have used the prior discipline if he had had all that? He could use it to help explain it, to help give context, to give meaning as to, you know, what happened with those disciplinary matters, whether that suspension from 1997 was well taken, well supported. What were the underlying facts of it? That, we don't know.

And, so, what happened was Commissioner -- Hearing Master De La Garza and, then, Commissioner Bulla both had those prior disciplines. It just -- it colors -- it changes the proceeding and the remoteness in time is definitely something that's very strong. Something that the Arbitrator noted.

But, again, just so I'm clear with the 289, it is we're alleging for purposes of this hearing, sort of a continuing violation that those prior incidents should never even have been part of consideration, starting with that notice of termination and, then, ending with the arbitration award. And the Arbitrator at least did note that we did have a due process base objections to that. So, I would submit on that.

Thank you very much, Your Honor.

THE COURT: All right. I'm going to start first with the issue about whether or not the Office of Diversity -- yes?

MR. PERDOMO: Your Honor, we just have a point of

390

clarification. My client has indicated that the records that were in the possession of OOD were, based on the record, they were confidential and my client is taking the position that they didn't have access to those records, that those were --

THE COURT: I think it's clear in the record that that -- or it's inferred from the record that -- not that the Court didn't -- that those records were not maintained by the Court and that it is the policy of the Office of Diversity -- and this was stated by Officer Knickmeyer's counsel, that they would not -- that those are confidential records and they won't be disclosed. That doesn't mean that the Court couldn't have attempted to get them. Nor does it mean that the Arbitrator couldn't have subpoenaed them, if requested to do so, or issued a subpoena for them, or that someone couldn't have filed a Motion to Compel. It simply means that if you called the Office of Diversity, they would tell you: No. We will not give you that.

Whether they would give it to the Court or not, we don't know. That's not part of the record. So, any representation by your client to that effect would be supplementing the record. The inference is that you can't just call up and get it. So --

All right. So, I'm going to deal, first, with the argument that the proceedings below were invalid because

391

they violated various provisions of NRS 289, the peace officer's right, with regard to the affirmative duty of the agency to provide the personnel file and the evidence that the agency was going -- was relying upon in the disciplinary proceeding. And there are several statues cited and, essentially, the citations are part of the record and, yeah, that is what they require.

It is clear that the Office of Diversity is a part of the Executive Branch of Clark County and it is not part of the Eighth Judicial District Court. And that in the prior 2003 and 1997 disciplinary actions, the Court used the Office of Diversity to conduct investigations. Based upon the result of that investigation, Judge Mosley determined to issue two reprimands. One and -- or disciplines. I won't say -- I don't want to use the word reprimand because the actual memorandums indicate that they were not reprimands, they were suspensions. But -- or a suspension and I don't remember whether the '97 was a suspension, as well. So, Judge Mosley, based upon whatever that investigation was, determined to issue discipline.

The memorandums of the actual discipline were in the Eighth Judicial District Court file. Those memorandums are what the Eighth Judicial District Court was using as a part of its evidence in investigating the 2013 Complaints. So, that evidence that they were using was provided and the

392

personnel file, all of those things, were complied with and the Eighth Judicial District Court did not violate the statute with regard to its file and the information it was relying upon in considering the Complaints and discipline. The issue is whether it had an affirmative duty to attempt to get, from the Office of Diversity, the remainder of the information that led to the two disciplines imposed by Judge Mosely, which were documented in the file.

The Court, one can argue -- and I'm not going to make a decision that it was required because I don't have to, in the context of this proceeding. If petitioner -- it's certainly a valid argument to make that if you are going to use the memorandums, and you're going to consider those disciplines, you have an affirmative duty to at least attempt to get, from the Office of Diversity, the underlying investigative reports. But since you weren't going to rely on that underlying investigative report in imposing discipline, the only documents you were relying upon was the memorandum, one could also argue that you had no duty to go get the additional documents.

Either way, if petitioner considered the failure to obtain those documents to be a violation of the MOU and the MOU's -- the Court's contractual agreement to apply NRS Chapter 289 to the MOU in its dealings with the Marshals, then it was inherent -- or it was the requirement that the

353

petitioner make a specific request and a Complaint during the proceedings that: You haven't given me all the documents I'm entitled to. I'm entitled to the Office of Diversity documents and you need to get them for me. No such request was ever made in step one, step two, the meetings between counsel, petitioner, and the Court. It was never made to the Arbitrator in the arbitration proceeding. So, to the extent that you now want to complain about it, it is waived. You failed to exhaust your administrative remedies.

Now, whether that was a strategic decision because counsel, at the time, didn't want that information to be part of the record and, in fact, felt that the better strategy was to try and have the memorandums struck, I don't know. Perhaps, that was the strategy that counsel and petitioner were employing at the time. But petitioner had the opportunity to address what was in the memorandums and, in fact, made some comments with regard to the fact that at the time, he chose not to argue about it with Judge Mosley, and to contest it, and that he let it be.

I suppose he could have gone into more detail about it, as well. That would have been up to him. But the -- he can -- he has clearly not exhausted his administrative remedies and clearly waived the ability to say: Affirmatively, you should have given it to him and

394

because you didn't, it was a violation of Chapter NRS 289.

Secondly, the memorandums were a part of the Court's consideration, in terms of termination and why progressive discipline wasn't warranted and termination was. It's not clear how key those memorandums were but they certainly were considered. They were also considered at step one by Hearing Master De La Garza.

Step two, I believe the record, when read in its entirety, indicates that Hearing Master Bulla did not consider them and, in fact, struck them from consideration. But I acknowledge, Mr. Kennedy, that there's some ambiguity in the way that those findings are written that might suggest that perhaps she did.

However, step three, arbitration, is a de novo proceeding with an evidentiary hearing and it's absolutely clear that the arguments that were being made were: Arbitrator McLean, we don't think you should consider these two memorandum and any information contained in them for the following reasons. One, there's no indication that he was denied due process. The due process argument has to be to this proceeding, this arbitration. You can't come in and argue that because he allegedly was denied due process in 1997 or 2003, that this hearing was tainted. That's not the argument. The argument is that because the process for challenging the 1997 and -- in 1997 and in 2003, any

disciplinary proceeding isn't clear. We don't know what that process was. We only know it wasn't the same process that's in place under the memorandum of understanding. That is from the record. Whatever people knew in their minds but didn't communicate on the record is kind of irrelevant. Or is irrelevant. So, but it was an argument to be made. Look, the procedures back then were different so, we ask that you not consider them because we can't tell -- what was the quality of the investigation? What was my ability to participate in it? Did it meet some sort of due process standard back then? They're too old to be considered.

Arbitrator McLean clearly found those arguments persuasive and indicated: I will not consider them. Which indicates they're stricken, in terms of evidence, which is another reason why your argument that they taint the whole proceeding -- I appreciate it when you say that jurors -- we don't know if jurors do that. I also appreciate that it's presumed judges do. And, in fact, the record here indicates that because when he started his analysis, then, about whether or not, one, there was just cause for termination. That is: Do the incidents, the allegations that have been alleged -- first, factually, do I believe them to be true? What do I believe has been proven? There's more than substantial evidence to support his

396

factual determinations. His factual determinations were essentially that the comments, as they related to supervisor Moody and other people in the chain of command in the Marshal's unit, as related by Officer Ellis were true. So, we believe Officer Ellis. He meant -- he said he didn't believe Officer Knickmeyer. He's entitled to weigh credibility. It's never pleasant when someone tells you that but that's what he did. He also found Ms. Litt to be credible.

So, he found that the statements as alleged had been made. He, then, found that the incident with regard to Litt occurred and, from the factual statements made by Ms. Litt, he came to the conclusion that this was a retaliatory action, that the initial scan and rescan, that was not. But the issue with regard to -- or the initial search of the purse after the initial scan. And, then, running it back through, arguably, was not. But the actions thereafter, which involved a second scan or third scan, as they say, was. And he relied upon a number of things amongst them that he believed that Officer Knickmeyer called a member of the Bar a bitch and referred to the fact that she was a complainant against him in a completely separate proceeding. Now -- and, then, was deliberately using his office to harass her.

There's substantial evidence in the record from

397

which he can conclude that. There was discussion in the record with regard to the nature of the previous problems in which Ms. Litt was involved and it begins with the fact that Ms. Litt was a witness to a prior disciplinary issue involving Officer Knickmeyer. As a result of her testimony and other information that is not detailed in the record, there was a decision to issue discipline, and the investigation started, if memory serves me correctly, in September of 2012 and concluded in May of 2013, not too long before these -- or concluded, I believe, in May of 2013 with the -- some sort of reprimand. It's not clear from the record whether or not that reprimand was now subject to an appeal, or an arbitration, or where it was going, just that she was a witness in that proceeding and that proceeding ended up in discipline. Substance went to that.

She, then, had an encounter with Officer Knickmeyer and she filed a separate Complaint on that encounter, alleging that he was acting inappropriately towards her as a result of her testimony in the first disciplinary proceeding. And, therefore, this was -- knowing that he had all of this -- these issues relating to Ms. Litt pending, he still engaged -- and this is the factual finding for which there is substantial evidence in the record to support it, in retaliatory action.

398

Both orally and in his written findings, he, then, goes towards what is the standard the Arbitrator has to use? Under Article 13, the Arbitrator, it says will consider, but that's really must consider, the incident and the discipline in terms of severity of the action, evidence of progressive discipline, and appropriateness of the disciplinary action. The Arbitrator did that.

The Arbitrator noted that for purposes of determining the severity of the actions of Officer Knickmeyer and the appropriateness of the disciplinary action, that we had these -- we had the 2012 incident, Ms. Litt's involvement as a witness in that, the discipline that resulted from that, the subsequent Complaint by Ms. Litt that she was being harassed as a result of her witnessing that incident by Officer Knickmeyer. And, then, Officer Ellis' testimony that the scans and rescans were being done for retaliatory purposes because Officer Knickmeyer was mad at her as a result of her involvement in the other disciplinary proceedings.

So, why that is not progressive discipline in and of itself because those prior proceedings had not been finalized. At least, it doesn't appear from the record that they were actually final, only that they were in process. But he did take in into consideration in determining the appropriateness of the disciplinary action

399

for the complaints in this case.

So, he found just cause based upon all of that evidence for termination. And, as I said earlier, once he found just cause, the question, then, was: Was termination reasonable in response to those actions? Which requires a waive -- a weighing of whether or not the other forms of potential discipline that are listed in the memorandum of understanding, written reprimands, written warnings, demotions, etcetera, suspensions, should have been imposed in this instance.

Now, it's true, he doesn't use the word reasonableness but it's very clear in both his oral and his written opinion that he did engage in that weighing process. And, in the end, he determined that it was appropriate. It was reasonable, without using the word. That's, in fact, what he concludes. And it was warranted, one, because of the chain of command issues. But, added to that -- because he says it was just chain of command, maybe not. People in the workplace, as the defense pointed out, you're talking with your fellow employees, you think you've been treated unfairly, you let your mouth wander, is that really such a threat to discipline? He recognized it. But he firmly believed that Officer Knickmeyer, in retaliation for the testimony that Ms. Litt give -- gave, was on a vendetta against her and used his position to do so.

400

Whether I agree or disagree or whether anyone else agrees or disagrees isn't the point. The point is, there's substantial evidence in the record from which he could make such a finding. And he made a determination that, under the circumstances, when an employee of the Court engages in a vendetta against an attorney for having complained about that employee's conduct, and while a pending complaint about having done that exists, shows a lack of judgment and control that warranted the termination in this case. And that some other type of discipline was not appropriate.

So, I find that the Petition should be denied. The Arbitrator did not exceed the scope of the agreement. There was nothing arbitrary and capricious about the decision. The decision was done in accordance with both the MOU and with the provisions of Chapter 38, which is the Uniform Arbitration Act in Nevada. And, as I had previously discussed, and I'm going to do just once again just so it's all kind of together, why that is the appropriate remedy under the MOU because the MOU makes it the appropriate remedy. And the more specific provisions under Article 13 about judicial review of the Arbitrator's decision speak to the Uniform Arbitration Act. The reference to any other law is more vague.

But even if one could argue that the appropriate remedy is something under Chapter 289, what does Chapter

401

289 say? Well, Chapter 289 simply says that you get the ability to go to the courts. It doesn't say what vehicle you use to get there. Arguably, there would be three vehicles under 289.120 to apply for judicial relief. I suppose you could file -- maybe more than that. But you'd file a declaratory relief action. I suppose, potentially, that's a ply for judicial relief. Does it mean you can file a Petition for judicial review under Chapter 233(b)? Well, while a Court is not a law enforcement agency and the only reason 289 would apply in this case is because the Court agreed to have it apply, contractually, does that mean that the Court is also agreeing that it's an agency for purposes of 233(b)130? I would argue not but even if a Petition for Judicial Review was the appropriate vehicle, the standard for review under that is very similar. You have to violate the Constitution or statutory provisions. Well, I find there were not violations because -- of either one. It wasn't in an excess of authority, there wasn't an unlawful procedure, and it wasn't clearly erroneous in view of reliable, probable, substantial evidence, nor was it arbitrary or capricious.

And, finally, is apply for judicial relief some reference to extraordinary relief under writ of mandamus, writ of probation, Chapter 34? Well, clearly, that wasn't the relief being requested here, even if one could argue it

402

was. Then, you have the other issue that in order to do such a writ, you have to find that there was an excess of authority or that it was arbitrary and capricious and there wasn't any of that in the Court's actions.

So, no matter what standard you use and how you construe the initial pleadings in this case, essentially, you're still back to that same concept. And the record simply doesn't support a violation of 289. The one area where one could argue such a violation wasn't preserved and there's clearly substantial evidence to support the decision.

There's no finding that he manifestly disregarded the law. He didn't. Or that he consciously ignored the law. Officer McLean didn't do that. He talked about the MOU. He talked about the requirements. And the fact that he was talking about, in general, labor law, well, that's exactly what the MOU contemplates. It talks about you're supposed to apply labor law. So, that's not outside the scope of it.

Policy and procedural matter. Again, the MOU references that. That's a part of what we're to be considered. And there was no objection to it. And, in fact, that was part of the argument that was made below. That's a judicial estoppel argument, that you used the policy and procedural manual. You said it applied. You

said that was part of what had to guide the decision and why you needed just cause. You can't argue that now that using it was outside the scope of the MOU.

I'm not enamored of your judicial estoppel argument on other grounds. So, I'm not relying upon that to deny the Petition. I think it's not a judicial estoppel argument. I think it's simply a you didn't preserve the issue of the Office of Diversity below for purposes of you should have affirmatively got it and given it to us. You had a duty to bring that up and you didn't. And, so, you can't bring it up on appeal. Nor was the Office of Diversity required to somehow automatically give up the records because it's not a law enforcement agency under 289.040. And it can't be made one by virtue of any agreement that the Court entered into with the Marshals. But I suspect if you really wanted those documents, you would have simply filed a Motion for them and ask for a subpoena or said to them: You know, we think these documents should be provided to us. If the Court said: No. We can't get them. Then, you had a remedy.

So -- I'm looking through my notes to make sure I have everything. All right. I think I've covered all of the grounds from my notes as to what I thought was important to put in the record, in terms of supporting a denial of the Petition. And, so, that will be the Order.

404

And the Court will prepare the -- or the State of Nevada is to prepare the findings in the Order. Submit it to opposing counsel for his signature. In the event that you can't agree on the form of the document, you can submit a draft to me, together with any comments that you have, Mr. Kennedy.

MR. KENNEDY: Okay.

THE COURT: And, then, I will make the final decision.

MR. KENNEDY: Thanks, Your Honor. Thank you.

THE COURT: We'll be in recess.

MR. KENNEDY: Okay.

PROCEEDING CONCLUDED AT 10:13 A.M.

* * * * *

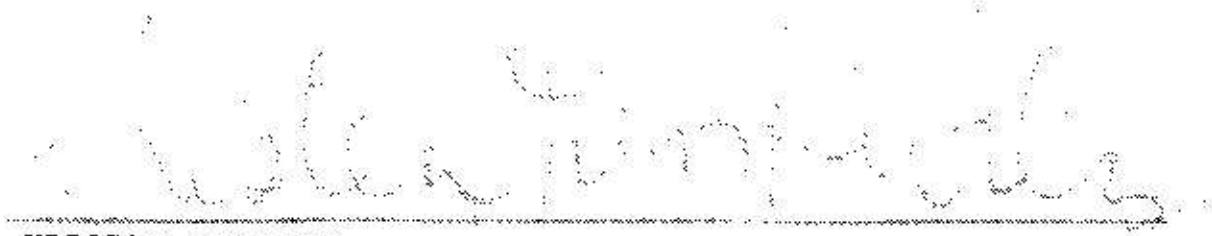
405

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THOMAS KNICKMEYER, Plaintiff, vs. STATE OF NEVADA, et al., Defendants.	Case No.: A-14-711200-P Dept. No. XXXII

NOTICE OF ENTRY OF ORDER DENYING AMENDED PETITION TO SET ASIDE ARBITRATION DECISION, OR, IN THE ALTERNATIVE PETITION FOR JUDICIAL REVIEW

TO: Plaintiff, THOMAS KNICKMEYER, and his counsel of record, Kirk T. Kennedy, Esq.

PLEASF TAKE NOTICE that on the 23rd day of August, 2016, the above Court entered its Order Denying Amended Petition to Set Aside Arbitration Decision, or, in the Alternative Petition for Judicial Review. A true and correct copy of this Court's Order is attached hereto as Exhibit A.

DATED this 25th day of August, 2016.

ADAM PAUL LAXALT
Attorney General

By: _____
FREDERICK J. PERDOMO,
Senior Deputy Attorney General
Bureau of Litigation - Public Safety Division
Attorneys for Defendants

907

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on August, 25, 2015, I caused to be served a copy of the foregoing, **NOTICE OF ENTRY OF ORDER DENYING AMENDED PETITION TO SET ASIDE ARBITRATION DECISION, OR, IN THE ALTERNATIVE PETITION FOR JUDICIAL REVIEW**, by District Court's Electronic Filing system to the following:

Attorney for Petitioner:
Kirk T. Kennedy, Esq.
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An employee of the
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EXHIBIT A

EXHIBIT A

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

In the matter of the Petition of

THOMAS KNICKMEYER,

Petitioner,

vs.

STATE OF NEVADA, ex rel., EIGHTH JUDICIAL DISTRICT COURT,

Respondent.

CASE NO.: A-14-711200-P
DEPT. NO: 32

Hearing Date: May 20, 2016
Hearing Time: 9:00 a.m.

ORDER DENYING AMENDED PETITION TO SET ASIDE ARBITRATION DECISION, OR, IN THE ALTERNATIVE PETITION FOR JUDICIAL REVIEW

Before this Court is Petitioner Thomas Knickmeyer's "Petitioner" Amended Petition to Set Aside Arbitration Decision, or, in the alternative Petition for Judicial Review filed on December 15, 2015. The matter has been fully briefed and argued.

I. SUMMARY OF ARGUMENT

Petitioner's Amended Petition to Set Aside Arbitration Decision, or, in the alternative Petition for Judicial Review "Amended Petition" sought to set aside an arbitration award, which denied his grievance challenging his termination from employment as an administrative marshal for the Eighth Judicial District Court of the State of Nevada in and for Clark County "EJDC". Relying on certain sections of a Memorandum of Understanding "MOU" between the

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Clark County Deputy Marshals Association "CCDMA" and the EJDC and Nevada Revised Statutes "NRS" Chapter 289, Petitioner argued that he was improperly denied discovery related to the underlying records supporting his 1997 and 2003 disciplinary suspensions. Petitioner also argued that the arbitrator exceeded the scope of his authority under the MOU when he upheld Petitioner's termination without specifically finding that the punishment was reasonable, considered violations of the Clark County Marshals Division Policy and Procedure Manual in finding that just cause existed for termination, and referred to outside sources to define the purpose for and limits of progressive discipline.

Respondent argued that Petitioner waived his argument that he was improperly denied discovery related to the underlying records supporting his 1997 and 2003 disciplinary suspensions. Respondent argued that the arbitrator's finding that termination was appropriate and just satisfied the reasonableness standard provided for under the MOU. Respondent also argued that the express terms of the MOU stated that violations of the Clark County Marshals Division Policy and Procedure Manual could be considered in making a finding that just cause existed to terminate Petitioner. Respondent further argued that consideration of outside sources in determining the underlying purpose for and limits of progressive discipline was well within the arbitrator's discretion under the terms of the MOU. Even though not addressed in Petitioner's briefing, Respondent argued that there was more than substantial evidence to support the factual and legal conclusions made by the arbitrator and that there was no evidence in the record that the arbitrator manifestly disregarded the law.

II. PROCEDURAL HISTORY

The termination process commenced on October 23, 2013, when Petitioner received a notice that Respondent was placing him on administrative leave and recommending termination as a result of various forms of misconduct he engaged in on January 7 and 8, 2013. (OAP, Exhibit B, EJDC_ARB 0727–29).[1] The termination process was guided by the MOU, which provided for a three-step grievance procedure. (*Id.* at EJDC_ARB 0687–707).

[1] Respondent filed the administrative record in support of its Motion to Dismiss, or in the alternative, Response to Petition to Set Aside Arbitration Award filed on February 6, 2015. Excerpts of these records supported Petitioner's Amended Petition and Respondent's opposition to the Amended Petition.

Petitioner was represented by counsel for CCDMA during the first two steps of this process and private counsel during the last step of this process.

Petitioner received a Step 1 Pre-termination meeting on November 7, 2013, before Special Hearing Master Melisa De La Garza, Esq. ("Hearing Master De La Garza"). (*Id.* at EJDC_ARB 0711). The meeting concluded without a resolution between Respondent and Petitioner. (*Id.*). Following the meeting, Hearing Master De La Garza entered an eleven page written ruling, which sustained six of the seven allegations of misconduct against Petitioner and upheld Respondent's recommendation to terminate him. (*Id.* at EJDC_ARB 0708–18). The EJDC's Court Administrator, Steven Grierson, adopted these findings on November 14, 2013, and terminated Petitioner. (*Id.* at EJDC_ARB 0681).

On November 18, 2013, Petitioner, through CCDMA counsel, appealed this decision and requested a Step 2 Post-termination meeting. (*Id.* at EJDC_ARB 0682–83). Petitioner received a Step 2 Post-termination meeting on February 5, 2014, before Bonnie Bulla ("Ms. Bulla"), who was designated by Respondent to preside over the meeting. (*Id.* at EJDC_ARB 0719). The meeting concluded without a resolution between Respondent and Petitioner. (*Id.*). After the meeting, Ms. Bulla entered an eight page written ruling, which found that Respondent had just cause to terminate Petitioner. (*Id.* at EJDC_ARB 0719–26).

Petitioner requested that the matter be submitted to arbitration. The parties selected an arbitrator under the procedures provided for in the MOU. (*Id.* at EJDC_ARB 0691). The arbitration hearing was held on September 11, 2014. (OAP, Exhibit A, Arbitration Transcript, EJDC_ARB 0001–0276). On November 3, 2014, the parties submitted written briefs in support of their respective positions. (OAP, Exhibit C, EJDC_ARB 0752). The arbitrator entered his written decision on November 24, 2014, which found that Respondent had just cause to terminate Petitioner and denied Petitioner's grievance on this basis. (*Id.* at EJDC_ARB 0752–65).

Petitioner commenced this action on December 16, 2014, by filing a Petition to Set Aside Arbitration Decision "Petition." The Petition sought an order from this Court setting aside the arbitration award. Respondent filed a Motion to Dismiss, or in the alternative,

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4/2

Response to Petition to Set Aside Arbitration Decision on February 6, 2015. Petitioner filed an opposition to the motion on March 2, 2015. Respondent's motion was heard and denied by the court on November 9, 2015. In denying the motion, the court ordered Petitioner to file an amended petition, which clarified the jurisdictional basis for judicial review. An order was entered to that effect on November 16, 2015.

Petitioner filed the Amended Petition on December 15, 2015. Respondent filed a Motion to Dismiss the Amended Petition on January 15, 2016. Petitioner filed an opposition to that motion on February 3, 2016 and Respondent filed a reply brief on February 11, 2016. Respondent's motion was heard on February 12, 2016, and denied by the court. An order was entered to that effect on February 25, 2016. Respondent was directed to file an opposition to the Amended Petition by April 15, 2016, and Petitioner was directed to file his reply brief by May 5, 2016. The briefs were timely filed and the matter was heard by this Court on May 20, 2016.

III. LEGAL STANDARD

Judicial review of an arbitration award is provided for under Article 13, Step 3(2) of the MOU. This section provides as follows:

> The arbitrator's decision will be final and binding on all parties to this Agreement as long as the arbitrator does not exceed his/her authority as set forth below and as long as the arbitrator performs his/her functions in accordance with the case law regarding labor arbitration, the provisions of the U.S. Uniform Arbitration Act, and where applicable, Nevada Revised Statutes-(NRS).

(OAP, Exhibit B, EJDC_ARB 0691). The language of this provision provides two bases to challenge an arbitration award.

First, this section of the MOU states that an arbitration award is final and binding "as long as the arbitrator does not exceed his/her authority" under its terms. (*Id.*). This standard mirrors NRS 38.241(1)(d), which states that "[u]pon motion to the court by a party to an arbitral proceeding, the court shall vacate an award made in the arbitral proceeding if: . . . an arbitrator exceeded his or her powers." Under this standard, "[c]ourts presume that arbitrators are acting within the scope of their authority." *Health Plan of Nevada, Inc. v. Rainbow*

Medical, LLC., 120 Nev. 689, 697, 100 P.3d 172, 178 (2004). Review for excess of authority is limited and "only granted in very unusual circumstances." *Id.* at 698. The party moving to vacate an arbitration award carries the burden of "demonstrating by clear and convincing evidence how the arbitrator exceeded that authority." *Id.* at 697. "Absent such a showing, courts will assume that the arbitrator acted within the scope of his or her authority and confirm the award." *Id.*

Second, this section of the MOU states that the arbitrator's decision is final and binding "as long as the arbitrator performs his/her functions in accordance with the case law regarding labor arbitration . . ." (OAP, Exhibit B, EJDC_ARB 0691). "There are two common-law grounds recognized in Nevada under which a court may review private binding arbitration awards: (1) whether the award is arbitrary, capricious, or unsupported by the agreement; and (2) whether the arbitrator manifestly disregarded the law." *Clark County Educ. Ass'n v. Clark County School Dist.*, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006). "[T]he arbitrary and capricious standard limits a reviewing court's consideration to whether the arbitrator's findings are supported by substantial evidence, while the manifest-disregard-of-the-law standard limits the reviewing court's concern to whether the arbitrator consciously ignored or missed the law." *Id.* at 342. Under the substantial evidence standard, "'[a]n arbitrator's decision must be upheld unless it is "completely irrational"'" *Wichinsky v. Mosa*, 109 Nev. 84, 90, 847 P.2d 727, 731 (1993) (quoting *French v. Merrill Lynch, Pierce, Fenner & Smith*, 784 F.2d 902, 906 (9th Cir. 1986)). Under the manifest-disregard-of-the-law standard, the moving party must demonstrate that 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 342.

The MOU also states that "[t]he Courts recognize and agree that all deputy marshals will be afforded their rights as provided for in NRS Chapter 289." (OAP, Exhibit B, EJDC_ARB 0687). NRS 289.020 through 289.120 is the Peace Officer's Bill of Rights. Under NRS 289.120, "[a]ny peace officer aggrieved by an action of the employer of the peace officer in violation of this chapter may, after exhausting any applicable internal grievance procedures, grievance procedures negotiated pursuant to chapter 288 of NRS and other administrative

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414

remedies, apply to the district court for judicial relief." This section is not specific as to the means by which judicial relief should be requested or the standard governing requests for judicial relief. Petitioner's right to judicial relief under NRS 289.120 only exists by virtue of the MOU, as NRS 289.020 through 289.120 regulates the conduct of law enforcement agencies with regard to peace officers and Respondent is not a law enforcement agency. In the absence of express procedures and standards governing an application for judicial relief under NRS 289.120, Petitioner is limited to the procedures and standards expressly provided for under the MOU, NRS Chapter 38, and Nevada common law.

IV. DISCUSSION

A. Waiver

"It is well-established that arguments raised for the first time on appeal need not be considered by [the] court." *Diamond Enterprises, Inc. v. Lau*, 113 Nev. 1376, 1378, 952 P.2d 73, 74 (1997). "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 915 (1971). Similarly, "[a]rguments not raised before the appropriate administrative tribunal . . . cannot be raised for the first time on appeal." *Carrigan v. Commission on Ethics of the State of Nevada*, 129 Adv. Op. 95, 313 P.3d 880, 887, n. 6 (2013).

The Amended Petition argued that Petitioner was improperly denied discovery of the investigative records supporting his 1997 and 2003 disciplinary suspensions. The memorandums by Judge Mosley memorializing these suspensions were admitted as a joint exhibit during the arbitration hearing. (OAP, Exhibit A, EJDC_ARB 0004; Exhibit B, EJDC_ARB 0737–38). These memorandums were part of Petitioner's personnel file, which was provided to Petitioner prior to that hearing. (OAP, Exhibit F, EJDC_ARB 0966–67). Petitioner did not receive the investigative records supporting these suspensions, which were maintained by the Clark County Office of Diversity "OOD." OOD is part of the executive branch of Clark County. While there is a question as to whether Respondent had an affirmative duty to attempt to obtain these records from OOD, this Court does not need to

reach a decision on this issue. Petitioner was required to make a complaint about or a request for these records at some time during the administrative proceedings. Petitioner did not raise this issue during the administrative proceedings, and Petitioner's arguments are waived as he failed to exhaust his administrative remedies.

Rather than seeking to address the substance of these investigations during the arbitration hearing, Petitioner argued that the 1997 and 2003 disciplinary suspensions were too remote in time to constitute earlier incidents of progressive discipline. (OAP, Exhibit C, EJDC_ARB 0765). Petitioner also argued that there was a lack of due process with respect to the administration of these suspensions. (*Id.*). The record reflects that the process for challenging Petitioner's 1997 and 2003 suspensions, if any, was different than what was provided for under the MOU. (OAP, Exhibit D, EJDC_ARB 0833; Exhibit E, EJDC_ARB 0890–95, 902–03). There was no evidence presented at any stage of the administrative proceedings that established the quality of the investigation and procedures used to discipline Petitioner in 1997 and 2003. The arbitrator found Petitioner's arguments persuasive and effectively struck this evidence from the record by not considering these suspensions as progressive forms discipline. (OAP, Exhibit C, EJDC_ARB 0765).

Review of the arbitration award is confined to issues raised during that proceeding. Petitioner did not preserve for judicial review discovery issues related to Respondents duty, if any, to attempt to obtain the investigative records supporting Petitioner's 1997 and 2003 disciplinary suspensions. Rather, the record reflects that Petitioner successfully argued for striking evidence of these suspensions from the record. Petitioner did not exhaust his administrative remedies, and his Amended Petition must be denied on this issue.

B. Statutory and Common Law Standards of Review

Review of the arbitration award is confined to the standards provided for under NRS 38.240(1)(d) and Nevada common law. While Petitioner did not make arguments to set-aside the arbitration award under Nevada common law, this Court will still consider both standards of review.

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1. Statutory Standard of Review

Under Nevada law, the arbitrator is presumed to have acted within the scope of his authority. *Health Plan of Nevada, Inc.*, 120 Nev. at 697. Petitioner carries the burden of demonstrating by clear and convincing evidence that the arbitrator exceeded his authority. *Id.* Absent such a showing, this Court must assume that the arbitrator acted within the scope of his authority and confirm the award. *Id.* A finding that the arbitrator acted in excess of his authority requires Petitioner to show that the arbitrator addressed issues "outside the scope of the governing contract." *Id.*

Petitioner argued that the arbitrator exceeded his authority by applying an incorrect standard. Specifically, Petitioner argued that the MOU required the arbitrator to make a finding that Respondent's disciplinary action was reasonable in order to reach his conclusion that just cause existed to terminate Petitioner. Article 13, Section 1(3) of the MOU provides that "[t]he decision to uphold the disciplinary action will be based on the reasonableness of the discipline imposed by the supervisor in response to the actions taken or not taken by the marshal." (OAP, Exhibit B, EJDC_ARB 0688). This section also provides that "[t]he arbitrator will consider the incident and the discipline in terms of severity of the action, evidence of progressive discipline and appropriateness of the disciplinary action." (*Id.*). The arbitrator made specific findings as to whether termination was more appropriate than progressive discipline. While the arbitrator did not make an express finding that termination was reasonable, the arbitrator still applied this standard as it required the same type of weighing analysis he engaged in to determine that Respondent's decision to terminate Petitioner was appropriate. (OAP, Exhibit C, EJDC_ARB 0762–64).

Petitioner also argued that the arbitrator improperly relied on prior arbitration decisions and legal journals to define the purpose for and application of progressive discipline. Article 13, Step 3(*1*) of the MOU states that "[t]he arbitrator shall consider and decide only the particular issues presented by the CCDMA and the County, and the decision and award shall be based solely on his/her interpretation of the application of the express terms of [the MOU]." (OAP, Exhibit B, EJDC_ARB 0692). Article 13, Step 3(2) of the MOU required the arbitrator to

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417

perform his functions in accordance with case law regarding labor arbitration. (*Id.* at EJDC_ARB 0691). Weighing the appropriateness or reasonableness of termination over progressive discipline required knowledge of the underlying purpose for and the limits of progressive discipline. Referring to legal treatises or articles, which are informed by labor arbitration law, to interpret this express term in the MOU was well within his discretion under Article 13, Step 3 of the MOU.

Petitioner finally argued that the arbitrator improperly considered his violations of certain provisions of the Clark County Marshals Division Policy and Procedure Manual as support for his findings in the arbitration award. Article 13, Section 1(3) of the MOU states that "[t]he CCDMA recognizes the need for more severe initial disciplinary action in the event of major violation of established rules, regulations or policies of the Courts." (*Id.* at EJDC_ARB 0688) Article 13, Section 1(5) of the MOU also states that "[j]ust cause may include, but not be limited to: . . . [a] violation of established departmental work rules and procedures." (*Id.*). The Clark County Marshals Division Policy and Procedure Manual falls within scope of "established rules, regulations, or policies of the Court" or "departmental work rules and procedures" that may be considered in determining whether there was just cause to terminate Petitioner.

Petitioner has not carried his burden to demonstrate by clear and convincing evidence that the arbitrator acted outside the scope of his authority. Petitioner's challenge to the arbitration award on the basis that the arbitrator exceeded his powers granted by the MOU is denied.

2. Common Law Standard of Review

a. Substantial Evidence

Under the substantial evidence standard, an arbitration award may only be set-aside if its findings are "completely irrational." *Wichinsky*, 109 Nev. at 90. While the Amended Petition did not specifically address this standard of review, it disputed the arbitrator's factual findings with respect to Petitioner's conduct on January 7 and 8, 2013. The arbitrator found that the six allegations, which formed the factual basis for the discipline imposed

418

by Respondent, were established by a preponderance of the evidence. The allegations were as follows:

1. That Petitioner said, "fuck this place" while on duty and in uniform;
2. That Petitioner while on duty and in uniform told Marshal Ellis that Director Robert Bennett was going to be fired;
3. That Petitioner referred to Lieutenant Moody as a "motherfucker" and told Marshal Ellis that he was going to throw Lieutenant Moody under the bus;
4. That Petitioner showed Marshal Ellis a copy of a civil lawsuit involving Lieutenant Moody on his phone and told him he was going to distribute a copy of the lawsuit around the courthouse;
5. That Petitioner unnecessarily scanned Ms. Litt's purse three times; and
6. That Petitioner commented to Marshal Ellis after Ms. Litt left the scanning station that, "That was the bitch who complained on me."

(OAP, Exhibit C, EJDC_ARB 0760).

In addition to these factual findings, the arbitrator found that Ms. Litt was a witness to a prior incident, which resulted in a disciplinary reprimand against Petitioner and that Ms. Litt filed a separate complaint against Petitioner alleging that Petitioner acted inappropriately toward her. (*Id.* at EJDC_ARB 0761).

There was more than substantial evidence in the record to establish these facts, which included Marshal Ellis and Ms. Litt's testimony at the arbitration hearing and the reports and/or interviews they provided during Respondent's investigation of Petitioner's conduct on January 7 and 8, 2013. (OAP, § III, 6:22–9:13). While these factual findings required the arbitrator to weigh Marshal Ellis and Ms. Litt's credibility against Petitioner's credibility, the arbitrator's role as fact finder entitled him to make these determinations in issuing the arbitration award. The record from the arbitration hearing supports the factual findings made by the arbitrator, which satisfies the substantial evidence standard.

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b. Manifest Disregard of the Law

To establish manifest disregard for the law, Petitioner must demonstrate that the arbitrator knew of a law, recognized that it required a particular result, and disregarded it. *Clark County Educ. Ass'n*, 122 Nev. at 342. Because Petitioner waived arguments as to whether Respondent had an affirmative duty to obtain the underlying investigative records supporting his 1997 and 2003 disciplinary suspensions under Article 13 of the MOU and NRS Chapter 289, Petitioner cannot establish that he notified the arbitrator of these legal issues. Petitioner was provided with Respondents records pertaining to his 1997 and 2003 disciplinary suspensions, which is all that was required by NRS Chapter 289. The arbitrator properly applied the standards of review stipulated to by the parties and provided for under the MOU as well as applicable labor law. Therefore, this Court finds that there is no evidence in the record that the arbitrator manifestly disregarded the law.

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420

Accordingly,

IT IS ORDERED THAT the Amended Petition to Set Aside Arbitration Decision, or, in the alternative Petition for Judicial Review is DENIED.

DATED this 4 day of ~~July~~ August, 2016.

Senior District Court Judge

SUBMITTED BY:
ADAM PAUL LAXALT
Attorney General

FREDERICK J. PERDOMO
Senior Deputy Attorney General
Nevada Bar No. 10714
Bureau of Litigation
Public Safety Division
100 N. Carson Street
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Attorneys for Respondent

APPROVED AS TO FORM AND CONTENT BY:

DECLINED - NO ALTERNATIVE RECEIVED AFTER 7/19/16 NRO Submission

Kirk T. Kennedy, Esq.
815 S. Casino Center Blvd
Las Vegas, NV 89101
T (702) 385-5534
Attorney for Petitioner

921

CERTIFICATE OF SERVICE

I certify I am an employee of the Office of the Attorney General, State of Nevada, and that on this 19th day of July, 2016, I caused to be served a copy of the foregoing **ORDER DENYING AMENDED PETITION TO SET ASIDE ARBITRATION DECISION, OR, IN THE ALTERNATIVE PETITION FOR JUDICIAL REVIEW**, by District Court's Electronic Filing system to:

Attorney for Petitioner:
Kirk T. Kennedy, Esq.
815 S. Casino Center Blvd
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T (702) 385-5534
Ktkennedylaw@gmail.com

An Employee of the Office of
The Attorney General

922

Office of the
Attorney General
100 N. Carson St.
Carson City, NV
89701-4717

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CLERK OF THE COURT

NOT
KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 385-5534
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

In the matter of the Petition of THOMAS KNICKMEYER, Petitioner, vs. STATE OF NEVADA, ex rel., EIGHTH JUDICIAL DISTRICT COURT, Respondent.	Case No: A-14-711200-P Dept. No: XXXII

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, that the Petitioner, THOMAS KNICKMEYER, by and through his undersigned counsel, KIRK T. KENNEDY, ESQ., appeals to the Nevada Supreme Court from the final order and decision of the district court denying the amended petition to set aside the arbitration decision or in the alternative petition for judicial review, said notice of entry of order filed on August 25, 2016. See Notice and Order Attached.

Dated this 21st day of September, 2016.

/s/Kirk T. Kennedy
KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 385-5534
Attorney for Petitioner

423

CERTIFICATE OF SERVICE

I hereby affirm that on this 21st day of September, 2016, I mailed via first class U.S. Mail to the Respondent a copy of the foregoing to:

Frederick J. Perdomo
Senior Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701

/s/Kirk T. Kennedy
Law Office of Kirk T. Kennedy

AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS

I hereby affirm that the foregoing contains no social security numbers.

Dated this 21st day of September, 2016.

/s/Kirk T. Kennedy
KIRK T. KENNEDY, ESQ.
Nevada Bar No. 5032
815 S. Casino Center Blvd.
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(702) 385-5534
Attorney for Petitioner

424

IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

THOMAS KNICKMEYER, Appellant, vs. STATE OF NEVADA ex rel. THE EIGHTH JUDICIAL DISTRICT COURT, Respondent.	)	No. 71372

APPELLANT'S APPENDIX
VOLUME 4

KIRK T. KENNEDY, ESQ.
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TABLE OF CONTENTS

PAGE:

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I hereby affirm that on this 13th day of February, 2017, I mailed via first class U.S. Mail a copy of the foregoing to the Respondent at the address below:

D. Randall Gilmer
Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101

/s/Kirk T. Kennedy
Law Office of Kirk T. Kennedy

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THOMAS KNICKMEYER, Appellant, vs. STATE OF NEVADA ex rel. EIGHTH JUDICIAL DISTRICT COURT, Respondent.	CASE NO. A-14-711200 SENIOR JUDGE DEPARTMENT **Transcript of Proceedings**

BEFORE THE HONORABLE NANCY BECKER, SENIOR DISTRICT COURT JUDGE

AMENDED PETITION TO SET ASIDE ARBITRATION DECISION

FRIDAY, MAY 20, 2016

APPEARANCES:

For the Appellant: KIRK T. KENNEDY, ESQ.

For the Respondent: FREDERICK J. PERDOMO, ESQ.
ANDRES MOSES, ESQ.

RECORDED BY: MATTHEW YARBROUGH, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

360

FRIDAY, MAY 20, 2016 AT 9:00 A.M.

THE COURT: All right. If counsel would please enter their appearances for the record, please?

MR. KENNEDY: Your Honor, good morning. Kirk Kennedy, 5032, for the petitioner, Mr. Knickmeyer, who is present.

MR. PERDOMO: Rick Perdomo for respondent, 10714, Your Honor.

MR. MOSES: Andres Moses, 12827.

THE COURT: Representing the Eighth Judicial District Court. Is that correct?

MR. MOSES: Yes, Judge.

THE COURT: Okay. All right. This is the time set for oral argument on the Amended Petition challenging the disciplinary actions that were imposed against Officer Knickmeyer.

Yes. You are standing, Mr. Kennedy?

MR. KENNEDY: Oh, I'm sorry. I was -- I thought I was about to approach.

THE COURT: You were about to -- you can come to the podium. That's quite all right.

MR. KENNEDY: I was going to approach.

THE COURT: Because we have extensive written pleadings and because we've had extensive discussions

previously with regard to the other Motions that were filed in this, I'm going to limit each side to 15 minutes. Mr. Kennedy, you may reserve any portion of that for rebuttal, should you choose to do so.

MR. KENNEDY: Thank you, Your Honor.

THE COURT: You may proceed.

MR. KENNEDY: Your Honor, I thank Your Honor, opposing counsel.

You -- as you've indicated, the -- you know, we're here after several hearings where many of these issues have at least been looked at and fleshed out somewhat in the pleadings themselves and I know you've spent a lot of time reading everything that's been submitted. So, I want to maybe just focus on a couple points and leave the rest to what's in the written word.

It's Mr. Knickmeyer's position that, under existing Nevada law -- well, first of all, we recognize that there's much deference given to an arbitration ruling. An Arbitrator has a great deference in reaching his decision, his or her decision, and the Supreme Court will not lightly overturn an arbitration or set aside an arbitration decision. However, it's our position that, under both statutory and common-law remedies that the Arbitrator manifestly disregarded the law when it comes to his application of Article 13, which was the statutory --

362

or, excuse me. The law, for lack of a better word, for this arbitration that -- the guideline for it.

THE COURT: The contract between the parties.

MR. KENNEDY: I'm sorry?

THE COURT: The contract between the parties.

MR. KENNEDY: The contract between the parties, that he was there to interpret and apply. And it's quite clear in Article 13 that -- I mean, there is a provision that said the Arbitrator, you know, cannot add to it, cannot modify it, cannot ignore it. He just has to follow it in reaching his decision. And, as you saw from my brief and in my Reply, I made much of this idea of whether the arbitration decision and the Arbitrator's ruling failed to make a reasonableness analysis. There is a provision in Article 13, which I've cited, that indicates that in evaluating and assessing the discipline imposed, it must be, keyword, reasonable.

And my interpretation of this and our petitioner's interpretation is that reasonableness requires some form of analysis that the discipline imposed is reasonable under the circumstances and those -- and it's not just -- I'm not saying that there's a magic word that the Arbitrator failed to use the word this is reasonable. And because he failed to use the word reasonable, somehow that means he must give us everything we're looking for. But it is noteworthy that

in the arbitration decision, that reasonable missed word and reasonable is not part of any word of the decision when the Arbitrator made his final ruling.

Arbitrator McLean did state that when you -- when taking everything into consideration, he found that the petitioner's conduct regarding the -- we'll call it the Amanda Litt purse incident on January 8th, was sufficiently egregious, I believe is his words, to support bypassing all forms of progressive discipline and go straight to termination. And I'm paraphrasing but, essentially, towards the end of his decision, he comes to that conclusion. But, before he gets there, and when he gets there in that decision, you don't find any assessment or any analysis that this is the most reasonable or this is -- well, not saying most reasonable because he doesn't have to say it's most reasonable. Whether it's reasonable to jump to termination. You don't see that in his written decision and that's something that in our -- it's our contention that Article 13 says the Arbitrator cannot ignore any provision of Article 13. And that's not -- that something that's in black and white of the article.

And by failing to assess in writing, and in his decision, that the -- that this discipline was reasonable, as opposed to other forms of discipline and reasonable based on the facts that he's ignored a requirement under

364

Article 13.

And we think it's not some sort of minor deal. It's actually a big deal when you're talking about taking away someone's job, which they have a property benefit in.

And, so, it's our contention that if the Arbitrator is supposed to go forward and follow Article 13, he has to follow the letter and the spirit of it and to a T. He has to dot the I's and cross the T's. And by failing to address the concept of reasonableness, he's ignored a mandate, a mandate, a mandatory provision of Article 13. And, so, that is, we believe, is the basis to set aside the arbitration decision under both NRS 38 and the common-law remedies that are cited in the caselaw as arbitrary and capricious.

I think it's more along the lines of manifest disregard of the law is what I'm sort of hanging my hat on as opposed to arbitrary and capricious standard. I'm really sort of hanging on the hat and the idea that by failing to apply reasonableness or make any assessment of it, he subconsciously disregarded his obligations under Article 13. And I think that's sort of the nut of the -- of the -- one of my main arguments on this Petition.

The other -- the argument I'd like to just briefly address is, of course, the whole concept of 289 and what does that mean? This Court had previously addressed and

365

pointed out at a hearing last year how like, I believe, it's the first sentence of Article 13 talks about how it was negotiated, at least, that 289 would be applied or considered between the District Court and the Marshal's Association. So, 289 does have some control here. It does have some application for at least an assessment as to what happened. And, as you know from my briefing and our -- the Petition and the Reply, we have contended that Mr. Knickmeyer's 289 rights were violated, essentially, from the get-go.

And I want to tie all that in because I appreciate the fact that we're here on the arbitration award, not necessarily on the step one and step two hearings. But it's our contention for purposes of the record that starting with the notice of termination that was given by Lieutenant Newsome in October, I think, of, what was it? 2013. And, then, to the step one and the step two, that prior discipline, the 1997 and the 2003 suspensions that occurred to Mr. Knickmeyer was an integral part of the very basis for the discipline and the basis for bypassing all forms of progressive discipline because you look at one of the factors, I believe, you look at in assessing discipline. Okay, what's the guy's record like? If we're going to bypass and go straight to termination, and we're going to jump over reprimand, we're going to jump over

366

suspension, and go straight to termination, what's the guy's history look like?

You know, it's no different than if you're sentencing a defendant on a criminal case. This certainly is not the case, but you have a PSI, a PSI, the major part of that PSI is the criminal history section and many times that history will form the basis of a District Court's decision about whether to send -- to give a guy probation or to send him to High Desert, depending on whether he's a one-time felon, or five-time felon, or a no -- or a zero felony.

So, that record, in both a criminal context and, in this case, a civil employment record context, is relevant. And it's our contention that, under 289 -- I think it's 289.040. I hope I'm not wrong on that. 289 requires, as a peace officer's Bill of Rights, something that every peace officer is intimately aware of in Nevada, it requires the disclosure and the right to see certain items of investigatory nature that are being used against you if you're going through a hearing. It's our contention that starting with that notice of termination which, I believe, is an exhibit in the Petition in the record, Mr. Knickmeyer was not provided the necessary elements underlying -- evidence underlying those two events, those two suspension activities, from 1997 and 2003. That

carried over to both the step one and step two hearings where he was represented by --

THE COURT: Mr. Kennedy?

MR. KENNEDY: Yes, ma'am? Your Honor.

THE COURT: You would concede, would you not, that the record indicates that the only evidence of those two previous proceedings were the memorandums that were contained in the file. Those memorandums were provided --

MR. KENNEDY: Correct.

THE COURT: -- to Officer Knickmeyer. The issue is whether or not, under 289, the Court should have obtained and provided the underlying reports and investigation that might have been maintained and still existed in the Office of Diversity, which is a part of the Human Resources Department of Clark County, and not part of the Court, or the file maintained by the Court, with regard to Officer Knickmeyer. So, your argument has been that it was the Court's responsibility to obtain those documents and provide them, even though the Office of Diversity is not part of the Court.

MR. KENNEDY: Fair point. And just -- I, first of all --

THE COURT: I'm just clarifying.

MR. KENNEDY: Yeah.

THE COURT: I'm not making a decision. I'm just

268

clarifying that there are two -- that it's very specific here. He got what was in his file. What he didn't get was what was in the Office of Diversity's file. And the issue that you've been arguing is 289 requires that the Court affirmatively takes steps to go find and give to the officer, that file, as well, because that related to those two disciplines.

MR. KENNEDY: Correct. And it was being utilized in the step one and step two hearings.

THE COURT: No. The Office of Diversity's files were not being used --

MR. KENNEDY: Right.

THE COURT: -- in the step one and step two hearings.

MR. KENNEDY: Fair point. The memorandums were received. Yes.

THE COURT: The memorandum evidencing the discipline that was imposed by Judge Mosley on those two instances was --

MR. KENNEDY: Was.

THE COURT: -- was part of the step one and step two hearings.

MR. KENNEDY: And I can see that it was also part of the joint exhibits at the arbitration hearing. So, there's no --

269

289

THE COURT: Correct.

MR. KENNEDY: Yeah. I -- for purposes of the record, it's very clear that the petitioner had the actual disciplinary -- the final memorandum notices from the step one and step two. And, then, ultimately in the arbitration, it was a joint exhibit. No doubt about that.

So, I suppose that what we're trying to say is that the other -- those disciplinary notices were clearly relied upon at the step one hearing. They were a part of Hearing Master De La Garza's decision. And, then, when you go over to the step two hearing, I know the respondent has argued that Discovery Commissioner Bulla, who sat in as a Hearing Master, did not rely on that at all. But you may have seen in my Reply, I pointed out a half dozen instances in her own decision where she's referencing the prior disciplinary actions, the prior grievance misconduct. These are her own words in her decision. So, she was continuing to rely on this prior discipline, which was part of the record, and which Mr. Knickmeyer has contended with his other counsel, Mr. Adam Levine, that he did not receive these other supportive information from a separate entity, i.e., the Office of Diversity, Fair Point.

And, I guess, the question is that: Is there an obligation for the District Court to reach out to Office of Diversity and provide this documentation to supplement the

370

memorandums it's relying on? We would contend there is. It's not a difficult process. The Human Resource Manager, I believe -- of course, I got the title wrong. I think during the relevant time frame here was Mr. Ed May, intimately related with -- as far as contact with Office of Diversity, headed by Theresa Scoopy [phonetic] at the time. There is a working relationship between the Office of Diversity and the Human Resources Office of the Eighth Judicial District Court, as far as providing the guidelines and some of the Human Resource functions for the District Court personnel and staff and that's our contention.

So, we do not believe -- this is not a case where the District Court would have to go out of its way to get this additional information from an agency. Perhaps, like a federal agency, for example, having to go to FBI or to the DEA, which might be onerous and burdensome. This is just, really, supplemental information from an office that's just a few blocks away at the Clark County Government Center for the Office of Diversity with an agency that the District Court Human Resources Office has an intimate relationship with. It's our contention that they work regularly on a number of Human Resource issues so, it's not the burden that we contend that would preclude the District Court from getting that information.

Now, I wanted to address quickly the concern with

371

Arbitrator McLean's decision where he says, on one of the last pages of the decision, I'm paraphrasing but he makes a sentence: Hey, I saw the prior discipline. I'm not relying on it. It's too remote in time. He essentially downplays it as a factor.

And, so, one could say -- and, perhaps, the responder would argue that: Hey, what are we complaining about? The Arbitrator said he didn't even look at it, didn't even consider it. It was too remote. What are you worried about? The concern is, Your Honor, that we were there at the arbitration because of the step one and step two hearing process that brought us to the door. And this is a bigger argument that, perhaps, would be heard for -- on this 289 argument, this arbitration, this Motion to Set Aside, but we're contending, as I've said in my Petition, that there has been a substantive due process violation from the get-go because Mr. Knickmeyer's had been forced to face these prior, remote, stale disciplinary actions without adequate information at step one and notice of termination, step one, step two, and at the arbitration.

So, it's our contention that, although the Arbitrator said he didn't consider it, it's too remote, it was still part of the record, still formed the basis of at least his analysis on the case.

And, you know, I kind of compare it to the

372

Arbitrator saying he didn't consider it. Kind of like at trial when something happens -- and something bad happens and the judge turns to the jury: You can disregard that remark. And that's what the order is but they're still human beings and they see it. They're aware of it if something happens in the courtroom and even though the Court says: Disregard that. Or issues a limiting instruction, the jury still -- they're still humans. They see it.

Arbitrator McLean still sees it. He's aware of it. He knows that there's this prior disciplinary history. I'm not saying he lied in his decision but I'm saying he is a human being. He's aware of this history and he references it in his arbitration. So, it's our contention that the 289 violation was an ongoing violation and that issue alone would be a separate basis to set aside the Arbitrator's ruling and decision.

So, in the summation, Your Honor, I know there's some additional arguments but that's really the core of where we're at here on the 289 issue and under -- analysis under NRS 38.241 and the common-law remedies. So, those two arguments are the nut of why we're here and we're asking the Court to grant the Petition and to set aside the arbitration ruling. And, I believe, I may be mistaken on this, if the remedy is to set aside the arbitration ruling,

373

that would necessitate setting a new arbitration hearing and I believe that's what we're requesting in front of a new, neutral Arbitrator.

Thank you very much, Your Honor.

THE COURT: Thank you. Response?

MR. PERDOMO: Good morning, Your Honor. I'd like to just briefly address some of the points that Mr. Kennedy made on behalf of the petitioner. First, he argued about a reasonableness standard. Well, in the specific section that he is referring to, there are two standards: One is appropriate and one is reasonable. And they're used interchangeably. And petitioner has not -- and the record's pretty clear that the Arbitrator made a decision in this case based on whether termination was appropriate. And petitioner has not offered any argument about how the Arbitrator could find that termination was appropriate and, then, simultaneously find that termination was unreasonable. It seems like they're interchangeable standards.

They're also interchangeable standards with the just cause standard because petitioner still hasn't argued how he could find that termination is unreasonable but, yet, the Arbitrator could find that the termination was unreasonable but, on the same token, find that there was just cause to terminate him.

374

And the standard that we're applying here is whether the standard applied by the Arbitrator was grounded in the contract and the appropriateness standard is expressly provided for under the contract. There's no indication that he acted outside the contract and -- which is what we're -- is what their argument should be. But he based his ruling based on the expressed language of the contract which is whether termination was appropriate.

THE COURT: Well, I'll address. The standard is very clear in the contract, in terms of what the Arbitrator must do. Just cause refers to whether or not there are grounds for termination. Reasonableness is the weighing function as to whether or not, given the facts and the circumstances in this particular case, termination is a reasonable discipline. They are two different things, although one -- each one involves some element of reasonableness, but they are distinct. Just cause, which is incorporated into the MOU because the MOU incorporates provisions of the Policies and Procedures Manual, and the parties below stipulated that in order to have a termination, you have to show just cause.

Whether or not that termination was reasonable discipline, in response to the actions taken or not taken by the Marshal, is the standard that the Arbitrator must determine. So, you first have to determine: Would you

375

have grounds for termination in the first place? And, if you do, is termination reasonable, vis a vi some other form of discipline under the actions taken? So, the question is simply: Did the Arbitrator consider both issues and does the record support that?

MR. PERDOMO: And I think he did. And, in that same provision, we're talking about Article 13, Section 1 -- Section 3, that expressly states that:

> The Arbitrator will consider the incident and the discipline in terms of severity of the action, evidence of progressive discipline, and appropriateness of disciplinary action.

THE COURT: Correct.

MR. PERDOMO: So, that is expressly provided for and that is the decision that he made.

THE COURT: That is correct. So, the record must show that the Arbitrator did that.

MR. PERDOMO: And he did. And the standard was applied. And I'll point the Court to the Opposition, Exhibit C, which is the arbitration award. EJDCR762 through 64, which is exactly where he applied the appropriateness standard of that decision.

THE COURT: Right.

MR. PERDOMO: So, he made that decision. So, there's no basis to overturn the case on this

376

reasonableness standard. So, just to dispel that or dispense with that argument.

Number two, petitioner argues that, at some point, the step one and step two hearings, he was not able to respond to the factual substance of those 1997 and 2003 disciplinary investigations, and I've read, and we provided to the Court the transcripts from those meetings, and there is no indication in that transcript that the substance of those investigations ever came up. There is no indication in those transcripts that petitioner ever argued that: I wanted to address the substance of those investigations.

What we see in that -- in those two -- in, specifically, the step two transcript is petitioner saying: Hey, I don't think you can consider these disciplines at all because they were too remote in time, that Clark County Office of Diversity, which he acknowledged had maintained those files, had a policy that these were confidential. So, I didn't get to review them. So, you can't consider these as progressive forms of discipline. He didn't take the position: Hey, we're talking about the factual substance of this. I don't have those files. I need these files to be able to address what is being said at these hearings. He never said that. Nor did it -- and, I think, what it comes down to is any --

THE COURT: And what was contained in those files

377

was never presented at those hearings.

MR. PERDOMO: It was never presented.

THE COURT: What was presented was the ultimate disciplinary document, the memorandum, written by Judge Mosley imposing the disciplines. That was what was admitted at the hearings.

MR. PERDOMO: That was what was admitted and, as they conceded, it was admitted as a joint exhibit. Now, they also argue: Well, hey --

THE COURT: In the arbitration hearing.

MR. PERDOMO: In the arbitration hearing, which is what we're here for is to set aside the arbitration hearing. So, you would think that if petitioner thought that the step one and step two hearings were somehow tainted by this evidence, that they would try to keep those step one and step two decisions out of the record for arbitration, but they didn't. What did they do? They admitted both of those as Joint Exhibits 2 and 3 to the arbitration. So, they agreed to admit the very decisions that they argued were tainted, which is a complete waiver by them of any argument for judicial review that somehow those decisions tainted the arbitration process.

Now, petitioner also argues that Clark County Office of Diversity was -- you know, they conceded that those files were with the Clark County Office of Diversity.

378

The NDOC, we know, provided them with the investigative file and we know that petitioner was provided with his personnel file, which contained these memorandums. The Court didn't have possession -- at least based on the record and what was discussed at the step two hearing, didn't have possession of these files.

Now, what petitioner fails to realize is, you know, just like civil litigation, there's initial disclosures and there's also request for production of documents and there are subpoenas under the Rules of Civil Procedure, 45. There's also a subpoena process under NRS Chapter 38. So, if petitioner thought that he needed these investigative files, which were not in the Court's possession, to present at the arbitration hearing, he had the procedural mechanism available to go get those files. Or he could have asked the Court for those files, or indicated somewhere in the record of the arbitration proceeding: Hey, I requested those files. You didn't give them to me. I don't think that they should -- that any of this evidence should be admitted.

But he didn't do that. Instead, he admitted both of the memorandums as a joint exhibit and didn't object to any testimony about those memorandums in the arbitration hearing. Again, a waiver. It's -- he's not preserving the issue for judicial review by not taking any action during

379

the arbitration hearing to exclude evidence of these investigations or the suspensions from the record.

Petitioner also indicated that Bonnie -- that Hearing Master Bulla relied on these suspensions in her ruling. Now, I'll tell you that petitioner has very carefully selected, you know, excerpts from these rulings, but has ignored sort of the entire substance of the ruling, which indicates on at least four -- indicates or references on at least four occasions in that ruling that she is making a ruling that her decision to terminate is based on his conduct on January 8th, 2013.

On page 3 of that ruling, and this is EJDCR721:

> Hearing Master Bulla refers to four actions of petitioner on January 8th and expressly states those four acts, when considered in their totality, constitutes sufficient conduct to warrant termination.

So, petitioner is arguing that somehow these 1997 and 2003 disciplinary suspensions were part of this decision. But, clearly, she's stating that: No. It's your conduct on January 8th that is what I find - that warrants termination.

Again, in the footnote on that same page:

> While I affirm Special Hearing Master De La Garza's finding in this regard, the conduct that I believe independently upholds the termination without progressive discipline

380

occurred on January 8th, 2013.

Petitioner cited to a sentence on page 8 of the decision, which indicates:

> The foregoing demonstrates sufficient harm under *Johnson* to support termination especially in light of his other conduct.

And petitioner argues that she was taking into account the 1997 and 2003 disciplines. But if you actually read the paragraphs before that, what she's actually talking about is petitioner's conduct towards Ms. Litt on January 8th, 2013. And the other conduct that she's referencing is on page 6, which was the Complaint that was filed against petitioner by Ms. Litt. Those -- that is what immediately proceeds that sentence and that's what was being referred to, not the 1997 and 2003 disciplinary suspensions.

And on page 8, again, petitioner relies on this -- the last sentence which says:

> Taking into account his other inappropriate conducts set forth in Special Hearing Master De La Garza's termination -- or petitioner's termination was appropriate and should stand.

However, the sentence immediately preceding that statement states that he was specifically -- that she finds that he was -- that the four instances of misconduct or

381

January 8th, 2013 was sufficient to warrant termination.

So, we have four instances where she's making it very clear that her decision to find that there is sufficient ground to terminate petitioner was based on his conduct on January 8th, 2013. It wasn't based on the 1997 and 2003 disciplinary suspensions. It's very clear.

So, the first issue that the Court addressed in its brief is the issue of waiver. And the issue of waiver is that before either a Court or administrative tribunal, you have to preserve the issues for judicial review and he hasn't done that here. And the record is clear that petitioner didn't argue, he didn't try to exclude, he didn't say: Hey, you know, Mr. Arbitrator, you're admitting these, you know, this evidence of prior discipline but I think it should be excluded because I wasn't provided the investigative files. It's not in there.

THE COURT: I think it's fair to say that there was -- that it was stipulated as a joint exhibit and that there was no argument made below, at any stage, that those two documents, the memorandums from 1997 and 2003 disciplines, should be excluded and should not be considered as evidence.

However, there was extensive argument that they could not be considered in determining whether or not there

382

was progressive discipline, nor could they be considered in determining the reasonableness of termination without any other -- or, excuse me. The reasonableness of the discipline that Clark County imposed or the Court imposed in this instance. They made extensive arguments with regard to that. And, in fact, the Arbitrator granted those arguments and did indicate that that evidence would not be considered. And, by doing so, in effect, did exclude it.

So, I would agree that there wasn't -- that it was evidence that was subsequently excluded by the Arbitrator based upon the arguments that were made and the argument wasn't: It's not admissible. Rather: You should exclude it from your decision process for the reasons that we gave.

MR. PERDOMO: That's correct. And that goes to the Court's judicial estoppel argument, is that throughout this entire process, petitioner argued that the step two hearing officer and the Arbitrator could not consider these two suspensions as progressive forms of discipline. And, now, he's taking a completely inconsistent position during this judicial review, saying: Hey, I wanted to discuss the substance of those matters and you prevented me from doing so during the step two hearing and the arbitration hearing. And, I guess, wanting to -- I guess, presumably, although the strategy is not exactly clear to me, wanting to go back and address those matters when he never indicated that he

383

wanted to address them, never indicated that he thought that they were relevant, never indicated that he wanted to, at all, respond to these matters.

So, now, we're here on judicial review and he's going: Surprise. I wanted the -- those investigative -- I wanted the investigative records and I wanted to address those matters when he never brought it up before --

THE COURT: I don't think it's entirely inconsistent. I think the issue is: I don't believe that you didn't consider them and since I believe, in fact, they were considered, now I want the opportunity to specifically address them.

MR. PERDOMO: Well, and --

THE COURT: And the issue is -- that's not necessarily inconsistent. The issue is whether or not the record supports his belief that they were considered, even though they were excluded, which would be improper if that's what the record showed.

MR. PERDOMO: The record doesn't show that.

THE COURT: I just simply said that's the argument.

MR. PERDOMO: Well, and the response is --

THE COURT: I haven't made a comment about it.

MR. PERDOMO: -- is that, number one, the two decisions that he's relying on expressly stated: Hey, I

384

don't think that this conduct is relevant. What I think is relevant is his conduct on January 8th, 2013 which --

THE COURT: January 7th and January 8th. The Arbitrator found both dates.

MR. PERDOMO: The Arbitrator -- but the conduct -- my understanding is the conduct that he -- that the Arbitrator was relying on which was the retaliatory conduct towards Ms. Litt and some of the undermining comments towards Mr. Knickmeyer's chain of command which, I believe, occurred on January 8th. Although, the record is somewhat unclear on those points.

THE COURT: All right.

MR. PERDOMO: I will concede that.

THE COURT: It was unclear to me. Some of the comments could have occurred on January the 7th.

MR. PERDOMO: Yeah.

THE COURT: It's really rather -- it's the comments the Arbitrator's decision indicates it was the comments with regard to chain of command, together with the comments with regard to the issue involving attorney Litt that lead to his belief that termination should be upheld.

MR. PERDOMO: So, it's a tough position for petitioner to take because if he didn't want that evidence excluded then why did he admit it as a joint exhibit? If he didn't want the step one and step two hearing decisions

385

to be considered by the Arbitrator, why did he admit it as a joint exhibit to the arbitration? Essentially, he's stipulating that the Arbitrator could consider these -- this evidence.

THE COURT: I don't think so. I think they were stipulating that this is the record of the proceedings.

MR. PERDOMO: But --

THE COURT: It's difficult to know what that joint stipulation meant. You can certainly argue that they were stipulating that it would be evidence.

MR. PERDOMO: But, I guess, if I'm in the petitioner's position and I think that the -- that those decisions are somewhat, you know, tainted or that the Arbitrator can't consider these suspensions, my strategy would be to exclude that evidence from the record and to take some action to exclude that evidence from the record. But there's no evidence of that in either prior to or during the arbitration.

So, I think it's a tough position to come back and say: Well, you know, the Arbitrator should not have considered this evidence when it was admitted and it was admitted as a joint exhibit.

THE COURT: Why don't you wrap up your argument?

MR. PERDOMO: So, in sum, based on the brief, there's really five points that this Court can find to

386

affirm the arbitration decision. And the first is that he waived all the arguments related to his NRS Chapter 289 rights and any rights that he asserted under the MOU by not raising those issues below. Judicial estoppel prevents him from taking an inconsistent position with respect to these investigative files on judicial review when he succeeded on his prior argument. And, ultimately, what he's asking to do is go back and address these matters which, quite frankly, any suspensions that result in three [indiscernible] 20-day suspensions, the investigative facts behind those suspensions probably will not be very flattering to the petitioner.

The standard of review was expressly provided for under the MOU. The same section says appropriate and reasonable. There is no indication that the Arbitrator acted outside the scope of the agreement. Therefore, there's no basis to find that he manifestly disregarded or ignored the contract between the parties.

Interestingly, petitioner does not address the substantial evidence standard in the Reply brief and didn't address that in his Amended Petition. So, I think this Court and the Court -- and this Court can conclude that that's not an issue, that he is conceding that substantial evidence was present to support the factual findings and the decision by the Arbitrator.

387

And, finally, the last standard is whether there was manifest disregard for the law that required a different result. And there's no evidence in the record that petitioner notified the Arbitrator of any issues with disclosure pf the -- of these two investigative records. He's not shown that the Court violated any of the cited sections under Chapter 289 or Article 13 of the MOU. And petitioner has not shown that these records, even if disclosed, mandated a different result.

And those are the five bases that this Court should uphold the arbitration decision and the Court rest its case.

Thank you.

THE COURT: Rebuttal, Mr. Kennedy?

MR. KENNEDY: Your Honor, I just wanted to point out some issues you've probably already seen but just so this proceeding's clear. The petitioner, in Exhibit 6 which is a copy of the arbitration decision attached to the amended Petition, on page 14, is where the Arbitrator indicated that the -- he found that the prior suspensions were too remote in time but:

> The Arbitrator does acknowledge the grievance's arguments over the lack of due process in the administration of these suspensions are also well taken.

388

I'm quoting that sentence. So, it is part of the record in this proceeding that the petitioner did argue against those joint exhibits, those memorandums that were part of the record from the get-go.

You know, there's a concept of completeness of the record. I heard counsel argue that somehow, I should have -- I represented Mr. Knickmeyer in the arbitration. Somehow, I should have filed a Motion to Exclude the step one and step two hearing decisions. I mean, that's sort of the law of the case. I mean, I don't know how I could -- you know, we were there at the arbitration because of those set decisions. I mean, those -- the actual decisions themselves, I don't think you can get away -- I don't see any judge excluding the actual decision from even being considered. It's part of the record. So, I don't think that's realistic to say that you should somehow try to exclude those decisions themselves.

And, then, the question of the prior discipline. You know, what would we have done with that? What could Mr. Levine have done with that? The fact is, Knickmeyer had to face this process with having to also be tainted by prior -- in nearly 20 plus year old disciplinary actions that were brought against him. It sort of taints and colors the whole proceeding and is used -- was used to justify bypassing discipline. So, you know, how could he

389