IN THE SUPREME COURT OF THE STATE OF NEVADA

WASHOE COUNTY SCHOOL DISTRICT,

Appellant,

vs.

KARA WHITE AND WASHOE SCHOOL PRINCIPALS' ASSOCIATION,

Respondents.

No. 69385

APPEAL FROM ORDERS OF THE SECOND JUDICIAL DISTRICT COURT, WASHOE COUNTY, NEVADA

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

As Appellant Washoe County School District is a governmental entity [NRS 41.0305; NRS 386.010(2)], no NRAP 26.1 disclosure is required.

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TABLE OF AUTHORITIES

CASES

STATUTES[1]

[1] Effective October 1, 2015, the provision of NRS 391.311-391.3197 were subject to revision and classification by the Legislative Counsel Bureau. For the benefit of the Court and easy reference to the history of this matter, Appellant utilizes the former codification of NRS 391.311-391.3197.

SECONDARY SOURCES

RULES

I. JURISDICTIONAL STATEMENT

The Court has jurisdiction pursuant to NRS 38.247(1)(e), "An appeal may be taken from: . . . . An order vacating an award without directing a rehearing; . . . ." and pursuant to NRS 38.247(2), "An appeal under this section must be taken as from an order or a judgment in a civil action." NRS 38.247(1)(e) and (2). As such, the Order of the District Court is an appealable final order.

The Order of the District Court was filed on November 10, 2015. (JA 0832-0842) Respondent/Petitioners filed the Notice of Entry of Order on November 12, 2015. (JA 0843-0857) The Notice of Appeal was filed on December 11, 2015, within the 30 days from written notice of entry of judgment as set forth in NRAP 4(a). (JA 0858-0860)

II. ROUTING STATEMENT

Appellant believes this matter is not presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17. The Supreme Court does retain "[a]ppeals from orders denying motions to compel arbitration" pursuant to NRAP 17(a)(1); however, NRAP 17 does not specifically mention appeals from motions to vacate arbitration awards.

Appellant believes this matter should be retained by the Supreme Court to uphold strong public policy.

The District Court Judge went beyond his very limited authority in reviewing the arbitration award and reviewed the matter in a more plenary or de novo manner and Respondents/Petitioners failed to meet their high burden to prove their motion to vacate by clear and convincing evidence. These two errors by the District Court, if allowed to go uncorrected, will erode the strong public policy favoring arbitration in the State of Nevada. "Strong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." D.R. Horton, Inc. v. Green, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004).

"The scope of judicial review of an arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision. The party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." Health Plan of Nevada, Inc. v. Rainbow Med., LLC., 120 Nev. 689, 695, 100 P.3d 172, 176 (2004).

If the order of the lower court order goes uncorrected, the losing parties in future arbitrations will be encouraged to bring petitions to vacate arbitration awards because the high thresholds of limited review and proof by clear and convincing evidence will be eroded and the courts and litigants will not be able to avoid higher costs and longer time periods associated with traditional litigation.

III. STATEMENT OF THE ISSUES

1. Arbitrator Cohn did not exceed his powers pursuant to NRS 38.241(d) by finding that in the totality of the circumstances Ms. White's dishonesty constituted 'just cause' for dismissal. Arbitrator Cohn considered and interpreted the collective bargaining agreement language regarding the general tenets of progressive discipline.

2. The lower court exceeded its authority in reviewing the issue of whether Arbitrator Cohn exceeded his powers pursuant to NRS 38.241(d) because the court substituted its own interpretation of the collective bargaining agreement language rather than conducting a very limited review of whether Arbitrator Cohn was is arguably construing or applying the contract.

3. Arbitrator Cohn did not manifestly disregarded the law by acknowledging the existence of NRS 391.3116 in his Opinion and Award because, in spite of the fact that the Parties never presented any argument that NRS 391.3116 was applicable in their arbitrations, Arbitrator Cohn found the law and considered it.

4. The lower court exceeded its extremely limited reviewing authority regarding the issue of whether Arbitrator Cohn manifestly disregarded the law because the lower court looked at how Arbitrator Cohn interpreted and applied the law, not whether he consciously ignored or missed the law.

5. The Arbitration Opinion and Award is not arbitrary and capricious because there is substantial evidence in the record to support Arbitrator Cohn's finding of dishonesty.

6. The lower court exceeded its limited review of whether the Arbitration Opinion and Award was arbitrary and capricious because the lower court substituted its own judgment of the facts for that of the arbitrator's, rather than reviewing whether there was substantial evidence on the record for the arbitrator's findings.

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IV. STATEMENT OF THE CASE

This appeal is from the Order Granting Motion to Vacate Arbitration Award "Order" (JA 0832-0842) of the Second Judicial District Court, Judge Scott N. Freeman, filed November 10, 2015, which granted Respondents/Petitioners' Motion to Vacate Arbitration Opinion and Award of Arbitrator Alexander Cohn. The Motion to Vacate with its exhibits is hereinafter referred to as the "MTV." (JA 0001- 0591) On December 29, 2014, Arbitrator Cohn's Opinion and Award, hereinafter referred to as the "Cohn Award"(JA 0027-0087) upheld the Washoe County School District's ("District" or the "WCSD") dismissal of former Principal Kara White ("Ms. White, "Principal White", "Kara White" or "Grievant") .

The District Court had jurisdiction to review the 'binding arbitration' Award in accordance with NRS 38.206 to 38.248, also known as the Uniform Arbitration Act of 2000.

V. STATEMENT OF THE FACTS

All relevant times regarding this matter, the District and the Washoe School Principals' Associations ("WSPA") were Parties to the 2011-2013 Collective Bargaining Agreement ("CBA") entered into pursuant to Chapter 288 of Nevada Revised Statutes. (JA0616-0667) The WSPA is an employee

organization within the meaning of NRS 288.040 and is the recognized bargaining agent for principals and assistant principals working for the District. Upon information and belief, Ms. White was an administrator for the District and a member of the WSPA at all relevant times.

Ms. White began her employment with the District in 1999 as a teacher, later worked as student dean and Assistant Principal, and in 2008, began working as Principal of Lemmon Valley Elementary School ("Lemmon Valley" or "LVES"), until her termination in April 2013. (JA 0033, 0671, 0707) At the time of her termination, Ms. White's supervisor was Douglas Parry, who was Area Superintendent from July 2010-June 2013. (JA 0033) Prior to February 2013, while she was Principal, Grievant had not received any discipline. (JA 0034) By letter of May 8, 2011, Parry congratulated her and her staff for being selected as a District pilot site for alignment with the National Center of Response to Intervention, stating that it was further testament to the outstanding job she and her staff had done. Id. Lemon Valley won a 2010-2011 Excellence in Inclusion Award and did well on the 2012 School Staff Climate and Safety Survey Report and on the 2011-2012 School Accountability Summary Report. Id. Ms. White received good evaluations for her performance as Principal for the 2008-2009, 2009-2010,

2010-2011, and 2011-2012 school years, which noted that there had been outstanding progress since she had become principal. Id.

A. Ms. White's Discipline Covered in the Previous Arbitration.

On February 27, 2013, Grievant was given a Letter of Admonition and Notice of Intent to Suspend for ten days, both based on the same charges. Grievant's violations were covered by: NRS 391.312(1)(c) Unprofessional conduct; (d) Insubordination; (i) Inadequate performance; (k) Failure to comply with such reasonable requirements as a board may prescribe; (l) Failure to show normal improvement and evidence of professional training and growth; (p) Dishonesty; Administrative Regulations 4111.5 – Safe and Respectful Learning Environment, and 4111.3 – Harassment/Sexual Harassment and Intimidation; and violation of the Negotiated Agreement between the District and the Washoe Education Association, Article 27. (JA 0039, 0672, 0709) Grievant was informed that she was placed on administrative leave with pay, although she was already on administrative leave for the other issues for which she was terminated, described below. (JA 0039) She filed grievances on the Letter of Admonition and suspension which were denied and moved to arbitration. On January 28, 2014, Arbitrator Patrick Halter ("Halter") issued an Opinion and Award ("Halter Award")

sustaining 12 of the 13 allegations of misconduct. Id. (See, Halter Award at JA 0426-0452) In the Cohn Award, Arbitrator Cohn incorporated the Halter Award by reference. Id. The only issue stipulated to by the Parties and considered in the Halter arbitration was: Did the District have just cause to suspend grievant, Kara White, for ten (10) days? If not, what shall the remedy be? (JA 0432) Halter found that Ms. White violated: NRS 391.312(1)(c) Unprofessional conduct; (i) Inadequate performance and (k) Failure to comply with such reasonable requirements as a board may prescribe; and Administrative Regulations 4111.5 – Safe and Respectful Learning Environment and 4111.3 – Harassment/Sexual Harassment and Intimidation. Halter affirmed the letter of admonishment and rescinded the suspension. Id.

Halter found, "[t]he sustained allegations do not support a finding that grievant was insubordinate or dishonest. Grievant was less than forthcoming during the investigation but that does not equate, automatically, to dishonesty and insubordination. Dishonesty and insubordination fall into the category of the most serious offenses an employee can be charged with and subjected to discipline including dismissal for first time offenders. . . . The totality of circumstances in this grievance show grievant slipping off the precipice of acceptable standards of supervisory practices at LVES and engaging in

conduct that harassed and intimidated Ms. Martin and other employees." (JA 0451) (emphasis added)

There were no arguments presented by the Parties in the Halter arbitration that, pursuant to Article 18 of the CBA, NRS 391.3116 was applicable and therefore the Parties were not to process the discipline for Ms. White in accordance with the progressive discipline provisions of NRS 391.311 to 391.3197. (JA 0426-0452)

B. Ms. White's Dismissal Arbitration.

The Arbitration Hearing between the District and the WSPA on behalf of Ms. White was held over a four day period - February 25-28, 2014. Due to the post-hearing illness of the arbitrator who conducted the hearing, Anna D. Smith, the Parties selected Alexander Cohn to serve as sole impartial arbitrator to review the record produced and issue an Opinion and Award which was to be final and binding upon the Parties. (JA 0027) At the arbitration hearing, the Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of relevant exhibits, and for closing argument. Post-hearing briefs were filed. Arbitrator Cohn received the post-hearing briefs and the entire record on or about October 30, 2014, and the matter was submitted. Id.

> The Parties were unable to stipulate to an Issue(s). They agreed that the Arbitrator, after review of the record as a whole, had the authority to frame the Issue(s) in dispute. The District would frame the Issue as:
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> Whether there was just cause for Grievant's termination, but that, if the Arbitrator finds there was not, he should determine the remedy.
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> The Association would frame the Issue as:
>
> Whether there is just cause for the termination; and if not, the Arbitrator is restricted to the statutory remedy.
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> After review of the record as a whole, the Arbitrator frames the Issue as:
>
> **Whether Grievant was discharged for just cause; and if not, what shall be the appropriate remedy?**

(JA 0028) (emphasis added)

At no time throughout the entire grievance and arbitration process regarding Ms. White's dismissal did the District or the WSPA argue that the language contained in Article 18 of the CBA has the meaning or should be interpreted to mean that NRS 391.3116 was applicable, and therefore the Parties were not to process the discipline for Ms. White in accordance with the progressive discipline provisions of NRS 391.311 to 391.3197. See, Cohn

Award (JA 0027-0087), the District Closing Brief (JA 0669-0697) and the WSPA Closing Brief (JA 0670-0762). The first time this strained interpretation of the Article 18 language appears is in the MTV. (JA 0011)

The Cohn Award is 61 pages in length. (JA 0027-0087) In the Award, Arbitrator Cohn recites the relevant provisions of: the CBA – Article 18; the Nevada statutes – NRS 391.31297 (formerly NRS 391.312), NRS 391.313, NRS 391.314, NRS 391.317 and NRS 391.3116; and the relevant provisions of District's Student Activity Funds Policies and Procedures manual. The Parties discussed or pointed to all of these items during the arbitration process except for NRS 391.3116, which was never mentioned by the Parties during the grievance and arbitration process. (JA 0088-0591)

Arbitrator Cohn then uses over 10 pages to discuss the background facts of the matter. (JA0033-0044) He includes Ms. White's accomplishments, the training on the use of Student Activity Funds ("SAFs"), audits of SAFs, and audits of Lemmon Valley. (JA0034-0036) He discusses the report regarding Ms. White's inappropriate/excessive spending of SAFs and the investigation. (JA0036-0038) He discusses Ms. White's requirement that teachers take Guided Language Acquisition Design ("GLAD") training. (JA0038) Ms. White's previous discipline arbitration is

mentioned and the administrative leave and termination process for her dismissal is discussed. (JA 0039-0044)

Arbitrator Cohn then carefully takes over 25 pages of his Award to recount the witness testimony of 18 witnesses – 10 District witnesses and 8 WSPA witnesses including the Grievant, Ms. White. (JA 0045-0073)

Arbitrator Cohn then discussed the position of each Party. (JA 0073-0079) He summed up the District positon as:

> NRS 391.312 gives the District the authority to issue a dismissal after a Letter of Admonition has been issued. NRS 391.313 permits dismissal without a Letter of Admonition for certain offenses, including dishonesty. Grievant gave dishonest responses throughout the investigation and arbitration hearing and tried to deflect her actions to everyone but herself. Her poor judgment in using funds and the excessive amount of funds used for non-student purposes is egregious and shows a lack of leadership and poor performance. The final egregious act was to mandate training and deducting teachers' sick leave. Grievant's denial that any teachers came to her and questioned this was contradicted by teacher testimony. The District must assure that principals conduct themselves in a manner that is above reproach and that public funds are for students, not Parties, dinners, gift cards, and alcohol. She blatantly and willingly misused almost $15,000 of public funds, including a $1,000 dinner for staff with a champagne toast. While the Association argues that Grievant had good evaluations, the issues causing her termination were

> not known at the time of the evaluations. The District could no longer risk the potential liability Grievant was causing.

(JA 0075)

Arbitrator Cohn then described the WSPA position. The first line of his recounting stating, "The grievance must be sustained and Grievant reinstated and made whole, pursuant to applicable State law. Grievant is not only covered by the Agreement, but also protected by Nevada law, specifically NRS 391.313, 391.314, and 391.317." (JA 0076) (See, WASP Closing Brief at JA 0700)

Finally, Arbitrator Cohn found that "Without question, the record demonstrates that the Association attacked each and every District allegation in detail, leaving no stone unturned in Grievant's defense. However, as noted above, rather than assume responsibility for errors, Grievant chose to proffer an "I can't recall" defense which was unavailing. Thus, she was her own worst enemy. While all discharges are harsh, on the record presented, just cause exists for her dismissal." (JA 0087)

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VI. SUMMARY OF THE ARGUMENT

A. Arbitrator Cohn Did Not Exceed his Authority and the Lower Court Exceeded its Very Limited Scope of Review.

Arbitrator Cohn did not exceed his authority in this matter. The lower court misapplied the very limited exception to an arbitrator's very wide authority to decide matters discussed in Int'l Ass'n of Firefighters, Local 1285 v. City of Las Vegas, 107 Nev. 906, 910, 823 P.2d 877, 879 (1991) (citing, Int'l Broth. of Firemen & Oilers, AFL-CIO, Local No. 935-B v. Nestle Co., Inc., 630 F.2d 474 (6th Cir. 1980)).

Carefully considering the contract language discussed in the Int'l Broth. Of Firemen & Oilers, AFL-CIO, Local No. 935-B case, it is clear the Int'l Ass'n of Firefighters, Local 1285 court was referring to very narrow and specific language. The contract language in the Int'l Broth. of Firemen & Oilers, AFL-CIO, Local No. 935-B case is very specific to the type of misconduct and the penalty for that misconduct. Specifically, the contract stated, "Article XII (a) Intoxication, dishonesty, incompetency, insubordination or failure to perform satisfactorily the usual, customary duties of the employee, shall constitute cause for the dismissal of any

employee from the service of the Company." Int'l Broth. of Firemen & Oilers, AFL-CIO, Local No. 935-B, 630 F.2d at 475.

Completely distinguishable from the 'specific misconduct gets specific penalty' type language in that case, the facts and language in Article 18 of the CBA in the case at bar refers generally that types of "discipline action including "demotion, suspension, dismissal, and non-renewal actions taken against post-probationary unit members (in accordance with NRS 391), shall be progressive in nature and related to the nature of the infraction. Unit members shall be given reasonable opportunity for improvement." (JA 0028) And, "The [District] shall not discharge, demote, suspend or take any other disciplinary action against a post probationary bargaining unit member of this unit without just cause." Id. Article 18 does not state a specific action gets what specific penalty. (JA 0635)

Moreover, the Parties agreed that Arbitrator Cohn have wide authority in this matter. After review of the record as a whole, Arbitrator Cohn framed the Issue as: Whether Grievant was discharged for just cause; and if not, what shall be the appropriate remedy? His Award answered that Issue question based on the CBA and the law, finding that the District had just cause to dismiss Ms. White.

Also, the lower court substituted its own judgment and contract interpretation for that of the arbitrator, rather than doing a very limited review to see if the arbitrator was arguably construing or applying the contract in accordance with this Court's holding in Health Plan of Nevada, Inc., 120 Nev. at 697-98, 100 P.3d at 178.

B. Arbitrator Cohn Did Not Manifestly Disregard NRS 391.3116 and the Lower Court Exceeded its Very Limited Scope of Review.

Arbitrator Cohn did not manifestly disregard NRS 391.3116. In fact, he is the only one who even mentions that statute. Before the MTV, WSPA never before asserted at any time that the language of Article 18.1 usurps or supersedes the provisions of NRS 391.311 to 391.3197. The argument asserted by WSPA and accepted by the lower court is convoluted, confusing, and flies in the face of the factual history of this matter and the relationship between the WSPA and the District. As such, this claim by Respondents/Petitioners is frivolous and should be denied by the Court. The absurd argument is that because the CBA states discipline for unit members will be "(in accordance with NRS 391)" then NRS 391.3116 applies, so then NRS 391.311 to 391.3197 do not apply and the arbitrator must only use the language of Article 18.1. Therefore, because Arbitrator Cohn applied the

provisions of NRS 391 and his interpretation of the CBA, he manifestly disregarded NRS 391.3116. It is a nonsensical use of the phrase "in accordance with NRS 391." If the Parties meant to exclude NRS 391.111-391.3197 it would make sense to affirmatively state something to the effect "according to NRS 391.3116, the provisions of NRS 391.111- 391.3197 are superseded by this agreement."

The lower court goes beyond its very limited scope of review when it concluded that "while Arbitrator Cohn referenced NRS 391.3116, he did not apply the law correctly." Arbitrator Cohn did note NRS 391.3116 under the relevant provisions of Nevada statutes and he references it in a footnote. The rule for a court to find that an arbitrator has manifestly disregarded the law is well articulated in Nevada. This Court holds: ". . . judicial inquiry under the manifest-disregard-of-the-law standard is extremely limited." "A party seeking to vacate an arbitration award based on manifest disregard of the law may not merely object to the results of the arbitration." In such instance, "the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law." Clark County Education

Association and Isabell Stuart v. Clark County School District, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006).

"There must be concrete evidence of an intent to disregard known law in the findings of the arbitrator or in the transcript of the proceedings." Manor Health Care Ctr., Inc. v. Monsour, 126 Nev. 735, 367 P.3d 796 (2010). There is no concrete evidence in the record that Arbitrator Cohn had the intent to disregard NRS 391.3116.

C. The Cohn Award is Not Arbitrary and Capricious because the Dishonesty Charge is Supported by Substantial Evidence and the Lower Court Exceeded its Very Limited Scope of Review.

The lower court again goes beyond its limited review by finding that it disagrees with Arbitrator Cohn finding that Ms. White is dishonest. A court's review of the arbitrary-and-capricious standard is "limited to whether the arbitrator's findings are supported by substantial evidence in the record." Wichinsky v. Mosa, 109 Nev. 84, 89, 847 P.2d 727, 731 (1993) (citations omitted).

In its Order, the lower court states that it "concurs with Petitioner's oral arguments in that dishonesty requires an element of intent. The evidence does not support a finding of **intentional** dishonesty in Principal White's case." (JA 0839) (emphasis added) The lower court sees fit to add its own

definition and standard of what dishonesty is, in spite of the fact that Arbitrator Cohn clearly articulates the standard he was using to find dishonesty is that "[a]n "Untruthful" finding requires preponderant proof of a willful misstatement or omission of material fact." (JA 0086 fn 18)

"The arbitrary-and-capricious standard does not permit a reviewing court to vacate an arbitrator's award based on a misinterpretation of the law. Rather, our review is limited to whether the arbitrator's findings are supported by substantial evidence in the record." Clark County Educ. Ass'n, 122 Nev. at 344, 131 P.3d at 9-10, citing to, Wichinsky, 109 Nev. at 90, 847 P.2d at 731. In the present matter, the lower court goes beyond its limited scope by finding that Arbitrator Cohn misinterpreted the CBA and NRS 391.31297 regarding dishonesty.

The case at bar is similar to the facts in the Clark County Educ. Ass'n case where the Court found, "unlike our decision in *Wichinsky*, in which we noted that the appellate record was scant as to the arbitration proceedings, here the arbitrator's seventeen-page opinion and award specifically recounts the factual underpinning of the award in favor of the District. Thus, we conclude that the arbitrator's decision is supported by substantial evidence

and therefore is not arbitrary and capricious." Clark County Educ. Ass'n, 122 Nev. at 344, 131 P.3d at 10.

Without an outright prohibition of using Arbitrator Cohn's definition of dishonesty in the CBA or NRS, the Arbitrator was free to interpret dishonesty as he saw fit. "Thus, the Arbitrator's findings are supported by substantial evidence in the record." Underwood v. Palms Place, LLC, 2:09-CV-00700-RLH, 2011 WL 1790463, at *4 (D. Nev. May 10, 2011).

VII. ARGUMENT

A. Standard of Review

The Court reviews a district court's decision to vacate or confirm an arbitration award *de novo*. Thomas v. City of N. Las Vegas, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). The scope of a district court's review of an arbitration award, however, is limited. Health Plan of Nevada, Inc., 120 Nev. at 695, 100 P.3d at 176. "The party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." Id. "Strong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." D.R. Horton, Inc., 120 Nev. at 553, 96 P.3d at 1162.

As discussed below, Respondents/Petitioners failed meet their high burden to prove their motion to vacate by clear and convincing evidence and the lower court judge reviewed the matter, not in a very limited manner, but in a plenary or de novo type manner.

B. Arbitrator Cohn Did Not Exceed his Authority and the Lower Court Exceeded its Very Limited Scope of Review.

Arbitrator Cohn did not exceed his authority because his Award finding that the District had just cause to dismiss the Grievant for dishonesty was within the scope of the CBA and the Issue that the Parties presented to him for determination. The lower court substituted its own judgment for Arbitrator Cohn's in finding the language of the CBA required a different result. The lower court misapplied the law and the facts in its legal analysis and erroneously found that there was an exception to Arbitrator Cohn's wide authority.

The rule for finding that an arbitrator has exceeded his authority is well articulated by the Court, which holds:

> NRS 38.241(1)(d) dictates that a court shall vacate an arbitration award if the arbitrator exceeded his powers. Courts presume that arbitrators are acting within the scope of their authority. Parties moving to vacate an award on the ground that an arbitrator

> exceeded his or her authority have the burden of demonstrating by clear and convincing evidence how the arbitrator exceeded that authority. Absent such a showing, courts will assume that the arbitrator acted within the scope of his or her authority and confirm the award. Arbitrators exceed their powers when they address issues or make awards outside the scope of the governing contract. The broader the arbitration clause in a contract, the greater the scope of an arbitrator's powers. However, allegations that an arbitrator misinterpreted the agreement or made factual or legal errors do not support vacating an award as being in excess of the arbitrator's powers. Arbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement. The question is whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided. Review under excess-of-authority grounds is limited and only granted in very unusual circumstances. An award should be enforced so long as the arbitrator is arguably construing or applying the contract. If there is a colorable justification for the outcome, the award should be confirmed.

Health Plan of Nevada, Inc., 120 Nev. at 697-98, 100 P.3d at 178.

The lower court Order states that the Cohn Award contradicts the express language of Article 18.1 of the CBA, citing to Int'l Ass'n of Firefighters, Local 1285, 107 Nev. at 910, 823 P.2d at 879.

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The lower court found that "Arbitrator Cohn did not draw his award from the essence of the CBA. Arbitrator Cohn contradicted the express language of the CBA Article 18.1 which explicitly prescribes a particular discipline for a specified offense. . ." The Order then cites the language from Article 18.1 and concludes that "[b]ased on a plain language reading of CBA Article 18.1, the Court finds there are three mandatory provisions regarding dismissal and disciplinary procedures: an individual (1) *shall* be given progressive discipline, (2) *shall* be given a reasonable opportunity to improve, and (3) *shall* not be discharged without just cause. No ambiguity exists in Article 18.1 and the requirements are clear-cut." (JA 0837) (emphasis contain in the Order)

However, the lower court misapplied the very limited exception to an arbitrator's very wide authority to decide matters discussed in Int'l Ass'n of Firefighters, Local 1285, 107 Nev. at 910, 823 P.2d at 879 (citing, Int'l Broth. of Firemen & Oilers, AFL-CIO, Local No. 935-B, 630 F.2d 474 (6th Cir. 1980)).

The lower court fails to correctly apply the cited language, "Where a labor contract expressly prescribes **particular discipline for specified offenses**, an arbitration award overturning or modifying that discipline does

not "draw its essence" from the contract and is in excess of the arbitrator's authority." Id. (emphasis added) On this point, the lower court failed to complete the legal analysis of the case law. The Int'l Ass'n of Firefighters, Local 1285 Court cites to the Int'l Broth. of Firemen & Oilers, AFL-CIO, Local No. 935-B case to support its finding on this point. When one carefully considers the contract language discussed in the Int'l Broth. of Firemen & Oilers, AFL-CIO, Local No. 935-B case, it is clear that this Court was referring to very narrow and specific language. The contract language in the Int'l Broth. of Firemen & Oilers, AFL-CIO, Local No. 935-B case was very specific to the type of misconduct and the penalty for that misconduct. Specifically, that contract stated:

> Article II The management of the plant, the direction of the working force, the right to hire and discharge employees, is vested exclusively in Management, except as otherwise provided in this Agreement.
>
> Article XII (a) Intoxication, dishonesty, incompetency, insubordination or failure to perform satisfactorily the usual, customary duties of the employee, shall constitute cause for the dismissal of any employee from the service of the Company.

Int'l Broth. of Firemen & Oilers, AFL-CIO, Local No. 935-B, 630 F.2d at 475.

Completely distinguishable from the 'specific misconduct gets specific penalty' type language in that case, the facts and language in Article 18 of the CBA in the case at bar refers generally that types of "discipline action including demotion, suspension, dismissal, and non-renewal actions taken against post-probationary unit members (in accordance with NRS 391), shall be progressive in nature and related to the nature of the infraction. Unit members shall be given reasonable opportunity for improvement." (JA 0028) And, "The [District] shall not discharge, demote, suspend or take any other disciplinary action against a post probationary bargaining unit member of this unit without just cause." Id.

Clearly, the language of Article 18.1 is not the type of specific 'if this misconduct then this result' type language contemplated by the Court in the Int'l Ass'n of Firefighters, Local 1285. The language of Article 18.1 is too ambiguous and vague to fit the narrow exception, articulated in Int'l Ass'n of Firefighters, Local 1285 to limit the broad discretion and authority of arbitrators held by this Court in Health Plan of Nevada, Inc.

The lower court apparently did not see fit to analyze this Court's holding in Int'l Ass'n of Firefighters, Local 1285 and discussed the very narrow exception articulated in the Int'l Broth. of Firemen & Oilers, AFL-

CIO, Local No. 935-B case. If it did, it would realize that Article 18.1 is not a specific list of this action/this result like the Int'l Broth. of Firemen & Oilers, AFL-CIO, Local No. 935-B case.

The language contained in Article 18 of the CBA is ambiguous and vague as to what is expected regarding discipline. The language of Article 18 is not specific at all and begs the questions – What is progressive discipline? What is a reasonable opportunity for improvement? What is just cause? What is the meaning of the emboldened parenthetical inserted language "**(in accordance with NRS 391)**"? These are questions that the Parties to the CBA agreed to hire an arbitrator to answer. The lower court simply brushes away the 61 page Cohn Award findings and makes the conclusory statement, "No ambiguity exists in Article 18.1 and the requirements are clear-cut." The lower court does not and could not say that the language of Article 18 mandates a particular discipline for a particular offense to support its conclusions. However, as discussed below, the Parties agreed that Arbitrator Cohn should decide what the language of Article 18, in accordance with NRS 391, means and if there was just cause to dismiss Ms. White.

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The Parties stipulated that Arbitrator Cohn should have wide authority in deciding the dismissal. The Parties stipulated that Arbitrator Cohn have wide authority in the arbitration. As delineated in the Award:

> The Parties were unable to stipulate to an Issue(s). **They agreed that the Arbitrator, after review of the record as a whole, had the authority to frame the Issue(s) in dispute**.
>
> The District would frame the Issue as:
>
> Whether there was just cause for Grievant's termination, but that, if the Arbitrator finds there was not, he should determine the remedy.
>
> The Association would frame the Issue as:
>
> Whether there is just cause for the termination; and if not, the Arbitrator is restricted to the statutory remedy.
>
> After review of the record as a whole, the Arbitrator frames the Issue as:
>
> **Whether Grievant was discharged for just cause; and if not, what shall be the appropriate remedy?**

(JA 0028) (emphasis added)

Arbitrator Cohn properly and within his discretion gave the Parties the answer to the Issue and the principles of just cause, progressive discipline and reasonableness. Arbitrator Cohn states as preliminary matters:

> The District bears the burden to demonstrate that just cause exists for Grievant's discharge. Generally, the just cause standard requires persuasive proof that the rules and/or policies alleged were violated and, if so, that under the totality of circumstances, the penalty imposed was not excessive; i.e., outside the zone of reasonableness for the proven misconduct. Because discipline is to be corrective, not punitive, the just cause standard, generally, favors progressive discipline which affords an employee the opportunity to modify behavior before more severe discipline up to and including termination is imposed. Progressive discipline, however, does not always have to follow the counseling, oral warning, written warning, suspension and discharge path in lockstep order. **The facts and circumstances in each case determine the appropriate level of discipline. Moreover, progressive discipline concepts do not apply in the face of proven gross misconduct which warrants summary dismissal in the first instance.**

(JA 0079) (emphasis added)

Arbitrator Cohn then describes the factual underpinnings of his findings and opinion as supported by the arbitration record. (JA 0080-0087) After discussing the issues regarding the inappropriate/excessive use of SAFs by Ms. White and her mandating employees use sick leave for mandatory training, the Arbitrator turns to the charge of Ms. White's dishonesty, clearly articulates the factual underpinnings and finds: "Accordingly, as to these

particular issues, in the investigation and arbitration, Grievant was not truthful – she was dishonest." (JA 0086)

Finally, Arbitrator Cohn found that based "on the record presented, any inclination to reverse Grievant's discharge and substitute progressive discipline such as a lengthy suspension, last chance return, demotion, an opportunity to improve, etc., in light of her length of service and competency, is washed away by the dishonesty finding." The lower court took particular issue with Arbitrator Cohn's finding "that mandatory requirements of progressive discipline and reasonable opportunity to improve were "washed away" because of his finding of dishonesty." (JA 0837) Then, the lower court exceeds its own scope of review and substitutes his own judgement and finds that, "Arbitrator Cohn exceeded his authority by not looking to the express terms of the CBA and determining such provisions did not apply to Principal White's case. Arbitrator Cohn cannot merely "wash away" contractual provisions agreed upon by WCSD and WSPA. "'Washing away' two mandatory collective bargaining terms does not rise to the level of dismissal based on just cause." Id. The lower court is deciding the arbitration issue based on its own definitions of what is or what is not just cause and what is progressive discipline or not progressive discipline.

> . . . allegations that an arbitrator misinterpreted the agreement or made factual or legal errors do not support vacating an award as being in excess of the arbitrator's powers. Arbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement. The question is whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided. Review under excess-of-authority grounds is limited and only granted in very unusual circumstances. An award should be enforced so long as the arbitrator is arguably construing or applying the contract. If there is a colorable justification for the outcome, the award should be confirmed.

Health Plan of Nevada, Inc., 120 Nev. at 697-98, 100 P.3d at 178.

Arbitrator Cohn was granted wide authority to decide the Issue presented by the Parties, the CBA and the provisions of NRS 391. He was in his scope of authority and found "specifically, whether the "just cause" standard is viewed under the NRS or the Agreement, given the totality of her performance errors and misconduct, summary discharge is warranted." (JA 0087) The lower court, on the other hand, appears to be exacting its own brand of industrial justice and substituted its judgment and contract interpretation for that of the arbitrator, rather than do a very limited review

to see if the arbitrator was arguably construing or applying the contract in accordance with this Courts holding in Health Plan of Nevada, Inc.

Therefore, the Court must find that Arbitrator Cohn did not exceed his authority and the lower court exceeded its authority in reviewing the issue of whether Arbitrator Cohn exceeded his powers pursuant to NRS 38.241(d).

C. Arbitrator Cohn Did Not Manifestly Disregard the Law, NRS 391.3116, and the Lower Court Exceeded its Very Limited Scope of Review.

The lower court again goes beyond its very limited scope of review when it concluded that "while Arbitrator Cohn referenced NRS 391.3116, he did not apply the law correctly." (JA 0838) Arbitrator Cohn did note NRS 391.3116 under the relevant provisions of Nevada statutes and he referenced it in a footnote. (JA 0030 and 0061)

The rule for a court to find that an arbitrator has manifestly disregarded the law is well articulated in Nevada. This Court holds:

> ". . . judicial inquiry under the manifest-disregard-of-the-law standard is extremely limited." "A party seeking to vacate an arbitration award based on manifest disregard of the law may not merely object to the results of the arbitration." In such instance, "the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law

> required a particular result, simply disregarded the law."

Clark County Educ. Ass'n, 122 Nev. at 341, 131 P.3d at 8, citing, Exber, Inc., v. Sletten Constr. Co., 92 Nev. 721, 731, 558 P.2d 517, 523 (1976) and Bohlmann v. Printz, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004). [T]he manifest-disregard-of-the-law standard limits the reviewing court's concern to whether the arbitrator **consciously** ignored or missed the law. As a result, **neither standard permits a reviewing court to consider the arbitrator's interpretation of the law**. Id. 131 P.3d at 8-9 (emphasis added), citing, Wichinsky, 109 Nev. at 90, 847 P.2d at 731.

There is not clear and convincing evidence on the record below that Arbitrator Cohn knew if or how NRS 391.3116 applied to this arbitration, that it required a particular result and that he refused to apply it. At best it appears Arbitrator Cohn found NRS 391.3116 while researching for this arbitration and was not sure if or how it applied. He identified it and considered it in his Award. He found whether one applies only the CBA language or the provisions of NRS 391, there was just cause to dismiss the Grievant.

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While the lower court interpreted NRS 391.3116 to be applicable and mandatory to the Parties of the CBA, Arbitrator Cohn and the Parties themselves do not interpret the law that way.

The MTV is the very first time that the WSPA has asserted at any time that the language of Article 18.1 usurps or supersedes the provisions of NRS 391.311 to 391.3197. The argument presented by WSPA and adopted by the lower court is convoluted, confusing, flies in the face of the factual history of this matter and the relationship between the WSPA and the District. The absurd argument that the lower court adopts goes like this:

- During the course of two arbitrations over the last 3 years, the Parties have utilized and argued over the provisions of NRS 391.311 to 391.3197 regarding Ms. White's discipline issues.

- The Cohn Award identifies and considers NRS 391.3116, among the relevant provisions of NRS 391.311 to 391.3197.

- Arbitrator Cohn identifies and considers Article 18.1 of the CBA, which states that discipline for unit members "(in accordance with NRS 391), shall be progressive in nature and related to the nature of the infraction. Unit members shall be given reasonable opportunity for improvement. The School District shall not discharge, demote, suspend or take any other disciplinary action against a post probationary bargaining unit member of this unit without just cause."

- Respondents/Petitioners conclude from the above that because the language in the CBA says "in accordance with NRS 391," NRS 391.3116 applies, so then NRS 391.311 to 391.3197 do not apply and the arbitrator must only use the language of Article 18.1!

- The Cohn Award states, "[m]ore specifically, whether the "just cause" standard is viewed under the NRS or the Agreement, given the totality of her performance errors and misconduct, summary discharge is warranted."

And so, the arbitrator manifestly disregarded NRS 391.3116.

The Court's interpretation is flawed, leads to an absurd result and is not the way the Parties themselves have interpreted the CBA as evidenced by their actions and past practice.

> The custom or past practice of the Parties is the most widely used standard to interpret ambiguous and unclear contract language. It is easy to understand why, as the Parties' intent is most often manifested in their actions. Accordingly, when faced with ambiguous language, most arbitrators rely exclusively on the Parties' manifestation of intent as shown though past practice and custom. Indeed, use of past practice to give meaning to ambiguous contract language is so common that no citation of arbitral authority is necessary.

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Elkouri, F. & Elkouri, E. A., HOW ARBITRATION WORKS ch 12.8 (6th ed. 1985) (footnote omitted).

There is no evidence in the record that the Parties ever applied NRS 391.3116 to the CBA language. The actions and practice of the parties over three years and two arbitrations regarding Ms. White's misconduct and discipline evidence the opposite.

It is abundantly clear that Arbitrator Cohn did not manifestly disregard the law in this matter. In fact, WSPA and the lower court acknowledge that Arbitrator Cohn did reference NRS 391.3116 in a footnote. Footnote 20 notes, "NRS 391.3116 provides that a collective bargaining agreement may supercede [sic] the provisions of NRS 391.311 to 391.397," indicating that he contemplated that law when he wrote his finding, "[m]ore specifically, whether the "just cause" standard is viewed under the NRS or the Agreement, given the totality of her performance errors and misconduct, summary discharge is warranted." (JA 0087)

The reality is that the WSPA and Ms. White were unhappy with the Cohn Award and asked the lower court to review how Arbitrator Cohn interpreted NRS 391.3116. This Court made it clear in Clark County Educ. Ass'n, 122 Nev. at 341, 131 P.3d at 8 that a reviewing district court cannot

consider the arbitrator's interpretation of the law, only whether the arbitrator consciously ignored or missed the law all together. Moreover, WSPA did not "provide evidence that not only did it communicate the correct law to the arbitrator, but the arbitrator 'intentionally and knowingly chose to ignore that law despite the fact that it was correct.' There must be concrete evidence of an intent to disregard known law in the findings of the arbitrator or in the transcript of the proceedings." Manor Health Care Ctr., Inc., 126 Nev. 735, 367 P.3d 796 (2010), citing to, ABCO Builders v. Progressive Plumbing, 282 Ga. 308, 647 S.E.2d 574, 575-576 (Ga. 2007). There is no concrete evidence in the record that Arbitrator Cohn had the intent to disregard NRS 391.3116.

Therefore, the Court must find that the Arbitrator did not manifestly disregard the law and that the lower court exceeded its authority in reviewing the matter by substituting its judgment and interpretation of NRS 391.3116 for that of Arbitrator Cohn's.

D. The Cohn Award is Not Arbitrary and Capricious because the Dishonesty Charge is Supported by Substantial Evidence and the Lower Court Exceeded its Very Limited Scope of Review.

The lower court again goes beyond its limited review by finding that it disagrees with Arbitrator Cohn finding that Ms. White is dishonest. A court's review of the arbitrary-and-capricious standard is "limited to whether

the arbitrator's findings are supported by substantial evidence in the record." Wichinsky, 109 Nev. at 89, 847 P.2d at 731 (citations omitted).

In its Order, the lower court states that it "concurs with Petitioner's oral arguments in that dishonesty requires an element of intent. The evidence does not support a finding of **intentional** dishonesty in Principal White's case." (JA 0839) (emphasis added) The lower court sees fit to add its own definition and standard of what dishonesty is, in spite of the fact that Arbitrator Cohn clearly articulates the standard he was using to find dishonesty is that "[a]n "Untruthful" finding requires preponderant proof of a willful misstatement or omission of material fact." (JA 0086 fn 18) "The arbitrary-and-capricious standard does not permit a reviewing court to vacate an arbitrator's award based on a misinterpretation of the law. Rather, our review is limited to whether the arbitrator's findings are supported by substantial evidence in the record." Clark County Educ. Ass'n, 122 Nev. at 343-44, 131 P.3d at 9-10, citing to, Wichinsky, 109 Nev. at 90, 847 P.2d at 731. In the present matter, the lower court goes beyond its limited scope by finding that Arbitrator Cohn misinterpreted the CBA and NRS 391.31297 regarding dishonesty. NRS 391.31297 and NRS 391.313 give the District authority to summarily dismiss an administrator for dishonesty. There is no

mandatory definition of dishonesty contained in the CBA or provisions of NRS 391.31297 and NRS 391.313. It is the province of the arbitrator to determine what defines dishonesty.

The Wichinsky court noted the record in that case was scant on the arbitration proceedings and there was a lack of evidence in support of the arbitrator's opinion when it concluded that "the arbitrator abused her discretion." Id., 109 Nev. at 90. In complete opposition to the facts in Wichinsky, the entire arbitration record was submitted to the lower court as evidence. The record shows that Arbitrator Cohn reviewed and considered: the verbatim transcripts of four days of arbitration testimony numerous documents entered into evidence; Post Hearing Brief of WSPA and Closing Brief of the District; the Harter Award as well as other transcripts and exhibits. Furthermore, the lower court reviewed the 61 page Cohn Award, which specifically recounts the factual underpinnings of his Award. Regarding the dishonesty charge, Arbitrator Cohn delineated in his Award:

> Yet, this is not the entire picture because dishonesty is a separate and distinct charge. As *Harter* noted:
>
> Dishonesty ... [falls] into the category of the most serious [offense] an employee can be charged with and subjected to discipline including dismissal for first time offenders ...

> Grievant is just too competent a person to forget that, as a result of an audit, she, speaking for management, agreed in writing that gift cards would no longer be given to employees, checks would no longer be signed to oneself, etc. The audit referenced the Manual. Thus, on this record, a finding that Grievant could not remember the audit, discussing it with the auditor, filing the school's management responses, or even seeing the Manual before the March 7 meeting was merely the result of faulty memory, negligence, etc. is simply too far a stretch. Clearly, an audit where one goes over details with an auditor is not a routine, ministerial matter that leaves no lasting memory. Further, even with an assistant like Porter, a conclusion that a principal would not consult and/or review the Manual over a number of academic years is wholly incredible. The same is true concerning her testimony of lack of knowledge relating to SAF and other restricted funds. Grievant knew, or should have known, that, as Principal, she was the responsible person – her signature on documents has meaning and substance. Accordingly, as to these particular issues, in the investigation and arbitration, Grievant was not truthful – she was dishonest.

(JA 0086)

The case at bar is similar to the facts in the Clark County Educ. Ass'n v. Clark County Sch. Dist. case, where the Court found, "unlike our decision in *Wichinsky*, in which we noted that the appellate record was scant as to the arbitration proceedings, here the arbitrator's seventeen-page opinion and

award specifically recounts the factual underpinning of the award in favor of the District. Thus, we conclude that the arbitrator's decision is supported by substantial evidence and therefore is not arbitrary and capricious. Clark County Educ. Ass'n, 122 Nev. at 344, 131 P.3d at 10.

Further, there is no definition in the CBA or in NRS that mandates that an arbitrator must define or interpret dishonesty as being "intentional dishonesty" as defined by the lower court. Without an outright prohibition of using Arbitrator Cohn's definition of dishonesty in the CBA or NRS, the Arbitrator was free to interpret dishonesty as he saw fit. "Thus, the Arbitrator's findings are supported by substantial evidence in the record." Underwood v. Palms Place, LLC, 2:09-CV-00700-RLH, 2011 WL 1790463, at *4 (D. Nev. May 10, 2011).

Therefore, the Court must find that the Cohn Award is not arbitrary or capricious because it is based on substantial evidence and the lower court exceeded its authority in reviewing the matter by substituting its judgment and interpretation of the definition of dishonesty for that of the Arbitrator's.

VIII. CONCLUSION

The Court should find and order:

1. Arbitrator Cohn did not exceed his powers pursuant to NRS 38.241(d);

2. The lower court exceeded its authority in reviewing the issue of whether Arbitrator Cohn exceeded his powers pursuant to NRS 38.241(d);
3. Arbitrator Cohn did not manifestly disregarded the law by acknowledging the existence of NRS 391.3116 in his Opinion and Award;
4. The lower court exceeded its extremely limited reviewing authority regarding the issue of whether Arbitrator Cohn manifestly disregarded the law;
5. Arbitrator Cohn's Opinion and Award is not arbitrary and capricious;
6. The lower court exceeded its limited review of whether the Arbitration Opinion and Award was arbitrary and capricious;
7. Respondents/Petitioners' Motion to Vacate Arbitration Award is denied in its entirety and the Arbitrator's Opinion and Award is Confirmed pursuant to NRS 38.241(4); and
8. Appellant is entitled to attorney's fees, cost and expenses pursuant to NRS 38.243.

AFFIRMATION PURSUANT TO NRS 239B.030: The undersigned does hereby affirm that the preceding document **DOES NOT** contain the social security number of any person.

DATED this 3rd day of June, 2016.

WASHOE COUNTY SCHOOL DISTRICT

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellant's Opening 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and type style Times New Roman.

I further certify that, although this Appellant's Opening Brief does not comply with the page limitations of NRAP 32(a)(7)(a)(i), it complies with NRAP 32(a)(7)(a)(ii) in that it is proportionately spaced, has a typeface of 14 points or more and contains 8,503 words.

I hereby certify that I have read this this Appellant's Opening 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 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.

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I understand that I may be subject to sanctions in the event that this Appellant's Opening Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of June, 2016.

WASHOE COUNTY SCHOOL DISTRICT

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that I am an employee of the WASHOE COUNTY SCHOOL DISTRICT and that on this date I served a true and correct copy of Appellant's Opening Brief addressed to the following:

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by electronically filing the foregoing document with the Clerk of the Court which served Mr. Guinasso electronically. Paper copies of Vols. 1-4 of the Joint Appendix, with an electronic version on an enclosed CD, were hand delivered on this date to Mr. Guinasso.

DATED this 3rd day of June, 2016.

Breanne Read