

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.

Electronically Filed
Nov 09 2017 08:42 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
Case No. 73277
District Court No. A-16-741032

Appeal from Order Denying Petition for Judicial Review

Eighth Judicial District Court

JOINT APPENDIX

VOLUME I of IV

ADAM PAUL LAXALT

Attorney General

Michelle Di Silvestro Alanis (Bar. No.10024)

Deputy Attorney General

State of Nevada

Office of the Attorney General

555 E. Washington Ave., Ste. 3900

Las Vegas, Nevada 89101

(702) 486-3268 (phone)

(702) 486-3773 (fax)

malanis@ag.nv.gov

Attorneys for Appellant

INDEX

<u>Volume</u>	<u>Page(s)</u>
I Affidavit and Certification, filed 8/26/2016	0030
II Affidavit of Certification, filed 9/8/2016.....	0453
I Amended Certificate of Service, filed 8/2/2016	0024 - 0025
III Case Appeal Statement, filed 6/8/2017.....	0737 - 0742
I Certificate of Service, filed 8/19/2016.....	0029
I Certification of Transmittal, filed 8/26/2016	0031 - 0032
II Certificate of Transmittal, filed 9/8/2016	0454 - 0455
IV Civil Order to Statistically Close Case, filed 7/7/2017	0752
III Notice of Appeal, filed 6/8/2017.....	0743 - 0751
III Notice of Entry of Order, filed 5/10/2017.....	0733 - 0734
III Order Denying Judicial Review of Administrative Decision,	
filed 5/9/2017	0731 - 0732
I Petition for Judicial Review, filed 8/01/2016	0001 - 0023
III Petitioner's Opening Brief, filed 12/6/16.....	0634 - 0670
III Petitioner's Reply Brief, filed 4/13/17	0712 - 0730
I Plaintiff's Notice of Intent to Participate, filed 8/17/16	0026 - 0028
I Record on Appeal, filed 8/26/2016	0033 - 0250
II Record on Appeal, filed 8/26/2016.....	0251 - 0451

IV	Recorders Transcript of Hearing, filed 7/31/2017	0753 - 0768
III	Respondent's Answering Brief, filed 3/3/2017.....	0671 - 0711
II	Supplement Transmittal of Record on Appeal,	
	filed 9/8/2016	0456 - 0633
II	Transmittal of Record on Appeal.....	0452

DISTRICT COURT CIVIL COVER SHEET

Clark County, Nevada

XXVII

Case No.
(Assigned by Clerk's Office)**I. Party Information** (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): State of Nevada ex rel Department of Corrections,	Defendant(s) (name/address/phone): Brian Ludwick; The State of Nevada ex rel., its Department of Administration Personnel Commission, Hearing Officer
Attorney (name/address/phone): Jennifer K. Hostetler and Michelle Di Silvestro Alanis Nevada Attorney General, 555 E. Washington Ave. #3900 Las Vegas, NV 89101 702-486-3420	Attorney (name/address/phone): Adam Levine 610 S. Ninth Street Las Vegas, NV 89101 702-386-0536


II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input checked="" type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters


Business Court filings should be filed using the Business Court civil coversheet.

August 1, 2016

Date


 Signature of initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

ADAM PAUL LAXALT
Attorney General
JENNIFER K. HOSTETLER
Chief Deputy Attorney General
Nevada Bar No. 11994
MICHELLE DI SILVESTRO ALANIS
Deputy Attorney General
Nevada Bar No. 10024
555 E. Washington Ave., Ste. 3900
Las Vegas NV 89101-1068
Tel: (702) 486-3268
Fax: (702) 486-3773
jhostetler@ag.nv.gov
malanis@ag.nv.gov
Attorneys for Petitioner STATE OF NEVADA
EX REL. DEPARTMENT OF CORRECTIONS

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA EX REL.
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

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

Respondents.

CASE NO: A-16-741032-C

DEPT NO: XXVII

PETITION FOR JUDICIAL REVIEW

Petitioner, STATE OF NEVADA ex rel. DEPARTMENT OF CORRECTIONS, by and through counsel, ADAM PAUL LAXALT, Attorney General of the State of Nevada, JENNIFER HOSTETLER, Chief Deputy Attorney General, and MICHELLE DI SILVESTRO ALANIS, Deputy Attorney General, pursuant to NRS 284.390(8) and NRS 233B.010 et seq., petitions the Court as follows:

1. Petitioner requests judicial review of the final decision of the Nevada State Personnel Commission Hearing Officer dated July 1, 2016, in Case No. 1521187-CB.
2. This Court has jurisdiction pursuant to NRS 233B.130.
3. This Petition has been filed in accordance with NRS 233B.130 (1) and (2).

JA 0002

4. Petitioner has been aggrieved by the final decision of the Hearing Officer attached hereto as Exhibit "1," and Petitioner's rights have been prejudiced because the final decision is:

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

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

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

WHEREFORE, Petitioner prays as follows:

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

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

DATED this 1st day of August, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Jennifer Hostetler
JENNIFER K. HOSTETLER
Chief Deputy Attorney General
Nevada Bar No. 11994
MICHELLE DI SILVESTRO ALANIS
Deputy Attorney General
Nevada Bar No. 10024
Attorneys for Petitioner STATE OF NEVADA
ex rel. DEPARTMENT OF CORRECTIONS

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PETITION FOR JUDICIAL REVIEW** with the Clerk of the Court by using the electronic filing system on the 1st day of August, 2016.

I certify that some of the participants in the case are not registered electronic filing system users. For those parties not registered pursuant to Administrative Order 14-2, service was made by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada to the following unregistered participants:

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

Hearing Officer Cara L. Brown
Department of Administration
Hearings Division
2200 S. Rancho Dr., Ste. 220
Las Vegas, NV 89102

Brian Ludwick
5900 Sky Pointe Drive #1152
Las Vegas, Nevada 89130

/s/ Anela Kaheaku
An employee of the Office of the Attorney General

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 27th 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-F¹

and testimony under oath of the following witnesses:

¹ 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 4th. 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. Ludwick², 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 ²² 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 Presheess 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 4th. 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 4th 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
process for taking disciplinary action against such an
employee.

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

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,
8 and shall not consider any additional evidence beyond
9 the scope of the charges.

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

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

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

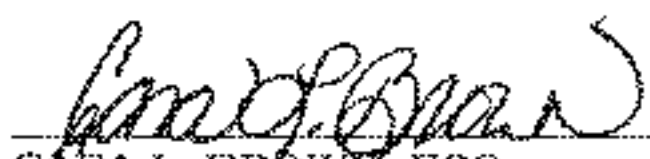
4 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

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 24th 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

CERTIFICATE OF SERVICE

I hereby certify that, on the 27th day of June, 2016, service of a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION** was made by first class mail, postage prepaid, to:

Brian Ludwick
5900 Sky Pointe Drive #1152
Las Vegas Nevada 89130

and by first class mail, postage prepaid, and email to:

Adam Levine, Esquire
Law Office of Daniel Marks
610 South 9th Street
Las Vegas Nevada 89101
office@danielmarks.net


and by interdepartmental mail to:

James Dzurenda, Director
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

Sharlet Gabriel, HR Administrator
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

and by interdepartmental mail and email to:

Susanne M. Sliwa, Senior Deputy Attorney General
Department of Health and Human Resources
555 Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
ssliwa@ag.nv.gov


D. Giambelluca, Legal Secretary II
Employee of the State of Nevada

JUL 01 2016

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARINGS OFFICER

BRIAN LUDWICK

Petitioner-Employee

vs.

NEVADA DEPARTMENT OF CORRECTIONS

Respondent-Employer.

APPEAL NO. 1521187-C8

ORDER GRANTING PETITIONER BRIAN LUDWICK'S PETITION FOR RECONSIDERATION


On June 27, 2016, Petitioner Brian Ludwick (hereinafter "Mr. Ludwick"), timely filed a PETITION FOR RECONSIDERATION (hereinafter "Petition") requesting reconsideration of the remedy granted in this Hearing Officer's Findings of Fact, Conclusions of Law and Decision filed June 27, 2016 in the above-captioned appeal (hereinafter "Decision"). Having considered Mr. Ludwick's Petition and having reviewed the Decision, Mr. Ludwick is correct in his position that pursuant to NRS 284.390(6), because there was a determination that his dismissal was without just cause he must be reinstated with full pay for the period of the dismissal. There was an oversight in preparing the Decision.

For the foregoing reasons, Mr. Ludwick's Petition must be granted.

IT IS HEREBY ORDERED that the Petitioner Brian Ludwick's PETITION FOR RECONSIDERATION is **GRANTED**; and

IT IS FURTHER ORDERED that Petitioner Brian Ludwick receive full back pay and benefits for the full period of his dismissal.

Dated this 30th day of June, 2016.


CARA L. BROWN, ESQ.
Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that, on the 1st day of July, 2016, service of a true and correct copy of the foregoing ORDER GRANTING PETITIONER BRIAN LUDWICK'S PETITION FOR RECONSIDERATION was made by first class mail, postage prepaid, to:

Brian Ludwick
5900 Sky Pointe Drive #1152
Las Vegas Nevada 89130

and by first class mail, postage prepaid, and email to:

Adam Levine, Esquire
Law Office of Daniel Marks
610 South 9th Street
Las Vegas Nevada 89101
office@danielmarks.net


and by interdepartmental mail to:

James Dzurenda, Director
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

Sharlet Gabriel, HR Administrator
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

and by interdepartmental mail and email to:

Susanne M. Sliwa, Senior Deputy Attorney General
Department of Health and Human Resources
555 Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
ssliwa@ag.nv.gov


D. Giambelluca, Legal Secretary II
Employee of the State of Nevada


CLERK OF THE COURT

ADAM PAUL LAXALT
Attorney General
JENNIFER K. HOSTETLER
Chief Deputy Attorney General
Nevada Bar No. 11994
MICHELLE DI SILVESTRO ALANIS
Deputy Attorney General
Nevada Bar No. 10024
555 E. Washington Ave., Ste. 3900
Las Vegas NV 89101-1068
Tel: (702) 486-3268
Fax: (702) 486-3773
jhostetler@ag.nv.gov
malanis@ag.nv.gov
Attorneys for Petitioner STATE OF NEVADA
EX REL. DEPARTMENT OF CORRECTIONS

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA EX REL.
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

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

Respondents.

CASE NO: A-16-741032-J

DEPT NO: XXVII

AMENDED CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General and that on the 2nd day of August, 2016, I served the **PETITION FOR JUDICIAL REVIEW** by causing a true and correct copy thereof to be served via U.S. Mail, Postage Prepaid addressed to the following:

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

///

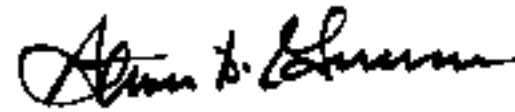
///

Hearing Officer Cara L. Brown
Department of Administration
Hearings Division
2200 S. Rancho Dr., Ste. 220
Las Vegas, NV 89102

Brian Ludwick
5900 Sky Point Dr., #1152
Las Vegas, Nevada 89130

(Via U.S. Mail and Certified Mail Return
Receipt Requested)

/s/ Anela Kaheaku
An employee of the Office of the Attorney General



CLERK OF THE COURT

1 NOTC
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 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 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 INTENT TO PARTICIPATE**

19 COMES NOW, Respondent BRIAN LUDWICK by and through his undersigned counsel.
20 Adam Levine, Esq. of the Law Office of Daniel Marks and pursuant to NRS 233B.130(3) provides

21 ///

22 ///

23 ///

24 ///

1 Notice of Real Party in Interest BRIAN LUDWICK'S Intent to Participate in the Judicial Review
2 Proceedings.

3 DATED this 17th day of August, 2016.

4 LAW OFFICE OF DANIEL MARKS

5
6 DANIEL MARKS, ESQ.

Nevada State Bar No. 002003

7 ADAM LEVINE, ESQ.

Nevada State Bar No. 004673

8 610 South Ninth Street

Las Vegas, Nevada 89101


9 *Attorneys for Respondent Brian Ludwick*

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4

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

Susanne M. Sliwa, Senior Deputy Attorney General
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Attorney for Respondent Department of Administration

Alinda Qu
Employee of the



CLERK OF THE COURT

ADAM PAUL LAXALT
Attorney General
JENNIFER K. HOSTETLER
Chief Deputy Attorney General
Nevada Bar No. 11994
MICHELLE DI SILVESTRO ALANIS
Deputy Attorney General
Nevada Bar No. 10024
555 E. Washington Ave., Ste. 3900
Las Vegas NV 89101-1068
Tel: (702) 486-3268
Fax: (702) 486-3773
jhosteller@ag.nv.gov
malanis@ag.nv.gov
Attorneys for Petitioner STATE OF NEVADA
EX REL. DEPARTMENT OF CORRECTIONS

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA EX REL.
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

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

Respondents.

CASE NO: A-16-741032-J

DEPT. NO: XXVII

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General and that on the 18th day of August, 2016, I served the **PETITION FOR JUDICIAL REVIEW** by causing a true and correct copy thereof to be served via U.S. Mail, Postage Prepaid addressed to the following:

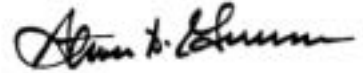
Brian Ludwick
729 Nectarine Court
Henderson, Nevada 89014

(Via U.S. Mail and Certified Mail Return
Receipt Requested)

/s/ Anela Kaheaku
An employee of the Office of the Attorney General

JA 0029

1 APPEALS OFFICE
2 2200 S. Rancho Drive Suite 220
3 Las Vegas NV 89102
4 (702) 486-2527



CLERK OF THE COURT

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 STATE OF NEVADA EX REL.
8 DEPARTMENT OF CORRECTIONS,

9 Petitioner,

10 vs.

11 BRIAN LUDWICK, an individual; THE
12 STATE OF NEVADA,
13 DEPARTMENT OF ADMINISTRATION
14 HEARINGS DIVISION, APPEALS OFFICE,


15 Respondents.

Case No.: A741032
Dept. No.: XXVII
ROA No.: 1702298-CB
Appeal No.: 1521187-CB

16 AFFIDAVIT & CERTIFICATION

17 This is to certify that the documents for the aforementioned Record on Appeal have
18 been reviewed by the Department of Administration, Hearings Division, and to the best of my
19 knowledge, all personal identifying information has been redacted, and that the enclosed
20 Record on Appeal is a certified copy of the original on file with this agency.

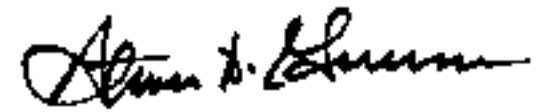
21 DATED this 25th day of August, 2016.

22 
23 Lisa Schiller, Legal Secretary II
24 An Employee of the Hearings Division
25
26
27
28

JA 0030

Electronically Filed
08/26/2016 02:20:24 PM

1 CRTF
2 APPEALS OFFICE
2200 S. Rancho Drive Suite 220
Las Vegas NV 89102
3 (702) 486-2527



CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

6 STATE OF NEVADA EX REL.
7 DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

9 BRIAN LUDWICK, an individual; THE
10 STATE OF NEVADA,
11 DEPARTMENT OF ADMINISTRATION
HEARINGS DIVISION, APPEALS OFFICE,

Respondents.

) Case No.: A741032
) Dept. No.: XXVII
) ROA No.: 1702298-CB
) Appeal No.: 1521187-CB

CERTIFICATION OF TRANSMITTAL

15 I certify that the hereto attached Transcript, and attached papers are all papers and
16 exhibits relating to the above-captioned action filed with the Appeals Officer.

Dated this 26th day of August, 2016.
Lisa Schiller, Legal Secretary II
An Employee of the Hearings Division

CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing was duly mailed, postage prepaid to the following:

BRIAN LUDWICK
729 NECTARINE CT
HENDERSON NV 89014-4035

ADAM LEVINE
LAW OFFICES OF DANIEL MARKS
610 S 9TH ST
LAS VEGAS NV 89101

DEPARTMENT OF CORRECTIONS
JAMES DZURENDA, DIRECTOR
3955 WEST RUSSELL ROAD
LAS VEGAS NV 89118

SUSANNE SLIWA, SENIOR DEPUTY ATTORNEY GENERAL
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
555 E WASHINGTON AVE STE 3900
LAS VEGAS NV 89101

SHARLET GABRIEL, HR ADMINISTRATOR
DEPARTMENT OF CORRECTIONS
3955 W RUSSELL RD
LAS VEGAS NV 89118

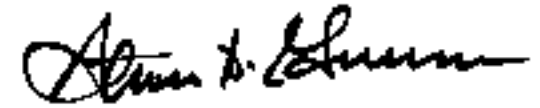
Dated this 24th day of August, 2016.



Lisa Schiller, Legal Secretary II
An Employee of the Hearings Division

Electronically Filed
08/26/2016 02:18:38 PM

1 ROA
 2 APPEALS OFFICE
 2200 S. Rancho Drive Suite 220
 Las Vegas NV 89102
 3 (702) 486-2527



CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

6 STATE OF NEVADA EX REL.
 DEPARTMENT OF CORRECTIONS,

7 Petitioner,

8 vs.

9 BRIAN LUDWICK, an individual; THE
 10 STATE OF NEVADA,
 DEPARTMENT OF ADMINISTRATION
 11 HEARINGS DIVISION, APPEALS OFFICE,

12 Respondents.

) Case No.: A741032
) Dept. No.: XXVII
) ROA No.: 1702298-CB
) Appeal No.: 1521187-CB

13 RECORD ON APPEAL IN ACCORDANCE WITH THE
 14 NEVADA ADMINISTRATIVE PROCEDURE ACT

15 BRIAN LUDWICK
 729 NECTARINE CT
 16 HENDERSON NV 89014-4035

SHARLET GABRIEL
 HR ADMINISTRATOR
 DEPARTMENT OF CORRECTIONS
 3955 W RUSSELL RD
 LAS VEGAS NV 89118

17 ADAM LEVINE
 18 LAW OFFICES OF DANIEL MARKS
 610 S 9TH ST
 19 LAS VEGAS NV 89101

20 DEPARTMENT OF CORRECTIONS
 21 JAMES DZURENDA, DIRECTOR
 3955 WEST RUSSELL ROAD
 22 LAS VEGAS NV 89118

23 SUSANNE SLIWA, SENIOR DEPUTY
 ATTORNEY GENERAL
 24 DEPARTMENT OF HEALTH AND
 HUMAN RESOURCES
 25 555 E WASHINGTON AVE STE 3900
 26 LAS VEGAS NV 89101

INDEX

ROA NUMBER: 1702298-CB
Appeal No.: 1521187-CB

<u>DESCRIPTION</u>	<u>DOC NO</u>	<u>PAGE NUMBERS</u>
TRANSMITTAL OF RECORD ON APPEAL	001	00001
RECORD ON APPEAL IN ACCORDANCE WITH THE NEVADA ADMINISTRATIVE PROCEDURE ACT	002	00002
COS OF DECISION AND ORDER OF SPECIAL APPEALS OFFICER BROWN FILED JULY 27, 2016	003	00003 – 00004
DECISION AND ORDER OF SPECIAL APPEALS OFFICER BROWN ON THE NDOC PETITION FOR RECONSIDERATION FILED JULY 25, 2016	004	00005 – 00014
OPPOSITION TO NDOC PETITION FOR RECONSIDERATION FILED JULY 18, 2016	005	00015 – 00063
NDOC PETITION FOR RECONSIDERATION FILED JULY 15, 2016	006	00064 – 00069
ORDER GRANTING PETITIONER'S PETITION FOR RECONSIDERATION FILED JULY 1, 2016	007	00070 – 00071
PETITION FOR RECONSIDERATION FILED JUNE 29, 2016	008	00072 - 00081
FINDING OF FACT, CONCLUSIONS OF LAW AND DECISION FILED JUNE 27, 2016	009	00082 – 00097
PETITIONER-EMPLOYEE'S EXHIBITS	010	00098 – 00277
SUPPLEMENT TO EMPLOYER'S PRE-HEARING STATEMENT LIST OF WITNESSES FILED MAY 26, 2016	011	00278 - 00279
PRE-HEARING STATEMENT FILED MAY 18, 2016	012	00280 - 00292
SUPPLEMENT TO EMPLOYER'S PRE-HEARING STATEMENT EXHIBITS W/O ENCL FILED MAY 17, 2016	013	00293 - 00295
EMPLOYER PRE-HEARING STATEMENT FILED MAY 16, 2016	014	00296 - 00407

INDEX

ROA NUMBER: 1702298-CB
Appeal No.: 1521187-CB

<u>DESCRIPTION</u>	<u>DOC NO</u>	<u>PAGE NUMBERS</u>
SUBPOENAS FOR ADMINISTRATIVE HEARING DATED MAY 3, 2016	015	00408 - 00411
NOTICE OF HEARING FILED MARCH 2, 2016	016	00412 - 00414
NOTICE OF EARLY CASE CONFERENCE FILED FEBRUARY 10, 2016	017	00415 - 00416
REQUEST FOR HEARING FILED JANUARY 4, 2016	018	00417 - 00418
AFFIDAVIT AND CERTIFICATION	019	00419
CERTIFICATION OF TRANSMITTAL	020	00420 - 00421

FILED
JUL 27 2016
HEARINGS DIVISION**BEFORE THE NEVADA STATE PERSONNEL COMMISSION****HEARING OFFICER**

BRIAN LUDWICK,

Petitioner-Employee,

v.

DEPARTMENT OF CORRECTIONS,

Respondent-Employer.

Hearing No. 1521187-CB

CERTIFICATE OF SERVICE

I hereby certify that, on the 27th day of July, 2016, service of a true and correct copy of the **DECISION AND ORDER ON THE NEVADA DEPARTMENT OF CORRECTIONS' PETITION FOR RECONSIDERATION** was made by first class mail, postage

1 prepaid, to:

2 Brian Ludwick
3 5900 Sky Pointe Drive #1152
4 Las Vegas Nevada 89130

5 and by first class mail, postage prepaid, and email to:

6 Adam Levine, Esquire
7 Law Office of Daniel Marks
8 610 South 9th Street
9 Las Vegas Nevada 89101
10 office@danielmarks.net

11 and by interdepartmental mail to:


12 James Dzurenda, Director
13 Department of Corrections
14 3955 West Russell Road
15 Las Vegas, Nevada 89118

16 Sharlet Gabriel, HR Administrator
17 Department of Corrections
18 3955 West Russell Road
19 Las Vegas, Nevada 89118

20 and by interdepartmental mail and email to:

21 Jennifer K. Hostetler, Chief Deputy Attorney General
22 Bureau of Litigation - Personnel Division
23 555 East Washington Avenue, Suite 3900
24 Las Vegas, Nevada 89101
25 Telephone: 702-486-3267
Email: jhostetler@ag.nv.gov

Michelle Di Silvestro Alanis, Deputy Attorney General
Bureau of Litigation - Personnel Division
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Telephone: 702-486-3268
FAX: 702-486-3773
Email: malanis@ag.nv.gov


D. Giambelluca, Legal Secretary II
Employee of the State of Nevada

FILED
JUL 25 2016
HEARINGS DIVISION

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARINGS OFFICER

BRIAN LUDWICK

Petitioner-Employee

vs.

NEVADA DEPARTMENT OF CORRECTIONS

Respondent-Employer.

APPEAL NO. 1521187-CB

DECISION AND ORDER ON THE NEVADA DEPARTMENT OF CORRECTIONS' PETITION FOR RECONSIDERATION

On July 12, 2016 the Nevada Department of Corrections (hereinafter "NDOC") timely filed a PETITION FOR RECONSIDERATION (hereinafter "Petition") requesting reconsideration of this Hearing Officer's June 27, 2016 Findings of Fact, Conclusions of Law and Decision (hereinafter "Decision") in the above-captioned appeal on the grounds that it was clear error to determine that NDOC Administrative Regulation (hereinafter "AR") 339 which sets forth NDOC's Code of Ethics, Employee Conduct and Prohibitions and Penalties had to be approved by the Personnel Commission. Having considered NDOC's Petition and Mr. Ludwick's opposition thereto and having reviewed the Decision, this Hearing Officer denies NDOC's Petition for the reasons set forth below.

DISCUSSION

1. THE DECISION REGARDING WHETHER AR 339 HAD TO BE APPROVED BY THE PERSONNEL COMMISSION AND THE RATIONALE FOR LIMITING ITS ADMISSIBILITY

NDOC states in its Petition that it is unclear whether this Hearing Officer determined that AR 339 had to be approved by the Personnel Commission. To be clear, at the Hearing held in this matter on May 27, 2016, after consideration of counsels' arguments in the pre-hearing briefs and at the Hearing, this Hearing Officer determined that AR 339 had to be approved by the Personnel Commission before it could be relied upon as the basis for terminating Mr. Ludwick. Because AR 339 had not been so

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

- (a) Lawfully designated as being in the classified service; and
- (b) Filled according to merit and fitness from eligible lists prepared upon the basis of examination, which must be open and competitive, except as otherwise provided in this chapter and NRS 209.161.

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

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

Emphasis added.

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

NAC 284.742(1):

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

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.*

Those who are exempted from the purview of NRS 284.150(2) are expressly identified as State employees or officers convicted of selling controlled substances¹; Wardens² and those who willfully disclose confidential information in violation of NRS 416.070.³ If the Nevada legislature wanted to include correctional officers among those exempted from the mandate of NRS 284.150(2), it could have done so.

NAC 284.742(1) and NRS 284.383(3) unambiguously state that each appointing authority *shall*: 1) ***subject to the approval of the Personnel Commission***, determine prohibited conduct as it relates to employees under their jurisdiction; 2) identify those prohibited activities in a policy established by the appointing authority; 3) include in the policy an explanation of the process of progressive discipline as administered by the appointing authority in conformance with the enumerated NRS and NAC provisions; and 4) 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 employee.

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

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

¹ See NRS 193.105

² See NRS 209.161

³ See NRS 416.070

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

Sec: 21. Board of state prison commissioners; board of examiners; examination of claims. The Governor, Secretary of State and Attorney 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.*

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

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, 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.

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

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

In place of the general supervisory authority formerly exercised by the state prison commissioners their powers were enumerated and limited as follows: They shall have full control of all the state prison grounds, buildings, **prison labor**, prison property; shall purchase or cause to be 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
carried at the state prison.
- 15 3. Sell all manufactured articles and stone and collect the money for
the same.
- 16 4. Rent or hire out any or all of the labor of the convict and collect
money therefor.
- 17 5. Regulate the number of officers and employees.

18 **Emphasis added.**

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

24 **Section 12.** The Board has full control of all grounds, buildings, **labor**,
25 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

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

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

Based upon the foregoing discussion, this Hearing Officer stands by its determination that AR 339 had to be approved by the Personnel Commission in order to serve as the basis for terminating Mr. Ludwick. That being said, no matter whether AR 339 had been admitted and given full weight⁴ or not admitted at all, this Hearing Officer's determination would remain the same - there simply was not just cause to dismiss Mr. Ludwick under the facts and circumstances presented in his case.

....

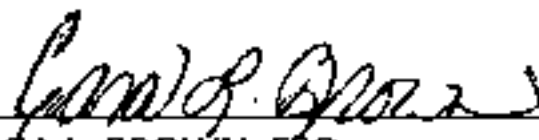
....

⁴ Even if AR 339 were given full weight, the penalties set forth in AR 339.04 are only "recommended penalties." As stated in AR 339.04(6), the Chart of Corrective/Disciplinary Sanctions set forth in AR 339.04(8) "may not reflect an appropriate penalty for the misconduct. Indeed, an appropriate penalty may be higher or lower depending upon current issues and the impact of the particular misconduct on 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).

ORDER

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

Dated this 22nd day of July, 2016.


CARA L. BROWN, ESQ.
Hearings Officer

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

CERTIFICATE OF SERVICE

I hereby certify that, on the 25th day of July, 2016, service of a true and correct copy of the foregoing **DECISION AND ORDER ON THE NEVADA DEPARTMENT OF CORRECTIONS' PETITION FOR RECONSIDERATION** was made by first class mail, postage prepaid, to:

Brian Ludwick
5900 Sky Pointe Drive #1152
Las Vegas Nevada 89130

and by first class mail, postage prepaid, and email to:

Adam Levine, Esquire
Law Office of Daniel Marks
610 South 9th Street
Las Vegas Nevada 89101
office@danielmarks.net

and by interdepartmental mail to:

James Dzurenda, Director
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

Sharlet Gabriel, HR Administrator
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

and by interdepartmental mail and email to:

Susanne M. Sliwa, Senior Deputy Attorney General
Department of Health and Human Resources
555 Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
ssliwa@ag.nv.gov



D. Giambelluca, Legal Secretary II
Employee of the State of Nevada

STATE OF NEVADA
DEPT. OF ADMINISTRATION
HEARINGS DIVISION

JUL 18 PM 3:21

RECEIVED
AND
FILED

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

6 BEFORE THE NEVADA STATE PERSONNEL COMMISSION
CARA BROWN, HEARING OFFICER

8 BRIAN LUDWICK,

Case No.: 1521187-CB

9 Petitioner/Employee,

10 v.

**OPPOSITION TO NEVADA
DEPARTMENT OF CORRECTIONS'
PETITION FOR RECONSIDERATION**

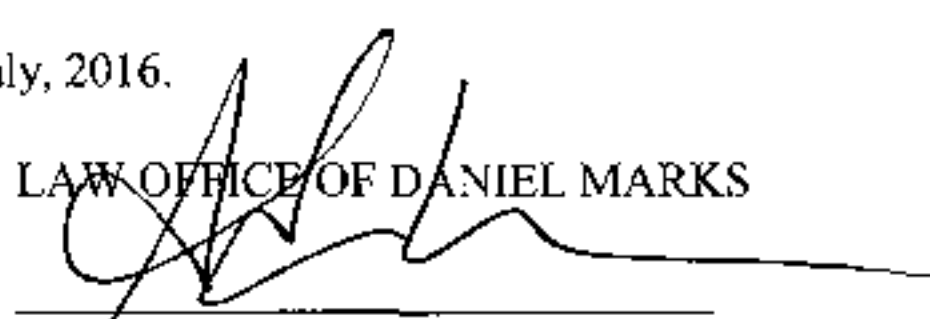
11 DEPARTMENT OF CORRECTIONS,

12 Respondent/Employer.
13 _____/

14 COMES NOW Petitioner/Employee Brian Ludwick ("Ludwick") by and through undersigned
15 counsel Adam Levine, Esq. of the Law Office of Daniel Marks and hereby opposes the Nevada
16 Department of Corrections' ("NDOC") Petition for Reconsideration. The grounds for Ludwick's
17 opposition are set forth in the attached Memorandum of Points and Authorities.

18 DATED this 15th day of July, 2016.

19 LAW OFFICE OF DANIEL MARKS

20 
DANIEL MARKS, ESQ.
21 Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
22 Nevada State Bar No. 004673
610 South Ninth Street
23 Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
24 *Attorneys for Petitioner/Employee*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 By statute the hearing officer must rule on the Petition for reconsideration "at least five days
3 before the expiration of the time for filing the petition for judicial review." NRS 233B.130(4). A
4 petition for judicial review must be filed within 30 days from the date the hearing officer's decision
5 was filed. NRS 233B.130. The hearing officer's final Decision following Ludwick's Petition for
6 reconsideration was July 1, 2016. Accordingly, it is this date which governs the deadline for NDOC's
7 Petition.

8 The Petition should be denied for multiple reasons. The Deputy Attorney General who filed the
9 Petition, Jennifer Hostetler, expresses confusion from the written decision as to whether the Hearing
10 Officer was making a determination as to whether A.R. 339 must be approved by the Personnel
11 Commission. However, Ms. Hostetler was not the Deputy Attorney General who represented NDOC at
12 the hearing. If she had been, she would have known that a clear record was made wherein the hearing
13 officer stated that she did find that such regulations had to be approved by the Personnel Commission
14 pursuant to NAC 284.742.

15 NDOC argues that because the Board of Prison Commissioners ("BOPC") is an entity created
16 by the Nevada Constitution, that regulations adopted by the BOPC are the supreme law of the State
17 and cannot be trumped by conflicting statutes such as NRS 284.150(2). This "supremacy" argument by
18 NDOC conveniently ignores Article 15 Section 15 of the Nevada Constitution which states "*The*
19 *legislature shall provide by law for a state merit system governing the employment of employees in the*
20 *executive branch of state government.*" That merit system is codified at NRS Chapter 284. See
21 Legislative declaration of purpose at NRS 284.010.

22 Article 5 Section 21 of the Constitution upon which NDOC relies was adopted in 1864. Article
23 15 section 15 is the more recent of the constitutional articles. It was an amendment to the Nevada
24 Constitution passed by the Legislature in 1967 and 1969, and ratified in the general election of 1970.

1 Just as the 21st Amendment to the United States Constitution repealing prohibition would supersede
 2 the 18th Amendment enacting the prohibition upon alcohol, a 1970 Amendment mandating that the
 3 Legislature adopt a merit system for State employees in the executive branch would supersede any
 4 1864 provisions purporting to vest such authority within the BOPC.

5 In fact, Article 5 section 21 states that the BOPC has "supervision of all matters connected with
 6 the State Prison *as may be provided by law.*" (Emphasis added). Over 100 years ago the Nevada
 7 Supreme Court rejected claims that the constitutional authorization of the BOPC superseded the
 8 legislature's statutory authority as argued by NDOC in its Petition for Reconsideration.

9 In *State ex rel. Fox v. Hobart*, 13 Nev. 419 (1878) the Supreme Court addressed whether the
 10 BOPC had the authority to appoint a physician for the state prison. The Supreme Court held with
 11 regard to the authority of Article 5 Section 21:

12 By section 21, article 5, of the constitution, the governor, secretary of state, and
 13 attorney-general are constituted a board of state prison commissioners, but they are to
 14 have only such supervision over matters connected with the prison as may be provided
 15 by law. It is to the statutes, therefore, that we must look for a definition of their powers.
 16 Under the act of 1873 (Stats. 1873, 18) they were invested with very extensive and
 17 general authority, including the right to appoint a warden and "all necessary help." But
 18 by the act of the last legislature (Stats. 1877, 66) a radical change in the government of
 19 the prison was effected. The power of appointing the warden was taken from the
 20 commissioners and vested in a joint convention of the two branches of the legislature;
 21 and upon the warden so to be chosen was conferred the power to appoint and remove
 22 the deputy warden, and "all necessary help" at the prison.

23 In place of the general supervisory authority formerly exercised by the commissioners
 24 their powers were enumerated and limited as follows: "They shall have full control of
 all the state prison grounds, buildings, prison labor, prison property; shall purchase, or
 cause to be 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 same; shall rent or hire out
 any or all of the labor of the convicts, and collect the money therefor." (Stats. 1877, 66,
 sec. 1.)

If the power to appoint a physician is not embraced in these provisions--and clearly it is
 not--there is nothing in the existing law under which the commissioners can claim to
 exercise it. Their general supervising powers have been abolished, and their power to

1 appoint "all necessary help" at the prison has been transferred to the warden. He alone,
2 in our opinion, has authority to employ a physician for the prisoners.

3 13 Nev. at 420-421.

4 NRS 209.111 "Powers and duties of Board" states:

5 The Board has full control of all grounds, buildings, labor, and property of the
6 Department, and shall:

7 1. Purchase, or cause to be purchased, all commissary supplies, materials and tools
8 necessary for any lawful purpose carried on at any institution or facility of the
9 Department.

10 2. Regulate the number of officers and employees of the Department.

11 3. Prescribe regulations for carrying on the business of the Board and the
12 Department.

13 The reference to "labor" in NRS 209.111 defining the Powers and duties of the BOPC is a reference to
14 prisoner (convict) labor, not employees of the classified service of the State of Nevada. Subsection of
15 the statute speaks in terms of "officers and employees" of the Department, as opposed to a reference to
16 "labor".¹

17 In contrast, NRS 284.150(2) states:

18 Except as otherwise provided in NRS 193.105, 209.161 and 416.070, a person must not
19 be appointed, transferred, promoted, demoted or discharged in the classified service in
20 any manner or by any means other than those prescribed in this chapter and the
21 regulations adopted in accordance therewith.

22 (Emphasis added). NRS 284.155(1) states "The Commission shall adopt a code of regulations for the
23 classified service."

24 ¹ Nevada follows the maxim "*expressio unius est exclusio alterius*", the expression of one thing is the exclusion of another.

Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967).

1 It is well-established that "When a specific statute is in conflict with a general one, the specific
2 statute will take precedence." *Lader v. Warden*, 121 Nev. 682, 120 P.3d 1164 (2005); *Gaines v. State*,
3 116 Nev. 359, 365, 998 P.2d 166, 170 (2000). NRS 209.111 is a general statute and must yield to NRS
4 284.150(2). This is self-evident from the language "Except as otherwise provided in... NRS 209.161".

5 NRS 209.161 entitled " Wardens of institutions: Appointment; duties" states:

6 1. The Director shall appoint a warden for each institution of the Department.

7 2. Each warden is in the classified service of the State except for purposes of
8 appointment and retention.

9 3. Each warden is responsible to the Director for the administration of his or her
10 institution, including the execution of all policies and the enforcement of all regulations
of the Department pertaining to the custody, care and training of offenders under his or
her jurisdiction.

11 The Legislature has placed wardens within the classified service of the State "except for purposes of
12 appointment and retention". Accordingly, wardens can be dismissed without compliance with the
13 regulations adopted by the Personnel Commission at NAC Chapter 284.

14 No such exemptions has been created for correctional officers. As members of the classified
15 service, they cannot be dismissed except in conformance with the regulations adopted by the Personnel
16 Commission. As the hearing officer is aware, NAC 284.742 authorizes appointing authorities such as
17 NDOC to identify "specific activities which, for employees under its jurisdiction, are prohibited as
18 inconsistent, incompatible or in conflict with their duties as employees" and include with it "an
19 explanation of the process of progressive discipline as administered by the appointing authority".
20 However, the regulation requires the identification of such prohibited specific activities and its
21 attendant discipline be "subject to the approval of the [Personnel] Commission". Because it is
22 undisputed that A.R. 339 was not approved by the Personnel Commission, the hearing officer cannot be
23 bound by its prescribed penalties.
24

1 The cases cited by NDOC are simply inapposite. NDOC cites an unpublished Court of Appeals
2 decision *Fore v. Nevada Department of Corrections*, for the proposition that an agency's regulations
3 have the "force of law". *Fore* does not involve discipline of a member of the classified service. The
4 issue in *Fore* was the failure of NDOC to comply with its own regulations in connection with the
5 discipline of prisoners. The exact quote was "[P]rinciples of due process require an agency to follow its
6 own regulations, which have the force of law" citing *Marshall v. Lansing*, 839 F.2d 933 (3d Cir. 1988).
7 Under this holding, if a hearing officer upheld a termination based upon a mandate in A.R. 339 without
8 requiring that regulation's approval by the Personnel Commission as required by NAC 284.742, due
9 process would be violated.

10 Similarly, NDOC cites dicta from a United States District Court opinion *Craig v. Hocker*, 405
11 F. Supp. 656 (D. Nev. 1975) implying that the BOPC is responsible for promulgation of regulations
12 governing employees. However this was dicta as the case did not involve discipline of a correctional
13 officer; it again involved discipline of prisoners. Moreover, opinion was decided in 1975 and the dicta
14 was with regard to former NRS 209.040 and NRS 209.070. NRS 209.111 was not even enacted until
15 1977 – two (2) years after the decision. Most significantly, because the case did not involve an
16 employee in the classified service the United States District Court did not examine or consider NRS
17 284.150(2).

18 The language in NRS 209.111 authorizing the BOPC to "Prescribe regulations for carrying on
19 the business of the Board and the Department" must be read in conjunction with NRS 209.161 which
20 makes clear that such regulations pertain to "the custody, care and training of offenders" under the
21 Department's jurisdiction. In contrast, NRS 284.155(1) clearly and unambiguously vests the authority
22 to adopt regulations for the classified service with the Personnel Commission. ("The Commission shall
23 adopt a code of regulations for the classified service"). Again, a specific statute takes precedence over a
24 general statute, and the directive that the regulations for the classified service come from the Personnel

Commission excludes any such regulatory authority from the BOPC under the maxim *expressio unius est exclusio alterius*.

The case involving Sheri Kassebaum referenced in footnote 2 is distinguishable from this case insofar as it does not implicate NRS 284.150(2) prohibiting dismissal from the classified service "in any manner or by any means other than those prescribed in this chapter". Officer Kassebaum received a written reprimand. She filed a grievance which was heard by the State of Nevada Employee Management Committee which adjusted the grievance down to a written reprimand. The First Judicial District Court held that the EMC lacks the statutory authorization to change NDOC's regulations. However, the court's ruling did not actually address NRS 284.150 because that was not a dismissal case. (Exhibit "1").

Attached hereto as Exhibit "2" is Hearing Officer Pulliam's Decision in Vonja Malcic v. NDOC. Notwithstanding A.R. 339 purporting to require termination for first offense for leaving your post without authorization, Hearing Officer Pulliam found that termination is too severe of a penalty and ordered Officer Malcic reinstated with a recommendation for a 30 day suspension.² NDOC filed a Petition for Judicial Review with the Eighth Judicial District Court. Among the arguments raised by NDOC was that A.R. 339 mandated dismissal. Because NRS 284.150(2) prohibits dismissal from the classified service except in accordance with the regulations adopted pursuant to NAC Chapter 284, undersigned counsel did raise the issue that A.R. 339 had not been submitted for approval with the Personnel Commission.

The district court denied judicial review and affirmed the reinstatement of Officer Malcic. (Exhibit "3"). While the Order does not specifically address the failure of A.R. 339 to comply with NAC 284.742, it is implicit in the district court's decision. If the district court had determined that A.R.

² The circumstances of Officer Malcic's abandonment of her post w much more severe than Officer Ludwick's.

1 339 mandates a form of discipline, and prohibits a hearing officer from departing from the discipline
2 prescribed, the district court would have granted NDOC's Petition.

3 Post-probationary members of the classified service may only be dismissed for "just cause".
4 NRS 284.390(6) ("If the hearing officer determines that the dismissal, demotion or suspension was
5 without just cause as provided in NRS 284.385, the action must be set aside and the employee must be
6 reinstated, with full pay for the period of dismissal, demotion or suspension.") The common-law
7 definition of just cause in a labor context requires an inquiry into "the relation of the degree of
8 discipline to the nature of the offense and the employee's past record". *United Paperwork International*
9 *Union AFL-CIO v. Miso, Inc.*, 484 U.S. 29, 34 at f.n. 5 (1987); see also *In re: Enterprise Wire Co.*, 46
10 LA 359 (Daugherty 1966).³

11 The reason that the Personnel Commission adopted NAC 284.742 requiring submission of
12 prohibitions and penalties to the Commission is to ensure that the penalties for given offenses are
13 reasonable and in accordance with "just cause". A hearing officer determining the issue of just cause
14 under NRS 284.390 cannot be bound to any penalty absent the approval of the Personnel Commission.
15 In the absence of such approval, it is the hearing officer who "determine[s] the reasonableness of a
16 dismissal". *Knapp v. State Department of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995).

17 Not all conduct labeled "abandonment of post without permission" is the same. The
18 circumstances may vary, and the impact on the institution may vary.

19 The hearing officer correctly concluded that Officer Ludwick's actions did not constitute just
20 cause for dismissal from the classified service. As the hearing officer will recall, even Warden Jo

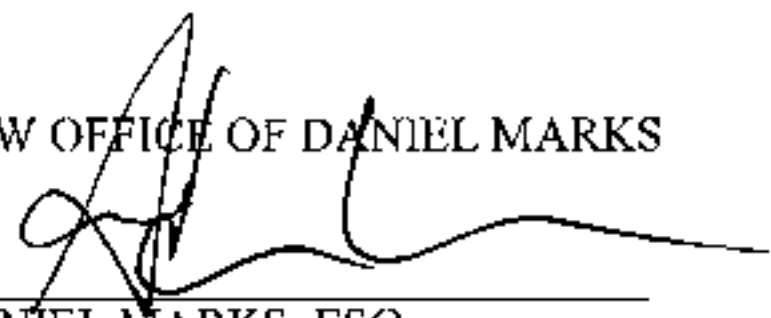
21
22
23 ³ *In re: Enterprise Wire Co.* was the decision where University of Northwestern Professor and
24 arbitrator Carol R. Daugherty attempted to codify the common law of just cause. A courtesy copy is
attached hereto as Exhibit "4".

1 Gentry, when adjudicating Officer Ludwick's case, issued a written determination that only a 5 day
2 suspension was warranted because there was no security breach. She testified that some unnamed
3 person in Human Resources, who did not even appear at the hearing, told her that the penalty had to be
4 changed. It is likely that the person in Human Resources was unaware of NRS 284.150(2) and NAC
5 284.742.

6 Both *Kassebaum* and *Malcic* are currently before the Nevada Supreme Court. Accordingly, the
7 Hearing Officer should deny Reharing. If NDOC wishes to file a Petition for Judicial Review, it may
8 do so. The outcome of that Petition will turn on the Supreme Court's decision in *Malcic*. However,
9 Brian Ludwick should be allowed to return to work, just as Officer Malcic has been so allowed, while
10 the Supreme Court decides the issue.

11 DATED this 15th day of July, 2016.

12 LAW OFFICE OF DANIEL MARKS

13 
14 DANIEL MARKS, ESQ.
15 Nevada State Bar No. 002003
16 ADAM LEVINE, ESQ.
17 Nevada State Bar No. 004673
18 610 South Ninth Street
19 Las Vegas, Nevada 89101
20 (702) 386-0536; FAX (702) 386-6812
21 Attorneys for Petitioner/Employee
22
23
24

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS AND BY MAIL

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS and that on the ____ day of June, 2016 I did serve by electronic means (e-mail) and did deposit in the United States Post Office at Las Vegas, Nevada a true and correct copy of the above and foregoing MOTION FOR RECONSIDERATION to the following email and mailing addresses:

SUSANNE SLIWA, Sr. Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Email: SSliwa@ag.nv.gov
CEssaqi@ag.nv.gov
Attorney for Employer/Respondent

And

Cara Brown, Hearing Officer
DEPARTMENT OF ADMINISTRATION
2200 S. Rancho Drive, Suite 220
Las Vegas, Nevada 89102
Email: cara.brown@admin.nv.gov
dgiambelluca@admin.nv.gov
Las Vegas, Nevada 89102

An employee of the
LAW OFFICE OF DANIEL MARKS

EXHIBIT “1”

REC'D & FILED

2015 NOV 20 PM 4:11

SUSAN MERRIWETHER
CLERKRYG. WINDER
DEPUTY

1 ADAM PAUL LAXALT
Attorney General
2 DOMINIKA J. BATTEN
Deputy Attorney General
3 Nevada Bar No. 12258
Personnel Division
4 6420 Kietzke Lane, Suite 202
Reno, Nevada 89511
5 Tel: 775-850-4117
Fax: 775-888-1822
6 dbatten@ag.nv.gov

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

9 STATE OF NEVADA, *ex rel.*, its
10 DEPARTMENT OF CORRECTIONS,

Petitioner,

11 vs.

12 SHARI KASSEBAUM, an individual; and
13 STATE OF NEVADA, *ex rel.*, ITS
14 DEPARTMENT OF ADMINISTRATION,
DIVISION OF HUMAN RESOURCE
15 MANAGEMENT, EMPLOYEE
MANAGEMENT COMMITTEE, an agency
of the State of Nevada,

16 Respondents.

CASE NO. 15 OC 0018 1B

DEPT. NO. 2

17
18 ORDER GRANTING PETITION FOR JUDICIAL REVIEW AND REINSTATING
19 WRITTEN REPRIMAND

20 After an Employee Management Committee (EMC) hearing on November 20, 2014,
21 Petitioner, STATE OF NEVADA, *ex rel.*, its DEPARTMENT OF CORRECTIONS (NDOC),
22 filed a petition for judicial review pursuant to NRS 233B. The Court having reviewed and
23 considered the motion and the responsive pleadings thereto, and good cause appearing,
24 decides as follows:

25 Findings of Fact

26 Sharl Kassebaum (Employee) is an NDOC senior correctional-officer at Lovelock
27 Correctional Center (LCC), filing two grievances after NDOC issued a written reprimand to
28 her for discourteous conduct, pursuant to NDOC's administrative regulations. ROA, Vol. I, p.

1 5. On or about March 3, 2014, Employee encountered another NDOC employee on the
2 freeway during their commute home. According to Employee, Employee was driving 84
3 miles per hour on the freeway, speaking to her husband on her phone and attempting to
4 pass a slow truck. Employee became frustrated because she believed that an NDOC cadet,
5 driving nearby, deliberately played "games" and prevented Employee from passing the truck.
6 ROA, Vol. II, p. 36-38. The next day at work, Employee confronted the cadet at the LCC
7 gatehouse in front of other employees. ROA, Vol. II, p. 33; p. 36-38.

8 NDOC investigated the incident and issued a written reprimand to Employee for the
9 gatehouse incident. Employee's conduct violated AR 339.05(6)(A) *Discourtesy*, a class-2
10 offense, because Employee confronted an officer at the gatehouse in front of others,
11 interrupting critical gatehouse prison operations. ROA, Vol. II, p. 105, 108. The minimum
12 discipline for a class-2 offense is a written reprimand. ROA, Vol. I, p. 7; ROA, Vol. II, p. 103-
13 104; 106; p. 116.

14 Employee filed two grievances challenging the written reprimand, submitting her
15 grievances to the EMC for final adjustment.

16 On November 20, 2014, the EMC held a hearing on Employee's grievances, granting
17 the grievances in part and denying them in part. ROA, Vol. I, p. 5-8. At the hearing, the
18 EMC agreed that Employee was discourteous, but replaced NDOC's written reprimand with
19 less severe discipline (verbal counseling) because the EMC thought a written reprimand was
20 too harsh. ROA, Vol. I, p. 7. Recognizing that *Discourtesy* was a class-2 offense,
21 punishable by written reprimand at minimum, the EMC changed the violation from a class-2
22 to a class-1 offense before replacing the written reprimand with verbal counseling.

23 On January 30, 2015, NDOC filed a petition for judicial review, seeking relief from the
24 EMC's decision. ROA, Vol. I, p. 1-2.

25 ///

26 ///

27 ///

Conclusions of Law

A. Standard of Review

Courts may reverse or modify an agency's decisions that prejudice the aggrieved party 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.

NRS 233B.135(3).

Courts review a hearing officer's decision for an abuse of discretion or clear error. *See Taylor v. State Dep't of Health & Human Servs.*, 129 Nev. —, —, 314 P.3d 949, 951 (2013). The Court also reviews the evidence presented at the hearing to determine if the decision was supported by the evidence, and to ascertain whether the hearing officer acted arbitrarily, capriciously, or contrary to the law. *Turk v. Nevada State Prison*, 94 Nev. 101, 103, 675 P.2d 699, 601 (1976).

The standard of review depends on whether the court is reviewing a hearing officer's legal conclusions or factual findings. The courts generally review a hearing officer's conclusions of law *de novo*, but will uphold the hearing officer's findings of fact if substantial evidence supports the findings. *Taylor*, 129 Nev. —, —, 314 P.3d 949, 951 (2013); *see also* NRS 233B.135(3). Substantial evidence is that evidence "a reasonable mind might accept as adequate to support a conclusion." *State, Emp. Security v. Hilton Hotels*, 102 Nev. 602, 608, 792 P.2d 497 (1986).

B. The Court has jurisdiction to hear NDOC's appeal of the EMC's Decision reversing Employee's written reprimand.

The EMC's decision, overturning an agency's written reprimand, is an NRS 233B.032 contested case subject to judicial review. NRS 233B states that a party aggrieved by an agency's final decision in a contested case can seek judicial review. NRS 233B.130(1). A

1 contested case is one "in which the legal rights, duties or privileges of a party are required by
2 law to be determined by an agency after an opportunity for hearing, or in which an
3 administrative penalty may be imposed." NRS 233B.032.

4 The EMC's decision reversing Employee's written reprimand is subject to judicial
5 review because the EMC's decision implicates NDOC's legal rights, duties and privileges to
6 discipline its employees pursuant to its administrative regulations. NDOC's administrative
7 regulations permitted NDOC to issue a written reprimand to Employee because she violated
8 AR 339.05(8)(A) *Discourtesy*, a class-2 offense providing a written reprimand as the
9 minimum penalty.¹ The EMC found Employee was discourteous, but withdrew Employee's
10 written reprimand, taking away NDOC's legal right, duty or privilege to discipline its
11 employees pursuant to its administrative regulations. ROA, Vol. I, p. 7.

12 The Nevada courts have previously reviewed the EMC's decisions. In *Mattice v. State*
13 *of Nevada, Dep't of Admin., Div. of Human Res. Mgmt., Employee-Mgmt. Comm. & State of*
14 *Nevada, Dep't of Corr.*, the First Judicial Court granted Petitioner's Petition for Judicial
15 Review. In that case, both the EMC and NDOC argued that the court did not have
16 jurisdiction and moved to dismiss Mr. Mattice's petition challenging an EMC decision.

17 The right to judicial review of an adverse administrative decision
18 is presumed in the absence of "clear and convincing evidence of
19 a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387
20 U.S. 136, 87 S. Ct. 1507, 1511 (1967), *abrogated on other*
21 *grounds, Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980 (1977)
22 (citing numerous authorities, and stating that "a survey of our
23 cases shows that judicial review of a final agency action by an
24 aggrieved person will not be cut off unless there is persuasive
25 reason to believe that such was the purpose of Congress");
26 *Checker Cab v. State, Taxicab Authority*, 97 Nev. 5, 8, 621 P.2d
27 496 (1981) ("[a]ll presumptions are in favor of a right to judicial
28 review for those who are injured in fact by agency action").

25 The presumption has not been rebutted here. NRS 233.130(1)
26 provides that any party who is aggrieved by the final decision of
27 an "agency" in a "contested case" is entitled to judicial review,
28 and NRS 233B.020(1) declares the intention of the Legislature to

¹ NDOC's administrative regulations are law. See *Turk v. Nevada State Prison*, 94 Nev. 101, 103-104, 575 P.2d 599, 601 (1976) (personnel rules delineating causes for termination have force and effect of law).

1 provide for judicial review of the "adjudication procedure of all
2 agencies of the Executive Department of the State Government .
3 . . . except agencies expressly exempted pursuant to the
4 provisions of this chapter." The EMC is not among those
5 agencies enumerated in NRS 233B.039 as wholly or partially
6 exempt from requirements of Chapter 233B.

7 The Court concludes, further, that the EMC is an "agency" within
8 the Executive Department, and that proceedings before the EMC
9 for the "adjustment" of grievances have all the hallmarks of a
10 "contested case" for the purposes of Chapter 233B. By way of
11 example only, the statutes and regulations governing the EMC
12 require it to give written notice of a hearing, permit the parties to
13 present testimonial and documentary evidence, authorize the
14 issuance of subpoenas for the attendance of witnesses and the
15 production of documents, provide for the appearance of
16 witnesses, and entitle the affected employee (at least) to
17 representation by counsel. See NRS 284.074, NRS 284.384(5),
18 NAC 284.698(2)(a) and (b), and NAC 284.6955. The EMC's
19 Decision #35-12 contains written findings of fact and conclusions
20 of law. See NRS 233B.125.

21 In the absence of specific statutory language precluding judicial
22 review, the statutory and regulatory references to the EMC's
23 decisions being "final" and "binding" simply indicate that they
24 resolve grievances and are binding upon the parties unless and
25 until judicial review is sought and the decisions are modified or
26 reversed by a reviewing court. See, e.g., *Vass v. Board of*
27 *Trustees*, 379 S.E.2d 26, 29 (N.C. 1989) ("we conclude that the
28 use of the term 'binding' in the statute was intended to mean only
that the Board's decision would be binding upon the parties
absent further review according to law"). See also *Dahlberg v.*
Pittsburgh & L.E.R. Co., 138 F.2d 121, 122 (3d Cir. 1943)
(statutory language making decision of National Railroad
Adjustment Board "final and binding upon both parties to the
dispute" did not bar judicial review; "[w]e think [the statute]
discloses an intention to use the words in the sense that the
award is the definitive act of a mediative agency, binding until and
unless it is set aside in the manner prescribed"); *City of London v.*
Soukup, 340 N.W.2d 420, 421-422 (Neb. 1983) (rejecting
contention that "final and binding" decision of city personnel board
was exempt from judicial review; "[a]n order by the personnel
board, like the order of any intermediate court or administrative
agency, is final and binding unless appealed"); *Dep't Ind.*
Relations v. Circus-Circus, 101 Nev. 405, 409-10, 705 P.2d 645
(1985) (where regulation made decision of hearing officer "final
and binding," employer was required to comply with decision
pending appeal, in the absence of a stay).

The fact that NRS 284.384 and the other statutes and regulations specifically applicable to the EMC are silent on the question of judicial review is not sufficient to rebut the presumption in favor of judicial review. See, e.g., *San Juan Legal Services v. Legal Services Corp.*, 665 F.2d 434, 438 (1st Cir. 1981); *Peoples Gas, Light & Coke Co. v. U.S. Postal Serv.*, 658 F.2d 1182, 1190 & n.4 (7th Cir. 1981); *Pisano v. Shillinger*, 835 P.2d 1138, 1140 (Wyo. 1992).

Respondents also acknowledge that an EMC decision was the subject of judicial review pursuant to NRS 233B.130 et seq., in *Westergard v. Barnes*, 105 Nev. 830, 784 P.2d 944 (1989). Similar to the instant action, *Westergard* involved the EMC's denial of a State employee's grievance. *Id.* at 832. The employee filed a petition for judicial review of the EMC's decision in the First Judicial District Court, the Court conducted a hearing and entered its findings of fact, conclusions of law and judgment in favor of the employee. *Id.* The Supreme Court held:

Because the EMC did not adequately address the issues presented by the parties in this case and because both the EMC and the district court rendered findings of fact and conclusions of law based upon a misunderstanding of the law, we reverse the judgment of the district court in all respects and remand this case to the district court with instructions to return the case to the EMC [for further findings]. *Id.* at 834.

Order Denying Respondents' Motion to Dismiss entered in *Mattice v. State of Nevada, Dep't of Admin., Div. of Human Res. Mgmt., Employee-Mgmt. Comm. & State of Nevada, Dep't of Corr.*, First Judicial District Court, 12 OC 00270 1B (order dated 11/21/12) (unpublished).

While not precedential, the Court in *Mattice* held that Mr. Mattice's appeal of an EMC decision was "properly before the Court" because the EMC's decision was "a final decision of the agency pursuant to NRS 233B.130 et seq."

C. The EMC has no authority to change NDOC's administrative regulations.

The EMC's reversal of the written reprimand is wholly inconsistent with its finding that Employee committed Discourtesy, a class-2 offense, establishing a written reprimand as the minimum discipline. Nevada law affords employer-agencies the right to discipline their employees in accordance with Nevada law and regulations. An appointing authority may

1 discipline an employee for any reason set forth in NAC 284.650. NDOC has adopted
 2 policies authorizing disciplining its employees for various offenses, classifying offenses as
 3 class 1 - class 5, with class-1 offenses as the least severe (punishable with verbal
 4 counseling or written reprimand) and class-5 offenses as the most severe (punishable with
 5 dismissal).

6 Employees may appeal discipline to administrative hearing officers or to the EMC,
 7 depending on the severity of the discipline. Employees may appeal suspensions and higher
 8 to the administrative hearing officer, who can set aside the discipline if the hearing officer
 9 determines that the discipline was without just cause. NRS 284.390(1) and (6). Employees
 10 may appeal written reprimands to the EMC for review in the form of a grievance adjustment.
 11 NRS 284.384(1); NRS 284.384(4); NAC 284.695. Chapter 284 authorizes the EMC to adjust
 12 grievances, but Nevada law preserves a great deal of authority to agency heads to manage
 13 their affairs, including reserving the exclusive power to discipline employees for the
 14 agencies.

15 The EMC's finding that Employee committed *Discourtesy*, followed by its conclusion
 16 that a written reprimand was too harsh, exceeded the EMC's authority under NRS Chapter
 17 284, and was an error of law, and arbitrary and capricious. *Discourtesy* is a class-2 offense
 18 for which NDOC's administrative regulations provide a minimum discipline of written
 19 reprimand. The EMC changed *Discourtesy* from a class-2 to a class-1 offense in order to
 20 reduce Employee's discipline to verbal counseling. The EMC has no power to change
 21 NDOC's administrative regulations authorizing written reprimands for class-2 offenses.

22 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that NDOC's Petition for
 23 Judicial Review is GRANTED.

24 DATED this 18 day of November, 2016.

25
 26
 27 
 28 JAMES E. WILSON, JR.



EXHIBIT “2”

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARING OFFICER

VANJA MALCIC,

Petitioner-Employee

v.

NEVADA DEPARTMENT OF
CORRECTIONS

Respondent-Employer.

Hearing# 1412349-GP

FINDINGS OF FACT; CONCLUSIONS OF LAW & DECISION

I. INTRODUCTION

This matter came on for hearing on the 12th day of March, 2015.

Present at the hearing was the Petitioner-Employee, Vanda Malcic, (hereinafter referred to as Ms. Malcic) with her representative Paul Lunkwitz. Also present was Jo Gentry, Warden of Florence McClure Correctional Center (FMCC) appearing as the Respondent-Employer Agency Representative; with counsel Chief Deputy Attorney General Ann McDermott. The agency will hereinafter be referred to as NDOC.

The Hearing Officer admitted and considered NDOC's Exhibit A-C. Exhibit D was not admitted. Exhibit E is a confidential document that was offered and admitted into evidence and will be kept under seal.

In addition, the Hearing Officer admitted and considered Ms. Malcic's Exhibit 1 and Exhibit 2.

The following individuals were called to testify under oath at the hearing:

1. Sgt. Willontray Holmes

- 1 2. Warden Jo Gentry
- 2 3. Gisele Schaefer
- 3 4. Lt. Gary Piccinini
- 4 5. Ernest Van Cline, Jr.
- 5 6. The Petitioner-Employee

6 The Hearing was adjourned on March 12, 2015.

7 Ms. Malcic was served with an NPD-41 *Specificity of Charges* informing
8 her that she was to be terminated effective May 23, 2014. The NPD set forth
9 the following as the basis for Ms. Malcic's termination.

10 **Violation of NAC 284.650**

- 11 1. Activity which is incompatible with an employee's conditions of
12 employment established by law or which violates a provision of NAC
13 285.653 Or 284.738 to 284.771;
- 14 3. The employee of any institution administering a security program,
15 in the considered judgment of the appointing authority, violates or
16 endangers the security of the institution;
- 17 6. Insubordination or willful neglect;
- 18 7. Inexcusable neglect of duty.

19 In addition, the Specificity of Charges described the Class of Offenses
20 Guidelines pursuant to AR 339.05. Those guidelines read as follows:

21 **AR 339.05 12 Insubordination**

- 22 A. Any disobeying or refusing to obey but not limited to refusal to work
23 mandatory overtime, which results in mandatory staffing levels not
24 being met, a breach that leads to any injury to a person, or resulting
25 in another type of security breach. **CLASS 5**

AR 339.05 15 Neglect of Duty

NN. Security Violation – Jeopardizing the security of the institution.

Class 5

UU. Leaving an assigned post while on duty without authorization of a supervisor. **Class 5**

II. FINDINGS OF FACT GIVING RISE TO THE TERMINATION

Ms. Malcic testified she was hired with NDOC as a Correctional Officer (CO) in August 2011. She was employed in that capacity until May 23, 2014; the date of her termination.

Ms. Malcic testified that on January 25, 2014, she worked her regular shift from 0400 to 1200 at FMCC. On that date she was also scheduled for another shift from 1300 to 2100 at Valley Hospital (Valley). The Valley shift involved guarding an inmate who was a patient at the hospital.

Ms. Malcic testified that she wore her BDU uniform for her first shift at FMCC. She testified that at the completion of her FMCC shift she stopped at her home and grabbed her lunch to take to the Valley shift. She testified she did not change uniforms for the second shift.

She testified that she reported for duty at Valley at approximately 1255. She was scheduled to work in tandem with another CO from FMCC and the assignment was guarding one inmate at Valley. At the time the inmate was restrained to the bed and was under sedation. The inmate's room was located on the third floor

The specific assignment involves a contact officer and non-contact officer. Ms. Malcic testified that she and her fellow CO switched the duties back and forth based on the situation. One of the CO's was armed and according to

1 Ms. Malcic they would transfer the weapon back and forth based on their
2 respective status.

3 The concept of the assignment was to have at least one armed CO
4 present in the room with the inmate. Typically in this scenario if either CO had
5 to use the bathroom facilities they would use the bathroom located in the
6 patient's room. However, in this instance Ms. Malcic testified that the inmate
7 was on quarantine status and the CO's could not use the patient's bathroom
8 located in the room. Additionally, the CO's were required to wear protective
9 clothing to prevent spread of any potential disease etc.

10 On the day in question Ms. Malcic testified that she had to use the
11 bathroom and was informed by the nursing staff that the nearest bathroom
12 was located on the first floor in the lobby area. Ms. Malcic proceeded to the first
13 floor bathroom and the other CO stayed behind to stand guard over the inmate.
14 Ms. Malcic testified that normally she would have transferred possession of the
15 firearm to the other CO while she was using the facilities. She testified that she
16 took the weapon with her because allegedly there had been a recent incident in
17 the Valley elevator involving some unsavory characters that might have
18 brought harm to Ms. Malcic. This incident was not confirmed and the only
19 evidence of such an incident is Ms. Malcic's representations.

20 Ms. Malcic testified that once she used the bathroom facilities on the first
21 floor she decided to step outside to the parking lot to retrieve her lunch from
22 her personal vehicle. She testified that while in the vehicle she lit a cigarette
23 out of habit and smoked the cigarette while walking back to the Valley
24 entrance.

1 As Ms. Malcic was outside Sgt. Holmes observed her outside in her BDU
2 uniform; armed; and smoking a cigarette. Sgt. Holmes was present at Valley to
3 visit a family member during his off duty hours. He just happened upon Ms.
4 Malcic while she was outside.

5 Sgt. Holmes testified that he reported his observations to Lt. Piccinini.
6 Sgt. Holmes testified that he was concerned that Ms. Malcic was outside the
7 hospital smoking, in her BDU's and armed. Sgt. Holmes testified that he did
8 not speak to Ms. Malcic about the situation or his concerns. Sgt. Holmes
9 testified that Ms. Malcic was not supposed to be wearing her BDU's at that
10 duty assignment.
11

12 At the hearing there was evidence that the Valley duty assignment is
13 considered a remote duty location and there is supposedly an updated and
14 current operating manual onsite for the assigned CO's to review and follow.

15 Ms. Malcic testified that the onsite operational manual on the date of the
16 incident was not current and therefore she contends she did not receive
17 extensive training as required by the current operating procedure.

18 There was also evidence that anytime Ms. Malcic or any CO were
19 working the Valley detail, they are required to contact their immediate
20 supervisor for permission to leave the vicinity of the inmate's hospital room.
21 Ms. Malcic contends she did make an attempt and the NDOC contends she did
22 not.
23
24
25

1 Ms. Malcic also testified that she had served as the duty guard at Valley
2 for a few months prior to the date of the incident giving rise to this action. She
3 testified that she was familiar with the details of working the assignment.

4 The records show that Ms. Malcic has no prior discipline.

5 **III. CONCLUSIONS OF LAW**

6 Ms. Malcic's appeal to the undersigned Administrative Hearing
7 Officer of the Nevada State Personnel Commission were timely filed and the
8 determination of the merits of the appeal is properly within the jurisdiction of
9 the Commission.

10 In addition to the NAC and Administrative Manual sections cited and
11 discussed above the following conclusions of law are considered for purposes of
12 these matters.
13

14 Chapter 284 of the Nevada Revised Statutes addresses the State
15 Personnel System. NRS 284.385 authorizes the dismissal, demotion and
16 suspension of a permanent classified State Employee and states as follows:

17 1. An appointing authority may:

18 (a) Dismiss or demote any permanent classified Employee when the
19 appointing authority considers that the good of the public service will
20 be served thereby.

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

24 2. A dismissal, involuntary demotion or suspension does not become
25 effective until the Employee is notified in writing of the dismissal,
involuntary demotion or suspension and the reasons therefor. The
notice may be delivered personally to the Employee or mailed to the
Employee at the Employee's last known address by registered or
certified mail, return receipt requested. If the notice is mailed, the

1 effective date of the dismissal, involuntary demotion or suspension
2 shall be deemed to be the date of delivery or if the letter is returned to
the sender, 3 days after mailing.

3 3. No Employee in the classified service may be dismissed for religious or
4 racial reasons.

5 NRS 284.383 authorizes the Personnel Commission to adopt a regulation
6 system for the discipline of state Employees stating:

7 1. The Commission shall adopt by regulation a system for administering
8 disciplinary measures against a state Employee in which, except in cases
9 of serious violations of law or regulations, less severe measures are
10 applied at first, after which more severe measures are applied only if less
severe measures have failed to correct the
Employee's deficiencies.

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

14 NRS 284.390 establishes a state Employee's right to a hearing if the state
15 Employee disagrees with the disciplinary action taken by an appointing
16 authority.

17 Pursuant to NRS 284.390 (1), the hearing officer is to determine the
18 reasonableness of the disciplinary action. Further, pursuant to NRS 284.390
19 (6), the hearing officer is to determine if the dismissal, demotion or suspension
20 was without just cause as provided in NRS 284.385.

21 The Nevada Supreme Court recently held hearing officers may determine
22 the reasonableness of disciplinary actions and recommend appropriate levels of
23 discipline, but only appointing authorities have the power to prescribe the
24 actual discipline imposed on permanent classified state Employee. *Taylor v. The*
25

1 *State Department of Health and Human Services*, 129 Nev. Advance Opinion 99,
2 at 6 (December 26, 2013).

3 The Personnel Commission has promulgated regulations at NAC 284.638
4 et al. pursuant to the authority granted it under NRS 284.383, which set forth
5 the specific causes for disciplining the Employee. Those regulations have the
6 full force and effect of law. *Turk v. Nevada State Prison*, 94 Nev. 101 (1978),
7 (holding that the regulations prescribed by the Department of Personnel have
8 the "force and effect of law"). Id. at 104.

9 NAC 284.650 sets forth causes for which disciplinary action can be taken
10 against a person legally holding a position in the public service.

11 NAC 284.642 sets forth the basis for suspending and demoting a person
12 legally holding a position in public service.

13 NAC 284.794 sets forth the evidence a hearing officer is to consider in
14 determining the validity of a disciplinary action.

15 NAC 284.656 (b)(3) sets forth the following notice requirements to an
16 Employee being dismissed, demoted or suspended: "Specify the charges, the
17 reasons for them and the cause of action contained in NAC 284.650 on which
18 the proposed action is based."
19

20 NAC 284.794 sets forth the evidence a hearing officer is to consider in
21 determining the validity of a disciplinary action stating in paragraph 1:
22

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

In reviewing the actions taken by the employer against the employee, it

1 is the duty of the administrative Hearing Officer to make an independent
2 determination as to whether there is evidence showing the discipline would
3 serve the good of the public service. *Knapp v. State Dep't of Prisons*, 111 Nev.
4 420 (1995).

5 In discussing the evidence that a hearing officer can consider, the
6 Nevada Supreme Court in *Dredge v. State ex tel. Dep't of Prisons*, 105 Nev. 39,
7 43 (1989) held details not contained in the specification of charges should be
8 considered as long as they support the grounds charged. The Nevada Supreme
9 Court stated:

10 Dredge was specifically charged with unauthorized association with an
11 ex-inmate. Details in support of the charge that were presented at the
12 hearing but not included within the specification of charges were not
13 properly excluded under Schall. We therefor agree with the district court
14 that the hearing officer erroneously failed to consider substantive
15 evidence in reaching his decision.

16 In discussing cause for discipline, the Nevada Supreme Court held that a
17 showing of "legal cause" was cause "specifically and substantially relating to
18 and affecting the qualifications for, or the performance of, the position."
19 *Whalen v. Wellivet*, 60 Nev. 154, 159 (1940).

20 The Employer has the burden of proof to present evidence and argument
21 to prove the allegations presented in the specificity of charges and whether
22 there is "just cause" to discipline the employee..

23 The Nevada Supreme Court recently issued a decision addressing the
24 standard of proof in these type of hearings. In *Nassiri and Johnson v.*
25 *Chiropractic Physicians' Board of Nevada*, 130 Nev. Adv. Op 27 (April 3, 2014),

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

6 In order to act arbitrarily and capriciously, an administrative agency
7 must act in disregard of the facts and circumstances involved *Meadow v. Civil*
8 *Service Bd. of Las Vegas Metro. Police Dept.*, 105 Nev. 624, 627 (1989).

9 As previously noted, the authority granted the hearing officer pursuant
10 to NRS 284.390(6) is to determine whether the agency had just cause for the
11 discipline "as provided in NRS 284.385."
12

13 IV. DISCUSSION & ANALYSIS

14 Let's review what actually took place on the date of the incident in order
15 to determine if Ms. Malcic's conduct justifies her termination.

16 First, Ms. Malcic worked her regular 8 hour shift at FMCC from 0400 to
17 1200. She had 1 hour to report for her second shift at Valley which
18 commenced at 1300. She made a quick stop at home to retrieve her lunch so
19 she could eat while on duty at Valley.

20 Based on these facts Ms. Malcic was being a dedicated employee of
21 NDOC by agreeing to work a double shift. She obviously had the NDOC's best
22 interest in mind based on her willingness to help.
23

24 Second, Ms. Malcic was wearing her BDU's for the Valley shift.
25

1 Technically that is a violation but in this instance because of the limited
2 time to change and her commitment to working a double shift, she should not
3 be disciplined for that oversight.

4 Third, on the date of the incident there were two CO's guarding one
5 sedated and shackled inmate at Valley and because of the inmate's physical
6 condition, Ms. Malcic had to leave the inmate's room to use the bathroom
7 facilities. The nearest bathroom was on the first floor and the inmate's room
8 was on the third floor.

9 Based on these facts it is not unreasonable for Ms. Malcic to use the
10 downstairs bathroom facilities.

11 Fourth, Ms. Malcic left her CO partner in the room with the sedated and
12 shackled inmate in order to use the bathroom facilities.

13 Based on these facts this scenario is not all that serious because there
14 was a CO in the inmate's room to assist in any security functions while Ms.
15 Malcic was gone.

16 Fifth, Ms. Malcic did not receive express authority to leave her post prior
17 to using the bathroom facilities on the first floor.

18 Based on the Hearing Officer's interpretation of this requirement the
19 necessity for this express authority is designed and intended for use and
20 enforcement when the employee is working primarily at the physical location of
21 the particular NDOC institution. This Hearing Officer does not consider that
22 receiving express authority to use the bathroom is as significant a priority at
23 this remote location especially when there is a CO partner on scene as well.
24
25

1 Sixth, Ms. Malcic took the weapon with her when she proceeded down
2 stairs to use the bathroom and did not leave the weapon with her CO partner
3 while she proceeded to the first floor.

4 Based on these facts that is a serious situation because it left her CO
5 partner unarmed and guarding the inmate.

6 Seventh, Ms. Malcic decided to go to her car to retrieve her lunch after
7 she used the downstairs bathroom. She testified that she would duck out and
8 get her lunch while she was down there.

9 Based on these facts, it was not an unreasonable idea to "kill two birds
10 with one stone" and take advantage of the opportunity to retrieve her lunch
11 while she was as close to her vehicle as she was.

12 Eighth, Ms. Malcic smoked a cigarette while she was retrieving her lunch
13 and apparently was smoking outside the entrance to Valley as observed by Sgt.
14 Holmes.

15 These facts establish serious and inappropriate conduct on the part of
16 Ms. Malcic because she should not have been smoking while outside to retrieve
17 her lunch. She should have hastily returned to her duty location to support her
18 CO partner.

19 Now considering the allegations in the NPD-41 as to the proper discipline
20 for Ms. Malcic, the following is offered.

21 As to violation of NAC 284.650(1); yes her conduct technically violates of
22 her conditions of employment when she left her CO partner unarmed in the
23 inmate's hospital room.

1 However, under the circumstances the conduct does not warrant
2 termination because the inmate was shackled and sedated.

3 As to violation of NAC 284.650(6); this Hearing Officer is not convinced
4 that her conduct was insubordination or willfully disobedient. She made some
5 inappropriate choices such as taking the weapon and smoking, but the Hearing
6 Officer simply cannot classify that conduct as willfully disobedient. Her
7 conduct is certainly negligent.

8 As to NAC 284.650(7); the Hearing Officer determines that there was an
9 inexcusable neglect of duty here that subjects Ms. Malcic to discipline.

10 When analyzing this neglect of duty in conjunction with AR 339.05 NN.
11 and UU.; the Hearing Officer does not consider that Ms. Malcic necessarily
12 jeopardized the security of the institution because she was assigned to the
13 remote location. Yes, it is acknowledged that she made an inappropriate choice
14 to leave her CO partner without the gun but the inmate was shackled and
15 sedated at the time and therefore not a serious security threat. She also should
16 not have been smoking a cigarette in the Valley parking lot.

17 There is no excuse for her conduct and her conduct is certainly subject
18 to discipline; however, not termination.

19 As to leaving the post without the authorization of the supervisor under
20 section UU.; that issue has been addressed above.

21 **V. CONCLUSION**

22 The NDOC did act arbitrarily and capricious in making the decision to
23 terminate Ms. Malcic. Her conduct while, serious under the circumstances, is
24
25

1 not worthy of termination for this incident. There are mitigating factors present
2 that explain some of her conduct and she is certainly worthy of some discipline
3 but not termination.

4 Additionally, Ms. Malcic has no prior discipline and has otherwise been
5 an asset to the NDCO as a CO.

6 Ms. Malcic did neglect her duty in certain respects and there is no
7 excuse for that neglect however, the termination is too harsh a penalty and the
8 Hearing Officer instead recommends a 30 day suspension as more appropriate
9 discipline for her conduct.
10

11 **V. DECISION**

12 Based on the foregoing Findings of Fact and Conclusions of Law and
13 good cause appearing therefore,

14 **IT IS HERBY ORDERED, ADJUDGED AND DECREED:**

15 That the preponderance of the evidence does not establish that Ms.
16 Malcic's termination has been shown to be for the good of the public service,
17 and that the decision of the NDOC to terminate Ms. Malcic is hereby

18 **REVERSED.**

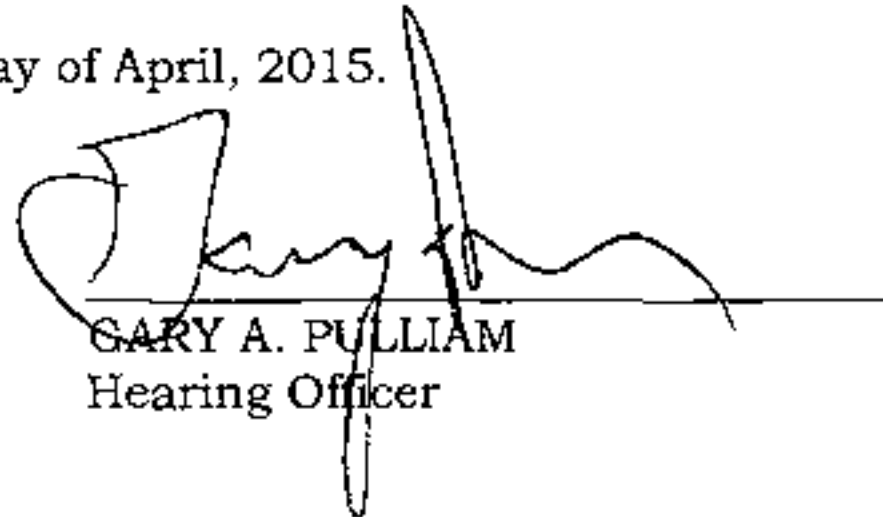
19 Ms. Malcic is reinstated to her position and is awarded back pay and
20 benefits forfeited as a result of the termination. The period of time for the back
21 pay and benefits encompasses the period of time from May 23, 2014, to
22 October 16, 2014.
23

24 October 17, 2014, was the scheduled date of the original hearing and
25 NDOC was prepared to go forward with the hearing. Ms. Malcic requested a

1 continuance which was granted. At that time the NDOC made a request that
2 should Ms. Malic be reinstated the accrual of back pay would stop on October
3 16, 2014. The Hearing Officer agrees and thus the limited back pay is awarded.

4 Furthermore, the matter is **REMANDED** for consideration of a
5 recommendation that Ms. Malic receive a 30 day suspension for the reasons
6 discussed above.

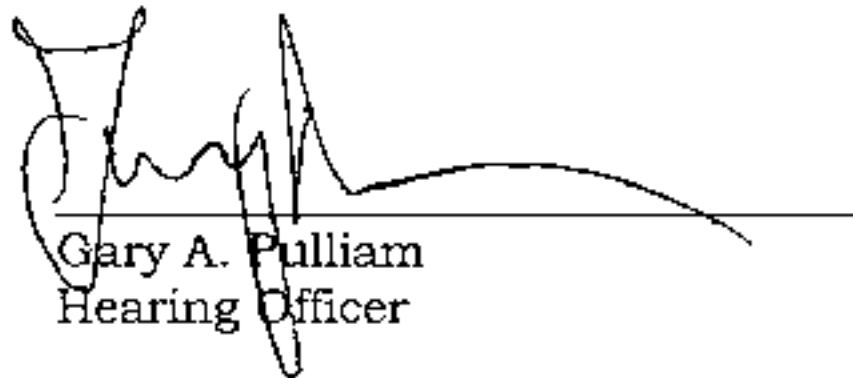
7 DATED THIS 10th day of April, 2015.

8
9
10
11
12

GARY A. PULLIAM
Hearing Officer

13 **NOTICE:** Pursuant to NRS 233B.130, should any party desire to appeal
14 this final determination of the Hearing Officer, a Petition for Judicial
15 Review must be filed with the District Court within 30 days after service by
16 mail of this decision.
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing **FINDINGS OF FACT;**
CONCLUSIONS OF LAW & DECISION, was made on the 10th day of April
2015, via e-mail and regular mail as follows:



Gary A. Pulliam
Hearing Officer

Paul Lunkwitz
7872 Tolberts Mill Dr.
Las Vegas NV 89460
drunkwitz@yahoo.com

Ann McDermott, Esq.
Chief Deputy Attorney General
Attorney General's Office
555 E. Washington Ave., #3900
Las Vegas, NV 89101
amcdermott@ag.nv.gov

cc: (via e-mail only)

Greg Cox – gcox@doc.nv.gov
Nancy Sanders – nsanders@doc.nv.gov
Sharlet Gabriel – sgabriel@doc.nv.gov
Celina Lopez – clopez@ag.nv.gov
AKaheaku@ag.nv.gov
carrie.lee@admin.nv.gov
jzepeda@admin.nv.gov

EXHIBIT “3”

Electronically Filed
04/07/2016 02:08:52 PM



CLERK OF THE COURT

1 ORDER
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 Vanja Malcic

7 DISTRICT COURT

8 CLARK COUNTY, NEVADA

10 STATE OF NEVADA ex rel, its
DEPARTMENT OF CORRECTIONS

Case No.: A-15-717787-J
Dept. No.: XXIX

11 Petitioner,

12 v.

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

16 Respondents.

17
18 **ORDER GRANTING RECONSIDERATION, ORDER DENYING PETITIONER NEVADA**
19 **DEPARTMENT OF CORRECTIONS' PETITION FOR JUDICIAL REVIEW, AND ORDER**
20 **GRANTING RESPONDENT/CROSS PETITIONER MALCIC'S CROSS PETITION FOR**
JUDICIAL REVIEW

21 On January 15, 2016 this Court entered its Order Granting Petition and Cross-Petition for
22 Judicial Review wherein the Court determined that the hearing officer had erred in ordering a
23 Correctional Officer Vanja Malcic reinstated to her employment with the Nevada Department of
24 Corrections (hereafter "NDOC"). That Order further held that if this Court were incorrect regarding the

1 issue of reinstatement, then the Cross-Petition filed by Officer Malcic would have to be granted as the
2 hearing officer abused his discretion in cutting off back pay as of October 16, 2014. NRS 284.390(6)
3 clearly states "If the hearing officer determines that a dismissal, demotion or suspension was without
4 just cause as provided in NRS 284.385, the action must be set aside and the employee must be
5 reinstated, with full pay for the period of dismissal, demotion or suspension".

6 Malcic filed a timely Motion for Reconsideration of the Court's January 15, 2016 Order
7 pursuant to NRCP 59(e). Having read and considered the Motion for Reconsideration, and NDOC's
8 Opposition, along with the citations to the Record, and after a review of *Department of Prisons v.*
9 *Jackson*, 111 Nev. 770, 895 P.2d 1296 (1995), the Court concludes that its initial determination
10 granting NDOC's Petition for Judicial Review was in error as *Jackson* clearly holds that deference to
11 the decision of the appointing authority is only applicable in cases of egregious security breaches. The
12 hearing officer made express findings that the alleged security violations were not egregious. Pursuant
13 to NRS 233B.135(3) this Court may not substitute its judgment for that of the hearing officer as to the
14 weight of evidence on a question of fact. Accordingly;

15 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Malcic's Motion for
16 Reconsideration is GRANTED.

17 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that NDOC'S Petition for
18 Judicial Review of the hearing officer's decision to reinstate Officer Malcic to her employment is
19 DENIED.

20 ///

21 ///

22 ///

23 ///

24 ///

State of Nevada, ex rel its Dept. of Corrections v. Vanja Malcic
Case No. A-15-717787-J
Dept. XXIX

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Malcic's Cross-Petition for
Judicial Review of the hearing officer's determination that back pay should be cut off as of October 16,
2014 is GRANTED. NDOC shall pay to Officer Malcic back pay from October 17, 2014 until the date
of her reinstatement.

DATED this 6th day of April, 2016.


DISTRICT COURT JUDGE *Jw*

Respectfully submitted by:

LAW OFFICE OF DANIEL MARKS


DANIEL MARKS, ESQ.

Nevada State Bar No. 002003

ADAM LEVINE, ESQ.

Nevada State Bar No. 004673

610 South Ninth Street

Las Vegas, Nevada 89101

Attorneys for Respondent Vanja Malcic

EXHIBIT “4”

ENTERPRISE WIRE CO.(46 LA 359, 1966)**Decision of Arbitrator**

In re ENTERPRISE WIRE COMPANY (Blue Island, Ill.] and ENTERPRISE INDEPENDENT UNION

March 28, 1966

Arbitrator: Carroll R. Daugherty

[DISCHARGE- Absenteeism - Unsatisfactory work-Tests for 'just cause' -- 118. 6361 -- 118.651]

Employer was justified in discharging employee for record of unexcused absences and for failure to tag materials correctly as required by his job. Employer's action meets tests for "just cause" for discharge: (1) Employee was forewarned of consequences of his actions; (2) company's rules are reasonably related to business efficiency and performance employer might expect from employee; (3) effort was made before discharge to determine whether employee was guilty as charged; (4) investigation was conducted fairly and objectively; (5) substantial evidence of employee's guilt was obtained; (6) rules were applied fairly and without discrimination; and (7) degree of discipline was reasonably related to seriousness of employee's offense and employee's past record. (C. Daugherty)Enterprise Wire Co., 46 LA 359.

Appearances: For the union Philip R. Davis, attorney. For the company-Jay G. Swardenski, Seyfarth, Shaw, Fairweather, and Geraldson, attorney.

TESTS FOR 'JUST CAUSE'**Factual Background**

Daugherty, Arbitrator:-On October 8, 1965, the Company communicated to grievant X- an employment termination notice, signed by the plant manager and by the assistant plant superintendent and giving as the reasons for X's dismissal unsatisfactory work, including absenteeism, plus insubordination or refusal to work as directed.

The aggrieved employee had been hired on April 13, 1965, and had been trained as a wire rod cleaner in the Cleaning Department, second shift. The Company receives coils of wire rod from its suppliers, and said coils vary in diameter and metallurgical composition. Before the coils reach the cleaner employee, they are welded together at the ends in sets of three to form a "pin" and are tagged for identification as to diameter and composition. The cleaner's job is to clean the pins in an acid tank, preserve their identities, and respectively to re-tag them after they have been so pickled and as they are left suspended from a sort of beam called a "yoke." The tag is a rectangular piece of cardboard with spaces to be filled in as to size and other characteristics of the wire rod in the pin and as to the identity of the wire-drawing machine to which the pin is to go. At the top of the tag is a reinforced hole through which a fine, flexible wire is placed by the cleaner, fastened to a strand of rod in the pin, and wound or twisted to prevent detachment.

Failure properly to tag each pin results in production delays, cost increases, and customer dissatisfaction (when orders for wire are not filled according to specifications). Alleged continued failure to tag some of his pins properly-either through allegedly not tagging some pins at all or through allegedly not marking the machine number on some of them was the immediate cause of X's discharge.

Other material facts are set forth below under Findings and Opinion in respect to the issue of "just cause."

Contract Provisions

The provisions of the Parties' controlling Agreement cited by the Company read as follows:

Article IV**Hours of Work and Overtime**

Section 10. Absence From Work. Any employee absent from work for any cause is required to report at once to the Superintendent and arrange his next scheduled work shift. Any employee unable to report on his regularly scheduled shift shall notify his foreman or the Superintendent at least two hours prior to the start of the shift. Any employee failing to report as described above will, on the second offence, be given disciplinary layoff of one shift. Repetition of this practice without proper cause will be considered basis for discharge.

Article VII**Management**

The Union hereby recognizes that the management of the plant and the direction of the working forces, including, but not limited to the right to direct, plan and control plant operations, to establish and change working schedules, to hire, transfer, suspend, discharge or otherwise discipline employees for cause, to promulgate, administer and enforce plant rules, to relieve employees because of lack of work or for other legitimate reasons, to introduce new or improved methods or facilities and to manage its properties, is vested exclusively in the Company. It is understood that the aforesaid rights of management shall not be exercised in a manner inconsistent with the other provisions of this Agreement.

Any rights not specifically abridged, qualified or limited by this Agreement are reserved exclusively to the Company

Article VIII**Discipline**

Section 1. Proper Cause. No employee shall be discharged or otherwise disciplined except for proper cause.

Section 2. Discharge or Discipline Grievance. Any case of discharge or other discipline may be taken up through the grievance procedure, but any such grievance must be presented within three working days after the disciplinary action occurs.

Section 3. Notice to Union. The Union shall be notified within one working day of any disciplinary action taken against any employee covered by this Agreement.

The Union contends that the Company's disciplinary action violated the Agreement but cites no provisions thereof alleged to have been breached.

Arbitrator's Findings and Opinion

Article VII, quoted above, affirms the Company's right to discipline for "cause"; and Article VIII, Section 1, requires "proper cause" for discipline, including discharge. No provision in the Agreement defines these terms; that is, no contractual criteria exist for determining from the facts of any disciplinary case, including this one, whether or not the Company had just cause for its decision. Therefore it is necessary for the Arbitrator to supply and apply his own just cause standards. Same are set forth in detail as an Appendix to this decision. In what follows, the Arbitrator makes findings of fact from the evidence of record in respect to each criterion.

Question No. 1: The record establishes that the Company gives to each employee a copy of a booklet labeled "INTRODUCTION TO ENTERPRISE WIRE CO." Pertinent portions thereof are reproduced just below:

PLANT INFORMATION AND RULES

In order to have our plant operate at maximum efficiency and insure the safety

of the individual and plant property, it is necessary for all workers to abide by certain rules and regulations. We believe this will provide for our mutual protection and benefit. Rules cover the following areas: instructional, standard practice, and disciplinary.

GENERAL INFORMATION AND RULES

ABSENTEEISM: Employees are required to notify or call their foreman or superintendent when, for any reason, they are unable to be present or anticipate a late arrival. (Shop employees are referred to Article IV, Section 10 of the union contract.)

ADMINISTRATION OF DISCIPLINE:

The welfare of the company as a whole must be considered first, because it represents the total welfare of the entire group. Rules and regulations are established for the guidance and protection of all employees. Employees should be familiar with the rules and govern themselves accordingly. Failure to do so will result in disciplinary action, including suspension and discharge.

Disciplinary action may be in the form of verbal reprimand or written notice type. Our written notice type is based upon three notices within a twelve month period. The first warning notice is issued as a serious warning when verbal reprimand has failed. The second written warning notice carries a time off penalty related to the seriousness of the offense. The third notice requires suspension or discharge.

Disciplinary action will be taken in the following instances:

- 16. Insubordination, inability or refusal to perform assigned duties.
- 18. Unsatisfactory performance of duties assigned to the employee.

From the above the Arbitrator must find that X had been put on notice in respect to (1) the necessity for notifying the Company about impending absence or tardiness; (2) the necessity for satisfactory compliance with job requirements and supervisory directions when actually at work; and (3) the possible disciplinary consequences of failing to fulfill said requirements.

In addition to the above finding, which is general in nature, the evidence of record supports the firm conclusion that X had been put on much more specific notice in respect to absenteeism, absence notification and work performance: (1) On June 16, 1965, X's foreman spoke to him about his absences and placed in his personnel file a written memorandum (not a formal warning notice) summarizing said interview. (2) On July 27, 1965, a formal written warning notice was issued to X (and placed in his file) and a one-day suspension was imposed for his having been absent on two preceding days and for his not having notified the company thereon. Said notice also promised further discipline for repetition of the offense. (3) On September 13, 1965, X received a second such notice and one-day suspension for the same offense. He was also then put on a three-month probation. "Further action" was promised for his next "warning for any Reason." (4) During the first week in October, 1965, X received four oral communications from three management persons-his two immediate foremen (who divided supervision of X's shift) and the assistant plant superintendent-in respect to his alleged failure to tag some of his cleaned pins or properly to mark some of the pins he did tag. Neither of the foremen explicitly warned him that continued dereliction of tagging duty would lead to discipline; but on the evening before the discharge the assistant superintendent told X that if he (the assistant superintendent) found the next morning that X's pins were not identified, the assistant superintendent would have to discharge him.

From all of the above, the Arbitrator must find that the answer to Question No. 1 is clearly and strongly "Yes."

Question No. 2: The record contains no evidence, nor indeed does the Union contend, that the Company's rules and warning against absenteeism, against failure to notify the Company on

same, and against tagging laxity were and are not reasonably related to Company efficiency and X's work capability. The answer to the second criterion must also be a strong "Yes."

Questions Nos. 3 and 4: On this Question the weight of the evidence of record warrants the following conclusions: (1) As to absenteeism and failure to notify: (a) The offense is of such a nature that, given X's records thereon, a prior further investigation into the fact was unnecessary. But there was no explicit testimony about whether or not the Company asked X to explain or excuse his lapses in this area. (2) As to X's alleged tagging failures: (a) This offense was of a different sort. At the hearing there was no controversion of the Company's evidence that on the three mornings preceding the date of X's discharge some of the pins that he had cleaned the prior evenings either lacked tags entirely or, if tagged, lacked wiredrawing - machine identification. Then, given the Company-conceded possibility that X- *might* have tagged all his cleaned pins properly those evenings and some one else or some post-shift occurrence might have caused the tickets to be removed or lost after X went home, the Company would be on firmer ground here if it had taken the pains to question material handlers and other employees who conceivably might have been involved in order to remove as much doubt in this area as possible. On the other hand, if some of the tags that X did attach on those evenings did not bear machine numbers, no further inquiry into this portion of his alleged offense was needed. (c) X, at the times he was spoken to by management, had ample opportunity to try to justify or explain his tagging deficiencies if same existed. The Company cannot be held to have been seriously remiss in this field of its investigation. The Company is not shown actively to have solicited from X any justification for his alleged sins of omission; but the Company may not rightly be found to have denied him such opportunity. (d) A relatively detached management official, higher than X's foremen, made the determining inquiries.

On balance, the Arbitrator holds that the answer to these two Questions is a moderate "Yes."

Question No. 5: Of all the seven questions, the fifth is the crucial one here. This statement is grounded on two facts of record: (1) The evidence on this Question is in direct conflict. At the hearing the Company witnesses testified forthrightly that on the mornings of that October week, after X had left the preceding nights, some of his cleaned pins lacked tags entirely or, if tagged, lacked machine numbers. They also testified that, although X at first denied any tagging failures whatever, he later (twice) admitted having tagged only "most" of his pins. On the other hand, X himself at the hearing just as forthrightly testified that he had tagged all his pins, and only two tags lacked machine numbers because some one came to take them immediately to the right machine, thus obviating any need for so identifying them. He also denied ever conceding to the Company that he had tagged only "most" of his pins. (2) No management person checked on X's tagging at the ends of his shifts that week. His foreman spot-checked his tagging those evenings and found same entirely satisfactory; but his checking ended one hour before X's shifts ended; and no further checking was done until the next mornings. Thus the record is blank on what happened from 10 p.m. until the morning checks.

This Arbitrator has no means for resolving the conflicts in testimony or for filling in the blank area in facts. His function here is to determine whether the Company's decision-maker or "judge" (the plant manager) had reasonable, non-arbitrary grounds for accepting the word and conclusions of his managerial subordinates rather than any denials X may have made.

On this issue the Arbitrator finds as follows: He has no proper basis for ruling that the Company's decision that X was guilty of the alleged tagging offense was so unreasonable or arbitrary as to have constituted an abuse of managerial discretion. The record contains no

probative evidence that either the Company or some fellow employee was trying to "frame" X. The Company's evidence on the tagging matter must be ruled to have been sufficiently substantial to support its decision.

In respect to the absenteeism question, the Company must be held to have had amply substantial evidence of X's failures.

Given all the above, the answer to Question No. 5 must be a fairly strong "Yes."

Question No. 6: The record contains no evidence of probative value that would support a finding of Company discrimination against X in the action it took. The answer to this Question is "Yes."

Question No. 7: This Question is a two-fold one. In the light of the Notes set forth in the Appendix hereto, as applied to the facts of record here, the answer to Question 7(a) must be "Yes." The Arbitrator has held that the Company properly found X guilty of violating its reasonable rule on absenteeism and its reasonable shop rules Nos. 16 and 18. Such violations in the context of this case constituted a serious offense. The Company may not be found to have been unreasonable or arbitrary in deciding on discharge rather than on some lesser penalty.

As to Question No. 7 (b), the Union makes two contentions: (1) X's record on absenteeism has no bearing on his discharge, for he had already been penalized for same. (2) The Company violated the contractual provision that three warning notices for the same offense are necessary before discharge can be imposed.

The Arbitrator is forced to reject both these contentions. As to (1), the reasons will be evident from the Appendix Notes to Question No. 7. As to (2), the following should be noted: (a) There is nothing in the Agreement about the necessity for three warning notices for the same offense before discharge. The Company's own discipline rules (previously quoted) were unilaterally issued and are not a part of the Agreement because not referred to there. (b) Even if same were in the Agreement, (i) they can not be interpreted in the manner contended for, because there is no statement that the three notices have to be for the same sort of offense; and (ii) nothing therein would prevent the Company from discharging an employee for a truly serious first offense.

The Arbitrator finds that the Company's decision here was not unreasonably related to X's record.

Then the answer to the whole of Question No. 7 must be held to be "Yes."

The Arbitrator has found that all seven Questions merit affirmative answers. Accordingly, he must now rule that there is no proper basis for sustaining X's grievance.

AWARD

The grievance is denied.

TEST APPLICABLE FOR LEARNING WHETHER EMPLOYER HAD JUST AND PROPER CAUSE FOR DISCIPLINING AN EMPLOYEE

Few if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in unnumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guide lines or criteria that are to be applied to the facts of any one case, and said criteria are set forth

below in the form of questions.

A "no" answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such "no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more "no" answers so weak and the other, "yes" answers so strong that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastize" both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company---e.g., by reinstating a discharged employee without back pay.

It should be clearly understood also that the criteria set forth below are to be applied to the employer's conduct in making his disciplinary decision before same has been processed through the grievance procedure to arbitration. Any question as to whether the employer has properly fulfilled the contractual requirements of said procedure is entirely separate from the question of whether he fulfilled the "common law" requirements of just cause before the discipline was "grieved."

Sometimes although very rarely, a union-management agreement contains a provision limiting the scope of the arbitrator's inquiry into the question of just cause. For example, one such provision seen by this arbitrator says that "the only question the arbitrator is to determine shall be whether the employee is or is not guilty of the act or acts resulting in his discharge." Under the latter contractual statement an arbitrator might well have to confine his attention to Question No. 5 below-or at most to Questions Nos. 3, 4, and 5. But absent any such restriction in an agreement, a consideration of the evidence on all seven Questions (and their accompanying Notes) is not only proper but necessary.

The Questions

1. Did the company give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the

company might properly expect of the employee?

Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions. In a very real sense the company is obligated to conduct itself like a trial court.

Note 3: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation he will be restored to his job with full pay for time lost.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person there are not witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Note 1: A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and order, and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgment thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating," among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing establishes firm "Yes" answers to all the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment. In this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "trial judge," might have imposed a lesser penalty. Actually the arbitrator may be said in an important sense to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth. -In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of company unreasonableness.

**BEFORE THE NEVADA STATE PERSONNEL COMMISSION
HEARING OFFICER**

BRIAN LUDWICK,

Petitioner-Employee,

vs.

NEVADA DEPARTMENT OF
CORRECTIONS,

Respondent-Employer.

Hearing # 1521187-CB

**NEVADA DEPARTMENT OF CORRECTIONS'
PETITION FOR RECONSIDERATION**

The Respondent-Employer, Nevada Department of Corrections (NDOC), by and through its counsel, Adam Paul Laxalt, Attorney General for the State of Nevada, and Jennifer Hostetler, Chief Deputy Attorney General, hereby submits this Petition for Reconsideration.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

NDOC requests reconsideration of the Hearing Officer's June 27, 2016 Findings of Fact, Conclusions of Law and Decision ("Decision"). In that Decision, the Hearing Officer determined that NDOC Administrative Regulation ("AR") 339 setting forth NDOC's Code of Ethics, Employee Conduct, and Prohibitions and Penalties has 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." Decision at p. 1 n.1. However, the Hearing Officer later indicated she did not "analyz[e] the issue of whether the ARS had to be approved by the Commission." Decision at p. 9. Instead, the Hearing Officer indicated that she had "sufficient law upon which to base a decision in this case without reliance upon the ARs." Decision at p. 10.

NDOC submits that the Hearing Officer's Decision with respect to AR 339 was in error and respectfully requests that the Hearing Officer give full weight to AR 339. First, the Hearing Officer indicated she did not analyze whether the AR needed approval from the

Personnel Commission; however, she limited the admissibility of AR 339, stating "AR 339 has not been approved by the Nevada Personnel Commission." Decision at p. 1 n.1 and p. 9. Those statements are conflicting. Second, to the extent the Hearing Officer determined that NDOC AR 339 requires approval of the Personnel Commission, that determination was in 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. For these reasons, reconsideration is appropriate.

II. LEGAL ARGUMENT

A. Standard for Reconsideration

The Nevada Personnel Commission's Hearing Officer Rule of Procedure 11.7 provides that a petition for rehearing or reconsideration must be filed with the hearing officer within 15 days after the date of service of the hearing officer's decision.¹ See NRS 233B.130(4). Reconsideration is appropriate where the Hearing Officer is presented with: (1) newly discovered evidence; (2) committed clear error; or (3) if there is an intervening change in controlling law. See *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999).

Here, NDOC submits that the Hearing Officer committed clear error in not giving full weight to AR 339 in her Decision as discussed below.

B. The Decision Does Not Clearly Indicate Whether The Hearing Officer Determined AR 339 Requires Approval From The Personnel Commission

In her Decision, the Hearing Officer indicated she did not analyze whether NDOC's ARs needed approval from the Personnel Commission. Decision at p. 9. However, in a footnote on page one of the decision, the Hearing Officer indicated that she limited the admissibility of AR 339, stating "AR 339 has not been approved by the Nevada Personnel Commission." Decision at p. 1 n.1. As a result, the Hearing Officer indicated she would accept AR 339 for the purposes of showing the kind of conduct NDOC deemed to be

¹ Fifteen calendar days after the date of service, June 27, 2016, is July 12, 2016. Accordingly, this request is timely.

misconduct but "not for the purpose of proving the penalty associated with the prescribed conduct." *Id.*

The Hearing Officer's statements on page one and page nine of her Decision are conflicting and therefore, it is unclear exactly if the Hearing Officer made a determination as to whether AR 339 must be approved by the Personnel Commission. If the Hearing Officer did not determine or analyze whether approval is needed by the Personnel Commission, NDOC submits that the decision to limit the admissibility of AR 339 on that basis was legally unsupported and in error.

C. AR 339 Is A Lawful Administrative Regulation That Should Have Been Given Due Weight In The Decision

To the extent the Hearing Officer determined that AR 339 requires approval by the Personnel Commission to be valid, NDOC respectfully submits that the Hearing Officer erred. NDOC AR 339 on "Code of Ethics, Employee Conduct, and Prohibitions and Penalties" is a valid and lawful administrative regulation having been approved by the Board of State Prison Commissioners.²

Chapter 233B on the Administrative Procedure Act (APA) outlines regulation-making and adjudication procedure of all executive department agencies, except those exempted. NRS 233B.020. The Nevada Legislature has exempted NDOC from the APA, devoting Chapter 209 to NDOC. NRS 233B.039(b); see generally NRS Chapter 209.

The Board of State Prison Commissioners (the "Board") heads NDOC. NRS 209.101(2). Article 5 § 21 of the Nevada Constitution defines the Board to include the Governor,³ the Secretary of State, and Attorney General and provides that the Board "shall

² The argument concerning NDOC AR 339 raised by Petitioner is not a new argument. In fact, counsel for Petitioner has raised this argument in other personnel matters concerning NDOC as early as May 2015 including in proceedings before the First Judicial District Court, the Eighth Judicial District Court, and before Hearing Officer Gentile each of which have declined counsel's invitation to declare NDOC's administrative regulations unlawful. See e.g., *State of Nevada, ex. rel., its Dep't of Corr. v. Kassebaum*, Case No. 15 OC 00018 1B, (1st Jud. Dist. Ct. Nev. 2015); *State of Nevada, ex. rel., its Dep't of Corr. v. Malcic*, Case No. A-15-717787-J, (8th Jud. Dist. Ct. Nev. 2015); *Webster v. Nevada Dep't of Corr.*, Hearing No. 1508890-MG (Nev. Dep't of Admin Hearings Division 2016).

³ The Personnel Commission reports to the Governor. See NRS 284.065(2). However, the Governor is the President of the Board of Prison Commissioners. See NRS 209.101(3). The

1 have such supervision of all matters connected" with Nevada's prisons. Chapter 209 of the
 2 Nevada Revised Statutes further explains that the Board has "full control" of NDOC's "labor"
 3 and authorizes the Board to "[p]erscribe regulations for carrying on the business of the Board
 4 and the Department." NRS 209.111.

5 These statutes and others make it clear that the Board of Prison Commissioners
 6 is primarily responsible for the administration of the prison, and the promulgation
 7 of rules and regulations governing the prisoners, employees and other
 8 persons....The Nevada Constitution and statutes place responsibility for
 9 supervision of the prison in a board of prison commissioners. The evident intent
 10 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.

11 *Craig v. Hocker*, 405 F. Supp. 656, 682 (D. Nev. 1975), *overruled on other grounds by Smith*
 12 *v. Sumner*, 994 F.2d 1401, 1405 (9th Cir. 1993). See NRS 209.131(6) (explaining the Director
 13 of NDOC shall "[e]stablish regulations with approval of the Board and enforce all laws
 14 governing the administration of the Department and the custody, care and training of
 15 offenders"). See also NRS 209.131(7) (explaining the Director of NDOC shall "[t]ake proper
 16 measures to protect the health and safety of the staff and offenders in the institutions and
 17 facilities of the Department").

18 The Board pursuant to the authority vested in it by the Nevada Constitution and State
 19 statute approved AR 339. See e.g., Nev. Const. art. 5, § 21. AR 339 is and has been a valid
 20 and lawful administrative regulation. See *Fore v. Nevada Dep't of Corr.*, No. 64028, 2015
 21 WL 6705101, at *3-4 (Nev. Ct. App. Oct. 23, 2015) (unpublished) (noting an agency's own
 22 regulations have the "force of law"). Any contention that Chapter 284 of the NRS or NAC
 23 invalidates AR 339⁴ for lack of approval by the Personnel Commission is untenable. The
 24 articles of the Nevada Constitution are the supreme law of the State and cannot be trumped
 25 suggestion that the Governor's approval through the Board is insufficient and that the Personnel
 Commission instead must give its approval is incongruent.

26 4 It should be noted that AR 339 sets forth a policy of progressive discipline in keeping with the
 27 regulations and statutes of Chapter 284. NDOC's Chart of Offense Guidelines as set forth in AR 339
 28 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.

by conflicting statutes or regulations like the ones cited in the Decision concerning approval by the Personnel Commission. Decision at pp. 8-9. 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). See *id.* (The Nevada Supreme Court "construe[s] statutes, if reasonably possible, so as to be in harmony with the constitution.") (internal citations and quotations omitted). Any suggestion that AR 339 is invalid and cannot be used for purposes of disciplining NDOC employees is without merit and in violation of the Nevada Constitution.

Accordingly, the Hearing Officer erred in limiting the admission of AR 339 into evidence. The Hearing Officer, in refusing to admit AR 339 to establish the penalty associated with Petitioner leaving his assigned post without approval, did not consider important and relevant evidence when deciding whether it was reasonable for NDOC to terminate Petitioner. Indeed, termination is consistent with the penalty proscribed under AR 339 for Petitioner's misconduct and should have properly been considered by the Hearing Officer during the hearing and in her Decision. NDOC respectfully submits that her failure to do so was clear error.

III. CONCLUSION

For the foregoing reasons, Respondent-Employer NDOC respectfully requests that the Hearing Officer reconsider her June 27, 2016 Decision and give due weight to AR 339 in determining the reasonableness of NDOC's decision to terminate Petitioner.

DATED this 12th day of July, 2016.

ADAM PAUL LAXALT
 ATTORNEY GENERAL

By: /s/ Jennifer K. Hostetler

JENNIFER K. HOSTETLER
 Chief Deputy Attorney General
 Nevada Bar No. 11994
 MICHELLE DI SILVESTRO ALANIS
 Deputy Attorney General
 Nevada Bar No. 10024
 555 E. Washington Ave., Suite 3900
 Las Vegas, NV 89101-1068
 Tel: (702) 486-3267
 JHostetler@ag.nv.gov

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 12th day of July, 2016, service of the **NEVADA DEPARTMENT OF CORRECTIONS' PETITION FOR RECONSIDERATION** was made this date by depositing a true copy of the same for mailing, first class mail, at Las Vegas, Nevada, or via e-mail, addressed as follows:

Cara L. Brown
Hearing Officer
Department of Administration
2200 S. Rancho Dr., Ste. 210
Las Vegas, Nevada 89102

(Via U.S. mail and E-mail: cara.brown@admin.nv.gov
dgiambelluca@admin.nv.gov)

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

/s/ Anela Kaheaku
An employee of the Office of Attorney General

FILED
JUL 01 2016
HEARINGS DIVISION

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARINGS OFFICER

BRIAN LUDWICK

Petitioner-Employee

vs.

NEVADA DEPARTMENT OF CORRECTIONS

Respondent-Employer.

APPEAL NO. 1521187-CB

ORDER GRANTING PETITIONER BRIAN LUDWICK'S PETITION FOR RECONSIDERATION

On June 27, 2016, Petitioner Brian Ludwick (hereinafter "Mr. Ludwick"), timely filed a PETITION FOR RECONSIDERATION (hereinafter "Petition") requesting reconsideration of the remedy granted in this Hearing Officer's Findings of Fact, Conclusions of Law and Decision filed June 27, 2016 in the above-captioned appeal (hereinafter "Decision"). Having considered Mr. Ludwick's Petition and having reviewed the Decision, Mr. Ludwick is correct in his position that pursuant to NRS 284.390(6), because there was a determination that his dismissal was without just cause he must be reinstated with full pay for the period of the dismissal. There was an oversight in preparing the Decision.

For the foregoing reasons, Mr. Ludwick's Petition must be granted.

IT IS HEREBY ORDERED that the Petitioner Brian Ludwick's PETITION FOR RECONSIDERATION is **GRANTED**; and

IT IS FURTHER ORDERED that Petitioner Brian Ludwick receive full back pay and benefits for the full period of his dismissal.

Dated this 30th day of June, 2016.


 CARA L. BROWN, ESQ.
 Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that, on the 19 day of July, 2016, service of a true and correct copy of the foregoing ORDER GRANTING PETITIONER BRIAN LUDWICK'S PETITION FOR RECONSIDERATION was made by first class mail, postage prepaid, to:

Brian Ludwick
5900 Sky Pointe Drive #1152
Las Vegas Nevada 89130

and by first class mail, postage prepaid, and email to:

Adam Levine, Esquire
Law Office of Daniel Marks
610 South 9th Street
Las Vegas Nevada 89101
office@danielmarks.net

and by interdepartmental mail to:

James Dzurenda, Director
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

Sharlet Gabriel, HR Administrator
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

and by interdepartmental mail and email to:

Susanne M. Sliwa, Senior Deputy Attorney General
Department of Health and Human Resources
555 Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
ssliwa@ag.nv.gov


D. Giambelluca, Legal Secretary II
Employee of the State of Nevada

STATE OF NEVADA
DEPT OF ADMINISTRATION
HEARINGS DIVISION

JUN 29 AM 10:19

RECEIVED
AND
FILED

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

6 BEFORE THE NEVADA STATE PERSONNEL COMMISSION
CARA BROWN, HEARING OFFICER

8 BRIAN LUDWICK,

Case No.: 1521187-CB

9 Petitioner/Employee,

10 v.

11 DEPARTMENT OF CORRECTIONS,

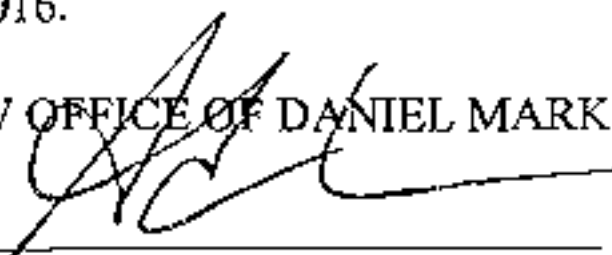
12 Respondent/Employer.
13 _____

14 **PETITION FOR RECONSIDERATION**

15 COMES NOW Petitioner/Employee Brian Ludwick by and through undersigned counsel Adam
16 Levine, Esq. of the Law Office of Daniel Marks and hereby submits his Petition for Reconsideration.
17 The grounds for this Petition are set forth in the following Memorandum of Points and Authorities.

18 DATED this 27th day of June, 2016.

19 LAW OFFICE OF DANIEL MARKS

20 
DANIEL MARKS, ESQ.
21 Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
22 Nevada State Bar No. 004673
610 South Ninth Street
23 Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
24 *Attorneys for Petitioner/Employee*

MEMORANDUM OF POINTS AND AUTHORITIES

Petitions for reconsideration of administrative decisions are permitted pursuant to NRS 233B.130(4). The hearing officer is required to grant or deny the Petition "at least five days before the expiration of the time for filing the petition for judicial review." A petition for judicial review must be filed within 30 days from the date the hearing officer's decision was filed, NRS 233B.130. Therefore, this Petition must be granted or denied by no later than Friday July 22, 2016.

The grounds for the Petition are as follows:

The hearing officer correctly determined that the termination was not for the good of the public service. However, in formulating the remedy the hearing officer's Decision states "The period of time for the back pay and benefits starts on December 28, 2015 and ends on May 27, 2016, the hearing date."

NRS 284.390(6) states "If 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."

Ending the back pay on May 27, 2016 – the hearing date – violates the statute because Officer Ludwick was not reinstated as of May 28, 2016. He remained dismissed throughout the 30 days that the hearing officer wrote her Decision. He will likely remain dismissed for several more weeks while NDOC processes the paperwork necessary to return him to active duty.

The District Court has consistently reversed hearing officers when they have failed to award full back pay. Attached as Exhibits "1" and "2" are the District Court decisions in the cases of Correctional

///

///


///

///

1 Officers Derland Blake and Vonja Malcic. Because the plain language of NRS 284.390(6) requires
2 "full pay for the period of dismissal", the language of the remedial Order should be changed to "The
3 period of time for the back pay and benefits starts on December 28, 2015 and ends upon the date
4 of reinstatement."

5 DATED this 27th day of June, 2016.

6 LAW OFFICE OF DANIEL MARKS

7 
8 DANIEL MARKS, ESQ.
9 Nevada State Bar No. 002003
10 ADAM LEVINE, ESQ.
11 Nevada State Bar No. 004673
12 610 South Ninth Street
13 Las Vegas, Nevada 89101
14 (702) 386-0536; FAX (702) 386-6812
15 Attorneys for Petitioner/Employee
16
17
18
19
20
21
22
23
24

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS AND BY MAIL

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS and that on the 27th day of June, 2016 I did serve by electronic means (e-mail) and did deposit in the United States Post Office at Las Vegas, Nevada a true and correct copy of the above and foregoing MOTION FOR RECONSIDERATION to the following email and mailing addresses:

SUSANNE SLIWA, Sr. Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Email: SSliwa@ag.nv.gov
CEssaqi@ag.nv.gov
Attorney for Employer/Respondent

And

Cara Brown, Hearing Officer
DEPARTMENT OF ADMINISTRATION
2200 S. Rancho Drive, Suite 220
Las Vegas, Nevada 89102
Email: cara.brown@admin.nv.gov
dgiambelluca@admin.nv.gov
Las Vegas, Nevada 89102

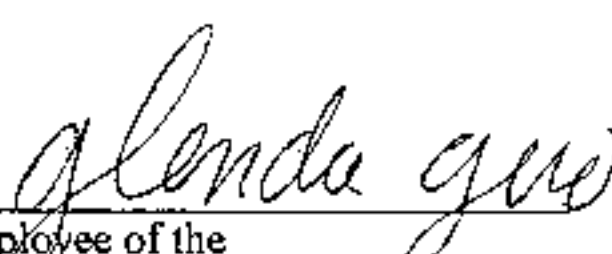

An employee of the
LAW OFFICE OF DANIEL MARKS

EXHIBIT “1”


CLERK OF THE COURT

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
7 530 South Las Vegas Blvd., Suite 300
8 Las Vegas, Nevada 89101
9 (702) 386-0536; FAX (702) 386-6812
10 Attorneys for Petitioner-Employee

11 DISTRICT COURT
12 CLARK COUNTY, NEVADA

13 DERLAND BLAKE

Case No.: A-13-675446-J
Dept. No.: XVI

14 Petitioner-Employee,

15 v.

16 STATE OF NEVADA DEPARTMENT
17 OF CORRECTIONS, and DEPARTMENT
18 OF ADMINISTRATION DIVISION OF
19 HUMANRESOURCES MANAGEMENT,

Date: 05/30/13
Time: 9:00am

20 Respondents- Employer
21 _____

22 **ORDER GRANTING PETITION FOR JUDICIAL REVIEW**

23 Petitioner's Petition For Judicial Review having come before this Court for hearing on May 30,
24 2013 at 9:00 AM, and Petitioner being represented by Adam Levine, Esq. of the Law Office of Daniel
25 Marks, and Respondent Department of Corrections being represented by Chief Deputy Attorney
General Linda C. Anderson, and the Department of Administration having declined to file a Statement
of Intent to participate pursuant to NRS 233B.130(3); and the court having reviewed the administrative
record, and having heard the arguments of counsel;

IT IS HEREBY ORDERED ADJUDGED AND DECREED that the Petition for Judicial
Review is granted. The provisions of NRS 284.390(6) do not grant a State hearing officer discretion to
deny back pay where, as here, the hearing officer determines that the dismissal from the classified
service was without just cause. Moreover, because the hearing officer made specific findings that
Petitioner did not commit the offenses charged, there is no basis to remand the matter back to a hearing


1 officer to determine whether some period of suspension is warranted. Accordingly, Petitioner is
2 entitled to be received his full back pay and emoluments from the date of his termination until the date
3 he was reinstated to his position with the Department of Corrections.

4 DATED this 5th day of June, 2013

5 
6 DISTRICT COURT JUDGE
7 JL

8 Respectfully Submitted by:

9 LAW OFFICE OF DANIEL MARKS

10 
11 DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
12 ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
13 530 S. Las Vegas Blvd., Ste. 300
Las Vegas, Nevada 89101
14 Attorney for Petitioner
Derland Blake
15

16 Approval as to Form and Content:

17 OFFICE OF THE ATTORNEY GENERAL


18 
19 LINDA ANDERSON, ESQ.,
20 Chief Deputy Attorney General
Nevada State Bar No. 004090
21 555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
22 Attorney for Respondent
Department of Corrections
23
24
25

EXHIBIT “2”

CLERK OF THE COURT

01-357,643-413 ACVO **JA 0113**

State of Nevada v. Vanja Malcic
Case No.: A-15-717787-J
Dept. No.: XXVI

ORDERED, ADJUDGED AND DECREED that both the Petition for Judicial Review and the Cross-Petition are Granted. The Court finds that Officer Malcic's failure to provide her sidearm to her fellow correctional officer before going to the restroom constitutes the type of egregious security violation requiring the hearing officer to defer to the appointing authority. Accordingly, the hearing officer erred in ordering Officer Malcic reinstated; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if it is later determined that this Court is incorrect regarding the issue of reinstatement of Officer Malcic, then Officer Malcic is entitled to full back pay retroactive to the date of her termination pursuant to the plain language of NRS 284.390(6).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a status check shall be heard January 11, 2015 at 10:30 AM regarding the request made by Officer Malcic to stay this Court's decision pending an appeal to the Nevada Supreme Court.

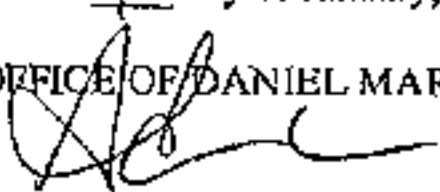
DATED this 5 day of January, 2016.


DISTRICT COURT JUDGE JW

Respectfully submitted by:

DATED this 4th day of January, 2016.

LAW OFFICE OF DANIEL MARKS


DANIEL MARKS, ESQ.

Nevada State Bar No. 002003

ADAM LEVINE, ESQ.

Nevada State Bar No. 004673

610 South Ninth Street

Las Vegas, Nevada 89101

Attorneys for Respondent Vanja Malcic

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 27th 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-F¹

and testimony under oath of the following witnesses:

¹ 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.

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

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

17 **FINDINGS OF FACT**

18 At the time of his termination, Mr. Ludwick had been employed as a
19 Correctional Officer with the NDOC for approximately three years and was assigned to
20 the FMWCC. On April 4, 2015, Mr. Ludwick was assigned to Unit 1 of FMWCC along
21 with two other officers. Approximately 15 to 30 minutes into his shift, Mr. Ludwick
22 testified that he tried unsuccessfully to call his supervisor, then Lieutenant Gary
23 Piccinini, to request permission to switch from Unit 1 to Unit 5, but was unable to
24 reach him by phone. According to Mr. Ludwick, he suffers from severe hypertension
25 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 4th. 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. Ludwick², 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
24 ²²² 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 4th. 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 4th 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
process for taking disciplinary action against such an
employee.

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

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:

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

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

The Commission adopted NAC 284.742 which provides:

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

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

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 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.*

There was no evidence presented to support a finding that the NDOC's ARs were approved by the Commission. Without analyzing the issue of 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

DECISION

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

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

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

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

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

Dated this 24th day of June, 2016.


CARA L. BROWN, ESQ.
Hearings Officer

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

CERTIFICATE OF SERVICE

I hereby certify that, on the 27th day of June, 2016, service of a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION** was made by first class mail, postage prepaid, to:

Brian Ludwick
5900 Sky Pointe Drive #1152
Las Vegas Nevada 89130

and by first class mail, postage prepaid, and email to:

Adam Levine, Esquire
Law Office of Daniel Marks
610 South 9th Street
Las Vegas Nevada 89101
office@danielmarks.net


and by interdepartmental mail to:

James Dzurenda, Director
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

Sharlet Gabriel, HR Administrator
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

and by interdepartmental mail and email to:

Susanne M. Sliwa, Senior Deputy Attorney General
Department of Health and Human Resources
555 Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
ssliwa@ag.nv.gov



D. Giambelluca, Legal Secretary II
Employee of the State of Nevada

BEFORE THE NEVADA STATE PERSONNEL COMMISSION
CARA BROWN, HEARING OFFICER

BRIAN LUDWICK,

Hearing # 1521187-CB

Petitioner/Employee,

Hearing Date: June 1, 2016

v.

Hearing Time: 9:00 a.m

DEPARTMENT OF CORRECTIONS,

Respondent/Employer.

_____ /

Petitioner-Employee's Exhibits

Witness

BEFORE THE NEVADA STATE PERSONNEL COMMISSION
CARA BROWN, HEARING OFFICER

BRIAN LUDWICK,

Case No.: 1521187-CB

Petitioner/Employee,

v.

DEPARTMENT OF CORRECTIONS,

Hearing Date: June 1, 2016

Hearing Time: 9:00 a.m.

Respondent/Employer.

HEARING EXHIBITS

	OFFERED	ADMITTED
1. August 2014 FMLA certification	_____	_____
2. August 2015 FMLA certification	_____	_____
3. NEATS "Attendance Card" for Brian Ludwick for the week of April 1, 2015	_____	_____
4. NOTIS Investigation Detail Report containing Notations that Ludwick was placed on FMLA Leave at the direction of Associate Warden Hill	_____	_____
5. Any documents contained within OIG Case #1521187 Investigative File	_____	_____
6. Code of Federal Regulations subpart 825 governing FMLA	_____	_____
7. Findings of Fact; Conclusions of Law & Decision in <i>Malcic v. Nevada Department of Corrections</i> Hearing #1412349-GP	_____	_____
8. Order Granting Reconsideration, Order Denying Petitioner Nevada Department Of Corrections' Petition for Judicial Review, and Order Granting Respondent/Cross Petitioner Vanja Malcic's Cross Petition for Judicial Review in <i>Malcic v. Nevada Department of Corrections</i> Case No. A-15-717787-J	_____	_____

1. August 2014 FMLA certification

2. August 2015 FMLA certification

3. NEATS "Attendance Card" for Brian Ludwick for the week of April 1, 2015

4. NOTIS Investigation Detail Report containing Notations that Ludwick was placed on FMLA Leave at the direction of Associate Warden Hill

5. Any documents contained within OIG Case #1521187 Investigative File

6. Code of Federal Regulations subpart 825 governing FMLA

7. Findings of Fact; Conclusions of Law & Decision in *Malcic v. Nevada Department of Corrections* Hearing #1412349-GP8. Order Granting Reconsideration, Order Denying Petitioner Nevada Department Of Corrections' Petition for Judicial Review, and Order Granting Respondent/Cross Petitioner Vanja Malcic's Cross Petition for Judicial Review in *Malcic v. Nevada Department of Corrections* Case No. A-15-717787-J

**STATE OF NEVADA
NOTICE OF ELIGIBILITY AND RIGHTS & RESPONSIBILITIES
(FAMILY AND MEDICAL LEAVE ACT)**

In order to be eligible for FMLA leave, you must have worked for the State of Nevada for at least 12 months and have worked at least 1,250 hours in the 12-month period preceding the leave. FMLA leave is provided to employees who are employed by the State of Nevada and who are eligible for FMLA leave. FMLA leave is provided to employees who are employed by the State of Nevada and who are eligible for FMLA leave. FMLA leave is provided to employees who are employed by the State of Nevada and who are eligible for FMLA leave.

PART A: NOTICE OF ELIGIBILITY

DATE: 8/05/14
TO: Brian Ludwig (Employee's Name) 50967 (Employee ID #)
FROM: Hope Chowanski Nevada Department of Corrections Accounting Assistant III PHONE: ph: 775-887-3375 fx: 775-887-3244

On 8/5/14 (Date), you notified us/we became aware that you needed leave beginning on _____ (Date) for:

- ☐ The birth of a child, or the placement of a child with you for adoption or foster care.
- ☒ Your own serious health condition.
- ☐ Because you are needed to care for your ☐ spouse, ☐ child, ☐ parent due to his/her serious health condition.
- ☐ Because of a qualifying exigency arising out of the fact that your ☐ spouse, ☐ son or daughter, ☐ parent is on covered active duty (duty during deployment to a foreign country as a member of the Armed Forces).
- ☐ Because you are the ☐ spouse, ☐ son or daughter, ☐ parent, ☐ next of kin of a covered servicemember of the Armed Forces with a serious injury or illness that was incurred or aggravated in the line of duty on active duty or a veteran who is undergoing medical treatment for a serious injury or illness that occurred any time during the 5 years preceding the date of treatment.

This Notice is to inform you that: (check appropriate boxes; explain where indicated)

- ☒ You are eligible for leave under the FMLA (See Part B below for Rights and Responsibilities).
- ☐ You are not eligible for leave under the FMLA because:
- ☐ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately _____ months towards this requirement.
- ☐ You have not met the FMLA's 1,250 hours-worked requirement.

NOTE: If you have questions regarding this determination contact Hope Chowanski or view the FMLA poster attached.

PART B: RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA available in the applicable 12-month period. However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by 8/22/14.

- ☒ Sufficient certifications to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request is enclosed.
- ☐ Sufficient documentation to establish the required relationship between you and the qualifying individual.
- ☒ Other: NPD-60- FMLA LEAVE OF ABSENCE
CERTIFICATION from HEALTH CARE PROVIDER for ☒ SELF ☐ FAMILY MEMBER
- ☐ No additional information requested.

Note: If a certification is requested, you must be allowed at least 15 calendar days from receipt of this notice to respond; additional time may be required in some circumstances. If sufficient information is not provided in a timely manner, your leave may be denied.

EMPLOYEE RESPONSIBILITIES If you take FMLA leave, you will have the following responsibilities while on FMLA leave. (Only checked boxes apply.)

With the exception of a qualifying workers' compensation event, you will be required to exhaust all accumulated compensatory time and all forms of paid leave time for which you are eligible prior to using leave without pay (NAC 284.5811). This absence will involve the use of the type(s) of leave indicated in order.

- ☒ Sick Leave ☐ Family Sick Leave ☒ Compensatory Time ☒ Annual Leave ☐ Catastrophic Leave

- ☒ You are authorized to begin using FMLA codes on your timesheet for any leave used in conjunction with this event. If this event is later determined not to be eligible for FMLA leave, then the agency will change these codes as appropriate and notify you of the changes. You should use the following codes:

☒ UFMSL (SICK LEAVE) ☐ UFMFS (FAMILY SICK LEAVE) ☒ UFMCT (COMP. LEAVE) ☒ UFMAL (ANNUAL LEAVE)
☒ UFMPL (LEAVE WITHOUT PAY) ☒ UFMHL (HOLIDAY) WITH THE (F) REASON CODE IN THIS ORDER IF NEEDED

During FMLA leave the State must maintain your group health insurance on the same basis as if you were not on leave. If you normally pay a portion of the premiums for your group health insurance [e.g. Self-Funded PPO participant deduction, coverage through a health maintenance organization (HMO)], you will continue to be responsible for these payments during your FMLA leave. The following apply.

JA 0133

STATE OF NEVADA
CERTIFICATION OF HEALTH CARE PROVIDER FOR EMPLOYEE'S SERIOUS HEALTH
CONDITION (FAMILY MEDICAL LEAVE ACT)

SECTION I: For Completion by the AGENCY

INSTRUCTIONS to the AGENCY: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1).

Agency: Nevada Department of Corrections	Agency Contact: Hope Chowanski ph: 775-887-3375 fx: 775-887-3244
Employee's job title: Correctional Officer	Employee's essential job functions/job description is attached. <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Regular work schedule:	

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections, 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name:				
Brian	Ludwick		50867	3725
(First)	(Middle)	(Last)	(Employee ID #)	(Budget #)

SECTION III: For Completion by HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Please be sure to sign the form on the last page.

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Provider's name: Caprice Hutchison, APN	Business address:
Type of practice/Medical specialty: 2704 North Tanaya Las Vegas, NV 89128	IM
Telephone number: 702-243-8500	Fax number:

Part A — MEDICAL FACTS

(1) Approximate date condition commenced:

Jan 2014

X

Probable duration of condition:

lifetime

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility? ☐ Yes ☒ No

If so, dates of admission:

Date(s) you treated the patient for condition:

8-4-14

Will the patient need to have treatment visits at least twice per year due to the condition? ☒ Yes ☐ NoWas medication, other than over-the-counter medication, prescribed? ☒ Yes ☐ NoWas the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)? ☐ Yes ☒ No

If so, state the nature of such treatments and expected duration of treatment:

(2) Is the medical condition pregnancy? ☐ Yes ☒ No

If so, expected delivery date:

(3) Use the information provided by the employer (see Section I and attached) to answer this question. If the employer fails to provide a list of the employee's essential job functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition? ☐ Yes ☒ No

If so, identify the job functions the employee is unable to perform:

(4) Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

has hypertension -
needs to be off when
BP is too high

Part B — AMOUNT OF LEAVE NEEDED

- (5) Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ☐ Yes ☒ No

If so, estimate the beginning and ending dates for the period of incapacity:

- (6) Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ☒ Yes ☐ No

If so, are the treatments or the reduced number of hours of work medically necessary? ☒ Yes ☐ No

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

1-2 x mo.

Estimate the part-time or reduced work schedule the employee needs, if any:

8 hour(s) per day; 1-2 days per ^{mo} week from 8-4-14 through 8-4-15

- (7) Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ☒ Yes ☐ No

Is it medically necessary for the employee to be absent from work during the flare-ups? ☒ Yes ☐ No

If so, explain: BP too high

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency: 1-2 times per week(s) ☒ month(s)

Duration: 8 hours or 1 day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

Signature of Health Care Provider

Cynthia Hutchison NP

Date

8-12-14

NPD-83 1/11

**STATE OF NEVADA
FAMILY MEDICAL LEAVE ACT
DESIGNATION FORM**

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. When the employer has enough information to determine whether leave is being taken for a FMLA-qualifying reason, the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days.

29 C.F.R. § 825.300

DATE:

9/04/14

TO:

Brian Ludwig50867

(Employee's name)

(ID#)

FROM:

Nevada Department of Corrections

(Agency)

Hope Chowanski Accounting Assistant III, Nevada Department of Corrections

(Name & title of appropriate agency representative)

PHONE: 775-887-3375

We have reviewed the documentation related to your leave request that potentially qualifies under the FMLA. We received your most recent information on 8/29/14 and the following determination has been made:

☒ **FMLA leave is approved. All leave taken for this reason will be designated as FMLA leave.**

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change, leave dates are extended, or your circumstances change. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

☐ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your entitlement:

Intermitt basis 8/29/14 to 8/29/15 1 to 2 times a month, lasting
1 day - Not to exceed 480 hours in rolling year

☒ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA leave entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

☐ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

☒ We are requiring you to substitute or use paid leave during your FMLA leave.

☐ You will be required to present a medical release certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided.

A list of the essential functions of your position is attached. ☐ Yes ☐ No

If attached, the medical release certification must address your ability to perform these functions.

A FMLA medical release form (NPD-81) is attached. ☐ Yes ☐ No

☐ Additional information is needed to determine if your FMLA leave request can be approved:

- ☐ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide additional information no later than _____ (at least seven calendar days is allowed), unless it is not practicable under the particular circumstance despite your diligent good faith efforts, or your leave may be denied.

The information needed is:

- ☐ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

☐ FMLA leave is not approved because:

- ☐ The FMLA does not apply to your leave request.
- ☐ Failure to provide appropriate medical documentation.
- ☐ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

Appointing Authority Signature and Comments:

John Chocomaust
(Signature of Appointing Authority or Designee)

09/04/14
(Date)

Comments:

Please read attached e-mail for any coding/ directions

cc: Employee's Agency Confidential Medical File

STATE OF NEVADA
NOTICE OF ELIGIBILITY AND RIGHTS & RESPONSIBILITIES
(FAMILY AND MEDICAL LEAVE ACT)

In general, to be eligible an employee must have worked for an employer for at least 12 months and have worked at least 1,250 hours in the 12 months preceding the leave. A fully completed Form NPD-62 provides employees with the information required by 29 C.F.R. § 825.100(b) which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave as required by 29 C.F.R. § 825.300(b)(6).

PART A: NOTICE OF ELIGIBILITY

DATE: 6/22/15

TO: BRIAN LUDWICK
 (Employee's Name)

50867 / 3761
 (Employee ID #)

FROM: Jennifer McComb Nevada Department of Corrections Accounting Assistant III PHONE: ph:775-887-3314 fx:775-887-3244

On 06/18/2015, we were notified/became aware that you needed leave beginning on 08/29/2015 for
 (Date) (Date)

- ☐ The birth of a child, or the placement of a child with you for adoption or foster care.
- ☒ Your own serious health condition.
- ☐ Because you are needed to care for your ☐ spouse, ☐ child, ☐ parent due to his/her serious health condition.
- ☐ Because of a qualifying exigency arising out of the fact that your ☐ spouse, ☐ son or daughter, ☐ parent is on covered active duty (duty during deployment to a foreign country as a member of the Armed Forces).
- ☐ Because you are the ☐ spouse, ☐ son or daughter, ☐ parent, ☐ next of kin of a covered servicemember of the Armed Forces with a serious injury or illness that was incurred or aggravated in the line of duty on active duty or a veteran who is undergoing medical treatment for a serious injury or illness that occurred any time during the 5 years preceding the date of treatment.

This Notice is to inform you that: (check appropriate boxes; explain where indicated)

- ☒ You are eligible for leave under the FMLA (See Part B below for Rights and Responsibilities).
- ☐ You are not eligible for leave under the FMLA because:
- ☐ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately _____ months towards this requirement
- ☐ You have not met the FMLA's 1,250 hours-worked requirement.

NOTE: If you have questions regarding this determination contact Jennifer McComb or view the FMLA poster located at attached

PART B: RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA available in the applicable 12-month period. However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by 08/29/2015.

- ☒ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request is enclosed.
- ☐ Sufficient documentation to establish the required relationship between you and the qualifying individual.
- ☒ Other: NPD-60- FMLA LEAVE OF ABSENCE FORM
NPD-83-HEALTH CARE PROVIDER for EMPLOYEE'S SERIOUS HEALTH CONDITION
- ☐ No additional information requested.

Note: If a certification is requested, you must be allowed at least 15 calendar days from receipt of this notice to respond; additional time may be required in some circumstances. If sufficient information is not provided in a timely manner, your leave may be denied.

EMPLOYEE RESPONSIBILITIES: If your leave does qualify as FMLA leave, you will have the following responsibilities while on FMLA leave (only checked boxes apply):

With the exception of a qualifying workers' compensation event, you will be required to exhaust all accumulated compensatory time and all forms of paid leave time for which you are eligible prior to using leave without pay (NAC 284.5811). This absence will involve the use of the type(s) of leave indicated.

☒ Compensatory Time ☒ Annual Leave ☒ Sick Leave ☐ Family Sick Leave ☐ Catastrophic Leave ☐ N/A

☒ You are authorized to begin using FMLA codes on your timesheet for any leave used in conjunction with this event. If this event is later determined not to be eligible for FMLA leave, then the agency will change these codes as appropriate and notify you of the changes. You should use the following codes:

☒ UFMSL(SICK LEAVE) ☐ UFMFS(FAMILY SICK LEAVE) ☒ UFMCT(COMP LEAVE) ☒ UFMAL(ANNUAL LEAVE) ☒ UFMPL(LEAVE WITHOUT PAY) WITH THE (F1) REASON CODE IN THIS ORDER IF NEEDED.

During FMLA leave the State must maintain your group health insurance on the same basis as if you were not on leave. If you normally pay a portion of the premiums for your group health insurance [e.g. Self-Funded PPO participant deduction, coverage through a health maintenance organization (HMO)], you will continue to be responsible for these payments during your FMLA leave. The following apply:

- ☐ While you are on paid leave, your health insurance will be deducted through normal payroll deductions.
- ☐ While you are on unpaid leave, you are responsible for making premium payments on the 20th day of each month for insurance coverage for that calendar month. You have a 30-day grace period in which to make payment. If payment has not been made during the grace period, your group health insurance may be canceled provided you are notified in writing at least 15 days before your health coverage will cease. Premium payment will be made to:

☒ The Public Employees' Benefit Program

☐ _____ (Other)

- ☐ You have decided to discontinue your insurance coverage during your FMLA leave. You will be restored to coverage upon your return from leave and will not be required to re-qualify for coverage.

If you normally pay premiums for optional insurance (e.g. dependent health insurance, supplemental life insurance, auto insurance) you will continue to be responsible for these payments during your FMLA leave. The following apply:

- ☒ While you are on paid leave, your optional insurance will be deducted through normal payroll deductions.
- ☒ While you are on unpaid leave, you are responsible for making premium payments to the Public Employees' Benefit Program or the applicable vendor (plan administrator) responsible for the coverage. Any questions regarding continuation of health coverage should be directed to the Public Employees' Benefit Program at (775) 684-7000.

- ☐ You are considered as a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We ☐ have ☐ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous harm to us.

- ☒ While on leave, you will be required to furnish us with periodic reports of your status and intent to return to work every UPON REQUEST. (Indicate interval of reports, as appropriate for the particular leave situation.)

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

EMPLOYEE RIGHTS - If your leave does qualify as FMLA leave, you will have the following rights while on FMLA leave:

- You have a right under the FMLA for:
 - ☒ Up to 12 weeks of leave in a 12-month period calculated as a "rolling" 12-month period measured backward from the date of any FMLA usage.
 - ☐ Up to 26 weeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on: _____
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protective leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have the return rights under FMLA.)
- If you do not retire or do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which could entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered service member's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have any compensatory, annual, sick and catastrophic leave run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the use of paid leave are referenced in NAC 284.523 through 284.598. Check with your agency personnel representative for any leave use policies specific to your agency. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

Once we obtain the information from you as specified above, we will inform you, within 5 working days, whether your leave will be designated as FMLA leave and count toward your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

Jennifer McComb Nevada Department of Corrections Accounting Assistant III at ph:775-887-3314 fx:775-887-3244
Name Phone

cc: Employee's Agency Confidential Medical File

STATE OF NEVADA
CERTIFICATION OF HEALTH CARE PROVIDER FOR EMPLOYEE'S SERIOUS HEALTH
CONDITION (FAMILY MEDICAL LEAVE ACT)

SECTION I: For Completion by the AGENCY

INSTRUCTIONS to the AGENCY: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1).

Agency: Nevada Department of Corrections	Agency Contact: Jennifer McComb ph: 775-887-3314 fx: 775-887-3244
Employee's job title: CORRECTIONAL OFFICER	Employee's essential job functions/job description is attached. <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Regular work schedule:	

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

BRIAN	H	LUDWICK	50867 / 3761
(First)	(Middle)	(Last)	(Employee ID #)

SECTION III: For Completion by HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Please be sure to sign the form on the last page.

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Provider's name: Michael Coyne	Business address: 1000 S. Rainbow Blvd Las Vegas NV 89145 Healthcare Partners Medical Group 1000 S. Rainbow Blvd. Las Vegas, NV 89145
Type of practice/Medical specialty: F-P	
Telephone number: 702-255-4200	Fax number: 702-255-0200

Part A — MEDICAL FACTS

(1) Approximate date condition commenced: 11/2014Probable duration of condition: 7/11/15 - 7/11/16Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility? ☐ Yes ☒ No

If so, dates of admission: _____

Date(s) you treated the patient for condition: 7/16/15, 6/11/15Will the patient need to have treatment visits at least twice per year due to the condition? ☒ Yes ☐ NoWas medication, other than over-the-counter medication, prescribed? ☒ Yes ☐ NoWas the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)? ☐ Yes ☒ No

If so, state the nature of such treatments and expected duration of treatment: _____

(2) Is the medical condition pregnancy? ☐ Yes ☒ No

If so, expected delivery date: _____

(3) Use the information provided by the employer (see Section I and attached) to answer this question. If the employer fails to provide a list of the employee's essential job functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition? ☐ Yes ☐ No

If so, identify the job functions the employee is unable to perform: _____

(4) Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

HypertensionPalpitationsAnxiety

Part B — AMOUNT OF LEAVE NEEDED

- (5) Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ☐ Yes ☒ No

If so, estimate the beginning and ending dates for the period of incapacity:

- (6) Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ☐ Yes ☒ No

If so, are the treatments or the reduced number of hours of work medically necessary? ☐ Yes ☐ No *N/A*

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

N/A

Estimate the part-time or reduced work schedule the employee needs, if any: *N/A*

_____ hour(s) per day; _____ days per week from _____ through _____

- (7) Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ☒ Yes ☐ No

Is it medically necessary for the employee to be absent from work during the flare-ups? ☒ Yes ☐ No

If so, explain: *Patient may have a flare-up preventing him from working*

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency: *1-4* times per _____ week(s) *1* month(s)

Duration: *4-8* hours or *1-4* day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

[Signature]
Signature of Health Care Provider

[Signature]
Date

NPD-83 1/11

**STATE OF NEVADA
FAMILY MEDICAL LEAVE ACT
DESIGNATION FORM**

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. When the employer has enough information to determine whether leave is being taken for a FMLA-qualifying reason, the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days. 29 C.F.R. § 825.300

DATE: 07/06/15

TO: BRIAN H LUDWICK 50867 / 3761
(Employee's name) (ID#)

FROM: Nevada Department of Corrections
(Agency)

Jennifer McComb Accounting Assistant III Nevada Department of Corrections
(Name & title of appropriate agency representative)

PHONE: 775-887-3314

We have reviewed the documentation related to your leave request that potentially qualifies under the FMLA. We did receive your completed packet as of 07/06/15 and the following determination has been made:

☒ **FMLA leave is approved. All leave taken for this reason will be designated as FMLA leave.**

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change, leave dates are extended, or your circumstances change. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

☐ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your entitlement:

Intermittent from 8/29/15 to 8/29/16 at 1-4 times per month, lasting 1-4 days per episode. Not to exceed 480 hours in a rolling year.

☒ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA leave entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

☐ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

☒ We are requiring you to substitute or use paid leave during your FMLA leave.

☐ You will be required to present a medical release certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided.

A list of the essential functions of your position is attached. ☐ Yes ☐ No

If attached, the medical release certification must address your ability to perform these functions.

A FMLA medical release form (NPD-81) is attached. ☐ Yes ☐ No

☒ Additional information is needed to determine if your FMLA leave request can be approved.

- ☐ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide additional information no later than _____ (at least seven calendar days is allowed), unless it is not practicable under the particular circumstance despite your diligent good faith efforts, or your leave may be denied.

The information needed is:

- ☐ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

☒ FMLA leave is not approved because:

- ☐ The FMLA does not apply to your leave request.
- ☐ Failure to provide medical documentation.
- ☐ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

Appointing Authority Signature and Comments:


(Signature of Appointing Authority or Designee)

7/6/15
(Date)

Comments

Remember, you are only allowed 480 hours of FMLA entitlement in a rolling year. If you have any questions, please feel free to contact me.

cc: Employee's Agency Confidential Medical File

- ☒ While you are on paid leave, your health insurance will be deducted through normal payroll deductions.
- ☒ While you are on unpaid leave, you are responsible for making premium payments on the 20th day of each month for insurance coverage for that calendar month. You have a 30-day grace period in which to make payment. If payment has not been made during the grace period, your group health insurance may be canceled provided you are notified in writing at least 15 days before your health coverage will cease. Premium payment will be made to:

☒ The Public Employees' Benefit Program

☐ _____ (Other)

- ☐ You have decided to discontinue your insurance coverage during your FMLA leave. You will be restored to coverage upon your return from leave and will not be required to re-qualify for coverage.

If you normally pay premiums for optional insurance (e.g. dependent health insurance, supplemental life insurance, auto insurance) you will continue to be responsible for these payments during your FMLA leave. The following apply:

- ☒ While you are on paid leave, your optional insurance will be deducted through normal payroll deductions.
- ☒ While you are on unpaid leave, you are responsible for making premium payments to the Public Employees' Benefit Program or the applicable vendor (plan administrator) responsible for the coverage. Any questions regarding continuation of health coverage should be directed to the Public Employees' Benefit Program at (775) 684-7000.

- ☐ You are considered as a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We ☐ have ☐ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous harm to us.

- ☒ While on leave, you will be required to furnish us with periodic reports of your status and intent to return to work UPON REQUEST. (Indicate interval of reports, as appropriate for the particular leave situation.)

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

EMPLOYEE RIGHTS: If your leave does qualify as FMLA leave, you will have the following rights while on FMLA leave:

- You have a right under the FMLA for:
 - ☒ Up to 12 weeks of leave in a 12-month period calculated as a "rolling" 12-month period measured backward from the date of any FMLA usage.
 - ☐ Up to 26 weeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on: _____
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protective leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have the return rights under FMLA.)
- If you do not retire or do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which could entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered service member's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have any compensatory, annual, sick and catastrophic leave run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the use of paid leave are referenced in NAC 284.523 through 284.598. Check with your agency personnel representative for any leave use policies specific to your agency. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

Once we obtain the information from you as specified above, we will inform you, within 5 working days, whether your leave will be designated as FMLA leave and count toward your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

Hope Chowanski Nevada Department of Corrections Accounting Assistant III at Ph: 775-887-3375 fax: 775-887-3244.
Name Phone

cc: Employee's Agency Confidential Medical File

NPD-62
Rev. 2/10

JA 0146

Attendance Card

Employee Name Lodwick, Brian C/O

Internal ID# 50867

Hire Date

	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon					
JAN					1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
				CO	CO		CO	CO				CO	CO	CO	CO						SL					SL	SL	SL	SL	COB			CO	COB	COB
FEB	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28							
	COB	CO			COB	SL	CO	SL	CO			COB	CO	CO	CO							LWO				USA	USA	USA							
MAR	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31				
	USA	USA			USA	USA	USA	USA			POT	USA	USA	USA	USA			USA			POT	USA				USA	RYO	POT	USA	SL					
											U7A																								
					1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	
					USA	POT	USA	SL	SL			U1B	U1A	POT	POT	POT			U1B	U1A	POT	U1A	U1B	U1A		SLP	OP	PP	PP	SL		POT	PP		
					1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
MAY					SL	SL	SL				PP	PP	PP	PP	POT				PP	PP	PP	PP	PP			PP	PP	PP	PP	PP		LWO	PP	PP	PP
JUN		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30				
				PP	PP	PP	PP	PP																											
				1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	
JUL																																			
AUG																																			
SEP																																			
NOV																																			
DEC																																			

Monday, June 01, 2015

Page 1 of 1



State of Nevada Department of Corrections

Investigation Detail Report

Investigation

Investigator: EMLING, ARTHUR
Assigned Date: 04/29/2015
Report Due Date: 05/20/2015
Disposition Date:

IR Number: IR-2015-SNWCC-000409
Occurrence Date: 04/04/2015
IA Number: IA-2015-0058
IN Number: IN-
Institution: SNWCC

Referral

Referred By: HILL, TANYA
Referred Date: 04/06/2015 08:37
Referral Detail: Possible abuse of FMLA. Sharlet Gabriel notified via email 4/6/15.

Narrative

alleged staff misconduct.

Staff Involvement

Staff Name	Participation										
LUDWICK, BRIAN	Participant										
Comment:											
<ul style="list-style-type: none"> <u>Allegations</u> <table> <tr> <th>Alleg#</th><th>Incident Subtype</th></tr> <tr> <td>1</td><td>Neglect of Duty</td></tr> <tr> <td>1</td><td>Neglect of Duty</td></tr> <tr> <td>1</td><td>Neglect of Duty</td></tr> <tr> <td>2</td><td>Neglect of Duty</td></tr> </table> 		Alleg#	Incident Subtype	1	Neglect of Duty	1	Neglect of Duty	1	Neglect of Duty	2	Neglect of Duty
Alleg#	Incident Subtype										
1	Neglect of Duty										
1	Neglect of Duty										
1	Neglect of Duty										
2	Neglect of Duty										

Staff Name	Participation				
PICCININI, GARY	Reporting				
Comment:					
<ul style="list-style-type: none"> <u>Reports</u> <table> <tr> <th>Report Type</th><th>Report Detail</th></tr> <tr> <td>INC028</td><td>On April 4, 2015, I, Lieutenant G. Piccinini was in shift command when at 0532 hours Officer Ludwick entered. Officer Ludwick requested that I switch him out of Unit 1 with Officer Ennis-Wright who was currently assigned to Unit 5. Officer Ludwick did not telephone in advance requesting permission to leave his assigned post. Officer Ludwick stated that he is used to unit 5</td></tr> </table> 		Report Type	Report Detail	INC028	On April 4, 2015, I, Lieutenant G. Piccinini was in shift command when at 0532 hours Officer Ludwick entered. Officer Ludwick requested that I switch him out of Unit 1 with Officer Ennis-Wright who was currently assigned to Unit 5. Officer Ludwick did not telephone in advance requesting permission to leave his assigned post. Officer Ludwick stated that he is used to unit 5
Report Type	Report Detail				
INC028	On April 4, 2015, I, Lieutenant G. Piccinini was in shift command when at 0532 hours Officer Ludwick entered. Officer Ludwick requested that I switch him out of Unit 1 with Officer Ennis-Wright who was currently assigned to Unit 5. Officer Ludwick did not telephone in advance requesting permission to leave his assigned post. Officer Ludwick stated that he is used to unit 5				

Report Name: IGIDR
Reference Name: NOTIS-RPT-OR-0185.7
Run Date: MAY-27-15 12:03 PM

Page 1 of 2

JA 0148



State of Nevada Department of Corrections

Investigation Detail Report

Investigation

Investigator: EMLING, ARTHUR
Assigned Date: 04/29/2015
Report Due Date: 05/20/2015
Disposition Date:

IR Number: IR-2015-SNWCC-000409
Occurrence Date: 04/04/2015
IA Number: IA-2015-0058
IN Number: IN-
Institution: SNWCC

Staff Involvement

● Reports

Report Type Report Detail

and does not know Unit 1. I told him no. Officer Ludwick asked why? I informed him that he needs to learn Unit 1. Officer Ludwick then became angry and stated "Well how about I use FMLA then because I have not taken my blood pressure medication, Hows that!" I informed him that is fine with me and before I could attempt to talk with him he stormed out of the office. When I had posted Officer Ludwick to Unit 1 at the beginning of shift, he had asked me who was in Unit 5 today. It is apparent that Officer Ludwick is not happy with where he was posted. He did not make any attempts at speaking with me prior to this conversation about where he was posted and his condition. Unit 1 had three Officers assigned today, making it relevant to keep him in there to be trained. Officer Ludwick has been assigned to FMWCC since February 23, 2015, and has only worked Unit 1 once prior to today. Officer Ludwicks conduct would suggest that he is falsely using FMLA because he did not get what he wanted.

Officer Ludwick is assigned to the Unit 3 position at FMWCC on day shift. This position is a pull/shut down position. AOD AW Hill notified at 0610 hours.

AW Hill instructed for me to document this incident in NOTIS, put Officer Ludwick out on AWOL for the remainder of the shift, and send her my report via e-mail so she can follow up with it on Monday.

...[GPICININI, 04/04/2015 10:20:01] Per AW Hill, leave Officer Ludwick on FMLA status until investigation is complete. NSIS records changed to indicate FMLA.



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

555 E. Washington Ave. Suite 3900
Las Vegas, Nevada 89101

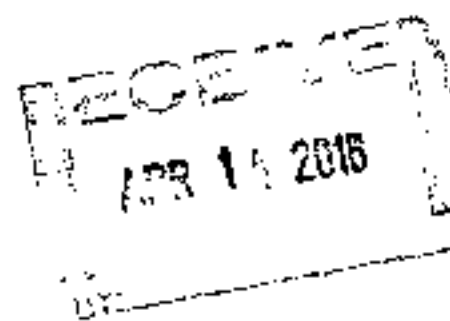
ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
*First Assistant
Attorney General*

NICHOLAS A. TRUTANICH
*First Assistant
Attorney General*

April 13, 2016

Adam Levine, Esq.
Law Office of Daniel Marks
530 S. Las Vegas Boulevard, #300
Las Vegas, Nevada 89101



RE: Ludwick v. NDOC
Case # 1521187-CB

Dear Mr. Levine:

I am responding to your email request of April 7, 2016. Pursuant to NRS 289.080(8) I am producing the complete internal investigation materials, including audio recordings of the investigation interviews.

Thank you for your courtesy and cooperation. If you have any questions or comments, please do not hesitate to contact me.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: Susanne M. Sliwa
Susanne M. Sliwa
Senior Deputy Attorney General

Encls.



Patrick Cates
Director

Lee-Ann Easton
Administrator

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION
Division of Human Resource Management
100 N. Stewart Street, Suite 200 | Carson City, Nevada 89701
Phone: (775) 684-0150 | <http://hr.nv.gov>

MEMORANDUM

October 20, 2015

TO: E.K. McDaniel, ~~Interim~~ Director
Department of Corrections

FROM: Lee-Ann Easton, Administrator *Lee-Ann Easton*
Division of Human Resource Management

RE: 60-day Extension Request -- Brian Ludwick (IA-2015-0058)

In response to your request of a 60-day extension to make a determination and notify the employee of disciplinary actions resulting from an investigation for Brian Ludwick, Correctional Officer; your extension has been granted.

Pursuant to NRS 284.387, sub-section 2, please be advised that any further extension requests regarding Brian Ludwick, Correctional Officer, can only be granted by the Governor's Office.

LE:tp



State of Nevada Department of Corrections

Investigation Detail Report

Investigation

Investigator: EMLING, ARTHUR
Assigned Date: 04/29/2015
Report Due Date: 05/20/2015
Disposition Date:

IR Number: IR-2015-SNWCC-000409
Occurrence Date: 04/04/2015
IA Number: IA-2015-0058
IN Number: IN-
Institution: SNWCC

Referral

Referred By: HILL, TANYA
Referred Date: 04/06/2015 08:37
Referral Detail: Possible abuse of FMLA. Sharlet Gabriel notified via email 4/6/15.

Narrative

alleged staff misconduct.

Staff Involvement

Staff Name	Participation										
LUDWICK, BRIAN	Participant										
Comment:											
<ul style="list-style-type: none"> Allegations <table> <tr> <th>Alleg#</th><th>Incident Subtype</th></tr> <tr> <td>1</td><td>Neglect of Duty</td></tr> <tr> <td>1</td><td>Neglect of Duty</td></tr> <tr> <td>1</td><td>Neglect of Duty</td></tr> <tr> <td>2</td><td>Neglect of Duty</td></tr> </table> 		Alleg#	Incident Subtype	1	Neglect of Duty	1	Neglect of Duty	1	Neglect of Duty	2	Neglect of Duty
Alleg#	Incident Subtype										
1	Neglect of Duty										
1	Neglect of Duty										
1	Neglect of Duty										
2	Neglect of Duty										

Staff Name	Participation				
PICCININI, GARY	Reporting				
Comment:					
<ul style="list-style-type: none"> Reports <table> <tr> <th>Report Type</th><th>Report Detail</th></tr> <tr> <td>INC028</td><td>On April 4, 2015, I, Lieutenant G. Piccinini was in shift command when at 0532 hours Officer Ludwick entered. Officer Ludwick requested that I switch him out of Unit 1 with Officer Ennis-Wright who was currently assigned to Unit 5. Officer Ludwick did not telephone in advance requesting permission to leave his assigned post. Officer Ludwick stated that he is used to unit 5</td></tr> </table> 		Report Type	Report Detail	INC028	On April 4, 2015, I, Lieutenant G. Piccinini was in shift command when at 0532 hours Officer Ludwick entered. Officer Ludwick requested that I switch him out of Unit 1 with Officer Ennis-Wright who was currently assigned to Unit 5. Officer Ludwick did not telephone in advance requesting permission to leave his assigned post. Officer Ludwick stated that he is used to unit 5
Report Type	Report Detail				
INC028	On April 4, 2015, I, Lieutenant G. Piccinini was in shift command when at 0532 hours Officer Ludwick entered. Officer Ludwick requested that I switch him out of Unit 1 with Officer Ennis-Wright who was currently assigned to Unit 5. Officer Ludwick did not telephone in advance requesting permission to leave his assigned post. Officer Ludwick stated that he is used to unit 5				

Report Name: IGIDR
Reference Name: NOTIS-RPT-OR-0185.7
Run Date: MAY-27-15 12:03 PM

Page 1 of 2

JA 0152



State of Nevada Department of Corrections

Investigation Detail Report

Investigation

Investigator: EMLING, ARTHUR
Assigned Date: 04/29/2015
Report Due Date: 05/20/2015
Disposition Date:

IR Number: IR-2015-SNWCC-000409
Occurrence Date: 04/04/2015
IA Number: IA-2015-0058
IN Number: IN-
Institution: SNWCC

Staff Involvement

● Reports

Report Type Report Detail

and does not know Unit 1. I told him no. Officer Ludwick asked why? I informed him that he needs to learn Unit 1. Officer Ludwick then became angry and stated "Well how about I use FMLA then because I have not taken my blood pressure medication, Hows that!" I informed him that is fine with me and before I could attempt to talk with him he stormed out of the office. When I had posted Officer Ludwick to Unit 1 at the beginning of shift, he had asked me who was in Unit 5 today. It is apparent that Officer Ludwick is not happy with where he was posted. He did not make any attempts at speaking with me prior to this conversation about where he was posted and his condition. Unit 1 had three Officers assigned today, making it relevant to keep him in there to be trained. Officer Ludwick has been assigned to FMWCC since February 23, 2015, and has only worked Unit 1 once prior to today. Officer Ludwicks conduct would suggest that he is falsely using FMLA because he did not get what he wanted.

Officer Ludwick is assigned to the Unit 3 position at FMWCC on day shift. This position is a pull/shut down position. AOD AW Hill notified at 0610 hours.

AW Hill instructed for me to document this incident in NOTIS, put Officer Ludwick out on AWOL for the remainder of the shift, and send her my report via e-mail so she can follow up with it on Monday.

...[GPICININI, 04/04/2015 10:20:01] Per AW Hill, leave Officer Ludwick on FMLA status until investigation is complete. NSIS records changed to indicate FMLA.

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
OFFICE OF THE INSPECTOR GENERAL
MEMORANDUM

DATE: June 12, 2015

TO: White, Preshess, Correctional Officer, Florence McClure Women's Correctional Center,
Las Vegas, NV

FROM: Arthur Emling Jr, Criminal Investigator II, Las Vegas, NV

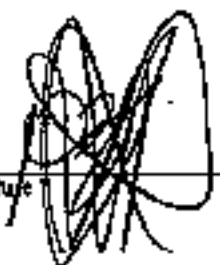
SUBJECT: Admonition of Confidentiality IA-2014-0058

You are ordered not to discuss this case or any portion of your interview concerning the allegations under investigation in this matter with anyone. You are ordered not to have any interaction, engage in any conversations with, intimidate, threaten or coerce any other participant, witness, accused or reporting party, about this matter or the investigation. This admonition covers all questions asked, your responses to those questions, and any reports authored by you. You are not to discuss any conversations related to your interview and the matter under investigation. You are not to share copies of any tape recordings of this interview that may be in your possession with any person.

In the event this order is violated, you may be subject to new and/or additional disciplinary action, up to and including termination.

Your signature below confirms that you have read, understand and agree to follow this admonition.

06-12-15
Date

Signature 

Any information that a representative obtains from the peace officer who is the subject of the investigation is confidential and must not be disclosed, except under the prescribed mandated circumstances outlined in NRS 289.080.

Any information that a representative obtains from the peace officer who is a witness concerning the investigation is confidential and must not be disclosed as outlined in NRS 289.080.

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
NOTICE OF ADMINISTRATIVE
PEACE OFFICER WITNESS INTERVIEW

TO: White, Preshess, Correctional Officer, Florence McClure Women's Correctional Center, Las Vegas, NV

FROM: Arthur Emling Jr., Criminal Investigator I, Office of Inspector General, Las Vegas, NV

DATE: June 12, 2015

This is to advise you that you are a witness in connection to an internal administrative investigation. While investigators gather the facts concerning the allegations, your full cooperation is requested and expected. This investigation is based upon one or more allegations of improper conduct or activity that has been received by this office. Nothing in this process shall abridge any rights guaranteed by the Constitution of the United States or any other applicable law or regulation.

Pursuant to State law you have the right to have two representatives of your choosing present during an interview relating to the investigation, including without limitation, a lawyer, a representative of a labor union or another peace officer only. You have not less than 48 hours to obtain a lawyer or other authorized representative, if you so choose. The presence of the second representative must not create an undue delay in either the scheduling or conducting of the interview. The representative must not be a person connected to or named as a subject of the investigation.

You are directed to make yourself available for interview on 06-12-15. The interview will be held at FMWCC. You are expected to provide candid and truthful information during the interview. Criminal Investigator Arthur Emling Jr will be conducting the interview. Providing false or misleading statements to the interviewer is a separate violation that could result in additional disciplinary action, including termination.

This is an official investigation being conducted by the Department of Corrections. All matters are strictly confidential. In order to protect your confidentiality, the rights of other employees and involved persons, and the integrity of the investigation, you are hereby directed not to participate in the dissemination/discussion of any information based on this investigative process. In addition, you will exclude yourself from any form of communication with others regarding this investigation. Information shared with your representative is excluded from this directive. Any violation of this confidentiality directive or attempts to influence any witness or victim is a separate violation that could result in additional disciplinary action, including termination.

☒

I waive my right to have an attorney/representative present.

☐

I wish to have _____ represent me during this interview:

Any information that a representative obtains from the peace officer who is a witness concerning the investigation is confidential and must not be disclosed.

IMPORTANT: Your signature is merely an acknowledgement of receipt of this notice. Your refusal to sign this notice when ordered to do so may result in disciplinary action against you.



EMPLOYEE SIGNATURE

06-12-15
DATE



PERSON SERVING SIGNATURE

06-12-15
DATE

**STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
OFFICE OF THE INSPECTOR GENERAL
MEMORANDUM**

DATE: June 2, 2015

TO: Terry Day, Senior Correctional Officer, Florence McClure Women's Correctional Center, Las Vegas, NV

FROM: Arthur Emling Jr, Criminal Investigator II, Las Vegas, NV

SUBJECT: Admonition of Confidentiality IA-2014-0145

You are ordered not to discuss this case or any portion of your interview concerning the allegations under investigation in this matter with anyone. You are ordered not to have any interaction, engage in any conversations with, intimidate, threaten or coerce any other participant, witness, accused or reporting party, about this matter or the investigation. This admonition covers all questions asked, your responses to those questions, and any reports authored by you. You are not to discuss any conversations related to your interview and the matter under investigation. You are not to share copies of any tape recordings of this interview that may be in your possession with any person.

In the event this order is violated, you may be subject to new and/or additional disciplinary action, up to and including termination.

Your signature below confirms that you have read, understand and agree to follow this admonition.

Date 6/2/15

Signature [Handwritten Signature]

Any information that a representative obtains from the peace officer who is the subject of the investigation is confidential and must not be disclosed, except under the prescribed mandated circumstances outlined in NRS 289.080.

Any information that a representative obtains from the peace officer who is a witness concerning the investigation is confidential and must not be disclosed as outlined in NRS 289.080.

DOC 030 (Rev 09-2013)

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
NOTICE OF ADMINISTRATIVE
PEACE OFFICER WITNESS INTERVIEW

TO: Terry Day, Senior Correctional Officer, Florence McClure Women's Correctional Center, Las Vegas, NV

FROM: Arthur Emling Jr., Criminal Investigator I, Office of Inspector General, Las Vegas, NV

DATE: June 2, 2015

This is to advise you that you are a witness in connection to an internal administrative investigation. While investigators gather the facts concerning the allegations, your full cooperation is requested and expected. This investigation is based upon one or more allegations of improper conduct or activity that has been received by this office. Nothing in this process shall abridge any rights guaranteed by the Constitution of the United States or any other applicable law or regulation.

Pursuant to State law you have the right to have two representatives of your choosing present during an interview relating to the investigation, including without limitation, a lawyer, a representative of a labor union or another peace officer only. You have not less than 48 hours to obtain a lawyer or other authorized representative, if you so choose. The presence of the second representative must not create an undue delay in either the scheduling or conducting of the interview. The representative must not be a person connected to or named as a subject of the investigation.

You are directed to make yourself available for interview on June 2, 2015 @7:30am. The interview will be held at FMWCC. You are expected to provide candid and truthful information during the interview. Criminal Investigator Arthur Emling Jr will be conducting the interview. Providing false or misleading statements to the interviewer is a separate violation that could result in additional disciplinary action, including termination.

This is an official investigation being conducted by the Department of Corrections. All matters are strictly confidential. In order to protect your confidentiality, the rights of other employees and involved persons, and the integrity of the investigation, you are hereby directed not to participate in the dissemination/discussion of any information based on this investigative process. In addition, you will exclude yourself from any form of communication with others regarding this investigation. Information shared with your representative is excluded from this directive. Any violation of this confidentiality directive or attempts to influence any witness or victim is a separate violation that could result in additional disciplinary action, including termination.

☒


I waive my right to have an attorney/representative present.


☐

I wish to have _____ represent me during this interview.

Any information that a representative obtains from the peace officer who is a witness concerning the investigation is confidential and must not be disclosed.

IMPORTANT: *Your signature is merely an acknowledgement of receipt of this notice. Your refusal to sign this notice when ordered to do so may result in disciplinary action against you.*

 6/2/15
EMPLOYEE SIGNATURE DATE

 M. Emling Jr 6-2-15
PERSON SERVING SIGNATURE DATE

**STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
OFFICE OF THE INSPECTOR GENERAL
MEMORANDUM**

DATE: 6-2-2015

TO: Gary Piccinini, Correctional Lieutenant, Florence McClure Women's Correctional Center, Las Vegas, NV

FROM: Arthur Emling Jr, Criminal Investigator II, Las Vegas, NV


SUBJECT: Admonition of Confidentiality IA-2015-0058

You are ordered not to discuss this case or any portion of your interview concerning the allegations under investigation in this matter with anyone. You are ordered not to have any interaction, engage in any conversations with, intimidate, threaten or coerce any other participant, witness, accused or reporting party, about this matter or the investigation. This admonition covers all questions asked, your responses to those questions, and any reports authored by you. You are not to discuss any conversations related to your interview and the matter under investigation. You are not to share copies of any tape recordings of this interview that may be in your possession with any person.

In the event this order is violated, you may be subject to new and/or additional disciplinary action, up to and including termination.

Your signature below confirms that you have read, understand and agree to follow this admonition.

6/2/15
Date


Signature

Any information that a representative obtains from the peace officer who is the subject of the investigation is confidential and must not be disclosed, except under the prescribed mandated circumstances outlined in NRS 289.080.

Any information that a representative obtains from the peace officer who is a witness concerning the investigation is confidential and must not be disclosed as outlined in NRS 289.080.

DOC 030 (Rev 09-2013)

**STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
NOTICE OF ADMINISTRATIVE
PEACE OFFICER WITNESS INTERVIEW**

TO: Gary Piccinini, Correctional Lieutenant, Florence McClure Women's Correctional Center, Las Vegas, NV

FROM: Arthur Emling Jr., Criminal Investigator I, Office of Inspector General, Las Vegas, NV

DATE: 6-2-15

This is to advise you that you are a witness in connection to an internal administrative investigation. While investigators gather the facts concerning the allegations, your full cooperation is requested and expected. This investigation is based upon one or more allegations of improper conduct or activity that has been received by this office. Nothing in this process shall abridge any rights guaranteed by the Constitution of the United States or any other applicable law or regulation.

Pursuant to State law you have the right to have two representatives of your choosing present during an interview relating to the investigation, including without limitation, a lawyer, a representative of a labor union or another peace officer only. You have not less than 48 hours to obtain a lawyer or other authorized representative, if you so choose. The presence of the second representative must not create an undue delay in either the scheduling or conducting of the interview. The representative must not be a person connected to or named as a subject of the investigation.

You are directed to make yourself available for interview on 6-2-15 @ 7:00 AM. The interview will be held at Finnell. You are expected to provide candid and truthful information during the interview. Criminal Investigator Arthur Emling Jr will be conducting the interview. Providing false or misleading statements to the interviewer is a separate violation that could result in additional disciplinary action, including termination.

This is an official investigation being conducted by the Department of Corrections. All matters are strictly confidential. In order to protect your confidentiality, the rights of other employees and involved persons, and the integrity of the investigation, you are hereby directed not to participate in the dissemination/discussion of any information based on this investigative process. In addition, you will exclude yourself from any form of communication with others regarding this investigation. Information shared with your representative is excluded from this directive. Any violation of this confidentiality directive or attempts to influence any witness or victim is a separate violation that could result in additional disciplinary action, including termination.



I waive my right to have an attorney/representative present.

()


I wish to have _____ represent me during this interview.

Any information that a representative obtains from the peace officer who is a witness concerning the investigation is confidential and must not be disclosed.

IMPORTANT: Your signature is merely an acknowledgement of receipt of this notice. Your refusal to sign this notice when ordered to do so may result in disciplinary action against you.


EMPLOYEE SIGNATURE

6/2/15
DATE

 A. Emling
PERSON SERVING SIGNATURE

6-2-15
DATE

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
OFFICE OF THE INSPECTOR GENERAL
MEMORANDUM

DATE: June 8, 2015

TO: Towers, Michael, Correctional Officer Trainee, Florence McClure Women's
Correctional Center, Las Vegas, NV

FROM: Arthur Emling Jr, Criminal Investigator II, Las Vegas, NV

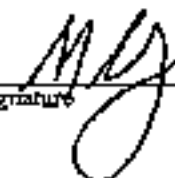
SUBJECT: Admonition of Confidentiality ~~LA-2014-0145~~

You are ordered not to discuss this case or any portion of your interview concerning the allegations under investigation in this matter with anyone. You are ordered not to have any interaction, engage in any conversations with, intimidate, threaten or coerce any other participant, witness, accused or reporting party, about this matter or the investigation. This admonition covers all questions asked, your responses to those questions, and any reports authored by you. You are not to discuss any conversations related to your interview and the matter under investigation. You are not to share copies of any tape recordings of this interview that may be in your possession with any person.

In the event this order is violated, you may be subject to new and/or additional disciplinary action, up to and including termination.

Your signature below confirms that you have read, understand and agree to follow this admonition.

06/8/15
Date


Signature

Any information that a representative obtains from the peace officer who is the subject of the investigation is confidential and must not be disclosed, except under the prescribed mandated circumstances outlined in NRS 289.080.

Any information that a representative obtains from the peace officer who is a witness concerning the investigation is confidential and must not be disclosed as outlined in NRS 289.080.

**STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
NOTICE OF ADMINISTRATIVE
PEACE OFFICER WITNESS INTERVIEW**

TO: Towers, Michael, Correctional Officer Trainee, Florence McClure Women's Correctional Center, Las Vegas, NV

FROM: Arthur Emling Jr., Criminal Investigator I, Office of Inspector General, Las Vegas, NV

DATE: June 8, 2015

This is to advise you that you are a witness in connection to an internal administrative investigation. While investigators gather the facts concerning the allegations, your full cooperation is requested and expected. This investigation is based upon one or more allegations of improper conduct or activity that has been received by this office. Nothing in this process shall abridge any rights guaranteed by the Constitution of the United States or any other applicable law or regulation.

Pursuant to State law you have the right to have two representatives of your choosing present during an interview relating to the investigation, including without limitation, a lawyer, a representative of a labor union or another peace officer only. You have not less than 48 hours to obtain a lawyer or other authorized representative, if you so choose. The presence of the second representative must not create an undue delay in either the scheduling or conducting of the interview. The representative must not be a person connected to or named as a subject of the investigation.

You are directed to make yourself available for interview on June 8, 2015 @ 9:00am. The interview will be held at Fmucc. You are expected to provide candid and truthful information during the interview. Criminal Investigator Arthur Emling Jr will be conducting the interview. Providing false or misleading statements to the interviewer is a separate violation that could result in additional disciplinary action, including termination.

This is an official investigation being conducted by the Department of Corrections. All matters are strictly confidential. In order to protect your confidentiality, the rights of other employees and involved persons, and the integrity of the investigation, you are hereby directed not to participate in the dissemination/discussion of any information based on this investigative process. In addition, you will exclude yourself from any form of communication with others regarding this investigation. Information shared with your representative is excluded from this directive. Any violation of this confidentiality directive or attempts to influence any witness or victim is a separate violation that could result in additional disciplinary action, including termination.

☒

I waive my right to have an attorney/representative present.

☐

I wish to have _____ represent me during this interview.

Any information that a representative obtains from the peace officer who is a witness concerning the investigation is confidential and must not be disclosed.

IMPORTANT: Your signature is merely an acknowledgement of receipt of this notice. Your refusal to sign this notice when ordered to do so may result in disciplinary action against you.

EMPLOYEE SIGNATURE

DATE

PERSON SERVING SIGNATURE

DATE

BOARD OF COMMISSIONERS
 BRIAN SANDOVAL
 GOVERNOR
 ADAM PAUL LAXALT
 ATTORNEY GENERAL
 BARBARA K. CEGAVSKE
 SECRETARY OF STATE



STATE OF NEVADA DEPARTMENT OF CORRECTIONS



E.R. MCDANIEL
 INTERIM DIRECTOR
 SHERYL FOSTER
 DEPUTY DIRECTOR

October 9, 2015

SUBJECT: ADJUDICATION IA-2015-0058
ACCUSED STAFF Brian Ludwick, Correctional Officer
DUE DATE October 19, 2015

The Office of the Inspector General has completed the investigation into allegations of misconduct against the above named staff. The investigative report and corresponding information are located on the Stewart Shared Drive under the Inspector General Area for your review and adjudication. The investigative report is formatted in a series of allegations. It will be the responsibility of the adjudicator to review AR 339 and make a determination about the allegations. This adjudication sheet contains the allegations on a single list to assist in the review.

When adjudicating, please make a separate and distinct classification for each allegation:

- ***Sustained*** (the act occurred)
- ***Not sustained*** (insufficient evidence to clearly prove or disprove)
- ***Exonerated*** (act occurred but was justified)
- ***Unfounded*** (act did not occur)

Prior to proceeding with any corrective or disciplinary action, the Warden/Division Head must obtain concurrence from the Deputy Director. The concurrence date should be included in the Adjudication Report. Also, the Deputy Director must sign and check "Agree or Disagree" on the cover page of the Adjudication Report.

The Adjudication Report must be completed in the prescribed format as outlined in AR 341. The Results of Adjudication Memorandum must be signed by the accused employee and witness. The accused employee may receive a copy of the Results of Adjudication Memorandum. If the results of the adjudication are not any corrective or disciplinary actions that do not result in a Specificity of Charges, the accused employee may also receive a copy of the Adjudication Report. If the results of the adjudication are such that a Specificity of Charges are required, the employee does not receive a copy of the Adjudication Report as the Attorney General's office must review per NRS 284.385.

You must return the original signed Adjudication Report and the original signed Result of Adjudication Memorandum, by the assigned Due Date, regarding your adjudication and disposition to the Office of the Inspector General.

Sincerely,

Pamela Del Porto,
 Inspector General

BOARD OF COMMISSIONERS
BRIAN SANDOVAL
GOVERNOR
ADAM PAUL LAXALT
ATTORNEY GENERAL
BARBARA K. CEGAVSKIE
SECRETARY OF STATE



STATE OF NEVADA
DEPARTMENT OF CORRECTIONS



E.K. MCDANIEL
INTERIM DIRECTOR

October 9, 2015

Mr. Brian Ludwick
5900 Skypointe Dr.
#1152
Las Vegas, Nevada 89130

SUBJECT: COMPLAINT INVESTIGATION
IA-2015-0058

The Office of the Inspector General has completed the investigation into allegations of misconduct by you reported under the above referenced case. The matter has been forwarded to Warden Jo Gentry for appropriate disposition.

Sincerely,

A handwritten signature in cursive script, appearing to read "Pamela Del Porto".

Pamela Del Porto
Inspector General
Nevada Department of Corrections

cc Jo Gentry, Warden, FMWCC

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
OFFICE OF THE INSPECTOR GENERAL

DATE: August 10, 2015

TO: Jo Gentry, Warden, Florence McClure Women's Correctional Center, Las Vegas, NV

FROM: Arthur Emling Jr, Criminal Investigator II, Office of the Inspector General

SUBJECT: **REPORT OF NEGLECT OF DUTY COMPLAINT INVESTIGATION**
IA-2015-0058

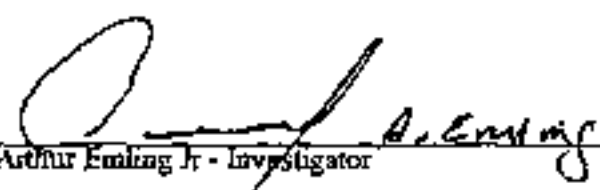
COMPLAINT:

Department complaint alleges Correctional Officer Brian Ludwick engaged in **NEGLECT OF DUTY** while assigned to Florence McClure Women's Correctional Center.

Department complaint alleges Correctional Officer Brian Ludwick engaged in **NEGLECT OF DUTY** while assigned to Florence McClure Women's Correctional Center.

ACCUSED STAFF:

Brian Ludwick
Correctional Officer
Florence McClure Women's Correctional Center



Arthur Emling Jr - Investigator

August 10, 2015
Date

Supervisor
Dave Molnar- Office of the Inspector General

Date Reviewed

APPROVED


Pam Del Porto
Inspector General

10-8-15
Date

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0164

INVESTIGATION

Page 2

Subject: IA-2015-0058

SUMMARY:

On April 4, 2015 Correctional Lieutenant Gary Piccinini (hereinafter "Piccinini") authored a report that was submitted into Nevada Offender Tracking Information System (NOTIS) under IR-2015-SNWCC-000409 regarding an encounter with Correctional Officer Brian Ludwick (hereinafter "Ludwick"). Piccinini stated in his report that on April 4, 2015 Ludwick left his post in Unit 1 without authorization and arrived in the Shift Command Office at Florence McClure Women's Correctional Center (FMWCC) and approached him (Piccinini) at 0532 hours requesting to be switched from Unit 1 to Unit 5 because he (Ludwick) was more familiar with Unit 5. Piccinini reported that when Ludwick was denied the switch to Unit 5, Ludwick stated, "Well how about I use FMLA then, because I have not taken my blood pressure medication, how's that?" Piccinini conceded and allowed Ludwick to leave on FMLA but Piccinini was unable to speak further with Ludwick because Ludwick "stormed" out of the office.

Piccinini reported that Ludwick had made no attempts during the posting of shifts on April 4, 2015 to communicate his displeasure of being assigned to Unit 1, or his desire to work in Unit 5. Piccinini reported that during the posting of shift, Ludwick did ask who was working in Unit 5. Piccinini reported that Ludwick is normally assigned to Unit 3, but the position was a pull/shut down post.

On April 6, 2015 the alleged incident was referred for review and assigned to Investigator Arthur Emling Jr of the Professional Responsibilities Unit, Office of Inspector General under IA-2015-0058.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0165

INVESTIGATION

Page 3

Subject: LA-2015-0058

ALLEGATION I

Department complaint alleged that while on duty, April 4, 2015, Correctional Officer Brian Ludwick engaged in **NEGLECT OF DUTY** when he left his assigned post in Unit 1 without prior authorization from a supervisor, or any other person of higher authority.

ALLEGATION II

Department complaint alleged that while on duty, April 4, 2015, Correctional Officer Brian Ludwick engaged in **NEGLECT OF DUTY** in which he failed to perform his assigned security functions in Unit 1 after leaving his assigned post.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0166

INVESTIGATION

Page 4

Subject: IA-2015-0058

WITNESS	DATE/TIME INTERVIEWED	AUDIO RECORDED DISC NUMBER	PAGE NUMBER
Day, Terry Senior Correctional Officer FMWCC EID #45107	June 2, 2015 7:30am	Day Terry IA-2015-0058	Pages 8-9
Piccinini, Gary Correctional Lieutenant FMWCC EID #25242	June 2, 2015 6:50am	Piccinini, Gary IA-2015-0058	Pages 5-7
Ludwick, Brian Correctional Officer FMWCC EID #50867	July 29, 2015 6:05am	Ludwick, Brian IA-2015-0058	Pages 14-18
Towers Jr., Michael Correctional Officer FMWCC EID #54221	June 8, 2015 8:55am	Towers, Michael IA-2015-0058	Pages 10-11
White, Preshess Correctional Officer FMWCC EID #51249	June 12, 2015 6:37am	White, Preshess IA-2015-0058	Pages 12-13

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0167

INVESTIGATION

Page 5

Subject: IA-2015-0058

-INVESTIGATION-**PICCININI, GARY, CORRECTIONAL LIEUTENANT, FLORENCE MCCLURE
WOMEN'S CORRECTIONAL CENTER, LAS VEGAS, NV**

On June 2, 2015 Correctional Lieutenant Gary Piccinini was interviewed by Investigator Arthur Emling Jr, at Florence McClure Women's Correctional Center (4370 Smiley Rd Las Vegas, NV). He acknowledged being served with the Notice of Administrative Peace Officer Witness Interview and the Admonition of Confidentiality documents on June 2, 2015. He waived representation and the 48 hour notice, agreeing to be interviewed this same date, and signed both documents. The interview was digitally recorded under Piccinini, Gary IA-2015-0058.

Piccinini was supplied his report upon his request to aid in refreshing his memory. He confirmed that his report was true and accurate to the best of his knowledge. Piccinini stated that he has been employed by the Nevada Department of Corrections for almost 14 years. He stated that he has held the title of Lieutenant for approximately five and one half years, and has been assigned to FMWCC since October, 2012. Piccinini described his general duties as a Lieutenant to be a shift supervisor, oversee schedules, performance evaluations, disciplinary hearings for inmates, run the operations side of the facility, and fulfill the Associate Warden duties when he or she is absent. Piccinini confirmed that he has a lot of responsibility.

Allegation I**Allegation II**

Piccinini testified that he worked on April 4, 2015 on the 5am-1pm shift. He stated that at the beginning of shift C/O Ludwick came in to work and he (Piccinini) posted him to Unit 1 and then Ludwick asked him who was in Unit 5, and Piccinini stated that "it was no big secret" so he told Ludwick who was in Unit 5. Piccinini stated that about one half hour after he posted shift, Ludwick unexpectedly entered his (Piccinini's) office and asked to be switched with C/O Ennis-Wright who was assigned to Unit 5. Piccinini stated that C/O Whisenant was also in Unit 5.

Piccinini stated that C/O Ennis-Wright was on a light duty contract and could only be in control rooms 1, 5, or 7. Piccinini stated that at the time minimum staffing for Unit 1 was two officers. Piccinini stated that if he put C/O Ennis-Wright in Unit 1 Control with one other officer then that one floor officer would have to do all the work for 1/3 of the entire prison population. Piccinini stated that he would rather put two or three officers in Unit 1 that could switch out and share the workload, because one officer has to stay in the control room of the unit at all times. Piccinini stated that C/O Ennis-Wright would be more suited for Unit 5 based on the light-duty contract and that there are less inmates housed in the unit, which equates to less work for one officer to complete.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0168

INVESTIGATION

Page 6

Subject: IA-2015-0058

PICCININI, GARY, CORRECTIONAL LIEUTENANT, CONTINUED.

Piccinini testified that when Ludwick asked him to switch to Unit 5 he (Piccinini) told him "No". Piccinini stated that Ludwick asked why, and Piccinini told him that he needed him (Ludwick) trained in Unit 1. Piccinini stated that Ludwick told him he was familiar with Unit 5, which is why he was requesting to be moved. Piccinini stated that Ludwick instantly became irate when his request to switch was denied and he (Piccinini) stated that he knew he was irate based on Ludwick's tone and body language. Piccinini stated that Ludwick said, "Well how about I go home FMLA because I haven't taken my blood pressure medication, how's that?" Piccinini stated it appeared as if it was, "I am going to get you" kind of attitude from Ludwick, almost as if Ludwick was trying to "hurt" him emotionally. Piccinini stated that he wanted to talk to Ludwick to explain himself, but Ludwick stormed off and left the institution.

Piccinini stated that the way he staffed the institution that day, was what he thought was the best scenario for the security of the institution, and in accordance with minimum staffing procedures. Piccinini stated that it was his responsibility to ensure his staff is trained in all areas of the institution. Piccinini stated that at the time of the incident minimum staffing for Unit one was two officers, but is now three officers. Piccinini stated that Unit 1 is General Population and is the largest unit at FMWCC containing 6 Pods, two of which are dormitory housing. Piccinini stated that officers in Unit 1 have a variety of tasks and duties that need to be completed daily. Piccinini stated that Unit 1 is categorized as a general population unit where inmates get tier time, recreation yard, and are rarely in their cell.

Piccinini stated that he wasn't sure if other supervisors were working on the day in question and if there was it may have been Senior Officer Day or Officer Baumgras. Piccinini stated that he briefed Associate Warden Hill of the incident and Hill initially instructed Piccinini to place Ludwick on AWOL then later informed Piccinini to allow Ludwick to be placed on FMLA. Piccinini stated that a day or two later Ludwick had approached him and apologized by stating that he (Ludwick) was having headaches on the day in question. Piccinini stated that he has not had any problems with Ludwick since the incident.

Piccinini confirmed that it is not normal for a person who is already assigned and working his or her post to show up to shift command shortly after his or her shift. Piccinini testified that an officer is to receive authorization from a supervisor prior to leaving their post unless an emergency exists. Piccinini was asked if Ludwick had received authorization to leave his post and he stated that Ludwick did not receive that authorization. Piccinini stated that he knows that Ludwick did not ask because he (Piccinini) was in the office the entire time. Piccinini stated that if he (Piccinini) wrote in his report that Ludwick did not ask for permission then he (Piccinini) would have already asked the other supervisors if any one of them had given Ludwick permission to leave his post.

Piccinini stated that a Senior Officer is considered a supervisor at FMWCC.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0169

INVESTIGATION

Page 7

Subject: LA-2015-0058

PICCININI, GARY, CORRECTIONAL LIEUTENANT, CONTINUED.

Piccinini stated that if an officer leaves his or her post without him (Piccinini) knowing and an incident occurs and someone calls for assistance over the radio in that unit, and knowing that he has three officers in that unit then he would not have to expedite the response and would likely arrive safely with the correct resources. Piccinini stated that if he knows that two officers are in the unit then the response would need expedited on an increased level.

Piccinini confirmed that although Ludwick abandoned the Unit 1 post minimum staffing requirements were still met with a total of two officers. Piccinini denied that the Unit would be secure even though two officers would meet minimum staffing for Unit 1 because normal operations would still ensue. Piccinini stated that with only two officers in Unit 1 there was a lot less coverage for unit operations as opposed to three officers. Piccinini stated that Unit 1 is the largest (approximately 300 or more inmates) and most troublesome unit which is another reason having all three officers is better than two.

Piccinini was not certain if Ludwick had received any corrective or disciplinary action in his past regarding abandoning a post(s). Piccinini stated that when he arrived on the 5am-1pm shift he sent out an expectations e-mail to his day shift staff and one of the topics included in the e-mail was to inform the staff to make sure they receive authorization prior to leaving their post.

Piccinini was given the opportunity to add any further information. The information he added was not relevant to the investigation. The interview was concluded.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0170

INVESTIGATION

Page 8

Subject: LA-2015-0058

**DAY, TERRY, SENIOR CORRECTIONAL OFFICER, FLORENCE MCCLURE
WOMEN'S CORRECTIONAL CENTER, LAS VEGAS, NV**

On June 2, 2015 Senior Correctional Officer Terry Day (hereinafter "Day") was interviewed by Investigator Arthur Emling Jr, at Florence McClure Women's Correctional Center (4370 Smiley Rd Las Vegas, NV). He acknowledged being served with the Notice of Administrative Peace Officer Witness Interview and the Admonition of Confidentiality documents on June 2, 2015. He waived representation and the 48 hour notice, agreeing to be interviewed this same date, and signed both documents. The interview was digitally recorded under Day, Terry LA-2015-0058.

Allegation I**Allegation II**

Day testified that he has been a Senior Officer for just over two years at FMWCC. He explained his responsibilities and duties as a Senior Officer are to train officers, conduct hearings, run shift, run Unit 4, hiring & firing porters, inmate work credits, mid-management/supervisory role, and conduct disciplinary duties.

Day testified that he recalled working on day shift (5am-1pm) at FMWCC on or around April, 2015. Day was asked how often he runs shift and he stated not as much now as he used to. Day stated that if there was not a Sergeant or Lieutenant then he or Senior Officer Gardner would run shift. Day stated that he may run shift only a couple of times a month.

Day confirmed working April 4, 2015 and he stated on that day he was assigned to the Search and Escort position and he remembered having an incident with Brian Ludwick. Day stated that he recalled the incident specifically because he was not running shift on that day and he received a call from Ludwick not long after 5:00am asking if he (Ludwick) could go home on FMLA. Day stated that he informed Ludwick that he was not running shift and that he needed to contact the shift commander, Lieutenant Piccinini. Day confirmed that Ludwick never asked him if he could leave his post to go to shift command to talk to Lieutenant Piccinini. Day stated that Ludwick probably called him to request to leave because Ludwick may have thought that he (Day) was in a position of authority on April 4, 2015. Day stated that he could not be certain as to what Ludwick was thinking. Day stated that no further conversation took place between him and Ludwick. Day stated that if he was running shift on April 4, 2015 then he could have exercised the authority to say yes or no to Ludwick, but Day added that was not the case on the day in question.

Day confirmed that if an officer leaves his or her post without authorization than it is considered abandonment of their post. Day stated that he believes the policy is governed under OP 339. Day stated that he believes it is a Class 5 violation if someone abandons their post.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0171

INVESTIGATION

Page 9

Subject: IA-2015-0058

DAY, TERRY, SENIOR CORRECTIONAL OFFICER, CONTINUED.

Day stated that leaving ones post without permission is a safety and security issue. Day stated that at the time he believed that minimum staffing in Unit 1 was two officers and if there were only two officers total then that would just leave the control officer who cannot step out of the control room with no floor officer. Day stated that at that point all the pods in Unit 1 would be unsupervised. Day stated when asked if there were only two officers on the floor then it would still be a safety and security issue. Day confirmed that if there were two officers on the floor and one officer left, then Unit 1 would remained at minimum staffing.

Day stated that he personally has not verbally counseled or provided disciplinary action to Ludwick regarding any past abandonment post issues and is not aware of anyone else doing the same.

Day stated that he had heard rumors following the incident about why Ludwick went home that day. Day confirmed that he did not write a report concerning the incident because he was not asked to write one. Day did not have first-hand knowledge as to why Ludwick did not want to work in Unit 1. Day stated that he found it odd because Ludwick had only been assigned to FMWCC for a few weeks and wondered how Ludwick would know Unit 5 better.

Day stated that he had spoken with Piccinini regarding the incident and added that he was not present when Ludwick and Piccinini had a conversation on April 4, 2015.

Day had no further information to add and no further questions were asked of Day. The interview was concluded.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0172

INVESTIGATION

Page 10

Subject: IA-2015-0058

**TOWERS JR., MICHAEL, CORRECTIONAL OFFICER, FLORENCE MCCLURE
WOMEN'S CORRECTIONAL CENTER, LAS VEGAS, NV**

On June 8, 2015 Correctional Officer Michael Towers (hereinafter "Towers") was interviewed by Investigator Arthur Emling Jr, at Florence McClure Women's Correctional Center (4370 Smiley Rd Las Vegas, NV). He acknowledged being served with the Notice of Administrative Peace Officer Witness Interview and the Admonition of Confidentiality documents on June 8, 2015. He waived representation and the 48 hour notice, agreeing to be interviewed this same date, and signed both documents. The interview was digitally recorded under Towers, Michael IA-2015-0058.

Towers testified that as of April 28, 2015 he has been employed by the NDOC for just over one year; He started as a Correctional Officer and has been assigned to FMWCC. Towers confirmed that he has worked nearly every post in the institution to include transportation, gatchouse, visitation, culinary, units, and the sally port. Towers explained his general duties and responsibilities as maintaining the safety and security of the institution, supervising inmates, ensure count accuracy, feeding inmates, and keeping officers safe. Towers confirmed he has a lot of responsibility.

Allegation I**Allegation II**

Towers confirmed that he has worked the 5am-1pm shift at FMWCC for the past three months with Thursday's and Friday's off. Towers confirmed that he worked Saturday April 4, 2015 if the schedule indicates that he did in fact work.

Towers confirmed that he has worked in Unit 1 on many occasions in the past at least one day out of the week. Towers stated that at times he would be assigned as the floor officer or the Control (Bubble) Officer. Towers confirmed that he worked as the Floor Officer in Unit 1 on April 4, 2015. Officer Towers was informed that he worked with Officer White and Officer Ludwick and it was at that point that he recalled an incident.

Towers stated that he and White worked with Ludwick, at the maximum, for one hour on April 4, 2015 in Unit 1. Towers stated that he believed that he was the last person to arrive in Unit 1 and approximately 20 minutes into the shift Ludwick called shift command but did not know what it was about, did not know who Ludwick talked to. Towers stated that he was in the Control Room when Ludwick called and heard Ludwick say on the phone something to the affect of "Who is in Unit 5, can I go to Unit 5". Towers stated that Officer White was in the Control Room as well when Ludwick placed the call. Towers stated that Ludwick left the Control Room and went to shift command. Towers stated that when Ludwick came back to the Control Room he stated, "I am not feeling this today".

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

INVESTIGATION

Page 11

Subject: IA-2015-0058

TOWERS JR., MICHAEL, CORRECTIONAL OFFICER, CONTINUED.

Towers stated that Ludwick made another phone call and was not sure who was on the other line, because after that he left the unit. Towers stated that during the second phone call he was attempting to find out who was in Unit 5 and when he found out he could not go to Unit 5 then that was the end of Ludwick's day and he left. Towers stated that Ludwick never spoke to him regarding any issues that day.

Towers stated that Ludwick appeared upset that he could not work in Unit 5. Towers confirmed that he did not hear Ludwick ask anyone if he could go to shift command.

Towers stated that when Ludwick left it was up to him and White to operate the entire unit for the rest of their shift.

No further information was provided by Towers. No further questions were asked of Towers. The interview was concluded.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0174

INVESTIGATION

Page 12

Subject: IA-2015-0058

**WHITE, PRESHESS, CORRECTIONAL OFFICER, FLORENCE MCCLURE
WOMEN'S CORRECTIONAL CENTER, LAS VEGAS, NV**

On June 12, 2015 Correctional Officer Presheess White (hereinafter "White") was interviewed by Investigator Arthur Embling Jr, at Florence McClure Women's Correctional Center (4370 Smiley Rd Las Vegas, NV). She acknowledged being served with the Notice of Administrative Peace Officer Witness Interview and the Admonition of Confidentiality documents on June 12, 2015. She waived representation and the 48 hour notice, agreeing to be interviewed this same date, and signed both documents. The interview was digitally recorded under White, Presheess IA-2015-0058.

White testified that she has been employed with the NDOC as a Correctional Officer for approximately two and one half years at FMWCC.

Allegation I**Allegation II**

White confirmed that she has worked Unit 4 and Unit 1 and is currently assigned in Unit 1 and has been for the past two years. White confirmed that she has a good grasp with the operations in Unit 1. White confirmed that her shift has been 5am-1pm since January, 2015 with Tuesday's and Wednesday's off.

White confirmed that she worked in Unit 1 on April 4, 2015 with Officer Ludwick and Officer Towers. White stated that on that day when she arrived to Unit 1, Officer Ludwick did not want to work in Unit 1 and seemed pretty upset that he was working there. Presheess stated that while Towers and she was in the Control Room with Ludwick he called down to Unit 5, was not sure who Ludwick was talking to, but then when Ludwick got off the phone he called Lieutenant Piccinini to see if Piccinini was in the office (Shift Command). White stated that Ludwick left and went to the Office (Shift Command) and when Ludwick arrived back to Unit 1, White stated that Ludwick told her that since he could not work Unit 5 then he (Ludwick) was going to go home on FMLA. White stated that she had assumed Piccinini told Ludwick that he couldn't work in Unit 5 because when Ludwick hung up the phone he was upset. White stated that she asked Ludwick (in a joking manner) "What, you don't want to work with us"? White stated that Ludwick responded with "No, F'ing Piccinini won't let me work in Unit 5 and I told him if he doesn't let me work in Unit 5 then I am going home FMLA". White stated that Ludwick packed up his stuff and left way before 10:00am, a short time after the shift started.

White stated that everyone in the facility knows that Ludwick wants to go wherever Officer Whisenant is at and Whisenant was in Unit 5.

White was asked if she could recall Ludwick ask Piccinini if he could go to shift command during the phone conversation and she stated that she did not hear Ludwick ask Piccinini for permission. White confirmed that an officer must have permission from a supervisor to leave their post unless it involves an escort involving normal duties.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

INVESTIGATION

Page 13

Subject: IA-2015-0058

WHITE, PRESHESS, CORRECTIONAL OFFICER, CONTINUED.

White confirmed that when Ludwick left there were two officers left in Unit 1. White stated that on April 4, 2015 minimum staffing was two officers. White confirmed that two Officers were plenty of officers for Unit 1 and that Ludwick was considered an extra officer. White stated that as of the interview, minimum staffing was now three officers in Unit 1. White confirmed that Unit 1 is the largest unit in the facility. White stated that two officers cannot effectively cover the entire unit which is why she believes they added a third officer. White confirmed one less officer makes it less safe in the unit.

White stated that Ludwick had made statements to her regarding that he kept getting assigned everywhere and didn't know why he was in Unit 1 and stated that he was getting picked on.

White had no further information to provide and no further questions relevant to the investigation were asked of White. The interview was concluded.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0176

INVESTIGATION

Page 14

Subject: IA-2015-0058

**LUDWICK, BRIAN, CORRECTIONAL OFFICER, FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER, LAS VEGAS, NV**

On July 22, 2015 Correctional Officer Brian Ludwick (hereinafter "Ludwick") was served with the Notice of Interrogation/Interview Administrative Investigation and Admonition of Confidentiality documents. Ludwick signed the documents and noted his representative to be "Baumgras" during the interrogation. Ludwick confirmed that he understood his rights under NRS 289. Ludwick had asked the investigator if the investigation would stop him from attaining a job from LVMPD and the investigator informed Ludwick that the Investigation has nothing to do with LVMPD and he cannot determine if LVMPD will hire him as the investigator is not employed by LVMPD. Ludwick was provided a copy of the documents.

On July 29, 2015 Ludwick was interrogated/interviewed at Casa Grande Transitional Housing Center in the Administrative Building in the interview room. Ludwick was informed that he is still under the Admonition of Confidentiality and he acknowledged. Ludwick was given a copy of the Admonition of Rights document and was read the document aloud and encouraged Ludwick to read the document as well. Ludwick had no questions concerning the Admonition of Rights document when asked by the investigator. Ludwick signed the Admonition of Rights document noting his title, date, and time. The investigator signed and dated the document as a witness. Ludwick did not have a representative or attorney present during the interview. Ludwick acknowledged and had no objections that the interrogation/interview would be digitally recorded and recorded under Ludwick, Brian IA-2015-0058.

Ludwick was read the Lead-In Statement and asked by the investigator, "During the course of your employment have you had an opportunity to review and/or read the Department's policies, procedures, and Administrative Regulations and he (Ludwick) stated, "No". Ludwick was asked if there are any specific regulations he has not read and he stated, "No, I mean no, I don't look at the AR's" Ludwick was asked if at any time he has read the regulations and he stated, "I do not have access to any of that". Ludwick was asked when he went through the academy did you have a chance and he stated, "Oh yea, yea we got trained with the AR's and that".

Ludwick testified that he has been employed with the Nevada Department of Corrections since January 7, 2013 as a Correctional Officer and is currently assigned to Florence McClure Women's Correctional Center.

Ludwick had no questions prior to proceeding with the interrogation/interview.

Allegation I**Allegation II****OFFICIAL USE ONLY**

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0177

INVESTIGATION

Page 15

Subject: IA-2015-0058

LUDWICK, BRIAN, CORRECTIONAL OFFICER, CONTINUED.

Ludwick confirmed that he has worked for the Department of Corrections for a little over two years. Ludwick confirmed that he has a good understanding of his job as a Correctional Officer. Ludwick confirmed that other than working at FMWCC he has worked at Southern Desert Correctional Center and Three Lakes Valley Conservation Camp.

Ludwick stated that he started working at FMWCC on February 17, 2015. Ludwick was asked what his duties and responsibilities are as a Correctional Officer and he stated, "It depends on what unit I am in, but I supervise inmates, be a floor officer, PREA checks, PREA announcements, report writing, and making sure inmates go where they need to go". Ludwick confirmed that he has a lot of responsibility.

Ludwick confirmed his signature on the Administrative Acknowledgement form dated January 3, 2013 but does not recall signing it. Ludwick was asked if he has ever had a chance to read AR 339 during his career and he stated, "No". The investigator described to Ludwick what AR 339 entailed and further read the statement at the top of the Administrative Regulations Acknowledgement which states that by signing the document the person signing acknowledges it is their responsibility to read and familiarize themselves with the regulations listed below which includes AR 339. The language also states that the person signing acknowledges that the regulations are available on the Department's website at www.doc.nv.gov and in Department Administrative Offices and any corresponding Operational Procedures are located on the Department's Stewart Shared Drive. Lastly, the document was read by the investigator that states should the acknowledging employee not be able to access the regulations that he or she shall notify the Department's human resources office. Ludwick confirmed after being read the literature that he has not read AR 339. Ludwick stated that when he is housed in a Unit he doesn't have time to read any AR's. Ludwick was asked if he ever reviewed AR 339 in the academy and he stated, "I am sure we did". Ludwick was asked if anything specific regarding AR 339 would be pertinent to him as an Officer and he stated, "Code of Ethics".

Ludwick confirmed that while working at FMWCC he has been assigned to Unit 1, Unit 5, culinary, recreation yard, S & E, transportation runs, sally port, unit 4 (Seg), and perimeter.

Ludwick was asked if he recalled what shift he worked on April 4, 2015 and he stated "Yea I was in Unit 1 from 0500 to 13:00". Ludwick stated that he had been on the 0500-13:00 shift two to three weeks prior to April 4, 2015 in Unit 1. Ludwick stated that he had worked in Unit 1 for approximately two to three weeks everyday prior to April 4, 2015. Ludwick was informed that according to the records that was not the case. Ludwick stated that he was mainly assigned to Unit 5, but that there was a "stretch" when he was in Unit 1. Ludwick was asked what type of unit is Unit 1 and he stated, "They call it one brawler". Ludwick stated that Unit 1 is where one goes when they come out of the "hole". Ludwick stated that he was not sure what type of unit that Unit 1 is. Ludwick stated that the attendance roster is incorrect because he has worked Unit 1 many of times.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0178

INVESTIGATION

Page 16

Subject: IA-2015-0058

LUDWICK, BRIAN, CORRECTIONAL OFFICER, CONTINUED.

Ludwick was asked what types of duties and responsibilities is an officer responsible for in Unit 1 and he stated that one officer must be in the Control Room (Bubble) at all times and an officer on the floor who is constantly keying doors, letting inmates out for movement, breakfast, retrieving porter supplies, letting porters out, letting inmates out to work, handing out kites, any and all paperwork, and to monitor the hallway for discrepancies during movement. Ludwick confirmed that the officers assigned to Unit 1 would be the officers to complete those duties and responsibilities he just explained. Ludwick was asked what the minimum staffing was on the day in question and he could not be certain but confirmed that Towers and White was present in the unit.

Ludwick was asked what the level of security FMWCC is such as medium, max, minimum, etc., and he stated, "Max, I guess, because you have to push the button to let them out through the sally port".

Ludwick was asked if he recalled going to work on April 5, 2015 and he stated, "Yes". Ludwick was asked when he was assigned to Unit 1 on April 4, 2015 if he was displeased with the post and he stated, "I wasn't feeling well and I went to the Lieutenant Piccinini". The investigator asked, "You were displeased because you weren't feeling well" and Ludwick stated, "Uh-huh". Ludwick was asked why he wanted to work in Unit 5 and he stated, "That is because that is where I usually worked". Ludwick stated that on that day he called Officer Ennis and asked if he could work Unit 5 and he stated that she stated that she would cover him. Ludwick stated that he told Ennis that he was tired of Unit 1, and that he wasn't feeling well and he forgot to take his blood pressure medication, and that the Lieutenant wouldn't work with him (Ludwick). Ludwick stated that he told the Lieutenant that he was going to go home FMLA sick. Ludwick stated that the Lieutenant stated that it was fine with him and then the Lieutenant threw his own hands up in the air.

Ludwick was asked to explain to the investigator what happened from the time he arrived to work up to the time he left. Ludwick stated, "I came in to shift command and Lt Piccinini said 1, and I said ok. So I went down there and Officer White was in there, I believe, and Officer Towers was in there that day. I said I am not feeling well and I don't feel like dealing with this unit today because it is pretty rough. I went to shift command and talked to Lieutenant Piccinini and I asked him if he could move me to Unit 5 and Ennis would cover me, because I had talked to her. She said yea I'll come down and cover for you, come up to 5". Ludwick was asked if he had called Piccinini prior to that and Ludwick stated, "I can't remember if I called or she did, but I just went up there". Ludwick stated "I ended up going to shift command and asking Piccinini if he would move me because I don't feel well. I forgot to take my blood pressure medication. I am not feeling well can you please move me". Ludwick was asked by the investigator if he had talked to Senior Officer Day prior to speaking with Piccinini and asked him if he could leave or transition to Unit 5 and Ludwick stated, "I do not recall that, did I, I don't remember". Ludwick was asked if that was something he might have done and he stated, "Possibly, yea". Ludwick stated, regarding his

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0179

INVESTIGATION

Page 17

Subject: LA-2015-0058

LUDWICK, BRIAN, CORRECTIONAL OFFICER, CONTINUED.

continued interaction with Piccinini while in Shift Command, that "Piccinini had this smile on his face knowing that I wasn't feeling well and he said "No". I said you are not going to do this, can you please move me I do not feel well, and he (Piccinini) said "No" so I said I am going home FMLA then I don't feel well; I forgot to take my blood pressure medication". Ludwick stated that Piccinini stated, "That's fine with me" and then Piccinini threw his hands up in the air.

Ludwick stated that he went back down to Unit 1 and grabbed his personal gear and left the institution. Ludwick stated that Piccinini didn't say anything to him (Ludwick) about anything. Ludwick was asked if Piccinini stated that it was fine he could go (Leave the Institution) and Ludwick stated, "Yes".

Ludwick was asked if he was aware if he were to leave that he is to receive supervisor's authorization to do so and Ludwick stated, "He told me that was fine that is why I left; He threw his hands in the air and stated that was fine". Ludwick was asked if he recalled talking to Piccinini on the phone on the day in question and Ludwick stated, "No". Ludwick was asked if it was fair to say that he may have called him and Ludwick stated, "I don't believe I did; I went to shift command".

Ludwick was asked if there is a regulation that governs needing authorization to leave and he stated, "Yea, you just showed it to me". Ludwick was asked if most of the institutions have a regulation that requires authorization to leave and he stated, "Yes, as far as I was concerned I did get authorization from him". Ludwick agreed with the investigator that if he (Ludwick) or anyone were to leave a unit leaving a fewer amount of officers in the unit than were assigned, then a slower response time to a situation (such as if an inmate were to attack another inmate or attack an officer endangering staff, inmates, or the institution) would ensue and furthermore, the officer would not be able to complete his duties and responsibilities as required.

Ludwick was asked by the investigator, after looking back at the situation, if he (Ludwick) would make a different decision and Ludwick stated, "No, because Piccinini stated that was fine, which is the only reason I left".

Ludwick was informed by the investigator that he believes that he is missing the focus of the investigation and explained that the investigation revolves around the allegation of him (Ludwick) leaving Unit 1 to go to Shift Command to talk to Piccinini without prior supervisor authorization. Ludwick stated, "Wow, (Ludwick Chuckled)". Ludwick was informed by the investigator that Piccinini admitted in his report and through investigation that he told you it was fine that you left work, but never gave authorization for you to leave Unit 1 to go to Shift Command talk to him. Ludwick was asked if he agreed that he left his post without permission and he stated, "No, I won't because he told me that it was fine that I left". Ludwick stated, "No I am not going to say yes because I didn't leave the institution; I went up to shift command to speak to a supervisor". Ludwick stated, "No, I am not going to say yes Art. I am not going to".

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0180

INVESTIGATION

Page 18

Subject: IA-2015-0058

LUDWICK, BRIAN, CORRECTIONAL OFFICER, CONTINUED.

The investigator asked if he (Ludwick) would need permission to leave Unit 1 and Ludwick stated, "I am not going to Art, I am not". Ludwick stated, "He Ok'd my time card, with this investigation going on, why didn't he charge me AWOL and put it on my time card". Ludwick was informed that the investigation has nothing to do with him leaving the institution but everything to do with him leaving the Unit without authorization.

Ludwick was informed that there is no information discovered that he received authorization to leave Unit 1, but that there was information discovered that revealed he was authorized to leave the institution after he left Unit 1 without authorization. Ludwick was informed that officers were left in Unit 1 with one less officer to fulfill the duties required of them. Ludwick was explained again that he was not authorized to leave Unit 1 prior to being authorized to leave the institution. Ludwick was asked if it made sense and he stated, "Yea it makes sense".

Ludwick confirmed that he apologized to Piccinini a few days after the incident occurred. Ludwick stated that Piccinini explained to him (Ludwick) that he needed to communicate with him. Ludwick stated that he told Piccinini that he did communicate by telling him that he did not feel well.

Ludwick was given an opportunity to refute the allegations. The first allegation was read to Ludwick and he stated "Yea, no, I am not agreeing with that, I don't agree with it". The second allegation was read to Ludwick and he stated, "No, I don't agree with it".

Ludwick was asked if there was anything pertinent he would like to add and he stated, "No". Ludwick was asked if he had any questions for the investigator and he stated, "No". No further questions were asked of Ludwick. The interview was concluded.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0181

INVESTIGATION

Page 19

Subject: IA-2015-0058

INVESTIGATOR NOTES

- 1) During the course of the investigation the investigator discovered that no staff member could confirm that Officer Brian Ludwick had asked a supervisor or any person with authority in further granting Ludwick authorization to leave his assigned post (Unit 1, Floor A) on April 4, 2015.
- 2) During Officer Brian Ludwick's interrogation/interview on July 29, 2015 he appeared to misunderstand the nature of the allegation and appeared, based on his responses, that the allegations were in regard to leaving the institution without authorization as opposed to leaving Unit 1 without authorization. The interview concluded with Ludwick confirming that he understood the allegations against him.
- 3) Officer Brian Ludwick stated during his interrogation/interview on more than one occasion that he left Unit 1 to relocate to Shift Command to correspond his issues with Lieutenant Piccinini in reference to being reassigned to Unit 5. Ludwick could not confirm that he received permission to leave Unit 1 on the morning of April 4, 2015.
- 4) According to Administrative Regulation 339 under section (15) Neglect of Duty and subsection (UU), Leaving an assigned post while on duty without authorization of a supervisor is against regulation. AR 339 was effective on June 17, 2012 and has not been superseded. Correctional Officer Brian Ludwick signed the Administrative Regulation Document on January 3, 2013 acknowledging that he will read and familiarize himself with the regulation. Ludwick has had approximately two years and one month to read AR 339.
- 5) Ludwick confirmed during his interrogation/interview that he is aware of the regulation that he is to receive authorization to leave an assigned post.
- 6) Officer Brian Ludwick agreed during his interrogation/interview that any officer including himself that leaves a post with fewer officers in a unit who were originally assigned to work there, then the response time would decrease if a situation would arise and furthermore creating an endangered environment directly relating to the safety of staff, inmates, and the institution. Ludwick agreed that leaving a post would result in that officer not be able to complete his assigned duties and responsibilities.
- 7) It was confirmed during the investigation that Lieutenant Piccinini sent out an e-mail to dayshift staff when he took over the 5am-1pm shift, which was late March early April, prior to April 4, 2015 which contained information about not leaving posts without authorization. However, information was discovered that the e-mail was not read by Brian Ludwick until the e-mail was resent to him a few days following April 4, 2015.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0182

INVESTIGATION

Page 20

Subject: IA-2015-0058

INVESTIGATOR NOTES CONTINUED

- 8) According to the records discovered through the FMWCC shift roster dated April 4, 2015, no alternate staff were assigned to complete the shift from 5:30am-1pm for Unit 1 Floor A position following Brian Ludwick's departure.
- 9) Brian Ludwick provided contradicting statements during his interrogation/interview by first stating that he had worked in Unit 1 for a few weeks and claimed the shift roster to be incorrect, and later in the interview he stated that the reason he wanted to work Unit 5 was because that is where he usually worked". According to Brian Ludwick's attendance Card for 2015 he had only worked Unit 1 once prior to April 4, 2015.
- 10) According to OP 326 minimum staffing for Unit 1 on April 4, 2015 was (1) Control Officer and (1) Floor Officer.

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0183

INVESTIGATION

Page 21

Subject: LA-2015-0058

ADDENDA

- 1) Brian Ludwick's signed and dated Notice of Interrogation/Interview Administrative Investigation, Admonition of Confidentiality, Admonition of Rights, and Interview Lead-In Statement documents (5 Pages).
- 2) Copy of Gary Piccinini's report that was submitted into NOTIS under IR-2015-SNWCC-000409 (1 Page).
- 3) Copy of Brian Ludwick's signed and dated Administrative Regulations Acknowledgement (1 Page).
- 4) Copy of Administrative Regulation 339, "Code of Ethics, Employee Conduct, Prohibitions, and Penalties" effective date June 17, 2012 (19 Pages).
- 5) Copy of Operational Procedure 326, "Posting of Shifts/Overtime" effective date February 3, 2015 (9 Pages).
- 6) Copy of SNWCC Shift Roster for the 5am-1pm shift on April 4, 2015 (1 Page).
- 7) Copy of Brian Ludwick's Attendance Card for the year 2015 (1 Page).

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

JA 0184

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
NOTICE OF INTERROGATION/INTERVIEW
ADMINISTRATIVE INVESTIGATION
Peace Officer

TO: Brian Ludwick, Correctional Officer, Florence McClure Women's Correctional Center, Las Vegas, NV

FROM: Arthur Emling Jr., Criminal Investigator II, Office of Inspector General, Las Vegas, NV

DATE: July 22, 2015

This is to advise you that you are the subject of an internal administrative investigation that could result in punitive action being taken against you. While investigators gather the facts concerning the allegations against you, be assured that every reasonable effort will be made to conduct the investigation in a neutral, fair, impartial, and timely manner. Your full cooperation is requested and expected. This investigation is based upon one or more allegations of improper conduct or activity that has been received by this office. Nothing in this process shall abridge any rights guaranteed by the Constitution of the United States or any other applicable law or regulation.

Pursuant to State law, (NRS 289.060) you have the right to have two representatives of your choosing present during any phase of an interrogation or hearing relating to the investigation including without limitation, **a lawyer, a representative of a labor union or another peace officer only**, when you are questioned regarding this/these allegations. You have up to 48 hours to obtain a lawyer or other authorized representative, if you so choose. However, the representative must not be a person connected to or named as a subject or witness to the investigation.

It is alleged that you engaged in **NEGLECT OF DUTY** while on duty on April 4, 2015 at approximately 5:30am, when you abandoned your post in Unit 1 at Florence McClure Women's Correctional Center without prior authorization from a supervisor or any other person of higher authority (Class 5).

It is alleged that you engaged in **NEGLECT OF DUTY** while on duty on April 4, 2015 on the 5am-1pm shift, you failed to perform your assigned security functions in Unit 1 after leaving your assigned post (Class 4).

This matter has been assigned for investigation by Inspector General Pamela K. Del Porto to Investigator Arthur Emling Jr (702-378-7649), who is in charge of the investigation. You are directed to make yourself available for interview on July 29, 2015 @ 6:00am. The interview will be conducted by Investigator Arthur Emling Jr and Steve LeMaire. The interview will be held at Casa Grande Transitional Housing Center, 3955 W. Russell Rd Las Vegas, NV 89118. You are expected to provide candid and truthful information during the interview. Providing false or misleading statements to the interviewer is a separate violation that could result in additional disciplinary action, including termination.

ADDENDUM

1

pg 1 of 5

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
NOTICE OF INTERROGATION/INTERVIEW
ADMINISTRATIVE INVESTIGATION
Peace Officer

This is an official investigation being conducted by the Department of Corrections. All matters are strictly confidential. In order to protect your confidentiality, the rights of other employees and involved persons, and the integrity of the investigation, you are hereby directed not to participate in the dissemination/discussion of any information based on this investigative process. In addition, you will exclude yourself from any form of communication with others regarding this investigation. Information shared with your representative is excluded from this directive. Any violation of this confidentiality directive or attempts to influence any witness or victim is a separate violation that could result in additional disciplinary action, including termination.

() I waive my right to have an attorney/representative present.

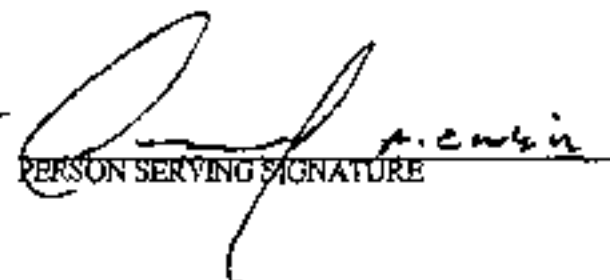
(X) I wish to have B. Amcas represent me during this interview.

Any information that a representative obtains from the peace officer who is the subject of the investigation is confidential and must not be disclosed, except under the prescribed mandated circumstances outlined in NRS 289.080.

IMPORTANT: Your signature is not an admission of guilt. Your signature is merely an acknowledgement of receipt of this notice. Your refusal to sign this notice when ordered to do so may result in disciplinary action against you.


EMPLOYEE SIGNATURE

7/22/15
DATE


PERSON SERVING SIGNATURE

7/22/15
DATE

ADDENDUM

1

18205

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
OFFICE OF THE INSPECTOR GENERAL
MEMORANDUM

DATE: July 22, 2015

TO: Brian Ludwick, Correctional Officer, Florence McClure Women's Correctional Center,
Las Vegas, NV

FROM: Arthur Emling Jr, Criminal Investigator II, Las Vegas, NV

SUBJECT: Admonition of Confidentiality IA-2015-0058

You are ordered not to discuss this case or any portion of your interview concerning the allegations under investigation in this matter with anyone. You are ordered not to have any interaction, engage in any conversations with, intimidate, threaten or coerce any other participant, witness, accused or reporting party, about this matter or the investigation. This admonition covers all questions asked, your responses to those questions, and any reports authored by you. You are not to discuss any conversations related to your interview and the matter under investigation. You are not to share copies of any tape recordings of this interview that may be in your possession with any person.

In the event this order is violated, you may be subject to new and/or additional disciplinary action, up to and including termination.

Your signature below confirms that you have read, understand and agree to follow this admonition.

7/22/15
Date

Brian Ludwick
Signature

Any information that a representative obtains from the peace officer who is the subject of the investigation is confidential and must not be disclosed, except under the prescribed mandated circumstances outlined in NRS 289.080.

Any information that a representative obtains from the peace officer who is a witness concerning the investigation is confidential and must not be disclosed as outlined in NRS 289.080.

ADDENDUM

¹
pg 3 of 5
DOC 030 (Rev 09-2013)

State of Nevada
 Department of Corrections
Admonition of Rights (Administrative)

Case Number

IA-2015-0058

This is to advise you that you are being questioned as part of an official investigation by the Nevada Department of Corrections. You will be asked questions specifically directed and narrowly related to the performance of your official duties. You are entitled to all the rights and privileges guaranteed by law, including the Constitution of the State of Nevada and the Constitution of the United States. This includes the right not to be compelled to incriminate yourself. You are further advised that if you refuse to answer questions and/or mislead or give false statements relating to the performance of your official duties, you will be subject to Department Charges that could result in your dismissal from employment. If you do answer, your statements will not be used against you in any subsequent criminal proceedings. However, these statements may be used against you in relation to subsequent Department Charges.

As in all investigations conducted by this office, the Inspector General is in charge of the investigation. The investigator(s) assigned to the case is _____. You may upon request, without limitation, have a lawyer and/or other representative of your choosing present, as long as the representative(s) is not otherwise connected to, or the subject of this investigation, per NRS 289.060/NRS 284.387.

I do hereby acknowledge that I have received and understand the above Administrative Admonition of Rights.

Signature: Brian Ledwith Date: 7/29/15
 Title: C/O Time: 06:10

Employee Representative

Name: _____ Date: _____
 Title: _____ Time: _____

Witness: Arthur Embling Jr. Date: 7/29/15
 Title: Criminal Investigator

ADDENDUM

1
pg 4 of 5

State of Nevada
 Department of Corrections
Interview Lead-in Statement

Case Number IA-2015-0058

This is a (digitally) recorded interview regarding a Department of Corrections investigation, Case Number **IA-2015-0058**. Today's date is **July 29, 2015**, and the time is

The interview is being (digitally) recorded on number **Ludwick, Brian IA-2015-0058**.

The location of the interview is **Casa Grande Transitional Housing Center/Administrative Side of the Building inside the Interview Room**.

and present to be interviewed is **Correctional Officer Brian Ludwick**.

Officer Ludwick please state and spell your last name for the record.
(Mr., Mrs. or Title - Subject's name)

Thank you. Please indicate who you are employed by, where you are assigned, your title, how long you have been employed by the Department of Corrections, and if you know it, your employee Identification Number

The interview is being conducted by Criminal Investigator Arthur Emling Jr.

Also present are _____,

_____ and _____ of the _____,

_____ and _____ respectively.

Officer Ludwick prior to this interview being recorded, I handed you a copy
(Mr., Mrs. Or Title - Subject's name)

of the Department's Administrative Admonition of Rights form, is that correct?

Have you read the document and do you understand it?

Did you sign the Administrative Admonition form?

Officer Ludwick, during the course of your employment have you had an opportunity to review and/or read the Department's policies, procedures and Administrative Regulations?

I am conducting an investigation regarding **Two Counts of Neglect of Duty** alleged against you by the **Department of Corrections**. This occurred on **April 4, 2015** at **Florence McClure Women's Correctional Center**.

Do you have any questions before we proceed?

ADDENDUM

18-5-15

Gary Piccinini

IR-2015-SNWCC-000409

On April 4, 2015, I, Lieutenant G. Piccinini was in shift command when at 0532 hours Officer Ludwick entered. Officer Ludwick requested that I switch him out of Unit 1 with Officer Ennis-Wright who was currently assigned to Unit 5. Officer Ludwick did not telephone in advance requesting permission to leave his assigned post. Officer Ludwick stated that he is used to unit 5 and does not know Unit 1. I told him no. Officer Ludwick asked why? I informed him that he needs to learn Unit 1. Officer Ludwick then became angry and stated "Well how about I use FMLA then because I have not taken my blood pressure medication, Hows that!" I informed him that is fine with me and before I could attempt to talk with him he stormed out of the office. When I had posted Officer Ludwick to Unit 1 at the beginning of shift, he had asked me who was in Unit 5 today. It is apparent that Officer Ludwick is not happy with where he was posted. He did not make any attempts at speaking with me prior to this conversation about where he was posted and his condition. Unit 1 had three Officers assigned today, making it relevant to keep him in there to be trained. Officer Ludwick has been assigned to FMWCC since February 23, 2015, and has only worked Unit 1 once prior to today. Officer Ludwicks conduct would suggest that he is falsely using FMLA because he did not get what he wanted.

Officer Ludwick is assigned to the Unit 3 position at FMWCC on day shift. This position is a pull/shut down position. AOD AW Hill notified at 0610 hours.

AW Hill instructed for me to document this incident in NOTIS, put Officer Ludwick out on AWOL for the remainder of the shift, and send her my report via e-mail so she can follow up with it on Monday.

...[GPICININI, 04/04/2015 10:20:01] Per AW Hill, leave Officer Ludwick on FMLA status until investigation is complete. NSIS records changed to indicate FMLA.

ADDENDUM

2
Pg 1 of 1

ADMINISTRATIVE REGULATIONS ACKNOWLEDGEMENT

The following 300 Series Administrative Regulations outline staff conduct, rules, and regulations. By signature below I acknowledge it is my responsibility to read and familiarize myself with these regulations, as well as their periodic updates. I also acknowledge these regulations are available for review on the department's website at www.doc.ny.gov, and in Department administrative offices. Any corresponding Operational Procedures are located on the Department's Stewart Shared Drive. Should I be unable to access these regulations, I will notify the Department's Human Resource Office.

A.R.	300	Recruitment and Hiring
A.R.	301	Shift Bidding
A.R.	302	Meet and Confer Procedures
A.R.	304	Equal Employment Opportunity Complaint Procedure
A.R.	305	Sexual Harassment Prevention
A.R.	306	Employee Formal Grievance Procedure
A.R.	307	Furlough Policy
A.R.	308	Department Staff and Applicant Records
A.R.	310	Work Performance Standards
A.R.	311	Performance Evaluations for Classified Employees
A.R.	313	Dismissal of Probationary and Trial Period Employees
A.R.	314	Employee Physical Examinations & Health Requirements
A.R.	316	Employee Transfers
A.R.	317	Employee Awards and Commendation
A.R.	318	Employee Performance Cards
A.R.	319	Workplace Safety
A.R.	320	Salary Administration
A.R.	321	Workplace Violence
A.R.	322	Types of Leave and Leave Procedure
A.R.	326	Posting of Shifts/Overtime
A.R.	329	Employee Work-Related Illness or Injury
A.R.	330	Employee Resignation and Reinstatement Procedure
A.R.	332	Employee Reporting Responsibility
A.R.	337	Staff Requirements for Home Address and Personal Telephone Number
A.R.	338	Former Employees Access to Department Property
A.R.	339	Code of Ethics; Employee Liability; Employee Conduct; Prohibitions and Penalties
A.R.	340	Employee Complaint Reporting and Investigation
A.R.	341	Employee Misconduct and Performance Adjudication
A.R.	342	Employee Representation Witness Compensation
A.R.	343	Imposing Corrective/Disciplinary Action
A.R.	345	Unauthorized Relationships
A.R.	346	Nepotism
A.R.	347	Political Activities by Employees
A.R.	348	Alcohol and Drug Testing Testing Requirements – Commercial Driver's License
A.R.	349	Employee/Applicant Alcohol and Drug Testing
A.R.	350	Department Grooming and Dress Standards
A.R.	352	Identification Cards
A.R.	355	Employee Secondary Employment
A.R.	357	Service of Actions Against Department Accepting Service
A.R.	358	Request for Basic Peace Officer Certificate
A.R.	363	Honor Guard

Brian Ludwick
Signature

1/31/13
Date

Brian Ludwick
Print Name

ADDENDUM

3
pg (of 1)

**NEVADA DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE REGULATION
339**

**CODE OF ETHICS
EMPLOYEE CONDUCT
PROHIBITIONS AND PENALTIES**

Supersedes: AR 339 (Temporary, 11/24/11); AR 339 (Temporary, 10/13/14); AR 339 (Temporary, 12/10/14); and AR 339 (Temporary, 12/18/14)
Effective date: 06/17/12 (Reverted back to last permanent AR on 05/19/15)

AUTHORITY

Any and all relevant NRS and NAC including but not limited to: NRS Chapters 284 & 289; NRS 199.325; NRS 281.481; NAC 284.638 - 284.656; NAC 284.738 - 284.771

RESPONSIBILITY

1. The Director has the final and overall responsibility for administering employee discipline.
2. The overall responsibility for compliance with the provisions set forth in this Administrative Regulation (AR) has been delegated by the Director to the Appointing Authorities.
3. The Wardens/Division Heads are responsible to ensure compliance with this Administrative Regulation and to ensure that non-compliance with this procedure is reported and addressed in a timely manner.
4. All Wardens/Division Heads are responsible to distribute, post, and ensure accessibility and compliance with this AR.
5. All Department employees are responsible to comply with this procedure at all times. All Department employees are responsible to make appropriate notifications concerning incidents, activities, or events of immediate interest or concern which take place within the jurisdiction of, or which impact, the Department.
6. The Department Human Resources Division is responsible to ensure all new employees receive a copy of this AR and sign acknowledgment of such.
7. The Employee Development Manager is responsible to develop and deliver training on this AR.

AR 339

Page 1 of 19

ADDENDUM

4

pg 1 of 19 JA 0192

339.01 CODE OF ETHICS

1. Employees of the Nevada Department of Corrections should at all times adhere to the following Code of Ethics.

A. The Nevada Department of Corrections is committed to a code of ethics that will guide the performance, conduct and behavior of its employees. This code will ensure that our professionalism is reflected in the operation and activities of the Department and is recognized by all interested parties. In this light, the following principles are practiced:

- (1) Employees shall maintain high standards of honesty, integrity, and impartiality, free from any personal considerations, favoritism or partisan demands.
- (2) Employees shall be courteous, considerate, and prompt when dealing with the public, realizing that we serve the public.
- (3) Employees shall maintain mutual respect and professional cooperation in their relationships with other staff members of the Department of Corrections.
- (4) Employees shall be firm, fair, and consistent in the performance of their duties. Employees should treat others with dignity, respect, and compassion and provide humane custody and care, void of all retribution, harassment or abuse.
- (5) Employees shall uphold the tenets of the United States Constitution, its amendments, the Nevada Constitution, federal and State laws, rules and regulations, and policies of the Department.
- (6) Whether on or off duty, in uniform or not, employees shall conduct themselves in a manner that will not bring discredit or embarrassment to the Department of Corrections and the State of Nevada.
- (7) Employees shall report without reservation any corrupt or unethical behavior that could affect either inmates, employees, or the integrity of the Department of Corrections.
- (8) Employees shall not use their position for personal gain.
- (9) Employees shall maintain confidentiality of information that has been entrusted to them and designated as such.
- (10) Employees shall not permit themselves to be placed under any kind of personal obligation that could lead any person to expect official favors.

ADDENDUM

(11) Employees shall not accept or solicit from anyone, either directly or indirectly, anything of economic value, such as a gift, gratuity, favor, entertainment, or loan which is, or may appear to be, designed to influence their official conduct.

(12) Employees shall not discriminate against any inmate, employee or any member of the public on the basis of race, color, religion, sex, sexual orientation, age, disability, gender identity or expression, or national origin.

(13) Employees shall not sexually harass or condone sexual harassment with or against any person.

(14) Employees shall maintain the highest standards of personal hygiene, grooming and neatness while on duty or otherwise representing the Department.

339.02 EMPLOYEE LIABILITY

1. Inmate Property

A. Loss of or damage to inmate property caused by an employee of the Department which is attributable to negligence, lack of reasonable care, failure to follow proper procedures or misconduct on the part of the employee may subject the employee to a financial liability for replacement of the property and may result in disciplinary action.

2. State Property

A. Loss of or damage to state property or unnecessary expenditure of state funds caused by any employee of the Department which is attributable to negligence, lack of reasonable care, failure to follow proper procedures or misconduct on the part of the employee, may subject the employee to a financial liability for the replacement of the property or funds and may result in disciplinary action.

B. Misuse, unauthorized use, or unlawful use of State Property by any employee or the Department may subject the employee to a financial liability and may result in disciplinary action.

3. Penalties for employees who violate any regulation that results in loss or property damage or costs incurred by the Department may result in, but are not limited to:

A. Being held financially liable, after appropriate legal process, for the costs associated with the violation.

B. Reprimand, suspension or dismissal from State service.

C. Subject the employee to civil, compensatory or criminal prosecution and penalties.

339.03 EMPLOYEE CONDUCT ON AND OFF DUTY

1. All Department employees are responsible, at all times, to conduct themselves in an appropriate manner, with honor, integrity and impartiality, whether on or off duty, to obey and support the letter and spirit of the law, and to always exercise appropriate self-discipline in the use of the power and authority entrusted to them.
2. The penalty imposed for a violation of 339.04 Class of Offense Guidelines (18. U.), can range from a CLASS 1 - 5 violation depending upon the facts and circumstances of the particular case.
3. Under the law Peace Officers are expected to abide by the laws they are empowered to enforce. Employees will obey all laws of the U.S., State of Nevada, and ordinances in force in their jurisdiction. Violations of law, or an indictment, or information filed against an officer or a conviction will be cause for disciplinary action up to and including termination from employment.

339.04 PROHIBITIONS AND PENALTIES

1. The Chart of Corrective/Disciplinary measures ascribes an available range of Corrective/Disciplinary action for each Class of prohibited activity. This chart indicates the suggested level of discipline, from less serious to more serious, for the Class of Offense and for first, second and third offenses.
2. Penalties for prohibited activities should be assessed based upon criteria established in the Chart of Corrective/Disciplinary Sanctions.
3. Multiple Infractions - In cases involving more than one sustained violation, disciplinary action should begin with the most serious violation. Other related violations may then be considered as aggravating circumstances when determining the appropriate penalty from within the minimum and maximum recommended range, or each violation may be individually considered and the penalties cumulated.
4. Progressive Discipline - Grave acts of misconduct may warrant dismissal of an employee without previous corrective action or progressive discipline. However, less serious acts of misconduct may warrant the use of progressive discipline, i.e., lesser to greater discipline, to give the employee a chance to reform his or her conduct. The increasing level of concern expressed through progressive discipline may begin with corrective action or proceed to a written reprimand, suspension for up to 30 calendar days, demotion or dismissal.
5. Appointing Authorities and employees must recognize that penalty schedules cannot accurately, fairly, or consistently address every situation. Appointing Authorities must conduct an individual analysis of each employee for each incident and exercise their professional judgment and discretion, then recommend a penalty based upon the need to modify the

ADDENDUM

4

pg 4 of 19 JA 0195

employee's behavior, set expectations for other employees, and maintain the public trust. There is no requirement that charges similar in nature must result in identical penalties.

6. Appointing Authorities and their reviewers should neither rely solely on previously imposed penalties nor quote them as an authority in penalty rationales. It must be remembered that this is a historical document of penalties. As such, it may not reflect an appropriate penalty for the misconduct. Indeed, an appropriate penalty may be higher or lower depending upon current issues and the impact of the particular misconduct on the Department and/or fellow employees.

7. Appointing Authorities should determine if arrests or convictions have an adverse impact on the employment of the employee by the State, and if an adverse impact is found, the appointing authority may immediately dismiss the employee.

8. The Department has developed a Class of Offense Guide which describes prohibited employee conduct and a Chart of Corrective/Disciplinary Sanctions which prescribes recommended penalties for inappropriate conduct.

	<i>First Offense</i>		Second Offense		Third Offense	
Class	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
1	Verbal Counseling	Written Reprimand	Written Reprimand	Suspension	Suspension	Dismissal
2	Written Reprimand	Suspension	Suspension	Suspension Demotion	Suspension Demotion	Dismissal
3	Suspension	Suspension Demotion	Suspension Demotion	Dismissal	Dismissal	N/A
4	Suspension Demotion	Dismissal	Suspension Demotion	Dismissal	Dismissal	N/A
5	Dismissal	Dismissal				

339.05 CLASS OF OFFENSE GUIDELINES

1. ABSENT WITHOUT LEAVE (AWOL)

A. Unexcused tardiness. CLASS 1

B. Absence without approved leave for three consecutive scheduled working days. CLASS 5

2. DISCHARGE OF FIREARM DUE TO NEGLIGENCE

A. Discharge of firearm because of negligence. CLASS 2

ADDENDUM

4

P 5 of 19 JA 0196

B. Discharge of firearm due to negligence, with substantial injury/damage. **CLASS 4**

3. ALCOHOL ABUSE

The State of Nevada Reasonable Suspicion and Pre-Employment Drug and Alcohol Testing Program provides for the testing of employees and applicants for alcohol and drugs pursuant to NRS 284.406 through NRS 284.407; and NAC 284.880 to 284.894, inclusive.

A. Employees under the influence of alcohol with the intent to report to duty or while on duty. First offense. **CLASS 4** Second offense within five years. **CLASS 5**

B. Appear for duty with the odor of alcohol/intoxicant on person or breath. **CLASS 3**

C. Purchase or consumption of alcohol while in uniform when off duty. **CLASS 2**

D. Purchase or possess alcoholic beverage on duty. **CLASS 3**

E. Consumption of an alcoholic beverage while on duty. **CLASS 4**

F. Driving while under the influence of alcohol while on duty. **CLASS 4**

G. Damaging State property while under the influence of alcoholic beverages. **CLASS 4**

H. Refusal to submit to a lawfully required alcohol test. **CLASS 5**

4. NARCOTICS/DRUGS

The State of Nevada Reasonable Suspicion and Pre-Employment Drug and Alcohol Testing Program provides for the testing of employees and applicants for alcohol and drugs pursuant to NRS 284.406 through NRS 284.407; and NAC 284.880 to 284.894, inclusive.

A. Employees under the influence of or using a controlled substance/narcotic/drug, etc. while on duty. First offense **CLASS 3** Second offense within five years. **CLASS 5**

B. Peace Officers and/or those employees who come into contact with inmates as a part of their job duties, under the influence of or using a controlled substance/narcotic/drug, etc. while on duty. First offense **CLASS 4** Second offense within five years **CLASS 5**

C. Refusal to submit to a lawfully required controlled substance/narcotic/drug test. **CLASS 5**

D. An employee driving under the influence in violation of NRS 484.379 or of any other offense for which driving under the influence is an element of the offense, and the offense occurred while driving a state vehicle, or a privately owned vehicle on state business. **CLASS 4**

E. Unlawful manufacture, distribution, dispensing, possession, selling, or use of any controlled substance, narcotic, and/or drug at his place of work or on state business. CLASS 4

F. Knowingly transport any person to buy/obtain any controlled substance, narcotic, and/or drug. CLASS 4

G. Failure to notify a supervisor after consuming any drug, alcohol and/or substance which could interfere with the safe and efficient performance of his duties. CLASS 4

5. CRIMINAL MISCONDUCT

A. An employee who is convicted of driving under the influence in violation of NRS 484.379 or of any other offense for which driving under the influence is an element of the offense while driving a state vehicle, or a privately owned vehicle on state business. CLASS 5

B. An employee who is convicted of the unlawful manufacture, distribution, dispensing, possession, selling, or use of any controlled substance at his place of work or on state business. CLASS 5

C. Guilty plea of any type (Alford, no contest, etc.) or conviction of a felony, gross misdemeanor, or misdemeanor. CLASS 4

**Provided the conduct at issue has an adverse impact upon the Department and/or negatively reflects upon the image of the State of Nevada or the Department of Corrections.*

D. Reasonable belief that a felony, gross misdemeanor, or misdemeanor has been committed. CLASS 4

**Provided the conduct at issue has an adverse impact upon the Department and/or negatively reflects upon the image of the State of Nevada or the Department of Corrections.*

E. Domestic violence conviction. [18 U.S.C.A. §§ 917, 922 (Federal Gun Control Act of 1968) as amended, effective October 1, 1996]. CLASS 5

F. Any sexual contact/conduct with an inmate under the supervision of the Department, including but not limited to, oral sexual contact or sexual intercourse, masturbation, homosexual acts, or physical contact with the clothed or unclothed genitals or pubic area to arouse, appeal to or gratify sexual desires. CLASS 5

6. DISCOURTESY

A. Discourteous or improper remark to a co-worker. CLASS 2

B. Discourteous or improper remark to a member of the public. CLASS 2

C. Inappropriate gesture or touching. CLASS 2

D. Initiate and/or perpetuate malicious rumors regarding fellow employees. CLASS 2

E. Verbal threats toward a staff member. CLASS 3

7. DISCRIMINATION/SEXUAL HARASSMENT AND OTHER TITLE VII VIOLATIONS

A. "Hostile work environment" is a legal term for discriminatory conduct in violation of Title VII by employees that occurs over a period of time and by its nature changes an employee's terms and conditions of employment. It is not a work environment that is unpleasant for reasons not directly associated with Title VII discrimination, such as a grouchy supervisor or ill-mannered co-workers.

B. "Sexual Harassment" as defined pursuant to NAC 284.771.

C. Therefore, depending on the nature, severity, and duration of conduct in violation of Title VII, NDOC should impose prompt disciplinary sanctions ranging from a CLASS 1 to a CLASS 5 in accordance with NAC 284.771.

D. NDOC is required by Title VII to ensure that no discrimination occurs in the workplace. As part of this responsibility, NDOC must promptly discipline employees engaging in unlawful conduct to assure that the individual involved stops the discriminatory behavior as well as discouraging other employees who might engage in such behavior from doing so.

E. Title VII of the Civil Rights Act pertains to discriminatory acts in the workplace taken against applicants or employees merely on the basis of their race, color, religion, sex, sexual orientation, age, disability, or national origin.

F. Refer to NAC 284.771.

(1) Discriminating against or harassing another person because of that person's race, color, religion, sex, sexual orientation, age, disability, gender identity or expression, or national origin. CLASS 4

(2) Make a prohibited discriminatory remark at work or in the work related environment. CLASS 4

(3) Display photographs, cartoons, jokes, social network postings of a discriminatory nature at work or in the work related environment. CLASS 4

8. DISHONESTY

- A. Theft, misappropriation, or other fraudulent activity involving Department or State funds, property, or resources. **CLASS 5**
- B. Theft of property belonging to another employee, a citizen, or an inmate. **CLASS 5**
- C. Knowingly making false statement on travel claims. **CLASS 5**
- D. Receiving travel expenses through false pretenses. **CLASS 5**
- E. Making a personal profit from State transactions. **CLASS 5**
- F. Accepting or soliciting a bribe or gratuity. **CLASS 5**
- G. Converting found, recovered or seized property to personal use. **CLASS 2**

9. FALSE AND MISLEADING STATEMENTS

- A. Knowingly providing false or misleading statements, either verbally or in written reports or other documents, concerning actions related to the performance of official duties or providing false or misleading statements in response to any question or request for information in any *official* investigation, interview, hearing or judicial proceeding. **CLASS 5**
- B. Knowingly providing false/misleading statements to a supervisor. **CLASS 4**
- C. Knowingly falsifying any State record or report. **CLASS 5**
- D. Failure to assure factual accounting and record-keeping to prohibit falsification, unauthorized alteration or destruction of documents, log books, and other records. **CLASS 5**

10. FRAUD IN SECURING APPOINTMENT

- A. Willful falsification of application for employment or other personnel forms. The falsification must deal with a material fact that would have adversely affected the employee's selection. **CLASS 5**
- B. Permitting another person to take a portion of the State Service examination for the employee or for someone else or participating in such an examination for another person. **CLASS 5**

ADDENDUM

4

pg 9 of 19 0200

11. IMPROPER POLITICAL ACTIVITY

- A. Using or promising to use any official authority or influence for the purpose of influencing the vote or political action of any person or for any consideration. **CLASS 2**
- B. Engaging in political activity during the hours of their state employment to improve the chances of a political party or a person seeking office, or at any time engage in political activity to secure a preference for a promotion, transfer, or salary advancement. **CLASS 2**
- C. Engaging in any unauthorized political activity, except for expressing an opinion, while on duty, while in uniform or at public expense. **CLASS 3**
- D. Soliciting and/or influencing any employee to engage or not engage in any political activities with direct or indirect use of any threat, intimidation or coercion, including threats of discrimination, reprisal, force or any other adverse consequence including loss of any benefit, reward, promotion, advancement or compensation. **CLASS 5**
- E. Subjecting any employee who chooses not to engage in any political activity to any direct or indirect discrimination, reprisal, force, coercion or intimidation or any other adverse consequence including the loss of any benefit, reward, promotion, advancement or compensation. **CLASS 5**

12. INSUBORDINATION

- A. Disobeying or refusing to obey, a statute, regulation, written instruction or lawful order wherein no security breach occurs is a **CLASS 4** Any disobeying or refusing to obey, including but not limited to refusal to work mandatory overtime, which results in mandatory staffing levels not being met, a breach that leads to any injury to a person, or resulting in another type of security breach. **Class 5**
- B. Argue about the wisdom or propriety of a lawful order or decision. **CLASS 2**
- C. Refusal to undergo a search of person or property on institutional property. **CLASS 5**
- D. Failure to provide identification or display proper I.D. **CLASS 1**
- E. Unauthorized service and or acceptance of legal process. **CLASS 1**
- F. Unauthorized representation of Department. **CLASS 2**
- G. Disobeying the State of Nevada smoking statutes. **CLASS 1**

13. MISUSE OR UNAUTHORIZED USE OF STATE PROPERTY

- A. Damage to or loss of State property or equipment - neglect or carelessness. **CLASS 1**

ADDENDUM

4

pg 10 of 19A 0201

- B. Failure to properly maintain State property and/or department equipment. **CLASS 1**
- C. Unauthorized use, misuse, or waste of property belonging to the State or Department. **CLASS 2**
- D. Unauthorized destruction of State records. **CLASS 5**
- E. Speeding or committing other traffic violations while driving a state owned vehicle, or reckless handling of other State equipment. **CLASS 2**
- F. Using Department vehicle for other than official business or for personal use and benefit. **CLASS 3**
- G. Deliberate waste of materials or supplies. **CLASS 2**
- H. Unlawful removal of State property. **CLASS 5**
- I. Improper use of Department communications systems. **CLASS 4**
- J. Employees shall not permit inmates to use Department telephones, or be in an area unsupervised where staff telephones are accessible, except as otherwise authorized by administrative regulations. **CLASS 4**
- K. Intentional destruction, damage to or loss of property or State equipment. **CLASS 4**

14. COMPUTER USAGE VIOLATIONS

AR 143: An inmate shall not work on or with any computer, computer system or information system that is connected, in any way, to any network, or that is equipped with a modem, network card, or similar device, which would permit data communications or communications of any type with a person or device outside a Department facility. Failure to comply will result in disciplinary action up to and including termination.

- A. Unauthorized or Improper use or copying of proprietary software, electronic file, program, or data without authorization. **CLASS 4**
- B. Unauthorized use of Department data or programs for other than the administration of Department duties, responsibilities, and business. **CLASS 2**
- C. The inappropriate introduction or use of unauthorized computer hardware or software, including the downloading to Department computers of inappropriate or unauthorized materials from any source. **CLASS 2**
- D. Accessing Department computers using another employee's password. **CLASS 3**

ADDENDUM

4

pg 11 of JA9202

- E. Providing your password to any other person. CLASS 3
- F. Misrepresenting oneself on the Internet as another person without authorization. CLASS 3
- G. Inappropriate use of Department e-mail or internet system that includes, use which violates any Administrative Regulation, Policy or Procedure, use for purposes not directly related to Department duties, unauthorized use to access and/or distribute computer games unrelated to the Department mission. CLASS 3
- H. Inappropriate use of Department e-mail or internet system that includes, use which violates any Law, use in any for-profit endeavor unrelated to Department duties, use for private business including commercial advertising, unauthorized fund-raising or public relations. CLASS 4
- I. Use of Department equipment for gambling. CLASS 5
- J. Use for access to and/or distribution/copying of indecent, adult, offensive or obscene material. CLASS 5
- K. Forge a digital signature. CLASS 5
- L. Attempting to, or intentionally using e-mail or Internet facilities to disable, impair, overload or disrupt computer or network performance, services or equipment, or to circumvent any system intended to protect privacy or security of another user or the system or to harass other users. CLASS 5
- M. Unauthorized use to inappropriately seek, distribute, obtain copies of, modify, or distribute information, files, or other data that is private, confidential or not open to public inspection. CLASS 5
- N. Intentionally allowing an inmate to have any password protected file. CLASS 5
- O. Inmates shall never be permitted to have access to privileged, confidential, or sensitive information contained on a computer. Employees should not access such information on their computer screens with inmates in the vicinity. CLASS 4
- P. Inmates shall never be left unsupervised in any area which contains privileged, confidential, or sensitive information which is not properly secured. CLASS 5
- Q. Improperly permitting an inmate to work on or use any computer, computer system, or information system that is connected in any way to a network or that is equipped with a modem, network card or similar device to permit communication outside a Department facility. CLASS 5

R. Improperly permitting an inmate to write or modify any computer software owned, leased, or used by the Department or the State, or to utilize such software to collect or organize personal, Department or State proprietary data. CLASS 5

S. Improperly instructing or permitting any inmate to provide technical assistance or otherwise assist staff with the resolution or attempted resolution of any computer, computer system, or information system problem. CLASS 4

15. NEGLECT OF DUTY

A. Careless or sloppy work; frequent mistakes or errors. CLASS 1

B. Failure to complete work assignments. CLASS 1

C. Failure to complete and submit required reports to supervisor or other designated person. CLASS 2

D. Failure to take corrective action when warranted. CLASS 1

E. Willful failure to intervene or respond when necessary. CLASS 3

F. Making inappropriate recommendations. CLASS 1

G. Wasting time or loitering. CLASS 1

H. Failure to devote full time, attention and effort to assigned duties. CLASS 2

I. Conducting outside/personal business on State time. CLASS 2

J. Engage in unauthorized off duty employment, activity or enterprise determined to be inconsistent, incompatible, or in conflict with duties as employees of the Department. CLASS 3

K. Engage in secondary employment without an approved Request for Secondary Employment Form. CLASS 2

L. Failure to keep work area clean and uncluttered causing a work hazard. CLASS 1

M. Misplacement of important documents or property. CLASS 1

N. Disregard of safety rules. CLASS 2

O. Intentionally initiating or causing a disruption of normal operations. CLASS 4

P. Failure to make proper notification of sick leave. CLASS 2

Q. Failure to maintain telephone or other method of delivering messages at residence. **CLASS 1**

R. Failure to maintain required uniform. **CLASS 1**

S. Failure to wear appropriate clothing consistent with assigned duties. **CLASS 1**

T. Failure to appear for court or a hearing when duly notified or subpoenaed. **CLASS 2**

U. Failure to maintain personal appearance appropriate to the job. **CLASS 1**

V. Loss of seized, found, or recovered property by negligence. **CLASS 1**

W. Allowing unauthorized personnel to enter work areas. **CLASS 2**

X. Failure to ensure subordinate employees perform required duties. **CLASS 1**

Y. Failure to report to a supervisor when tired or ill. **CLASS 2**

Z. Failure to report misconduct, or failure to report or notify supervisor concerning incidents, activities, or events of immediate interest or concern which take place within the jurisdiction of, or which impact, the Department. **CLASS 3**

AA. Failure to exercise proper supervision over offenders. **CLASS 2**

BB. Concealing or covering-up of defective workmanship. **CLASS 2**

CC. Failure to report an arrest or conviction of any misdemeanor, gross misdemeanor, or felony within 5 working days. **CLASS 2**

DD. Failure to report a violation of a traffic law when a driver's license is a requirement of the position. **CLASS 2**

EE. Willful failure to turn seized, found, or recovered property directly to property custodian, court, or owner. **CLASS 2**

FF. Preferential treatment of subordinates or offenders. **CLASS 2**

GG. Failure to respond to radio call. **CLASS 2**

HH. Failure to comply with any court order or judgment. **CLASS 3**

II. Unauthorized possession of weapons or security equipment on State Property. **CLASS 5**

JJ. Sleeping on duty or failure to remain fully awake while on duty. **CLASS 4**

KK. Failure to assure safety and security as part of effective job performance, employees remain alert, aware of, attentive and responsive to their surroundings while on duty. **CLASS 4**

LL. Failure to perform security functions. **CLASS 4**

MM. Failure to Discharge Duties - intentionally failing to discharge custodial responsibility provided that failure results in (a) escape of a prisoner or (b) the serious physical injury or death of another person. **CLASS 5**

NN. Security Violation - Jeopardizing the security of the institution. **CLASS 5**

OO. Engage in any act or communicating information in any fashion that could assist any individual to escape arrest, detention and/or punishment, or enables any individual to dispose of or secrete evidence. **CLASS 5**

PP. Withholding information or concealing suspected criminal activity to shield individuals from detection, arrest, detention or punishment. **CLASS 5**

QQ. Attempting to have any formal charges dismissed, reduced, avoided or stricken from any court calendar, except as provided by law. **CLASS 4**

RR. Take any action that interferes with the administration of criminal justice, including intentionally interfering with the service of subpoenas, other lawful process, or the attendance or testimony of any witness at any lawful proceeding. **CLASS 5**

SS. Concealing, altering, falsifying, destroying, removing, tampering or withholding any property or evidence associated with any alleged misconduct, investigation, arrest, or other administrative or enforcement action. **CLASS 5**

TT. Removing, copying, concealing, altering, falsifying, destroying, stealing, or tampering with any record, report, or other official document maintained by the State, Department or any other criminal justice agency. (Official Department reports may be removed and/or copied only as allowed by law and Department policy/procedure.) **CLASS 5**

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

VV. Failure to meet Peace Officer Standards & Training (POST) requirements. **CLASS 5**

WW. Failure to maintain a valid driver's license when it is a condition of employment. **CLASS 5**

XX. Failure to maintain license, certification, etc. when condition of employment. **CLASS 5**

YY. Introduction of a telecommunication device as described in NRS 212.165. **CLASS 5**
When the introduction of the telecommunications device is immediately self-reported by the employee, no calls have been made or received through the device during the time it has been inside the institution, and the employee has been discipline-free during the previous 12 months. **CLASS 2.**

ZZ. Possession and/or Introduction of non-intoxicant contraband. Contraband is any item not issued by the State to properly perform job duties. An employee must obtain written approval of the Warden or designee to possess any personal items while on duty. **CLASS 4**

AAA. Possession and/or introduction of an intoxicant contraband, including narcotics and alcohol. **CLASS 5**

BBB. Failure to cooperate with official investigations conducted by the Department or other criminal justice agencies, when such failure does not violate an accused' Constitutional self incrimination protection. **CLASS 3**

CCC. Failure to safely operate motor vehicles while on duty – When the failure results in significant damage, bodily injury or death. **CLASS 5** When the failure results in minimal damage and/or minor injuries. **CLASS 3**

DDD. Failure to report an inmate's sexual activity. **CLASS 5**

EEE. Failure to report contact with law enforcement (other than in matters involving routine traffic stops, random automobile stops and road blocks, and other than in cases involving the rendering of assistance to law enforcement) or having been notified that employee is the subject of a criminal investigation, or that a criminal investigation is proceeding against employee. **CLASS 2**

16. SEXUAL MISCONDUCT

A. Any sexual contact including but not limited to, oral sexual contact or sexual intercourse, masturbation, homosexual acts, or physical contact with the clothed or unclothed genitals or pubic area to arouse, appeal to or gratify sexual desires involving any individual other than an inmate on State time and/or involving State property or equipment. **CLASS 5**

B. Custodial Sexual Misconduct is any behavior or act of a sexual nature, either consensual or non-consensual, directed toward an inmate by an employee, volunteer, contractor, official visitor, or agency representative. These acts include but are not limited to:

(1) Unauthorized, intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, arouse or gratify sexual desire; or

- (2) Unauthorized, intentional touching, fondling, or caressing of an inmate's person, directly or indirectly, related to a "romantic" relationship;
- (3) Completed, attempted, threatened, or requested sexual acts; or
- (4) Occurrences of indecent exposure, invasion of privacy or staff voyeurism for sexual gratification..

CLASS 5

17. UNAUTHORIZED USE OF FORCE

- A. Willfully employing or permitting the use of unnecessary, unauthorized, or excessive force. **CLASS 4**
- B. Creating a situation where force must be used unnecessarily. **CLASS 4**
- C. Failing to report any use of force either as a participant or a witness. **CLASS 3**

18. UNBECOMING CONDUCT

- A. Engaging in horseplay with inmates and/or co-workers. **CLASS 3**
- B. Gambling on State property or while on duty. **CLASS 2**
- C. Unprofessional remark to an inmate. **CLASS 1**
- D. Providing contraband to an inmate. **CLASS 5**
- E. Abuse of sick leave. **CLASS 2**
- F. Borrowing from or lending to an inmate something of value. **CLASS 2**
- G. Misuse and/or abuse of supervisory authority or privilege. **CLASS 2**
- H. Activities or relationships between Department staff and all persons currently or formerly under the supervision of the Department, or the jurisdiction of a criminal justice agency and their families, outside the normal course of interactions required by their duties. **CLASS 1 - 5**
- I. Divulging criminal records, medical records, or other legally protected information of one person to another, except when necessary to conduct the Department's business. **CLASS 5**
- J. Unauthorized disclosure of confidential Department matters. **CLASS 4**

K. Compromising the confidentiality of inmate affairs. CLASS 3

L. Conducting unauthorized business transactions with an inmate or an inmate's family. CLASS 5

M. Transmitting prohibited messages for inmates. CLASS 3

N. NAC 284.650 (2) Disgraceful personal conduct which impairs the performance of a job or causes discredit to the agency. CLASS 2

O. Identified self, displayed badge or identification, or made improper use of your status as a Department employee other than is necessary, whether on or off duty. CLASS 5

P. Wear the Department uniform in any bar, tavern, nightclub, or gambling establishment except in the performance of assigned duties. CLASS 2

Q. Retaliated against another employee for reporting a complaint of misconduct. CLASS 3

R. Inciting another to fight. CLASS 4

S. Unauthorized use, misuse, destruction or waste of property belonging to another employee, a citizen or an inmate. CLASS 2

T. Displaying pornographic or adult pictures, movies, or videos to inmates, employees or to persons outside of the Department while on paid status or on state property. CLASS 5

U. Any conduct whether on or off duty which negatively reflects upon the image of the State of Nevada or the Department of Corrections. CLASS 1 - 5

V. Staff on inmate Sexual Harassment, which includes staff, volunteer, contractors, or any service providers coming in contact with an inmate, said conducts includes but is not limited to:

- (1) Repeated verbal comments of a sexual nature to an inmate; or
- (2) Demeaning references to gender; or
- (3) Derogatory comments about body or clothing; or
- (4) Repeated profane or obscene language or gestures.

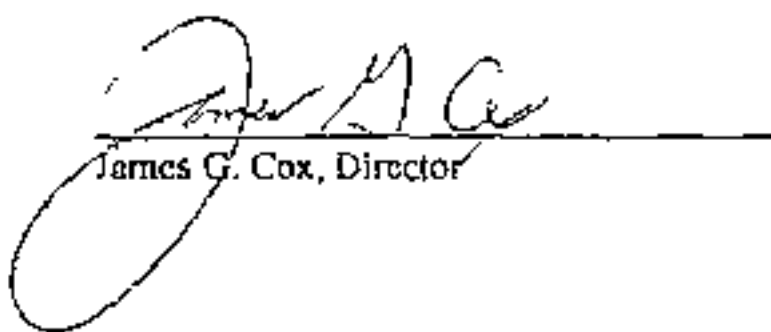
CLASS 1 - 5

APPLICABILITY

1. This regulation applies to all employees of the Department.
2. This regulation does not require an Operational Procedure.
3. This regulation does not require an audit.

REFERENCES:

ACA Standards 4-4069; 4-4048; 4-4067 and 2008 Supplement


James G. Cox, Director
Date**ADDENDUM**

4

Pg 19 of 19

**NEVADA DEPARTMENT OF CORRECTIONS
OPERATIONAL PROCEDURE
FLORENCE MCCLURE WOMENS CORRECTIONAL CENTER
326**

POSTING OF SHIFTS/OVERTIME

Effective Date: February 3, 2015

Review Date: January 2016

AUTHORITY:

AR(s) 301, 320, 322, 326, 350

NRS 281.100, FLSA

RESPONSIBILITY

The Warden of Florence McClure Women's Correctional Center has overall responsibility for overseeing the administration of this procedure.

The Associate Warden responsible for Operations is responsible to ensure that all Shift Supervisors utilize assigned staff in an efficient and effective manner.

Each Shift Supervisor is responsible for understanding the tasks/duties that must be completed on their shift and how to properly structure the available manpower, preventing overtime.

METHODS

This operational procedure shall be available to all staff via FMWCC shared drive in accordance with OP105. All Shift Supervisors shall receive extensive training regarding this procedure.

RESCISSION

December 12, 2013

326.01 SHIFT HOURS OF OPERATION

1. Florence McClure Women's Correctional Center (FMWCC) shifts are as follows:
 - First Shift 5:00 AM to 1:00 PM
 - Second Shift 1:00 PM to 9:00 PM
 - Third Shift 9:00 PM to 5:00 AM
 - 10 Hour Shift 7:00 AM to 5:00 PM (Sat, Sun, and Mon) 10:00 AM to 8:00 PM (Fri)
 - 12 Hour Shift Day A 5:00 AM to 5:00 PM (Thur., Fri, Sat, e/o Wed)
 - 12 Hour Shift Day B 5:00 AM to 5:00 PM (Sun, Mon, Tue, e/o Wed)
 - 12 Hour Shift Night A 5:00 PM to 5:00 AM (Thur., Fri, Sat, e/o Wed)
 - 12 Hour Shift Night B 5:00 PM to 5:00 AM (Sun, Mon, Tue, e/o Wed)

326.02 SHIFT SUPERVISORS RESPONSIBILITY

1. The shift sergeant shall review the shift roster to ensure the minimum staffing as set forth by the Associate Warden responsible for Operations, making adjustments utilizing identified pull/shutdown posts.

POSTING OF SHIFTS/OVERTIME OP #326

February 3, 2015

FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER

Page 1 of 9
ADDENDUM
5

18 1049

JA 0211

- If overtime staff is needed, it is the Shift Supervisor's responsibility to ensure that all overtime can be justified and is necessary. The Shift Supervisor shall notify and receive from the on call Warden, approval for overtime.
2. The shift supervisors shall ensure the NSIS computer roster is correct and that any staff not present for their normal workday is correctly entered.
 3. The shift supervisors can begin posting the shift fifteen (15) minutes prior to the beginning of the shift.
 4. The Shift Supervisors will post the shift from the Shift Commander's office.
 - Only after being posted by the Shift Supervisors may staff proceed to their assigned posts.
 5. Staff may depart their assigned posts after being properly relieved at the end of the shift.
 6. PREA Standard 115.13 Supervision and monitoring. At least once every year FMWCC in collaboration with the PREA Coordinator and the Deputy Director over Operations will review the staffing plan to see whether adjustments are needed in the following areas:
 - The Staffing plan
 - The deployment of monitoring technology
 - The allocation of Agency/Institution resources to commit to the staffing plan to ensure PREA compliance.
- (a) The agency shall ensure that each facility it operates shall develop, document, and make its best efforts to comply on a regular basis with a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, facilities shall take into consideration:
- Generally accepted detention and correctional practices;
 - Any judicial findings of inadequacy;
 - Any findings of inadequacy from Federal investigative agencies;
 - Any findings of inadequacy from internal or external oversight bodies;
 - All components of the facility's physical plant (including "blind-spots" or areas where staff or inmates may be isolated);
 - The composition of the inmate population;
 - The number and placement of supervisory staff;
 - Institution programs occurring on a particular shift;
 - Any applicable State or local laws, regulations, or standards;
 - The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and
 - Any other relevant factors.
- (b) In circumstances where the staffing plan is not complied with, the facility shall document and justify all deviations from the plan.

POSTING OF SHIFTS/OVERTIME OP #326

February 3, 2015

FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER

Page 2 of 9

ADDENDUM

5

pg 2 of 9 JA 0212

(c) Whenever necessary, but no less frequently than once each year, for each facility the agency operates, in consultation with the PREA coordinator required by § 115.11, the agency shall assess, determine, and document whether adjustments are needed to:

- The staffing plan established pursuant to paragraph (a) of this section;
- The facility's deployment of video monitoring systems and other monitoring technologies; and
- The resources the facility has available to commit to ensure adherence to the staffing plan.

(d) Each agency operating a facility shall implement a policy and practice of having intermediate-level or higher-level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Such policy and practice shall be implemented for night shifts as well as day shifts. Each agency shall have a policy to prohibit staff from alerting other staff members that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility.

326.03 STAFF RESPONSIBILITY

1. All staff shall report for duty fully prepared to work.
 - Uniform, standard equipment, including staff I.D. card, and personal appearance shall be in accordance with AR 350.
2. Staff will report to the Shift Supervisor in the Shift Commander's office for posting of their assignment:
 - Staff will report early enough to be on their post by the start time of their shift.
 - Staff will report in person.
 - Area of assignment does not exempt the staff from reporting for duty to the Shift Supervisor.
3. All staff should check their respective mailboxes prior to reporting for duty.
4. Upon assuming post all staff should check their e-mail for any pertinent information. Shift Supervisors will ensure that staff who do not have access to a computer will be provided a time period within the shift to have access to a computer.

326.04 SHIFT ROSTERS

1. To efficiently utilize assigned staff, shift supervisors must plan in advance the work week schedule and take into account changes in the workload such as, transportation, hospital coverage or Parole Boards.
 - Shift Supervisors must staff all mandatory positions.
 - Completion of shift rosters will be done one (1) week in advance.
 - Final completion of shift rosters will be done by end of shift for that day.

326.05 CALL-INS

1. Only persons designated as Shift Supervisor can accept a call-in.

POSTING OF SHIFTS/OVERTIME OP #326

February 3, 2015

FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER

Page 1 of 9
ADDENDUM

5

18 3 + 9

JA 0213

2. Call-ins must be entered into the NSIS computer for documentation of not being present for their scheduled shifts.
 - Use the appropriate code.
3. A DOC 1000 Authorization for Leave and Overtime request form will be completed for all used leaves and overtime. The DOC 1000 will be completed and submitted by the affected staff member.
4. The shift affected by the call-in shall be adjusted to ensure proper staff coverage.

326.06 IDENTIFIED PULL AND SHUTDOWN POSITIONS BY SHIFT

1. Shift supervisors will utilize the below listed "pull" and "shut down" positions to ensure mandatory positions are manned and prior to hiring overtime.
 - The Warden or a Associate Warden must be notified of the need and must approve all overtime.
 - Shift supervisors shall refrain from repeatedly pulling the same personnel and should take work load into consideration.
 - A pull position is identified as a position in which the assigned officer may be pulled from that position and assigned elsewhere in the institution during their assigned shift.
 - A shut down position is identified as a position in which the assigned officer may be pulled from their assigned post and the post closed with the officer being assigned elsewhere in the institution for their entire assigned shift.
2. First Shift (5:00 AM – 1:00 PM)
 - Positions are both pull and shutdown positions:
 - o Sergeant
 - o Unit 1 Floor B
 - o Unit 3
 - o S & E B
 - o Yard Labor Officer
 - o Visiting C
 - o Community Hospital
3. Second Shift (1:00 PM – 9:00 PM)
 - Positions are both pull and shutdown positions:
 - o Sergeant
 - o Unit 1 Floor B
 - o Unit 3
 - o S & E B
 - o Visiting C
 - o Community Hospital
4. Third Shift (9:00 PM – 5:00 AM)
 - Positions are both pull and shutdown positions:
 - o Sergeant
 - o Unit 3
 - o Unit 4 Floor B

POSTING OF SHIFTS/OVERTIME OP #326

February 3, 2015

FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER

Page 4 of 9

ADDENDUM

5

18 4 of 9A 0214

- o Community Hospital

326.07 OVERTIME

1. Overtime will be kept to an absolute minimum and Shift Supervisors must have the approval of an Associate Warden or Warden prior to hiring overtime.
 - The Shift Supervisor must utilize all pull and shutdown position as defined in section 326.06 of this procedure prior to any overtime being hired.
 - All overtime will be documented in NSIS and NOTIS.
 - Overtime codes will be used in the following order.
 - o Hospital if inmates housed at hospital
 - o Transportation if inmates on transportation
 - o Vacant position
 - o Furlough
 - o Military
 - o AWOL / LWOP
 - o Sick
 - o Other Codes as appropriate
2. As a condition of employment, employees shall work overtime on short notice, on weekends and holidays, be recalled to work in cases of emergency or staff shortages on regular days off, or any and all other times so required, and be placed on stand-by status if and whenever necessary.
3. A reasonable advance notice of overtime will be one (1) hour if the situation allows.
 - The Shift Supervisor may give less advance notice depending on the needs of the institution such as, a last minute call-in.
4. No officer is to work more than two (2) consecutive double shifts. Unless an emergency situation occurs, no staff can work more than a 16 hour shift in a 24 hour period.
5. Employees on Proof Status (sick leave abuse) duty are not authorized to volunteer for overtime.
 - An employee on Proof Status may be utilized for mandatory overtime.
6. Employees on modified duty are not authorized to work overtime.
7. Shift Supervisors will maintain two (2) shift seniority lists specifically designated for selecting staff to work overtime:
 - Voluntary List:
 - o Identify each officer by date of request submission. Requests may not be submitted more than 3 days in advance.
 - Mandatory List
 - o Identify each officer from the least seniority to the most seniority.
 - Shift Supervisors will regenerate these lists every 45 days and adjust whenever staff are deleted from or added to the shift or after all staff has worked mandatory overtime.
8. The overtime seniority lists will be prepared by each shift.
 - Shift Supervisors will use the volunteer list to hire overtime prior to mandatory overtime.

POSTING OF SHIFTS/OVERTIME OP #326

February 3, 2015

FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER

Page 5 of 9

ADDENDUM

5

pg 5 of JA 0215

9. Overtime is not guaranteed.
 - It may or may not be assigned at the discretion of the shift supervisor or higher authority.

326.08 VOLUNTARY OVERTIME

1. Shift Supervisors will use the volunteer list to hire overtime prior to mandatory overtime.
 - The Shift Supervisor will contact each officer starting with the earliest submission until the number of overtime officers is met.
 - No employee who calls in sick or utilizes sick leave during any given pay period will be allowed to work voluntary overtime.
 - If an employee accrues overtime during the first week of the pay period and then utilizes sick leave, the employee will not be permitted any voluntary overtime in the next pay period.
 - Employees who are in AWOL or LWOP status will not be allowed to volunteer/eligible for overtime in the same pay period.
 - If an employee accrues overtime during the first week of the pay period and then LWOP or AWOL is accrued, the employee will not be permitted any voluntary overtime in the next pay period.

326.09 MANDATORY OVERTIME

1. The Shift Supervisor shall go over the shift roster to ensure the minimum staffing as set forth by the Associate Warden responsible for Operations is met.
2. If overtime is needed and insufficient staff voluntarily agrees to work, the following procedure will be adhered to:
 - The Shift Supervisor will select employees from the mandatory overtime list when mandatory overtime is needed.
 - The mandatory list will be restarted once exhausted or every 45 days.
 - The mandatory list will be a list of the Senior Correctional Officers, Correctional Officers, and Correctional Officer Trainees based upon least seniority in their hire date and last involuntary, i.e. mandatory, overtime date for each shift.
 - Once that person is selected, the shift supervisor will write the date and total hours worked in a space or on a line next to the employee's name working the mandatory overtime.
 - On the next occasion requiring mandatory overtime, the supervisor will move up the seniority list, selecting employees who have not been chosen for mandatory overtime or who have not recently been selected for mandatory overtime.
 - The Relief Lieutenant will provide a staff seniority roster for this purpose.
3. If an employee is required to work mandatory overtime, that employee may be allowed to solicit a volunteer to work in his/her place.
 - If a volunteer is found, the shift supervisor must approve the substitution prior to the person being allowed to work.
 - If the substitution is approved, the Officer originally scheduled to work the mandatory overtime will remain at the top of the mandatory overtime list until they actually works it.
 - The employee has 1 hour to find a substitute whenever possible.

POSTING OF SHIFTS/OVERTIME OP #326

February 3, 2015

FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER

Page 6 of 9

ADDENDUM

5

pg 6 of 9 JA 0216

326.10 APPROVED EMERGENCY POSITION STAFFING

1. Prior to implementing the emergency position staffing, the on-duty Shift Supervisor will notify the Warden or Associate Warden.
 - Implementation of the emergency position staffing will only take place when there is insufficient staffing to meet minimal requirements for officer and inmate safety.
 - o It may be necessary to modify or cancel some activities as a result of emergency staffing. The Warden/Associate Warden will be notified of the cancellation of any activity or program.
 - o Staff shortages may be the result of mandated furloughs, in conjunction with annual leave, sick leave, leaves of absences, military leave, training, lack of hiring or other causes for staff vacancies.
2. The shift supervisor will initiate Section XIII - Employee Job Actions/Work Stoppage of the Emergency Response Manual should emergency staffing levels be required.
3. The below listed positions will be manned should an emergency be declared by the Warden or Associate Warden due to insufficient staffing:
 - Emergency staffing maybe accomplished through voluntary as well as mandatory overtime, if necessary.
 - One (1) Supervisor per shift.
 - One (1) Correctional Officer for every position listed below:
 - o Unit 1 Control
 - o Unit 1 Floor
 - o Unit 4 Control
 - o Unit 4 Floor
 - o Unit 5 Control
 - o Unit 5 Floor
 - o Unit 7 Control
 - o Unit 7 Floor
 - o Unit 9A
 - o Unit 9B
 - o Infirmary
 - o Central Control
 - o S & E
 - o Culinary
 - o Perimeter
 - o Property
 - o Mail Room
 - o Gatehouse
4. The institutional nurse will conduct pill call in the unit.
 - Inmates will only be transported to the Infirmary for emergencies.

POSTING OF SHIFTS/OVERTIME OP #326

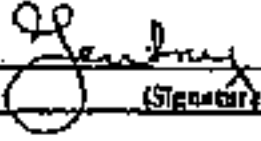
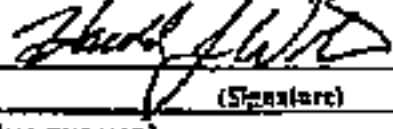
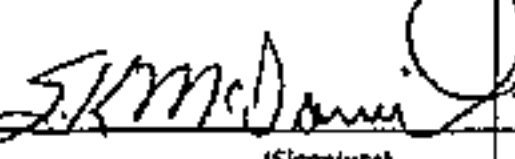
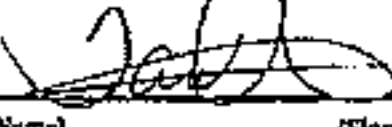
February 3, 2015

FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER

Page 7 of 9

ADDENDUM5
18 7 of 3A 0217

Signature Authority:

Warden of Facility		AW of Facility (Operations)	
Jo Gentry		Harold Wickham	
(Printed Name)	(Signature)	(Printed Name)	(Signature)
Deputy Director		AW of Facility (Programs)	
E. K. McDaniel		Tanya Hill	
(Printed Name)	(Signature)	(Printed Name)	(Signature)

INMATE ACCESS

YES: NO: ✓

POSTING OF SHIFTS/OVERTIME OP #326

February 3, 2015

FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER

Page 8 of 9

ADDENDUM

pg 8 of 9

JA 0218

FMWCC OPERATIONAL PROCEDURE #326
AUDIT QUESTIONS

1. Is all overtime being approved by an Associate Warden or Warden prior to hiring the overtime?
2. Is all custody staff reporting to the Shift Supervisor prior to reporting to their assigned post?
3. When utilizing the pull and shut down posts, are the Shift Supervisors pulling/shutting down posts that are not on the authorized list?
4. Is there a voluntary and mandatory overtime list posted within the Shift Supervisor's office?
5. Are staff being permitted to work more than a 16 hour shift.

POSTING OF SHIFTS/OVERTIME OP #326

FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER

February 3, 2015

Page 9 of 9
ADDENDUM
5
pg 9 of 9
JA 0219

Thermal Nevada Womens Correctional Center
4/4/2015 5:00:00 AM - 4/4/2015 1:00:00 PM

Shift Roster

	Post Name	Staff List
<input type="checkbox"/>	Lieutenant	[05:00 AM] Piccinini, Gary [01:00 PM]
<input checked="" type="checkbox"/>	Sergeant	>>>>>>>EMPTY<<<<<<<<
<input type="checkbox"/>	Central Control	[05:00 AM] Osampo, Marco [05:00 PM]
<input checked="" type="checkbox"/>	Community Hospital A	>>>>>>>EMPTY<<<<<<<<
<input checked="" type="checkbox"/>	Community Hospt. B	>>>>>>>EMPTY<<<<<<<<
<input type="checkbox"/>	Perimeter Patrol	[05:00 AM] Maldonado, Luis [01:00 PM]
<input type="checkbox"/>	Gatehouse	[05:00 AM] Monahan, Alfred [01:00 PM]
<input type="checkbox"/>	Unit 1 Control	[05:00 AM] White, Presheas [01:00 PM]
<input type="checkbox"/>	Unit 1 Floor A	[05:00 AM] Ludwick, Brian [05:30 AM]
<input checked="" type="checkbox"/>	Unit 1 Floor B	[05:00 AM] Towers Jr, Michael [01:00 PM]
<input checked="" type="checkbox"/>	Unit 3	>>>>>>>EMPTY<<<<<<<<
<input type="checkbox"/>	Unit 4 Control	[05:00 AM] Padilla, Gilberto [01:00 PM]
<input checked="" type="checkbox"/>	Unit 4 Floor A	[05:00 AM] Quarterman, Marie [01:00 PM]
<input type="checkbox"/>	Unit 4 Floor B	[05:00 AM] Huffington, Vanessa [01:00 PM]
<input type="checkbox"/>	Unit 5 Control	[05:00 AM] Ennis-Wright, Sharon [01:00 PM]
<input type="checkbox"/>	Unit 5 Floor	[05:00 AM] Whisenant, Ashley [01:00 PM]
<input type="checkbox"/>	Unit 7 Control	[05:00 AM] Finlayson, Brian [01:00 PM]
<input checked="" type="checkbox"/>	Unit 7 Floor	[05:00 AM] Hawkins, Marjion [01:00 PM]
<input type="checkbox"/>	Unit 9-A	[05:00 AM] Jeffries, Nicole [01:00 PM]
<input type="checkbox"/>	Unit 9-B	[05:00 AM] Luckett, Patricia [01:00 PM]
<input type="checkbox"/>	Search and Escort A	[05:00 AM] Day, Terry [01:00 PM]
<input checked="" type="checkbox"/>	Search and Escort B	>>>>>>>EMPTY<<<<<<<<
<input type="checkbox"/>	Cullinary	[03:30 AM] Ferguson, Lawrence [11:30 AM] [11:30 AM] Johnson, Cedric [07:30 PM]
<input type="checkbox"/>	Rec Yard Officer	[05:00 AM] Cramer, Gregg [01:00 PM]
<input type="checkbox"/>	Visiting A	>>>>>>>EMPTY<<<<<<<<
<input checked="" type="checkbox"/>	Visiting B	[07:00 AM] Ebert, Kelly [05:00 PM]
<input checked="" type="checkbox"/>	Visiting C	[07:00 AM] Torrey, Glen [05:00 PM]
<input type="checkbox"/>	Unit 11 Infirmary	[05:00 AM] Rivera-Reynoso, Marissa [01:00 PM]

Available Staff Not Working Legislative Approved Post

Staff Off Post			
Staff Name	Time Off Post	Location	Reason Off Post
Howard Jr, Andre	05:00 AM - 01:00 PM		>>>>Comment by: triches<<<< POST Academy

Staff On Overtime

ADDENDUM

6

pg 1 of 1

Supervisors Signature:

Sergeant or Above

Date / Time

Signature certifies that all information on this document is accurate to the best knowledge of the signator at the date and time of signing. All pages must be signed.

Tuesday, June 02, 2015

JA 0220
Page 1 of 1

Attendance Card

Employee Name **Ludwick, Brian C/O**

Internal ID# **50867**

Hire Date

	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon							
					1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31		
JAN					CO	CO		CO	CO			CO	CO	CO	CO							SL			SL	SL	SL	SL	SL	COB			CO	COB	COB		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28									
FEB	COB	CO			COB	SL	CO	SL	CO			COB	CO	CO	CO								LWO			USA	USA	USA									
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31						
MAR	USA	USA			USA	USA	USA	USA			POT U7A	USA	USA	USA	USA			USA			POT	USA			USA	RYO	POT	USB	SL								
				1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30				
				USA	POT U4A	USA	SL U1B	SL			U1B	U1A	POT U1A	POT U1B	POT U1A			U1B	Tran	POT U3A	U3A	USB			SLP U3A	OP PP	PP	PP	SL			POT PP	PP				
					1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31		
					SL	SL	SL				PP	PP	PP	PP	POT PP				PP	PP	PP	PP	PP			PP	PP	PP	PP	PP			LWO	PP	PP	PP	PP
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30						
JUN				PP	PP	PP	PP	PP																													
				1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31			
JUL							1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
AUG																																					
			1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30					
SEP				1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31			
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30							
NOV																																					
			1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31				
DEC																																					

Monday, June 01, 2015

Page 1 of 1

JA 0221

PAGE 0000188

Board of State
Prison Commissioners

BRIAN SANDOVAL
Governor

BARBARA CECOVICH
Secretary of State

ADAM PAUL LARALT
Attorney General



STATE OF NEVADA DEPARTMENT OF CORRECTIONS



Northern Administration
5500 Snyder Avenue, Carson City, NV 89702
Phone: (775) 887-3285 - Fax: (775) 887-3138

Southern Administration
2956 W. Russell Road, Las Vegas, NV 89118
Phone: (702) 486-9938 - Fax: (702) 486-9981

Office of the Inspector General
Phone: (702) 486-9913 - Fax: (702) 486-9955

BRIAN SANDOVAL
Governor

E.M. McDaniell
Interim Director

JO GENTRY
Warden

To: Brian Ludwick
From: Jo E. Gentry, FMWCC
Date: 10/21/2015
Subject: RESULT OF ADJUDICATION
IA-2015-0058

The adjudication of the above referenced Personnel Misconduct Complaint investigation has been completed. The misconduct allegation was classified as Sustained. The matter is being referred for a Specificity of Charges.

This recommendation is subject to final review and concurrence by the Department Human Resources Office and/or Attorney General's Office.

Refused to Sign
Employee's Signature

Date

W. P. Placencia
Witness

10/21/15
Date

Stated will refer to Attorney.

B3

JA 0222

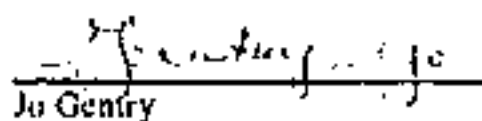
STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
EMPLOYEE MISCONDUCT ADJUDICATION REPORT

DATE: October 13, 2015
TO: E.K. McDaniel, Interim Director
VIA: Office of the Inspector General
FROM: Jo E. Gentry, Warden
SUBJECT: Adjudication Report - IA-2015-0058

Complaint by:

The complaint investigation IA-2015-0058 resulted in two allegations of misconduct against one Department employee:

Brian Ludwick, #50867
Correctional Officer
Florence McClure Women's Correctional Center


Jo Gentry

October 13, 2015
Date

Reviewed By:

Date

Agree Disagree

Adjudication Report - IA-2015-0058
Page 2 of 3

The allegations are listed below with recommendations for classification, corrective/disciplinary action, and supporting rationales.

ALLEGATION 1

It is alleged that Brian Ludwick engaged in **NEGLECT OF DUTY**. When on April 4, 2015 Correctional Officer Brian Ludwick left his assigned post (Unit 1 Floor) without authorization from his supervisor.

CLASSIFICATION

It is recommended that this allegation be classified as Sustained.

RATIONALE

Based upon written documentation and witness statements there is sufficient evidence to sustain this allegation. Correctional Officer Ludwick admits that he left his assigned post (Unit 1 Floor) to speak with Lt. Piccinini within the Shift Supervisor's office without authorization to leave his post. Witness statements indicate that Officer Ludwick did not want to work Unit 1 and requested to work another post (Unit 5). Officer Ludwick left his post and entered Shift Command and requested Lt. Piccinini to work in Unit 5. After his request was denied, Officer Ludwick informed Lt. Piccinini that he had to take FMLA for medical reasons. Officer Ludwick was approved FMLA leave status for the remainder of his shift.

ALLEGATION 2

It is alleged that Brian Ludwick engaged in **NEGLECT OF DUTY**. When on April 4, 2015 Correctional Officer Brian Ludwick failed to perform his assigned security functions within Unit 1 after left his assigned post (Unit 1 Floor) without authorization from his supervisor.

CLASSIFICATION

It is recommended that this allegation be classified as Not Sustained.

RATIONALE

Based upon written documentation and witness statements there is not sufficient evidence to sustain this allegation. The minimum staffing levels at the time were still maintained after Officer Ludwick left his post without authorization. There were no security breaches or incidents during his absence. Furthermore the Shift Supervisor did not fill Officer Ludwick's post after Officer Ludwick left the institution of approve FMLA leave.

CORRECTIVE/DISCIPLINARY ACTION RECOMMENDATION

It is recommended that Brian Ludwick receive a Specificity of Charges - consisting of one (5) day suspension from State Service in lieu of the Class 5 Dismissal of State Service since there was no security breach resulting from him leaving his post.

Adjudication Report – IA-2015-0058
Page 3 of 3

DEPUTY DIRECTOR CONCURRENCE

E. K. McDaniel has reviewed this adjudication and agrees with the recommendations contained.

EMPLOYEE NOTIFICATION

On October 21, 2015 Correctional Officer Ludwick met with Acting Associate Warden Piccinini and notified him concerning the outcome of the investigation. Correctional Officer Ludwick was provided a copy of the "Result of Adjudication Report"

ELECTRONIC CODE OF FEDERAL REGULATIONS**e-CFR data is current as of May 11, 2016**

Title 29 → Subtitle B → Chapter V → Subchapter C → Part 825

Title 29: Labor

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993**Contents****Subpart A—Coverage Under the Family and Medical Leave Act**

- §825.100 The Family and Medical Leave Act.
- §825.101 Purpose of the Act.
- §825.102 Definitions.
- §825.103 [Reserved]
- §825.104 Covered employer.
- §825.105 Counting employees for determining coverage.
- §825.106 Joint employer coverage.
- §825.107 Successor in interest coverage.
- §825.108 Public agency coverage.
- §825.109 Federal agency coverage.
- §825.110 Eligible employee.
- §825.111 Determining whether 50 employees are employed within 75 miles.
- §825.112 Qualifying reasons for leave, general rule.
- §825.113 Serious health condition.
- §825.114 Inpatient care.
- §825.115 Continuing treatment.
- §825.116–825.118 [Reserved]
- §825.119 Leave for treatment of substance abuse.
- §825.120 Leave for pregnancy or birth.
- §825.121 Leave for adoption or foster care.
- §825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.
- §825.123 Unable to perform the functions of the position.
- §825.124 Needed to care for a family member or covered servicemember.
- §825.125 Definition of health care provider.
- §825.126 Leave because of a qualifying exigency.
- §825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

- §825.200 Amount of leave.
- §825.201 Leave to care for a parent.
- §825.202 Intermittent leave or reduced leave schedule.
- §825.203 Scheduling of intermittent or reduced schedule leave.
- §825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.
- §825.205 Increments of FMLA leave for intermittent or reduced schedule leave.
- §825.206 Interaction with the FLSA.
- §825.207 Substitution of paid leave.
- §825.208 [Reserved]
- §825.209 Maintenance of employee benefits.
- §825.210 Employee payment of group health benefit premiums.
- §825.211 Maintenance of benefits under multi-employer health plans.

- §825.212 Employee failure to pay health plan premium payments.
- §825.213 Employer recovery of benefit costs.
- §825.214 Employee right to reinstatement.
- §825.215 Equivalent position.
- §825.216 Limitations on an employee's right to reinstatement.
- §825.217 Key employee, general rule.
- §825.218 Substantial and grievous economic injury.
- §825.219 Rights of a key employee.
- §825.220 Protection for employees who request leave or otherwise assert FMLA rights.

Subpart C—Employee and Employer Rights and Obligations Under the Act

- §825.300 Employer notice requirements.
- §825.301 Designation of FMLA leave.
- §825.302 Employee notice requirements for foreseeable FMLA leave.
- §825.303 Employee notice requirements for unforeseeable FMLA leave.
- §825.304 Employee failure to provide notice.
- §825.305 Certification, general rule.
- §825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
- §825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.
- §825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
- §825.309 Certification for leave taken because of a qualifying exigency.
- §825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).
- §825.311 Intent to return to work.
- §825.312 Fitness-for-duty certification.
- §825.313 Failure to provide certification.

Subpart D—Enforcement Mechanisms

- §825.400 Enforcement, general rules.
- §825.401 Filing a complaint with the Federal Government.
- §825.402 Violations of the posting requirement.
- §825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.
- §825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

Subpart E—Recordkeeping Requirements

- §825.500 Recordkeeping requirements.

Subpart F—Special Rules Applicable to Employees of Schools

- §825.600 Special rules for school employees, definitions.
- §825.601 Special rules for school employees, limitations on intermittent leave.
- §825.602 Special rules for school employees, limitations on leave near the end of an academic term.
- §825.603 Special rules for school employees, duration of FMLA leave.
- §825.604 Special rules for school employees, restoration to an equivalent position.

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

- §825.700 Interaction with employer's policies.
- §825.701 Interaction with State laws.
- §825.702 Interaction with Federal and State anti-discrimination laws.

Subpart H—Special Rules Applicable to Airline Flight Crew Employees

- §825.800 Special rules for airline flight crew employees, general.
- §825.801 Special rules for airline flight crew employees, hours of service requirement.
- §825.802 Special rules for airline flight crew employees, calculation of leave.
- §825.803 Special rules for airline flight crew employees, recordkeeping requirements.

SOURCE: 78 FR 8902, Feb. 6, 2013, unless otherwise noted.

[↑ Back to Top](#)

Subpart A—Coverage Under the Family and Medical Leave Act

[↑ Back to Top](#)

§825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993, as amended, (FMLA or Act) allows eligible employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months (see §825.200(b)) because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). In addition, eligible employees of a covered employer may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a single 12-month period to care for a covered servicemember with a serious injury or illness. In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered servicemember, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employer generally has a right to advance notice from the employee. In addition, the employer may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (see §§825.312 and 825.313). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

[↑ Back to Top](#)

§825.101 Purpose of the Act.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

⬆ Back to Top

§825.102 Definitions.

For purposes of this part:

Act or FMLA means the Family and Medical Leave Act of 1993, Public Law 103-3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 *et seq.*, as amended).

ADA means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*, as amended).

Administrator means the Administrator of the Wage and Hour Division, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

Airline flight crew employee means an airline flight crewmember or flight attendant as those terms are defined in regulations of the Federal Aviation Administration. See also §825.800(a).

Applicable monthly guarantee means:

(1) For an airline flight crew employee who is not on reserve status (line holder), the minimum number of hours for which an employer has agreed to *schedule* such employee for any given month; and

(2) For an airline flight crew employee who is on reserve status, the number of hours for which an employer has agreed to *pay* the employee for any given month. See also §825.801(b)(1).

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, as amended (Pub. L. 99-272, title X, section 10002; 100 Stat 227; 29 U.S.C. 1161-1168).

Commerce and industry or activity affecting commerce mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce" as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. 142(1) and (3).

Contingency operation means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. See also §825.126(a)(2).

Continuing treatment by a health care provider means any one of the following:

(1) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(iii) The requirement in paragraphs (i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

(iv) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(v) The term "extenuating circumstances" in paragraph (i) means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. See also §825.115(a)(5).

(2) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. See also §825.120.

(3) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(4) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Covered active duty or call to covered active duty status means:

(1) In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and,

(2) In the case of a member of the Reserve components of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. See 10 U.S.C. 101(a)(13)(B). See also §825.126(a).

Covered servicemember means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is

undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness, or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. See §825.127(b)(2).

Eligible employee means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence, except that an employer need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, *unless*:

(i) The break in service is occasioned by the fulfillment of the employee's Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*, covered service obligation (the period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by the employer, but this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes); and

(2) Who, on the date on which any FMLA leave is to commence, has met the hours of service requirement by having been employed for at least 1,250 hours of service with such employer during the previous 12-month period, or for an airline flight crew employee, in the previous 12 months, having worked or been paid for not less than 60 percent of the applicable total monthly guarantee and having worked or been paid for not less than 504 hours, not counting personal commute time, or vacation, medical or sick leave (see §825.801(b)), *except that*:

(i) An employee returning from fulfilling his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining whether the employee met the hours of service requirement (accordingly, a person reemployed following absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked for the employer (or, for an airline flight crew employee, would have been worked for or paid by the employer) added to any hours actually worked (or, for an airline flight crew employee, actually worked or paid) during the previous 12-month period to meet the hours of service requirement); and

(ii) To determine the hours that would have been worked (or, for an airline flight crew employee, would have been worked or paid) during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations; and

(3) Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

(4) Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code.

(5) Excludes any employee of the United States House of Representatives or the United States Senate covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(6) Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

(7) Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

Employ means to suffer or permit to work.

Employee has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e), as follows:

(1) The term *employee* means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, *employee* means—

(i) Any individual employed by the Government of the United States—

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the United States House of Representatives or the United States Senate who is covered by the Congressional Accountability Act of 1995,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who—

(1) Holds a public elective office of that State, political subdivision, or agency,

(2) Is selected by the holder of such an office to be a member of his personal staff,

(3) Is appointed by such an officeholder to serve on a policymaking level,

(4) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(5) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

Employee employed in an instructional capacity. See the definition of Teacher in this section.

Employer means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes—

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

(2) Any successor in interest of an employer; and

(3) Any public agency.

Employment benefits means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. *See also* §825.209(a).

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*).

Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) The Act defines health care provider as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Secretary to be capable of providing health care services.

(2) Others "capable of providing health care services" include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(iv) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase "authorized to practice in the State" as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See the definition of *Teacher* in this section.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Invitational travel authorization (ITA) or Invitational travel order (ITO) are orders issued by the Armed Forces to a family member to join an injured or ill servicemember at his or her bedside. See also §825.310(e).

Key employee means a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite. See also §825.217.

Mental disability: See the definition of *Physical or mental disability* in this section.

Military caregiver leave means leave taken to care for a covered servicemember with a serious injury or illness under the Family and Medical Leave Act of 1993. See also §825.127.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. See also §825.127(d)(3).

Outpatient status means, with respect to a covered servicemember who is a current member of the Armed Forces, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. See also §825.127(b)(1).

Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents "in law."

Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents "in law." See also §825.127(d)(2).

Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., as amended, define these terms.

Public agency means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a "person" engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Reserve components of the Armed Forces, for purposes of qualifying exigency leave, include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation. See also §825.126(a)(2)(i).

Secretary means the Secretary of Labor or authorized representative.

Serious health condition means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in §825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of §825.113 are met.

Serious injury or illness means: (1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(2) In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active

duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. *See also* §825.127(c).

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

Son or daughter of a covered servicemember means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* §825.127(d)(1).

Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See also* §825.126(a)(5).

Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

TRICARE is the health care program serving active duty servicemembers, National Guard and Reserve members, retirees, their families, survivors, and certain former spouses worldwide.

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10000, Feb. 25, 2015]

[⬆ Back to Top](#)

§825.103 [Reserved]

[⬆ Back to Top](#)

§825.104 Covered employer.

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. See §825.600.

(b) The terms commerce and industry affecting commerce are defined in accordance with section 501(1) and (3) of the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. 142 (1) and (3)), as set forth in the definitions at §825.800 of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the joint employment test discussed in §825.106, or the integrated employer test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

- (i) Common management;
- (ii) Interrelation between operations;
- (iii) Centralized control of labor relations; and
- (iv) Degree of common ownership/financial control.

(d) An employer includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of employer in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers "acting in the interest of an employer" are individually liable for any violations of the requirements of FMLA.

[↑ Back to Top](#)

§825.105 Counting employees for determining coverage.

(a) The definition of employ for purposes of FMLA is taken from the Fair Labor Standards Act, §3(g), 29 U.S.C. 203(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term "employ" as defined in the Act includes "to suffer or permit to work." The courts have indicated that, while "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on isolated factors or upon a single characteristic or technical concepts, but depends "upon the circumstances of the whole activity" including the underlying "economic reality." In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who "follows the usual path of an employee" and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If

there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of September 1, 2008, subsequently dropped below 50 employees before the end of 2008 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2009, the employer would continue to be covered throughout calendar year 2009 because it met the coverage criteria for 20 workweeks of the preceding (i.e., 2008) calendar year.

[↑ Back to Top](#)

§825.106 Joint employer coverage.

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

- (1) Where there is an arrangement between employers to share an employee's services or to interchange employees;
- (2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,
- (3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b)(1) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.

(2) A type of company that is often called a Professional Employer Organization (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the primary employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer. Where a PEO is a joint employer, the client employer most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. See §825.111(a)(3).) An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer. In those cases in which a

PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary placement agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its jointly employed employees, whether or not the secondary employer is covered by FMLA. See §825.220(a). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

[⬆ Back to Top](#)

§825.107 Successor in interest coverage.

(a) For purposes of FMLA, in determining whether an employer is covered because it is a "successor in interest" to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

- (1) Substantial continuity of the same business operations;
- (2) Use of the same plant;
- (3) Continuity of the work force;
- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Similarity in machinery, equipment, and production methods;
- (7) Similarity of products or services; and
- (8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a successor in interest exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a successor in interest, employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours of service with the predecessor for purposes of determining employee eligibility for FMLA leave.

[⬆ Back to Top](#)

§825.108 Public agency coverage.

(a) An employer under FMLA includes any public agency, as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines *public agency* as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. *State* is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a public agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, *etc.*, is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

(2) The Census Bureau takes a census of governments at five-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries, or online at <http://www.census.gov/govs/www/index.html>. For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St. NW., Washington, DC 20402.

(d) All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (e.g., State) employ 50 employees at the worksite or within 75 miles.

⬆ Back to Top

§825.109 Federal agency coverage.

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. Employees of the Government Printing Office are covered by Title II. While employees of the Government Accountability Office and the Library of Congress are covered by Title I of the FMLA, the Comptroller General of the United States and the Librarian of Congress, respectively, have responsibility for the administration of the FMLA with respect to these employees. Other legislative branch employees, such as employees of the Senate and House of Representatives, are covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Regulatory Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by these regulations if they are not covered by Title II of FMLA.

(d) Employees of the judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. For example, employees of the U.S. Tax Court are covered by these regulations.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

⬆ Back to Top

§825.110 Eligible employee.

(a) An eligible employee is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave (see §825.801 for special hours of service requirements for airline flight crew employees), and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. See §825.105(b) regarding employees who work outside the U.S.

(b) The 12 months an employee must have been employed by the employer need not be consecutive months, *provided*

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by the employer for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*, covered service obligation. The period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by the employer. However, this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months.

(4) Nothing in this section prevents employers from considering employment prior to a continuous break in service of more than seven years when determining whether an employee has met the 12-month employment requirement. However, if an employer chooses to recognize such prior employment, the employer must do so uniformly, with respect to all employees with similar breaks in service.

(c)(1) Except as provided in paragraph (c)(2) of this section and in §825.801 containing the special hours of service requirement for airline flight crew employees, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. See 29 CFR part 785. The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.

(2) An employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the hours of service requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations. See §825.801(c) for special rules applicable to airline flight crew employees.

(3) In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR part 541), the employer has the burden of showing that the employee has not worked the requisite hours. An employer must be able to clearly demonstrate, for example, that full-time teachers (see §825.102 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave. See §825.801(d) for special rules applicable to airline flight crew employees.

(d) The determination of whether an employee meets the hours of service requirement and has been employed by the

employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on non-FMLA leave at the time he or she meets the 12-month eligibility requirement, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA leave. See §825.300(b) for rules governing the content of the eligibility notice given to employees.

(e) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

[↑ Back to Top](#)

§825.111 Determining whether 50 employees are employed within 75 miles.

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, e.g., construction workers, transportation workers (e.g., truck drivers, seamen, pilots), salespersons, etc., the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, etc., from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their worksite. The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (see §825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g., airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are maintained on the payroll during any portion of the year when school is not in

session. See §825.105(c).

[↑ Back to Top](#)

§825.112 Qualifying reasons for leave, general rule.

(a) *Circumstances qualifying for leave.* Employers covered by FMLA are required to grant leave to eligible employees:

- (1) For birth of a son or daughter, and to care for the newborn child (see §825.120);
- (2) For placement with the employee of a son or daughter for adoption or foster care (see §825.121);
- (3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (see §§825.113 and 825.122);
- (4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (see §§825.113 and 825.123);
- (5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status (see §§825.122 and 825.126); and
- (6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember. See §§825.122 and 825.127.

(b) *Equal application.* The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

(c) *Active employee.* In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

[↑ Back to Top](#)

§825.113 Serious health condition.

(a) For purposes of FMLA, *serious health condition* entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in §825.115.

(b) The term *incapacity* means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term *treatment* includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

[↑ Back to Top](#)

§825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in §825.113(b), or any subsequent treatment in connection with such inpatient care.

[↑ Back to Top](#)

§825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term *extenuating circumstances* in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. See also §825.120.

(c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

[↑ Back to Top](#)

§§825.116-825.118 [Reserved]

[↑ Back to Top](#)

§825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of §§825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

[↑ Back to Top](#)

§825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a child as follows:

(1) Both parents are entitled to FMLA leave for the birth of their child.

(2) Both parents are entitled to FMLA leave to be with the healthy newborn child (i.e., bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If state law allows, or the employer permits, bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. See §825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, both parents are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newborn child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. Note, too, that many state pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the birth mother, and would not be subject to the combined limit.

(4) The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days.

(5) A spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition. See §825.124.

(6) Both parents are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA

leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. For example, an employer and employee may agree to a part-time work schedule after the birth. If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the expectant mother or newborn child. See §§825.202—825.205 for general rules governing the use of intermittent and reduced schedule leave. See §825.121 for rules governing leave for adoption or foster care. See §825.601 for special rules applicable to instructional employees of schools. See §825.802 for special rules applicable to airline flight crew employees.

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10000, Feb. 25, 2015]

[↑ Back to Top](#)

§825.121 Leave for adoption or foster care.

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If state law allows, or the employer permits, leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. See §825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newly placed child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring

periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. See §§825.202-825.205 for general rules governing the use of intermittent and reduced schedule leave. See §825.120 for general rules governing leave for pregnancy and birth of a child. See §825.601 for special rules applicable to instructional employees of schools. See §825.802 for special rules applicable to airline flight crew employees.

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10000, Feb. 25, 2015]

[↑ Back to Top](#)

§825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

(a) Covered servicemember means: (1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. *Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. See §825.127(b)(2).

(b) *Spouse, as defined in the statute*, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

(c) *Parent*. Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (d) of this section. This term does not include parents "in law."

(d) *Son or daughter*. For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

(1) *Incapable of self-care* means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) *Physical or mental disability* means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

(3) Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(e) *Next of kin of a covered servicemember* means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made,

and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. See §825.127(d)(3).

(f) *Adoption* means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. See §825.121 for rules governing leave for adoption.

(g) *Foster care* means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. See §825.121 for rules governing leave for foster care.

(h) *Son or daughter on covered active duty or call to covered active duty status* means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. See §825.126(a)(5).

(i) *Son or daughter of a covered servicemember* means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. See §825.127(d)(1).

(j) *Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents "in law." See §825.127(d)(2).

(k) *Documenting relationships.* For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10001, Feb. 25, 2015]

[↑ Back to Top](#)

§825.123 Unable to perform the functions of the position.

(a) *Definition.* An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. 12101 et seq., and the regulations at 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) *Statement of functions.* An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. See §825.306.

[↑ Back to Top](#)

§825.124 Needed to care for a family member or covered servicemember.

(a) The medical certification provision that an employee is needed to care for a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. See §§825.202-825.205 for rules governing the use of intermittent or reduced schedule leave.

[⬆ Back to Top](#)

§825.125 Definition of health care provider.

(a) The Act defines *health care provider* as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others capable of providing health care services include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase authorized to practice in the State as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

[⬆ Back to Top](#)

§825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent (the military member or member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty).

(1) *Covered active duty or call to covered active duty status* in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. The active duty orders of a member of the Regular components of the Armed Forces will generally specify if the member is deployed to a foreign country.

(2) *Covered active duty or call to covered active duty status* in the case of a member of the Reserve components of the Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United

States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. See 10 U.S.C. 101(a)(13)(B).

(i) For purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (a)(2).

(ii) The active duty orders of a member of the Reserve components will generally specify if the military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation and will specify that the deployment is to a foreign country.

(3) *Deployment of the member with the Armed Forces to a foreign country* means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters.

(4) A call to covered active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (a)(2) of this section.

(5) *Son or daughter on covered active duty or call to covered active duty status* means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

(b) An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

(1) *Short-notice deployment.* (i) To address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment;

(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty;

(2) *Military events and related activities.* (i) To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member; and

(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member;

(3) *Childcare and school activities.* For the purposes of leave for childcare and school activities listed in (i) through (iv) of this paragraph, a child of the military member must be the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active duty status of the military member necessitates a change in the existing childcare arrangement;

(ii) To provide childcare for a child of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a child of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member;

(4) *Financial and legal arrangements.* (i) To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

(ii) To act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status;

(5) *Counseling.* To attend counseling provided by someone other than a health care provider, for oneself, for the military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the covered active duty or call to covered active duty status of the military member;

(6) *Rest and Recuperation.* (i) To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment;

(ii) Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave;

(7) *Post-deployment activities.* (i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status; and

(ii) To address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services;

(8) *Parental care.* For purposes of leave for parental care listed in (i) through (iv) of this paragraph, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent;

(ii) To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings;

(9) *Additional activities.* To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.