IN THE SUPREME COURT OF THE STATE OF NEVADA

CHAD ZENOR,

Appellant

vs.

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

Respondent.
_____/

Supreme Court Case No. 71790

District Court Case No. 15OC002751B

On Appeal from Order Denying Motion for Attorney's Fees
dated November 17, 2016
in the First Judicial District Court, Carson City
The Honorable James Wilson Presiding

APPELLANT'S OPENING BRIEF

Mark Forsberg (SBN 4265)
OSHINSKI & FORSBERG, LTD.
504 E. Musser St., Suite 302
Carson City, Nevada 89701
Telephone 775-301-4250
Mark@OshinskiForsberg.com
Attorney for Appellant

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record for Appellant certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Mark Forsberg, Esq.
Oshinski & Forsberg, Ltd.

Senior Deputy Attorney General David R. Keene II
Deputy Attorney General Dominika J. Batten
Nevada Attorney General Adam P. Laxalt

3. If litigant is using a pseudonym, the litigant's true name: N/A

Dated this 13th day of June, 2017.

OSHINSKI & FORSBERG, LTD.

By /s/ Mark Forsberg, Esq.
Mark Forsberg, Esq. NSB 4265

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(8) which establishes the appealability of special orders of the District Court after final judgment. Here, the District Court's denial of Respondent's Petition for Judicial Review was a final judgment. Appellant moved for attorney's fees post-judgment and appeals from the order denying that motion.

ROUTING STATEMENT

NRAP 17(a) enumerates cases that are to be heard and decided by the Supreme Court. NRAP 17(a)(14) provides that this Court will hear matters raising as a principal issue a question of state-wide public importance. Appellant urges that this case is of state-wide importance because it potentially could determine that NRS 18.010(2)(b) is applicable to the State of Nevada when it and its attorneys act in bad faith by bringing and maintaining a petition for judicial review without reasonable ground or to harass the prevailing party. The Court has not addressed this issue, nor has it addressed whether an individual who is the prevailing-party respondent to the State's petition for judicial review brought pursuant to NRS 233B may recover attorney's fees.

STATEMENT OF ISSUES

1. Should an individual respondent to the State of Nevada's petition for judicial review of a hearing officer's decision in favor of the employee be entitled

to an award of attorney's fees notwithstanding the holding of *State Dept. of Human Resources, Welfare Division v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993)?

2. Should NRS 18.010(2)(b) apply to the State of Nevada where it and its attorneys bring and maintain a petition for judicial review under NRS 233B without reasonable ground or to harass the prevailing party?

STATEMENT OF THE CASE

The State of Nevada Department of Transportation ("NDOT") terminated Chad Zenor's ("Zenor") employment on the ground that he had a medical disability eight months after NDOT received a release to full duty without limitations from Mr. Zenor's treating worker's compensation physician on October 22, 2014. Zenor administratively appealed the termination, asserting that NDOT improperly terminated him based on a disabling medical condition when, in fact, NDOT knew that his physician had determined that he was fit for duty. The hearing officer found in favor of Zenor and ordered NDOT to reinstate him with back pay. *Decision of the Hearing Officer, Appellant's Appendix ("A. App.") Vol. I: 228-240.* NDOT filed a petition for judicial review in the First Judicial Court seeking to overturn the order of the hearing officer, but did not challenge the findings of fact made by the hearing officer. *A. App. Vol. II:241-247.* Zenor was compelled to defend the decision of the hearing officer and retained counsel to represent him. Contemporaneously with the filing of its petition, NDOT moved for a stay of the hearing officer's decision. *A.*

App. Vol. II: 258-266. Zenor opposed the motion for stay, *A. App. Vol. II: 267-277*, and the District Court denied the motion, finding that NDOT had not demonstrated that it had a reasonable likelihood of success on the merits of its petition. *A. App. Vol. II: 293-296.* After full briefing, the District Court denied the petition. *A. App. Vol. II: 345-355*. NDOT did not appeal the order denying its petition, and is therefore bound by order and its factual findings and conclusions of law. Zenor timely moved to recover the attorney's fees he incurred in defending the hearing officer's decision against a groundless petition for judicial review. *A. App. Vol. II: 371-394*. Zenor asserted that he was entitled to an award of fees under NRS 18.010(2)(b), and that the circumstances of his case placed him outside this Court's precedent denying fees where a statute, NRS 284, did not expressly provide for such an award.

STATEMENT OF FACTS

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

hearing officer. NDOT did not dispute the factual findings of the hearing officer in its petition for judicial review, and did not appeal the denial of its petition for judicial review. Therefore, as a matter of law, all the findings of fact contained in the decision of the hearing officer must be accepted by this Court.

The following are the findings of fact contained in the decision of the hearing officer and are set forth in his decision. *A. App. Vol. I: 228-240.*

Chad Zenor was employed by the Nevada Department of Transportation as a Highway Maintenance Worker III. He suffered a work-related injury to his right wrist on August 1, 2013. He received worker's compensation benefits as a result of his work-related injury.

On July 21, 2014, Zenor was subjected to a Functional Capacity Evaluation ("FCE") performed by a physical therapist and signed by his approved worker's compensation treating physician, Dr. Huene, which determined that he was not yet capable of performing the activities required by his pre-injury job. *A. App. Vol. I: 1-6.*

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

of Proceedings Before the Honorable Charles P. Cockerill, Hearing Officer. A. App. Vol. I: 229, para. 5.

However, on September 24, 2014, Dr. Huene examined Zenor again and released him to full pre-injury duties with a brace on his wrist as needed. *A. App. Vol. 1: 8.* Dr. Huene wrote in his note of that date: "I have reviewed the FCE; again this was done in July of 2014. He was not able to demonstrate the ability to safely perform the physical demands of his pre-injury job; however now his wrist is in better function." He wrote that "I will sign off on the FCE but, again, I expect him to continue to improve as he uses his wrist more and more . . ." *Id*. He further stated that "I have gone over with him and his case manager that the FCE was done on July 21, 2014 and that he was not permanent and stationary at that point and he obviously has better function of his wrist at this point . . . We will keep him on work restrictions, brace on as necessary; otherwise, he can use it fully."

On October 22, 2014, Dr. Huene released Zenor to full duty without limitations or restrictions. *A. App. Vol. I: 8*. The doctor wrote that ***"At this point I think he can do full duties without limitations."*** The doctor did not require or suggest that Zenor should continue to wear the brace on his right wrist.

Zenor and his wife, Cathie Zenor, delivered the release prepared by Dr. Huene to NDOT on October 22, 2014, the same date it was issued by Dr. Huene. *Hearing Officer Decision, A. App. Vol. I: 230, para. 7.* NDOT did not dispute this testimony.

Id. CCMSI, NDOT's third-party claims administrator and CCMSI claims representative Tani Consiglio also were aware of Zenor's release to full duty and Consiglio confirmed her knowledge of the release in a letter to Zenor dated October 24, 2014. *A. App. Vol. I: 14.*

The hearing officer found, based on the evidence before him, that CCMSI and NDOT were both aware that Zenor had been released to full duty during the period of time that Zenor was undergoing vocational rehabilitation. *Hearing Officer Decision, A. App. Vol. I: 230, para. 7.* Ms. Consiglio testified that the vocational rehabilitation option should not have been pursued under the circumstances because we "would not do vocational rehabilitation" where there is a full release to return to work. *Id.*

Nonetheless, NDOT did not return Zenor to work and instead pursued vocational rehabilitation. As part of that process, correspondence from Adler Vocational Rehabilitation Service directed Zenor to finalize a plan to return to work through an approved vocational rehabilitation program or risk suspension or termination pursuant to NRS 616C.601, an incorrect citation to NAC 616C.601. *A. App Vol. I: 11-13.*

NDOT deliberately refused to return Zenor to work, notwithstanding the full release given by Dr. Huene. In fact, on September 29, 2014, after Dr. Huene released Zenor to full duty wearing a wrist brace as needed, NDOT employee Diane Kelly

sent Consiglio an e-mail stating that:

> Employer is standing by the [July 21, 2014] FCE results ***regardless of what Dr. Huene states,*** he signed off on the FCE. Subsequently, Mr. Zenor was referred to voc rehab as appropriate and he needs to be working with Debra Adler in an active and ongoing manner to pursue other career options available through voc rehab. Mr. Zenor does not 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.

A. App. Vol. I: 9. Bracketed material and emphasis added. This e-mail shows that NDOT made a conscious decision to disregard the release to duty without restriction by Dr. Huene, and also, disingenuously, seems to question whether Zenor has an injury that would prevent him from returning to his prior job, noting the wrist strength required to ride a motorcycle.

At the request of NDOT, Dr. Huene medically approved Zenor to participate in vocational rehabilitation. *See countersigned letter from Adler to Dr. Huene, A. App. Vol. I: 15-18.* Dr. Huene's approval, of course, was consistent with his previous assessment of Zenor since he had released him to unrestricted full duty in his prior job. Rather than showing that Dr. Huene had changed his mind about Zenor's ability to work as a highway maintenance worker as NDOT asserts, the letter sought agreement from Dr. Huene that Zenor was physically able to perform the bookkeeping tasks for which he was to be trained. Dr. Huene signed the letter agreeing that Zenor could perform those tasks.

On December 23, 2014, Zenor signed an agreement dated December 11 and prepared by NDOT which contained a bullet point stating "Not able to physically perform work as a highway maintenance worker pre injury work." The hearing officer found as a matter of fact that Zenor objected to this statement being included in the agreement, but signed when Adler threatened him with dismissal from the rehabilitation program if he didn't sign the document as prepared. *Hearing Officer Decision at A. App. Vol I: 231, para. 12.* NDOT conceded at the hearing that this agreement did not waive any of Zenor's rights under NAC 284.611. *Id. at para. 13.*

Despite having in its possession the September 24, 2014 release to full duty with the use of a brace as needed, and the October 22, 2014 release to full duty with no limitations, NDOT sent Zenor a letter dated December 31, 2014 *(A. App. Vol. I: 19)* stating:

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

Emphasis added. The letter was signed by NDOT Highway Maintenance Manager Steve Williams but prepared by NDOT Human Relations Manager Kimberly King ("King") for Williams' signature. *Hearing Officer Decision, A. App. Vol. I: 232, para. 15.* At the time the letter was written, Zenor had long since delivered the October 22, 2014 release to full duty to NDOT and NDOT also had the earlier release

to full duty in its possession. Nonetheless, Zenor dutifully provided another copy of the release to NDOT in response to the letter. The letter from Williams to Zenor misstates the law. Nothing in NAC 284.611 or any other code provision or statute provides that the employer "***must***, in accordance with NAC 284.611, initiate separation due to physical disorder." What NDOT *was* required to do was follow the procedure set forth in the regulation. It was not required to terminate Zenor.

Despite its undisputed knowledge that Zenor had twice been released to full and unrestricted duty as a highway maintenance worker, on June 1, 2015, NDOT provided Zenor a formal written notification that NDOT was pursuing separation of his employment under NAC 284.611 based on "the independent functional capacity evaluation . . . which specifies your permanent physical limitations." *A. App. Vol. I: 20.* This letter signed by King, *A. App., Vol. 1: 16,* did not acknowledge the existence of the October 22, 2014 release. ***It was sent 10 months after the FCE was conducted and seven months after Zenor was released by his doctor to unrestricted duty.*** In his decision, the hearing officer noted that Ms. King admitted in her testimony that nowhere in the July 21, 2014 FCE were there described any "permanent physical limitations." *Hearing Officer Decision, A. App. Vol. I: 23, para. 16.* He noted that the October 22, 2014 release established that there were no such restrictions preventing Zenor from returning to his pre-injury job at NDOT. *Id.*

On June 5, 2015, NDOT Administrator Thor Dyson gave notice to Zenor that an administrative services officer would conduct a hearing regarding his separation from service. *Hearing Officer Decision, A. App. Vol. I 232-233, para 17*. This notice, too, relied solely on the July 21, 2014 FCE and did not mention the October 22, 2014 release. *Id.* At the hearing, NDOT did not provide the hearing officer with a copy of the October 22, 2014 release for consideration by the administrative services officer. *Id.* After the hearing, on June 24, 2015, NDOT Deputy Director Tracy Larkin-Thomason issued formal notice to Zenor that he was separated from service pursuant to NAC 284.611 effective June 26, 2015. *A. App Vol. I: 24-25.* Despite obviously not considering the October 22, 2014 release to full duty, NDOT based its decision to terminate Zenor on "your inability to perform the essential functions of your position due to medical reasons." This conclusion could only have been based on the FCE.

Despite the findings of fact and in the absence of reference to any other evidence or testimony from the record below, NDOT perpetuated this falsehood in its motion for stay pending appeal:

> It is Petitioner's position that Respondent has repeatedly admitted that he cannot perform the duties of a Highway Services Worker III, that he has not been cleared to perform the duties of a Highway Services Worker III, and that the doctor's note upon which he relies is rendered 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.

A. App. Vol. II: 258-266.

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

NDOT always incorrectly deemed the FCE to be Dr. Huene's final word on the subject of Zenor's ability to return to unrestricted employment in his pre-injury job. King's June 1, 2015, letter to Zenor a letter stated:

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

A. App Vol. I: 20. King's letter misrepresents the facts in the administrative record and as determined by the hearing officer and the District Court.

NDOT does not deny that it knew of Dr. Huene's September 24, 2014 assessment. And, although it clearly repudiates and expressly supersedes his opinion that became part of the FCE, NDOT disingenuously continued to rely on the FCE almost a year later when it informed Zenor that he was being separated from service based on the FCE and continued to rely on it in its petition before the District Court, long after it could have plausibly claimed not to know that Zenor was fit for duty as

of October 22, 2014. CCMSI's October 24, 2014 letter to Zenor acknowledges Dr. Huene's release and conclusion that his treatment of Zenor had concluded. *A. App. Vol. 1: 14.* The letter stated: "We recently received a report indicating that you completed your medical treatment for your work related injury. Prior to closing your claim we would like to schedule you for an impairment evaluation." *Id.* The letter was signed by Consiglio, the claims representative for Zenor's case at CCMSI. ***The letter was copied to NDOT***. Thus, on October 24, 2014, NDOT knew that Zenor's treatment had been completed and would also have been aware through CCMSI of Dr. Huene's full release of Zenor.

Because it will not accept the direct and unambiguous statements of Dr. Huene that Zenor was fit to return to full duty, NDOT now finds itself in the unenviable position of having to rely on another document signed by Dr. Huene to buttress its fabricated claims the Zenor was unfit to return to work. On December 3, 2014, Debra Adler of Adler Vocational Rehabilitation Service wrote a letter to Dr. Huene advising him that Zenor had "been released to participate in vocational rehabilitation services and to return to work." *A. App. Vol I:11-13.* The letter listed nine restrictions without identifying the source of the restrictions, which obviously did not come from Dr. Huene. Ms. Adler does not purport to have examined Zenor, so it is undeniable that the restrictions are again culled from the now-superseded FCE. Contrary to NDOT's assertions, this letter did not seek approval or confirmation of

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

Despite being fully aware that Zenor had been released to full duty, NDOT plowed ahead with efforts to place him in vocational rehabilitation. The hearing officer determined as a matter of fact that Zenor received letters dated September 1

and October 22 from Adler warning him that if he rejected vocational rehabilitation he would be waiving his rights to it. The hearing officer noted that CCMSI claims representative Consiglio confirmed that CCMSI, Adler and NDOT human resources were aware of the full release at the time the vocational rehabilitation option was being pursued. Consiglio also testified at the administrative hearing in response to a question from NDOT's counsel that CCSMI should have ceased its efforts to pursue vocational rehabilitation for Zenor when it became aware of Dr. Huene's October 22, 2014 release, and further testified that CCSMI would not do vocational rehabilitation when there has been a full release back to work. *Transcript of hearing, A. App. Vol. I:195-196.* The hearing officer concluded that "there was substantial evidence that Zenor should have been returned to work in his former position at NDOT immediately following NDOT's and/or CCMSI's receipt of the October 22 release."

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

The hearing officer found as a matter of fact that Zenor signed this document under protest over the content of the statement above his signature but signed when

Ms. Adler again warned him about being dismissed from the vocational rehabilitation program if he didn't. In fact, as the hearing officer found, Zenor had received two letters, dated September 1 and October 22 providing an admonition that if the vocational rehabilitation plan was not agreed to by Zenor, he would be subject to suspension or termination from the program and its benefits. *Decision of Hearing Officer, A. App. Vol. I: 236, lines 4-27.* The hearing officer noted that Zenor testified he was doing what he could to get back to work and provide for his family and found there to be substantial evidence that Zenor had no realistic choice but to sign the School Program Agreement. *Id*. These documents, combined with the letter written by Mr. Williams advising him that if he did not provide a release to work, NDOT would pursue medical separation, and the letter from Diane Kelly to Ms. Consiglio at CCMSI advising that NDOT would stand by the FCE "regardless of what Dr. Huene states," show that NDOT was conducting itself in bad faith and contrary to NAC 284.611.

STANDARD OF REVIEW

This Court reviews decisions to grant or deny motions for attorney's fees and costs for an abuse of discretion. *Pub. Employees' Ret. Sys. of Nev. v. Gitter*, 133 Nev. Adv. Op. 18 (2017). An award of attorneys' fees is reviewed for a manifest abuse of discretion. *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). This Court reviews a district court's factual determinations deferentially

and will not overturn such findings if supported by substantial evidence, unless clearly erroneous. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). However, whether a statute authorizes an award of fees under the circumstance of a particular case is a question of law to be reviewed de novo. *U.S. Design & Constr. Corp. v. I.E.B.W. Local 357 Joint Trust Funds*, 118 Nev. 458, 50 P.3d 170 (2002).

SUMMARY OF ARGUMENT

The hearing officer's decision finding that Zenor was wrongfully discharged and ordering him reinstated with back pay was supported by substantial evidence. The District Court was not permitted to substitute its judgment for that of the hearing officer as to the weight of evidence on a question of fact. *NRS 233B.135(3)*. NDOT did not dispute the factual determinations of the hearing officer in its petition for judicial review. Nor did NDOT appeal the District Court's denial of the petition. NDOT is therefore bound by the final judgment of the District Court's denial of the petition and all the factual and legal underpinnings for the District Court's decision. Because NDOT knew Zenor's treating physician had released Zenor to full duty, NDOT did not have grounds to terminate him pursuant to NAC 284.611, which permits a state agency to terminate an employee when a physical disorder prevents the employee from performing the essential functions of his job. Moreover, under NAC 284.611, NDOT was required, before terminating Zenor based on a physical disorder, to 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, to determine whether reasonable accommodation could be made to enable the employee to perform the essential functions of his job and to ensure that all reasonable efforts had been made to retain the employee. The arguments and factual assertions NDOT made in its petition for judicial review were without reasonable grounds as set forth in NRS 18.010(2)(b). NDOT continued to argue that, although it knew Zenor had been released to full duty without restrictions on October 22, 2015, it was justified in relying on a functional capacity evaluation conducted months before Zenor was reevaluated and released to full duty by his doctor, and on a document signed by his doctor stating that Zenor was physically able to perform the tasks of a job he was being trained for in vocational rehabilitation. The District Court, like the hearing officer, found these arguments to be unreasonable and without basis, and upheld the decision of the hearing officer.

Zenor timely filed a motion for attorney's fees based on NRS 18.010(2)(b). Zenor argued that the Nevada Supreme Court had never held that an individual respondent to a petition for judicial review who prevails should not be entitled to attorney's fees incurred in defending the decision of hearing officer, since the individual respondent had no choice but to retain counsel and participate in the district court proceedings. The District Court, relying solely on the holding of *State*,

Dept. of Human Resources, Welfare Div. v. Fowler, 109 Nev. 782, 858 P.2d 375 (1993), denied the motion on the ground that NRS 233B does not expressly provide for attorney's fees to a prevailing party. The District Court therefore declined to consider the effects of NRS 18.010(2)(b). In light of *Fowler*, the public policy of this State and *Franchise Tax Bd. of State v. Hyatt*, 130 Nev. Adv. Op. 71, 335 P.3d 125 (2014), the District Court abused its discretion in denying the motion, and erred by protecting the State and its counsel from its bad-faith misconduct.

ARGUMENT

A. Zenor is Entitled to Attorney's Fees As Set Forth in NRS 18.010(2)(b).

NRS 18.010 provides:

> 1. The compensation of an attorney and counselor for his or her services is governed by agreement, express or implied, which is not restrained by law.
> 2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to the prevailing party:
> (a) when the prevailing party has not recovered more than $20,000; or
> (b) without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of

> meritorious claims and increase the costs of engaging in business and providing professional services to the public.

Zenor is the prevailing party in this case, having succeeded in obtaining the reversal of NDOT's termination of his employment before the hearing officer and in defeating NDOT's petition for judicial review. It is evident from the hearing officer's finding of facts, which were not disputed by NDOT, that NDOT's termination of Zenor was without cause, and it is evident that its defense of that improper action before the hearing officer, its efforts to obtain a stay of the hearing officer's decision pending judicial review and its defense of the termination in the petition, were brought and maintained without reasonable ground.

When this is the case, NRS 18.010(2)(b) directs that the District Court is to liberally construe the provisions of the section in favor of awarding attorney's fees in appropriate situations. The section goes on to state that it is intent of the Nevada Legislature that the court award such fees and impose sanctions pursuant to NRCP 11 in all appropriate cases to punish for and deter frivolous or vexatious claims and defenses for public policy reasons, one of which is to preserve limited judicial resources, and another of which is to promote the timely resolution of meritorious claims. This case exemplifies precisely the kind of conduct that the attorney's fees provisions of NRS 18.010(2)(b) were designed to deter and which justify an award of attorney's fees.

A claim (or defense) is frivolous if it is baseless, that is, not well grounded in

fact and warranted by existing law or a good faith argument for an extension, modification or reversal of existing law and brought by an attorney without a reasonable and competent inquiry. *Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 128 P.3d 1057 (2006). A claim is groundless or frivolous if it lacks credible supporting evidence. *Rodriguez v. Prima Donna Co*., 125 Nev. Adv. Op. 45, 216 P.3d 793 (2009). *See*, also *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720 (1993) holding that if the record reveals that counsel or any party has brought, maintained or defended an action in bad faith, the rationale for attorney's fees is even stronger and noting that bad faith may include conduct that is "disrespectful of the truth." The claims in this case are exactly that: they are disrespectful of the truth, they are not based in fact and they are not supported by a reasonable and competent inquiry before filing or maintaining the claims set forth in the petition for judicial review.

The facts are thoroughly set forth in the decision of the hearing officer and in the District Court's order denying the petition for judicial review and need not be repeated here at length. The facts relevant to a decision regarding whether NDOT's defense is reasonably grounded in fact are:

1. Zenor injured his wrist on the job on August 1, 2013, during the course of his employment by NDOT.

2. Zenor received worker's compensation benefits.

3. NDOT and its third party worker's compensation claims administrator, CCMSI, arranged for Zenor to undergo a functional capacity evaluation (FCE). The evaluation was performed by a physical therapist on July 21, 2014, and concluded that Zenor was unable at that time to return to work. It did not find that he had any permanent disabilities as the result of his injury. Dr. Donald Huene, Zenor's treating physician, signed off on the report.

4. On September 24, 2014, before NDOT compelled Zenor to participate in vocational rehabilitation, Dr. Huene released Zenor to resume working at his pre-injury job, using a brace on his injured wrist as necessary. Dr. Huene explained in his notes regarding that visit that Zenor's condition had improved since the FCE was performed and that he could now work. NDOT and CCMSI knew Zenor had been released to resume work.

5. On September 29, 2014, an NDOT employee wrote an e-mail stating:

> Regardless of what Dr. Huene states, he signed off on the FCE. Subsequently Mr. Zenor was referred to voc rehab as appropriate and he needs to be working with Debra Adler in an active and ongoing manner to pursue other career options available through voc rehab. Mr. Zenor doesn't 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.

6. On October 22, 2014, Dr. Huene released Zenor to full duty without limitation or restriction, again explaining in his notes that the FCE was no longer a valid assessment of Zenor's condition. NDOT and CCMSI knew of the release and

the contents of Dr. Huene's notes. Zenor provided NDOT with a copy of Dr. Huene's release on October 22, 2014, the day of his appointment.

7. On December 3, 2014, Dr. Huene approved Zenor's participation in vocational rehabilitation, agreeing that Zenor could do the proposed tasks, but not retracting his previous release of Zenor to his pre-injury job.

8. Under protest, Zenor participated in vocational rehabilitation.

9. On December 31, 2014, NDOT sent Zenor a letter stating that unless he provided "full duty work release," NDOT "must" in accordance with NAC 284.611, initiate separation due to a physical disorder. NDOT already had a release to full duty prepared by Dr. Huene, and Zenor had no physical disorder when the letter was written. Zenor again provided the release to NDOT.

10. On June 1, 2015, in complete disregard for the release to full duty provided on at least two prior occasions to NDOT, NDOT began the process of terminating Zenor under NAC 284.611 "based on the functional capacity evaluation . . . which specifies your permanent physical limitations." At the time, NDOT knew Dr. Huene had repudiated the FCE as being outdated, and knew that the FCE did not describe any permanent physical limitations.

11. NDOT conducted an internal hearing regarding Zenor's termination, but did not provide the hearing officer either of Dr. Huene's releases to duty, and offered the outdated FCE as the only evidence of his condition.

12. On June 26, 2015, terminated Zenor because of his "inability to perform the essential functions of your position due to medical reasons." At that time -- and in fact since September 24, 2014 -- Zenor was able to perform the essential functions of his position, and NDOT knew it.

These facts are not disputed by NDOT. As a result, NDOT's efforts to terminate Zenor starting with the December 31, 2014 letter were not well-grounded in fact and its defenses of its efforts to terminate Zenor presented to the hearing officer and the District Court were brought and maintained without reasonable ground, thus forming the basis for an award of attorney's fees under NRS 18.101(2)(b). What's worse, NDOT wasn't simply mistaken in its conduct toward Zenor. It proceeded with full knowledge that the facts did not support its position. NDOT, as shown in its own internal communication, deliberately chose to disregard the medical findings made by Dr. Huene about Zenor's condition. It deliberately chose not to present Dr. Huene's releases to duty to its internal hearing officer, making it impossible for that person to make a proper decision about whether to terminate Zenor. It deliberately claimed that the FCE identified permanent disabilities suffered by Zenor when the FCE stated no such thing. It deliberately fired Zenor based on "medical reasons" when it knew that no such reasons existed. Based on these falsehoods, NDOT forced Zenor to defend himself before the hearing officer. Finally, NDOT forced Zenor to defend himself before the District Court

based on the same groundless, frivolous and bad-faith positions it had claimed as the grounds for firing him.

Because of the manifestly unreasonable and disingenuous conduct by NDOT in bringing the petition for judicial review, this Court should exercise its discretion by awarding Zenor the entire amount of attorney's fees he incurred in prevailing, $7,700.00, and an additional amount to cover fees incurred in bringing the motion. Zenor simply should never have been put in the position of having to defend the decision of the hearing officer.

B. Case Law Disallowing Attorney's Fees on Judicial Review is Distinguishable.

State Dept. of Human Resources, Welfare Div. v. Fowler, 109 Nev. 782, 858 P.2d 375 (1993), is distinguishable.

In *Fowler*, a state employee was terminated for permitting an unauthorized person to have access to the Welfare Division's computer system. The employee appealed his termination and the appeal was heard by a Personnel Commission hearing officer. After a hearing, the hearing officer found that the employee had violated the Welfare Division's rules by permitting unauthorized access, but held that the discipline must be progressive, and that termination was not justified. The hearing officer ordered the Welfare Division to reinstate Fowler with full back pay and benefits, minus offsets for his earnings during the period between his

termination and reinstatement, and further allowed the Welfare Division to impose lesser discipline, up to and including either 90 days' suspension without pay or demotion.

Fowler filed a petition for judicial review challenging the hearing officer's finding that the Welfare Division was entitled to offset Fowler's post-termination earnings and the finding that allowed the Welfare Division to impose lesser discipline. The Welfare Division cross-petitioned, challenging the hearing officer's ruling that Fowler's termination was unjustified and that he was entitled to reinstatement with full back pay and benefits.

The district court held that the Division was not justified in terminating Fowler, that it could impose lesser discipline and that it could offset Fowler's earnings. However, the district court reduced the period of suspension permitted by the hearing officer. In response to Fowler's motion for attorney's fees and costs pursuant to NRS 18.010(2)(a) on the ground that Fowler was a prevailing party, the district court awarded attorney's fees and interest. The Division appealed the order awarding attorney's fees and interest.

The Nevada Supreme Court held that NRS Chapter 284, which provides for judicial review of an agency's disciplinary action against an employee, provide for the exclusive remedies available to an employee. The only remedy available was that the disciplinary action be set aside and the employee reinstated with full pay for

the period of dismissal, demotion or suspension. The court also noted that NRS 233B.130(6) provides that the provisions of that chapter are the exclusive means of judicial review of, or judicial action concerning a final decision in a contested case involving a state agency. The court pointed out that NRS 233B.130 does not contain specific language authorizing the award of attorney's fees in actions involving petitions for judicial review of agency action.

The *Fowler* court, citing among others, *State Indus. Ins. System v. Snapp*, 100 Nev. 290, 680 P.2d 590 (1984) held that an award of attorney's fees to a party to a petition for judicial review pursuant to NRS 18.010(2)(a) was improper because it was not an action for money damages. Therefore, because Fowler did not request money damages in the judicial review proceedings, the district court did not have authority to award attorney's fees under NRS 18.010(2)(a).

Fowler is distinguishable from the case before the court. First, Zenor is not the petitioner but is the victim of a completely unjustified termination carried out by NDOT that was groundless and was carried out in violation of the provisions of NAC 284.611. Unlike Fowler, Zenor was not seeking any other remedies provided by NRS 284 in the district court, having already prevailed before the hearing officer in his appeal of NDOT's termination of him and, unlike Fowler, Zenor had no choice but to participate in a groundless, frivolous petition for judicial review. Had Zenor not retained counsel and responded to the petition, it is almost certain that NDOT's

petition would have been granted and Zenor would have lost the benefits of his employment and the hearing officer's order that he be reinstated with back pay. The Nevada Supreme Court has never addressed an award of attorney's fees under these circumstances.

In addition, this case is distinguishable from *Fowler* and its progeny because Zenor does not seek attorney's fees under NRS 18.010(2)(a) that permits attorney's fees to be awarded to a prevailing in a case for money damages. Rather, Zenor brings his motion under NRS 18.010(1)(2)(b), which permits attorney's fees to be awarded "without regard to the recovery sought" when the court finds that the claim or defense of the opposing party was brought or maintained without reasonable ground. Subsection (b) is the sole basis upon which Zenor seeks attorney's fees. Under these circumstances, unlike those in *Fowler*, the court is to liberally construe the provisions of the paragraph in favor of awarding attorney's fees in all appropriate situations. As subsection (b) informs, the intent of the legislature in enacting the statute was to "punish for and deter frivolous or vexation claims and defenses. . ." Here, Zenor has proven to the Court that NDOT's termination of Zenor was frivolous and vexatious because NDOT ***knew*** that its purported reason for terminating Zenor was false. NDOT knew Zenor was fit to return to work and had no disabling medical condition, yet NDOT terminated Zenor for having such a medical condition.

The general rule in Nevada that attorney's fees are not recoverable absent a

statute, rule or contractual provision to the contrary (*Rowland v. Lepire*, 99 Nev. 308, 662 P.2d 1332 (1983)) is not in conflict and does not prohibit the Court from awarding attorney's fees to Zenor. The authority for such an award in this case and on these facts comes not from a statute or contract, but from NRCP 11, the very rule cited by NRS 18.010(2)(b). Rule 11(b)(2) provides that by presenting a pleading to the court, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the claims, defenses and other legal contentions in the pleading are warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law and that under subsection 3, the allegations and other factual contentions have evidentiary support. *NRCP 11(c).* If subsection (b) is violated, the court may impose an appropriate sanction upon the attorneys or parties responsible. Because NDOT knew that its asserted ground for terminating Zenor was untrue, it cannot claim that its defenses were supported by either the facts or the law. Therefore, NDOT runs afoul of Rule 11, giving this Court the authority to award fees under NRS 18.010(2)(b).

C. The Reasoning of *Franchise Tax Bd. of State v. Hyatt,* 130 Nev. Adv. Op. 71, 335 P.3d 125 (2014) Should Apply to the State of Nevada When It Brings A Petition For Judicial Review Without Reasonable Ground.

In *Fowler, supra*, this Court declined to award attorney's fees to a state employee who brought a petition for judicial review to challenge his termination, and was a prevailing party. The court declined to permit attorney's fees where the statute permitting judicial review of the termination did not expressly provide for those fees. It was the only argument advanced by NDOT for denying Zenor's motion for attorney's fees and the only basis for the district court's denial of that motion. In fact, the District Court, in its order, states only that Zenor's arguments were unpersuasive *because* of *Fowler.*

This Court decided in *Fowler* that because NRS Chapter 233B does not contain specific language authorizing the award of attorney's fees in actions involving petitions for judicial review of agency actions, such fees may not be awarded to a prevailing party. In denying Zenor's motion for attorney's fees, the District Court relied exclusively on *Fowler* and held that Zenor's "arguments regarding NRS 18.010(2)(b) and the fact that no Nevada cases bar an award of attorney's fees under these circumstances are not persuasive" under the holding of *Fowler*. The District Court therefore never reached the argument presented by Zenor in the district court that NRS 18.010(2)(b) should apply because the petition for judicial review brought by NDOT and its lawyers was without reasonable ground.

Fowler was decided in 1993. The 2014 decision in *Franchise Tax Bd. of State v. Hyatt* strongly militates for the conclusion that *Fowler* should not apply in this

case or any other case where the State brings an action without reasonable grounds or to harass the prevailing party as it did by bringing a petition for judicial review in bad faith, which Mr. Zenor was then forced to defend in order to protect the decision of an administrative hearing officer that he be returned to work immediately with back pay based on his wrongful termination.

In *Hyatt*, the Court addressed the question whether a Nevada state agency was afforded discretionary-act immunity for its bad faith conduct, and concluded that such immunity was inappropriate as against public policy. The Court reviewed whether its adoption of the federal standard for discretionary-act immunity in *Martinez v. Maruscczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2000) impliedly overruled the holding in *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 892 (1991), holding that bad-faith conduct is not protected by discretionary-function immunity. Finding its decision on *Falline* consistent with that set forth in *Coulthurst v. United States*, 214 F.3d 106, 109 (2nd Cir. 2000), the Court affirmed its holding in *Falline* "that NRS 41.032 does not protect a government employee for intentional torts or bad-faith misconduct, as such misconduct, 'by definition, [cannot] be within the actor's discretion.' "

While the case here before the Court is not an appeal in a lawsuit initiated by Zenor below, this Court emphatically stated that bad faith misconduct is not within the discretion of a state actor. Therefore, irrespective of the immunity granted by

NRS 41.032(2), the law will not look away from the bad-faith misconduct of NDOT or its lawyers by clothing them with discretionary-function immunity. The *Falline* court determined that "bad faith is different from an abuse of discretion, in that an abuse of discretion occurs when a person acts within his or her authority but the action lacks justification, while bad faith 'involves an implemented attitude that completely transcends the circumference of authority granted' " to the actor. *Falline at 335 P.3d 136.* In *Hyatt*, the court explained that in that case, Nevada's interest in providing adequate relief to its citizens outweighed providing the California Franchise Tax Board with the benefit of a damage cap under comity principles.

Here, our State's interest in protecting its citizens from wrongful, bad-faith misconduct by the State and its agents must outweigh giving NDOT, for example, the benefit of this Court's holding in *Fowler*, while denying Zenor the benefits of NRS 18.010(2)(b) based solely on *Fowler's* aversion to reading an attorney's fees provision into NRS 233B.

But this Court need not read anything into NRS 233B nor even overrule *Fowler* to achieve relief for Zenor because NRS 18.010(2)(b) provides an independent basis for an award of attorney's fees, one which describes conduct that *Hyatt* clearly holds is outside the protection of discretionary-act immunity.

NDOT terminated Zenor based on an outdated FCE that was superseded by his physician's release to full duty without restriction, and unreasonably clung to its

position before the hearing officer and the District Court that a document in which the physician was simply asked whether the vocational rehabilitation training contemplated for Zenor was work which he could perform in his current condition was actually Dr. Huene's final word on Zenor's condition. An NDOT internal e-mail shows that NDOT employees deliberately chose to disregard what the physician said about Zenor's condition. And, before the hearing officer, NDOT employees and its lawyer stated that the release to full duty without restrictions was in fact ***not*** a release to full duty without restriction. *A. App. Vol. I: 87 ("Well, it's our position, Your Honor, that's not a full release").* Even worse, NDOT then filed a petition for judicial review based on these very same ludicrous and groundless arguments.

What NRS 18.010(2)(b) means when it addresses bringing or maintaining an action that is groundless is unimmunized ***bad faith conduct,*** and positions and actions taken by NDOT could not better exemplify what NRS 18.010(2)(b) is intended to remedy. In fact, the statute commands that it be construed broadly in all appropriate circumstances. NDOT and its lawyers simply do not have the discretion to bring a groundless and unreasonable petition for judicial review adverse to an employee they knew was wrongfully terminated. *Hyatt* and the public policy of this state demand that NDOT or any other state agency be subject to the remedial provisions of NRS 18.010 when the state and its actors bring a groundless action.

Zenor emphatically prevailed before the administrative hearing officer. NDOT did not, and could not, challenge the hearing officer's findings of fact in the District Court and so NDOT continued to rely on its disingenuous claims that the outdated Functional Capacity Evaluation and the physician's later determination that Zenor was fit for vocational rehabilitation somehow justified his termination for having a disabling medical condition. As did the hearing officer, the District Court determined, in essence, that NDOT's petition was not brought or maintained on reasonable grounds, that is, based on the two documents that simply do not say what NDOT asserts they say. As a result of NDOT's bad faith conduct, Zenor was forced to participate in a litigation he could neither ignore nor afford, especially given that he had lost his state employment. NDOT's conduct goes beyond bad faith, it is outrageous. If ever there was a case where NRS 18.010(2)(b) should apply, this is it. *Hyatt* compels the application of this statute here, as does the State's strong interest in protecting its citizens from the vindictive and retaliatory conduct of the State through one of its agencies.

NDOT surely must have believed that an unemployed Highway Maintenance Worker III would not and could not oppose their petition for judicial review and that it would have been granted without opposition. Again, this conduct should not and cannot be countenanced under NRS Chapter 18 or the holding of *Hyatt*.

CONCLUSION

For the reasons stated above, Chad Zenor respectfully requests that the Court reverse the District Court's denial of his motion for attorney's fees and costs and remand this matter to the District Court with direction to order the State to pay Zenor's attorney's fees.

Respectfully submitted this 13th day of June, 2017.

OSHINSKI & FORSBERG, LTD.

By /s/ Mark Forsberg, Esq.
Mark Forsberg, Esq. NSB 4265

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

1. This brief has been prepared using Microsoft Word with a Times New Roman font (proportional spacing) with a 14 point font size.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 9,347 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of June, 2017.

OSHINSKI & FORSBERG, LTD.

By /s/ Mark Forsberg, Esq.
Mark Forsberg, Esq. NSB 4265

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Oshinski & Forsberg, Ltd., and that on this date, I filed a true and correct copy of the foregoing **Appellant's Opening Brief and Appellant's Appendix Volumes I and II** with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification to all registered users as follows:

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

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

Executed on this 13th day of June, 2017, in Carson City, Nevada.

/s/ Linda Gilbertson
Linda Gilbertson