer Found that Appellant Misused the Database and Misrepresented Her Official Capacity to the Sheriff's Office, Against DMV Policy.

NRS 284.385(1)(a) provides that "[a]n appointing authority may . . . [d]ismiss . . . any permanent classified employee when the appointing authority considers that the good of the public service will be served thereby." An appointing authority may dismiss an employee for any reason set forth in NAC 284.650 if the agency "has adopted any rules or policies which authorize the dismissal of an employee for such a cause" or "if . . . [t]he seriousness of the offense or condition warrants such dismissal." NAC 284.646(1)(a)-(b). NAC 284.650 sets forth twenty three causes "for disciplinary or corrective action," including: *Activity which is incompatible with employee's conditions of employment*, *Insubordination or willful disobedience*; and *Misrepresentation of official capacity and authority*. NAC 284.650(1), (6) and (18). Further to NAC 284.646(1)(a), DMV, via its Prohibitions and Penalties, "has adopted . . . rules or policies which authorize the dismissal of an employee" for these causes.[4] *See*

[4] DMV's Prohibitions and Penalties set forth in part the conduct DMV employees are expected to follow as well as an offense minimum/maximum penalty guideline to look to if an employee violates and fails to comply with those prohibitions. DMV's Prohibitions and Penalties classify offenses as ranging from class-1 to class-5, with class-1 offenses being the least severe (punishable with oral warning) and class-5 offenses being the most severe (punishable with dismissal). RA, Vol. I, pp. 5–6.

DMV's Prohibition and Penalty G(1) (classifying *Database misuse* as a class 5-offense with a minimum discipline of termination) and DMV's Prohibition and Penalty H(7) and B(23) (classifying *Misrepresenting official capacity* and *Failure to follow policy* as class-1 to class-5 and class-2 to class-5 offenses, respectively, with a maximum discipline of termination for each offense).

Employees may appeal a termination to the administrative hearing officer, who can set aside the discipline if the hearing officer determines that the discipline was without just cause. NRS 284.390(1) and (6). In reviewing whether a termination is supported by just cause, a hearing officer determines whether substantial evidence existed to support an employer's decision to dismiss the employee. NRS 284.390(6); *Lapinski v. City of Reno,* 95 Nev. 898, 901, 603 P.2d 1088, 1090 (1979); *Knapp v. State ex. rel. Dep't of Prisons*, 111 Nev. 420, 424892 P.2d 574 (1995); *Whalen v. Welliver*, 60 Nev. 154, 191 104 P.2d 188 (1940).

Chapter 284 authorizes the hearing officer to review discipline for just cause (i.*e.*, whether the action was reasonable), but Nevada law preserves a great deal of authority to agency heads to manage their affairs, including reserving the exclusive power to discipline employees for the agencies. In particular, Chapter 284 "does

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The Personnel Commission approves DMV's Prohibitions and Penalties; they have the force and effect of law. *See Turk v. Nevada State Prison,* 94 Nev. 101, 575 P.2d 599 (1978) (holding that the regulations prescribed by the Department of Personnel have the "force and effect of law").

not limit the authority of elective officers and heads of departments to conduct and manage the affairs of their departments as they see fit." NRS 284.020. Indeed, the Nevada Supreme Court has held that only appointing authorities "have the power to prescribe the actual discipline imposed on permanent classified state employees." *Taylor v. State Dep't of Health & Human Servs.*, 129 Nev. at ___, 314 P.3d at 951 (2013) (holding that Nevada law does not provide authority to hearing officers to "prescribe the amount of discipline to be imposed.")

A hearing officer can reverse an employer's disciplinary decision for lack of just cause if the hearing officer determines that substantial evidence did not exist to support the terminable misconduct. In *Knapp*, 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 for the two violations that the employer proved against the employee. *Knapp,* 111 Nev. at 424–425, 892 P.2d at 578. Importantly, the employer in *Knapp* conceded that dismissal was not appropriate without the additional charges that the hearing officer had found unproven. *Id.* at 425, 578.

There is, however, just cause for the discipline where the hearing officer affirms "substantial" charges against the employee. In an unpublished decision, *Morgan v. State of Nevada, Dep't of Business & Industry, Taxicab Authority*, the hearing officer found that "the employee arrested one person without probable

cause and engaged in inappropriate conduct in connection with the arrest of a second person." *Morgan,* Nev. Ct. App. No. 67944 at 2 (May 16, 2016) (unpublished disposition). While there, the hearing officer did not affirm all of the offenses, finding that "some of the infractions set forth in the Specificity of Charges were not supported by sufficient evidence," the hearing officer found that "all of the charges arose out of the same course of conduct and the charges the hearing officer affirmed are substantial." *Id.* Thus, the Nevada Court of Appeals concluded that "[u]nder these facts, we cannot say the suspension was without just cause." *Id.* This Court further stated that progressive discipline did not apply in light of the hearing officer's findings of the underlying misconduct. *Id.*

Here, the district court properly reversed the hearing officer's decision because it is undisputed[5] that the hearing officer found that Appellant violated terminable offenses. DMV appropriately terminated Appellant for three NAC 284.650 causes and for violating the DMV's Prohibitions and Penalties on *Database misuse*, *Misrepresentation of official capacity*, and *Failure to follow policy*. NRS 284.385(1). Simply stated, not only were these offenses serious, warranting dismissal, but dismissal for Appellant's conduct was authorized by the

[5] Appellant did not appeal or cross-appeal the hearing officer's finding that she committed terminable misconduct to the district court. *See* NRS 233B.130 (requiring a party who is aggrieved by a hearing officer's decision to file a petition for judicial review within thirty days or a cross-petition within ten days of service of another party's petition for judicial review).

DMV's own rules or policies, its Prohibitions and Penalties. *See* NAC 284.646(1)(a)-(b) (authorizing DMV to dismiss Appellant for an NAC 284.650 cause if the agency "has adopted any rules or policies which authorize the dismissal of an employee for such a cause" or "if . . . [t]he seriousness of the offense or condition warrants such dismissal)." *See* NAC 284.650(1), (6) and (18) (listing as causes for disciplinary action: *Activity which is incompatible with employee's conditions of employment*; *Insubordination or willful disobedience*; and *Misrepresentation of official capacity and authority*). *See* DMV's Prohibitions and Penalties G(1), B(24) and H(7) (providing that such conduct is either a class-5 offense imposing minimum discipline of termination, or a various-class offense, punishable up to, and including, termination). RA, Vol. I, p. 6. In other words, Nevada law authorized DMV to terminate Appellant in this case. NAC 284.646(1).

Pursuant to NRS 284.390(6), the hearing officer reviewed Appellant's termination, finding that there was substantial evidence to support DMV's finding that Appellant was guilty of *Database misuse*, *Misrepresentation of official capacity*, and *Failure to follow policy*.[6] RA, Vol. I, p. 48. However, the hearing officer erred and ignored Nevada law when she reversed the termination,

[6] The hearing officer upheld all charges except one, DMV Prohibition and Penalty H(4) *Unauthorized or improper disclosure of confidential information.* RA, Vol. I, p. 48.

exceeding her Chapter 284 authority and substituting her judgment for the DMV's judgment. Appellant argues that the hearing officer's decision was proper because she concluded that the level of discipline for violating DMV Prohibition and Penalty G(1) *Database misuse* was "discretionary." Supp. Brief, pp. 22–23. However, any discretion as to the discipline prescribed belongs to the appointing authority, not the hearing officer. *See Taylor* 129 Nev. at ___, 314 P.3d at 951 (holding that Nevada law does not provide authority to hearing officers to "prescribe the amount of discipline to be imposed)." *See Lapinski,* 95 Nev. at 901, 603 P.2d at 1090 (holding that the hearing officer's role is to determine whether substantial evidence existed to support the misconduct).

The hearing officer's decision violated Chapter 284 because the appointing authority–DMV–not the reviewing hearing officer, is in the best place to judge the impact of Appellant's misconduct upon its affairs and operations. *See* NRS 284.020 (stating that Chapter 284 "does not limit the authority of elective officers and heads of departments to conduct and manage the affairs of their departments as they see fit.") A hearing officer's role is not to displace management's responsibility in imposing discipline, yet here, the hearing officer improperly stepped into the shoes of DMV and imposed discipline—inserting herself into a place where only appointing authorities have the power to discipline employees. *Taylor,* 129 Nev. at ___, 314 P.3d at 951.

Appellant misinterprets reviewing an employer's disciplinary decision for just cause as suggesting that a hearing officer can overturn the termination despite upholding the substantial charges against the employee. Nevada case law does not support such a contention; rather, hearing officers properly overturn terminations where the misconduct was not supported by substantial evidence, which was not the case here. Indeed, in *Knapp*, the hearing officer properly overturned the termination, but the employer there specifically did not prove terminable offenses, as DMV did here. To be sure, in *Knapp*, the employer proved just two violations, with the employer conceding that termination was too severe based upon those offenses alone.[7] *Knapp,* 111 Nev. at 424 - 425, 892 P.2d at 578. To the contrary,

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[7] Appellant also cites *State of Nevada, Dep't of Human Resources, Welfare Division v. Fowler* (a case focusing on attorney's fees, not just cause) as support for her argument that progressive discipline was appropriate (Supp. Brief, pp. 20-21); however, *Fowler* does not present sufficient facts about the charges upheld by the hearing officer to make such a conclusion. *Fowler,* 109 Nev. 782, 858 P.2d 375 (1993). There, the hearing officer reversed the employee's termination, and found that progressive discipline must be applied, despite finding that the employee allowed another individual to have access to his employer's computer system. *Id.* at 783, 376. However, the *Fowler* decision does not state whether the upheld offense, allowing another individual to have access to his employer's computer system, was a terminable offense, as is the case here. Further, it is possible that the hearing officer did not affirm all of the charges because the hearing officer found "no further evidence of indiscretions on Fowler's part." *Id.* Further, while the district court agreed that the employer "was not justified in terminating Fowler," the Nevada Supreme Court did not discuss that issue as the issue on appeal was attorney's fees and costs. *Id.* Thus, it is impossible to deduce from *Fowler* that the hearing officer can order progressive discipline in this case.

Appellant committed terminable offenses – offenses affirmed by the hearing officer – and in overturning the hearing officer's decision, the district court did not, therefore, "make the same mistake as the district court in *Knapp* [overturning the hearing officer's reversal of the discipline where the hearing officer did not affirm terminable offenses]" as claimed by Appellant. Supp. Brief, p. 24. *Morgan* likewise supports the district court's decision here because the hearing officer in this case affirmed "substantial charges"—indeed, terminable ones, including arguably the most substantial charge, DMV Prohibition & Penalty G(1) *Database misuse*—against Appellant, so that progressive discipline, *i.e.*, applying less severe measures first, was not necessary. *Morgan,* Nev. Ct. App. No. 67944 at 2.

It is likewise unclear why Appellant looks to *Schall v. State ex rel. Dep't of Human Resources* (Supp. Brief, p. 20) because that case is opposite to Appellant's case. *Schall,* 94, Nev. 660, 587 P.2d 1311 (1978). In *Schall*, the Nevada Supreme Court overturned both the district court and the hearing officer's decisions affirming the discipline because (1) the hearing officer affirmed the employee's termination despite nothing in the evidence suggesting disgraceful personal conduct on the part of the employee whose employment had been terminated on grounds of disgraceful personal conduct; and (2) the district court could not sustain the termination for activity that was incompatible with employment, a reason not asserted to the hearing officer. *Id.* at 661–662, 1311–1312. Here, contrary to *Schall*, the hearing officer held there was substantial evidence for *Database misuse* and *Misrepresenting official capacity*, against policy, the misconduct for which Appellant was terminated; thus, unlike the case in *Schall*, the district court here affirmed the termination on that basis, a reason asserted by, and upheld by, the hearing officer. *Schall* therefore is nothing like Appellant's case, and supports the district court's decision in this case.

The district court thus did not substitute its judgment for that of the hearing officer, nor did the district court "erroneously assume that DMV's termination was entitled to deference," as Appellant claims. Supp. Brief, p. 23 (citing *Morgan,* Nev. Ct. App. No. 67944 at 2); Supp. Brief, p. 17, p. 24 (citing *Knapp,* 111 Nev. at 425, 892 P.2d at 577. Rather, the district court properly reversed the hearing officer's decision because the hearing officer reversed Appellant's discipline despite finding that there was substantial evidence that Appellant violated these significant offenses.[8]

2. The Hearing Officer Improperly Concluded that DMV Was Required to Impose Less Severe Discipline.

Despite upholding the terminable offenses, the hearing officer concluded that the misconduct was not serious enough to warrant termination. Indeed, the hearing officer made various findings in an attempt to support her decision that despite upholding the terminable misconduct, Appellant's misconduct was not actually serious enough to warrant termination pursuant to NRS 284.383(1). RA, Vol. I, pp. 49–52. Not only are these findings arbitrary and capricious,[9] but as the

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[8] Although Appellant claims the district court "ignored" NRS 284.390(7) which states that, "The decision of the hearing officer is binding on the parties," (Supp. Brief, p. 18) it is Appellant who ignores relevant law, in particular, NRS 233B.135(2) which states, "the final decision of the agency shall be deemed reasonable and lawful *until reversed or set aside in whole or part by the court.*" (Emphasis added).

[9] While irrelevant because, despite the findings, the hearing officer

district court held, regardless of their merit, they are irrelevant because despite them, the hearing officer upheld terminable offenses, and therefore, did not have discretion to then reverse the termination.

Appellant continues by arguing that "[t]he district court . . . entirely ignored NRS 284.383(1), which provides for progressive discipline." Supp. Brief, p. 18.

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ultimately affirmed that Appellant committed terminable misconduct, the hearing officer's findings used to rationalize lower discipline were indeed arbitrary and capricious. For example, in an attempt to support that the discipline was not serious, the hearing officer found that DMV failed to provide "specific evidence" that it terminated other employees for similar misconduct. RA, Vol. II, p. 49; Supp. Brief, p. 17. She further considered that DMV merely suspended, rather than terminated, one employee for *Database misuse* in 2007. RA, Vol. II, p. 49. However, DMV proved with undisputed evidence that it consistently terminated similarly-situated employees for *Database misuse* since April of 2011—the suspended employee was long outside the applicable time period. RA, Vol. II, pp. 81-83, pp. 114–115, pp. 178–179, pp. 200–201; RA, Vol. III, p. 7. Further, DMV did not need to prove it terminated all employees for *Database misuse*. That is, DMV had lawful and factual basis to terminate Appellant for *her* misconduct because *she* violated terminable offenses. *See Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 603–05 (2008) (holding that a class-of-one equal protection claim is not permitted in the public employment sector and that allowing class-of-one equal protection claims would effectively subject government employers to judicial review on numerous routine employment decisions).

The other justifications likewise were arbitrary and capricious. Another example is the hearing officer's consideration that in violating *Database misuse*, Appellant "did not manipulate any data...." Supp. Brief, p. 8. However, *Database misuse* does not distinguish between "us[ing]" and "manipulat[ing] ... data or information outside the scope of one's job responsibilities or for non-business or personal reasons"; rather, an employee violates *Database misuse* if the employee "uses[s]" *or* "manipulate[s]" that data or information. RA, Vol. I, p. 13; Vol. II, p. 103.

However, this is not a case requiring progressive discipline. Less severe sanctions are not required if a violation is serious. *See* NRS 284.383(1). Here, Appellant willfully disregarded DMV's strict rules against using the database to perform a transaction for a friend. RA, Vol. I, p. 4. DMV stated these rules via DMV's Prohibition and Penalty G(1) (an offense so serious that a first offense is a minimum termination), repeated them in DMV's *Computer Usage Policy*, and even reiterated them another time in a specific memorandum that Appellant signed, acknowledging she read and understood the policy. RA, Vol. I, p. 1, p. 4; ; RA, Vol. II, pp. 135–136. In addition to misusing the database, she also lied to the Sheriff's Office about the nature of the call including misrepresenting that she had a customer at her counter during the transaction. RA, Vol. I, p. 4.

Appellant damaged the trust relationship with DMV with her willful and dishonest misconduct and the hearing officer upheld these terminable offenses as per DMV's Prohibitions and Penalties. RA, Vol. I, p. 10, p. 48. Accordingly, Appellant's misconduct was serious and the hearing officer improperly concluded that DMV was required to impose a less severe sanction of suspension.

3. DMV Properly Terminated Appellant Because It Investigated and Disciplined Appellant Pursuant to All Timelines Established by NRS Chapter 284.

Appellant argues that DMV did not inform Appellant "promptly" of the misconduct and then, without citing any authority, concludes that DMV "waived

its right to investigate and discipline." Supp. Brief, p. 17; p. 25.

First, DMV indeed promptly notified Appellant and investigated the misconduct. Appellant contends that the "supervisor ... [must take] prompt[ly] ... corrective disciplinary action when it is appropriate for employees under [the supervisor's] direction...." Supp. Brief, p. 26 (citing the DMV's Supervisor's Guide to Prohibitions and Penalties). However, Appellant was not under Ms. Karen Stoll's supervision—or anyone else's supervision at DMV—when Ms. Stoll found out about Appellant's calls to the Sheriff's Office. RA, Vol. I, p. 4; RA, Vol. II, pp. 116–119, p. 129, pp. 157–158. While the Guide that Appellant relies on does not define "prompt," in Appellant's case, her supervisor, Ms. Stoll, took "prompt" – indeed immediate – action, when Appellant returned to DMV's employ, and Ms. Stoll's supervision, on September 16, 2013. AA, Vol. I, pp. 113–128; RA, Vol. I, p. 4; RA, Vol. II, p. 239. Thus, Appellant's argument has no merit because DMV investigated and took action as soon as possible upon Appellant's re-employment with the DMV, on September 16, 2013.

Importantly, NRS 284 does not impose timelines on administering discipline. The only time limit imposed is NRS 284.387's requirement to complete an investigation within ninety days of providing written notice of the allegations and to representation before questioning the employee pursuant to NRS 284.387(1)(a). The statute is not at issue in this case. Appellant was properly

noticed, and the investigation was timely completed.[10] RA, Vol. I, pp. 2–18. Thus, DMV provided Appellant with all the process due to her pursuant to the Chapter 284 statutory scheme.[11] Appellant cites nothing to support her conclusory statement that somehow DMV "waived its right to investigate and discipline" when it investigated Appellant upon her return to DMV after the Division of Insurance ended her employment with that agency. Supp. Brief, p. 17; p. 25.

Regardless, Employee's point is irrelevant because the hearing officer found that Appellant committed terminable misconduct despite making the finding that DMV did not investigate until after Appellant returned to DMV. RA, Vol. I, pp. 48–49. Appellant did not appeal or cross-appeal the hearing officer's finding that she committed terminable misconduct—a conclusion that the hearing officer made despite noting an alleged "delay" in investigation—to the district court. *See* NRS

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[10] Appellant inaccurately, and for the first time on appeal, argues that she was questioned before receiving the written notice of the allegations because she states that DMV interviewed her before providing the Specificity of Charges (Supp. Brief, p. 26, p. 29). DMV however, properly provided written notice of the allegations on September 16, 2013, before interviewing Appellant. The *Notice of Employee Rights During an Internal Investigation*, not the *Specificity of Charges*, provides employees notice of the allegations before questioning pursuant to NRS 284.387(1)(a). RA, Vol. II, pp. 112–113. The Specificity of Charges, on the other hand, gives employees at least ten working days' written notice of the proposed action. NAC 284.656(1). Appellant appears to be confusing these two documents.

[11] Additionally, the courts have held that the remedy for a due process violation is to order the due process that was due and any attendant damages directly resulting from the failure to give the proper procedure. *See Brady v. Gebbie*, 859 F.2d 1543, 15551 (9th Cir. 1988).

233B.130 (requiring a party who is aggrieved by a hearing officer's decision to file a petition for judicial review within thirty days or a cross-petition within ten days of service of another party's petition for judicial review). Accordingly, while DMV's timing of the investigation and discipline fully complied with NRS 284, it is irrelevant to Appellant's claims.

C. DMV Did Not Deprive Appellant of her Right to Transfer Back to DMV After the Division of Insurance Rejected Her, An Issue Not Before This Court.

Finally, Appellant argues that DMV did not restore Appellant to her DMV employment after the Division of Insurance rejected her from employment, pursuant to NAC 284.462. This argument is improperly before this Court. First, Appellant raises this argument for the first time, so the Court should not consider it. *Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Second, compliance with NAC 284.462 has no bearing on whether just cause existed for Appellant's termination, the issue before this Court pursuant to NRS 233B. Regardless, this point has no merit because it is undisputed that DMV rehired Appellant on September 16, 2013. *See* Appellant's testimony stating that she reverted back to her prior position with DMV. RA, Vol. II, p. 23. *See also* RA, Vol. II, p. 118, pp. 131–133, p. 150; Supp. Brief, p. 6 (noting that Appellant returned to DMV on September 16, 2013). NAC 284.462 required DMV to rehire Appellant after she failed probation with the Division of Insurance and DMV

rehired her; thus, DMV acted pursuant to NAC 284.462. Accordingly, this argument has no merit.

VII. CONCLUSION

The Court of Appeals should affirm the district court's reversal of the hearing officer's decision and affirm Appellant's termination.

Respectfully submitted this 31st day of August, 2016.

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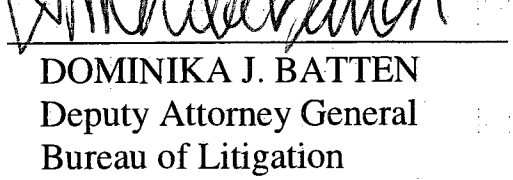
By: 

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face 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 Microsoft Word 2010 in font size 14 and font style Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) 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 6,946 words.

3. 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 28e(1), which requires every assertion in the 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.

DATED this 31st day of August, 2016.

ADAM PAUL LAXALT
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By: 
DOMINIKA J. BATTEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 31st day of August, 2016, I served a copy of the foregoing **RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF**, by placing said document in the U.S. Mail, first class postage prepaid, addressed to:

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