

EXHIBIT 6

EXHIBIT 6

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STATE OF NEVADA ex rel. its
8 DEPARTMENT OF TRANSPORTATION

9 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR CARSON CITY**

11 STATE OF NEVADA, ex rel. its
12 DEPARTMENT OF TRANSPORTATION

Case No. 15 OC 00275 1B

Dept. No. 2

13 Petitioner,

14 vs.

15 CHAD ZENOR,

16 Respondent.

17
18 **NOTICE OF ENTRY OF ORDER**

19 TO: Petitioner Chad Zenor and Mark Forsberg of Oshinski & Forsberg, Ltd., his counsel of record:
20 PLEASE TAKE NOTICE that on September 16, 2016, the Court entered an Order Denying
21 Motion for Attorney's Fees, a true and correct copy of which is attached to this notice as Exhibit 1.

22 DATED this 18th day of October, 2016.

23 ADAM PAUL LAXALT
Attorney General

24
25 By: *Cameron Sandenberg* for
DOMINIKA J. BATTEN
26 Deputy Attorney General
Nevada Bar No. 12258


27 Attorneys for Petitioner
28

AFFIRMATION
Pursuant to NRS 239B.030/603A.040

The undersigned does hereby affirm that the preceding document does not contain the personal information of any person pursuant to NRS 239B.030.

DATED this 18th day of October, 2016.

ADAM PAUL LAXALT
Attorney General

By 
DOMINIKA J. BATTEN
Deputy Attorney General
Nevada Bar No. 12258

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the State of Nevada, Office of the Attorney General and that on the 18th day of October, 2016, I served a true copy of the foregoing

NOTICE OF ENTRY OF ORDER by U.S. Mail and/or email to the following:

Mark Forsberg, Esq.
Rick Oshinski, Esq.
OSHINSKI & FORSBERG, LTD.
504 E. Musser Street, Suite 302
Carson City, NV 89701

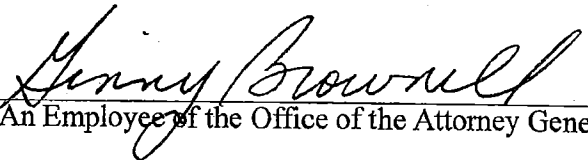
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An Employee of the Office of the Attorney General

INDEX OF EXHIBITS

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Exhibit 1 Order Denying Motion for Attorney's Fees 3 pages

EXHIBIT 1

EXHIBIT 1

REC'D & FILED

2016 SEP 16 PM 4:47

SUSAN MERRIWETHER
CLERK

BY SW DEPUTY

FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

STATE OF NEVADA, ex rel.
its DEPARTMENT OF
TRANSPORTATION,

Plaintiff,

vs.

CHAD ZENOR,

Defendant.

15 cc 00275
CASE NO. 16-DR1-00322 1B

DEPT. 2

ORDER DENYING MOTION FOR
ATTORNEY'S FEES

For the purpose of this order the court accepts the statement of facts
in Chad Zenor's Motion for Attorney's Fees.

A court cannot make an award of attorney's fees unless authorized by statute,
rule or contract. *State, Dep't of Human Resources v. Fowler*, 109 Nev. 782, 784,
858 P.2d 375 (1993). Mr. Zenor's Motion for Attorney's Fees seeks judicial
action concerning a final decision in a contested case involving an agency. NRS
233B.130(6) states in pertinent part: "The provisions of this chapter are the
exclusive means of ... judicial action concerning a final decision in a contested
case involving an agency" Chapter 233B does not contain any specific
language authorizing the award of attorney's fees in actions involving petitions
for judicial review of agency action. *Fowler* at 785. Because Chapter 233B does
not contain any specific language authorizing the award of attorney's fees and
Chapter 233B is the exclusive means of judicial action concerning final decision
in a contested case involving an agency the court cannot make an award of

1 attorney's fees.

2 Mr. Zenor's arguments regarding NRS 18.010(2)(b) and the fact that no
3 Nevada cases bar an award of attorney's fees under these circumstances are not
4 persuasive for the foregoing reasons.

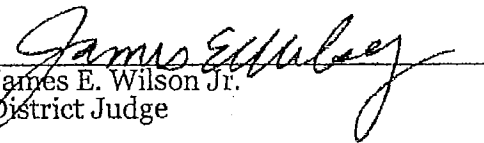
5 IT IS ORDERED:

6 The Motion for Attorney's Fees is denied.

7 September 16, 2016.

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James E. Wilson Jr.
District Judge

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Mark Forsberg, Esq.
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Dominika Batton, DAG
5420 Kietzke Lane
Reno, NV 89511



Gina Winder
Judicial Assistant

EXHIBIT 5

EXHIBIT 5

REC'D & FILED

2016 SEP 16 PM 4:47

SUSAN MERRIWETHER
CLERK

BY SW DEPUTY

FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

STATE OF NEVADA, ex rel.
its DEPARTMENT OF
TRANSPORTATION,

Plaintiff,

vs.

CHAD ZENOR,

Defendant.

150000275
CASE NO. 16-DR-00322 1B

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for judicial review of agency action. *Fowler* at 785. Because Chapter 233B does
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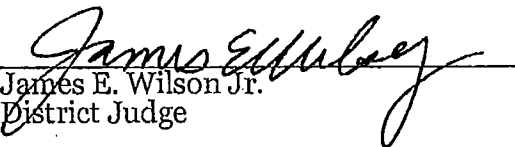
5 IT IS ORDERED:

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7 September 16, 2016.

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James E. Wilson Jr.
District Judge

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Giba Winder
Judicial Assistant

EXHIBIT 4

EXHIBIT 4

REC'D & FILED

2016 JUN 15 PM 2:23

SUSAN HERRIWETHER
CLERK

BY G. WINDER
DEPUTY

IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA, ex rel. its
DEPARTMENT OF TRANSPORTATION,

Case No. 15 OC 00275 1B

Dept. No. 2

Petitioner,

vs.

CHAD ZENOR,

Respondent.

ORDER DENYING PETITIONER'S PETITION FOR JUDICIAL REVIEW

Before the Court is the petition for judicial review brought pursuant to NRS 233B.135 by the State of Nevada, ex rel. its Department of Transportation ("NDOT") seeking to overturn the decision of an administrative hearing officer concluding that NDOT improperly terminated employee Chad Zenor based a purported disabling medical condition.

STANDARD OF REVIEW

NRS 233B.135(1)(b) provides that judicial review of an agency decision must be confined to the record created at the administrative hearing. NRS 233B.135(3) provides:

The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;

- 1 (d) Affected by other error of law;
- 2 (e) Clearly erroneous in view of the reliable, probative and substantial
- 3 evidence on the whole record; or
- 4 (f) Arbitrary or capricious or characterized by an abuse of discretion.

5 The district court reviews an administrative agency's decision for an abuse of discretion or
6 clear error. *Taylor v. Nev. Dep't of Health & Human Servs.*, 129 Nev. Adv. Op. 99, 314 P.3d 949
7 (2013). The court may also review the evidence in the record to determine if the decision was
8 supported by the evidence and to determine whether the hearing officer acted arbitrarily, capriciously,
9 or contrary to the law. *Turk v. Nevada State Prison*, 94 Nev. 101, 103, 575 P.2d 599 (1976).

10 FACTS

11 The agency decision being challenged was rendered by administrative hearing officer Charles
12 P. Cockerill. NDOT does not dispute any of the findings of fact made by the hearing officer.
13 Therefore, as a matter of law, all the findings of fact contained in the decision of the hearing officer
14 must be and are accepted by the Court.

15 The following are the findings of fact contained in the decision of the hearing officer and are
16 set forth in his decision. *ROA 1-13*.

17 Zenor was employed by NDOT as a Highway Maintenance Worker III. He suffered a work-
18 related injury on August 1, 2013, and received worker's compensation benefits as a result of his
19 injury.

20 On July 21, 2014, Zenor was directed by NDOT or its third-party worker's compensation
21 benefits administrator, CCMSI, to submit to a Functional Capacity Evaluation ("FCE"). The FCE was
22 performed by a physical therapist and signed by his approved worker's compensation treating
23 physician, Dr. Donald Huene. The FCE concluded that Zenor was not yet capable of performing the
24 activities required by his pre-injury job.

25 Based on the FCE, NDOT in August, 2014 convened a meeting that included Zenor, Certified
26 Rehabilitation Counselor Debra L. Adler and representatives of the third-party worker's
27 compensation administrator, CCMSI, to review options for Zenor, including vocational rehabilitation
28 training for a new position allowed by his physical restrictions.

Before NDOT began providing rehabilitation services to Zenor as a result of the August

1 meeting, on September 24, 2014 Dr. Huene released Zenor to full duty without restrictions, noting
2 that Zenor could wear a brace on his injured wrist as needed.

3 On October 22, 2014, Dr. Huene released Zenor to full duty without limitations or restrictions
4 and did not mention the use of a brace.

5 Zenor and his wife, Cathie Zenor, delivered the release prepared by Dr. Huene to NDOT on
6 October 22, 2014, the same date it was issued by Dr. Huene. CCMSI claims representative Tani
7 Consiglio also was aware of Zenor's release to full duty and confirmed her knowledge of the release
8 in a letter to Zenor dated October 24, 2014.

9 Ms. Consiglio testified at the hearing that the vocational rehabilitation option should not have
10 been pursued under the circumstances because CCMSI "would not do vocational rehabilitation"
11 where there is a full release to return to work.

12 As part of the vocational rehabilitation process, Adler Vocational Rehabilitation Service sent
13 letters to Zenor on September 1 and October 22, 2014 directing him to finalize a plan to return to
14 work through an approved vocational rehabilitation program or risk suspension or termination of
15 benefits pursuant to NRS 616C.601 (an incorrect citation to NAC 616C.601).

16 On September 29, 2014, five days after Dr. Huene released Zenor to full duty wearing a wrist
17 brace as needed, NDOT employee Diane Kelly sent Ms. Consiglio an e-mail stating that:

18 Employer is standing by the [July 21, 2014] FCE results *regardless of what Dr.*
19 *Huene states*, he signed off on the FCE. Subsequently, Mr. Zenor was referred to
20 voc rehab as appropriate and he needs to be working with Debra Adler in an active
21 and ongoing manner to pursue other career options available through voc rehab.
22 Mr. Zenor does not seem to have any trouble whatsoever riding around on his new
23 Harley. Last time I checked, it takes quite a bit of wrist action and strength to
24 operate these motorcycles.

25 Bracketed material and emphasis added. This e-mail shows that NDOT made a conscious decision to
26 disregard Dr. Huene's release, and also seems to contradict itself by questioning whether Zenor had
27 an injury that would prevent him from returning to his prior job.

28 On December 3, 2014, Adler sent Dr. Huene a letter seeking his approval of the vocational
rehabilitation in which Zenor was to participate. The letter stated: "Please review the information

1 contained in this letter and indicate your decision as to whether you release Mr. Zenor to perform this
2 training and subsequent employment in an administrative capacity with an emphasis in accounting.”

3 The letter listed nine restrictions without identifying the source of the restrictions, which did
4 not come from Dr. Huene. Ms. Adler does not purport to have examined Zenor and so it is evident
5 that the restrictions are derived from the now-superseded FCE. Contrary to NDOT’s assertions, the
6 letter from Ms. Adler letter did not seek approval or confirmation of the listed restrictions or that
7 Zenor was incapable of performing his pre-injury job. Rather, the letter asked that Dr. Huene either
8 approve or disapprove the proposed jobs for which Zenor was to be trained. Dr. Huene checked in a
9 space indicating his approval, not of the restrictions, but of the proposed jobs for which Zenor was to
10 be trained. He signed the letter on December 10, 2014. NDOT urges that Dr. Huene’s signature
11 approving Zenor to work as a bookkeeper is a reversal of his earlier positions going back to June of
12 2014 in which he had released Zenor to full duty. This characterization of the letter is unsupported by
13 the letter itself, which never inquires of Dr. Huene whether Zenor is able to return to his pre-injury
14 job but only to consider what his employment in the future might consist of after vocational
15 rehabilitation. The hearing officer declined to accept NDOT’s characterization of the meaning of the
16 letter, and his finding of fact in this regard cannot be disturbed by this Court, as set forth in NRS
17 233B.135(1)(b) and (3). In any event, it can hardly be contrary to the substantial evidence in this case
18 that the hearing officer gave greater weight to the diagnosis of a physician than of a vocational
19 rehabilitation purveyor or an outdated FCE prepared by a physical therapist many months before.

20 On December 23, 2014, Zenor signed an agreement prepared by NDOT which contained a
21 bullet point stating “Not able to physically perform work as a highway maintenance worker pre injury
22 work.” (sic). NDOT urges that this agreement is evidence that Zenor was not able to return to his
23 pre-injury job. This characterization is incompatible with the facts as determined by the hearing
24 officer. The hearing officer found as a matter of fact that Zenor objected to this statement being
25 included in the agreement, but signed when Ms. Adler threatened him with dismissal from the
26 rehabilitation program if he didn’t sign the document as prepared. Moreover, NDOT conceded at the
27 hearing that this agreement did not waive any of Zenor’s rights under NAC 284.611 relating to a
28 medical discharge from employment.

1 Zenor then participated in vocational rehabilitation.

2 NDOT next sent Zenor a letter dated December 31, 2014 stating:

3 We regret to inform you that the District will not be able to continue to approve
4 leave without pay status indefinitely . . . *If you are unable to provide us with a*
5 *full duty work release*, we will be placed in a regrettable position in which we
6 must, in accordance with NAC 284.611, initiate separation due to a physical
7 disorder.

8 The letter was signed by NDOT Highway Maintenance Manager Steve Williams but prepared by
9 NDOT Human Relations Manager Kimberly King for Williams's signature. As of the date of the
10 letter, Zenor had long since delivered the October 22, 2014 release to full duty to NDOT, and NDOT
11 also had the earlier release to full duty in its possession. Nevertheless, Zenor again provided a copy
12 of the release to NDOT in response to the letter.

13 On June 1, 2015 NDOT, through Ms. King, provided Zenor a formal written notification that
14 NDOT was pursuing separation of his employment under NAC 284.611 based on "the independent
15 functional capacity evaluation . . . which specifies your permanent physical limitations." This letter
16 did not acknowledge the existence of the October 22, 2014 release. In his decision, the hearing
17 officer noted that Ms. King admitted in her testimony that nowhere in the July 21, 2014 FCE were
18 there described any "permanent physical limitations."

19 On June 5, 2015, an NDOT official gave notice to Zenor that an administrative services officer
20 would conduct a hearing regarding his separation from service. The notice again relied solely on the
21 July 21, 2014 FCE and disregarded the October 22, 2014 release. At the hearing, NDOT did not
22 produce or introduce the October 22, 2014 release, persisting in its position that the FCE was the
23 dispositive record of Zenor's condition. After the hearing, on June 24, 2015, NDOT Deputy Director
24 Tracy Larkin-Thomason issued formal notice to Zenor that he was separated from service pursuant to
25 NAC 284.611 effective June 26, 2015. NDOT based its decision to terminate Zenor on "your
26 inability to perform the essential functions of your position due to medical reasons."

27 NDOT has insisted throughout these proceedings that the FCE is Dr. Huene's dispositive
28 statement regarding of Zenor's ability to return to unrestricted employment in his pre-injury job. For

1 example, on June 1, 2015, NDOT Human Relations Director King wrote Zenor a letter giving notice
2 of its intent to terminate Zenor, stating as follows:

3 The Nevada Department of Transportation (NDOT) is in receipt of the
4 independent functional capacity evaluation performed by Rhonda Fiorillo, PT,
5 MPT with Back In Motion Physical Therapy on July 21, 2014, which specifies
6 your permanent physical limitations. The Department reviewed your limitations
7 and determined that you are unable to return to your previous position as part of
8 your Workers' Compensation case . . . pursuant to NAC 284.416, the Department
9 of Transportation is pursuing your separation from state service for medical
10 reasons. . . It is with deepest regret, I must inform you the Department will
11 pursue separation under NAC 284.611.

12 King's letter misrepresents the facts in the record and as determined by the hearing officer.
13 Dr. Huene's sign-off on the FCE was not his last assessment of Zenor. Dr. Huene saw Zenor again on
14 September 24, 2014. His dictation prepared as a result of that visit states in pertinent part:

15 He comes in emergently per the insurance company. His case manager
16 accompanies him and is concerned about the FCE report. The problem is that the
17 FCE was done in July 2014 and his current work restrictions are different than the
18 FCE...I have reviewed the FCE; again, this was done in July 2014. He was not
19 able to demonstrate the ability to safely perform the physical demands of his pre-
20 injury job; however, now his wrist is in better function. I do not see anywhere
21 where I stated he was permanent and stationary prior to this FCE being
22 done...Again, I have gone over the fact that he is not permanent and stationary
23 per my records. I have gone over with him and his case manager that the FCE
24 was done on July 21, 2014 and that he was not permanent and stationary at that
25 point and he obviously has better function of his wrist at this point. I still do not
26 think he is permanent and stationary. He has tendonitis. I have given him a home
27 exercise program. If he does not improve, we will send him to occupational hand
28 therapy and ultimately we may do an injection of the ECU tendon; fortunately, his
carpal instability is not causing a significant problem. We will keep him on work
restrictions, brace on as necessary; otherwise, he can use it fully.

29 NDOT does not deny that it knew of Dr. Huene's September 24, 2014 assessment. And,
30 although it clearly supersedes and repudiates his opinion that became part of the FCE, NDOT
31 continued to rely on the FCE almost a year later when it informed Zenor that he was being separated
32 from service based on the FCE and continues to rely on it in its petition now before the Court.

33 Dr. Huene saw Zenor again on October 22, 2014. His dictation from that visit indicates
34 "improving ECU tendonitis." His recommendation states:

1 At this point, I think he can do full duties without limitations. I have warned him
2 about worsening and ultimately requiring some form of wrist fusion. I think he
3 has reached permanent stationary status and a rating can be performed. This was
4 discussed with his case manager. We will see him back as necessary. I explained
5 to him that, if he had worsening, his claim can be re-opened at that time.
6 Despite being fully aware that Zenor had been released to full duty, NDOT plowed ahead with
7 efforts to place him in vocational rehabilitation and then terminated him notwithstanding evidence
8 that the FCE was no longer an accurate assessment of Zenor.

9 NDOT next relies on a document signed by Zenor called a School Program Agreement dated
10 December 11, 2014 and signed by Zenor on December 23, 2014 as proof that he could not return to
11 work at his former position because it contained the following statement above Zenor's signature:
12 "Not able to physically perform work as highway maintenance preinjury work." [sic.]

13 The hearing officer found as a matter of fact that Zenor signed this document under protest
14 over the content of the statement above his signature but signed when Ms. Adler again warned him
15 about being dismissed from the vocational rehabilitation program if he didn't sign. The hearing
16 officer accepted as true Zenor's testimony that he was doing what he could to get back to work and
17 provide for his family, and found there to be substantial evidence that Zenor had no realistic choice
18 but to sign the School Program Agreement.

19 **NDOT'S FAILURE TO FOLLOW NAC 284.611**

20 NDOT claims to have terminated Zenor under procedures set forth in NAC 284.611, which
21 provides:

22 1. Before separating an employee because of a physical, mental or emotional
23 disorder which results in the inability of the employee to perform the essential
24 functions of his or her job, the appointing authority must:

25 (a) Verify with the employee's physician or by an independent medical
26 evaluation paid for by the appointing authority that the condition does not, or is
27 not expected to, respond to treatment or that an extended absence from work will
28 be required;

(b) Determine whether reasonable accommodation can be made to enable
the employee to perform the essential functions of his or her job;

(c) Make a request to the administrator of the Rehabilitation Division of
the Department of Employment, Training and Rehabilitation to obtain the services
provided by that Division, or if the employee is receiving worker's compensation,
request the services of the rehabilitation provider, to evaluate the employee's
condition and to provide any rehabilitative services possible; and

1 (d) Ensure that all reasonable efforts have been made to retain the
2 employee.

3 NDOT did not comply with the administrative code provisions governing Zenor's separation.
4 First, when it commenced separation proceedings in January of 2015, it already had knowledge that
5 Zenor had been cleared by his treating physician to return to full duty in his pre-injury position. The
6 evidence on this point in the record is substantial and NDOT does not and cannot dispute it.
7 Therefore, NDOT was not allowed as a matter of law to invoke the procedures set forth in NAC
8 281.611 because it could not terminate Zenor for a physical disorder that would result in his inability
9 to perform the essential functions of his job. This Court is not to weigh the evidence that is in the
10 record, but only to determine whether substantial evidence supports the decision of the hearing
11 officer. The decision must be upheld even if there is substantial evidence supporting conflicting
12 versions of the facts. *Robinson Transp. Co. v. Public Serv. Comm'n*, 39 Wis. 2d 653, 658, 159
13 N.W.3d 636, 638 (1968); *Dias v. Elique*, 436 F.3d 1125, 1130 (9th Cir. 2006). Thus, notwithstanding
14 NDOT's strained argument that the FCE and the vocational rehabilitation plan show otherwise, Dr.
15 Huene's repeated releases of Zenor to full duty constitute substantial evidence, especially when Dr.
16 Huene clearly repudiated his assessment of Zenor at the time of the FCE based on Zenor's steady
17 improvement thereafter.

18 Since NDOT could not terminate Zenor under the circumstances, no further argument is
19 necessary and NDOT's petition can and is denied on that basis alone.

20 However, even if Zenor had a physical condition that would disqualify him from working at
21 his pre-injury job, NDOT did not follow the procedures set forth in the administrative code to
22 properly separate him from service for medical reasons. Under NAC 284.611(1) (a-d), a state
23 employer is required to take each of four steps before terminating an employment because of a
24 physical condition. First, it must verify with the employee's treating *physician* or by an independent
25 medical evaluation that the condition does not or is not expected to respond to treatment or that an
26 extended absence from work will be required. NDOT is not permitted to rely on an evaluation by
27 anyone other than a physician -- not a physical therapist and not a vocational rehabilitation provider.
28 In fact, NDOT relied on the non-physician preparers of the FCE and the rehabilitation agreement.

1 When NDOT commenced proceedings to terminate Zenor, it made no effort to verify with Dr. Huene
2 that Zenor could not work. As set forth above, the FCE had been expressly repudiated by Dr. Huene
3 in September of 2014, long before NDOT initiated separation proceedings. Similarly, the
4 rehabilitation plan simply does not mean what NDOT asserts. Dr. Huene was never asked as part of
5 that process to validate or confirm the listed restrictions in the rehabilitation plan which, in any event,
6 were drawn entirely from the outdated FCE. Rather, he was asked to render an opinion about whether
7 Zenor could, in his current condition, work as a bookkeeper. Dr. Huene knew that Zenor was not
8 physically restricted from these tasks and approved the plan. NDOT's reliance on the FCE and
9 rehabilitation plan is misplaced. Had NDOT complied with this provision of the administrative code,
10 Zenor would not and could not have been terminated. NDOT did not comply with NAC 284.611(a).

11 Nor is there any evidence in the record that NDOT made any effort to accommodate Zenor if
12 it believed that he had a disabling physical condition. NDOT argues in its petition at length regarding
13 the fact that Dr. Huene released Zenor at one time to work to full duty with a brace, but there is
14 absolutely no evidence showing why, even if that were true, he could not have been accommodated in
15 his pre-injury job. The fact is that NDOT simply made no such effort and therefore did not comply
16 with NAC 284.611(b).

17 The record is also bereft of evidence that NDOT ensured that all reasonable efforts were made
18 to retain the employee as required by subsection (d). NAC 284.611 requires that all of the steps be
19 taken before an employee is terminated. Failure to take one of the steps is fatal to the process. NDOT
20 failed to carry out three of the four.

21 DECISION

22 Chad Zenor was cleared to return to full duty on October 22, 2014, at the latest. NDOT knew
23 he was fit for duty, but without justification required him to participate in vocational rehabilitation.
24 There is no evidence in the record that Zenor received any benefit from the training. NDOT failed to
25 return Zenor to his pre-injury job even though it knew he was fit for duty. Because NDOT did not
26 comply with the provisions of NAC 284.611, it lacked just cause to terminate Zenor and NDOT's
27 petition must be denied on that basis.
28

1 This Court must rely on the facts as determined by the hearing officer and the record of the
2 administrative hearing in reaching its decision. It may not weigh the evidence. When applying this
3 standard, there is nothing to demonstrate that the hearing officer committed clear error, abused his
4 discretion or acted arbitrarily in reversing Zenor's termination. The decision of the hearing officer is
5 therefore upheld. NDOT is hereby ordered to comply with the decision and make Zenor whole,
6 putting him in the same position he would have enjoyed had NDOT not improperly caused him to
7 enter vocational rehabilitation and then terminated. The decision of the hearing office and of this
8 Court mean that he should suffer no financial impact as a result of NDOT's misconduct, including the
9 necessity of defending against NDOT's petition for judicial review. Zenor is therefore given leave to
10 file a motion for attorney's fees and costs.

11 IT IS SO ORDERED.

12 Dated this 13 day of June, 2016.

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16 James E. Eulsey
17 JUDGE OF DISTRICT COURT
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Submitted by:
Mark Forsberg, Esq.
Oshinski & Forsberg, Ltd.

EXHIBIT 3

EXHIBIT 3

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IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA, ex rel. its
DEPARTMENT OF TRANSPORTATION,

Case No. 15 OC 00275 1B

Dept. No. 1

Petitioner,

vs.

CHAD ZENOR,

Respondent.

RESPONDENT'S ANSWERING BRIEF

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1 **TABLE OF AUTHORITIES**

2 **CASES:**

3 *Dias v. Elique,*
4 436 F.3d 1125, 1130 (9th Cir. 2006)..... 15
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6 *Robinson Transp. Co. v. Public Serv. Comm'n,*
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13 94 Nev. 101, 103, 575 P.2d 599 (1976).....13

14 **STATUTES:**

15 NAC 281.61115
16 NAC 284.611 2, 6, 7, 12, 13, 14, 15, 16, 17
17 NAC 616C.601.....5
18 NRS 233B.1353, 11, 12
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COMES NOW Respondent Chad Zenor, by and through his counsel, Rick Oshinski, Esq., Mark Forsberg, Esq. and Oshinski & Forsberg, Ltd., and hereby responds to Petitioner's Opening Brief.

I.

JURISDICTIONAL STATEMENT

Respondent agrees with the jurisdictional statement set forth in Petitioner's brief.

II.

STATEMENT OF THE ISSUE

Did the hearing officer commit clear error or abuse his discretion in finding that the Nevada Department of Transportation (hereinafter "NDOT") improperly terminated Respondent Chad Zenor's employment because of a physical disorder when NDOT knew at the time it did so that a physician had released Zenor to full and unrestricted duty?

III.

STATEMENT OF THE CASE

As set forth in Petitioner's Opening Brief and the Findings of Fact in the Hearing Officer's Decision, Respondent Chad Zenor ("Zenor" and/or "Respondent") was employed by NDOT as a Highway Maintenance Worker III. He suffered a work-related injury on August 1, 2013. Zenor received worker's compensation benefits as a result of his work-related injury. Zenor was assigned light duty from August 2, 2013 until approximately October 31, 2013, when he began taking worker's compensation leave. In July of 2014, Zenor submitted to a Functional Capacity Evaluation (hereinafter "FCE") performed by a physical therapist and signed by his worker's compensation physician, Dr. Donald Huene, who found that Zenor was unable to return to work as a Highway Maintenance Worker at that time.

However, on September 24, 2014, Dr. Huene released Zenor to full duty without restrictions, noting that Zenor could wear a brace on his injured wrist as needed. On October 22, 2014, Dr. Huene released Zenor to full duty without limitations or

1 restrictions.

2 Nonetheless, NDOT insisted that Zenor participate in vocational rehabilitation
3 based on the now superseded FCE. Under pressure from NDOT, on December 23, 2014,
4 notwithstanding the fact that he had twice been released to full and unrestricted duty by
5 Dr. Huene, Zenor signed a document prepared by NDOT in which he agreed to
6 participate in vocational rehabilitation. This agreement was entitled "School Program
7 Agreement." Part of the agreement stated that Zenor was "not able to physically perform
8 work as a highway maintenance preinjury work." Zenor objected to this statement but
9 signed the agreement after he was advised by an agent of NDOT that if he did not
10 participate in vocational rehabilitation and sign the document, he would be dismissed
11 from the program. In fact, Zenor had twice been provided letters, first on November 8,
12 2014 and again on December 28, 2014, warning him that anyone who rejected a suitable
13 program of vocational rehabilitation rejects employment which is within his physical
14 limitations as prescribed by a physician or refuses to cooperate with the insurer in the
15 development of a program of vocational rehabilitation or a search for a job, is subject to
16 suspension or termination of vocational rehabilitation benefits. The hearing officer
17 found that there was substantial evidence that Zenor had no realistic choice but to sign
18 the December 11 School Program Agreement.

19 In complete disregard for the physician's full release of Zenor to duty as a
20 Highway Maintenance Worker, NDOT commenced proceedings under NAC 284.611 to
21 separate Zenor from service on the ground that he was physically unable to return to
22 work as Highway Maintenance Worker. Zenor ultimately was terminated on June 26,
23 2015.

24 Zenor appealed his termination. After an administrative hearing before Hearing
25 Officer Charles P. Cockerill, the hearing officer determined that there was substantial
26 evidence that NDOT failed or refused to comply with the requirements of NAC
27 284.611(1)(a) which requires that an employer must verify with the employee's
28 physician or by an independent medical evaluation that the condition will not respond to

1 treatment and that an extended absence of work will be required, and that NDOT ignored
2 Dr. Huene's October 22 release and failed to return Zenor to work.

3 The hearing officer granted Zenor's appeal and ordered NDOT to *immediately*
4 reinstate Zenor to his former position at NDOT and to "make Mr. Zenor *whole*"
5 [emphasis added] by paying him the appropriate back pay and benefits retroactive to
6 June 26, 2015 with setoff for any interim earnings or other benefits Zenor received as a
7 result of his vocational rehabilitation training program and/or other employment
8 following June 26, 2015 and prior to his reinstatement.

9 The hearing officer's decision is dated November 23, 2015. NDOT neither
10 immediately reinstated Zenor nor paid him his back pay and other benefits, nor did it
11 offer an explanation for its failure to do so. Instead, NDOT petitioned for judicial review
12 filings its petition on December 21, 2015. At the same time it moved for a stay pending
13 appeal, which this Court denied by its order of March 1, 2016, in which it ordered NDOT
14 to comply with the decision of the hearing officer by paying back pay as required by the
15 decision and by returning Zenor to work immediately. NDOT directed Zenor to return
16 to work. He did so, for one day, and then tendered his resignation. NDOT has not, as of
17 the date of this responding brief, complied with the decision of the hearing officer or the
18 order of this Court to make Zenor whole by paying him back pay and other benefits, nor
19 has it offered any explanation for its failure to do so.

20 IV.

21 FACTS

22 NRS 233B.131(3) provides that in conducting judicial review of an agency action
23 (here, the decision of the hearing officer requiring NDOT to return Zenor to work and
24 pay him back wages) the court shall not substitute its judgment for that of the agency as
25 to the weight of evidence on a question of fact. Judicial review of a final agency decision
26 must be confined to the record of the administrative proceeding. *NRS 233B.135(1)(b)*.
27 NRS 233B.135(3) provides that the court "shall not substitute its judgment for that of the
28 agency as to the weight of evidence on a question of fact." Here, the agency's decision

1 was rendered by the administrative hearing officer. NDOT does not dispute any of the
2 findings of fact made by the hearing officer. Therefore, as a matter of law, all the
3 findings of fact contained in the decision of the hearing officer must be accepted by the
4 Court.

5 The following are the findings of fact contained in the decision of the hearing
6 officer and are set forth in his decision. *ROA 1-13*.

7 Respondent Chad Zenor ("Respondent" or Zenor") was employed by the Nevada
8 Department of Transportation ("NDOT") as a Highway Maintenance Worker III and
9 suffered a work-related injury on August 1, 2013. He received worker's compensation
10 benefits as a result of his work-related injury.

11 On July 21, 2014, Respondent was subjected to a Functional Capacity Evaluation
12 ("FCE") performed by a physical therapist and signed by his approved worker's
13 compensation treating physician, Dr. Huene, which determined that he was not yet
14 capable of performing the activities required by his pre-injury job.

15 Based on the FCE, NDOT in August, 2014 convened a meeting that included
16 Respondent, Certified Rehabilitation Counselor Debra L. Adler and representatives of
17 the third-party worker's compensation administrator, CCMSI, to review options for
18 Zenor, including vocational rehabilitation training for a new position allowed by his
19 physical restrictions.

20 However, on September 24, 2014, Dr. Huene released Zenor to full duty without
21 restrictions, noting that Zenor could wear a brace on his injured wrist as needed.

22 On October 22, 2014, Dr. Huene released Zenor to full duty without limitations or
23 restrictions.

24 Zenor and his wife, Cathie Zenor, delivered the release prepared by Dr. Huene to
25 NDOT on October 22, 2014, the same date it was issued by Dr. Huene. CCMSI claims
26 representative Tani Consiglio also was aware of Zenor's release to full duty and
27 confirmed her knowledge of the release in a letter to Zenor dated October 24, 2014.

28 The hearing officer found, based on the evidence before him, that CCMSI and

1 NDOT were both aware that Zenor had been released to full duty during the period of
2 time that Zenor was undergoing vocational rehabilitation. Ms. Consiglio testified that
3 the vocational rehabilitation option should not have been pursued under the
4 circumstances because we "would not do vocational rehabilitation" where there is a full
5 release to return to work.

6 Nonetheless, NDOT did not return Zenor to work and instead pursued vocational
7 rehabilitation. As part of that process, correspondence from Adler Vocational
8 Rehabilitation Service directed Zenor to finalize a plan to return to work through an
9 approved vocational rehabilitation program or risk suspension or termination pursuant to
10 NRS 616C.601, an incorrect citation to NAC 616C.601.

11 NDOT refused to return Zenor to work, notwithstanding the full release given by
12 Dr. Huene. In fact, on September 29, 2014, after Dr. Huene released Zenor to full duty
13 wearing a wrist brace as needed, NDOT employee Diane Kelly sent Ms. Consiglio an e-
14 mail stating that:

15 Employer is standing by the [July 21, 2014] FCE results *regardless of*
16 *what Dr. Huene states*, he signed off on the FCE. Subsequently, Mr.
17 Zenor was referred to voc rehab as appropriate and he needs to be
18 working with Debra Adler in an active and ongoing manner to pursue
19 other career options available through voc rehab. Mr. Zenor does not
20 seem to have any trouble whatsoever riding around on his new Harley.
Last time I checked, it takes quite a bit of wrist action and strength to
operate these motorcycles.

21
22 Bracketed material and emphasis added. This e-mail shows that NDOT made a conscious
23 decision to disregard the release to duty without restriction by Dr. Huene, and also,
24 disingenuously, seems to question whether Zenor has an injury that would prevent him
25 from returning to his prior job, noting the wrist strength required to ride a motorcycle.

26 At the request of NDOT, Dr. Huene medically approved Zenor to participate in
27 vocational rehabilitation. Dr. Huene's approval, of course, was not inconsistent with his
28 previous assessment of Zenor since he had released him to unrestricted full duty in his

1 prior job.

2 On December 23, 2014, Zenor signed an agreement dated December 11 and
3 prepared by NDOT which contained a bullet point stating "Not able to physically
4 perform work as a highway maintenance worker pre injury work." (sic). The hearing
5 officer found as a matter of fact that Zenor objected to this statement being included in
6 the agreement, but signed when Ms. Adler threatened him with dismissal from the
7 rehabilitation program if he didn't sign the document as prepared. NDOT conceded at
8 the hearing that this agreement did not waive any of Zenor's rights under NAC 284.611.

9 Despite having in its possession the September 24, 2014 release to full duty
10 without restrictions with the use of a brace as needed, and the October 22, 2014 release
11 to full duty with no restrictions, NDOT sent Zenor a letter dated December 31, 2014 (AX
12 12¹) stating:

13 We regret to inform you that the District will not be able to continue to
14 approve leave without pay status indefinitely . . . *If you are unable to*
15 *provide us with a full duty work release*, we will be placed in a
16 regrettable position in which we must, in accordance with NAC
284.611, initiate separation due to a physical disorder.

17 The letter was signed by NDOT Highway Maintenance Manager Steve Williams but
18 prepared by NDOT Human Relations Manager Kimberly King for Williams' signature.
19 At the time the letter was written, Zenor had long since delivered the October 22, 2014
20 release to full duty to NDOT and NDOT also had the earlier release to full duty in its
21 possession. Still, he again provided a copy of the release to NDOT in response to the
22 letter. The letter from Williams to Zenor misstates the law. Nothing in NAC 284.611 or
23 any other code provision or statute provides that the employer "*must*, in accordance with
24 NAC 284.611, initiate separation due to physical disorder." What NDOT *was* required
25

26
27 ¹ NDOT did not serve a copy of the Record on Appeal on counsel for Zenor. Therefore, exhibits
28 denominated with exhibit numbers beginning with AX are in the ROA beginning at page 216 and
proceed in sequential order. Exhibits denominated SX are in the ROA beginning at page 456 and are
in sequential order.

1 to do was follow the procedure set forth in the regulation. It was not required to terminate
2 Zenor.

3 Despite its undisputed knowledge that Zenor had twice been released to full and
4 unrestricted duty as a Highway Maintenance Worker, on June 1, 2015 NDOT, through
5 Ms. King, provided Zenor a formal written notification that NDOT was pursuing
6 separation of his employment under NAC 284.611 based on "the independent functional
7 capacity evaluation . . . which specifies your permanent physical limitations." This letter
8 did not acknowledge the existence of the October 22, 2014 release. In his decision, the
9 hearing officer noted that Ms. King admitted in her testimony that nowhere in the July
10 21, 2014 FCE were there described any "permanent physical limitations."

11 On June 5, 2015, Administrator II Thor Dyson gave notice to Zenor that an
12 administrative services officer would conduct a hearing regarding his separation from
13 service. The notice again relied solely on the July 21, 2014 FCE and did not mention the
14 October 22, 2014 release. At the hearing, NDOT did not provide the hearing officer with
15 a copy of the October 22, 2014 release for consideration by the administrative services
16 officer. After the hearing, on June 24, 2015, NDOT Deputy Director Tracy Larkin-
17 Thomason issued formal notice to Zenor that he was separated from service pursuant to
18 NAC 284.611 effective June 26, 2015. Despite obviously not considering the October
19 22, 2014 release to full duty, NDOT based its decision to terminate Zenor on "your
20 inability to perform the essential functions of your position due to medical reasons."

21 Despite the findings of fact and in the absence of reference to any other evidence
22 or testimony from the record below, NDOT argued in the motion for stay pending appeal
23 that:

24 It is Petitioner's position that Respondent has repeatedly admitted that
25 he cannot perform the duties of a Highway Services Worker III; that he
26 has not been cleared to perform the duties of a Highway Services
27 Worker III, and that the doctor's note upon which he relies is rendered
28 moot by a later dated note from the same physician, endorsing the
statement that Respondent cannot perform the duties of a Highway
Services Worker III.

1 NDOT also asserted that "Respondent has been determined incapable of performing the
2 essential functions of the position."

3 The evidentiary record is in accord with the findings of fact made by the hearing
4 officer. On July 21, 2014, Zenor was administered a FCE, *ROA Vol. 1, pp. 34-35; 230-*
5 *235*. The FCE concluded that Zenor could not perform his pre-injury job as of that date.
6 Dr. Huene signed the FCE although Dr. Huene had previously released Zenor to light
7 duty with a wrist brace (*ROA Vol. 1, pp. 112-113; 159*) and to full duty without
8 restrictions, including eliminating the need for a wrist brace (*ROA Vol. 1, pp. 261-263*),
9 he nonetheless signed the FCE in a manner suggesting that he approved of its
10 conclusions. NDOT deems the FCE to be Dr. Huene's final word on the subject of
11 Zenor's ability to return to unrestricted employment in his pre-injury job. In fact, on June
12 1, 2015, NDOT Human Relations Director Kimberly King wrote Zenor a letter stating
13 as follows:

14 The Nevada Department of Transportation (NDOT) is in receipt of the
15 independent functional capacity evaluation performed by Rhonda
16 Fiorillo, PT, MPT with Back In Motion Physical Therapy on July 21,
17 2014, which specifies your permanent physical limitations. The
18 Department reviewed your limitations and determined that you are
19 unable to return to your previous position as part of your Workers'
20 Compensation case . . . pursuant to NAC 284.416, the Department of
21 Transportation is pursuing your separation from state service for
22 medical reasons. . . It is with deepest regret, I must inform you the
23 Department will pursue separation under NAC 284.611.

24 *SX 004.*

25 King's letter misrepresents the facts in the Record on Appeal and as determined
26 by the hearing officer. In fact, Dr. Huene's sign off on the FCE was not his last
27 assessment of Zenor. Dr. Huene saw Zenor again on September 24, 2014. His dictation
28 prepared as a result of that visit, *ROA Vol. 1, pp. 52; 267-271*, states in pertinent part:

He comes in emergently per the insurance company. His case manager
accompanies him and is concerned about the FCE report. The problem
is that the FCE was done in July 2014 and his current work restrictions
are different than the FCE...I have reviewed the FCE; again, this was

1 done in July 2014. He was not able to demonstrate the ability to safely
2 perform the physical demands of his pre-injury job; however, now his
3 wrist is in better function. I do not see anywhere where I stated he was
4 permanent and stationary prior to this FCE being done...Again, I have
5 gone over the fact that he is not permanent and stationary per my
6 records. I have gone over with him and his case manager that the FCE
7 was done on July 21, 2014 and that he was not permanent and stationary
8 at that point and he obviously has better function of his wrist at this
9 point. I still do not think he is permanent and stationary. He has
10 tendonitis. I have given him a home exercise program. If he does not
11 improve, we will send him to occupational hand therapy and ultimately
12 we may do an injection of the ECU tendon; fortunately, his carpal
13 instability is not causing a significant problem. We will keep him on
14 work restrictions, brace on as necessary; otherwise, he can use it fully.

15 NDOT does not deny that it knew of Dr. Huene's September 24, 2014 assessment.
16 And, although it clearly supersedes and repudiates his opinion that became part of the
17 FCE, NDOT disingenuously continued to rely on the FCE almost a year later when it
18 informed Zenor that he was being separated from service based on the FCE and continues
19 to rely on it in its petition now before the Court.

20 Dr. Huene saw Zenor again on October 22, 2014. His dictation from that visit
21 indicates "improving ECU tendonitis." His recommendation states:

22 At this point, I think he can do full duties without limitations. I have
23 warned him about worsening and ultimately requiring some form of
24 wrist fusion. I think he has reached permanent stationary status and a
25 rating can be performed. This was discussed with his case manager.
26 We will see him back as necessary. I explained to him that, if he had
27 worsening, his claim can be re-opened at that time.

28 *Id.* NDOT expresses confusion regarding Dr. Huene's recommendation because it states
that a "rating" can be performed. Dr. Huene's recommendation is straightforward and
complies with typical worker's compensation procedure. Dr. Huene is concluding that
Zenor's injury is stationary and stable, meaning that it is unlikely to improve further nor
is it likely to regress. However, since he has some, but not incapacitating, ongoing

1 deficits, he is entitled to be rated for his permanent partial disability. In fact, Dr. Huene's
2 October 22, 2014 dictation was not confusing to third party administrator CCMSI. On
3 October 24, 2014, CCMSI sent a letter to Zenor acknowledging that Zenor had
4 completed the medical treatment for his work-related injury. *AX 15*. The letter
5 recognizes Dr. Huene's release and conclusion that his treatment of Zenor had
6 concluded. The letter stated: "We recently received a report indicating that you
7 completed your medical treatment for your work related injury. Prior to closing your
8 claim we would like to schedule you for an impairment evaluation." *Id.* The letter was
9 signed by Tani Consiglio, the claims representative for Zenor's case at CCMSI. The
10 letter was copied to NDOT. Thus, on October 24, 2014, NDOT knew that Zenor's
11 treatment had been completed and would also have been aware through CCMSI of Dr.
12 Huene's full release of Zenor.

13 As the hearing officer found as a matter of fact, Zenor delivered a copy of Dr.
14 Huene's October 22, 2014 release to full duty on October 22, the same day Dr. Huene
15 dated the release. NDOT did not dispute that it had received the release. NDOT now
16 had two releases of Zenor to full duty, one with a restriction of a brace and one without,
17 and had knowledge that Dr. Huene had essentially repudiated the FCE as the dispositive
18 document regarding Zenor's condition. Because it will not accept the direct and
19 unambiguous statements of Dr. Huene that Zenor was fit to return to full duty, NDOT
20 finds itself in the unenviable position of having to rely on another document signed by
21 Dr. Huene. On December 3, 2014, Debra Adler of Adler Vocational Rehabilitation
22 Service wrote a letter to Dr. Huene advising him that Zenor had "been released to
23 participate in vocational rehabilitation services and to return to work." *SX 34*. The letter
24 listed nine restrictions without identifying the source of the restrictions, which obviously
25 did not come from Dr. Huene. Ms. Adler does not purport to have examined Zenor and
26 so it is undeniable that the restrictions are again culled from the now-superseded FCE.
27 Contrary to NDOT's assertions, this letter did not seek approval or confirmation of the
28 listed restrictions. Rather, at the end of the letter, there was a request that Dr. Huene

1 either approve or disapprove the proposed jobs for which Zenor was to be trained. In
2 fact, most of the letter consisted of detailed job descriptions for various accounting and
3 bookkeeping functions. Dr. Huene checked in a space indicating his approval, not of the
4 restrictions, but of the proposed jobs for which Zenor was to be trained. He signed the
5 letter on December 10, 2014. NDOT urges that Dr. Huene's signature approving Zenor
6 to work as a bookkeeper is a reversal of his earlier positions going back to June of 2014
7 in which he had released Zenor to full duty. This characterization of the letter is
8 unsupported by the letter itself, which never inquires of Dr. Huene whether Zenor is able
9 to return to his pre-injury job but only to consider what his employment in the future
10 might consist of after vocational rehabilitation. The hearing officer declined to accept
11 NDOT's characterization of the meaning of the letter, and his finding of fact in this
12 regard cannot be disturbed by this Court, as set forth in NRS 233B.135(1)(b) and (3). In
13 any event, it can hardly be contrary to the substantial evidence in this case that the
14 hearing officer gave greater weight to the diagnosis of a physician than of a vocational
15 rehabilitation purveyor or an outdated FCE prepared by a physical therapist many
16 months before.

17 Despite being fully aware that Zenor had been released to full duty, NDOT plowed
18 ahead with efforts to place him in vocational rehabilitation. The hearing officer
19 determined as a matter of fact that Zenor received letters dated September 1 and October
20 22 from Adler warning him that if he rejected vocational rehabilitation he would be
21 waiving his rights to it. The hearing officer noted that CCMSI claims representative Tani
22 Consiglio confirmed that CCMSI, Adler and NDOT human resources were aware of the
23 full release at the time the vocational rehabilitation option was being pursued. Ms.
24 Consiglio also testified at the administrative hearing in response to a question from
25 NDOT's counsel that CCMSI should have ceased its efforts to pursue vocational
26 rehabilitation for Zenor when it became aware of Dr. Huene's October 22, 2014 release,
27 and further testified that CCMSI would not do vocational rehabilitation when there has
28 been a full release back to work. *Id.* The hearing officer concluded that "there was

1 substantial evidence that Zenor should have been returned to work in his former position
2 at NDOT immediately following NDOT's and/or CCMSI's receipt of the October 22
3 release."

4 NDOT next relies on a document signed by Zenor called a School Program
5 Agreement dated December 11, 2014 and signed by Zenor on December 23, 2014 as
6 proof that he could not return to work at his former position because it contained the
7 following statement above Zenor's signature: "Not able to physically perform work as
8 highway maintenance preinjury work." [sic.]

9 The hearing officer found as a matter of fact that Zenor signed this document under
10 protest over the content of the statement above his signature but signed when Ms. Adler
11 again warned him about being dismissed from the vocational rehabilitation program if
12 he didn't sign. In fact, as the hearing officer found, Zenor had received two letters, dated
13 September 1 and October 22 providing an admonition that if the vocational rehabilitation
14 plan was not agreed to by Zenor, he would be subject to suspension or termination from
15 the program and its benefits. The hearing officer noted that Zenor testified he was doing
16 what he could to get back to work and provide for his family and found there to be
17 substantial evidence that Zenor had no realistic choice but to sign the School Program
18 Agreement. *Hearing Officer Decision at p. 9, lines 9-27.*

19 These documents, combined with the letter written by Mr. Williams advising him
20 that if he did not provide a release to work, NDOT would pursue medical separation and
21 the letter from Diane Kelly to Ms. Consiglio at CCMSI advising that NDOT would stand
22 by the FCE "regardless of what Dr. Huehn states," show that NDOT was conducting
23 itself in bad faith and contrary to NAC 284.611.

24 V.

25 STANDARD OF REVIEW

26 The standard of review in this case is set forth by statute. NRS 233B.135(1)(b)
27 provides that judicial review of an agency decision must be confined to the record created
28 at the administrative hearing. NRS 233B.135(3) provides:

1 The court shall not substitute its judgment for that of the agency as to
2 the weight of evidence on a question of fact. The court may remand or
3 affirm the final decision or set it aside in whole or in part if substantial
4 rights of the petitioner have been prejudiced because the final decision
5 of the agency is:

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

14 The district court reviews an administrative agency's decision for an abuse of
15 discretion or clear error. *Taylor v. Nev. Dep't of Health & Human Servs.*, 129 Nev. Adv.
16 Op. 99, 314 P.3d 949 (2013). The court may also review the evidence in the record to
17 determine if the decision was supported by the evidence and to determine whether the
18 hearing officer acted arbitrarily, capriciously, or contrary to the law. *Turk v. Nevada*
19 *State Prison*, 94 Nev. 101, 103, 575 P.2d 599 (1976). Respondent agrees with
20 Petitioner's additional citations with respect to the standard of review.

21 VI.

22 SUMMARY OF ARGUMENT

23 The hearing officer's decision was supported by substantial evidence and his
24 decision cannot be disturbed based on his findings of fact, which, in any event, NDOT
25 does not dispute. Because his treating physician had released Zenor to full duty in his
26 pre-injury job, NDOT did not have grounds to terminate him pursuant to NAC 284.611,
27 which permits a state agency to terminate an employee when a physical disorder prevents
28 the employee from performing the essential functions of his job. Moreover, NAC
284.611 must verify with the employee's physician or by an independent medical
evaluation that the condition does not, or is not expected to, respond to treatment or that
an extended absence of work will be required, determine whether reasonable

1 accommodation can be made to enable the employee to perform the essential functions
2 of his job and to ensure that all reasonable efforts have been made to retain the employee.
3 Even if Zenor did not have the benefit of a full release from his treating physician, NDOT
4 did not carry out any of the aforementioned three steps before terminating him for
5 medical reasons, and does not assert that it did. Therefore, even if its bad faith conduct
6 was substantively justified, its actions were procedurally flawed and could not and
7 cannot be sustained.

8 NDOT has not identified any error or abuse of discretion by the hearing officer.

9 VII.

10 ARGUMENT

11 NDOT claims to have terminated Zenor under the authority granted by NRS
12 284.611 and NAC 284.611. The administrative code provision provides:

13 1. Before separating an employee because of a physical, mental or
14 emotional disorder which results in the inability of the employee to
15 perform the essential functions of his or her job, the appointing
authority must:

16 (a) Verify with the employee's physician or by an independent
17 medical evaluation paid for by the appointing authority that the
18 condition does not, or is not expected to, respond to treatment or that
an extended absence from work will be required;

19 (b) Determine whether reasonable accommodation can be made
20 to enable the employee to perform the essential functions of his or her
job;

21 (c) Make a request to the administrator of the Rehabilitation
22 Division of the Department of Employment, Training and
23 Rehabilitation to obtain the services provided by that Division, or if the
employee is receiving worker's compensation, request the services of
24 the rehabilitation provider, to evaluate the employee's condition and to
provide any rehabilitative services possible; and

25 (d) Ensure that all reasonable efforts have been made to retain
26 the employee.

27 ///

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1 NDOT did not comply with the administrative code provisions governing Zenor's
2 separation. First, when it commenced separation proceedings in January of 2015, it
3 already had knowledge that Zenor had been cleared by his treating physician to return to
4 full duty in his pre-injury position. The evidence on this point in the record is substantial
5 and NDOT does not and cannot dispute it. Therefore, NDOT was not allowed as a matter
6 of law to invoke the procedures set forth in NAC 281.611 because they could not
7 terminate Zenor for a physical disorder that results in his inability to perform the essential
8 functions of his job. As NDOT's Opening Brief points out, this Court is not to weigh
9 the evidence that is in the record, but only to determine whether substantial evidence
10 supports the decision of the hearing officer. The decision must be upheld even if there is
11 substantial evidence supporting conflicting versions of the facts. *Robinson Transp. Co.*
12 *v. Public Serv. Comm'n*, 39 Wis. 2d 653, 658, 159 N.W.3d 636, 638 (1968); *Dias v.*
13 *Elique*, 436 F.3d 1125, 1130 (9th Cir. 2006). Thus, notwithstanding NDOT's strained
14 argument that the FCE and the vocational rehabilitation plan show otherwise, Dr.
15 Huene's repeated releases of Zenor to full duty constitute substantial evidence, especially
16 when he clearly repudiated his assessment of Zenor at the time of the FCE based on
17 Zenor's steady improvement thereafter. Because substantial evidence is in the record
18 that Zenor was able to return to work, NDOT had no authority to invoke the provisions
19 of NAC 284.611 because Zenor simply did not have a disabling physical condition. This
20 Court cannot substitute its judgment for that of the hearing officer with regard to the
21 weight of this evidence.

22 Since NDOT could not terminate Zenor under the circumstances, no further
23 argument is necessary and NDOT's petition should be denied on that basis alone.

24 However, even if Zenor had a physical condition that would disqualify him from
25 working his pre-injury job, NDOT did not follow the procedures set forth in the
26 administrative code provision to properly separate him from service for medical reasons.
27 Under NAC 284.611(1) (a-d), a state employer is absolutely mandated to take each of
28 four steps before terminating an employment because of a physical condition. First, it

1 must verify with the employee's treating *physician* or by an independent medical
2 evaluation that the condition does not or is not expected to respond to treatment or that
3 an extended absence from work will be required. NDOT is not permitted to rely on an
4 evaluation by anyone other than a physician – not a physical therapist and not a
5 vocational rehabilitation provider. In fact, the latter are individuals NDOT relied on, the
6 non-physician preparers of the FCE and the rehabilitation agreement. When NDOT
7 commenced proceedings to terminate Zenor, it made no effort to verify with Dr. Huene
8 that Zenor could not work. As set forth above, the FCE had been expressly repudiated
9 by Dr. Huene in September of 2014, long before NDOT initiated separation proceedings.
10 Similarly, the rehabilitation plan simply does not mean what NDOT asserts. Dr. Huene
11 was never asked as part of that process to validate or confirm the listed restrictions in the
12 rehabilitation plan which, in any event, were drawn entirely from the repudiated FCE.
13 Rather, he was asked to render an opinion about whether Zenor could, in his current
14 condition, work as a bookkeeper. Obviously, Dr. Huene knew that Zenor was not
15 physically restricted from these tasks and approved the plan. But NDOT's reliance on
16 these two documents is wildly misplaced given Dr. Huene's repudiation of the FCE and
17 his October 22 release of Zenor to full and unrestricted duty in his pre-injury job. The
18 fact that NDOT disregarded the statements and in fact requested that he provide a release
19 long after NDOT had the release, should have given any reasonable administrator cause
20 to do what NAC 284.611(1)(a) requires: verify with the physician that the condition
21 would not respond to treatment or that an extended absence from work would be
22 required. Instead, NDOT botched the process, with one hand not knowing what the other
23 was doing. Had NDOT complied with this provision of the administrative code, Zenor
24 would not and could not have been terminated.

25 Nor is there any evidence in the record that NDOT made any effort to
26 accommodate Zenor if it believed that he had a disabling physical condition. NDOT
27 argues in its petition at length regarding the fact that Dr. Huene released Zenor at one
28 time to work to full duty with a brace, but there is absolutely no evidence showing why,

1 even if that were true, he could not have been accommodated in his pre-injury job. The
2 fact is that NDOT simply made no such effort and therefore did not comply with NAC
3 284.611(b).

4 The record is also bereft of evidence that NDOT ensured that all reasonable efforts
5 were made to retain the employee as required by subsection (d). Ironically, had NDOT
6 elected to terminate Zenor for medical reasons earlier in time while Zenor was unable to
7 work, it may have been able to terminate him pursuant to NAC 654.611, but by waiting
8 until he was fully recovered from the injury, it could no longer satisfy the provisions of
9 the code even if it had attempted to.

10 Because NDOT did not comply with the provisions of NAC 284.611, it lacked just
11 cause to terminate Zenor and NDOT's petition must be denied on that basis as well.

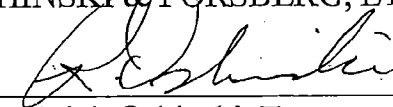
12 VIII.

13 CONCLUSION

14 This Court must rely on the facts as determined by the hearing officer and the
15 record of the administrative hearing in reaching its decision. It may not weigh the
16 evidence. When applying this standard, there is nothing to demonstrate that the hearing
17 officer committed clear error, abused his discretion or acted arbitrarily in reversing
18 Zenor's termination. The decision must be upheld and NDOT should be directed to
19 immediately comply with the decision and make Zenor whole. That necessarily means
20 that he should suffer no financial impact as a result of NDOT's misconduct, including
21 having to bear the attorney's fees and cost necessarily incurred in opposing the Petition
22 for Judicial Review.

23 *The undersigned does hereby affirm that this document, does not contain the social*
24 *security number of any person or persons pursuant to NRS 239B.*

25 Dated this 19th day of April, 2016. OSHINSKI & FORSBERG, LTD.

26 By 
27 Rick Oshinski, Esq.
28 Mark Forsberg, Esq.
Attorneys for Respondent

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Oshinski & Forsberg, Ltd., and that on this date, I served the within **Respondent's Answering Brief** on the following individuals or entities by serving a true copy thereof by the following method(s):

☒ enclosed in a sealed envelope with postage fully prepaid thereon, in the United States Post Office mail, pursuant to NRCP 5(b)(2)(B);

☐ via electronic filing pursuant to Nevada Electronic Filing and Conversion Rules ("NEFCR") 9(b);

☐ hand delivery via Reno/Carson Messenger Service pursuant to NRCP 5(b)(2)(A);

☐ electronic transmission (e-mail) to the address(es) listed below, pursuant to NRCP 5(b)(2)(D);and/or

☐ Federal Express, UPS, or other overnight delivery fully addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of April, 2016, in Carson City, Nevada.

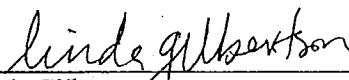

Linda Gilbertson

EXHIBIT 2

EXHIBIT 2

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9 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR CARSON CITY

11 STATE OF NEVADA, ex rel. its
12 DEPARTMENT OF TRANSPORTATION

CASE NO. 15 OC 00275 1B

DEPT. NO. I

13 Petitioner,

14 vs.

15 CHAD ZENOR,

16 Respondent.

17
18 **PETITIONER'S OPENING BRIEF**
19

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1 Petitioner STATE OF NEVADA, *ex rel.*, its DEPARTMENT OF TRANSPORTATION
2 (NDOT), by and through its attorneys, ADAM PAUL LAXALT, Attorney General, and
3 DOMINIKA BATTEN, Deputy Attorney General, files this opening brief in support of its petition
4 for judicial review, pursuant to NRS 233B. The brief is made and based on all papers,
5 pleadings, documents, and record on appeal on file in this matter, and the following
6 memorandum of points and authorities.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. JURISDICTIONAL STATEMENT**

9 This Court has jurisdiction pursuant to NRS 233B.130(2)(b). NDOT timely filed the
10 petition for judicial review on December 21, 2015, within 30 days of the hearing officer's final
11 decision, dated November 24, 2015.

12 **II. STATEMENT OF ISSUES ON APPEAL**

13 1. Did the hearing officer clearly err and abuse his discretion in finding that
14 vocational rehabilitation, which retrained employee into a new occupation because he could
15 no longer perform highway maintenance work, was insufficient to verify that the employee
16 could not return to his pre-injury highway maintenance work under NAC 284.611(1)(a).

17 **III. STATEMENT OF THE CASE**

18 Respondent, Chad Zenor ("Employee") was an NDOT highway maintenance worker
19 when he injured his wrist on the job. The injury's severity resulted in physical restrictions that
20 prevented Employee's return to highway maintenance work. Because the State of Nevada
21 could not permanently provide a position within his physical limitations, Employee received
22 vocational rehabilitation benefits pursuant to NRS 616C and retrained to become a
23 bookkeeper, a position within those limitations. NDOT then separated Employee from his
24 NDOT highway maintenance position.

25 Employee appealed his medical separation to the hearing officer, even though he
26 received full vocational rehabilitation benefits that NDOT had provided to him because he
27 could no longer physically perform highway maintenance work. The hearing officer reinstated

28 ///

1 Employee to his pre-injury job and awarded him back pay and benefits. NDOT now appeals
2 the hearing officer's decision as clear error and abuse of discretion.

3 **IV. STATEMENT OF FACTS**

4 **A. Employee's injury, workers' compensation benefits, and medical separation**

5 Employee was a Highway Maintenance Worker III for NDOT. ROA, Vol. I, p. 105. On
6 August 1, 2013, he injured his wrist while on duty and qualified for Chapter 616 workers'
7 compensation. ROA, Vol I, pp. 30-31. CCMSI was the insurer. ROA, Vol. I, p. 67; 158; 229.
8 Following injury, NDOT provided Employee light duty work for three months. ROA, Vol. I, p.
9 108. Employee also began treating with Dr. Huene.

10 In October, 2013, light duty expired, but Employee's wrist injury continued to prevent
11 him from returning to his pre-injury job and he began workers' compensation leave. ROA, Vol.
12 I, p. 86; 108. On July, 21, 2014, Employee completed a functional capacity evaluation (FCE),
13 a four-to-five hour evaluation performed by a physical therapist to determine his ability to
14 safely return to work. ROA, Vol. I, pp. 33-34; 230-235. The FCE indicated that Employee
15 could not perform the pre-injury job. ROA, Vol. I, p. 35; 177; 230-235. Dr. Huene signed the
16 FCE. ROA, Vol. I, p. 180; 192; 484.

17 After the FCE, CCMSI sent a permanent restriction letter and scheduled a roundtable
18 to determine if the State of Nevada had a permanent light-duty position within Employee's
19 physical restrictions, as determined by the FCE. ROA, Vol. I, p. 35; 64-65; 177; 184-185. In
20 August of 2014, the roundtable took place. ROA, Vol. I, p. 64-65. At the roundtable, there
21 were no state jobs that were within Employee's physical restrictions. ROA, Vol. I, p. 64-65;
22 76-78; 120; 178. Because no positions were available, Employee was deemed eligible for
23 vocational rehabilitation on September 1, 2014, and he subsequently began a vocational
24 rehabilitation program to become a bookkeeper, a position that was within his physical
25 restrictions. ROA, Vol. I, p. 65-66; 301-302.

26 After Employee initiated vocational rehabilitation, the next step was for NDOT to
27 terminate Employee's highway maintenance employment pursuant to NAC 284.611.
28 Accordingly, on December 31, 2014, NDOT sent Employee a letter about the impending

1 medical separation. ROA, Vol. I, p. 71; 276–277. In response, Employee provided NDOT a
2 medical release from Dr. Huene dated October, 2014; however, Dr. Huene issued this release
3 before he went on to approve vocational rehabilitation, and vocational rehabilitation direct
4 conflicts with a release to the pre-injury job. ROA, Vol. I, p. 72; 75; 97; 198; 273–274; 285–
5 288.

6 The following month, mid-January, 2015, Employee began the vocational rehabilitation,
7 training, completing the training in November, 2015. ROA, Vol. I, p. 66; 138.

8 NDOT finalized the medical separation on June 26, 2015. ROA, Vol. I, p. 223.

9 **B. Employee's medical treatment and evaluation**

10 Dr. Huene is a workers' compensation doctor who treated and evaluated Employee's
11 wrist following his injury, ultimately referring Employee for an impairment rating and approving
12 a vocational rehabilitation plan. ROA, Vol. I, p. 107–108. Dr. Huene's recommendations as to
13 whether Employee could work as a highway maintenance worker varied during the
14 approximate year he treated Employee. ROA, Vol. I, p. 136. Initially, Dr. Huene
15 recommended Employee assume light duty. ROA, Vol. I, p. 237–257. Then, on June, 18,
16 2014, Dr. Huene recommended Employee assume what appeared to be modified duty: Dr.
17 Huene checked off "Released to Full Duty without Restriction; however, he also wrote an "X"
18 next to "Brace on;" thus indicating, the release was not a full one, but included use of a brace.
19 ROA, Vol. I, p. 112–113; 259. One week later, on June 25, 2014, Dr. Huene recommended
20 "Released to Full Duty without Restriction," though this time, he did not place an "X" next to
21 "Brace on" and recommended "work hardening." ROA, Vol. I, p. 261–263. Thus, it appears
22 that in late June, Dr. Huene thought Employee could return to highway maintenance work.
23 ROA, Vol. I, p. 116.

24 However, on July 21, 2014, less than one month after issuing the June 25, 2014, full
25 duty release, Dr. Huene went back and indicated that Employee could not actually work full
26 duty—or even modified duty (release with brace on)—after all. On July 21, 2014, Employee
27 underwent a comprehensive functional capacity evaluation (FCE) concluding that Employee's
28 physical restrictions prevented his return to highway maintenance work with NDOT. The FCE

1 stated that Employee could only perform light/medium level work, listing nine restrictions,
2 including "Not able to physically perform work as a highway maintenance worker- pre-injury
3 work." A physical therapist administered the FCE, indicating Employee "did not demonstrate
4 the ability to safely perform the physical demands of the pre-injury job." ROA, Vol. I, 39. Dr.
5 Huene signed the FCE, indicating Employee "did not demonstrate the ability to safely perform
6 the physical demands of the pre-injury job." ROA, Vol. I, p. 39.

7 After the FCE, Dr. Huene indicated that Employee would return to work; however, Dr.
8 Huene went on to instead approve Employee for vocational retraining into a new occupation.
9 On August 13, 2014, and on September 24, 2014, Dr. Huene recommended "Released to Full
10 Duty without Restriction," with "Brace on." ROA, Vol. I, p. 52; 267-271. On October 22, 2014,
11 Dr. Huene adjusted his recommendation to "Released to Full Duty without Restriction"; this
12 time, he did not place an "X" next to "Brace on" and, for the first time, he also indicated "stable
13 and ratable" ("stable and ratable" indicated that this was Employee's release from Dr. Huene's
14 care). ROA, Vol. I, 36, 44; 120; 273-274.

15 Dr. Huene's October, 2014, recommendation was confusing because while Dr. Huene
16 released Employee to work, he also referred him for a disability rating. ROA, Vol. I, p. 273-
17 274. In any event, the October, 2014, release was not Dr. Huene's final word as to
18 Employee's ability to perform highway maintenance work. Following this release, in
19 December, 2014, Dr. Huene signed off on Employee's vocational rehabilitation program, a
20 program that called for Employee to abandon his highway maintenance occupation for a
21 bookkeeping occupation. ROA, Vol. I, p. 285-288. The vocational rehabilitation plan clearly
22 stated that Employee could not return to his pre-injury job; it stated:

23 *Not able to physically perform work as a highway maintenance worker...*

24 ROA, Vol. I., p. 137-138; 285. The vocational rehabilitation plan, contradicting the October,
25 2014, release was Dr. Huene's last recommendation before NDOT separated Employee.
26 ROA, Vol. I, p. 41-43; 206.

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1 **C. Employee's medical separation appeal**

2 Employee appealed the medical separation to the hearing officer. The hearing officer
3 reversed Employee's termination because of Dr. Huene's October 22, 2014, "full duty"
4 recommendation. In doing so, the hearing officer discounted the vocational rehabilitation plan
5 that Dr. Huene also subsequently approved, indicating that Employee could not actually
6 perform highway maintenance work, a document that came *after* the October 22, 2014, "full
7 duty" recommendation. In spite of the vocational rehabilitation agreement stating that
8 Employee could not return to highway maintenance work, the hearing officer stated that
9 NDOT did not verify that Employee's wrist "is not expected to respond to treatment or that an
10 extended absence from work will be required." NAC 284.611(1)(a).

11 **V. SUMMARY OF ARGUMENT**

12 The hearing officer's decision reversing Employee's medical separation is contrary to
13 NAC 284.611, which allows state employers to terminate injured employees who cannot
14 safely return to their jobs. See NAC 284.611. Employee's physician, Dr. Huene, represented
15 that Employee could no longer work in highway maintenance because he approved a
16 vocational rehabilitation program for Employee to retrain into bookkeeping, a position that the
17 plan stated was within Employee's physical restrictions. Employee accepted and proceeded
18 with the vocational rehabilitation plan as an alternative to his highway maintenance position,
19 and never appealed the plan to a workers' compensation hearing officer. NDOT in good faith
20 acted on Employee's vocational rehabilitation plan and separated his employment when
21 Employee's injury prevented him from returning to highway maintenance work.

22 After completing vocational rehabilitation, Employee sought to return to his pre-injury
23 job, but Employee's change of heart does not change that the medical separation was proper
24 and pursuant to NAC 284.611. Accordingly, this Court should set aside the hearing officer's
25 decision because it prejudices NDOT's substantial rights to separate employees who can no
26 longer perform their jobs due to injury.

27 ///

28 ///

1 **VI. ARGUMENT**

2 **A. Standard of Review**

3 This court should set aside the hearing officer's decision because the decision
4 prejudices NDOC's substantial rights as set forth in NRS. NRS 233B provides that courts may
5 reverse or modify an agency's decisions that prejudice the aggrieved party because the final
6 decision of the agency is:

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

14 NRS 233B.135(3).

15 The courts have set out the standard of review in cases appealing a hearing officer's
16 final decision pursuant to NRS 233B. Courts review a hearing officer's decision for an abuse
17 of discretion or clear error. See *Taylor v. State Dep't of Health & Human Servs.*, 129 Nev. —, —,
18 314 P.3d 949, 951 (2013). The Court also reviews the evidence presented at the hearing
19 to determine if the decision was supported by the evidence, and to ascertain whether the
20 hearing officer acted arbitrarily, capriciously, or contrary to the law. *Turk v. Nevada State*
21 *Prison*, 94 Nev. 101, 103, 575 P.2d 599, 601 (1976).

22 The standard of review depends on whether the court is reviewing a hearing officer's
23 legal conclusions or factual findings. A reviewing court will uphold the hearing officer's findings
24 of fact if substantial evidence supports the findings. However, questions of law are viewed
25 law *de novo*, but *Taylor*, 129 Nev. —, —, 314 P.3d 949, 951 (2013); see also NRS
26 233B.135(3). Substantial evidence is that evidence "a reasonable mind might accept as
27 adequate to support a conclusion." *State, Emp. Security v. Hilton Hotels*, 102 Nev. 602, 608,
28 792 P.2d 497 (1986). Substantial evidence [does] not include the idea of this Court weighing
the evidence to determine if a burden of proof was met or whether a view was supported by a
preponderance of the evidence. Such tests are not applicable to administrative findings and

1 decisions." *Id.*, n.1. "Evidence sufficient to support an administrative decision is not equated
2 with the preponderance of the evidence, as there may be cases wherein two conflicting views
3 each may be supported by substantial evidence." See *Robinson Transp. Co. v. Public Serv.*
4 *Comm'n*, 39 Wis. 2d 653, 658, 159 N.W.2d 636, 638 (1968); see also *Dias v. Elique*, 436 F.3d
5 1125, 1130 (9th Cir. 2006).

6 **B. The Hearing Officer's Decision Should be Reversed Because His Finding**
7 **That NDOT Did Not Comply with NAC 284.611 is Clearly Erroneous and an**
8 **Abuse of Discretion**

9 NAC 284.611 permits state employers to terminate employees when a physical
10 disorder prevents them from performing the essential functions of their positions. NAC
11 284.611(1). The statute requires the employer meet several requirements before termination,
12 including "[v]erif[y]ing] with the employee's physician or by an independent medical
13 evaluation... that the condition does not, or is not expected to respond to treatment, or that an
14 extended absence from work will be required. NAC 284.611(1)(a). An employee dismissed
15 under NAC 284.611 is entitled to the same rights and privileges afforded permanent
16 employees who are dismissed for disciplinary reasons. NAC 284.611(3). One of those rights
17 is hearing officer review of the termination, which can set aside a dismissal if the hearing
18 officer determines that the dismissal was without just cause. Here, the hearing officer
19 improperly set aside the dismissal because NDOT had just cause to terminate Employee.

20 **1. NDOT properly separated Employee's employment because the**
21 **vocational rehabilitation plan verified that his wrist injury prevented his**
22 **return to highway maintenance work**

23 NDOT properly separated Employee pursuant to NAC 284.611 because the vocational
24 rehabilitation plan verified that Employee could not safely return to work.¹ Nevada law permits
25 injured workers to receive certain benefits via the employer's insurer. See NRS Chapter 616C.

26 ¹ NAC 284.611 requires the employer meet various other requirements before medically separating the
27 employee for medical reasons; however, the hearing officer held only that NDOT did not meet NAC
28 284.611(1)(a): Before separating an employee because of a physical, mental or emotional disorder which results
in the inability of the employee to perform the essential functions of his or her job, the appointing authority must
...[v]erify with the employee's physician or by an independent medical evaluation paid for by the appointing
authority that the condition does not, or is not expected to, respond to treatment or that an extended absence
from work will be required[.]

1 Vocational rehabilitation is an available option, allowing an employee that is unable to return
2 to the pre-injury job to retrain for another occupation, though it is the last resort on the
3 insurer's priorities for returning injured employees to work. NRS 616C.530. ROA, Vol. I, 175;
4 192. An injured worker may be entitled to vocational rehabilitation benefits if the employee has
5 permanent restrictions on his ability to work and the pre-injury employer is unable to
6 accommodate the restrictions by offering a permanent light duty position. NRS
7 616C.590(1)(a)-(b).² An injured employee can appeal workers' compensation benefits by
8 requesting hearing officer review of "any matter within the hearing officer's authority." NRS
9 616C.315; ROA, Vol I, 188-189.

10 Here, NDOT had just cause to separate Employee because the vocational
11 rehabilitation agreement signed by Dr. Huene verified that Employee could not physically
12 return to his pre-injury job. While in October of 2014, Dr. Huene released Employee to "full
13 duty without restrictions" after this release, Dr. Huene ultimately indicated that Employee was
14 limited to light/medium work after all when in December of 2014, he approved a vocational
15 rehabilitation plan stating that Employee could not work as a highway maintenance worker.
16 ROA, Vol. I. p. 285-288. The vocational rehabilitation plan "verif[ied]" that Employee's wrist
17 was "not expected to respond to treatment or that an extended absence from work will be
18 required." NDOT did not need to conduct an independent medical evaluation (IME) in this
19 case, as the hearing officer suggested, because Employee's physician himself verified that
20 Employee could not return to work by approving the vocational rehabilitation.³

21 NDOT properly and reasonably relied on the vocational rehabilitation plan to verify that
22 Employee could not safely return to work. Dr. Huene would not have signed the vocational
23 rehabilitation plan if he had also released Employee to perform highway maintenance work
24 because Nevada law does not entitle Employee to both options. NRS 616C.590; NRS
25 616C.530; ROA, Vol. I, p. 192. The vocational rehabilitation program also included the

26
27 ² There are other requirements for vocational rehabilitation qualification. See NRS 616C.590(1)(a)-(c).

28 ³ NAC 284.611 required NDOT to verify with the employee's physician or by an independent medical
evaluation.

1 restriction that Employee could not perform highway maintenance work and it was Dr.
2 Huene's final correspondence before NDOT medically separated Employee. The hearing
3 officer erred and abused his discretion because he did not appreciate that vocational
4 rehabilitation means that the employee can no longer perform the pre-injury job.

5 State employers should be allowed to rely upon injured-employees' physician
6 recommendations in the workers' compensation process. Here, that recommendation was
7 vocational rehabilitation retraining into a position within Employee's physical restrictions
8 because he could not physically perform the highway maintenance job, a determination that
9 NDOT relied upon in good faith because Employee did not appeal it under the workers'
10 compensation statutes. ROA, Vol. I, p. 139. Allowing the hearing officer's decision to stand
11 here would give benefits to employees exceeding the benefits they are entitled to under
12 Nevada law.

13 **VII. CONCLUSION**

14 NDOT asks this Court to grant its petition for judicial review, reverse the hearing
15 officer's decision, and reinstate NAC 284.611 medical separation.

16 Respectfully submitted this 7th day of March, 2016.

17 ADAM PAUL LAXALT
18 Attorney General

19
20 By:



DOMINIKA J. BATTEN
Deputy Attorney General
Bureau of Litigation
Personnel Division

*Attorneys for Petitioner
State of Nevada, Department of
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AFFIRMATION
Pursuant to NRS 239B.030/603A.040

The undersigned does hereby affirm that the preceding document does not contain the personal information of any person pursuant to NRS 239B.030.

DATED this 7th day of March, 2016.

ADAM PAUL LAXALT
Attorney General

By:



DOMINIKA J. BATTEN
Deputy Attorney General
Nevada Bar No. 12258

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the State of Nevada, Office of the Attorney General and that on the 7th day of March, 2016, I served a true copy of the foregoing

Petitioner's Opening Brief by U.S. Mail, facsimile, and/or email to the following:

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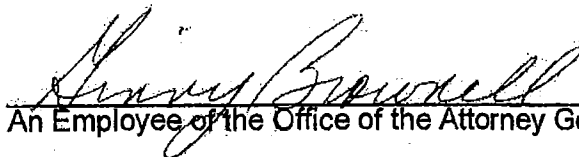

An Employee of the Office of the Attorney General

EXHIBIT 1

EXHIBIT 1

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DEPARTMENT OF TRANSPORTATION

REC'D & FILED

2015 DEC 21 PM 4:44

SUSAN HENNINGSEN
CLERK

BY J. COOPER
DEPUTY

IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF NVADA
IN AND FOR CARSON CITY

STATE OF NEVADA, ex rel. its
DEPARTMENT OF TRANSPORTATION

Petitioner,

vs.

CHAD ZENOR,

Respondent.

Case No. 150C 002751B

Dept. No. 1

PETITION FOR JUDICIAL REVIEW

Petitioner STATE OF NEVADA ex rel., its DEPARTMENT OF TRANSPORTATION (hereinafter "NDOT"), by and through counsel, ADAM PAUL LAXALT, Attorney General of the State of Nevada, and DAVID R. KEENE, II, Senior Deputy Attorney General, and pursuant to NRS 284.390(8) and NRS 233B.010 et seq., petitions the Court as follows:

1. Petitioner requests judicial review of the final decision of the Nevada State Personnel Administrative Hearing Officer dated November 23, 2015, in Case No. 53630-CC.

2. This Court has jurisdiction pursuant to NRS 233B.130.

3. This Petition has been filed in accordance with NRS 233B.130(1) and (2).

4. Petitioner has been aggrieved by the final decision of the Hearing Officer, attached hereto, and Petitioner's rights have been prejudiced because the final decision is:

- a) In violation of constitutional or statutory provisions;
- b) In excess of the statutory authority of the agency;
- c) Made upon unlawful procedure;

- d) Affected by other error of law;
- e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and/or
- e) Arbitrary or capricious, and characterized by abuse of discretion.

5. Petitioner will file a Memorandum of Points and Authorities after a copy of the entire record on appeal has been transmitted to the Court in accordance with NRS 233B.133.

6. Petitioner reserves its right to request oral argument in this matter pursuant to NRS 233B.133(4).

WHEREFORE, Petitioner prays as follows:

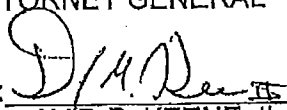
1. That this Court conduct a review of the final decision of the Nevada State Personnel Administrative Hearing Officer pursuant to NRS 233B.135 and enter an Order reversing or setting aside in whole or part the decision; and

2. For such further and other relief as the Court deems legal, equitable and just.

3. A Motion for Stay Pending Appeal is filed concurrently herewith pursuant to NRS 233B.140.

DATED this 18th day of December, 2015.

ADAM PAUL LAXALT
ATTORNEY GENERAL

By: 
DAVID R. KEENE, II
Senior Deputy Attorney General
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the State of Nevada, Office of the Attorney General and that on the 18th day of December, 2015, I served a copy of the foregoing **PETITION FOR JUDICIAL REVIEW** by U.S. Mail, facsimile or email a true copy to the following:

Kristie Fraser
Department of Administration
Hearings Division
1050 E. Williams Street, Suite 450
Carson City, Nevada 89701

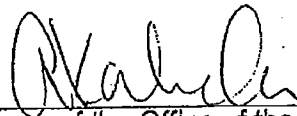
(Via Email: kfraser@admin.nv.gov)

Chad Zenor
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Carson City, NV 89706

(Via U.S. Mail and Personal Service)

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BEFORE THE NEVADA STATE PERSONNEL COMMISSION **FILED**

ADMINISTRATIVE HEARING OFFICER

NOV 24 2015

DEPT. OF ADMINISTRATION
APPEALS OFFICER

CHAD ZENOR,

Appellant/Employee,

Case No. 53630-CC

vs.

Decision

NEVADA DEPARTMENT OF
TRANSPORTATION,

Appellee/Employer.

On or about July 8, 2015 Appellant Chad Zenor (Appellant or Mr. Zenor) filed an appeal of his June 26, 2015 non-disciplinary involuntary separation of employment that was imposed by the Nevada Department of Transportation (NDOT) pursuant to the requirements of NAC 284.611 based on Mr. Zenor's physical condition caused by a work related injury.

On November 19, 2015 a hearing was conducted in Carson City, Nevada, pursuant to the requirements of NRS 284.390 to 284.405; and NAC 284.650; 284.774-284.818. Mr. Zenor was present at the hearing represented by Kevin Ranft, Labor Representative, AFSCME Local 4041. The Respondent Nevada Department of Transportation (NDOT) was present represented by Barbara Patrouch, Program Officer III and Deputy Attorney General David R. Keene, II. All parties and their witnesses were sworn in, the hearing was digitally recorded and exhibits were marked and admitted as Appellant Exhibits (AX) 1-27 and State Exhibits (SX) NDOT 1-115. The admitted exhibits were provided to Kristi Fraser at the conclusion of the hearing.

A. Findings of Fact

1. Mr. Zenor was employed by NDOT as a Highway Maintenance Worker III and incurred a work related injury to his right wrist on August 1, 2013 and continued his employment with NDOT until June 26, 2015 when he was involuntarily separated pursuant to NAC 284.611;

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- 1 2. Mr. Zenor had an approved workers compensation claim for the August 1, 2013 injury (AX 4)
2 and he testified that he was assigned light duty from on or about August 2, 2013 until on or about
3 October 31, 2013 at which time his light duty contract expired and he was transitioned to workers
4 compensation leave. While there were CCMSI Claim Notes in evidence (AX 21, pgs. 8-10, 14-16) that
5 indicated that NDOT requested and CCMSI conducted surveillance of Mr. Zenor while he was on
6 workers compensation claim, there was no evidence introduced at the hearing that NDOT or CCMSI
7 determined any wrong doing by Mr. Zenor that would affect his rights under NAC 284.611;
- 8 3. Mr. Zenor's assigned and approved treating physician for the worker's compensation claim was
9 Donald S. Huene, M.D. who provided medical evaluation and treatment for the August 1, 2013 injury
10 until October 22, 2014 when Mr. Zenor was released to unrestricted full duty. AX 11 & 14. There was
11 no other treating physician following October 22, 2014;
- 12 4. On July 21, 2014 Mr. Zenor underwent a Functional Capacity Evaluation (FCE) which
13 identified certain physical restrictions and determined that "patient did not demonstrate the ability to
14 safely perform the physical demands of the pre-injury job" citing the physical demands of his job. SX
15 0021-0029. The FCE was administered by Physical Therapist (PT) Rhonda Fiorillo, PT, MPT who is
16 an employee of "Back In Motion Physical Therapy". The FCE was signed off by PT Fiorillo and Dr.
17 Huene, as Mr. Zenor's treating physician. SX 0029;
- 18 5. NDOT Program Officer III Barbara Patrouch testified that following the FCE, in August, 2014,
19 NDOT Human Resources (HR) determined that there were no available positions in NDOT meeting
20 the work restrictions in the FCE and a "Roundtable" was convened including Mr. Zenor, Certified
21 Rehabilitation Counselor Debra L. Adler, M.S. CRC and representatives from CCMSI and NDOT HR
22 to review options for Mr. Zenor including vocational rehabilitation training into a new position
23 allowed by his physical restrictions;
- 24 6. Subsequently, Dr. Huene released Mr. Zenor to "Full Duty without Restrictions on 9/24/14"
25 with the only stipulation being a "Brace" for his wrist "as needed." AX 10. Dr. Huene then released
26 Mr. Zenor to "Full Duty without Restrictions on 10/22/14." (October 22nd release). There were no
27 stipulations in the October 22nd release and Dr. Huene's dictated notes "At this point, I think he can do
28 full duties without limitations." SX 0006-0007. Dr. Huene verified in a September 22, 2015 letter

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1 admitted in evidence without objection: "Chad Zenor was last seen on 10/22/2014 for his right wrist
2 which he injured on 8/1/2013. At that time, Mr. Zenor reported he was doing well with little pain, and
3 he did not feel the wrist was limiting his activities. He was released to full duty with no restrictions, as
4 permanent and stationary, and stable and rateable as of 10/22/2014. He was not scheduled to be seen
5 again, and he has not returned since 10/22/2014 for any additional treatment or problem." AX 14;

6 7. Mr. Zenor and his wife Kathy Zenor testified convincingly and NDOT did not dispute that he
7 delivered the October 22nd release to NDOT HR the same date. CCMSI Claims Representative Tani
8 Consiglio testified that she was provided a copy of the October 22nd release shortly thereafter and was
9 aware of same during discussions with Debra L. Adler, M.S. CRC and NDOT HR addressing a
10 potential vocational rehabilitation program for Mr. Zenor. On October 24, 2014 Ms. Consiglio wrote
11 Mr. Zenor a letter confirming receipt of the October 22nd release: "We recently received a report
12 indicating that you had completed your medical treatment for your work related injury." AX 15.
13 CCMSI Claim Notes admitted in evidence verify that CCMSI was aware of the October 22nd release
14 not later than November 10, 2014. AX 22, pg. 18. Ms. Consiglio testified that CCMSI was aware of
15 the October 22nd full release at the time that the vocational rehabilitation option was being pursued by
16 Ms. Adler, CCMSI and NDOT in the Fall of 2014. In response to question by Mr. Keene why didn't
17 someone "throw on the brakes" when they became aware of the October 22nd release, Ms. Consiglio
18 testified that "we should have." Ms. Consiglio testified that we "would not do vocational
19 rehabilitation" program where there is a full release back to work;

20 8. On September 1 and October 22, 2014 Mr. Zenor was provided virtually identical letters from
21 Adler Vocational Rehabilitation Service providing him until November 8 and then December 28, 2014
22 "to finalize a plan to return to work" via an approved vocational rehabilitation program. Certified
23 Rehabilitation Counselor Debra L. Adler, M.S. CRC authored the letters that contained the admonition
24 "Please note that NRS 616C.601¹ states: 'Anyone who rejects a suitable program of vocational
25 rehabilitation which is offered to him; rejects employment which is within the limitations prescribed by
26 a treating physician or chiropractor; or refuses to cooperate with the insurer in the development of a
27

28 ¹ The proper reference is to the "NAC" not the "NRS": NAC 616C.601

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1 program of vocational rehabilitation or a search for a job, is subject to suspension or termination of
2 vocational rehabilitation benefits'." AX 18 & 19

3 9. On September 29, 2015 NDOT employee Diane Kelly sent Ms. Consiglio a "confidential" e-
4 mail that *"Employer is standing by the FCE results regardless of what Dr. Huene states, he signed off*
5 *on the FCE. Subsequently Mr. Zenor was referred to voc rehab as appropriate and he needs to be*
6 *working with Debra Adler in an active and ongoing manner to pursue other career options available*
7 *through voc rehab. Mr. Zenor does not seem to have any trouble whatsoever riding around on his new*
8 *Harley. Last time I checked, it takes quite a bit of wrist action and strength to operate these*
9 *motorcycles."* AX 21, pg. 23;

10 10. On December 3, 2014 Ms. Adler sent Dr. Huene a letter addressing a plan for vocational
11 rehabilitation containing work restrictions previously listed in the July 21st FCE. The letter stated in
12 part "At the present time Mr. Zenor is interested in pursuing educational retraining in Reno Nevada so
13 he can acquire general computer and accounting skills and training." SX 0034. The letter concluded
14 "Please review the information contained in this letter and indicate your decision as to whether you
15 release Mr. Zenor to perform this training and subsequent employment of in an administrative capacity
16 with an emphasis in accounting." SX 0036. Dr. Huene checked "Approved" "Regarding Mr. Zenor's
17 training and working as an accounting clerk". SX 0037;

18 11. On December 23rd Mr. Zenor signed a December 11th letter addressing a plan for vocational
19 rehabilitation also containing work restrictions previously listed in the July 21st FCE, SX 0047;

20 12. On December 23rd Mr. Zenor signed a December 11th "School Program Agreement" prepared
21 by Ms. Adler and which contained the bullet point that "Not able to physically perform work as a
22 highway maintenance worker pre-injury work." SX 0087-0089. Mr. Zenor testified that he protested
23 this bullet point but signed when Ms. Adler allegedly threatened him with dismissal from the voc rehab
24 program if he didn't sign the document as prepared;

25 13. Mr. Keene stated for the record that NDOT was not advocating that the December 11th letter
26 and agreement signed by Mr. Zenor waived the requirements of NAC 284.611;

27 ///
28

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1 14. On December 31, 2014 Highway Maintenance Manager Steve Williams mailed Mr. Zenor a
2 letter informing him that "We regret to inform you that the District will not be able to continue to
3 approve leave without pay status indefinitely." The letter continued "If you are unable to provide us
4 with a full duty work release, we will be placed in a regrettable position in which we must, in
5 accordance with NAC 284.611, initiate separation due to a physical disorder." SX 0005. Mr. Williams
6 testified that in response to the December 31st letter Mr. Zenor delivered to Mr. Williams a copy of Dr.
7 Huene's October 22nd release and that he, in turn, delivered a copy of the October 22nd release to
8 NDOT HR;

9 15. NDOT HR Manager Kimberly King testified that she oversaw the non-disciplinary separation
10 process pursuant to the requirements of NAC 284.611 beginning with drafting the December 31st letter
11 for Mr. Williams' signature. She testified that she did not become aware of the October 22nd release
12 until she was reviewing all NDOT personnel files including worker's compensation files addressing
13 Mr. Zenor's work related injury. She testified that it was her opinion that all records "taken as a whole"
14 including July 21st FCE (SX 0021-0029), the October 22nd release (SX 0006-0007) and December 3rd
15 letter (SX 0034-0037) signed by Dr. Huene and December 11th letter (SX 0087-0088) and agreement
16 (SX 0087-0089) signed by Mr. Zenor established that Mr. Zenor's medical "condition does not, or is
17 not expected to, respond to treatment or that an extended absence from work will be required" pursuant
18 to NAC 284.611(1)(a). She testified that she did not feel that an "independent medical evaluation"
19 pursuant to NAC 284.611(1)(a) was warranted under the circumstances;

20 16. On June 1, 2015 Ms. King provided Mr. Zenor a formal written notification that NDOT was
21 pursuing separation of his employment under NAC 284.611 based on "the independent functional
22 capacity evaluation . . . which specifies your permanent physical limitations." SX 0004. This letter
23 did not mention the October 22nd release. Ms. King admitted in her testimony that nowhere in the July
24 21, 2014 FCE were there "permanent physical limitations". The October 22nd release established that
25 there were no such permanent restrictions on Mr. Zenor's return to work in his previous position at
26 NDOT;

27 17. On June 5, 2015 Administrator II Thor Dyson provided Mr. Zenor notice that Administrative
28 Services Officer Eden Lee would be conducting a hearing in accordance with NAC 284.656. This

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1 notice relied on the July 21st FCE and did not mention the October 22nd release. At the hearing Mr. nor
2 again provided a copy of the October 22nd release for consideration by NDOT in its separation
3 proceedings;

4 18. On June 24, 2015 NDOT Deputy Director Tracy Larkin-Thomason issued her decision "I have
5 reviewed the Recommendation of Separation Pursuant to NAC 284.611 (NPD-42) that was served
6 upon you in consideration of your inability to perform the essential functions of your position due to
7 medical reasons. This letter serves as your notification that separation pursuant to NAC 284.611 will
8 be carried out effective June 26, 2015. It is my determination that there exists a substantial basis for
9 this separation based on the reasons set forth in the NPD-42, and as such, separation is justified." SX
10 0001;

11 19. On July 8, 2015 Mr. Zenor timely appealed his separation of employment from NDOT. AX 3;

12 20. Prior to separation of a State employee because of a physical condition the law requires:

13 NAC 284.611 Separation for physical, mental or emotional disorder. (NRS 284.065, 284.155,
14 284.355, 284.383, 284.385, 284.390)

15 1. Before separating an employee because of a physical, mental or emotional disorder which results
16 in the inability of the employee to perform the essential functions of his or her job, the appointing
17 authority must:

18 (a) Verify with the employee's physician or by an independent medical evaluation paid for by the
19 appointing authority that the condition does not, or is not expected to, respond to treatment or that an
20 extended absence from work will be required;

21 (b) Determine whether reasonable accommodation can be made to enable the employee to perform
22 the essential functions of his or her job;

23 (c) Make a request to the Administrator of the Rehabilitation Division of the Department of
24 Employment, Training and Rehabilitation to obtain the services provided by that Division, or if the
25 employee is receiving worker's compensation, request the services of the rehabilitation provider, to
26 evaluate the employee's condition and to provide any rehabilitative services possible; and.

27 (d) Ensure that all reasonable efforts have been made to retain the employee.

28 2. A separation pursuant to this section is only justified when:

(a) The information obtained through the procedures specified in subsection 1 supports the decision to
separate;

(b) The employee is not on sick leave or other approved leave; and

(c) A referral has been made to the Public Employees' Retirement System and the employee has been
determined to be ineligible for, or has refused, disability retirement.

3. A permanent employee separated pursuant to this section is entitled to the same rights and
privileges afforded permanent employees who are dismissed for disciplinary reasons. The procedures
contained in NAC 284.656, 284.6561 and 284.6563 must be followed, and he or she may appeal the
separation to the hearing officer.

4. A permanent employee who is separated because of a physical, mental or emotional disorder is
eligible for reinstatement pursuant to NAC 284.386 if he or she recovers from the disorder.

(Added to NAC by Dep't of Personnel, eff. 10-26-84; A 8-1-91; 12-26-91; 7-6-92;
R197-99, 1-26-2000; A by Personnel Comm'n by R182-03, 1-27-2004; R143-05, 12-
29-2005; R063-09, 11-25-2009; R009-14, 6-23-2014)

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1 B. Conclusions of Law

2 1. There was substantial evidence that Mr. Zenor provided a copy of Dr. Huene's "Full Duty
3 without Restrictions on 10/22/14" to NDOT HR on or about October 22, 2014. CCMSI Claims
4 Representative Tani Consiglio confirmed that CCMSI, Ms. Adler and NDOT HR were aware of the
5 full release at the time that the vocational rehabilitation option was being pursued in the fall of 2014.
6 CCMSI Claim Notes admitted in evidence verify this fact as of November 10, 2014, AX 22, pg. 18. In
7 response to question by Mr. Keene why didn't someone "throw on the brakes" when they became
8 aware of the October 22nd release Ms. Consiglio testified "we should have." Ms. Consiglio testified
9 that we "would not do vocational rehabilitation" where there is a full release back to work. There was
10 substantial evidence that Mr. Zenor should have been returned to work in his former position at NDOT
11 immediately following NDOT's and/or CCMSI's receipt of the October 22nd release;

12 2. There was substantial evidence that Mr. Zenor provided a copy of Dr. Huene's "Full Duty
13 without Restrictions on 10/22/14" (SX 0006-0007) to his immediate supervisor immediately following
14 receipt of Mr. Williams' December 31, 2014 letter (SX 0005) requesting such release. Mr. Williams
15 testified that he provided a copy of the October 22nd release to NDOT HR which receipt was
16 acknowledged in testimony by HR Manager Kling;

17 3. Before NDOT could separate Mr. Zenor because of a physical condition it was required to
18 comply with the requirements of NAC 284.611(1)(a):

19 NAC 284.611 Separation for physical, mental or emotional disorder. (NRS 284.065, 284.155,
20 284.355, 284.383, 284.385, 284.390)

21 1. Before separating an employee because of a physical, mental or emotional disorder which results
22 in the inability of the employee to perform the essential functions of his or her job, the appointing
23 authority must:

24 (a) Verify with the employee's physician or by an independent medical evaluation paid for by
25 the appointing authority that the condition does not, or is not expected to, respond to treatment or
26 that an extended absence from work will be required (emphasis added);

27 There was substantial evidence provided in the testimony of Mr. Zenor and his wife, CCMSI Claims
28 Representative Consiglio and Mr. Williams that NDOT HR was provided copies of the October 22nd
release on at least two occasions in October, 2014 and January, 2015 and yet NDOT failed or refused
to put Mr. Zenor back to work. There was no evidence that NDOT obtained a second "independent

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1 medical evaluation" allowed by NAC 284.611 to countermand the October 22nd unrestricted release
2 provided by Dr. Huene. Ms. King testified that she did not feel that an "Independent medical
3 evaluation" pursuant to NAC 284.611(1)(a) was warranted under the circumstances based on the
4 findings of the July 21, 2015 FCE and December 3, 2014 letter signed by Dr. Huene that reasserted the
5 findings of the July 21, 2015 FCE. The problem for the Hearing Officer is that Dr. Huene's October
6 22nd release was unequivocal and contained no restrictions. The December 3, 2014 letter prepared by
7 Ms. Adler and signed by Dr. Huene can at most be characterized as Dr. Huene's approval of "Mr.
8 Zenor's training and working as an accounting clerk". SX 0037. The fact that the letter recited the
9 restrictions from the July 21, 2014 FCE cannot be reasonably construed as a change to the unequivocal
10 October 22nd release. This conclusion is reinforced by Dr. Huene's September 22, 2015 letter admitted
11 in evidence without objection that Mr. Zenor "was released to full duty with no restrictions" on
12 October 22nd, 2014 and was not seen by Dr. Huene after that date. NDOT also relies on 5% impairment
13 rating by David Rovetti, DC, Qualified DIR Rating Physician, Certified Chiropractic Rehabilitation
14 Physician and certain of the narrative of DC Rovetti's report as supporting the separation of Mr. Zenor.
15 In the November 21, 2014 report DC Rovetti narrowly reports on and documents a 5% impairment for
16 purposes of lump sum payment to a temporary total disability. AX 0103-0115. The problem with this
17 evidence is DC Rovetti was not retained to perform "an independent medical evaluation" contemplated
18 by NAC 284.611(1)(a) and in any event he was not addressing return to work restrictions for Mr.
19 Zenor. DC Rovetti was only narrowly addressing a 5% impairment for purposes of lump sum payment
20 to a temporary total disability. DC Rovetti's letter and opinion do not satisfy the requirements of NAC
21 284.611(1)(a). The bottom line is that if NDOT had a problem with or disagreed with Dr. Huene's
22 October 22nd unrestricted release it had every opportunity under NRS 284.611(1)(a) to "Verify . . . by
23 an independent medical evaluation paid for by the appointing authority that the condition does not, or
24 is not expected to, respond to treatment or that an extended absence from work will be required."
25 NDOT did not obtain an "independent medical evaluation" after the December 31, 2014 separation
26 process was commenced and thus NDOT is bound by Dr. Huene's October 22nd release;
27 4. The NDOT argues that a December 11, 2014 letter signed by Mr. Zenor December 23rd also
28 proves that he could not return to work in his former position at NDOT since like the December 3rd

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1 letter signed by Dr. Huene the December 11th letter contained the work restrictions from the July 21,
2 2014 FCE. This letter authored by Ms. Adler was not addressing any change in Dr. Huene's October
3 22nd release. This letter was solely addressing enrollment in an approved vocational rehabilitation
4 program. This letter in any event does not satisfy the requirements of NAC 284.611(1)(a). The NDOT
5 also argues that a December 11, 2014 "School Program Agreement" signed by Mr. Zenor December
6 23rd proves that he could not return to work in his former position at NDOT because it contained the
7 following "bullet" above Mr. Zenor's signature:
8

- 9 • "Not able to physically perform work as a highway maintenance pre-injury work." SX 0089

10 Mr. Zenor testified convincingly that he protested this bullet point but signed when Ms. Adler
11 allegedly threatened him with dismissal from the voc rehab program if he didn't sign the document as
12 prepared. While Ms. Adler was not called as a witness by either party, her statutory admonition to Mr.
13 Zenor contained in her September 1st and October 22nd letters (finding of fact #8) provides
14 corroboration that Mr. Zenor was "between a rock and a hard place". On the one hand Mr. Zenor had
15 provided NDOT HR Dr. Huene's October 22nd unrestricted release and had not been forthwith returned
16 to work by NDOT. On the other hand Mr. Zenor is told by Ms. Adler's September 1st and October 22nd
17 letters and allegedly on December 23rd essentially that if he does not agree to the approved vocational
18 rehabilitation plan as prepared by Ms. Adler that he was subject to suspension and/or termination from
19 the vocational rehabilitation plan and benefits. Mr. Zenor testified he was doing what he could to get
20 back to work "to provide for his family". There is substantial evidence that Mr. Zenor really had no
21 realistic choice but to sign the December 11th "School Program Agreement" as prepared by Ms. Adler.
22 In any event this "School Program Agreement" prepared by Ms. Adler and signed by Mr. Zenor does
23 not satisfy the requirements of NAC 284.611(1)(a);
24
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///

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1 5. The NDOT argues that Mr. Zenor cannot "have his cake and eat it too" referring to receiving
2 the fruits of his completed vocational rehabilitation training and a return to his former NDOT position
3 of Highway Maintenance Worker III. The hearing officer is sympathetic to the plight of NDOT which
4 expended considerable staff and monetary resources to provide Mr. Zenor vocational rehabilitation
5 training. The problem with this argument is that Mr. Zenor always made it clear that he wanted to
6 return to his pre-Injury position at NDOT and in that regard provided NDOT HR copies of his October
7 22nd release not once but twice prior to NDOT proceeding with separation proceedings pursuant to
8 NAC 284.611. As Ms. Consiglio testified everyone "should have" put on the brakes on the vocational
9 rehabilitation option once they became aware of the October 22nd release. CCMSI's own records verify
10 that it had the October 22nd release at the latest on November 10th, 2014. AX 22, pg. 18. When
11 requested on December 31st, 2014 to provide "full duty work release" Mr. Zenor again provided
12 NDOT HR with a copy of Dr. Huene's October 22nd release. If anyone at NDOT had a problem with
13 the October 22nd release NDOT could have requested an "independent medical evaluation" pursuant to
14 NAC 284.611 but did not. NDOT could have returned Mr. Zenor to work on or about October 22, 2014
15 when it received the October 22nd release and at the latest shortly following December 31, 2014 when
16 it received the October 22nd release. Such timely return back to work in October, 2014 or at the latest
17 in January, 2015 would have avoided any costs in pursuing costly vocational rehabilitation which was
18 rendered unnecessary based on the October 22nd release. Mr. Keene stated for the record that NDOT
19 was not advocating that the December 11th letter and agreement signed by Mr. Zenor waived the
20 requirements of NAC 284.611. In any event Mr. Zenor remains eligible for reinstatement under the
21 terms of NDOT's December 31, 2014 letter and NAC 284.611(4): "A permanent employee who is
22 separated because of a physical, mental or emotional disorder is eligible for reinstatement pursuant to
23 NAC 284.386 if he or she recovers from the disorder". The October 22nd release establishes that Mr.
24 Zenor recovered from his "physical disorder" within the parameters of the December 31st letter and the
25 requirements of NAC 284.611(1)(a);

26 6. There is substantial evidence that NDOT failed and/or refused to comply with the requirements
27 of NAC 284.611(1)(a) prior to Mr. Zenor's June 26, 2015 separation by (1) ignoring Dr. Huene's
28 October 22nd release and failing to forthwith return Mr. Zenor to work in October, 2014; and/or by (2)

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1 proceeding with separation proceedings on and after December 31, 2014 pursuant to NAC 284.611 in
2 light of Dr. Huene's October 22nd unrestricted release and not obtaining an "independent medical
3 evaluation" pursuant to NAC 284.611(1)(a) if NDOT disagreed with Dr. Huene's October 22nd
4 unrestricted release. There was substantial evidence based on NDOT employee Diane Kelly's
5 "confidential" September 29, 2014 e-mail to Ms. Consiglio at CCMSI quoted below that at that time
6 NDOT and its representatives intentionally and without factual basis ignored all of Dr. Huene's
7 medical opinions and work releases issued and of record after the July 21, 2015 FCE: *"Employer is*
8 *standing by the FCE results regardless of what Dr. Huene states, he signed off on the FCE.*
9 *Subsequently Mr. Zenor was referred to voc rehab as appropriate and he needs to be working with*
10 *Debra Adler in an active and ongoing manner to pursue other career options available through voc*
11 *rehab. Mr. Zenor does not seem to have any trouble whatsoever riding around on his new Harley. Last*
12 *time I checked, it takes quite a bit of wrist action and strength to operate these motorcycles."* AX 21,
13 pg. 23. This e-mail provides direct and substantial evidence that (1) NDOT was intentionally ignoring
14 Dr. Huene's medical opinions and work releases following the July 21, 2014 FCE; and (2) that Ms.
15 Kelly as a representative of NDOT had personal knowledge that Mr. Zenor's wrist had recovered well
16 beyond the physical limitations set forth in the FCE;

17 7. There was no substantial evidence of just cause to separate Mr. Zenor from his employment
18 with NDOT. There was substantial evidence that the requirements of NAC 284.611(1)(a) were not
19 adhered to or fulfilled by NDOT prior to its June 26, 2015 separation of Mr. Zenor from his
20 employment at NDOT and on that that basis Mr. Zenor should be returned to his former pre-injury
21 position at NDOT with back pay and benefits retroactive to June 26, 2015 with set off for any interim
22 earnings or other benefits Mr. Zenor received as a result of his vocational rehabilitation and/or other
23 employment following June 26, 2015 and prior to his reinstatement.

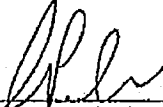
24 C. Decision

25 Based on the above findings of fact and conclusions of law it is the determination and decision
26 of the hearing officer that there was no substantial evidence of compliance with NAC 284.611(1)(a) or
27 other just cause justifying the June 26, 2015 involuntary separation of Mr. Zenor's employment from
28 his pre-injury employment at NDOT for his physical condition caused by an August 1, 2013 work

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1 related injury. Mr. Zenor's appeal is granted and NDOT is directed to immediately reinstate Mr. Zenor
2 to his former pre-injury position at NDOT and to make Mr. Zenor whole by paying him the appropriate
3 back pay and benefits retroactive to June 26, 2015 with set off for any interim earnings or other
4 benefits Mr. Zenor received as a result of his vocational rehabilitation training program and/or other
5 employment following June 26, 2015 and prior to his reinstatement.

6 Dated this 23 day of November, 2015.

7 
8 _____
9 Charles P. Cockerill, Esq.
10 Hearing Officer

11
12
13
14 **NOTICE:** Pursuant to NRS 233B.130, should any party desire to appeal this final determination of
15 the Appeals Officer, a Petition for Judicial Review must be filed with the district court within thirty
16 (30) days after service by mail of this decision.
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CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing DECISION AND ORDER was duly mailed, postage prepaid OR placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, 1050 E. Williams Street, Carson City, Nevada, to the following:

CHAD ZENOR
1233 BEVERLY DR
CARSON CITY, NV 89706

KEVIN RANFT
AFSCME LOCAL 4041
504 E MUSSER ST STE 300
CARSON CITY NV 89701

DAVID R KEBNE II
OFFICE OF THE ATTORNEY GENERAL
555 EAST WASHINGTON AVE
LAS VEGAS NV 89101

KIMBERLY KING
DEPARTMENT OF TRANSPORTATION
1263 S STEWART ST ROOM 115
CARSON CITY NV 89701

RODOLFO MALFABON
DEPARTMENT OF TRANSPORTATION
1263 S STEWART ST ROOM 201
CARSON CITY NV 89701

Dated this 24th day of November, 2015.

K. King
Employee of the State of Nevada

In the Supreme Court of the State of Nevada

Electronically Filed
Dec 29 2016 02:31 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CHAD ZENOR,

Supreme Court No. 71790
District Court Case No. 150C 00275 1B

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT
OF TRANSPORTATION,

**DOCKETING STATEMENT
CIVIL APPEALS**

Respondent.

_____ /

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. *NRAP 14(c)*. The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

Revised December 2015

1. Judicial District **First** Department **2**
County **Carson City** Judge **James E. Wilson Jr.**
District Court Case No. **15OC 00275 1B**

2. **Attorney filing this docketing statement:**

Attorney Mark Forsberg Telephone 775-301-4250
Firm Oshinski & Forsberg, Ltd.
Address 504 E. Musser Street, Suite 302
Carson City, NV 89701
Client Appellant Chad Zenor

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. **Attorney(s) representing respondent(s):**

Attorney Dominika J. Batten Telephone 775-687-2103
Firm Deputy Attorney General
Address 5420 Kietzke Lane
Reno, NV 89511
Client Respondent State of Nevada Dept. of Transportation

Attorney Adam P. Laxalt Telephone 775-687-8420
Firm Attorney General Appeals Office
Address 1050 E. William St., Ste. 450
Carson City, NV 89701
Client Respondent State of Nevada Dept. of Transportation

4. **Nature of Disposition below (check all that apply):**

- | | |
|---|--|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input checked="" type="checkbox"/> Other: Award of attorney fees |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify) _____ |

5. **Does this appeal raise issues concerning any of the following:** **No**

- ☐ Child custody
☐ Venue
☐ Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal: **None**
7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition: **None**
8. **Nature of the Action.** Briefly describe the nature of the action and the result below:

This matter began with the wrongful termination of Chad Zenor, an NDOT employee after a work related injury. A hearing officer found Mr. Zenor had been wrongfully terminated. NDOT filed a petition for judicial review challenging the hearing officer's decision. The district court upheld the hearing officer's decision, which required that Mr. Zenor be made whole by the payment of back pay with certain deductions. NDOT has not paid Mr. Zenor any back pay, calculating that it owes him none after deductions for wages earned elsewhere, worker's comp benefits and other benefits he received as a result of his work related injury. Mr. Zenor filed a motion for order to show cause why NDOT should not be held in contempt for failing to pay Mr. Zenor. The district court remanded the matter to the hearing officer for a determination of how much Mr. Zenor was owed, if anything. The remanded issue remains undecided by the hearing officer and could return to the district court for an ultimate decision. In addition to the description set forth in response to section 7, after the district court upheld the hearing officer's decision, Mr. Zenor filed a motion for attorney's fees and costs, arguing that NDOT and its counsel conducted themselves in bad faith as described in NRS 18.010(2)(b). The district court denied the motion based in part on *State Dept. of Human Resources, Welfare Div. v. Fowler*, 109 Nev. 782 (1993) which held that the prevailing party was not entitled to attorney's fees. Nor, the district court held, did NRS Chapter 284, which provides for judicial review of an agency's disciplinary action against an employee, or NRS 233B specifically provide that a prevailing party is entitled to attorney's fees. Therefore, the court denied the motion. The denial of the motion is the only issue on appeal, as NDOT did not appeal the district court order upholding the hearing officer decision that Mr. Zenor was wrongfully terminated.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal:

Do the holding of *Fowler*, cited above, or the absence of an attorney's fee provision in NRS 284 or 233B, essentially immunize the State of Nevada for its bad faith and wrongful termination of an employee when the State brought a frivolous petition for judicial review challenging a hearing officer's decision, thus compelling the employee to participate in litigation or risk having the motion granted for failure to oppose or inadequately opposing the petition?

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware

of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issues raised: **Appellant is unaware of any pending cases in this court raising same or similar issues.**

11. **Constitutional Issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. **Other issues.** Does this appeal involve any of the following issues? **Yes**

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: As set forth above, Appellant was the beneficiary of a hearing officer's decision determining that NDOT wrongfully terminated him. Nonetheless, he was forced to retain counsel and defend that decision when NDOT filed a frivolous and ultimately unsuccessful petition for judicial review. This unjust set of circumstances forced a wrongfully terminated employee to expend nearly \$10,000 in attorney's fees defending himself against NDOT's petition for judicial review, yet there is evidently no remedy that would permit him to be made whole as a result of NDOT's conduct. This Court has addressed the situation where the employee seeks judicial review and prevails, but not the circumstance here, where an employee is the respondent who prevails on the State's petition.

13. **Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case falls within the category of those presumptively to be heard by the Supreme Court, specifically under NRAP 17(a)(13), a matter raising as a principal issue a question of common law and (14) matters raising as a principal issue a question of state by public importance. The question presented is whether respondents to a petition for judicial review brought by a state agency may recover its attorney's fees when it compelled to litigation, even in a frivolous action.

14. **Trial.** If this action proceeded to trial, how many days did the trial last? **N/A**
Was it a bench or jury trial? **N/A**
15. **Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice? **Appellant does not intend to disqualify any justice.**

TIMELINESS OF NOTICE OF APPEAL

16. **Date of entry of written judgment or order appealed from:** Sept. 16, 2016

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: **N/A**
17. **Date written notice of entry of judgment or order was served** Oct. 18, 2016

Was service by
☐ Delivery
☒ Mail/electronic/fax
18. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)** **N/A**
(a) Specify the type of motion, the date and method of service of the motion, and date of filing.
☐ NRCP 50(b) Date of filing _____
☐ NRCP 52(b) Date of filing _____
☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA *Primo Builders v. Washington*, 126 Nev. ___, 245 P.3d 1190 (2010).

- (b) Date of entry of written order resolving tolling motion **N/A**
- (c) Date written notice of entry of order resolving tolling motion was served **N/A**
Was service by:
☐ Delivery
☐ Mail
19. **Date notice of appeal was filed:** Nov. 17, 2016

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

20. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a), or other** NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

- | | |
|--|--|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input checked="" type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| X Other: 3A(b)(8) | |

- (b) Explain how each authority provides a basis for appeal from the judgment or order:

The district court's order affected the rights of the Appellant by denying his post-judgment motion for attorney's fees.

22. **List all parties involved in the action or consolidated actions in the district court:**

- (a) Parties: State of Nevada, ex rel. its Department of Transportation, Chad Zenor

- (b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other: N/A

23. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the date of formal disposition of each claim.**

See No. 7 above regarding issues raised by the petition for judicial review and denial of post-judgment motion for attorney's fees.

24. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below:**

- X Yes
☐ No

25. **If you answered "No" to question 24, complete the following:** N/A

- (a) Specify the claims remaining pending below:
- (b) Specify the parties remaining below:
- (c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?
 - ☐ Yes
 - ☐ No
- (d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?
 - ☐ Yes
 - ☐ No

26. If you answered “No” to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

N/A

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims and third party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notice of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Chad Zenor
Name of Appellants

Mark Forsberg, Esq.
Name of counsel of record

Date December 29, 2016

/s/ Mark Forsberg, Esq.
Signature of Counsel of record

Carson City, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 29th day of December, 2016, I served a copy of this completed Docketing Statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es):

Dominika J. Batten
Deputy Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Attorneys for Respondent

J. Douglas Clark, Esq.
510 W. Plumb Lane, Ste. B
Reno, NV 89509
Settlement Judge

/s/Linda Gilbertson
Linda Gilbertson