

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, ex rel.  
DEPARTMENT OF CORRECTIONS,

Appellant,

v.

BRIAN LUDWICK, an individual; the  
STATE OF NEVADA, ex rel. its  
DEPARTMENT OF  
ADMINISTRATION, PERSONNEL  
COMMISSION, HEARING OFFICER,

Respondents.

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District Court No. A-16-741032

Appeal from Order Denying Petition for Judicial Review

Eighth Judicial District Court

**APPELLANT'S OPENING BRIEF**

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to NEV. R. APP. P. 3A(b)(1) and NRS 233B.150. The Eighth Judicial District Court of Clark County, Nevada's (District Court) Order Denying Petition For Judicial Review was entered on May 9, 2017. The Notice of Entry of Order was electronically served on May 10, 2017. The Notice of Appeal was timely filed on June 8, 2017.

This appeal is from the District Court's final order denying Appellant's Petition for Judicial Review.

## **ROUTING STATEMENT**

This case is presumptively assigned to the Court of Appeals under NEV. R. APP. P. 17(b)(10) as it relates to an administrative agency appeal not involving tax, water, or public utilities commission determinations.

However, recently the Nevada Supreme Court granted review of a Court of Appeals' Order to clarify the appropriate level of deference owed to an appointing authority's disciplinary decision. *See O'Keefe v. State*, No. 68460 (Jun. 27, 2017) (order granting petition for review). The parties were ordered to submit supplemental briefing regarding the correct standard to be employed by a hearing officer. *See id.* This case involves similar questions of the correct standard for a hearing officer and whether a hearing officer can overturn an appointing authority's disciplinary decision after finding that the employee has committed the

misconduct. As the standard is unclear, the Nevada Supreme Court should retain this case pursuant to NRAP 17(a)(11). Retention will ensure that this case is decided in harmony with *O'Keefe*.

### **STATEMENT OF ISSUES PRESENTED**

1. Whether the District Court erred when it affirmed the hearing officer's decision.
2. Whether the substantial rights of NDOC have been prejudiced by the District Court's denial of the Petition for Judicial Review and the hearing officer's reversal of the termination.
3. Whether the District Court's Order denying the Petition for Judicial Review should be set aside for the following reasons:
  - a. The hearing officer clearly erred and abused her discretion when she failed to make findings of fact regarding *Dredge* and failed to give deference to NDOC's decision to terminate in direct opposition to the Court's mandate in *Dredge v. State ex rel. Dep't of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989) and *State of Nev. ex rel. Dep't of Prisons v. Jackson*, 111 Nev. 770, 773, 895 P.2d 1296, 1298 (1995).
  - b. The hearing officer used the incorrect standard of proof and relied on a preponderance of the evidence standard instead of substantial evidence in reviewing the appointing authority's decision to terminate.
  - c. The hearing officer clearly erred when she found that NDOC's Administrative Regulation (AR) 339, which sets forth the Nevada Department of Correction's Code of Ethics, Employee Conduct and Prohibitions and Penalties, required approval by the Nevada Personnel Commission and therefore only admitted AR 339 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.

d. The hearing officer clearly erred and exceeded her statutory authority when she substituted her judgment for that of NDOC in determining the appropriate penalty for a class 5 terminable offense.

e. The hearing officer clearly erred and acted arbitrarily and capriciously in reversing the termination in view the reliable probative and substantial evidence on the whole record.

### **STATEMENT OF CASE**

This case involves the termination of Brian Ludwick (Employee) from his position as a correctional officer with the Nevada Department of Corrections (NDOC) based upon a clear and serious security breach which occurred while he was on duty at Florence McClure Women's Correctional Center (FMWCC). JA, Vol. II, 0337-0393. This clear and serious security violation occurred on April 1, 2015, when Employee left his assigned post without prior authorization from a supervisor. Id.

Employee appealed his termination to the Department of Administration Personnel Commission in accordance with the provisions set forth in NRS Chapter 284. JA, Vol. II, 0450-0451. After holding a hearing and considering evidence, the hearing officer found that Employee knew or should have known that Employee had a duty to obtain permission from a supervisor prior to leaving his post and found that credible testimony supported a finding that Employee left his post on

April 1, 2015 without obtaining prior authorization from a supervisor. JA, Vol. I, 0126. Further, the hearing officer found that Employee engaged in inexcusable neglect of duty by leaving his post without prior permission of a supervisor and that he violated a “very important safety and security policy.” JA, Vol. I, 0128. Such conduct constitutes a terminable offense pursuant to NDOC AR 339. Despite finding that Employee committed a terminable offense, the hearing officer improperly reversed the termination and recommended a suspension not to exceed 30 days. JA, Vol. I, 0095-0096. In reaching her decision, the hearing officer determined that AR 339, which sets forth NDOC’s Code of Ethics, Employee Conduct, and Prohibitions and Penalties, had not been approved by the Nevada Personnel Commission and, therefore, admitted AR 339 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.” JA, Vol. I, 0115. As a result, the hearing officer did not give any weight to why NDOC deems a correctional officer abandoning his post to be a terminable offense. JA, Vol. I, 0038-0047, 0115. Additionally, pursuant to well-established Nevada Supreme Court authority, the hearing officer was required to but did not give *Dredge* deference to the appointing authority’s decision to terminate when the facts indicated Employee’s conduct implicated serious security concerns for NDOC. JA Vol. I, 0115-0130. *See State of Nev., ex rel. Dep’t of Prisons v. Jackson*, 111 Nev. 770, 773, 895 P.2d

1296, 1297 (1995).

NDOC filed a Petition for Judicial Review on August 1, 2016. JA, Vol. I, 0001-0023. The District Court issued an Order Denying the Petition for Judicial Review on May 9, 2017. JA, Vol. III, 0731-0732. NDOC is now appealing the District Court's May 9, 2017, Order. JA, Vol III, 0743-0751.

## **STATEMENT OF FACTS**

### **A. Employment with NDOC**

Employee began his employment as a correctional officer with NDOC on January 7, 2013. JA, Vol. II, 0477-0478. Prior to commencing his employment, Employee signed NDOC's AR Acknowledgement form, acknowledging that it was his responsibility to familiarize himself with NDOC's ARs, including AR 339. JA, Vol. II, 0370. Employee began working at FMWCC on February 19, 2015. JA, Vol. II, 0478. As a correctional officer, he was responsible for the supervision of inmates, which included escorting inmates to culinary from the unit, making sure inmates received their supplies, and making sure inmates reported to work. JA, Vol. II, 0478-0479. Correctional officers are posted throughout the institution to meet the safety and security needs of the facility, the staff and the public. JA, Vol. III, 0530-0531.

### **B. Employee Commits Terminable Misconduct**

On April 4, 2015, Employee was working the 5:00 a.m. to 1:00 p.m. shift at

FMWCC. JA, Vol. II, 0479. When Employee reported to work at approximately 4:45 a.m., he reported to shift command to find out where he was assigned. JA, Vol. II, 0480-0481. Lieutenant Gary Piccinini (Piccinini)<sup>1</sup>, Employee's direct supervisor, assigned Employee to Unit 1. Id. On that day, three correctional officers, including Employee, were assigned to Unit 1. JA, Vol. II, 0481-0482. Employee reported to Unit 1 as assigned. JA, Vol. II, 0479.

When Employee reported to work, he was not feeling well, and he told the other officers in Unit 1 that he was not feeling well. JA Vol. II, 0482. Employee contacted Senior Correctional Officer Terry Day regarding this but Senior Day told him that he was not in charge of shift and to contact Piccinini. JA, Vol. II, 0483-0484. Piccinini was assigned as the lead shift supervisor in charge of the sergeants, senior correctional officers and correctional officers. JA, Vol. II, 0520. Employee called Piccinini, but there was no answer. JA, Vol. II, 0483-0484. Although Employee had a radio, he did not use his radio to contact Piccinini. JA, Vol. II, 0500; JA, Vol. III, 0522. At approximately 5:15 a.m., Employee left his post in Unit 1 to go to the shift command office. JA, Vol. II, 0482. However, Employee did not have authorization to leave his assigned post. JA, Vol. II, 0484; JA, Vol. III, 0522.

Once at the shift command office, Employee asked Piccinini if he could be

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<sup>1</sup> Piccinini was promoted to Associate Warden in December 2015. Therefore, at the time of the incident Piccinini was a Lieutenant; however, at the time of the hearing Piccinini was an Associate Warden.

moved to Unit 5, stating that he was more familiar with Unit 5 than Unit 1. JA, Vol. II, 0369; JA, Vol. III, 0521-0522. According to Employee, he told Piccinini he forgot to take his medication and was not feeling well. JA, Vol. II, 0484. According to Piccinini, Employee did not state he was experiencing any medical distress, only that he wanted to be moved to Unit 5. JA, Vol. III, 0522. Piccinini declined to move Employee to Unit 5 because he wanted Employee to learn Unit 1. JA, Vol. II, 0369, 0484; JA, Vol. III, 0521. After denying his request, Piccinini stated that Employee became angry and told Piccinini, “Well how about I use FMLA then because I have not taken my blood pressure medication, how’s that!” JA, Vol. II, 0369; JA, Vol. III, 0523-0524. Piccinini told Employee that is fine, and Employee stormed out of the office and left the institution. Id.

### **C. Staffing and Security**

Unit 1, one of the largest units at FMWCC, has six pods and can house up to 325 inmates, which is approximately one third of the inmate population at FMWCC. JA, Vol. III, 0527-0528. On April 4, 2015, there were three legislatively approved posts for Unit 1. JA, Vol. III, 0527. On that day, mandated minimum staffing for Unit 1 was two officers. Id. One officer is always required to remain in the control room. JA, Vol. I, 0118; JA, Vol. II, 0347. If only two officers are assigned to Unit 1, that would leave only one officer responsible for performing work and maintaining security for approximately three hundred inmates. Id.

Subsequently, the minimum staffing was changed from two to three officers because there had been an increase in incidents involving inmate assaults. JA, Vol. III, 0529, 0572-0573. Piccinini testified that he would like to see six officers assigned to Unit 1 because three officers are not sufficient to staff the large unit. JA, Vol. III, 0539. Since Unit 1 is categorized as a general population unit, inmates get tier time, recreation yard time, and are rarely in their cells. JA, Vol. II, 0348.

Piccinini assigned three officers to Unit 1 on April 4, 2015, because he had the staff available for the three legislatively approved posts and having more officers meant more security for the unit. JA, Vol. III, 0527. Having two officers instead of three officers in Unit 1 makes the unit less secure and puts the inmates and staff at risk. JA, Vol. III, 0528. Also, as the on duty supervisor, Piccinini is responsible for ensuring his staff is trained in all areas of the prison. JA, Vol. II, 0348. Warden Jo Gentry testified that while minimum staffing at the time in Unit 1 was one floor position and one control position, on a regular basis FMWCC had a least two floor positions and one control position for a total of three officers in Unit 1. JA, Vol. III, 0571.

When an officer leaves his post without authorization, it is a serious and grave infraction. JA, Vol. III, 0530. Officers are assigned to various posts to meet the institution's needs of safety and security. JA Vol. III 0530-0531. If an officer leaves their assigned post without authorization from their supervisor or chain of

command, they leave the unit vulnerable, particularly if an incident occurs and the officer is not able to respond and ensure the safety of inmates and other staff in the unit. JA, Vol. III, 0531. The chain of command is to know at all times where officers are assigned for these safety reasons. Id. Warden Gentry testified that leaving a post without authorization is a serious infraction:

When any staff member from any post leaves their assigned area, if they were to leave their assigned area, it reduces the immediate response to any incidences that would require immediate assistance from any staff members or inmates. That would include if any inmates were needing assistance if they were getting physically assaulted, sexually assaulted or if they had a medical emergency that required immediate attention. That would also include any staff members in the area that would require assistance for what we call backup as an additional responder to either deescalate a situation or to protect that officer to remove them from that area so they can control and contain that incident so that it doesn't spread throughout the institution.

The other reason is the accountability. We need to know where our staff are at all times. If they were to just be permitted or it was a practice of letting them leave whenever they wanted, we wouldn't know where they were at. So if they had a medical emergency or if they were placed in a hostage situation, and we didn't know where they were at, then we wouldn't be able to assist them when it was needed for their needs.

JA, Vol. III, 0563.

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#### **D. Disciplinary Process**

After Employee left the institution, Piccinini wrote a report regarding Employee leaving his assigned post without authorization and his possible abuse of FMLA. JA, Vol. II, 0369; JA, Vol. III, 0525-0526. The matter was assigned for investigation to the Office of the Inspector General and assigned to Investigator Arthur Emling. JA, Vol. II, 0343-0392; JA, Vol. III, 0544-0545. The investigation included an interview of Employee and four other witnesses as well as a review of records and policy related to Employee's conduct. JA, Vol II, 0343-0363. The investigation led to the following sustained allegation of misconduct: neglect of duty for Employee leaving his assigned post without authorization from a supervisor. JA, Vol. II, 0393-0395. As a result, NDOC served Employee with a Specificity of Charges for the following violations: NAC 284.650(1), activity which is incompatible with an employee's conditions of employment established by law or which violates a provision of NAC 284.653 or 284.738 to 284.771, inclusive; NAC 284.650(3), the employee of any institution administering a security program in the considered judgment of the appointing authority, violates or endangers the security of the institution; NAC 284.650(7), inexcusable neglect of duty; and AR 339.05.15 (UU), leaving an assigned post while on duty without authorization of a supervisor, Class 5. JA, Vol. II, 0337-0392. Warden Gentry recommended termination and Acting Director E.K. McDaniel made the final

decision to terminate Employee. JA, Vol. III, 0567-0568. NDOC terminated Employee effective December 28, 2015, for his misconduct on April 4, 2015. JA, Vol. II, 0337-0392, 0477.

#### **E. Procedural History**

Employee requested a hearing regarding his termination with a hearing officer of the Nevada State Personnel Commission pursuant to NRS 284.390. JA, Vol. I, 0120; JA, Vol. II, 0450-0451. A hearing was held on May 27, 2016, before Hearing Officer Cara L. Brown. JA, Vol. II, 0445-0447, 0458-500; JA, Vol. III, 0501-0633. On June 27, 2016, Hearing Officer Brown issued her Findings of Fact, Conclusions of Law and Decision (Decision). JA, Vol. I, 0115-0130. In the Decision, the hearing officer found that Employee knew or should have known that Employee had a duty to obtain permission from a supervisor prior to leaving his post and found that credible testimony supported a finding that Employee left his post in Unit 1 on April 1, 2015 without obtaining prior authorization from a supervisor. JA, Vol I, 0126. Further, the Hearing Officer found that Employee engaged in inexcusable neglect of duty by leaving his post without prior permission of a supervisor and that he violated a “very important safety and security policy.” JA, Vol I, 0128. Despite these findings, the hearing officer held “[t]hat the preponderance of the evidence does not establish that Mr. Ludwick’s termination was for the good of the public service,” reversed NDOC’s decision to terminate Employee, and ordered

Employee's reinstatement and reimbursement for back pay and benefits from December 28, 2015 until May 27, 2016. JA, Vol. I, 0129. Further, in her Decision, the hearing officer determined that AR 339, which sets forth NDOC's Code of Ethics, Employee Conduct, and Prohibitions and Penalties had not been approved by the Personnel Commission and therefore, admitted AR 339 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." JA, Vol. I, 0115. Thus, the hearing officer did not rely on AR 339 in making her decision. JA, Vol. I, 0122-0125.

On July 15, 2016, NDOC filed a Petition for Reconsideration arguing that the hearing officer's order was in error because AR 339 did not require approval by the Personnel Commission and AR 339 is a lawful administrative regulation that should have been given full weight in the hearing officer's final decision. JA, Vol. I, 0097-0102. NDOC argued that Article 5 § 21 of the Nevada Constitution and NRS Chapter 209 created the Board of State Prison Commissioners to head NDOC and authorized it to prescribe regulations for the operation of NDOC; therefore, NDOC was exempt from obtaining approval of AR 339 from the Personnel Commission. *Id.* Employee opposed NDOC's Motion for Reconsideration. JA, Vol. I, 0048-0096.

On July 25, 2016, the hearing officer denied NDOC's Motion for

Reconsideration and upheld her previous ruling that AR 339 had to be approved by the Personnel Commission in order to rely on AR 339 as a basis for termination, essentially invalidating NDOC's prohibitions and penalties for its employees. JA, Vol. I, 0038-0047.

On August 1, 2016, NDOC filed a Petition for Judicial Review appealing the final decision in this matter and requested the District Court reverse the hearing officer's decision to reverse the termination and reinstate the Employee with back pay and benefits. JA, Vol. I, 0002-0023. The matter was fully briefed and a hearing was held on April 19, 2017, before the Honorable Nancy Allf. *See* JA, Vol. III, 0634-670; JA, Vol. III, 0671-0711; JA, Vol. III, 0712-0730; JA, Vol. III, 0731-0732. Judge Allf denied the petition for judicial review and found that the hearing officer's decision was reasonable given that the facts found by the hearing officer supported the decision, that there was no clear error in the application of law, the hearing officer did not exceed her authority or abuse her discretion, the hearing officer's decision was not arbitrary or capricious and that the evidentiary standard used by the hearing officer was sufficient to justify the result. JA, Vol. III, 0731-0732; JA, Vol. IV, 0768.

### **SUMMARY OF ARGUMENT**

The hearing officer abused her discretion when she reversed the termination based on the preponderance of the evidence standard instead of substantial

evidence standard. The hearing officer's final decision is contrary to Nevada law, which affords employer-agencies the right to discipline their employees in accordance with Nevada law and regulations. NRS 284.020(2). The hearing officer's ruling that NDOC's AR 339 requires approval from the Personnel Commission was in clear error. AR 339 has the full force and effect of law, having been approved by the Board of State Prison Commissioners pursuant to its authority under the Nevada Constitution and State statute to oversee all aspects of Nevada's prisons.

Pursuant to AR 339.05.15, leaving an assigned post while on duty without authorization of a supervisor is a Class 5 offense. The prescribed penalty for a first offense of a Class 5 offense is dismissal from State service. The hearing officer found that Employee did in fact leave his assigned post without authorization of a supervisor but determined that dismissal was too harsh of a penalty and reversed the termination. In reversing the termination—despite finding that Employee engaged in misconduct—the hearing officer exceeded her statutory role. In addition, the hearing officer's decision was arbitrary and capricious and an abuse of discretion because the record revealed that Employee committed a serious security violation and deference therefore should have been given to the appointing authority.

This Court should reverse the District Court's Order denying the Petition for

Judicial Review which affirmed the hearing officer's final decision because the hearing officer exceeded her statutory authority, acted in clear error of law, abused her discretion, and issued a decision that was arbitrary and capricious and clearly erroneous in view of the reliable, probative and substantial evidence of the record.

## **ARGUMENT**

### **A. Standard of Review.**

When an order deciding a petition for judicial review has been appealed, this Court reviews the administrative decision in the same manner as the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. \_\_\_, \_\_\_, 312 P.3d 479, 482 (Adv. Op. 84, Nov. 7, 2013). The standard of review by which this Court evaluates a hearing officer's decision is governed by the Administrative Procedure Act, NRS 233B. NRS 233B.135(3) provides, in pertinent part, as follows:

...The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the Employee have been prejudiced because the final decision of the agency is:

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

Appellate courts "review the evidence presented to the administrative body and ascertain whether that body acted arbitrarily or capriciously, thus abusing its

discretion.” *Gandy v. State ex rel. Div. Investigation*, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980). “To be arbitrary and capricious, the decision of an administrative agency must be in disregard of the facts and circumstances involved.” *Meadow v. Civil Service Bd. Of LVMPD*, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989). A hearing officer abuses its discretion when it applies an incorrect legal standard. *See Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007). A hearing officer’s conclusions of law—like questions of statutory interpretation—are reviewed *de novo*. *See City Plan Dev., Inc. v. Office of Labor Com’r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005); *Dykema v. Del Webb Communities, Inc.*, 132 Nev. Adv. Op. 82, 385 P.3d 977, 979 (2016)(statutory interpretation).

In reviewing questions of fact, the courts are enjoined from substituting their judgment for that of the agency concerning the weight of the evidence on questions of fact if supported by substantial evidence. *Bisch v. Las Vegas Metro. Police Dep’t*, 129 Nev. \_\_\_, 302 P.3d 1108, 1112 (Adv. Op. 36, May 30, 2013). Substantial evidence is evidence that “a reasonable mind might accept as adequate to support a conclusion.” *Id.* Both the District Court and this Court are constrained to review the record as it existed before the administrative agency to determine whether the agency abused its discretion by acting arbitrarily or capriciously. *Dredge*, 105 Nev. at 43.

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**B. The Hearing Officer Clearly Erred and Abused Her Discretion When she Failed to Make Findings of Fact regarding *Dredge* and Failed to Apply *Dredge* Deference.**

The hearing officer did not make any findings of fact regarding whether Ludwick's conduct did or did not rise to the level of being a "clear and serious security threat" as defined in *Jackson*. The hearing officer's failure to make these findings was in clear error. *See Jackson*, 111 Nev. 770 at 895 P.2d at 1298; *State v. Malcic*, No. 70341, 2017 WL 1806807, \*2 (Nev. Ct. App. Apr. 28, 2017) (If a hearing officer is not going to apply *Dredge* deference, then the decision must be based on specific findings that the facts of this case do not indicate a clear and serious security threat. Otherwise, the hearing officer must give deference to the appointing authority.) (internal citation omitted).

Ludwick's conduct jeopardized the safety of FMWCC. NDOC charged Ludwick with violating NAC 284.650(3), endangering the security of an institution. The Nevada Supreme Court has held such a violation entitles NDOC's disciplinary decision to deference. *See Dredge*, 105 Nev. at 42, 769 P.2d at 58 (citing NAC 284.650(3) for the proposition that NDOC's disciplinary decision is entitled to deference); *Jackson*, 111 Nev. at 772-73, 895 P.2d at 1298 (recognizing NAC 284.650(3) violation entitled NDOC to deference).

Furthermore, the hearing officer's Decision is clearly erroneous and characterized as an abuse of discretion because she failed to give deference to

NDOC's decision to terminate Employee for leaving his assigned post without authorization of a supervisor which is a clear and serious security threat. The "critical need to maintain a high level of security within the prison system *entitles the appointing authority's decision to deference by the hearing officer whenever security concerns are implicated.*" *Dredge*, 105 Nev. at 42, 769 P.2d at 58 (emphasis added). *See* NAC 284.650(3); *Jackson*, 111 Nev. at 773, 895 P.2d at 1298. This deference applies when the facts indicate a clear and serious security threat. *Jackson*, 111 Nev. at 773, 895 P.2d at 1298; *Knapp v. State ex rel. Dep't of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 578 (1995). This bedrock principle of Nevada law, which was ignored by both the hearing officer and the District Court, should be followed because NDOC possesses superior competence and expertise to determine what constitutes a security concern and how that security concern should be addressed. Further, deferring to NDOC on these matters establishes much needed predictability for NDOC and its employees. If hearing officers and judges are permitted to substitute their own view of the "seriousness" of a NDOC security violation, the goal of predictability will be undermined.

NDOC, in exercising its specialized and expert discretion, determined that Employee committed a serious security violation constituting misconduct in the form of a Class 5 violation when he abandoned his post. There is substantial evidence in the record to support this determination. Both Piccinini and Warden

Gentry testified that leaving an assigned post without authorization is a grave and serious infraction. Additionally, both Piccinini and Warden Gentry testified that leaving an assigned post without authorization is a security violation that threatens the safety of the inmates, staff, and public. The Supreme Court has long held “[t]he administration of a prison is at best an extraordinarily difficult undertaking” and the safety of an institution’s inmates and employees is perhaps the most fundamental responsibility of the prison administration. *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984); *Hewitt v. Helms*, 459 U.S. 460, 473 (1983). Based upon the unique difficulty of correctional work, prison administrators “should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and maintain institutional security.” *Hudson*, 468 U.S. at 526-27. Further, judicial deference should be accorded not merely because prison administrations have a better grasp of correctional considerations and risks, but also because correctional operations are specifically the authority of the Legislative and Executive Branches of our Government, not the Judicial. *Bell v. Wolfish*, 441 U.S. 520, 547-549 (1979); *see Nev. Const. art. 5, § 21*.

Moreover, the clear and serious security threat in this case is more egregious than those in *Dredge*, where the Nevada Supreme Court held the hearing officer owed NDOC deference. In *Dredge*, NDOC terminated a correctional sergeant, who

was considered to be a valued employee, for *off* duty conduct. *Dredge*, 105 Nev. at 42, 769 P.2d at 58. In particular, the Director of NDOC determined that the terminated employee's off-duty misconduct of drunk driving, fraternizing with a convicted felon, and financially supporting that felon in violation of department regulations constituted a security concern. *Id.* A hearing officer reversed the dismissal. *Id.* at 45, 769 P.2d at 60. The Nevada Supreme Court noted the obvious security concerns and chastised the hearing officer for, viewing "the evidence in a more benevolent light" than NDOC. *Id.* at 42, 769 P.2d at 58. The Nevada Supreme Court affirmed the district court's reversal of the hearing officer's decision. *Id.* at 45, 769 P.2d at 60. NDOC had the right to dismiss the correctional sergeant from state service because security concerns were implicated. *Id.*

Here, Employee's *on*-duty misconduct constituted a security concern. NDOC demonstrated by substantial evidence that Employee's decision to abandon his post without authorization jeopardized the safety of the inmates, staff, and public.

Analysis under *Department of Prisons v. Jackson*, which affirmed rather than superseded *Dredge*, also establishes that NDOC's termination decision is entitled to deference. In *Jackson*, a corrections officer was terminated because he gave a civilian a tour of the prison "control center." *Jackson*, 111 Nev. at 771, 895 P.2d at 1297. The relevant NDOC administrative regulations stated the following:

“The control center security doors shall remain locked for security. No unauthorized personnel will be admitted inside the control center.” *Id.* Despite this regulation, the employee felt that letting the civilian into the control center posed no threat. *Id.* The hearing officer overturned the dismissal based in part upon the warden’s opinion that progressive discipline had not been followed and evaluated several instances of comparable breaches of security and unauthorized visits. *Id.* The hearing officer concluded that compared to the discipline meted out in other incidents, Jackson’s termination was out of proportion to the facts. *Id.* The district court upheld the decision of the hearing officer. *Id.* The Nevada Supreme Court upheld the appointing authority’s decision to terminate because *Dredge* “requires deference to the appointing authority in cases of breaches of security” and in light of the administrative regulation at issue, the case “clearly f[ell] within the ambit of a security breach.” *Id.* at 733. The Court then explained that *Dredge* deference applies in instances of “a clear and serious security threat.” *Id.* In analyzing this standard, the Court upheld employee’s termination because there was “a written administrative regulation addressing authorized accessibility to the control center” and the regulation, the validity of which was not questioned by the Court, “addressed the need and reasons for the stricter security.” *Id.*

Here, just as in *Jackson*, Employee knowingly breached a memorialized security measure by abandoning his post. The *Jackson* Court’s decision to uphold

the appointing authority's decision to terminate employment establishes that the security breach in question does not need to result in any actual harm. The mere breach alone is sufficient.

In determining that Employee should be terminated, NDOC relied on the seriousness of the offense and the discipline provided for under AR 339. Despite evidence indicating Employee committed an offense that constitutes a clear and serious security threat, the hearing officer did not give NDOC's appointing authority deference and instead reversed the termination—even after the hearing officer made the determination that Employee violated a “*very important safety and security policy*.” JA, Vol. I, 0128 (emphasis added). Accordingly, the substantial evidence in the record demonstrates that the hearing officer and the District Court were obligated to defer to NDOC's decision to terminate Employee.

**C. The Hearing Officer Should Have Used the Substantial Evidence Standard in Reviewing the Appointing Authority's Decision to Terminate.**

The District Court's Order denying the Petition for Judicial Review of the hearing officer's Decision should be reversed because the incorrect standard was used in reviewing the Employee's termination. In her Decision, the hearing officer held that the standard of proof in administrative hearings was preponderance of the evidence or “more probable than not.” JA, Vol. I, 0125-0126 The hearing officer

improperly relied on *Nassiri v Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op 27, 327 P.3d. 487 (2014) in determining that preponderance of the evidence is the standard used in these proceedings. *Id.* *Nassiri* created confusion because it noted that the standard of proof was preponderance of the evidence but that was in relation to determining the Chiropractic Board's determination for its license revocation proceedings. *Nassiri* at 490.

NRS 284.390 sets forth the standard of review that hearing officers must apply when reviewing an executive branch agency's disciplinary decision. The relevant subsection states that "[i]f the hearing officer determines that the dismissal, demotion or suspension *was without just cause as provided in NRS 284.385*, the action must be set aside and the employee must be reinstated, with full pay for the period of dismissal, demotion or suspension." NRS 284.390(6) (emphasis added). In turn, NRS 284.385(1)(a) provides that "[a]n appointing authority may...[d]ismiss or demote any permanent classified employee *when the appointing authority considers that the good of the public service will be served thereby.*" (emphasis added).

When those provisions are read together, a hearing officer's review is limited to determining whether "just cause," NRS 284.390(6), supports the "appointing authority's" decision "that the good of the public service will be served" by the appointing authority's chosen disciplinary action. NRS

284.385(1)(a); *see also Hernandez v. Bennett-Haron*, 128 Nev. Adv. Op. 54, 287 P.3d 305, 316 (2012) (noting that this Court will read statutes in harmony).

“A discharge for ‘*just*’ or ‘*good*’ cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) *supported by substantial evidence*, and (2) reasonably believed by the employer to be true.” *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1078, 901 P.2d 693, 701 (1995)(emphasis added). In other words, the hearing officer’s review is limited to determining whether the employer’s decision to terminate was made in good faith and supported by substantial evidence. *Id.* at 1079, 901 P.2d at 702; *Nevada Dep’t of Motor Vehicles v. Adams*, No. 68057, 2017 WL 521774, \*1 (Nev. Ct. App. Jan. 30, 2017) (unpublished).

“[W]hile hearing officers may determine the reasonableness of disciplinary actions and recommend appropriate levels of discipline, only appointing authorities have the power to prescribe the actual discipline imposed on permanent classified state employees.” *Taylor v. Dep’t of Health and Human Servs.*, 129 Nev. \_\_, \_\_, 314 P.3d 949, 951 (2013). It is not the role of a hearing officer to step into the shoes of employer and substitute his judgment for that of the employer in disciplinary matters relating to the operation of the department. *Hagblom v. Pers. Advisory Comm’n of State of Nev.*, 97 Nev. 35, 38, 623 P.2d 977, 978 (1981).

Substantial evidence has been defined as that which “a reasonable mind

might accept as adequate to support a conclusion.” *State, Emp. Sec. Dep’t v. Hilton Hotels*, 102 Nev. 606, 608, 792 P.2d 497, 498 (1986), citing *Richardson v. Perales*, 402 U.S. 389 (1971) (“We [equate] substantial evidence with that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion...”). A decision is arbitrary, capricious, or unsupported, if it is not “supported by substantial evidence in the record.” *Clark Cnty. Educ. Ass’n v. Clark Cnty. Sch. Dist.*, 122 Nev. 337, 342, 131 P.3d 5, 9 (2006).

Here, the hearing officer erroneously relied on the preponderance of the evidence standard to determine whether there was just cause for NDOC to terminate Employee. JA, Vol. I, 0125-0126, 0129. This was the **wrong** standard. The substantial evidence in the record supports NDOC’s decision to terminate Employee. The hearing officer confirmed in her decision that the evidence demonstrated that Employee violated NAC 284.650(7) and engaged in inexcusable neglect of duty when he abandoned his assigned post without permission—the exact conduct that AR 339 deems terminable. The evidence included testimony from Warden Gentry and Piccinini that abandoning post puts the correctional officer, the NDOC staff, and the public in a vulnerable and precarious position. Additionally, the Warden testified there are safety and security concerns underlying this policy which make it a serious infraction. Critically, the hearing officer determined that Employee violated a “*very important safety and security*

*policy.*” JA, Vol. I, 0128. (emphasis added). Yet, rather than relying on the reliable and substantial evidence in the record and upholding NDOC’s termination of Employee for committing this serious offense of abandoning post, the hearing officer indicated that a suspension of 30 days or less was more appropriate. JA, Vol. I, 0129. Accordingly, the reliable, probative, and substantial evidence on the whole record demonstrates that the hearing officer erred in reversing the termination and refusing to defer to NDOC on clear and serious security threat.

In other words, a reasonable mind could accept the substantial evidence as adequately supporting NDOC’s decision to terminate. Therefore, the hearing officer’s decision was an abuse of discretion and the District’s Court’s Order finding that the standard was sufficient was in clear error. Thus, this case should be reversed and remanded for the hearing officer to utilize the correct standard.

**D. The Hearing Officer Clearly Erred When She Found that AR 339 Required Approval by the Personnel Commission to be Valid and Did Not Consider it in Determining Whether NDOC Properly Terminated Employee.**

AR 339 sets forth, in part, the conduct prohibited by NDOC employees as well as a Chart of Corrective/Disciplinary Sanctions that NDOC is to look to when an employee engages in the proscribed conduct. The Chart of Corrective/Disciplinary Sanctions categorizes offenses as ranging from a Class 1 to a Class 5 offense. A Class 5 offense is the most severe offense resulting in

termination. A Class 1 offense is the least severe offense resulting in verbal counseling. Employee admitted that he signed the AR Acknowledgment Form prior to commencing his employment, recognizing that it is his responsibility to review and become familiar with NDOC's ARs including AR 339. JA, Vol. III, 0510.

In December 2015, NDOC charged Employee with violating AR 339.05.15, Neglect of Duty, Section UU, which provides that leaving an assigned post while on duty without authorization of a supervisor is a Class 5 terminable offense for the first violation. The hearing officer, however, did not give AR 339 full weight and consideration in deciding if Employee's termination was reasonable—contrary to the position of NDOC who relied on AR 339 for the recommended discipline. Instead, she erroneously determined that AR 339 required approval from the Personnel Commission pursuant to NRS 284.383<sup>2</sup> and therefore, was invalid.

AR 339 does not require approval from the Personnel Commission. Chapter 233B of the Administrative Procedure Act (APA) outlines regulation-making and adjudication procedure for all executive department agencies, except those exempted. NRS 233B.020. The Nevada Legislature exempted NDOC from the APA, devoting Chapter 209 to NDOC. NRS 233B.039(b); *see generally* NRS

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<sup>2</sup> NRS 284.383(3) states that “[a]n 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.”

## Chapter 209.

The Board of State Prison Commissioners (Board) heads NDOC. NRS 209.101(2). Article 5 § 21 of the Nevada Constitution defines the Board to include the Governor, the Secretary of State, and the Attorney General, and provides that the Board “shall have such supervision of *all* matters connected” with Nevada’s prisons as provided by law. Nev. Const. art. 5, § 21 (emphasis added). “Prison regulations are promulgated by the Board of State Prison Commissioners, pursuant to authority granted in NRS 209.111(3).” *Michenfelder v. Sumner*, 624 F. Supp. 457, 463 (D. Nev. 1985), *aff’d*, 860 F.2d 328 (9th Cir. 1988). NRS 209.111 provides that “the Board has full control of all grounds, buildings, labor<sup>3</sup>, and property of the Department and shall...[r]egulate the number of officers and employees of the Department,” and “shall...[p]rescribe regulations for carrying on the business of the Board and the Department”:

### **NRS 209.111 Powers and duties of Board.**

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,

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<sup>3</sup> When first enacted, NRS 209.111 referred to “prison labor.” See *Craig v. Hocker*, 405 F. Supp. 656, 682 (D. Nev. 1975), overruled on other grounds by *Smith v. Sumner*, 994 F.2d 1401, 1405 (9th Cir. 1993) (emphasis added). The statute was amended in 1977 to refer simply to “labor.” 1977 Nev. Stat. 845. At the time of the amendment, the statute contained a provision allowing for the Board to contract with nonprofit governmental agencies for the labor of offenders. 1979 Nev. Stat. 888. That provision was removed from the statute in 1983, but the reference to “labor” in the statute remains. 1983 Nev. Stat. 719.

materials and tools necessary for any lawful purpose carried on at any institution or facility of the Department.

2. Regulate the number of officers and employees of the Department.
3. Prescribe regulations for carrying on the business of the Board and the Department.

NRS 209.121 provides that the Director of NDOC will be appointed by the Governor and “shall be selected with special reference to his or her training, experience and aptitude in the field of corrections.” NRS 209.131 outlines the duties of the Director:

**NRS 209.131 Director of Department: Duties.**

The Director shall:

1. Administer the Department under the direction of the Board.
2. Supervise the administration of all institutions and facilities of the Department.
3. Receive, retain and release, in accordance with law, offenders sentenced to imprisonment in the state prison.
4. Be responsible for the supervision, custody, treatment, care, security and discipline of all offenders under his or her jurisdiction.
5. Ensure that any person employed by the Department whose primary responsibilities are:
  - (a) The supervision, custody, security, discipline, safety and transportation of an offender;
  - (b) The security and safety of the staff; and
  - (c) The security and safety of an institution or facility of the Department, is a correctional officer who has the powers of a peace officer pursuant to subsection 1 of NRS 289.220.
6. Establish regulations with the approval of the Board and enforce all laws governing the administration of the Department and the custody, care and training of offenders.
7. Take proper measures to protect the health and safety of the staff and offenders in the institutions and facilities of the Department.
8. Take proper measures to protect the health and safety of persons employed by a school district to operate a program of education for

incarcerated persons in an institution or facility pursuant to chapter 388H of NRS.

9. Cause to be placed from time to time in conspicuous places about each institution and facility copies of laws and regulations relating to visits and correspondence between offenders and others.
10. Provide for the holding of religious services in the institutions and facilities and make available to the offenders copies of appropriate religious materials.

NRS 209.131 confirms that NDOC's Director shall "[a]dminister the Department under the direction of the Board[,] . . . [s]upervise the administration of all institutions and facilities of the Department [and] . . . [e]stablish regulations with the approval of the Board and enforce all laws governing the administration of the Department and the custody, care and training of offenders." NRS 209.131(1) and (6). Additionally, the Director of NDOC shall "[t]ake proper measures to protect the health and safety of the staff and offenders in the institutions and facilities of the Department." NRS 209.131(7).

"NRS chapter 209 plainly gives the NDOC Director and the Board of State Prison Commissioners the authority to create and implement regulations with respect to the management of the prisons and the prisoners," *Corzine v. State ex rel Dep't of Prisons*, No. 68086, 2015 WL 5517030 (Nev. Ct. App. Sept. 15, 2015) (unpublished):

These statutes and others make it clear that the Board of Prison Commissioners is primarily responsible for the administration of the prison, and the promulgation of rules and regulations governing the prisoners, *employees* and other persons....The Nevada Constitution and statutes

place responsibility for supervision of the prison in a board of prison commissioners. The evident intent is that this lay board, removed from the difficult problems of prison administration, should review and pass upon the basic rules and regulations in the light of their own experiences, knowledge of public affairs, social conscience and legal expertise.

*Craig v. Hocker*, 405 F. Supp. 656, 682 (D. Nev. 1975), overruled on other grounds by *Smith v. Sumner*, 994 F.2d 1401, 1405 (9th Cir. 1993) (emphasis added). Contrary to the hearing officer's determination, the authority given to the Board in the Nevada Constitution and as further delineated in NRS 209.111 encompasses prison administration, a function that necessarily requires the Board to address personnel matters. If the Board were unable to prescribe regulations governing the conduct of NDOC employees, it would have virtually no meaningful powers of administration.

The Board, pursuant to the authority vested in it by the Nevada Constitution and State statute approved AR 339. *See e.g.*, Nev. Const. art. 5, § 21. Thus, AR 339 is a valid and lawful administrative regulation that has the force and effect of law. *See United States v. Short*, 240 F.2d 292, 298 (9th Cir. 1956) ("An administrative regulation promulgated within the authority granted by statute has the force of law and will be given full effect by the courts."); *Fore v. Nev. Dep't of Corr.*, No. 64028, 2015 WL 6705101, at \*3-4 (Nev. Ct. App. Oct. 23, 2015) (unpublished) (noting an agency's own regulations have the "force of law").

Indeed, AR 339 has been presented to the Board for approval several times, the most recent being August 30, 2017, to update legislative changes and investigatory procedures.<sup>4</sup> Prior to August, the last time AR 339 had been presented to the Board for approval was January 14, 2016. *Minutes of the Meeting of the Board of Prison Commissioners*, January 14, 2016, [http://doc.nv.gov/Home/Prison\\_Commissioners/Board\\_of\\_State\\_Prison\\_Commissioners/](http://doc.nv.gov/Home/Prison_Commissioners/Board_of_State_Prison_Commissioners/). At the January 14<sup>th</sup> meeting, Governor Brian Sandoval asked if sufficient prior notice was given to everyone including NDOC staff regarding the proposed revisions to AR 339. *Id* at 8. Before moving forward on approving the revised AR, Governor Sandoval confirmed that all staff concerns regarding AR 339 had been addressed prior to the January 14, 2016 meeting. *Id*.

The Acting Director of NDOC explained the process that NDOC goes through before presenting a proposed AR to the Board for approval. “[O]nce the AR executive policy panel<sup>5</sup> has tentatively approved a draft, the AR coordinator<sup>6</sup> will send out all draft AR’s [sic] for final comment and input from staff. He said this means each AR actually goes out twice for staff review.” *Id*. The careful

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<sup>4</sup> To date, the August 30, 2017, minutes have not been posted to the Board’s website.

<sup>5</sup> The Executive AR Policy Panel consists of the Director, the Deputy Directors, the Medical Director, Inspector General and the Human Resources Administrator. The Executive AR Policy Panel is responsible for policy development. AR 100.

<sup>6</sup> The AR Policy Coordinator is designated by the Director and facilitates the Executive AR Policy Panel meeting and performs duties as the AR custodian. AR 100.

drafting of AR 339 and the process taken to ensure its consistency with State regulations was discussed as follows:

Director McDaniel discussed AR 339 employee code of ethics and conduct. He said this AR was drafted by NDOC's subject matter expert, Inspector General Pam Del Porto, as well as a member of the Attorney General's office, Deputy Attorney General Janet Traut, assuring that they were in compliance with all processes. After the last board meeting, this AR was sent out again for staff's second and final review before it would be brought before the board today to be made a final AR. IG Del Porto said that since the last board meeting one staff member contacted her regarding the word loyalty being included in this AR. It was agreed that the word loyalty would be removed from the AR. There were no additional concerns from staff. Janet Traut explained that the revisions to this AR actually began in 2011 due to a statutory change regarding all classified state employees prohibitions and penalties along with the process for discipline. She also discussed progressive discipline in relationship with Chapter 284 – State Personnel System where discipline is included. **This AR was compared line by line with both Chapter 284 and chapter 289 – Peace Officers, to make sure the NDOC is compliant with the NRS's.** She said they clarified language in AR 339 that had been problematic. Governor Sandoval said he appreciated all the hours of work and attention to detail that it took to get the AR to this point. Secretary Cegavske wanted to make it part of the record that employees sign this pre-service which is well before they actually begin work. She said she recalls this being worked on for the past two sessions and appreciates everyone's hard work. Governor Sandoval took a motion for approval of all of the administrative regulations that were presented under this agenda item and the motion passed.

*Id.* (emphasis added).<sup>7</sup>

The version of AR 339 that was approved and in effect prior to January 2016 was approved by the Board on May 17, 2012. The Board's extensive review of the regulation along with all staff and public comment on the issue is documented in the Board's May 17, 2012 meeting minutes. *Minutes of the Meeting of the Board of Prison Commissioners, May 17, 2012*, [http://doc.nv.gov/uploadedFiles/docnvgov/content/Home/Prison\\_Commissioners/Minutes\\_BoPC20120517.pdf](http://doc.nv.gov/uploadedFiles/docnvgov/content/Home/Prison_Commissioners/Minutes_BoPC20120517.pdf).

Here, it is clear that the Board has supervisory authority over all matters relating to NDOC, including but not limited to the content, scope and issuance of administrative regulations. The Board, when approving an administrative regulation like AR 339, carefully considers any proposed changes, receives

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<sup>7</sup> It should be noted that AR 339 sets forth a policy of progressive discipline in keeping with the regulations and statutes of Chapter 284. The system of discipline set forth in Chapter 284 of the NRS and NAC identify a system of progressive discipline where serious violations warrant a more severe punishment. NRS 284.383(1). *See* NAC 284.646(1) (An "appointing authority may dismiss an employee for any cause set forth in NAC 284.650 if... (b) The seriousness of the offense or condition warrants such dismissal.") NDOC's Chart of Corrective/Disciplinary Sanctions as set forth in AR 339 are consistent with and promote the system of discipline set forth in Chapter 284 of the NRS and NAC, identifying a system of progressive discipline where serious violations warrant a more severe punishment.

Additionally, the measures taken by the Board and NDOC are consistent with NRS 284.383(2) and (3). Each NDOC employee is provided with a copy of AR 339 at the beginning of their employment which explains prohibited acts, possible violations and penalties and fair and equitable process for taking disciplinary action. The employee also receives a copy of any findings or recommendations regarding the proposed disciplinary action.

feedback from staff, and ensures that all issues and concerns are addressed prior to its approval. In their role, the Director and the Board must assess and evaluate issues and situations unique to NDOC that other state agencies do not face, particularly as they relate to the safety and security of the institution. The Board, led by the Governor, was created by the Nevada Constitution to address such complex and difficult issues that should not and cannot be left to the Personnel Commission. *See Rucker v. McDaniel*, No. 3:04-cv-120-ECR(RAM), 2008 WL 5416428 at \*3 (D. Nev. Dec. 5, 2008) (explaining the Governor exercises “considerable judgment formulating policies for the prison system. The complexity of this task explains why the legislature required the [G]overnor to preside over the [Board].”)<sup>8</sup> Indeed, the Director and the Board possess superior competence and expertise in identifying regulations—including regulations that identify the type of employee conduct that cannot be condoned in the prison system and the penalties for such conduct—which are necessary to ensure Nevada’s prison system functions effectively and safely year after year. *See Craig*, 405 F. Supp. at 682.

Any contention that Chapter 284 of the NRS or NAC invalidates AR 339 for lack of approval by the Personnel Commission is untenable. If NRS 284.383 were

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<sup>8</sup> The Personnel Commission reports to the Governor. *See* NRS 284.065(2). Therefore, the hearing officer’s finding that the Governor’s approval through the Board is insufficient and that the Personnel Commission instead must give its approval is incongruent. *See Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995) (explaining that statutory interpretation should avoid absurd or unreasonable results).

read to require that the Personnel Commission approve AR 339 or otherwise ratify its implementation, the Personnel Commission would have the ability to nullify or undermine the Board's critical powers of prison administration as set forth in the Nevada Constitution and as further provided by State statute. The articles of the Nevada Constitution are the supreme law of the State and cannot be trumped by conflicting statutes or regulations. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. \_\_, \_\_, 327 P.3d 518, 521 (2014) ("The Nevada Constitution is the supreme law of the state, which controls over any conflicting statutory provisions." (internal citation and quotations omitted) The Nevada Supreme Court "construe[s] statutes, if reasonably possible, so as to be in harmony with the constitution.") (internal citations and quotations omitted). Interpreting Chapter 284 of the NRS, as the hearing officer did here, to require the Personnel Commission's final approval of AR 339 to be valid would necessarily conflict with the authority given to the Board under the Nevada Constitution and NRS 209.111.<sup>9</sup>

Indeed, at least one hearing officer with the Nevada Personnel Commission, hearing officer, Mark Gentile, has rejected the notion that AR 339 is invalid for

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<sup>9</sup> Assuming there is even a conflict between NRS Chapter 284 and NRS 209.111, the supposed conflict is a policy matter that concerns the authority of executive branch agencies in relation to one another. The Governor and his fellow constitutional officers conclusively resolved the alleged conflict when they approved AR 339. The matter was of no concern to the hearing officer in the performance of her quasi-judicial function. *See North Lake Tahoe Protection Dist. v. Washoe Cnty. Bd. of Cnty Comm'rs*, \_\_Nev.\_\_, 310 P.3d 583, 587 (2013) (holding that judicial officers must abstain from addressing controversies that involve policy choices committed to the discretion of members of the executive or legislative branches of government).

lack of approval by the Personnel Commission. Hearing Officer Gentile provided the following reasoning for his determination:

The Board of State Prison Commissioners is primarily responsible for the administration of prisons and for the promulgation of rules and regulations governing the prisoners, employees and other persons. NRS Chapter 209 authorizes the Board to prescribe regulations for carrying on the business of the Board and the Department of Prisons. AR 339 is a legal and enforceable administrative regulation.

I do not find the fact that this regulation was promulgated by the Board of State Prison Commissioners, through the auspices of Article 5 Section 21 of the Nevada Constitution, instead of being 'subject to the approval of the State Personnel Commission' under NRS Chapter 284 invalidates the application of the regulation as it applies to [the employee in the case before Hearing Officer Gentile].

JA, Vol. III, 0666-0670. Accordingly, hearing officer Gentile upheld the validity of AR 339 in the matter pending before him, giving it full weight in determining whether NDOC properly disciplined the employee.

Because the hearing officer in this case determined that AR 339 needed approval from the Personnel Commission to be valid and did not give AR 339 full consideration in her decision to overturn Employee's termination, she clearly erred. The District Court in denying NDOC's Petition for Judicial Review and affirming the hearing officer was also in clear error. Thus, this Court should reverse the decision that AR 339 requires approval from the Personnel

Commission and remand for the hearing officer to admit AR 339 and give it full weight.

**E. The Hearing Officer Exceeded her Statutory Authority and Committed Clear Error of Law by Substituting her Judgment for that of NDOC.**

The hearing officer exceeded her statutory authority and committed clear error of law by substituting her judgment for that of the employer. As stated above, the authority granted the hearing officer is to determine whether NDOC had just cause for the discipline “as provided in NRS 284.385.” NRS 284.385 provides that an appointing authority may discipline a permanent classified employee “when [it] considers the good of the public service will be served thereby.”

NAC 284.646(1) identifies two circumstances under which an appointing authority may terminate an employee for the good of the public service. First, an appointing authority may dismiss an employee for any reason set forth in NAC 284.650 if the agency with which the employee is employed has adopted rules or policies that authorize the dismissal of an employee for such cause. NAC 284.646(1)(a). Second, an “appointing authority may dismiss an employee for any cause set forth in NAC 284.650 if... (b) The seriousness of the offense or condition warrants such dismissal.” NAC 284.646(1)(b).

First, NDOC has adopted AR 339 which provides the rules outlining the responsibilities and proper practices of NDOC employees as well as informs the

employees of NDOC's expectations and penalties for failing to comply. AR 339.05 identifies approximately 172 different offenses for prohibited employee conduct. JA, Vol. I, 0196-0209. Once NDOC determines the offense(s) an employee's conduct violated, NDOC looks to the Chart of Corrective/Disciplinary Sanctions, which prescribes the recommended penalties for the offense. JA, Vol. I, 0196.

AR 339 authorizes termination for Employee's conduct. NDOC charged Employee with violating AR 339.05.15 UU, Leaving an assigned post while on duty without authorization of a supervisor, which is a Class 5 Offense and terminable for the first violation. JA, Vol. I, 0196, 0206. NDOC has deemed that leaving an assigned post while on duty without authorization of a supervisor to be a serious offense warranting classification as a Class 5 Offense.

The hearing officer concluded that Employee's conduct was a violation of NDOC's Administrative Regulations. Specifically the hearing officer found as matter of law that the "[c]redible testimony supports a finding that Mr. Ludwick left his post in Unit 1 on April 4, 2015 and went to the Shift Command Office without obtaining prior authorization from a supervisor." JA, Vol. I, 0126. The Nevada Supreme Court has confirmed that a hearing officer does not have the authority to prescribe the amount of discipline to be imposed. *Taylor*, 129 Nev. at \_\_\_, 314 P.3d at 951. As the hearing officer found that Employee committed a

terminable offense under the appointing authority's regulations and policies, the hearing officer lacked authority to hold that a termination was too harsh and recommend a suspension not to exceed thirty days.

Leaving a post without authorization is considered a serious and grave infraction at NDOC. JA, Vol. III, 0530, 0562. Piccinini testified that officers are assigned to posts to protect the safety and security of the prison, the staff and the public. JA, Vol. III, 0530. He further testified that if an officer leaves his assigned post, then he has left the unit vulnerable, particularly, if an incident occurs because the staff and other inmates would be at risk. JA, Vol. III, 0531. Warden Gentry testified that when an officer leaves his assigned post it reduces the institution's immediate response time to any incidents that would require assistance for a staff member or inmate, including but not limited to inmates being physically or sexually assaulted and staff members needing a backup responder to deescalate a situation. JA, Vol. III, 0563. Warden Gentry further testified that when an officer leaves his post, the chain of command does not know his whereabouts. For example, if the officer suffered a medical emergency or was being held hostage, they would not know his location and could not assist. Id.

In determining the appropriate discipline to give Employee in this case, Warden Gentry looked to AR 339, considered the seriousness of the violation, and recognized that leaving an assigned post poses a safety and security breach. JA,

Vol. II, 0567, 0575. Warden Gentry further testified that NDOC's Human Resources was consulted regarding the proposed discipline and Human Resources suggested termination because abandoning post is a Class 5 terminable offense and is consistent with how such misconduct has been treated by NDOC in the past. JA, Vol. III, 0582-584. As a result, Warden Gentry recommended Employee be terminated from State service. JA, Vol. III, 0567. Acting Director E.K. McDaniel made the final decision to terminate Employee in accordance with AR 339. JA, Vol. III, 0567, 0586-0589.

Based on the extensive process described above, it is clear that NDOC did not act arbitrarily and capriciously in deciding to terminate Employee. NDOC acted in accordance with its regulation that authorizes the dismissal of an employee for such cause. *See* NAC 284.646(1)(a). NDOC conducted a thorough investigation, considered the fact that Employee's misconduct implicated serious safety and security concerns, and evaluated the misconduct against AR 339 and their own records of previously imposed discipline. NDOC determined that the facts surrounding Employee leaving his post without authorization were supported by substantial evidence and were reasonably believed by it to be true. Therefore, NDOC had just cause to terminate Employee because its decision to terminate was based upon sound evidence that led NDOC to conclude that the good of the public would be served by the termination.

Further, the seriousness of the offense warrants a dismissal. NDOC acted in accordance with NAC 284.650(7), dismissing Employee for what it deemed a serious inexcusable neglect of duty. *See* NAC 284.646(1)(b). Critically, the hearing officer determined that Employee engaged in an inexcusable neglect of duty and violated NAC 284.650(7) when he left his assigned post without authorization of a supervisor. JA, Vol. I, 0126. Despite this determination and testimony elicited from witnesses regarding the severity of the offense, the hearing officer concluded that the circumstances warranted a suspension—not giving any weight to NDOC testimony or the penalty proscribed by NDOC in AR 339 for the offense.

Based upon the evidence in the record, NDOC had just cause to terminate Employee, yet the hearing officer improperly stepped into the Employer’s shoes and substituted her judgment for that of the Employer. Therefore, the District Court and the hearing officer erred and the Decision must be reversed.

**F. The Hearing Officer Clearly Erred and Acted Arbitrarily and Capriciously in Reversing the Termination in View of the Reliable, Probative and Substantial Evidence on the Whole Record.**

The Court may set aside a final decision by a hearing officer where the final decision is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” NRS 233B.135(3)(e). Substantial evidence has been defined as that which “a reasonable mind might accept as adequate to support

a conclusion.” *State, Emp. Sec. Dep’t v. Hilton Hotels*, 102 Nev. 606, 608, 792 P.2d 497, 498 (1986), citing *Richardson v. Perales*, 402 U.S. 389 (1971) (“We [equate] substantial evidence with that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion...”). A decision is arbitrary, capricious, or unsupported, if it is not “supported by substantial evidence in the record.” *Clark Cnty. Educ. Ass’n v. Clark Cnty. Sch. Dist.*, 122 Nev. 337, 342, 131 P.3d 5, 9 (2006).

As set forth above, the substantial evidence in the record demonstrates that NDOC lawfully terminated Employee. The hearing officer confirmed in her decision that the substantial and reliable evidence demonstrated that Employee violated NAC 284.650(7) and engaged in an inexcusable neglect of duty when he abandoned his assigned post without permission—the exact conduct that AR 339 deems terminable. Specifically, she determined that “[c]redible testimony supports a finding that [Employee] left his post in Unit 1 on April 4, 2015 and went to the Shift Command Office without obtaining prior authorization from a supervisor.” JA, Vol. I, 0126. The substantial and reliable evidence included testimony from the Warden and the supervisor on duty that abandoning post puts the correctional officer, the NDOC staff, and the public in a vulnerable and precarious position. Additionally, the Warden testified there are safety and security concerns underlying this policy which make it a serious infraction. Critically, the hearing

officer determined that Employee violated a “very important safety and security policy.” JA, Vol. I, 0128. Yet, rather than upholding NDOC’s termination of Employee for committing this serious offense of abandoning post, the hearing officer indicated that a suspension of 30 days or less was more appropriate. JA, Vol. I, 0129. Despite substantial evidence supporting NDOC’s termination, the hearing officer failed to uphold the termination, instead concluding that Employee’s discipline was too harsh. The hearing officer’s conclusion is untenable in the correctional setting. *Cf. Meadow v. Civil Serv. Bd. of Las Vegas Metro. Police Dep’t*, 105 Nev. 624, 626 n.1, 781 P.2d 772, 773 n.1 (1989) (“We are most reluctant, in light of the evidence in this record, to impose on the Sheriff an officer whom he has determined to be unfit for service in the law enforcement agency over which he is responsible. It is difficult to hold heads of organizations responsible for the quality and effectiveness of their efforts if they are forced to work with persons found, by substantial evidence, to be unfit for service.”)

Accordingly, the reliable, probative, and substantial evidence on the whole record demonstrates that the hearing officer’s decision is clearly erroneous and arbitrary and capricious.

## **CONCLUSION**

The District Court’s Order denying the Petition for Judicial Review and affirming the hearing officer’s Decision must be reversed. The substantial rights of

the NDOC were prejudiced by the hearing officer's decision because the hearing officer exceeded her statutory authority, acted in clear error of law, abused her discretion, and issued a decision that was arbitrary and capricious and clearly erroneous in view of the reliable, probative and substantial evidence of the record. The substantial evidence in the record demonstrates that NDOC had just cause to terminate Employee when he left his assigned post without authorization from supervisor. Therefore, Appellant respectfully requests this Court reverse the District Court's Order and the hearing officer's Decision.

Dated: November 8, 2017.

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## 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:

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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 8<sup>th</sup> day of November, 2017.

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## **CERTIFICATE OF SERVICE**

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on November 8, 2017 I electronically filed the foregoing document via this Court's electronic filing system. I certify that the following participants in this case are registered electronic filing systems users and will be served electronically and by U.S. Mail first class postage prepaid:

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