

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 WASHOE COUNTY SCHOOL
3 DISTRICT,

4 Appellant,

5 vs.

6 KARA WHITE AND WASHOE
7 SCHOOL PRINCIPALS'
8 ASSOCIATION,

9 Respondents.

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

12 **APPELLANT'S REPLY BRIEF**

13 Christopher B. Reich, Esq.
14 Nevada Bar No. 10198
15 General Counsel
16 Neil A. Rombardo, Esq.
17 Nevada Bar No. 6800
18 Chief General Counsel
19 Sara K. Almo, Esq.
 Nevada Bar No. 11899
 Associate General Counsel
 Washoe County School District
 P.O. Box 30425
 Reno, NV 89520-3425
 (775) 348-0300
 Attorneys for Appellant
 Washoe County School District

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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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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.

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1 **APPELLANT’S REPLY BRIEF**

2 **I. INACCURACIES CONTAINED IN THE RESPONDENTS’**
3 **STATEMENT OF THE CASE**

4 In the Respondents’ Answering Brief (“Answering Brief”) there are
5 errors in under section “III. Statement of the Case, A. Procedural History”
6 that the Washoe County School District (“District”) is obligated to clarify for
7 the Court. Respondents mistakenly assign the arbitration that is the center of
8 this matter (JA 0027-0087) with a case number- “CASE NO. A1-046098.”
9 (Answering Brief at page 2, line 11.) That case number is not a reference
10 number for the arbitration, and in fact, is not found in the Joint Appendix
11 regarding this matter. Appellant submits to the Court that, on or about June
12 29, 2013, Respondents Washoe School Principals’ Association (“WSPA”)
13 and Kara White (“Ms. White”) also filed a Complaint with the State of
14 Nevada Local Government Employee-Management Relations Board
15 (“EMRB”) alleging various prohibited practices under Nevada Revised
16 Statutes Chapter 288. That EMRB matter was assigned as “Case No. A1-
17 46098” by the EMRB.

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1 Also under the same section of the Answering Brief at point “2. Case
2 No. CV15-00572,” Respondents mistakenly name the “Honorable Patrick
3 Flanagan” as the as the Second Judicial Court judge issuing the Order
4 Granting Motion to Vacate Arbitration Award. (Answering Brief at page 3,
5 lines 6-8.) As a point of clarity for the Court, the appeal is from the Order
6 Granting Motion to Vacate Arbitration Award “Order” (JA 0832-0842) of
7 the Second Judicial District Court, Judge Scott N. Freeman, filed November
8 10, 2015, which granted Respondents/Petitioners’ Motion to Vacate
9 Arbitration Opinion and Award of Arbitrator Alexander Cohn.

10 **II. RESPONDENTS MISAPPLY THE LOWER COURT’S**
11 **SCOPE OF REVIEW REGARDING THE ISSUE OF**
12 **WHETHER THE ARBITRATOR EXCEEDED HIS**
13 **AUTHORITY**

13 Respondents explicitly and erroneously state in their Answering Brief
14 that “[t]he ultimate issue before the District Court was whether the Arbitrator
15 Cohn’s award in this matter contradicts the express language of Article 18.1,
16 which it unequivocally does.” (Answering Brief at page 16, lines 12-15). The
17 rule for a court reviewing whether an arbitrator exceeded his authority is not
18 whether the arbitrator made an erroneous finding with regard to a particular
19 section of a collective bargaining agreement.

1 This Court’s rule for finding that an arbitrator has exceeded his
2 authority is well articulate in the case Health Plan of Nevada, Inc. v. Rainbow
3 Med., LLC., 120 Nev. 689, 100 P.3d 172, (2004).

4 Arbitrators exceed their powers when they address
5 issues or make awards outside the scope of the
6 governing contract. The **broader the arbitration**
7 **clause in a contract, the greater the scope of an**
8 **arbitrator's powers. However, allegations that**
9 **an arbitrator misinterpreted the agreement or**
10 **made factual or legal errors do not support**
11 **vacating an award as being in excess of the**
12 **arbitrator's powers. Arbitrators do not exceed**
13 **their powers if their interpretation of an**
14 **agreement, even if erroneous, is rationally**
15 **grounded in the agreement. The question is**
16 **whether the arbitrator had the authority under**
17 **the agreement to decide an issue, not whether the**
18 **issue was correctly decided.** Review under excess-
19 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.

15 Health Plan of Nevada, Inc., 120 Nev. at 697-98, 100 P.3d at 178. (Emphasis
16 added.)

17 In the case at bar, the contract language that the parties used for
18 arbitration is “The School District shall not discharge, demote, suspend or
19 take any other disciplinary action against a post probationary bargaining unit

1 member of this unit **without just cause.**” (JA0635) (Emphasis added.) And
2 the issue to be decided by the arbitrator was very broad. This very broad just
3 cause provision was use in the dismissal arbitration when the arbitrator was
4 given the authority to frame the issue as “Whether Grievant was discharged
5 **for just cause**; and if not, what shall be the appropriate remedy?” (JA0028)
6 (Emphasis added.) The same ‘just cause’ contract provision was the impetus
7 for the issue question for the 10-day suspension arbitration between the same
8 parties. In that arbitration, the issue was stipulated to by the same parties as,
9 “Did the District **have just cause** to suspend grievant, Kara White, for ten
10 (10) days? If not, what shall the remedy be?” (JA0432) (Emphasis added.)

11 The lower court’s error is evident and it is heralded by the Respondents
12 in their Answering Brief. The lower court clearly looked to the find whether
13 the arbitrator made the correct decision not whether he had the authority to
14 decide the issue of ‘just cause’. The lower court judge clearly exceeded his
15 very limited authority and disagreed with Arbitrator Cohn’s findings in his
16 Opinion and Award, rather than look to whether Arbitrator Cohn was
17 arguably construing or applying the contract. “An award should be enforced
18 so long as the arbitrator is arguably construing or applying the contract. If

19

1 there is a colorable justification for the outcome, the award should be
2 confirmed.” Id.

3 **III. ARBITRATOR COHN DID NOT MANIFESTLY**
4 **DISREGARD THE LAW, NRS 391.3116, AND THE LOWER**
5 **COURT EXCEEDED ITS VERY LIMITED SCOPE OF**
6 **REVIEW**

7 The Respondents correctly cite to Graber v. Comstock Bank, 111 Nev.
8 1421, 1428, 905 P.2d 7 1112, 1116 (1995) for the proposition that “in order
9 to vacate an arbitration award due to manifest disregard of the law, ‘[t]he
10 governing law alleged to have been ignored must be well-defined, explicit,
11 and clearly applicable.’” (Answering Brief at page 19, lines 2-7.) However,
12 there is more discussion from the courts that gives context on this point. The
13 Graber Court cited to City of Boulder v. General Sales Drivers, 101 Nev.
14 117, 694 P.2d 498 (1985) and Merrill Lynch, Pierce, Fenner & Smith, Inc. v.
15 Bobker, 808 F.2d 930, 933 (2d Cir.1986) when it held:

16 Review under the manifest disregard standard does
17 not entail plenary judicial review. Instead, when
18 searching for a manifest disregard for the law, a
19 court should attempt to locate arbitrators who
appreciate the significance of clearly governing
legal principles but decide to ignore or pay no
attention to those principles. The governing law
alleged to have been ignored must be well-defined,
explicit, and clearly applicable. Further, **courts are**

1 **not at liberty to set aside arbitration awards**
2 **because of an arguable difference regarding the**
 meaning or applicability of laws.

3 Graber, 111 Nev. at 1428, 905 P.2d at 1116. (Emphasis added.)

4 In discussing the seminal United States Supreme Court case United
5 Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80
6 S.Ct. 1358, 4 L.Ed.2d 1424 (1960), the City of Boulder Court pointed out
7 that

8 . . . substantive review by the courts of arbitration
9 awards was inappropriate in light of the special
10 qualifications of arbitrators for resolving labor
11 disputes by virtue of their knowledge of the customs
12 and practices of a particular factory or a particular
13 industry. The court noted that plenary judicial
14 review “would make meaningless the provisions
15 that the arbitrator's decision is final, for in reality it
16 would almost never be final.” In light of this history
17 and tradition we are persuaded that when the
18 legislature chose to require submission of these
19 disputes to an “arbitrator,” and further determined
 that such arbitration awards should be “final and
 binding,” . . .

16 City of Boulder, 101 Nev. at 119, 694 P.2d at 500, citing to, Enterprise Wheel
17 & Car Corp., 363 U.S. at 599, 80 S.Ct. at 1362.

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1 Analyzing the judicial inquiry into the ‘manifest disregard’ of the law
2 standard, the often cited United States Court of Appeals, Second Circuit case,
3 Merrill Lynch, 808 F.2d at 933–34 held:

4 Although the bounds of this ground have never been
5 defined, it clearly means more than error or
6 misunderstanding with respect to the law. . . .The
7 error must have been obvious and capable of being
8 readily and instantly perceived by the average
9 person qualified to serve as an arbitrator. Moreover,
10 the term “disregard” implies that the arbitrator
11 appreciates the existence of a clearly governing
12 legal principle but decides to ignore or pay no
13 attention to it. . . . To adopt a less strict standard of
14 judicial review would be to undermine our well
15 established deference to arbitration as a favored
16 method of settling disputes when agreed to by the
17 parties. . . . Judicial inquiry under the “manifest
18 disregard” standard is therefore extremely limited.
19 The governing law alleged to have been ignored by
the arbitrators must be well defined, explicit, and
clearly applicable. **We are not at liberty to set
aside an arbitration panel's award because of an
arguable difference regarding the meaning or
applicability of laws urged upon it.**

15 Merrill Lynch, 808 F.2d at 933–34 (Citations omitted.) (Emphasis added.)

16 As argued in the Appellants’ Opening Brief, it is abundantly clear that
17 Arbitrator Cohn did not manifestly disregard the law in this matter. In fact,
18 WSPA and the lower court acknowledge that Arbitrator Cohn did reference
19 NRS 391.3116 in a footnote. Footnote 20 notes, “NRS 391.3116 provides

1 that a collective bargaining agreement **may** supercede [sic] the provisions of
2 NRS 391.311 to 391.397,” (Emphasis added) indicating that he contemplated
3 that law when he wrote his finding, “[m]ore specifically, whether the “just
4 cause” standard is viewed under the NRS or the Agreement, given the totality
5 of her performance errors and misconduct, summary discharge is warranted.”
6 (JA 0087)

7 The reality is that the Respondents in this matter, WSPA and Ms.
8 White, were unhappy with the Cohn Award and asked the lower court to
9 review how Arbitrator Cohn interpreted NRS 391.3116. This Court made it
10 clear in Clark County Education Association and Isabell Stuart v. Clark
11 County School District, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006) that a
12 reviewing district court cannot consider the arbitrator’s interpretation of the
13 law, only whether the arbitrator consciously ignored or missed the law all
14 together.

15 **IV. THE COHN AWARD IS NOT ARBITRARY AND**
16 **CAPRICIOUS BECAUSE THE DISHONESTY CHARGE IS**
17 **SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE**
LOWER COURT EXCEEDED ITS VERY LIMITED SCOPE
OF REVIEW

18 In the Answering Brief, Respondents attempt to make hay with the fact
19 that Arbitrator Cohn was not the arbitrator at the hearing. (Answering Brief

1 at page 25, lines 11-16.) The Respondents propose that Arbitrator Cohn is
2 unable to determine the issue of dishonesty because he received the
3 arbitration matter on the record. This is a red herring and a clear instance of
4 wanting to get another bite of the apple. The Respondents agreed to have
5 Arbitrator Cohn decide all the issues based on the record after Arbitrator
6 Smith took ill. Now, only after the Award is issued, Respondents argue that
7 Arbitrator Cohn cannot find dishonesty. “Due to the post-hearing illness of
8 the Arbitrator who conducted the hearing, the parties selected ALEXANDER
9 COHN to serve as sole, impartial Arbitrator to review the record produced
10 and issue an Opinion and Award which will be final and binding upon the
11 parties.” (JA 0027) (Emphasis added.)

12 The lower court is not authorized to “reweigh” the evidence presented
13 to the arbitrator. So, as long as there is any substantial evidence to support
14 the arbitrator’s award, and so long as the arbitrator’s award interpretation of
15 the evidence is not palpably irrational, the Court must respect that
16 interpretation. See, e.g., City of Reno v. Reno Fire Dep’t Administrative
17 Assn., 111 Nev. 1004, 1009, 899 P.2d 1115 (1995); Granger Northern, Inc.
18 v. Cianchette, 572 A.2d 136, 139 (Me. 1990).

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1 As the Court reviews this matter *de novo* and will review the entire
2 record, there is no doubt the Court will find that Arbitrator Cohn's decision
3 is supported by substantial evidence and therefore is not arbitrary and
4 capricious. See, Clark County Educ. Ass'n, 122 Nev. at 344, 131 P.3d at 10.

5 **V. CONCLUSION**

6 The Court should find and order:

- 7 1. Arbitrator Cohn did not exceed his powers pursuant to NRS 38.241(d);
- 8 2. The lower court exceeded its authority in reviewing the issue of
9 whether Arbitrator Cohn exceeded his powers pursuant to NRS
10 38.241(d);
- 11 3. Arbitrator Cohn did not manifestly disregarded the law by
12 acknowledging the existence of NRS 391.3116 in his Opinion and
13 Award;
- 14 4. The lower court exceeded its extremely limited reviewing authority
15 regarding the issue of whether Arbitrator Cohn manifestly disregarded
16 the law;
- 17 5. Arbitrator Cohn's Opinion and Award is not arbitrary and capricious;
- 18 6. The lower court exceeded its limited review of whether the Arbitration
19 Opinion and Award was arbitrary and capricious;

- 1 7. Respondents/Petitioners' Motion to Vacate Arbitration Award is
2 denied in its entirety and the Arbitrator's Opinion and Award is
3 confirmed pursuant to NRS 38.241(4); and
4 8. Appellant is entitled to attorney's fees, cost and expenses pursuant to
5 NRS 38.243.

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

9 DATED this 6th day of September, 2016.

10 WASHOE COUNTY SCHOOL DISTRICT

11 By: /s/Christopher B. Reich, Esq. _____
12 CHRISTOPHER B. REICH, ESQ.
13 Nevada Bar No. 10198
14 General Counsel
15 NEIL A. ROMBARDO, ESQ.
16 Nevada Bar No. 6800
17 Chief General Counsel
18 SARA K. ALMO, ESQ.
19 Nevada Bar No. 11899
Associate General Counsel
Washoe County School District
P.O. Box 30425
Reno, NV 89520-3425

Attorney for Appellant
WASHOE COUNTY SCHOOL DISTRICT

1 **ATTORNEY’S CERTIFICATE OF COMPLIANCE**

2 I hereby certify that this Appellant’s Reply Brief complies with the
3 formatting requirements of NRAP 32(a)(4), the typeface requirements of
4 NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it
5 has been prepared in a proportionally spaced typeface using Microsoft Word
6 in 14 point font and type style Times New Roman.

7 I further certify that this Appellant’s Reply Brief complies with the
8 page limitations of NRAP 32(a)(7)(A)(i) as this Appellant’s Reply Brief is
9 less than 15 pages.

10 I hereby certify that I have read this this Appellant’s Reply Brief, and
11 to the best of my knowledge, information, and belief, it is not frivolous or
12 interposed for any improper purpose. I further certify that this brief complies
13 with all applicable Nevada Rules of Appellate Procedure, in particular NRAP
14 28(e)(1), which requires every assertion in the brief regarding matters in the
15 record to be supported by a reference to the page and volume number, if any,
16 of the transcript or appendix where the matter relied on is to be found.

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

4 DATED this 6th day of September, 2016.

5 WASHOE COUNTY SCHOOL DISTRICT

6 By: /s/Christopher B. Reich, Esq.

CHRISTOPHER B. REICH, ESQ.

7 Nevada Bar No. 10198

General Counsel

8 NEIL A. ROMBARDO, ESQ.

Nevada Bar No. 6800

9 Chief General Counsel

SARA K. ALMO, ESQ.

10 Nevada Bar No. 11899

Associate General Counsel

11 Washoe County School District

P.O. Box 30425

12 Reno, NV 89520-3425

13 Attorney for Appellant

14 WASHOE COUNTY SCHOOL DISTRICT

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Jason D. Guinasso, Esq.
Reese Kintz Guinasso, LLC
190 W Huffaker Lane, Suite 402
Reno, NV 89511
Attorney for Respondents Kara White and
Washoe School Principals' Association

DATED this 6th day of September, 2016.

Breanne Read
Breanne Read