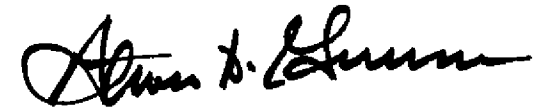


# EXHIBIT 4

2017-05-10 Notice of Entry of  
Order Denying Petition for  
Judicial Review

# EXHIBIT 4



CLERK OF THE COURT

1 NEO  
LAW OFFICE OF DANIEL MARKS  
2 DANIEL MARKS, ESQ.  
Nevada State Bar No. 002003  
3 ADAM LEVINE, ESQ.  
Nevada State Bar No. 004673  
4 610 South Ninth Street  
Las Vegas, Nevada 89101  
5 (702) 386-0536; FAX (702) 386-6812  
*Attorneys for Respondent Brian Ludwick*

7  
8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 STATE OF NEVADA ex rel, ITS  
DEPARTMENT OF CORRECTIONS

Case No.: A-16-741032-J  
Dept. No.: XXVII

11 Petitioner,

12 v.

13 BRIAN LUDWICK, an individual; THE  
14 STATE OF NEVADA ex rel; ITS  
DEPARTMENT OF ADMINISTRATION  
15 PERSONNEL COMMISSION, HEARING  
OFFICER,

16 Respondents.  
17 \_\_\_\_\_/

18 **NOTICE OF ENTRY OF ORDER DENYING PETITION FOR JUDICIAL REVIEW**

19 TO: STATE OF NEVADA DEPARTMENT OF CORRECTIONS, Petitioner,

20 TO: JENNIFER K. HOSTETLER, Deputy Attorney General, Attorney for Petitioner;

21 TO: MICHELLE DI SILVESTRO ALANIs, Deputy Attorney General, Attorney for Petitioner;

22 ///

23 ///

1 PLEASE TAKE NOTICE that the Order Denying Petition for Judicial Review was entered in  
2 the above-entitled action on the 8<sup>th</sup> day of May, 2017 a copy of which is attached hereto.

3 DATED this 10<sup>th</sup> day of May, 2017.

4 LAW OFFICE OF DANIEL MARKS

5  
6 /s/ Adam Levine, Esq.  
7 DANIEL MARKS, ESQ.  
8 Nevada State Bar No. 002003  
9 ADAM LEVINE, ESQ.  
Nevada State Bar No. 004673  
610 South Ninth Street  
Las Vegas, Nevada 89101  
*Attorneys for Respondent Brian Ludwick*

10 **CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

11 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 10<sup>th</sup>  
12 day of May, 2017, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically transmitted  
13 a true and correct copy of the above and foregoing NOTICE OF ENTRY OF STIPULATION AND  
14 ORDER TO EXTEND THE FILING OF THE ANSWERING BRIEF AND CONTINUE HEARING  
15 (Second Request) by way of Notice of Electronic Filing provided by the court mandated E-file & Serve  
16 system, to the e-mail address on file for:

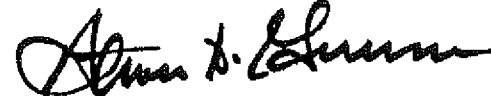
17 Jennifer K. Hostetler, Chief Deputy Attorney General  
18 Michelle Di Silvestro Alanis, Deputy Attorney General  
OFFICE OF THE ATTORNEY GENERAL  
*Attorneys for Petitioner*  
19 E-mail: jhostetler@ag.nv.gov  
malanis@ag.nv.gov

20  
21 /s/ Joi E. Harper  
22 An employee of the  
23 LAW OFFICE OF DANIEL MARKS

ORIGINAL

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1 ORDR  
LAW OFFICE OF DANIEL MARKS  
2 DANIEL MARKS, ESQ.  
Nevada State Bar No. 002003  
3 ADAM LEVINE, ESQ.  
Nevada State Bar No. 004673  
4 610 South Ninth Street  
Las Vegas, Nevada 89101  
5 (702) 386-0536; FAX (702) 386-6812  
*Attorneys for Respondent Brian Ludwick*

  
CLERK OF THE COURT

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA  
9

10 STATE OF NEVADA ex rel, ITS  
DEPARTMENT OF CORRECTIONS

Case No.: A-16-741032-J  
Dept. No.: XXVII

11 Petitioner,  
12

13 v.

14 BRIAN LUDWICK, an individual; THE  
STATE OF NEVADA ex rel; ITS  
DEPARTMENT OF ADMINISTRATION  
15 PERSONNEL COMMISSION, HEARING  
OFFICER,  
16

Respondents.  
17 \_\_\_\_\_/

18 **ORDER DENYING PETITION FOR JUDICIAL REVIEW**

19 This matter having come before the Court on April 19, 2017, with Petitioner Nevada  
20 Department of Corrections ("NDOC") being represented by Deputy Attorney General Michelle Di  
21 Silvestro Alanis, and Respondent Brian Ludwick represented by Adam Levine, Esq. of the Law Office  
27 of Daniel Marks; and the Court having considered the record of the administrative agency proceedings  
22 and the briefs of the parties, and having heard the arguments of counsel:  
23



1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that NDOC's Petition for Judicial  
2 Review is denied for the following reasons:

- 3 1. The Hearing Officer's Decision was reasonable based upon the facts.  
4 2. There was no clear error in the application of the law by the Hearing Officer.  
5 3. The Hearing Officer did not exceed her authority.  
6 4. The Hearing Officer's Decision was not arbitrary or capricious.  
7 5. The evidentiary standard used by the Hearing Officer was sufficient to justify the result.

8 DATED this 8 day of May, 2017.

9  
10 Nancy L Alf  
DISTRICT COURT JUDGE DC

11  
12 APPROVED AS TO FORM AND CONTENT:

13 OFFICE OF THE NEVADA ATTORNEY GENERAL

14 By: Michelle Di Silvestro Alanis  
15 Jennifer K. Hostetler, Chief Deputy Attorney General  
16 Michelle Di Silvestro Alanis, Deputy Attorney General  
17 Bureau of Business & State Services - Personnel Division  
555 E. Washington Avenue, Ste. 3900  
Las Vegas, NV 89101

18 Respectfully submitted by:

19 LAW OFFICE OF DANIEL MARKS

20  
21 By: [Signature]  
22 DANIEL MARKS, ESQ.  
Nevada State Bar No. 002003  
ADAM LEVINE, ESQ.  
Nevada State Bar No. 004673  
610 South Ninth Street  
23 Las Vegas, Nevada 89101  
*Attorneys for Respondent Brian Ludwick*

# EXHIBIT 3

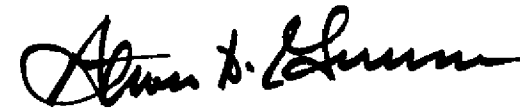
2017-05-09 Order Denying  
Petition for Judicial Review

# EXHIBIT 3

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1 ORDR  
2 LAW OFFICE OF DANIEL MARKS  
3 DANIEL MARKS, ESQ.  
4 Nevada State Bar No. 002003  
5 ADAM LEVINE, ESQ.  
6 Nevada State Bar No. 004673  
7 610 South Ninth Street  
8 Las Vegas, Nevada 89101  
9 (702) 386-0536; FAX (702) 386-6812  
10 *Attorneys for Respondent Brian Ludwick*



CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

10 STATE OF NEVADA ex rel, ITS  
11 DEPARTMENT OF CORRECTIONS

Case No.: A-16-741032-J  
Dept. No.: XXVII

12 Petitioner,

13 v.

14 BRIAN LUDWICK, an individual; THE  
15 STATE OF NEVADA ex rel; ITS  
16 DEPARTMENT OF ADMINISTRATION  
17 PERSONNEL COMMISSION, HEARING  
18 OFFICER,

19 Respondents.

20 **ORDER DENYING PETITION FOR JUDICIAL REVIEW**

21 This matter having come before the Court on April 19, 2017, with Petitioner Nevada  
22 Department of Corrections ("NDOC") being represented by Deputy Attorney General Michelle Di  
23 Silvestro Alanis, and Respondent Brian Ludwick represented by Adam Levine, Esq. of the Law Office  
of Daniel Marks; and the Court having considered the record of the administrative agency proceedings  
and the briefs of the parties, and having heard the arguments of counsel:

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that NDOC's Petition for Judicial  
2 Review is denied for the following reasons:

- 3 1. The Hearing Officer's Decision was reasonable based upon the facts.  
4 2. There was no clear error in the application of the law by the Hearing Officer.  
5 3. The Hearing Officer did not exceed her authority.  
6 4. The Hearing Officer's Decision was not arbitrary or capricious.  
7 5. The evidentiary standard used by the Hearing Officer was sufficient to justify the result.

8 DATED this 8 day of May, 2017.

9  
10 Nancy L. Alf  
DISTRICT COURT JUDGE DC

11  
12 **APPROVED AS TO FORM AND CONTENT:**

13 OFFICE OF THE NEVADA ATTORNEY GENERAL

14 By: Michelle Di Silvestro Alanis  
15 Jennifer K. Hostetler, Chief Deputy Attorney General  
16 Michelle Di Silvestro Alanis, Deputy Attorney General  
17 Bureau of Business & State Services - Personnel Division  
555 E. Washington Avenue, Ste. 3900  
Las Vegas, NV 89101

18 Respectfully submitted by:

19 LAW OFFICE OF DANIEL MARKS

20  
21 By: [Signature]  
22 DANIEL MARKS, ESQ.  
27 Nevada State Bar No. 002003  
ADAM LEVINE, ESQ.  
22 Nevada State Bar No. 004673  
610 South Ninth Street  
23 Las Vegas, Nevada 89101  
*Attorneys for Respondent Brian Ludwick*

# EXHIBIT 2

2016-07-22 Decision and Order  
on the Nevada Department of  
Correction's Petition for  
Reconsideration

# EXHIBIT 2

STATE OF CALIFORNIA  
HUMAN RESOURCES ADMINISTRATION  
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1 approved, this Hearing Officer declined to admit AR 339 for the purpose of proving the penalty  
2 associated with Mr. Ludwick's conduct and instead, admitted AR 339 for the limited purpose of  
3 showing the kind of conduct NDOC deemed to be misconduct. See Footnote 1 in the Decision. This  
4 Hearing Officer understands the confusion as to the determination regarding AR 339 given the wording  
5 in the last sentence beginning on page 9 of the Decision and continuing at the top of page 10. What  
6 this Hearing Officer intended to convey was that it was not necessary to set forth in the Decision the  
7 analysis of the issue as to whether AR 339 had to be approved by the Personnel Commission because a  
8 determination as to whether there was just cause to terminate Mr. Ludwick could be made on the basis  
9 of applicable Nevada Administrative Code provisions and without reliance upon AR 339.

10 The rationale behind this Hearing Officer's decision to allow even limited admissibility of AR 339  
11 was so that this Hearing Officer could understand, in the context of the Department of Corrections, the  
12 expectations and duties as it relates to correctional officers being at their assigned post and determine:  
13 1) whether Mr. Ludwick's conduct violated the Nevada Administrative Code provisions he was charged  
14 with violating; 2) whether, in the case of NAC 284.650.7, his conduct rose to the level of inexcusable  
15 neglect of duty; and 3) the appropriate penalty for any violations in accordance with the progressive  
16 disciplinary scheme required by NRS 284.383.

17 **2. WHETHER THE DETERMINATION THAT AR 339 HAD TO BE APPROVED BY THE PERSONNEL**  
18 **COMMISSION WAS CLEAR ERROR**

19 When it comes to matters of appointing, transferring, promoting, demoting and discharging  
20 persons in the classified service, as are correctional officers, NRS 284.150(2) unambiguously mandates  
21 that those actions be taken in accordance with NRS 284 and the regulations adopted in accordance  
22 therewith. NRS 284.150(2) states:

23 **NRS 284.150 Classified service: Composition; limitations on**  
24 **appointment, transfer, promotion, demotion or discharge;**  
25 **discrimination prohibited.**



1           1. The classified service of the State of Nevada is comprised of all  
2 positions in the public service now existing or hereafter created which  
3 are:

4               (a) Lawfully designated as being in the classified service; and

5               (b) Filled according to merit and fitness from eligible lists  
6 prepared upon the basis of examination, which must be open and  
7 competitive, except as otherwise provided in this chapter and NRS  
8 209.161.

9           2. Except as otherwise provided in NRS 193.105, 209.161 and 416.070,  
10 **a person must not be** appointed, transferred, promoted, demoted or  
11 **discharged in the classified service in any manner or by any means**  
12 **other than those prescribed in this chapter and the regulations**  
13 **adopted in accordance therewith.**

14           3. A person must not be discriminated against on account of the  
15 person's religious opinions or affiliations, race, sex, age or disability.

16 *Emphasis added.*

17 NAC 284 sets forth the regulations adopted by the Personnel Commission. NAC 284.742(1) provides:

18 **NAC 284.742(1):**

19 (1) Each appointing authority shall determine, ***subject to the approval of the***  
20 ***[Personnel] Commission***, those specific activities which, for employees  
21 under its jurisdiction, are prohibited as inconsistent, incompatible or in  
22 conflict with their duties as employees. The appointing authority shall  
23 identify those activities in the policy established by the appointing authority  
24 pursuant to NRS 284.383. *Emphasis added.*

25 NRS 284.383(3) provides:

**NRS 284.383 Use of disciplinary measures; employee entitled to receive  
copy of findings or recommendations; classified employee entitled to  
receive copy of policy explaining information relating to disciplinary  
action.**

3. An appointing authority shall provide each permanent classified  
employee of the appointing authority with a copy of a policy ***approved by***  
***the [Personnel] Commission*** that explains prohibited acts, possible  
violations and penalties and a fair and equitable process for taking  
disciplinary action against such an employee. *Emphasis added.*



1 Those who are exempted from the purview of NRS 284.150(2) are expressly identified as State  
2 employees or officers convicted of selling controlled substances<sup>1</sup>; Wardens<sup>2</sup> and those who willfully  
3 disclose confidential information in violation of NRS 416.070.<sup>3</sup> If the Nevada legislature wanted to  
4 include correctional officers among those exempted from the mandate of NRS 284.150(2), it could have  
5 done so.

6 NAC 284.742(1) and NRS 284.383(3) unambiguously state that each appointing authority **shall**:

7 **1) subject to the approval of the Personnel Commission**, determine prohibited conduct as it relates to  
8 employees under their jurisdiction; 2) identify those prohibited activities in a policy established by the  
9 appointing authority; 3) include in the policy an explanation of the process of progressive discipline as  
10 administered by the appointing authority in conformance with the enumerated NRS and NAC  
11 provisions; and 4) provide each permanent classified employee of the appointing authority with a copy  
12 of a policy **approved by the Personnel Commission**, that explains prohibited acts, possible violations  
13 and penalties and a fair and equitable process for taking disciplinary action against such employee.

14 Because the prohibitions and penalties set forth in AR 399 which Mr. Ludwick was charged with  
15 violating have not been approved by the Personnel Commission, they cannot be relied upon as a basis  
16 for terminating his employment.

17 In its Petition for Rehearing, NDOC argues that this Hearing Officer committed clear error by  
18 not admitting and giving full weight to AR 339. In support of its position, NDOC asserts a new  
19 argument, in the sense that it was not presented in NDOC's Pre-hearing Statement or at the Hearing,  
20 that Article 5 § 21 of the Nevada Constitution gives the Board of Prison Commissioners supervision of  
21 all matters connected with Nevada's prisons. See Petition for Rehearing at pages 3-4. This Hearing  
22 Officer disagrees with what appears to be NDOC's assertion that the Board of Prison Commissioners  
23

---

24 <sup>2</sup> See NRS 193.105

25 <sup>2</sup> See NRS 209.161

<sup>3</sup> See NRS 416.070

1 has plenary powers over all matters associated with the Department of Corrections. Article 5 § 21  
2 pertaining to the powers given to the Board of Prison Commissioners dates back to 1864 and provides:

3 Sec: 21. **Board of state prison commissioners; board of examiners;**  
4 **examination of claims.** The Governor, Secretary of State and Attorney  
5 General shall constitute a Board of State Prison Commissioners, which Board  
shall have such supervision of all matters connected with the State Prison *as*  
*may be provided by law.* *Emphasis added.*

6 NRS 209.111 describes the powers and duties of the Board of Prison Commissioners and provides:

7 **NRS 209.111 Powers and duties of Board.** The Board has full  
8 control of all grounds, buildings, labor, and property of the Department,  
and shall:

- 9 1. Purchase, or cause to be purchased, all commissary supplies,  
10 materials and tools necessary for any lawful purpose carried on at  
any institution or facility of the Department.
- 11 2. Regulate the number of officers and employees of the  
Department.
- 12 3. Prescribe regulations for carrying on the business of the Board  
and the Department.

13 Counsel for NDOC takes the position that because NRS 209.111 gives the Board of Prison  
14 Commissioners “full control” of NDOC’s “labor” and authorizes the Board to “prescribe regulations for  
15 carrying on the business of the Board and Department,” AR 339’s approval by the Board of Prison  
16 Commissioners is sufficient to make it a lawful regulation. This Hearing Officer disagrees.

17  
18 A look at Nevada case law and the legislative history of NRS 209 reveal that the “labor”  
19 referenced in NRS 209.111 is **prison labor** and not labor in terms of officers and employees of NDOC. In  
20 State ex rel. Fox v. Hobart, 13 NV. 419 (1878) regarding Article 5 § 21 and the precursor to NRS 209.111,  
21 the Nevada Supreme Court stated:

22 In place of the general supervisory authority formerly exercised by the  
23 state prison commissioners their powers were enumerated and limited  
as follows: They shall have full control of all the state prison grounds,  
24 buildings, **prison labor**, prison property; shall purchase or cause to be  
25 purchased, all needed commissary supplies, all raw material and tools  
necessary for any manufacturing purposes carried on at said prison;  
shall sell all manufactured articles and stone, and collect money for the

1 same; shall rent or hire out any or all of the labor of the convicts, and  
2 collect the money therefore. Nev. Stats. 1877, 66 § 1. **Emphasis added.**

3 13 Nev. At 420-421.

4 For the avoidance of doubt as to what the legislature meant by “labor” in the context of NRS 209, 111,  
5 and to the extent that “labor” as currently used in NRS 209.111 is ambiguous, we are permitted to look  
6 to the legislative history of NRS 209 for guidance. See *Lader v. Warden, Northern Nevada Correctional*  
7 *Center*, 121 Nev. 682, 120 P.3d 1164 (2005) (stating “[w]hen the language of a statute is ambiguous,  
8 the intent of the Legislature is controlling.”). In 1975, when the powers of the Board of Prison  
9 Commissioners were set forth in what was then NRS 209.040, “labor” as used in the statute still  
10 referenced “prison labor.” The 1975 version of the statute read:

11 **NRS 209.040 General Powers of Board.** The Board has:

- 12 1. *Full control of all* the state prison grounds, buildings, **prison**  
**labor** and prison property.
- 13 2. Purchase, or cause to be purchased, all commissary supplies, all  
14 raw materials and tools necessary for any manufacturing purposes  
15 carried at the state prison.
- 16 3. Sell all manufactured articles and stone and collect the money for  
17 the same.
- 18 4. Rent or hire out any or all of the labor of the convict and collect  
19 money therefor.
- 20 5. Regulate the number of officers and employees.

21 *Emphasis added.*

22 In 1977, Senate Bill 116 (hereinafter “S.B. 116”) was introduced in the Committee on  
23 Education, Health and Welfare and State Institutions for the primary purpose of reorganizing the state  
24 prison system into a Department of Prisons and amending or repealing much of the statutory language  
25 dating back to 1873 that governed prison operations. See the Summary of Legislation attached to the  
1977 Senate History, Fifty-ninth Session. The relevant text of S.B. 116 that was ultimately enacted in  
1977 read as follows:

**Section 12.** The Board has full control of all grounds, buildings, **labor**,  
and property of the Department, and shall:



1. Purchase, or cause to be purchased, all commissary supplies, materials and tools necessary for any lawful purpose carried on at any institution of the Department.
2. Sell all manufactured articles and collect the money for their sale.
3. Contract with tax-supported, nonprofit government agencies for any **labor of offenders** and collect money therefor. All state agencies shall cooperate with the department in carrying out the provisions of this sub-section to the extent consistent with their other lawful duties.
4. Regulate the number of officers and employees of the Department.
5. Prescribe regulations for carrying on the business of the Board and the Department.

Though the enacted version of S.B. 116 no longer referred to "prison labor" in the lead-in sentence, the deletion of the word "prison" was not meant to and did not change the meaning or intent of the statute. In a letter dated March 22, 1977 from then Deputy Attorney General Patrick J. Mullen to the then Chairman of the Senate Judiciary Committee regarding "S.B. 116 - substantive changes from NRS Chapter 209," there is no mention of changing the meaning of "labor" as it had been used in the context of NRS 209. See Exhibit B1 and B2 to the Senate Judiciary Committee Minutes of Meeting of March 15, 1977.

Based upon the limitations on the Board of Prison Commissioner's authority as set forth in Article 5 §21 of the Nevada Constitution and in NRS 209.111, this Hearing Officer does not concur with NDOC's position that the approval of AR 339 solely by the Board of Prison Commissioners makes AR 339 a lawful and valid administrative regulation. Nor does this Hearing Officer see a conflict between NAC 284.742(1) and NRS 284.383(3) which require Personnel Commission approval of AR 339 and the authority vested in the Board of Prison Commissioners under Article 5 § 21 and in NRS 209. The Personnel Commission and the Board of Prison Commissioners serve two distinctly different roles. Just because the Governor sits as the President of the Board of Prison Commissioners and, separate and apart from that position, has the authority in his capacity as Governor to appoint Personnel

1 Commission members does not negate the express mandate of the Legislature that the Personnel  
2 Commission, composed of individuals with either a “demonstrated interest in or knowledge of the  
3 principles of public personnel administration” or a “background in personnel administration” approve  
4 policies related to the hiring and firing of all classified state employees, except those who are  
5 exempted by law.

6 It is beyond the scope of my authority as a Hearing Officer to substitute my judgment in place  
7 of the Legislatures and determine that the approval of the prohibitions and penalties in AR 339 by the  
8 Board of Prison Commissioners is a sufficient and valid substitute for the approval of the Personnel  
9 Commission when the plain language of NAC 284.742(1) and NRS 284.383(3) states otherwise. As the  
10 Nevada Supreme Court instructed in *Goudge v. State of Nevada*, \_\_ Nev. \_\_, \_\_\_, 287 P.3d. 301, 204  
11 (2012) “when used in a statute, the word ‘shall’ imposes a duty on a party to act and prohibits judicial  
12 discretion.” Id. at 302 (citing *Otak Nevada, LLC v. District Court*, 127 Nev. at \_\_\_, 260 P.3d at 411).

13 Based upon the foregoing discussion, this Hearing Officer stands by its determination that AR 339  
14 had to be approved by the Personnel Commission in order to serve as the basis for terminating Mr.  
15 Ludwick. That being said, no matter whether AR 339 had been admitted and given full weight<sup>4</sup> or not  
16 admitted at all, this Hearing Officer’s determination would remain the same - there simply was not just  
17 cause to dismiss Mr. Ludwick under the facts and circumstances presented in his case.

18 ....

19 ....

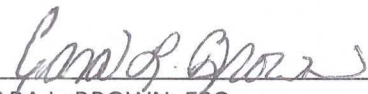
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21 <sup>4</sup> Even if AR 339 were given full weight, the penalties set forth in AR 339.04 are only “recommended  
22 penalties.” As stated in AR 339.04(6), the Chart of Corrective/Disciplinary Sanctions set forth in AR  
23 339.04(8) “may not reflect an appropriate penalty for the misconduct. Indeed, an appropriate penalty  
24 may be higher or lower depending upon current issues and the impact of the particular misconduct on  
25 the Department and/or fellow employees.” Moreover, this is not a case where there was a clear and  
serious threat to security such that this Hearing Officer had to defer to the appointing authority’s  
decision to terminate Mr. Ludwick. See *Dredge v. State ex rel. Dept. of Prisons*, 105 Nev. 39, 769 P.2d  
56 (1989).

1  
2 ORDER

3 **IT IS HEREBY ORDERED** that the Nevada Department of Corrections' PETITION FOR  
4 RECONSIDERATION is **DENIED**.  
5

6 Dated this 22<sup>nd</sup> day of July, 2016.

7  
8   
9 CARA L. BROWN, ESQ.  
Hearings Officer

10  
11  
12 **NOTICE:** Pursuant to NRS 233B.130, should any party desire to appeal this final determination of the  
13 Appeals Officer, a Petition for Judicial Review must be filed with the District Court within 30 days  
14 after service by mail of this decision.  
15  
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# EXHIBIT 1

2016-06-27 Findings of Fact,  
Conclusions of Law and  
Decision

# EXHIBIT 1

FILED  
JUN 27 2016  
HEARINGS DIVISION

BEFORE THE NEVADA PERSONNEL COMMISSION

HEARINGS OFFICER

BRIAN LUDWICK,

Petitioner-Employee

vs.

NEVADA DEPARTMENT OF  
CORRECTIONS,

Respondent-Employer.

HEARING NO.: 1521187-CB

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

This matter came on for administrative hearing before the undersigned Hearings Officer for the Nevada Personnel Commission on the 27<sup>TH</sup> day of May 2016 pursuant to the Petitioner-Employee's appeal of his termination from employment with the Nevada Department of Corrections (hereinafter "NDOC") effective December 28, 2015. The Petitioner-Employee (hereinafter "Mr. Ludwick") appeared by and through his representative Adam Levin. Respondent-Employer, NDOC, appeared by and through Susanne M. Sliwa, Deputy Attorney General for the State of Nevada.

The following evidence was admitted and considered during the Hearing:

- Mr. Ludwick's Exhibits 1 - 8
- NDOC's Exhibits A-F<sup>1</sup>

and testimony under oath of the following witnesses:

<sup>1</sup> Exhibit A28-A46 is a copy of NDOC Administrative Regulation (hereinafter "AR") 339 Code of Ethics Employee Conduct Prohibitions and Penalties. As AR 339 has not been approved by the Nevada Personnel Commission it was admitted for the limited purpose of showing the kind of conduct NDOC deemed to be misconduct but not for the purpose of proving the penalty associated with the proscribed conduct.



- Brian Ludwick, Petitioner and former Correctional Officer with the Florence McClure Women's Correctional Center (hereinafter "FMWCC")
- Arthur Emling, Jr., Criminal Investigator II, Office of the Inspector General, State of Nevada, Department of Corrections
- Gary Piccinini, former Correctional Lieutenant and current Associate Warden, FMWCC
- Jo Gentry, Warden, FMWCC
- Earnest Van Kline, Police Officer, North Las Vegas Police Department and former Correctional Officer with FMWCC
- Glenda Stewart, Correctional Officer, FMWCC
- Joel Tynning, Correctional Officer, FMWCC
- Dana Pinapfel, Correctional Officer, FMWCC

The undersigned Hearings Officer having heard and considered the arguments of the parties and reviewed and considered the above-referenced exhibits and the testimony of the above-referenced witnesses does hereby make the following Findings of Fact, Conclusions of Law and Decision.

#### **FINDINGS OF FACT**

At the time of his termination, Mr. Ludwick had been employed as a Correctional Officer with the NDOC for approximately three years and was assigned to the FMWCC. On April 4, 2015, Mr. Ludwick was assigned to Unit 1 of FMWCC along with two other officers. Approximately 15 to 30 minutes into his shift, Mr. Ludwick testified that he tried unsuccessfully to call his supervisor, then Lieutenant Gary Piccinini, to request permission to switch from Unit 1 to Unit 5, but was unable to reach him by phone. According to Mr. Ludwick, he suffers from severe hypertension and was feeling ill when he reported to duty on April 4, 2015 as he had forgotten to

1 take his medication. He wanted to switch from Unit 1 to Unit 5 because, in Mr.  
2 Ludwick's words, Unit 5 was a "less stressful unit." Mr. Ludwick testified that he  
3 made no further efforts to contact Lieutenant Piccinini via telephone or handheld  
4 radio or by any other means, but rather left Unit 1 and walked approximately 60  
5 yards to the Shift Command Office where he approached Lieutenant Piccinini and  
6 requested a switch in assigned posts stating, according to Lieutenant Piccinini, that  
7 he did not know Unit 1 and was used to Unit 5. See Exhibit 4 - Investigation Detail  
8 Report. Lieutenant Piccinini denied Mr. Ludwick's request because he had already  
9 made shift assignments for the day and wanted Mr. Ludwick to get trained in Unit 1  
10 as he had worked in Unit 1 only one time prior to April 4<sup>th</sup>. After his request for a  
11 change to Unit 5 was rejected, Lieutenant Piccinini stated that Mr. Ludwick became  
12 irate and said, "[w]ell how about I use FMLA then because I have not taken my blood  
13 pressure medication, how's that!" Id. Upon hearing that, Lieutenant Piccinini granted  
14 Mr. Ludwick permission to leave the institution.

15 Two days later on April 6, 2016, an Investigation Detail Report was prepared  
16 and referred to the NDOC's Office of Inspector General because in Lieutenant  
17 Piccinini's opinion Mr. Ludwick's conduct suggested that he was "falsely using FMLA  
18 because he did not get what he wanted." See Id. at page 2. The report was submitted  
19 for investigation of "[p]ossible abuse of FMLA and neglect of duty. Id. at page 1.

20 In June 2015, Arthur Emling, Jr., Criminal Investigator II with NDOC's Office  
21 of the Inspector General ("OIG") began an Internal Affairs investigation into two (2)  
22 allegations against Mr. Ludwick: (1) that he engaged in neglect of duty when he "left  
23 his assigned post in Unit 1 without prior authorization from a supervisor, or any  
24 other person of higher authority;" and 2) that he engaged in neglect of duty when he  
25 "failed to perform his assigned security functions in Unit 1 after leaving his assigned

1 post." See Exhibit 5 – Memo dated August 10, 2015 from Arthur Emling, Jr. to Jo  
2 Gentry, Warden at page 3. After conducting interviews of those with knowledge of  
3 what had occurred on April 4, 2015 involving Mr. Ludwick<sup>2</sup>, Mr. Emling concluded  
4 that "no staff member could confirm that Officer Brian Ludwick had asked a  
5 supervisor or any person with authority in further granting Ludwick authorization to  
6 leave his assigned post (Unit 1, Floor A) on April 4, 2015." Id. at page 19.

7 According to the testimony of Lieutenant Piccinini, the mandated minimum  
8 staffing for Unit 1 on April 4, 2015 was two officers. He testified that he had assigned  
9 three officers to the unit since one officer has to remain in the control room at all  
10 times; and if there are only two officers assigned to the unit, that leaves only one  
11 officer responsible for performing work for 1/3 of the entire prison population. In  
12 Lieutenant Piccinini's judgment, he thought it best to have three officers assigned to  
13 Unit 1 on April 4, 2015 not only for the security of the institution but also to allow  
14 Mr. Ludwick to be trained in Unit 1. See Id. at pages 5 and 6. After April 4, 2015,  
15 minimum staffing for Unit 1 was increased to three correctional officers. Id. at page 6.

16 Each of the correctional officers who testified at the Hearing, except for Mr.  
17 Ludwick, acknowledged that there was a policy, practice and custom that requires  
18 correctional officers to get prior authorization from a supervisor before leaving their  
19 post. Several of officers further testified that although there was such a policy it was  
20 often violated for various reasons and according to at least one witness, depending  
21 upon the supervisor, violation of the policy could result in discipline. The policy  
22 prohibiting correctional officers from leaving their post without prior authorization  
23

24 <sup>222</sup> The employees of FMWCC who were interviewed in connection with the  
25 incident at issue were: 1) Gary Piccinini, Correctional Lieutenant; 2) Terry  
Day, Senior Correctional Officer; Brian Ludwick, then Correctional Officer;  
Michael Towers, Jr., Correctional Officer assigned to Unit 1 on April 4, 2015  
and Preshess White, Correctional Officer assigned to Unit 1 on April 4, 2015.

1 from a supervisor was reiterated by Lieutenant Piccinini in an email sent to dayshift  
2 staff just days prior to April 4, 2015. According to the testimony of Mr. Ludwick he  
3 did not read the email until after April 4<sup>th</sup>. See Id. at page 19. Mr. Ludwick alleges  
4 that he did not read the email until after April 4, 2015 because he did not have  
5 access to a computer. The evidence however, shows that Mr. Ludwick did in fact  
6 have access to a computer after the email was issued and prior to April 4<sup>th</sup> but he did  
7 not open the email.

8 On October 13, 2015, Jo Gentry, Warden of FMWCC authored an Adjudication  
9 Report that sustained the neglect of duty charge against Mr. Ludwick for leaving his  
10 assigned post without prior authorization from his supervisor. Ms. Gentry, however,  
11 did not sustain the allegation that Mr. Ludwick failed to perform his assigned security  
12 functions after he left his assigned post as she found there to be insufficient evidence  
13 to support the charge. The recommended discipline was one five (5) day suspension  
14 in lieu of dismissal "since there was no security breach resulting from [Mr. Ludwick]  
15 leaving his post." See Exhibit 5 - Adjudication Report memo dated October 13, 2015  
16 at page 2 of 3. NDOC Deputy Director E.K. McDaniel reviewed the report and  
17 concurred with the recommendations contained therein. Id at page 3 of 3.  
18 Lieutenant Piccinini was serving as Acting Associate Warden at the time and met with  
19 Mr. Ludwick to notify him of the outcome of the investigation. Id. After the  
20 Adjudication Report was signed-off on and forwarded to Human Resources for review,  
21 Human Resources advised Warden Gentry that past violations of AR 339.05.15 UU -  
22 leaving an assigned post while on duty without authorization of a supervisor - had  
23 resulted in dismissal. Warden Gentry testified that she discussed with Deputy  
24 Director McDaniel the information provided by Human Resources and Deputy  
25 Director McDaniel made the final decision to terminate Mr. Ludwick so that Mr.

1 Ludwick's discipline would be consistent with discipline imposed in the past for  
2 similar infractions at FMWCC.

3 Mr. Ludwick was served with a Specificity of Charges on December 9, 2015  
4 charging him with violating:

5 NAC 284.650.1 - Activity which is incompatible with an  
6 employee's conditions of employment established by law or  
7 which violates a provision of NAC 284.653 or 284.738 to  
8 284.771, inclusive.

9 NAC 284.650.3 - The employee of any institution  
10 administering a security program in the considered  
11 judgment of the appointing authority, violates or endangers  
12 the security of the institution

13 NAC 284.650.7 - Inexcusable neglect of duty

14 AR 339.05.15.UU - Neglect of Duty - Leaving an assigned  
15 post while on duty without authorization of a supervisor.

16 He was terminated effective December 28, 2015 and on January 4, 2016 timely filed a  
17 Request for Hearing Regarding Dismissal Suspension, Demotion or Involuntary  
18 Transfer.

### 19 CONCLUSIONS OF LAW

20 NRS 284 sets forth the statutory framework governing the Nevada Personnel  
21 System. NRS 284.383 authorizes the Nevada Personnel Commission  
22 (hereinafter the "Commission") to adopt a system for disciplining state  
23 employees and provides:

24 **NRS 284.384 Adjustment of certain grievances: Regulations;  
25 appeal to Employee-Management Committee; enforcement of  
binding decisions of Employee-Management Committee;  
representation of employee.**

1. The Commission shall adopt by regulation a system  
for administering disciplinary measures against a  
state Employee in which, except in cases of serious  
violations of law or regulations, less severe measures

1 are applied at first, after which more severe measures  
2 are applied only if less severe measures have failed to  
correct the Employee's deficiencies.

3 2. The system adopted pursuant to subsection 1 must  
4 provide that a state Employee is entitled to receive a  
5 copy of any findings or recommendations made by an  
6 appointing authority or the representative of the  
appointing authority, if any, regarding proposed  
disciplinary action.

7 3. An appointing authority shall provide each  
8 permanent classified employee of the appointing  
9 authority with a copy of a policy approved by the  
10 Commission that explains prohibited acts, possible  
violations and penalties and a fair and equitable  
11 process for taking disciplinary action against such an  
employee.

12 Pursuant to the authority granted under NRS 284.383, the  
13 Commission promulgated regulations which set forth the specific causes  
14 for disciplining State employees. Those regulations have the full force and  
15 effect of law. *Turk v. Nevada State Prison*, 94 Nev. 101, 104 (1978). NAC  
16 284.646(1) provides the basis for which an appointing authority may  
17 dismiss an employee and provides:

18 **NAC 284.646 Dismissals.**

19 1. An appointing authority may dismiss an employee for  
20 any cause set forth in NAC 284.650 if:

21 (a) The agency with which the employee is employed has  
22 adopted any rules or policies which authorize the dismissal  
of an employee for such a cause; or

23 (b) The seriousness of the offense or condition warrants  
24 such dismissal.  
25

1 NAC 284.650 sets forth causes for which disciplinary action can be taken  
2 against a person legally holding a position in the public service. In  
3 particular, as it relates to the instant case, NAC 284.650(7) provides:

4 **NAC 284.650 Causes for disciplinary action.**  
5 Appropriate disciplinary or corrective action may be taken  
6 for any of the following causes:

7 7. Inexcusable neglect of duty.

8 NDOC takes the position that there was just cause to terminate Mr.  
9 Ludwick because, in addition to violating NRS 284.650(7), Mr. Ludwick  
10 also violated NDOC Administrative Regulation 339 and termination is  
11 consistent with the recommended penalty for such a violation.  
12 According to NDOC, pursuant to NRS 209.131(6), the Director of NDOC  
13 has the duty and right to establish regulations with the approval of the  
14 Board of State Prison Commissioners and that Administrative  
15 Regulation (hereinafter "AR") 339.05.15.UU, the regulation Mr. Ludwick  
16 is charged with violating, is such a regulation. AR 339.05.15 provides:

17 **NDOC ADMINISTRATIVE REGULATION (AR)**  
18 **339, PROHIBITIONS AND PENALTIES, CLASS**  
19 **OF OFFENSE GUIDELINES**

20 **AR 339.05.15 Neglect of Duty**

21 UU. Leaving an assigned post while on duty  
22 without authorization of a supervisor. CLASS 5

23 Mr. Ludwick argues that the NDOC's ARs were never approved by  
24 the Personnel Commission and therefore cannot be utilized for  
25 discipline. He basis his position on NRS 284.150(2) which provides:

1       **NRS 284.150 Classified service: Composition;**  
2       **limitations on appointment, transfer, promotion,**  
3       **demotion or discharge; discrimination prohibited.**

4       2. Except as otherwise provided in NRS 193.105,  
5       209.161 and 416.070, a person must not be appointed,  
6       transferred, promoted, demoted or discharged in the  
7       classified service in any manner or by any means other  
8       than those prescribed in this chapter and the regulations  
9       adopted in accordance therewith.

10      The Commission adopted NAC 284.742 which provides:

11       **NAC 284.742 Appointing authorities required to**  
12       **determine prohibited conflicting activities and identify**  
13       **such activities and explain process of progressive**  
14       **discipline in policy. (NRS 284.065, 284.155, 284.383)**

15       1. Each appointing authority shall determine, **subject to**  
16       **the approval of the Commission**, those specific activities  
17       which, for employees under its jurisdiction, are prohibited  
18       as inconsistent, incompatible or in conflict with their duties  
19       as employees. The appointing authority shall identify those  
20       activities in the policy established by the appointing  
21       authority pursuant to NRS 284.383.

22      NRS 284.383(3) provides:

23       **NRS 284.383 Use of disciplinary measures; employee**  
24       **entitled to receive copy of findings or**  
25       **recommendations; classified employee entitled to**  
26       **receive copy of policy explaining information relating**  
27       **to disciplinary action.**

28       3. An appointing authority shall provide each permanent  
29       classified employee of the appointing authority with a copy  
30       of a policy approved by the Commission that explains  
31       prohibited acts, possible violations and penalties and a fair  
32       and equitable process for taking disciplinary action against  
33       such an employee. *Emphasis added.*

34      There was no evidence presented to support a finding that the NDOC's  
35      ARs were approved by the Commission. Without analyzing the issue of  
36      whether the ARs had to be approved by the Commission, this Hearing



1 Officer has sufficient law upon which to base a decision in this case  
2 without reliance upon the ARs.

3  
4 The duty of the hearing officer at a hearing requested pursuant to  
5 NRS 284.390 is to determine the reasonableness of the disciplinary action.  
6 See NRS 284.390(1). Additionally, in accordance with NRS 284.390 (6), the  
7 hearing officer is to determine if the dismissal, demotion or suspension was  
8 without just cause as provided in NRS 284.385.

9 NRS 284.385 provides:

10 **NRS 284.385 Dismissals, demotions and suspensions.**

11 1. An appointing authority may:

12 (a) Dismiss or demote any permanent classified  
13 Employee when the appointing authority considers  
14 that the good of the public service will be served  
15 thereby.

16 (b) Except as otherwise provided in NRS 284.148,  
17 suspend without pay, for disciplinary purposes, a  
18 permanent Employee for a period not to exceed 30 days.

19 In reviewing the actions taken by the employer against the employee, the  
20 hearing officer is to make an independent determination as to whether  
21 there is evidence showing the discipline would serve the good of the  
22 public service. *Knapp v. State Dep't of Prisons*, 111 Nev. 420 (1995). In  
23 *Whalen v. Welliver*, 60 Nev. 154, 104 P.2d 188 (1940) the Nevada Supreme  
24 Court held that this requirement necessitated a showing of just cause or  
25 "legal cause," one specifically and substantially relating to, and affecting, the  
qualifications for, and the performance of, the position. It is also well  
established that an agency cannot act arbitrarily and capriciously when  
taking disciplinary action. In other words, an agency cannot act in

1 disregard of the facts and circumstances involved. *Meadow v. Civil Service*  
2 *Ed. of Las Vegas Metro. Police Dept.*, 105 Nev. 624, 627 (1989).

3 NAC 284.794(1) sets forth the evidence a hearing officer is to  
4 consider in determining the validity of a disciplinary action:

5 The hearing officer shall determine the evidence upon  
6 the charges and specifications as set forth by the  
7 appointing authority in the appropriate documents,  
and shall not consider any additional evidence beyond  
the scope of the charges.

8 The Nevada Supreme Court in *Dredge v. State ex rel. Dept. of Prisons*, 105 Nev. 39, 769  
9 P.2d 56 (1989) ruled details not contained in the specification of charges should be  
10 considered as long as they support the grounds charged. *Id.* at 43.

11 In *Dredge*, the Nevada Supreme Court also recognized special security  
12 concerns in prisons and stated that "the critical need to maintain a high level of  
13 security within the prison systems entitles the appointing authority's decision to  
14 deference by the hearing officer whenever security concerns are implicated. *Id.* at 42-  
15 43 (citing NAC 284.650(3)). The Court clarified its position in this regard in *State of*  
16 *Nevada, ex rel. Dept of Prisons v. Jackson*, 111 Nev. 770, 895 P.2d 1296 and stated  
17 for the security exception to apply, the facts must "indicate a clear and serious  
18 security threat." *Id.* at 773.

19 The Employer has the burden of proof to present evidence and  
20 argument to prove the allegations presented in the specificity of charges  
21 and whether there is "just cause" to discipline the employee. The  
22 *standard of proof* required in administrative hearings of this nature is  
23 addressed in *Nassiri and Johnson v. Chiropractic Physicians' Board of Nevada*,  
24 130 Nev. Adv. Op 27 (April 3, 2014). In *Nassiri*, the Nevada Supreme Court  
25 held that the standard of proof is the degree or level of proof demanded to

1 prove a specific allegation and that the preponderance of the evidence is  
2 the standard of proof for an agency to take disciplinary action against an  
3 employee. The preponderance of evidence standard is described as "more  
4 probable than not."

#### 5 **DISCUSSION AND ANALYSIS**

6 This Hearing Officer finds that Mr. Ludwick knew or should have known that  
7 he had a duty to get permission from a supervisor prior to leaving his post to go to  
8 the Shift Command Office on April 4, 2015. Each of the Correctional Officers who  
9 testified during the Hearing, with the exception of Mr. Ludwick, acknowledged that  
10 they were aware of the policy, custom and practice prohibiting officers from leaving  
11 their assigned post without prior authorization. Though several officers testified that  
12 the policy was often violated, they nonetheless acknowledged that they were aware of  
13 its existence. Not only were correctional officers made aware of the policy during  
14 training, Lieutenant Piccinini reiterated the rule in an email to the dayshift staff just  
15 days prior to Mr. Ludwick violated the policy. Despite Mr. Ludwick's failure to read  
16 the email prior to April 4, 2015 and his claim that he essentially had no knowledge of  
17 the policy, it is only reasonable to expect a correctional officer at a prison to make  
18 themselves aware of the policies, rules and regulations that govern the safety and  
19 security of the institution which they are employed to help oversee. Credible  
20 testimony supports a finding that Mr. Ludwick left his post in Unit 1 on April 4, 2015  
21 and went to the Shift Command Office without obtaining prior authorization from a  
22 supervisor.

23 According to the testimony of Lieutenant Piccinini, if officers fail to obtain prior  
24 permission before leaving their post they put themselves, their fellow staff members,  
25 and the public in a vulnerable position. Warden Gentry reiterated the safety and

1 security concerns underlying the policy noting that it is a serious infraction for  
2 several reasons including: 1) if there is a hostage situation or medical emergency  
3 involving an officer and management is not aware of the officer's whereabouts timely  
4 assistance cannot be provided; and 2) there is a decrease in response time when you  
5 have less officers at a post than is assigned and you are unaware that an officer has  
6 left the post. In essence, the officer who leaves their post without permission from a  
7 supervisor subjects the institution, staff, themselves, inmates and the public to an  
8 unnecessary increase in potential harm.

9 Mr. Ludwick, argues that he had implied permission to leave his post without  
10 getting actual permission because he had previously been approved for intermittent  
11 FMLA. This Hearing Officer disagrees with the assertion that Mr. Ludwick had  
12 "implied permission" to leave his post. §825.303(c) of the FMLA provides that "[w]hen  
13 the need for leave is not foreseeable, an employee must comply with the employer's  
14 usual and customary notice and procedural requirements for requesting leave, absent  
15 unusual circumstances." See Exhibit 6 – a copy of The Family and Medical Leave Act  
16 of 1993. The testimony supports a finding that Mr. Ludwick was not having a  
17 medical emergency at the time he left Unit 1 without permission; rather he just did  
18 not feel well. Mr. Ludwick himself testified that he called Unit 5 to inquire about  
19 whether an officer in Unit 5 would switch posts with him so he apparently felt he  
20 could continue to work the remainder of the shift. Additionally, Lieutenant Piccinini  
21 testified that Mr. Ludwick did not appear to be in medical distress when he appeared  
22 before him in the Shift Control Office and did not indicate that he was in distress.  
23 Mr. Ludwick also testified that he did not go to the hospital or seek any other medical  
24 attention related to his condition on April 4, 2015. There is nothing in the FMLA that  
25 excuses a person who has pre-approved intermittent FMLA from complying with an

1 employer's notice requirements for leave in non-emergency situations. The evidence  
2 supports a finding that Mr. Ludwick could have done more to reach his supervisor.  
3 Though he tried once to contact his supervisor, Mr. Ludwick could have tried more  
4 than once to reach him by phone or by using the hand-held radio that he had at his  
5 disposal.

6 Based upon the foregoing, this Hearing Officer finds that Mr. Ludwick engaged  
7 in inexcusable neglect by leaving his post without the prior permission of a  
8 supervisor. The question now is whether it was reasonable to terminate Mr. Ludwick  
9 for the violating NRS 284.650(7). For the following reasons, this Hearing Officer finds  
10 that termination was too harsh a penalty. Mr. Ludwick had no prior discipline. The  
11 minimum permitted staffing on the day in question was two officers. Had there been  
12 a serious security risk by having less than the three scheduled officers, presumably,  
13 Lieutenant Piccinini would have assigned someone else to the post after Mr. Ludwick  
14 was allowed to leave the institution on FMLA leave. According to Lieutenant  
15 Piccinini, he did not add any additional staff to Unit 1 that day and there were no  
16 incidents. Despite the foregoing, this Hearing Officer finds that Mr. Ludwick is  
17 nonetheless deserving of some discipline because he did in fact violate a very  
18 important safety and security policy by leaving his post without prior authorization  
19 from a supervisor. Given the facts and circumstances this Hearing Officer finds that  
20 termination was too harsh a penalty and recommends instead a suspension not to  
21 exceed thirty days.

22 ....

23 ....

24 ....

25 ....

1 **DECISION**

2 Based upon the foregoing Findings of Fact and Conclusions of Law and good  
3 cause appearing therefore,

4 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

5 That the preponderance of the evidence does not establish that Mr. Ludwick's  
6 termination was for the good of the public service and that the decision of NDOC to  
7 terminate Mr. Ludwick is hereby **REVERSED**.

8 Mr. Ludwick is hereby reinstated to his position and is awarded back pay and  
9 benefits forfeited as a result of the termination. The period of time for the back pay  
10 and benefits starts on December 28, 2015 and ends on May 27, 2016, the hearing  
11 date.

12 Furthermore, this matter is **REMANDED** for consideration of a  
13 recommendation that Mr. Ludwick receive a suspension not to exceed thirty days for  
14 the reasons discussed above.

15 Dated this 24<sup>th</sup> day of June, 2016.

16  
17   
18 CARA L. BROWN, ESQ.  
19 Hearings Officer

20  
21 **NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final**  
22 **determination of the Appeals Officer, a Petition for Judicial Review must be filed**  
23 **with the District Court within 30 days after service by mail of this decision.**  
24  
25



## IN THE SUPREME COURT OF THE STATE OF NEVADA

### INDICATE FULL CAPTION:

THE STATE OF NEVADA DEPARTMENT  
OF CORRECTIONS,

Appellant,

v.

BRIAN LUDWICK, AN INDIVIDUAL,

Respondent.

No. 73277

Electronically Filed  
Jul 07 2017 02:17 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
DOCKETING STATEMENT  
CIVIL APPEALS

### 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.



1. Judicial District Eighth Judicial Department 27  
County Clark County Judge Nancy Allf  
District Ct. Case No. A-16-741032-J

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

Attorney Michelle Di Silvestro Alanis Telephone 702-486-3268  
Firm State of Nevada, Office of the Attorney General  
Address 555 E. Washington Ave., Suite 3900, Las Vegas, NV 89101

Client(s) State of Nevada Department of Corrections

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 respondents(s):**

Attorney Daniel Marks Telephone 702-386-0536  
Firm Law Office of Daniel Marks  
Address 610 South Ninth Street, Las Vegas, NV, 89101

Client(s) Brian Ludwick

Attorney Adam Levine Telephone 702-386-0536  
Firm Law Office of Daniel Marks  
Address 610 South Ninth Street, Las Vegas, NV, 89101

Client(s) Brian Ludwick

(List additional counsel on separate sheet if necessary)

**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 type="checkbox"/> Other (specify): _____                         |
| <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 checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____             |

**5. Does this appeal raise issues concerning any of the following?**

- ☐ 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:

Not applicable

**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:

Not applicable

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

Effective December 28, 2015, Respondent Brian Ludwick was terminated for neglect of duty. Ludwick appealed his termination to a State administrative hearing officer. After conducting a hearing, the hearing officer found that credible testimony supported a finding that Ludwick left his post without obtaining prior authorization. After noting the security risks caused when an employee leaves his post without permission, the hearing officer found that Ludwick committed inexcusable neglect. Despite these findings, the hearing officer determined termination was too harsh and reversed Ludwick's termination. The hearing officer further determined that AR 339 required approval by the Nevada Personnel Commission and could not be considered when determining the appropriate penalty. On May 9, 2017, the District Court denied Appellant's Petition for Judicial Review in a two page order.

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Did the hearing officer clearly err when she found that NDOC's Administrative Regulation (AR) 339 required approval by the Nevada Personnel Commission and therefore only admitted AR 339 for a limited purpose?

Did the hearing officer clearly err and exceed her authority when she substituted her judgment for that of NDOC in determining the appropriate penalty for a class 5 terminable offense?

Did the hearing officer clearly err and/or abuse her discretion when she reversed the termination, failing to give Dredge deference?

Did the hearing officer clearly err and/or act arbitrarily and capriciously in reversing the termination in view of the reliable probative and substantial evidence on the whole record?

**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 issue raised:

*Cara O'Keefe v. State of Nevada Department of Motor Vehicles*, No. 68460. Recently, the Supreme Court granted a petition for review of a Nevada Court of Appeal's decision. The petition for review directed the parties to submit supplemental briefing addressing what standard of review a hearing officer should employ when reviewing a disciplinary action. This case additionally raises the question of whether a hearing officer can conclude that discipline imposed consistent with a disciplinary policy adopted by the State Personnel Commission does not serve the good of the public service.

**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?

☐ 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: The hearing officer determined that NDOC's administrative regulation must first be approved by the State Personnel Commission before it may be relied upon in determining the appropriate discipline. Currently, NDOC submits its regulations to the Nevada Board of Prison Commissioners, which is comprised of the Governor, the Attorney General, and the Secretary of State. The hearing officer's decision calls into question the Board's authority to approve prison regulations.

**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:

Pursuant to NRAP 17(b)(10) this case is presumptively assigned to the Nevada Court of Appeals. However, this case should be retained by the Supreme Court pursuant to NRAP 17(a)(11) because the hearing officer's determination that an administrative regulation must be approved by the State Personnel Commission presents a question of statewide importance. Specifically, such a ruling calls into question the authority of the Nevada Board of Prison Commissioners.

**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?

N/A

## TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from May 9, 2017

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served May 10, 2017

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)

(a) Specify the type of motion, the date and method of service of the motion, and the 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 \_\_\_\_\_

(c) Date written notice of entry of order resolving tolling motion was served \_\_\_\_\_

Was service by:

☐ Delivery

☐ Mail

**19. Date notice of appeal filed** June 8, 2017

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:

**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 checked="" 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             |
| <input type="checkbox"/> Other (specify) _____    |  |

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

NRAP 3A(b)(1): The District Court's Order Denying Petition for Judicial Review dated May 9, 2017, was a final judgment adjudicating all issues presented in the judicial review proceeding commenced in that court pursuant to NRS 233B.130 et seq.

NRS 233B.150: The District Court's Order Denying Petition for Judicial Review dated May 9, 2017, was a final judgment of a district court reviewing a final decision of an agency of the Executive Department of the State of Nevada within the meaning of Chapter 233B of NRS which aggrieved the Appellant.

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

(a) Parties:

State of Nevada Department of Corrections

Brian Ludwick

(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.**

Appellant sought judicial review of the hearing officer's decision. This was the only claim involved.

The date of formal disposition (i.e., denial) of the claim was May 9, 2017.

**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?**

☒ Yes

☐ No

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

(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)):**

**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
- Notices 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.

State of Nevada, Dept. of Corrections  
Name of appellant

Kathlyn Brady  
Name of counsel of record

July 7 2017  
Date

*Kathlyn Brady*  
Signature of counsel of record

Nevada Clark County  
State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 7<sup>th</sup> day of July, 2017, 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): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Daniel Marks  
Adam Levine  
Law Office of Daniel Marks  
610 S. Ninth St.  
Las Vegas, NV 89101

Dated this 7<sup>th</sup> day of July, 2017

*AKerheed*  
Signature