

1 supervisor is a Class 5 terminable offense for the first violation. The Hearing Officer, however, did not  
2 give AR 339 full weight and consideration in deciding if Employee's termination was reasonable—  
3 contrary to the position of NDOC who relied on AR 339 for the recommended discipline. Instead, she  
4 erroneously determined that AR 339 required approval from the Personnel Commission pursuant to NRS  
5 284.383<sup>3</sup> and therefore, was invalid.

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

11 The Board of State Prison Commissioners (Board) heads NDOC. NRS 209.101(2). Article 5 §  
12 21 of the Nevada Constitution defines the Board to include the Governor, the Secretary of State, and  
13 Attorney General and provides that the Board “shall have such supervision of *all* matters connected”  
14 with Nevada’s prisons as provided by law. Nev. Const. art. 5, § 21 (emphasis added). “Prison  
15 regulations are promulgated by the Board of State Prison Commissioners, pursuant to authority granted  
16 in NRS 209.111(3).” *Michenfelder v. Sumner*, 624 F. Supp. 457, 463 (D. Nev. 1985), *aff’d*, 860 F.2d  
17 328 (9th Cir. 1988). NRS 209.111 provides that “the Board has full control of all grounds, buildings,  
18 labor<sup>4</sup>, and property of the Department and shall...[r]egulate the number of officers and employees of  
19 the Department,” and “shall...[p]rescribe regulations for carrying on the business of the Board and the  
20 Department”:

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23 <sup>3</sup> NRS 284.383(3) states that “[a]n appointing authority shall provide each permanent classified  
24 employee of the appointing authority with a copy of a policy approved by the [Personnel] Commission  
25 that explains prohibited acts, possible violations and penalties and a fair and equitable process for  
26 taking disciplinary action against such an employee.”

27 <sup>4</sup> When first enacted, NRS 209.111 referred to “prison labor.” *See Craig v. Hocker*, 405 F.  
28 Supp. 656, 682 (D. Nev. 1975), overruled on other grounds by *Smith v. Sumner*, 994 F.2d 1401, 1405  
(9th Cir. 1993) (emphasis added). The statute was amended in 1977 to refer simply to “labor.” 1977  
Nev. Stat. 845. At the time of the amendment, the statute contained a provision allowing for the Board  
to contract with nonprofit governmental agencies for the labor of offenders. 1979 Nev. Stat. 888. That  
provision was removed from the statute in 1983, but the reference to “labor” in the statute remains.  
1983 Nev. Stat. 719.

**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.

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

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

The Director shall:

1. Administer the Department under the direction of the Board.
2. Supervise the administration of all institutions and facilities of the Department.
3. Receive, retain and release, in accordance with law, offenders sentenced to imprisonment in the state prison.
4. Be responsible for the supervision, custody, treatment, care, security and discipline of all offenders under his or her jurisdiction.
5. Ensure that any person employed by the Department whose primary responsibilities are:
  - (a) The supervision, custody, security, discipline, safety and transportation of an offender;
  - (b) The security and safety of the staff; and
  - (c) The security and safety of an institution or facility of the Department, is a correctional officer who has the powers of a peace officer pursuant to subsection 1 of NRS 289.220.
6. Establish regulations with the approval of the Board and enforce all laws governing the administration of the Department and the custody, care and training of offenders.
7. Take proper measures to protect the health and safety of the staff and offenders in the institutions and facilities of the Department.
8. Take proper measures to protect the health and safety of persons employed by a school district to operate a program of education for incarcerated persons in an institution or facility pursuant to chapter 388H of NRS.
9. Cause to be placed from time to time in conspicuous places about each institution and facility copies of laws and regulations relating to visits and correspondence between offenders and others.

1 10. Provide for the holding of religious services in the institutions and facilities and  
2 make available to the offenders copies of appropriate religious materials.

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

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

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14 These statutes and others make it clear that the Board of Prison  
15 Commissioners is primarily responsible for the administration of the  
16 prison, and the promulgation of rules and regulations governing the  
17 prisoners, *employees* and other persons....The Nevada Constitution and  
18 statutes place responsibility for supervision of the prison in a board of  
19 prison commissioners. The evident intent is that this lay board, removed  
from the difficult problems of prison administration, should review and  
pass upon the basic rules and regulations in the light of their own  
experiences, knowledge of public affairs, social conscience and legal  
expertise.

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

26 The Board pursuant to the authority vested in it by the Nevada Constitution and State statute  
27 approved AR 339. See e.g., Nev. Const. art. 5, § 21. AR 339 is a valid and lawful administrative  
28 regulation that has the force and effect of law. See *United States v. Short*, 240 F.2d 292, 298 (9th Cir.

1 1956) (“An administrative regulation promulgated within the authority granted by statute has the force  
2 of law and will be given full effect by the courts.”); *Fore v. Nev. Dep’t of Corr.*, No. 64028, 2015 WL  
3 6705101, at \*3-4 (Nev. Ct. App. Oct. 23, 2015) (unpublished) (noting an agency’s own regulations  
4 have the “force of law”).

5 Indeed, AR 339 has been presented to the Board for approval several times, the most recent  
6 being January 14, 2016. *Minutes of the Meeting of the Board of Prison Commissioners*, January 14,  
7 2016, [http://doc.ny.gov/Home/Prison\\_Commissioners/Board\\_of\\_State\\_Prison\\_Commissioners](http://doc.ny.gov/Home/Prison_Commissioners/Board_of_State_Prison_Commissioners). At the  
8 January 14<sup>th</sup> meeting, Governor Brian Sandoval asked if sufficient prior notice was given to everyone  
9 including NDOC staff regarding the proposed revisions to AR 339. *Id.* at 8. Before moving forward on  
10 approving the revised AR, Governor Sandoval confirmed that all staff concerns regarding AR 339 had  
11 been addressed prior to the January 14, 2016 meeting. *Id.*

12 The Director of NDOC explained the process that NDOC goes through before presenting a  
13 proposed AR to the Board for approval. “[O]nce the AR executive policy panel<sup>5</sup> has tentatively  
14 approved a draft, the AR coordinator<sup>6</sup> will send out all draft AR’s [sic] for final comment and input  
15 from staff. He said this means each AR actually goes out twice for staff review.” *Id.* The careful  
16 drafting of AR 339 and the process taken to ensure its consistency with State regulations was discussed  
17 as follows:

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19 Director McDaniel discussed AR 339 employee code of ethics and  
20 conduct. He said this AR was drafted by NDOC’s subject matter expert,  
21 Inspector General Pam Del Porto, as well as a member of the Attorney  
22 General’s office, Deputy Attorney General Janet Traut, assuring that they  
23 were in compliance with all processes. After the last board meeting, this  
24 AR was sent out again for staff’s second and final review before it would  
25 be brought before the board today to be made a final AR. IG Del Porto  
26 said that since the last board meeting one staff member contacted her  
regarding the word loyalty being included in this AR. It was agreed that  
the word loyalty would be removed from the AR. There were no  
additional concerns from staff. Janet Traut explained that the revisions to  
this AR actually began in 2011 due to a statutory change regarding all

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

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



classified state employees prohibitions and penalties along with the process for discipline. She also discussed progressive discipline in relationship with Chapter 284 – State Personnel System where discipline is included. This AR was compared line by line with both Chapter 284 and chapter 289 – Peace Officers, to make sure the NDOC is compliant with the NRS's. She said they clarified language in AR 339 that had been problematic. Governor Sandoval said he appreciated all the hours of work and attention to detail that it took to get the AR to this point. Secretary Cegavske wanted to make it part of the record that employees sign this pre-service which is well before they actually begin work. She said she recalls this being worked on for the past two sessions and appreciates everyone's hard work. Governor Sandoval took a motion for approval of all of the administrative regulations that were presented under this agenda item and the motion passed.

*Id.*<sup>7</sup>

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

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

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

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

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

13 Any contention that Chapter 284 of the NRS or NAC invalidates AR 339 for lack of approval  
14 by the Personnel Commission is untenable. If NRS 284.383 were read to require that the Personnel  
15 Commission approve AR 339 or otherwise ratify its implementation, the Personnel Commission would  
16 have the ability to nullify or undermine the Board’s critical powers of prison administration as set forth  
17 in the Nevada Constitution and as further provided by State statute. The articles of the Nevada  
18 Constitution are the supreme law of the State and cannot be trumped by conflicting statutes or  
19 regulations. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. \_\_, \_\_, 327 P.3d 518, 521 (2014)  
20 (“The Nevada Constitution is the supreme law of the state, which controls over any conflicting  
21 statutory provisions.”) (internal citation and quotations omitted). *See id.* (The Nevada Supreme Court  
22 “construe[s] statutes, if reasonably possible, so as to be in harmony with the constitution.”) (internal  
23 citations and quotations omitted). Interpreting Chapter 284 of the NRS, as the Hearing Officer did  
24 here, to require the Personnel Commission’s final approval of AR 339 to be valid would necessarily  
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26 <sup>8</sup> The Personnel Commission reports to the Governor. *See* NRS 284.065(2). Therefore, the  
27 Hearing Officer’s finding that the Governor’s approval through the Board is insufficient and that the  
28 Personnel Commission instead must give its approval is incongruent. *See Motors v. Jackson*, 111 Nev.  
1026, 1029, 900 P.2d 345, 348 (1995) (explaining that statutory interpretation should avoid absurd or  
unreasonable results).

1 conflict with the authority given to the Board under the Nevada Constitution and NRS 209.111.<sup>9</sup>

2       Indeed, at least one hearing officer with the Nevada Personnel Commission, Hearing Officer  
3 Mark Gentile, has rejected the notion that AR 339 is invalid for lack of approval by the Personnel  
4 Commission. Hearing Officer Gentile provided the following reasoning for his determination:

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

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

17       See August 12, 2016 Decision on Petition for Rehearing/Reconsideration, attached as Exhibit A.  
18 Accordingly, Hearing Officer Gentile upheld the validity of AR 339 in the matter pending before him,  
19 giving it full weight in determining whether NDOC properly disciplined the employee.

20       Because the Hearing Officer in this case determined that AR 339 needed approval from the  
21 Personnel Commission to be valid and did not give AR 339 full consideration in her decision to  
22 overturn Employee's termination, she clearly erred and the Court should grant NDOC's Petition for  
23 Judicial Review.

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

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

The Hearing Officer exceeded her statutory authority and committed clear error of law by substituting her judgment for that of the employer. Pursuant to NRS 284.390(6), the authority granted the hearing officer is to determine whether NDOC had just cause for the discipline “as provided in NRS 284.385.” NRS 284.385 provides that an appointing authority may discipline a permanent classified employee “when [it] considers the good of the public service will be served thereby.”

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

“It [is] the task of the hearing officer to determine whether [the NDOC’s] decision to terminate [Employee] was based upon evidence that would enable [the NDOC] to conclude that the good of the public service would be served by [Employee’s termination].” *Dredge*, 105 Nev. at 42, 769 P.2d at 58. In *Whalen v. Welliver*, 60 Nev. 154, 104 P.2d 188 (1940), the Nevada Supreme Court held that this requirement necessitated a showing of just cause or “legal cause,” one specifically and substantially relating to, and affecting, the qualifications for, and the performance of, the position. In other words, the hearing officer’s task is to determine whether the appointing authority had “just cause” to terminate Employee from State service for the good of the public service. See NRS 284.390(6). A termination for “just cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based upon facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.” *Sw. Gas Corp. v. Vargas*, 111 Nev. 1064, 1077-79, 901 P.2d 693, 700-03 (1995).

“[W]hile hearing officers may determine the reasonableness of disciplinary actions and recommend appropriate levels of discipline, only appointing authorities have the power to prescribe the actual discipline imposed on permanent classified state employees.” *Taylor v. Dep’t of Health and*

1 *Human Servs.*, 129 Nev. \_\_\_, \_\_\_, 314 P.3d 949, 951 (2013). It is not the role of a hearing officer to step  
2 into the shoes of employer and substitute his judgment for that of the employer in disciplinary matters  
3 relating to the operation of the department. *Hughlom v. Pers. Advisory Comm'n of State of Nev.*, 97  
4 Nev. 35, 38, 623 P.2d 977, 978 (1981).

5 Here, an investigation was conducted into Employee's conduct and the findings were sustained.  
6 ROA, Vol. I, pp. 0000360-363. The investigation included an interview of Employee and four other  
7 witnesses as well as a review of records and policy related to Employee's conduct. ROA, Vol. I, pp.  
8 0000310-330. During the investigation, Employee admitted that he left his assigned post without  
9 authorization of supervisor. ROA, Vol. II, pp. 000028, 000066. Leaving a post without authorization is  
10 considered a serious and grave infraction at NDOC. ROA, Vol. II, pp. 000074, 0000106. Piccinini  
11 testified that officers are assigned to posts to protect the safety and security of the prison, the staff and  
12 the public. ROA, Vol. II, 000074. He further testified that if an officer leaves his assigned post, then he  
13 has left the unit vulnerable, particularly, if an incident occurs because the staff and other inmates would  
14 be at risk. ROA, Vol. II, p. 000075. Warden Gentry testified that when an officer leaves his assigned  
15 post it reduces the institution's immediate response time to any incidents that would require assistance  
16 for a staff member or inmate, including but not limited to inmates being physically or sexually  
17 assaulted and staff members needing a backup responder to deescalate a situation. ROA, Vol. II, p.  
18 0000107. Warden Gentry further testified that when an officer leaves his post, the chain of command  
19 would not know his whereabouts. For example, if the officer suffered a medical emergency or was  
20 being held hostage, they would not know his location and could not assist. ROA, Vol. II, p. 0000107.

21 AR 339.05.15 defines leaving an assigned post without authorization as a neglect of duty, which  
22 is a Class 5 terminable offense. In determining the appropriate discipline to give Employee in this case,  
23 Warden Gentry looked to AR 339, considered the seriousness of the violation, and recognized that  
24 leaving an assigned post poses a safety and security breach. ROA, Vol. II, 0000111, 0000119. Warden  
25 Gentry further testified that NDOC's Human Resources was consulted regarding the proposed  
26 discipline and Human Resources suggested termination because abandoning post is a Class 5  
27 terminable offense and is consistent with how such misconduct has been treated by NDOC in the past.  
28 ROA, Vol. II, p. 0000126-128. As a result, Warden Gentry recommended Employee be terminated

1 from State service. ROA, Vol. II, p. 0000111. Acting Director E.K. McDaniel made the final decision  
2 to terminate Employee in accordance with AR 339. ROA, Vol. II, p. 0000111, 000130-132.

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

13 Further, NDOC acted in accordance with NAC 284.650(7), dismissing Employee for what it  
14 deemed a serious inexcusable neglect of duty. *See* NAC 284.646(1)(b). Critically, the Hearing Officer  
15 determined that Employee engaged in an inexcusable neglect of duty and violated NAC 284.650(7)  
16 when he left his assigned post without authorization of a supervisor. ROA, Vol. I, p. 000093. Despite  
17 this determination and testimony elicited from witnesses regarding the severity of the offense, the  
18 Hearing Officer concluded that the circumstances warranted a suspension—not giving any weight to  
19 NDOC testimony or the penalty proscribed by NDOC in AR 339 for the offense. The Hearing Officer,  
20 however, may not step into the shoes of the employer and substitute her judgment for that of the  
21 employer. *Taylor*, 129 Nev. at \_\_\_, 314 P.3d at 951. The Nevada Supreme Court has determined that  
22 while hearing officers may determine the reasonableness of disciplinary actions and recommend  
23 appropriate levels of discipline, only appointing authorities have the power to prescribe the actual  
24 discipline imposed on permanent classified state employees. *Id.* In other words, a hearing officer does  
25 not have the authority to impose a lesser discipline. *Id.* Nevertheless, that is exactly what the Hearing  
26 Officer did in this case when she concluded a suspension not to exceed 30 days was the proper  
27 discipline even though she found that employee left his assigned post without authorization of a  
28 supervisor—a Class 5 terminable offense.

1 Based upon the evidence in the record, NDOC had just cause to terminate Employee, yet the  
2 Hearing Officer improperly stepped into the Employer's shoes and substituted her judgment for that of  
3 the Employer. Therefore, the Hearing Officer's Decision must be reversed.

4 **D. The Hearing Officer Clearly Erred and Abused Her Discretion When she Failed to Apply**  
5 ***Dredge* Deference.**

6 The Hearing Officer's Decision is clearly erroneous and characterized as an abuse of discretion  
7 because she failed to sustain the discipline imposed by NDOC for Employee leaving his assigned post  
8 without authorization of a supervisor.

9 Generally, deference is afforded to the Hearing Officer because employees need to be able to  
10 have an independent evaluation of the agency's decision to discipline them. However, the "critical  
11 need to maintain a high level of security within the prison system *entitles the appointing authority's*  
12 *decision to deference by the hearing officer whenever security concerns are implicated.*" *Dredge*,  
13 105 Nev. at 42, 769 P.2d at 58 (emphasis added). See NAC 284.650(3); *Jackson*, 111 Nev. at 773, 895  
14 P.2d at 1298. This exception is considered when the facts indicate a clear and serious security threat.  
15 *Jackson*, 111 Nev. at 773, 895 P.2d at 1298; *Knapp v. State ex rel. Dep't of Prisons*, 111 Nev. 420, 424,  
16 892 P.2d 575, 578 (1995). This bedrock principle of Nevada law, which was ignored by the Hearing  
17 Officer, should be followed because NDOC possesses superior competence and expertise to determine  
18 what constitutes a security concern. Further, deferring to NDOC on these matters establishes much  
19 needed predictability for NDOC and its employees. If hearing officers and judges are permitted to  
20 substitute their own view of the "seriousness" of a NDOC security violation, the goal of predictability  
21 will be undermined.

22 This is in accord with well-established Nevada Supreme Court authority. In *Dredge*, NDOC  
23 terminated a correctional sergeant, who was considered to be a valued employee, for off duty conduct.  
24 *Dredge*, 105 Nev. at 42, 769 P.2d at 58. In particular, the Director of NDOC determined that the  
25 terminated employee's off-duty misconduct of drunk driving, fraternizing with a convicted felon, and  
26 financially supporting that felon in violation of department regulations constituted a security concern.  
27 *Id.* A hearing officer reversed the dismissal. *Id.* at 45, 769 P.2d at 60. The Nevada Supreme Court  
28 noted the obvious security concerns and chastised the hearing officer for, viewing "the evidence in a



1 more benevolent light" than NDOC. *Id.* at 42, 769 P.2d at 58. The Nevada Supreme Court affirmed  
2 the district court's reversal of the hearing officer's decision. *Id.* at 45, 769 P.2d at 60. NDOC had the  
3 right to dismiss the correctional sergeant from state service because security concerns were implicated.  
4 *Id.*

5 Analysis under *Department of Prisons v. Jackson*, which affirmed rather than superseded  
6 *Dredge*, also establishes that NDOC's termination decision is entitled to deference. In *Jackson*, a  
7 corrections officer was terminated because he gave a civilian a tour of the prison "control center."  
8 *Jackson*, 111 Nev. at 771, 895 P.2d at 1297. The relevant administrative regulations stated the  
9 following: "The control center security doors shall remain locked for security. No unauthorized  
10 personnel will be admitted inside the control center." *Id.* Despite this regulation, the employee felt that  
11 letting the civilian into the control center posed no threat. *Id.* The Hearing officer overturned the  
12 dismissal based in part upon the warden's opinion that progressive discipline had not been followed  
13 and evaluated several instances of comparable breaches of security and unauthorized visits. *Id.* The  
14 hearing officer concluded that compared to the discipline meted out in other incidents, Jackson's  
15 termination was out of proportion to the facts. *Id.* The district court upheld the decision of the hearing  
16 officer. *Id.* The Nevada Supreme Court upheld the appointing authority's decision to terminate  
17 because *Dredge* "requires deference to the appointing authority in cases of breaches of security" and in  
18 light of the administrative regulation at issue, the case "clearly [fell] within the ambit of a security  
19 breach." *Id.* at 733. The Court then explained that *Dredge* deference applies in instances of "a clear  
20 and serious security threat." *Id.* In analyzing this standard, the Court upheld employee's termination  
21 because there was "a written administrative regulation addressing authorized accessibility to the control  
22 center" and the regulation "addressed the need and reasons for the stricter security." *Id.*

23 Here, just as in *Jackson*, Employee knowingly breached a memorialized security measure by  
24 abandoning his post. The *Jackson* Court's decision to uphold the appointing authority's decision to  
25 terminate employment establishes that the security breach in question does not need to result in any actual  
26 harm. The mere breach alone is sufficient.

27 NDOC, in exercising its specialized and expert discretion, determined that Employee committed  
28 a serious security violation constituting misconduct in the form of a Class 5 violation when he

1 abandoned his post. There is substantial evidence in the record to support this determination. Both  
2 Piccinini and Warden Gentry testified that leaving an assigned post without authorization is a grave and  
3 serious infraction. Additionally, both Piccinini and Warden Gentry testified that leaving an assigned  
4 post without authorization is a security violation that threatens the safety of the inmates, staff, and  
5 public. The Supreme Court has long held “[t]he administration of a prison is at best an extraordinarily  
6 difficult undertaking” and the safety of an institution’s inmates and employees is perhaps the most  
7 fundamental responsibility of the prison administration. *Hudson v. Palmer*, 468 U.S. 517, 526-527  
8 (1984); *Hewitt v. Helms*, 459 U.S. 460, 473 (1983). Based upon the unique difficulty of correctional  
9 work, prison administrators “should be accorded wide-ranging deference in the adoption and execution  
10 of policies and practices that in their judgment are needed to preserve internal order and discipline and  
11 maintain institutional security.” *Hudson*, 468 U.S. at 526-27. Further, judicial deference should be  
12 accorded not merely because prison administrations have a better grasp of correctional considerations  
13 and risks, but also because correctional operations are specifically the authority of the Legislative and  
14 Executive Branches of our Government, not the Judicial. *Bell v. Wolfish*, 441 U.S. 520, 547-549  
15 (1979); see Nev. Const. art. 5, § 21.

16 In determining that Employee should be terminated, NDOC relied on the seriousness of the  
17 offense and the discipline provided for under AR 339. Despite evidence indicating Employee  
18 committed an offense that constitutes a clear and serious security threat, the Hearing Officer did not  
19 give NDOC’s appointing authority deference and instead reversed the termination—even after the  
20 Hearing Officer made the determination that Employee violated a “*very important safety and security*  
21 *policy*.” ROA, Vol. 1, p. 000095 (emphasis added). Thus, the Hearing Officer’s Decision should be  
22 reversed as she clearly erred and abused her discretion when she failed to give deference to NDOC in  
23 its decision to terminate Employee.

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

27 The Court may set aside a final decision by a hearing officer where the final decision is clearly  
28 erroneous in view of the reliable, probative and substantial evidence on the whole record.” NRS

1 233B.135(3)(e). Substantial evidence has been defined as that which “a reasonable mind might accept  
2 as adequate to support a conclusion.” *State, Emp. Sec. Dep’t v. Hilton Hotels*, 102 Nev. 606, 608, 792  
3 P.2d 497, 498 (1986), citing *Richardson v. Perales*, 402 U.S. 389 (1971) (“We [equate] substantial  
4 evidence with that quantity and quality of evidence which a reasonable man could accept as adequate to  
5 support a conclusion...”). A decision is arbitrary, capricious, or unsupported, if it is not “supported by  
6 substantial evidence in the record.” *Clark Cnty. Educ. Ass’n v. Clark Cnty. Sch. Dist.*, 122 Nev. 337,  
7 342, 131 P.3d 5, 9 (2006).

8 As set forth above, the substantial evidence in the record demonstrates that NDOC lawfully  
9 terminated Employee. The Hearing Officer confirmed in her decision that the substantial and reliable  
10 evidence demonstrated that Employee violated NAC 284.650(7) and engaged in an inexcusable neglect  
11 of duty when he abandoned his assigned post without permission—the exact conduct that AR 339  
12 deems terminable. Specifically, she determined that “[c]redible testimony supports a finding that  
13 [Employee] left his post in Unit 1 on April 4, 2015 and went to the Shift Command Office without  
14 obtaining prior authorization from a supervisor.” ROA, Vol. I, p. 000093. The substantial and reliable  
15 evidence included testimony from the Warden and the supervisor on duty that abandoning post puts the  
16 correctional officer, the NDOC staff, and the public in a vulnerable and precarious position.  
17 Additionally, the Warden testified there are safety and security concerns underlying this policy which  
18 make it a serious infraction. Critically, the Hearing Officer determined that Employee violated a “very  
19 important safety and security policy.” ROA, Vol. I, p. 000095. Yet, rather than upholding NDOC’s  
20 termination of Employee for committing this serious offense of abandoning post, the Hearing Officer  
21 indicated that a suspension of 30 days or less was more appropriate. ROA, Vol. I, p. 000096. Despite  
22 substantial evidence supporting NDOC’s termination, the Hearing Officer failed to uphold the  
23 termination, instead concluding that Employee’s discipline was too harsh. *Cf. Meadow v. Civil Serv.*  
24 *Bd. of Las Vegas Metro. Police Dep’t*, 105 Nev. 624, 626 n.1, 781 P.2d 772, 773 n.1 (1989) (“We are  
25 most reluctant, in light of the evidence in this record, to impose on the Sheriff an officer whom he has  
26 determined to be unfit for service in the law enforcement agency over which he is responsible. It is  
27 difficult to hold heads of organizations responsible for the quality and effectiveness of their efforts if  
28 they are forced to work with persons found, by substantial evidence, to be unfit for service.”)

Accordingly, the reliable, probative, and substantial evidence on the whole record demonstrates that the Hearing Officer's decision is clearly erroneous and arbitrary and capricious.

**vii.**

## CONCLUSION

This Court's review of the Record on Appeal will show that the Findings of Fact, Conclusions of Law and Decision of the Administrative Hearing Officer below is not supported by substantial and reliable evidence. Additionally, this Court's review of the Record on Appeal will show that the Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Decision contain errors of law, was arbitrary and capricious, and is an abuse of discretion.

Therefore, Petitioner respectfully requests entry of this Court's Order reversing said Decision in its entirety, and granting Petitioner's Petition for Judicial Review.

Dated: December 6<sup>th</sup>, 2016.

ADAM PAUL LAXALT  
Attorney General

By: /s/ Michelle Di Silvestro Alanis  
Michelle Di Silvestro Alanis (Bar No. 10024)  
Deputy Attorney General

Attorneys for Petitioner  
State of Nevada ex rel. Department of Corrections

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Dated: December 6<sup>th</sup>, 2016.

By: /s/ Michelle Di Silvestro Alanis  
Michelle Di Silvestro Alanis (Bar No. 10024)  
Deputy Attorney General

Attorneys for Petitioner  
State of Nevada ex rel. Department of Corrections

## CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 6<sup>th</sup> day of December, 2016, I electronically filed the foregoing **PETITIONER'S OPENING BRIEF** with the Clerk of the Court by using the electronic filing system. Parties that are registered with this Court's electronic filing system will be served electronically. For those parties not registered, service was made by depositing a copy for mailing in the United States Mail, first-class postage pre-paid, at Las Vegas, Nevada to the following:

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

/s/ Anela Kaheaku  
Anela Kaheaku, an employee of the  
Office of the Nevada Attorney General

**EXHIBIT A**

**EXHIBIT A**



STATE OF NEVADA  
BEFORE THE NEVADA DEPARTMENT OF ADMINISTRATION  
HEARINGS DIVISION  
AUG 15 AM 9:25

MARTHA L. BAEZA,

Petitioner-Employee

v.

NEVADA DEPARTMENT OF  
CORRECTIONS,

Respondent-Employer.

RECEIVED  
AND  
FILED

Hearing No. 1508882-MG

**DECISION ON PETITION FOR REHEARING/RECONSIDERATION**

This matter came on for the completion of an administrative hearing before the undersigned Hearing Officer for the Nevada Department of Administration, Hearings Division on June 10, 2016. The hearing was initiated on December 4, 2015 before Hearing Officer Gary Pulliam, who recognized a potential conflict during the hearing such that he voluntarily recused himself from this matter. The hearing was held pursuant to Petitioner/Employee Martha L. Baeza's appeal of her dismissal from State Service for failing to pass her bi-annual firearm qualification.

The decision in this matter affirming Ms. Baeza's dismissal from state service was issued on July 7, 2016. Following the issuance of that Decision, on July 20, 2016, I received a Petition for Rehearing/Reconsideration of the July 7, 2016 Decision pursuant to NRS 233B.1304. The Petition for Rehearing/Reconsideration is timely and will be considered accordingly. Nevada Department of Corrections filed an Opposition to the Petition for Rehearing/Reconsideration on July 27, 2016.

The essence of the argument in the Petition for Rehearing/Reconsideration is that Administrative Regulation 339 had not been properly approved and adopted as an Administrative Regulation pursuant to NRS Chapter 284. AR 339 was, apparently, adopted by the Nevada Board of State Prison Commissioners, consisting of the Governor, Secretary of State, and the Attorney General under the auspices of NRS Chapter 209. The argument is that because the Nevada Personnel Commission never approved this Administrative Regulation, the regulation is void and unenforceable. Accordingly, the Decision to affirm Officer Baeza's dismissal from state service should be reversed and the matter remanded back to NDOC for the appropriate level of progressive discipline.

**DISCUSSION**

**1. THE ISSUE REGARDING THE VALIDITY OF AR 339 WAS NEVER ADDRESSED IN ANY FASHION BEFORE THIS PETITION FOR REHEARING/RECONSIDERATION.**

I would note that this matter has had a rather complicated process. The hearing, as noted above, was initiated on December 4, 2015 before hearing officer, Gary Pulliam, and it appeared, from reading the transcript, that hearing went on for a full day. Prior to that hearing, the matter was fully briefed by the respective parties.

After that hearing was completed and the conflict recognized, the undersigned was named as the substitute hearing officer for Mr. Pulliam. Prior to the time of this second June 10, 2016, hearing, I issued an order inviting both parties in the case to supplement their briefs, if necessary; to identify and call additional witnesses, if appropriate; to identify any new legal issues and to supply supplemental briefing if there were matters that were not covered in the initial briefings that they would like to be considered.

At the June 10, 2016 hearing, I exercised my discretion consistently in such a way as to allow Ms. Baeza's representative to call witnesses and introduce exhibits irrespective of the fact they were not previously identified or disclosed. It was my desire to make the hearing process as fair and as inclusive as possible, and to give both parties the opportunity to fully present the case on the merits. The June 10, 2016 hearing also lasted the better part of an entire day.

The issue being raised in this Petition for Rehearing/Reconsideration - that AR 339 was never appropriately approved by the State of Nevada Personnel Commission was never addressed in any briefing or discussed in any fashion prior to receiving this Petition for Rehearing/Reconsideration on July 20, 2016. It is unfortunate that the issues being raised now, for the first time, were not properly vetted through the hearing process.

Attached to this Petition for Rehearing/Reconsideration was a decision in a different matter, Brian Ludwig v. Nevada Department of Corrections, Hearing No. 1521187, which was determined by a different hearing officer for the State of Nevada (Cara Brown, Esq.). I have complete respect for the work of Ms. Brown as a hearing officer, however, I don't believe that her findings of fact and conclusions of law in a separate case decided under a separate record has any type of precedential

1 authority that I am required to, or that I should, consider in determining this Petition. Not having  
2 access to the record in that particular case, I have no idea of the basis of her decision or the evidence  
3 underlying her decision in that matter.

4 **2. AR 339 SETS FORTH POLICY OF PROGRESSIVE DISCIPLINE WITH RESPECT**  
5 **TO THE DEPARTMENT OF CORRECTIONS.**

6 The Petition for Rehearing/Reconsideration is a bit misleading when it infers that AR 339  
7 mandates termination as a disciplinary measure and is somehow the antithesis of a mandated system  
8 of progressive discipline. See Petition for Rehearing, 5:1-7. A complete reading of AR 339 plainly  
9 reflects that it is the embodiment of a system of progressive discipline for employees of the Nevada  
10 Department of Corrections. In AR 339, there are five designated class of offenses noted with  
11 minimum/maximum penalties for each class of offense along with minimum/maximum penalties  
12 for second and third offense for the same transgressions. The Administrative Regulations recognize  
13 and set forth that there are certain offenses, including those related to bi-annual firearm qualification  
14 with firearms, that are so serious that they do not warrant progressive discipline and, in fact, warrant  
15 dismissal from state service.

16 **3. AR 339 AND AR 332 ARE VALID AND LAWFUL ADMINISTRATIVE**  
17 **REGULATIONS.**

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

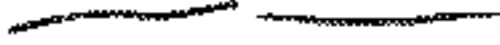
23 I do not find that the fact that this regulation was promulgated by the Board of State Prison  
24 Commissioners, through the auspices of Article 5 Section 21 of the Nevada Constitution, instead of  
25 being 'subject to the approval of the State Personnel Commission.' under NRS Chapter 284,  
26 invalidates the application of the regulation as it applies to Ms. Baeza. I also believe that other  
27 provisions of the Administrative Code, including NAC 284.650(3) and NAC 289.230 provide a firm  
28 statutory authority and basis for the determination of discipline for the failure of a corrections officer  
to meet POST requirements. I still believe that issues of weapons proficiency and qualification are

1 matters that go to the heart of the safety and security of an institution and, as such, deference to the  
2 decision of NDOC is warranted and mandated by Nevada law. Accordingly, the dismissal of Ms.  
3 Baeza from State service should be sustained.

4 **ORDER**

5 Based on the foregoing, Martha L. Baeza's Petition for Rehearing/Reconsideration is hereby  
6 DENIED.

7 DATED this 12 day of August, 2016.

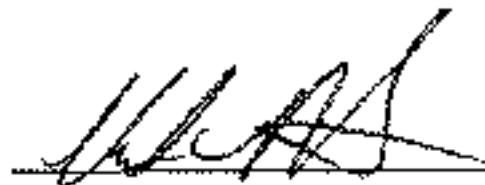
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11 MARK L. GENTILE  
12 Hearing Officer

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

I hereby certify that, on the 18<sup>th</sup> day of August, 2016, a true and correct copy of the foregoing **DECISION ON PETITION FOR REHEARING /RECONSIDERATION** was duly mailed, postage prepaid, to the following:

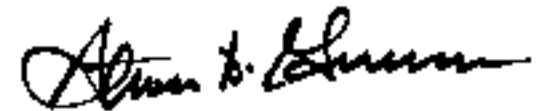


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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. ITS  
DEPARTMENT OF CORRECTIONS

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

Petitioner,

v.

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

Respondents.

RESPONDENT BRIAN LUDWICK'S ANSWERING BRIEF

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*Attorneys for Respondent Brian Ludwick*

1                    DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

2            The undersigned counsel of record certifies that the following are persons and entities as  
3 described in NRAP 26.1(a) and must be disclosed. These representations are made on order that the  
4 Justices of this Court may evaluate possible disqualification or recusal.

5            1.        Daniel Marks, Esq. and Adam Levine, Esq. of the Law Office of Daniel Marks. There  
6 are no parent corporations.

7            Attorneys of Record for Respondent Brian Ludwick.



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1. Were the substantial rights of NDOC prejudiced for any of the statutory reasons delineated in 233B.135(3)(a) - (i) when a State of Nevada Department of Administration Hearing Officer determined pursuant to NRS 284.390(6) that NDOC did not have just cause to terminate the employment of Corrections Officer Brian Ludwick.

STATEMENT OF FACTS

Brian Ludwick was employed as a correctional officer with the Nevada Department Corrections (hereafter "NDOC") at the Florence McClure Women's Correctional Center ("FMWCC"). Ludwick suffers from severe hypertension. (ROA Vol. II at 30). When he has a hypertension attack it causes heart palpitations, irritability, headaches, dizziness and loss of sensation in his hands and arms. (ROA Vol. II at 32). In 2014 Ludwick applied for leave under the Family and Medical Leave Act, 29 U.S.C. §2601 et seq. (hereafter "FMLA") for his medical condition. This request was *granted* by NDOC. (ROA Vol. I at 100-105; Vol. II at 30-32).

An employer may require annual medical re-certification if the medical condition giving rise to coverage under the FMLA lasts beyond a single year. 29 CFR 825.305(e). In August of 2015 Officer Ludwick's physician re-certified him for another year of FMLA leave. (ROA Vol. 1 at 106-113).

The FMLA permits employees take leave in block amounts, or on an intermittent basis as needed. Ludwick's FMLA leave accrued by NDOC was intermittent in nature because he could not know in advance when he would be suffering a hypertension attack. (ROA Vol. 1 at 104-105, 111-112; Vol. II at 31-32).

On April 4, 2015 while driving to work Ludwick started feeling ill from an oncoming hypertension attack. (ROA Vol. II at 34). When he arrived at FMWCC he was assigned to Unit 1. This unit is the most challenging unit, and the most intense and stressful environment because it houses

///

1 inmates coming out of solitary confinement. There are more inmate fights, more inmate violence, and  
2 more challenging of authority than any other unit. (ROA Vol. II at 32).

3 While in the control room of Unit 1, Ludwick informed two (2) fellow officers that he was not  
4 feeling well. (ROA Vol. II at 25). He attempted to contact the Shift Commander, Lieutenant Piccinini,  
5 by telephone. However, the Shift Command office would not pick up. (ROA Vol. II at 27-28).

6 Having a correctional officer who is not at 100% capacity in a unit such as Unit 1 is a danger to  
7 the safety of the inmates and the institution. (ROA Vol. II at 33). When Officer Ludwick could not  
8 reach Lt. Piccinini by telephone, he walked 60 yards from the Unit 1 control room to the Shift  
9 Command Office. (ROA Vol. II at 38). He was able to locate Lt. Piccinini and informed him that he  
10 wasn't feeling well. Ludwick requested a transfer to another unit in order to try to "tough it out" rather  
11 than go home because calling in sick is frowned upon. (ROA Vol. II at 27). Piccinini informed  
12 Ludwick that he would not transfer him to another Unit. At that point Ludwick informed Piccinini that  
13 he would have to take FMLA leave. Piccinini responded "That is fine with me". (ROA Vol. II at 28-  
14 29). While the facilities minimum staffing requirements would have to yield to federal law in any  
15 event, there were still two (2) officers left in Unit 1 which met the minimum staffing requirements.  
16 (ROA Vol. I at 150, 361; Vol. II at 37).

17 Despite the fact that Ludwick was exercising his right under federal law to his intermittent  
18 FMLA leave, and despite the fact that Piccinini told Ludwick that he may do so, Piccinini initially  
19 logged Ludwick as AWOL. However, after speaking with Associate Warden Hill, Ludwick's status  
20 was changed to FMLA. (ROA Vol. I at 116; Vol. II at 78-79). Ludwick was also forced to take a sick  
21 day the following day on April 5, 2015. (ROA Vol. II at 42).

22 Officer Ludwick was investigated by the Office of the Inspector General ("OIG") regarding an  
23 allegation that he have neglected his duty and abandoned his post at Unit 1 without authorization. The  
24 investigation uncovered that while Lt. Piccinini had sent out an e-mail a few days before April 4, 2015



1 informing officers they may not leave their post without prior authorization, that Officer Ludwick  
2 never received that e-mail. (ROA Vol. I at 149; Vol. II at 56). The Report further confirmed that the  
3 minimum staffing levels for Unit 1 had been maintained. (ROA Vol. I at 130).

4       OIG investigators do not adjudicate complaints; they merely compile information. (ROA Vol. II  
5 at 97-98). Following the OIG's investigation, the investigatory report was forwarded to Warden Jo  
6 Gentry to adjudicate. (ROA Vol. I at 130). Gentry sustained Officer Ludwick on one (1) count of  
7 Neglect of Duty when he left Unit 1 to go to the Shift Command office. She did not sustain the other  
8 count of Neglect of Duty alleging that he failed to perform his assigned security function. Warden  
9 Gentry then concluded:

10       It is recommended that Brian Ludwick receive a Specificity of Charges - consisting of  
11 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.

12 (ROA Vol. I at 361). Deputy Director of NDOC E.K. McDaniel agreed with the disciplinary  
13 recommendation. (ROA Vol. I at 362).

14       However, on December 19, 2015 Ludwick was served with an NPD-41 Specificity of Charges  
15 recommending his dismissal from State Service for leaving his post to walk to the Shift Command  
16 Office. (ROA Vol. I at 304-309). This Specificity of Charges alleged a violation of NAC 284.650 (3)  
17 which authorizes discipline where "The employee of any institution administering a security program,  
18 and the considered judgment of the appointing authority, violates or endangers the security of the  
19 institution" (ROA Vol. II at 305) despite the fact that there was an express finding that no such security  
20 breach had occurred. ((ROA Vol. I at 361-362).

21       Officer Ludwick timely appealed his termination to a State of Nevada Department of  
22 Administration hearing officer. Following an evidentiary hearing on May 27, 2016, Hearing Officer  
23 Cara L. Brown determined that Ludwick's actions did not warrant termination, and overturned the

24 ///

1 dismissal ordering Officer Ludwick reinstated with back pay and benefits (along with a  
2 recommendation for a suspension). (ROA Vol. I at 82-97).

3 NDOC filed a Petition for Reconsideration with the hearing officer arguing that NDOC  
4 Administrative Regulation 339 mandates termination for Neglect of Duty, and that the hearing officer  
5 erred in ruling that she would consider A.R. 339, but was not bound by it. (ROA Vol. I at 64-68).  
6 Following the filing of an opposition by Ludwick (ROA Vol. I at 15-63), the Hearing Officer denied  
7 reconsideration. (ROA Vol. I at 5-14).

8 Thereafter, NDOC sought a stay of the Hearing Officer's Order. This Court denied the stay and  
9 Officer Ludwick was returned to work at NDOC. However, following his reinstatement with back pay,  
10 he resigned his position with NDOC to pursue other vocations. Accordingly, he is no longer an  
11 employee.

#### 12 STANDARD FOR JUDICIAL REVIEW

13 The court's ability to set aside the decision of the hearing officer is extremely limited. The  
14 provisions of NRS 233B.135(3) state:

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

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

24 Under subsection (2) of NRS 233B.135, the hearing officer's decision is to be deemed "reasonable and  
lawful" and it is the state that bears the burden of proof to demonstrate the decision is invalid under the  
criteria of subsection (3).

1 Where, as here, there is "substantial evidence" in the record, the Findings of the hearing officer  
2 are not merely entitled to "deference"; they are conclusive. *State Employment Security Department v*  
3 *Nacheff*, 104 Nev. 347, 575 P.2d 787 (1988). The Decision of the hearing officer may not be disturbed  
4 unless the rights of the petitioner have been "prejudiced" for the specific statutory reasons set forth  
5 under NRS 233B.135. While the courts are free to decide purely legal issues without deference to the  
6 determination of the administrative agency, where the agency's conclusions of law are necessarily  
7 closely related to the agency's view of the facts, the agency's conclusions of law are likewise entitled  
8 to deference and may not be disturbed if supported by substantial evidence. *Jones v. Rosner*, 102 Nev.  
9 215, 719 P.2d 805 (1986).

10 In reviewing the decision of an administrative agency, this court may not substitute its own  
11 judgment for that of the hearing officer with regard to the weight of the evidence or the credibility of  
12 the witnesses. *Gilman v. Nevada State Board of Veterinary Medical Examiners*, 120 Nev. 263 (2004);  
13 *Knapp v. State Department of Prisons*, 111 Nev. 420, 423, 892 P.2d 575 (1995); *Nevada Industrial*  
14 *Commission v. Williams*, 91 Nev. 686, 541 P.2d 905 (1975). This Court may not disturb the hearing  
15 officer's decision unless the Court finds that the decision was "arbitrary and capricious". To be  
16 "arbitrary and capricious", the decision of the administrative agency must be in "disregard to the facts  
17 and circumstances involved". *Meadow v. The Civil Service Board of LVMPD*, 105 Nev. 624, 781 P.2d  
18 772 (1989).

### 19 ARGUMENT

#### 20 **I. THE HEARING OFFICER DID NOT COMMIT AN ERROR OF LAW IN ADMITTING** 21 **A.R. 339 FOR A LIMITED PURPOSE.**

22 NDOC argues that the Hearing Officer erred in failing to consider NDOC Administrative  
23 Regulation (A.R.) 339 in determining whether NDOC properly terminated Ludwick. (Opening Brief at  
24 ///

1 p. 9). This actually misrepresents the Hearing Officer's decision. The hearing officer did not fail to  
2 consider A.R. 339; she admitted it into evidence but only for a limited purpose.

3 Prior to the evidentiary hearing, NDOC filed its Pre-Hearing Statement which argued to the  
4 Hearing Officer that Neglect of Duty was a "Class 5" offense and that under NDOC Administrative  
5 Regulation 339 dismissal is the minimum discipline which can be imposed.<sup>1</sup> (ROA Vol. I at 298).  
6 However, Ludwick's Pre-Hearing Statement pointed out that any deviations from the statutory system  
7 of progressive discipline had to be approved by the Nevada Personnel Commission pursuant to NAC  
8 284.742. (ROA Vol. I at 282, 283, 288-290). It is undisputed by the parties that A.R. 339 was never  
9 submitted to, or approved by the Nevada Personnel Commission under NAC 284.742.

10 The hearing officer agreed with Ludwick that she could not be bound by an NDOC regulation  
11 such as A.R. 339 which had not been submitted to, and approved by, the Nevada Personnel  
12 Commission. However, she did allow admission into evidence for the limited purpose of demonstrating  
13 how NDOC views "the seriousness of the offense that is alleged to have been committed here." (ROA  
14 Vol. II at 9).

15 **A. Discipline Less Than Termination Is Permitted for "Neglect of Duty" Under A.R.**  
16 **339.**

17 At the outset, it must be emphasized that the underlying premise of NDOC's argument – that  
18 A.R. 339 mandates termination – is erroneous. That Regulation does define Neglect of Duty as a "Class  
19 5" offense for which termination is prescribed. However, the chart of offenses is only a "Guide". The  
20 actual language of the Regulation itself reveals that the Appointing Authority and other NDOC  
21 employees may deviate from the "Prohibitions and Penalties". Section 339.04 (5) and (6) of the  
22 Regulation state:

23  
24 <sup>1</sup> It is hard to imagine a discipline greater than dismissal unless NDOC plans on incarcerating or shooting its own employees.

1 5. Appointing Authorities and employees must recognize that penalty schedules  
2 cannot accurately, fairly, or consistently address every situation. Appointing Authorities  
3 must conduct an individual analysis of the each employee for each incident and exercise  
4 their professional judgment and discretion, then recommend a penalty based upon the  
need to modify the employee's behavior, set expectations for other employees, and  
maintained the public trust. There is no requirement that charges similar in nature must  
result in identical penalties.

5 6. Appointing Authorities and their reviewers should neither rely solely on  
6 previously imposed penalties nor quote them as authority in penalty rationales. It must  
7 be remembered that this is a historical document of penalties. As such it may not reflect  
8 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.

9 (ROA Vol. I at 341-342).

10 As addressed below, the Nevada Supreme Court has held that hearing officers do not defer to  
11 the Appointing Authority. However, given the undisputed fact that even NDOC is not required to  
12 terminate for every instance of Neglect of Duty under A.R. 339, NDOC cannot demonstrate that its  
13 rights were prejudiced when the Hearing Officer also found that she was not so bound.

14 **B. The Hearing Officer Correctly Determined That Any Regulations Relating To**  
15 **Dismissal From The Classified Service Must Be Approved By The Personnel**  
**Commission.**

16 As an NDOC Correctional Officer, Brian Ludwick was a member of the classified service of the  
17 State of Nevada. NRS 284.150(2) states "Except as otherwise provided in NRS 193.105, 209.161 and  
18 416.070, a person must not be appointed, transferred, promoted, demoted or discharged in the classified  
19 service in any manner or by any means other than those prescribed in this chapter and the regulations  
20 adopted in accordance therewith." (Emphasis added).

21 The State of Nevada Personnel Commission has promulgated regulations relating to  
22 "Prohibitions and Offenses". NAC 284.742 entitled "Appointing authorities required to determine  
23 prohibited conflicting activities and identify such activities and explain process of progressive  
24 discipline in policy" states:

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

6       2. If an appointing authority revises the policy described in subsection 1, the  
7       appointing authority shall provide a copy of the revised policy to each employee.

8       3. An appointing authority shall include in the policy described in subsection 1 an  
9       explanation of the process of progressive discipline as administered by the appointing  
10      authority. The process must conform to the provisions of NRS 284.383 and NAC  
11      284.638 to 284.656.3, inclusive.

12      (Emphasis added). If an appointing authority such as NDOC wishes to adopt Prohibitions and Penalties  
13      setting forth certain discipline for certain offenses, it may do so "subject to the approval of the  
14      [Personnel] Commission".

15      A.R. 339 "Class of Offense Guidelines", upon which NDOC seeks to rely, has never been  
16      submitted to, much less approved by the Personnel Commission. Rather, these Administrative  
17      Regulations was adopted by the Nevada Board of State Prison Commissioners. That Board consists of  
18      the Governor, Secretary of State and the Attorney General. Article 5 §21 of the Nevada Constitution.

19      The Nevada Legislature did not authorize the Board of State Prison Commissioners to enact  
20      disciplinary regulations for members of the classified service. Rather, the Legislature vested that power  
21      exclusively with the Personnel Commission under NRS Chapter 284. See NRS 284.150(2).

22      The Nevada Legislature has mandated that the State of Nevada Personnel Commission adopt,  
23      by regulation, a system of progressive discipline. Nevada Revised Statute 284.383 states in pertinent  
24      part:

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

30      ///

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

5 In conformance with this legislative mandate, the State of Nevada Personnel Commission adopted as  
6 part of the Nevada Administrative Code ("NAC") regulations creating the system of progressive  
7 discipline. NAC 284.638(2) and (3) state:

8        2.        If appropriate and justified, following a discussion of the matter, a reasonable  
9 period of time for improvement or correction may be allowed before initiating  
10 disciplinary action.

11        3.        In situations where an oral warning does not cause a correction of the condition  
12 or where a more severe initial action is warranted, a written reprimand prepared on a form  
13 prescribed by the Department of Personnel must be sent to the employee and a copy  
14 placed in the employee's personnel folder which is filed with the Department of  
15 Personnel.

16 Similarly, Nevada Administrative Code Section 284.642 entitled "Suspensions and Demotions" states  
17 in pertinent part:

18        1.        If other forms of disciplinary or corrective action have proved ineffective, or if  
19 the seriousness of the offense or condition warrants, an employee may be:

20                (a)        Suspended without pay for a period not to exceed 30 calendar days for  
21 any cause set forth in this chapter; or

22                (b)        Demoted for any cause set forth in this chapter.

23        2.        An exempt classified employee may only be suspended without pay in  
24 increments of one or more full workweeks.

      3.        The rights and procedures set forth in NAC 284.655 to 284.658, inclusive,  
apply to any disciplinary action taken pursuant to this section.

      Absent express approval from the Personnel Commission under the procedure set forth in NAC  
284.742 to designate a particular violation so severe so as to warrant dismissal for a first offense, the  
Hearing Officer was required to apply the statutorily mandated system of progressive discipline. Any  
attempt to base a dismissal upon A.R. 339's categorization of a violation as a "Class 5", which permits



1 no progressive discipline and mandates termination for a first offense, is an express violation of NRS  
2 284.150(2) which prohibits dismissal "in any manner or by any means other than those prescribed in  
3 this chapter and the regulations adopted in accordance therewith."

4 NDOC's brief argues that because Article 5 §21 is a constitutional provision, it somehow  
5 trumps the directives of the Legislature under NRS 284.150(2). This is incorrect.

6 Article 5 §21 states that the BOPC has "supervision of all matters connected with the State  
7 Prison *as may be provided by law.*" (Emphasis added). Over 100 years ago the Nevada Supreme Court  
8 rejected claims that the constitutional authorization of the BOPC superseded the legislature's statutory  
9 authority to limit the BOPC's authority.

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

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

24 In place of the general supervisory authority formerly exercised by the 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 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



1 exercise it. Their general supervising powers have been abolished, and their power to  
2 appoint "all necessary help" at the prison has been transferred to the warden. He alone,  
in our opinion, has authority to employ a physician for the prisoners.

3 13 Nev. at 420-421.

4 Moreover, any authority over employees which may have previously vested in the BOPC by  
5 Art. 1 §5 has been superseded by Article 15 §15 of the Nevada Constitution which states "*the*  
6 *legislature shall provide by law for a state merit system governing the employment of employees in the*  
7 *executive branch of state government.*" That merit system is codified at NRS Chapter 284. See  
8 Legislative declaration of purpose at NRS 284.010.

9 Article 5 §21 was adopted in 1864. Article 15 §15 is the more recent of the constitutional  
10 articles. It was an amendment to the Nevada Constitution passed by the Legislature in 1967 and 1969,  
11 and ratified in the general election of 1970. Because the authority of the Board of Prison  
12 Commissioners is limited only to those matters authorized by statute, and because Article 15 §15  
13 authorizes the Legislature to provide by law for the state merit system for employees in the executive  
14 branch, NRS 284.150(2) and NRS 284.155 supersede any authority of the BOPC.

15 NRS 209.111 "Powers and duties of Board [of Prison Commissioners]" states:

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

18 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.

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

20 3. Prescribe regulations for carrying on the business of the Board and the  
21 Department.

22 The reference to "labor" in NRS 209.111 defining the Powers and duties of the BOPC is a reference to  
23 prisoner (convict) labor, not employees of the classified service of the State of Nevada. Subsection of

24 ///

1 the statute speaks in terms of "officers and employees" of the Department, as opposed to a reference to  
2 "labor".<sup>2</sup>

3 In contrast, NRS 284.150(2) states:

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

8 (Emphasis added).

9 It is well-established that "When a specific statute is in conflict with a general one, the specific  
10 statute will take precedence." *Loder v. Warden*, 121 Nev. 682, 120 P.3d 1164 (2005); *Gaines v. State*,  
11 116 Nev. 359, 365, 998 P.2d 166, 170 (2000). NRS 209.111 is a general statute and must yield to NRS  
12 284.150(2). This is self-evident from the language "Except as otherwise provided in... NRS 209.161".

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

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

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

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

21 The Legislature has placed the wardens of NDOC within the classified service of the State  
22 "except for purposes of appointment and retention". Accordingly, wardens, such as Jo Gentry can be  
23 dismissed without compliance with the regulations adopted by the Personnel Commission at NAC  
24 Chapter 284.

25 ///

<sup>2</sup> Nevada follows the maxim "*expressio unius est exclusio alterius*", the expression of one thing is the exclusion of another.  
*Galloway v. Trandell*, 83 Nev. 13, 422 P.2d 237 (1967).

1 The Legislature has created no such exemptions for correctional officers. As members of the  
2 classified service, the Legislature has mandated under NRS 284.150(2) that they cannot be dismissed  
3 except in conformance with the regulations adopted by the Personnel Commission. Because it is the  
4 Legislature that determines the scope of the BPOC's authority, and the Legislature which has  
5 constitutional control over the merit system governing the classified service, NDOC's arguments are  
6 without merit.

7 On February 28, 2017 the Nevada Court of Appeals issued its decision in *Kassebaum v. Nevada*  
8 *Department of Corrections et al.* Docket No. 69468 recognizing that the schedule of penalties in A.R.  
9 339 are only "suggested levels of discipline". The Court of Appeals reversed a decision of the First  
10 Judicial District Court which granted judicial review of an EMC decision adjusting a written reprimand  
11 down to a warning notwithstanding the fact that "Discourtesy" was a "Class 2" offense with a  
12 minimum penalty of a written reprimand. A copy of the Court of Appeals decision, and the First  
13 Judicial District Court's Order, are appended hereto for the Court's convenience.<sup>3</sup>

14 **II. HEARING OFFICERS DO NOT DEFER TO THE APPOINTING AUTHORITIES**  
15 **IN APPEALS UNDER NRS 284.390.**

16 NDOC's Opening Brief erroneously cites to *Dredge v. Department of Prisons*, 105 Nev. 39,  
17 769 P.2d 56 (1989) to argue that the Hearing Officer exceeded her statutory authority by substituting  
18 her judgment for that of the Appointing Authority. (Opening Brief at 17-22). However, the holding in  
19 *Dredge* that Hearing Officers are required to defer to the appointing authority has been overruled.

20 ///

21 ///

22 ///

23 .....

24 <sup>3</sup> Undersigned counsel was the attorney for Corrections Officer Sherri Kassebaum.

1 In *Dredge v. State ex rel. Department of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989) Justice  
2 Springer issued his famous dissent from the deference given by the Court to the appointing authority  
3 stating:

4 I dissent because this case represents an excellent example of when the judicial branch  
5 of government should keep its nose out of administrative affairs. In compliance with the  
6 statutory scheme a Nevada Personnel Hearing Officer, after a full-day hearing, involving  
7 ten witnesses and the introduction of numerous exhibits, ruled that Dredge's actions did  
8 not warrant his permanent dismissal from state civil service. Now, for reasons far from  
9 satisfactory, this court intrudes into the prescribed scheme of things and destroys this  
10 man's career. I disapprove.

11 105 Nev. at 45, 769 P.2d at 60. Justice Springer asserted "Taking a new and impartial view of the  
12 evidence is exactly what personnel hearing officers are supposed to do." 105 Nev. at 47, 769 P.2d at 62.

13 Six (6) years later in *Knapp v. Department of Prisons*, 111 Nev. 420, 892 P.2d 575 (1995) the  
14 Nevada Supreme Court recognized the wisdom of Justice Springer's dissent from *Dredge* holding:

15 Generally, a hearing officer does not defer to the appointing authority's decision. A  
16 hearing officer's task is to determine whether there is evidence showing that a dismissal  
17 would serve the good of the public service. *Dredge*, 105 Nev. at 42, 769 P.2d at 58  
18 (citing NRS 284.385(1)(a)). A hearing officer "determine[s] the reasonableness" of a  
19 dismissal, demotion, or suspension. NRS 284.390(1). "The hearing officer shall make no  
20 assumptions of innocence or guilt but shall be guided in his decision by the weight of  
21 the evidence as it appears to him at the hearing." NAC 284.798. Justice Springer noted  
22 in his dissent in *Dredge*: "Taking a new and impartial view of the evidence is  
23 exactly what personnel hearing officers are supposed to do."

24 111 Nev. at 424, 892 P.2d at 577-578 (emphasis added). The *Knapp* Court held that the only time the  
appointing authority was entitled to any form of deference was "whenever security concerns are  
implicated in an employee's termination." *Id.*

However, a mere two (2) months after the *Knapp* decision the Supreme Court in *State ex rel.*  
*Dept. of Prisons v. Jackson*, 111 Nev. 770, 895 P.2d 1296 (1995) clarified that this deference over  
security concerns will only be applied in the most egregious of circumstances holding:

Although the issue of security concerns requires deference to the appointing authority,  
we will not consider this exception unless the facts indicate a clear and serious security  
threat. Therefore, this exception will be applied only in cases of egregious security

1 breaches and will not be allowed to undermine the job security of otherwise permanent  
2 employees, who deserve to have a fair and independent evaluation of the agency head's  
3 termination decision.

4 111 Nev. at 773, 895 P.2d at 1298.<sup>4</sup>

5 **III. THE HEARING OFFICER DID NOT ACT ARBITRARILY AND CAPRICIOUSLY IN**  
6 **REVERSING THE TERMINATION OF OFFICER LUDWICK BECAUSE THE**  
7 **EVIDENCE ESTABLISHED THAT THERE WAS NO EGREGIOUS SECURITY**  
8 **BREACH.**

9 As a forth above, under *Jackson* Hearing Officers are only to defer to the Appointing Authority  
10 in cases of "egregious breaches" of security. There was no such egregious security breach in this case.

11 Rather, Warden Gentry specifically found to the contrary in her adjudication:

12 It is recommended that Brian Ludwick receive a Specificity of Charges consisting of  
13 one (5) day suspension from State Service in lieu of the Class 5 Dismissal of State  
14 Service since there was no security breach resulting from him leaving his post.

15 (ROA Vol. I at 361).

16 Under cross-examination, Warden Gentry conceded that she found no security violation and had  
17 recommended only a five (5) day suspension, however Human Resources informed Gentry that the  
18 discipline had to be changed to termination to remain consistent with what had been done in the past at  
19 NDOC. (ROA Vol. II at 127-128). Ironically, the notion that the discipline must be consistent for what  
20 occurred in the past for the same offense is directly contrary to the provisions of A.R. 339 which states  
21 "There is no requirement that charges similar in nature must result in identical penalties" and  
22 Appointing Authorities and reviewers "should neither rely solely on previously imposed penalties nor  
23 quote them as authority in penalty rationales". (ROA Vol. I at 341-342).

24 \_\_\_\_\_  
<sup>4</sup> NDOC's Opening Brief erroneously cites to the standard of *Southwest Gas Corp. v. Fargas*, 411 Nev. 1061, 901 P.2d 693  
(1995) for the definition of just cause. That definition is only for private sector employees governed by a handbook creating  
an implied contract of continued employment, not public employees with a constitutionally protected property interest in  
their employment. The holding in *Fargas* was premised upon the fact that in including such language in an employee  
handbook, an employer was not contracting away his right to have a third-party determine whether just cause existed. Such  
a rationale has no application where, as here, the Legislature under NRS 284.390(6) has statutorily taken the determination  
away from the appointing authorities and given it to Department of Administration Hearing Officers.

1 After reviewing all the evidence, including the findings of OIG that Minimum Staffing levels  
2 were maintained, the Hearing Officer concluded that there was no egregious security breach requiring  
3 deference:

4 Based upon the foregoing, this Hearing Officer finds that Mr. Ludwick engaged in  
5 inexcusable neglect by leaving his post without the prior permission of a supervisor. The  
6 question now is whether it was reasonable to terminate Mr. Ludwick for violating NRS  
7 284.650(7). For the following reasons, this Hearing Officer finds that termination was  
8 too harsh a penalty. Mr. Ludwick had no prior discipline. The minimum permitted  
9 staffing on the day in question was two officers. Had there been a serious security risk  
10 by having less than three scheduled officers, presumably, Lieutenant Piccinini would  
11 have assign someone else to the post after Mr. Ludwick was allowed to leave the  
12 institution on FMLA leave.

13 (ROA Vol. I at 95).

14 Whether there was an egregious security breach was a contested issue of fact at the hearing.  
15 NRS 233B.135(3) states "The court shall not substitute its judgment for that of the agency as to the  
16 weight of evidence on a question of fact." Where, as here, the Hearing Officer finds that there was no  
17 security breach, this court may not disturb that finding.<sup>5</sup>

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24 <sup>5</sup> Actually the only decision of the Hearing Officer that was arbitrary and capricious was her finding that it was permissible  
to discipline him at all for exercising his rights under the FMLA. The Hearing Officer relied upon the FMLA regulations  
that 29 CFR §825.303(c) that if employee "must comply with the employer's usual and customary notice and procedural  
requirements for requesting leave, absent unusual circumstances." (ROA Vol. I at 94). However, the undisputed evidence  
established that there was no "usual and customary notice and procedural requirements". As detailed in the report of the  
OIG, the notion that one must get permission to leave one's post was only promulgated and distributed by an e-mail a few  
days prior to April 4, 2015, but Ludwick had not received that e-mail as of the date of the incident. (ROA Vol. I at 149,  
Volume II at 56). The evidence was undisputed that Ludwick first tried calling Shift Command, but nobody answered.  
Because Ludwick had already resolved to leave NDOC following his reinstatement, he elected not to file, or waste the  
money pursuing, a cross-petition in connection with the recommended suspension.

1 CONCLUSION

2 For all of the reasons set forth above, the Petition for Judicial Review must be DENIED.

3 DATED this 30<sup>th</sup> day of March, 2017.

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5   
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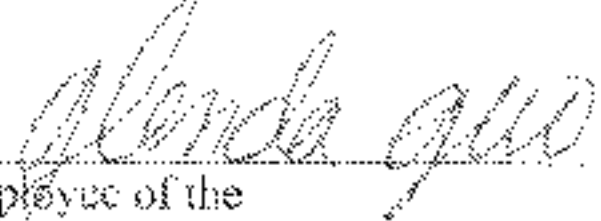
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1                                    CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

2            I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 30<sup>th</sup>  
3 day of March, 2017, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically transmitted  
4 a true and correct copy of the above and foregoing RESPONDENT BRIAN LUDWICK'S  
5 ANSWERING BRIEF by way of Notice of Electronic Filing provided by the court mandated E-file &  
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11                                      
12                                    An employee of the  
13                                    LAW OFFICE OF DANIEL MARKS

# ADDENDUM

# ADDENDUM

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHARI KASSEBAUM, AN  
INDIVIDUAL,  
Appellant,

vs.

THE STATE OF NEVADA  
DEPARTMENT OF CORRECTIONS;  
AND STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION,  
DIVISION OF HUMAN RESOURCE  
MANAGEMENT, EMPLOYEE  
MANAGEMENT COMMITTEE, AN  
AGENCY OF THE STATE OF NEVADA,  
Respondents.

No. 69468

FILED

FEB 28 2017

SHARI KASSEBAUM  
CLERK OF DISTRICT COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

This is an appeal from a district court order granting a petition for judicial review of an administrative adjustment of employee discipline. First Judicial District Court, Carson City; James E. Wilson, Judge.

Appellant, Sheri Kassebaum, is a classified employee of the State of Nevada Department of Corrections (NDOC), Respondent. Following an altercation at work, NDOC charged Kassebaum with "discourtesy," a "class two" offense. NDOC disciplined Kassebaum with a written reprimand, which was the "minimum" level of discipline for a class two offense. Kassebaum sought review of the discipline before the Employee Management Committee (EMC). Following a hearing, the EMC issued a decision agreeing that there was "discourteous treatment," but changing the level and type of discipline to a "class one" and changing the written reprimand to "verbal counseling." NDOC filed a petition for

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17-900397 JA0698

judicial review. The district court granted the petition, holding it could review the EMC's decision, the EMC exceeded its authority, and reinstating the written reprimand.<sup>1</sup>

On appeal, Kassebaum argues the EMC's decisions are not judicially reviewable and that the district court erred in holding the Employee Management Committee improperly lowered the class of offense from a written reprimand to an oral one.<sup>2</sup> We agree with the district court that EMC decisions are reviewable, but disagree that the EMC lacked authority or acted arbitrarily or capriciously in its decision.

*A petition for judicial review is proper*

Because Kassebaum's issues on appeal concern interpretation of statutes as a matter of law, this court will review de novo. *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006) (holding that statutory interpretation is a question of law which this court reviews de novo.)

NRS 233B.032 defines a contested case as a "proceeding . . . in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

<sup>2</sup>We also address Kassebaum's argument that the Nevada Department of Administration (NDA) "confessed to error" by failing to file an answering brief, but disagree. See *Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 359 (2010) ("NRAP 31(d) is a discretionary rule"). A review of the record and motions on appeal reveal that the NDA agreed with Kassebaum both at the district court and on appeal, and thus we are unsure what kind of error Kassebaum is alleging NDA confessed committing. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, n. 38, 130 P.3d 1280, 1288, n.38 (2006) (holding this court need not consider claims that are not cogently argued.).

which an administrative penalty may be imposed.” Here, the EMC is an agency that provides a hearing for both the employer and employee, and the proceeding was both for the purpose of determining whether an administrative penalty would be imposed on Kassebaum and also whether NDOC had the right, privilege, or duty to discipline Kassebaum the way that it did.

Further, the Nevada Supreme Court has reviewed petitions for judicial review from an EMC decisions before, necessarily indicating that it found a petition for judicial review from an EMC decision was proper. *See Westergard v. Barnes*, 105 Nev. 830, 831, 784 P.2d 944, 945 (1989) (reviewing a petition for judicial review from an EMC decision and determining the EMC did not adequately address the issues before it). Kassebaum attempts to distinguish her case from *Westergard* because that case involved an employee’s property interest in a promotion, whereas no property interest is implicated by her written reprimand. However, she ignores that it is not just her legal rights, duties, or privileges at stake that matters, but any party’s legal rights, duties, or privileges—including NDOC.

Thus, Kassebaum’s efforts to distinguish *Westergard* fail and the district court did not err by holding that the EMC’s decision presented a “contested case” under the meaning of NRS 233B.032. This court therefore affirms the district court’s holding that judicial review was proper.<sup>3</sup>

---

<sup>3</sup>We have also considered Kassebaum’s argument that NRS 284.384’s lack of explicit mention to judicial review means EMC decisions are unreviewable, but reject it. NRS 233B governs the adjudication procedures of the EMC, and NRS 233B defines what a contested case

*continued on next page...*

*The district court erred in holding that the Employee Management Committee improperly lowered the class of offense*

We now turn to whether the district court erred by holding that the EMC lacked authority to lower the type and form of Kassebaum's discipline. The district court held that the EMC's reversal of the written reprimand was inconsistent with its finding that Kassebaum committed a "Discourtesy, a class-2 offense." The district court held that, because "Nevada law preserves a great deal of authority to agency heads to manage their affairs including reserving the exclusive power to discipline employees for their own agencies," the EMC had no power to adjust the form of discipline, but did not cite any authority to support this conclusion.

The statute governing the EMC's power, NRS 284.073 gives the EMC the ability to "*make final decisions for the adjustment of grievances as provided by the regulations of the Commission.*" (emphasis added). Based on the plain language of this statute, the EMC has the ability to alter the type and form of employee discipline.<sup>4</sup>

We next consider whether the EMC properly exercised this ability. This court's standard of review for an administrative decision is

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*...continued*

suitable for review is. See NRS 233B.020 ("the Legislature intends to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies of the Executive Department of the State Government and for judicial review of both functions").

<sup>4</sup>This court has considered respondent's argument that *Taylor v. Department of Health and Human Services*, 129 Nev. 928, 314 P.3d 949 (2013) is controlling but rejects it because the statutes governing hearing officers and the EMC are markedly different. NDOC's remaining argument that the EMC must mechanically apply its regulations without any room for discretion is unpersuasive, as the EMC is tasked with the final authority to "adjust grievances." NRS 284.073.

identical to the district court. *Williams v. United Parcel Servs.*, 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013). A reviewing court shall not substitute its judgment for that of an agency in regard to a question of fact, but can reverse if it determines that the agency's decision was arbitrary or capricious. NRS 233B.135(3). An agency acts arbitrarily or capriciously when it takes actions without adequate reason. *City Council of City of Reno v. Irvine*, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986).

Here, the EMC provided adequate reason for adjusting the form of discipline for Kassebaum, such as Kassebaum's acknowledgement of fault, the lack of specificity and/or helpfulness of the written reprimand, and that while the conduct was discourteous, it did not rise to the level of a class 2 offense, requiring a written reprimand. Further, the administrative regulations in question provide for "suggested level[s] of discipline," and caution that the penalty schedules "cannot accurately, fairly, or consistently address every situation." Thus, the EMC did not act in a way inconsistent with the regulations themselves in reducing the discipline in accordance with the facts before it. Because the EMC had both the authority to adjust grievances and was consistent with its regulations, it did not act arbitrarily or capriciously, and the district court erred in reinstating the written reprimand.<sup>5</sup>

Accordingly, we

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<sup>5</sup>We have considered Kassebaum's remaining arguments that NDOC's administrative regulations were not properly approved by the Personnel Commission, but conclude they are irrelevant to the ultimate questions on appeal. Even if NDOC's regulations were not properly approved, or even if NDOC did not have any regulations at all, in this case the EMC acted within its authority to adjust grievances and did not do so arbitrarily or capriciously.

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Silver, C.J.  
Silver

Tao, J.  
Tao

Gibbons, J.  
Gibbons

cc: Hon. James E. Wilson, District Judge  
Robert L. Eisenberg, Settlement Judge  
Law Office of Daniel Marks  
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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,

11 Petitioner,

12 vs.

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

17 Respondents.

CASE NO. 15 OC 0018 1B

DEPT. NO. 2

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 Shari 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 ///

1 Conclusions of Law

2 **A. Standard of Review**

3 Courts may reverse or modify an agency's decisions that prejudice the aggrieved  
4 party because the final decision of the agency is:

- 5 (a) In violation of constitutional or statutory provisions;  
6 (b) In excess of the statutory authority of the agency;  
7 (c) Made upon unlawful procedure;  
8 (d) Affected by other error of law;  
9 (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.

10 NRS 233B.135(3).

11 Courts review a hearing officer's decision for an abuse of discretion or clear error.  
12 See *Taylor v. State Dep't of Health & Human Servs.*, 129 Nev. —, —, 314 P.3d 949, 951  
13 (2013) . The Court also reviews the evidence presented at the hearing to determine if the  
14 decision was supported by the evidence, and to ascertain whether the hearing officer acted  
15 arbitrarily, capriciously, or contrary to the law. *Turk v. Nevada State Prison*, 94 Nev. 101,  
16 103, 575 P.2d 599, 601 (1976).

17 The standard of review depends on whether the court is reviewing a hearing officer's  
18 legal conclusions or factual findings. The courts generally review a hearing officer's  
19 conclusions of law *de novo*, but will uphold the hearing officer's findings of fact if substantial  
20 evidence supports the findings. *Taylor*, 129 Nev. —, —, 314 P.3d 949, 951 (2013) ; see  
21 also NRS 233B.135(3) . Substantial evidence is that evidence "a reasonable mind might  
22 accept as adequate to support a conclusion." *State, Emp. Security v. Hilton Hotels*, 102 Nev.  
23 602, 608, 792 P.2d 497 (1986)

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

26 The EMC's decision, overturning an agency's written reprimand, is an NRS 233B.032  
27 contested case subject to judicial review. NRS 233B states that a party aggrieved by an  
28 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(6)(A) *Discourtesy*, a class-2 offense providing a written reprimand as the  
9 minimum penalty.<sup>1</sup> 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

<sup>1</sup> 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  
agencies enumerated in NRS 233B.039 as wholly or partially  
exempt from requirements of Chapter 233B.

5 The Court concludes, further, that the EMC is an "agency" within  
6 the Executive Department, and that proceedings before the EMC  
7 for the "adjustment" of grievances have all the hallmarks of a  
8 "contested case" for the purposes of Chapter 233B. By way of  
9 example only, the statutes and regulations governing the EMC  
10 require it to give written notice of a hearing, permit the parties to  
11 present testimonial and documentary evidence, authorize the  
12 issuance of subpoenas for the attendance of witnesses and the  
13 production of documents, provide for the appearance of  
witnesses, and entitle the affected employee (at least) to  
representation by counsel. See NRS 284.074, NRS 284.384(5),  
NAC 284.695(2)(a) and (b), and NAC 284.6955. The EMC's  
Decision #35-12 contains written findings of fact and conclusions  
of law. See NRS 233B.125.

14 In the absence of specific statutory language precluding judicial  
15 review, the statutory and regulatory references to the EMC's  
16 decisions being "final" and "binding" simply indicate that they  
17 resolve grievances and are binding upon the parties unless and  
18 until judicial review is sought and the decisions are modified or  
19 reversed by a reviewing court. See, e.g., *Vass v. Board of*  
20 *Trustees*, 379 S.E.2d 26, 29 (N.C. 1989) ("we conclude that the  
21 use of the term 'binding' in the statute was intended to mean only  
22 that the Board's decision would be binding upon the parties  
23 absent further review according to law"). See also *Dahlberg v.*  
24 *Pittsburgh & L.E.R. Co.*, 138 F.2d 121, 122 (3d Cir. 1943)  
25 (statutory language making decision of National Railroad  
26 Adjustment Board "final and binding upon both parties to the  
27 dispute" did not bar judicial review; "[w]e think [the statute]  
28 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).

1 The fact that NRS 284.384 and the other statutes and regulations  
2 specifically applicable to the EMC are silent on the question of  
3 judicial review is not sufficient to rebut the presumption in favor of  
4 judicial review. See, e.g., *San Juan Legal Services v. Legal*  
5 *Services Corp.*, 655 F.2d 434, 438 (1<sup>st</sup> Cir. 1981); *Peoples Gas,*  
6 *Light & Coke Co. v. U.S. Postal Serv.*, 658 F.2d 1182, 1190 & n.4  
7 (7<sup>th</sup> Cir. 1981); *Pisano v. Shillinger*, 835 P.2d 1136, 1140 (Wyo.  
8 1992).

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

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

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

28 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.

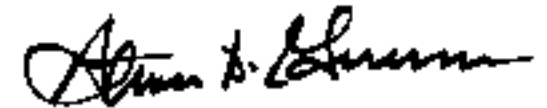
22 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that NDOC's Petition for  
23 Judicial Review is GRANTED.

24 DATED this 18 day of November, 2015.

25  
26  
27   
28 JAMES E. WILSON, JR.







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**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

**PETITIONER'S REPLY BRIEF**

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## **I. INTRODUCTION**

In his Answering Brief, Employee argues that the Hearing Officer correctly invalidated Nevada Department of Corrections' (NDOC) Administrative Regulation (AR) 339 because it is not approved by the Personnel Commission despite being a valid and lawful regulation which has been approved by the Board of Prison Commissioners (Board). Further, Employee attempts to minimize the scope of his misconduct and ignore the substantial evidence in the record demonstrating that the Hearing Officer should have, but did not, apply *Dredge* deference. Employee further argues that Hearing Officers should be afforded significantly expanded authority to allow the hearing officer to substitute his or her judgment for that of an appointing authority. This proposition is unsupported in law and would foolishly remove NDOC appointing authority expertise from the discipline process; therefore, Employee's position lacks merit.

## **II. DISPUTED FACTS AND FACTUAL CORRECTIONS**

In his Answering Brief, Employee emphasizes the fact that he applied for and was approved leave under the Family Medical Leave Act (FMLA). However, Employee's approved FMLA leave while raised on appeal was not determinative in the Decision and is not subject to this Petition for Judicial Review. In fact, the Hearing Officer disagreed with Employee's assertions that due to his FMLA approved leave he had implied permission to leave his post. ROA, Vol. II p. 94. The Hearing Officer specifically found that "[t]here is nothing in the FMLA that excuses a person who has pre-approved intermittent FMLA from complying with an employer's notice requirements for leave in non-emergency situations." ROA, Vol. II, pp. 94-95. The Hearing Officer further found that Employee knew or should have known that he had a duty to obtain permission from a supervisor prior to leaving his post and found that credible testimony supported a finding that Employee left his post in Unit 1 on April 1, 2015 without obtaining prior authorization from a supervisor. ROA, Vol. I, p. 93. Further, the Hearing Officer found that Employee engaged in inexcusable neglect of duty by leaving his post without prior permission of a supervisor and that he violated a "very important safety and security policy." ROA, Vol. I, p. 95. Employee has not challenged or sought judicial review of these findings. In fact, Employee admits in his Answering Brief that Unit 1 "is the most challenging unit, and the most intense and stressful environment because it houses inmates coming out of solitary confinement. There

1 are more inmate fights, more inmate violence, and more challenging of authority than any other unit.”  
2 *See* Answering Brief, pp. 1-2, ll. 23-2.

3 Employee dedicated about one page of his facts to NDOC’s adjudication report in which  
4 Warden Jo Gentry initially recommended a (5) day suspension without pay. Warden Gentry is not the  
5 Appointing Authority, and the adjudication report is neither a required step of the investigative process  
6 under Chapter 284 of the NRS and the NAC nor a final binding determination of the discipline imposed  
7 on the employee. *See generally* NRS Chapter 284, NAC Chapter 284; *See also* ROA, Vol. II, p. 129,  
8 ROA Vol. I, pp 360-363. The **final decision** is made by the Director of NDOC. ROA, Vol. II., p. 111,  
9 132. It is clear from Warden Gentry’s testimony that in making a determination of the appropriate  
10 discipline for Employee, Acting Director E.K. McDaniel amongst other things, considered and relied  
11 on AR 339, which prescribed termination for the misconduct. ROA, Vol. II, pp 127-128.

### 12 **III. ARGUMENT**

#### 13 **A. AR 339 is a Valid Regulation and the Hearing Officer Erred when She Did Not Rely On** 14 **AR 339 in Determining Whether NDOC Properly Terminated Employee.**

15 In his Answering Brief, Employee claims that NDOC misrepresented the Hearing Officer’s  
16 Decision when NDOC stated that the Hearing Officer failed to *consider* AR 339. *See* Answering Brief  
17 at 6. However, there is no misrepresentation because the Hearing Officer did not consider or rely on AR  
18 339. The Hearing Officer only admitted AR 339 for the limited purpose of showing the kind of conduct  
19 NDOC deemed to be misconduct but not for the purpose of proving the penalty associated with the  
20 proscribed conduct. ROA, Vol. II, P. 6. In denying NDOC’s Motion for Reconsideration, the Hearing  
21 Officer clarified and stated “what this Hearing Officer intended to convey was that it was not necessary  
22 to set forth in the Decision the analysis of the issue as to whether AR 339 had to be approved by the  
23 Personnel Commission because a determination as to whether there was just cause to terminate Mr.  
24 Ludwick could be made on the basis of applicable Nevada Administrative Code provisions and *without*  
25 *reliance upon AR 339.*” ROA, Vol. I, p. 6. (Emphasis added). The Hearing Officer further stated that  
26 “Because the prohibitions and penalties set forth in AR 399 [sic] which Mr. Ludwick was charged with  
27 violating have not been approved by the Personnel Commission, they *cannot be relied upon as a basis*  
28 *for terminating his employment.*” ROA Vol., p. 8 (emphasis added). Thus, while the AR was

admitted with a limited purpose, the Hearing Officer **did not** rely on AR 339, despite the fact that NDOC relied on AR 339 in determining that termination was the appropriate discipline for Employee.

**1. AR 339 does not require approval by the Personnel Commission.**

Employee argues that NDOC's AR 339 does not comply with NAC 284.742 because it has not been approved by the Personnel Commission. *See* Answering Brief pp. 7-8. However, AR 339 does not require approval from the Personnel Commission.

NRS 209.131 provides that the Director of NDOC shall "[a]dminister the Department under the direction of the Board[,] . . . [s]upervise the administration of all institutions and facilities of the Department [and] . . . *establisth regulations with the approval of the Board* and enforce all laws governing the administration of the Department and the custody, care and training of offenders."

NRS 209.131(1) and (6) (emphasis added). "NRS chapter 209 plainly gives the NDOC Director and the Board of State Prison Commissioners the authority to create and implement regulations with respect to the management of the prisons and the prisoners," *Corzine v. State ex rel Dep't of Prisons*, No. 68086, 2015 WL 5517030 (Nev. Ct. App. Sept. 15, 2015) (unpublished):

These statutes and others make it clear that the Board of Prison Commissioners is primarily responsible for the administration of the prison, and the promulgation of rules and regulations governing the prisoners, *employees* and other persons....The Nevada Constitution and statutes place responsibility for supervision of the prison in a board of prison commissioners. The evident intent is that this lay board, removed from the difficult problems of *prison administration*, should review and pass upon the basic rules and regulations in the light of their own experiences, knowledge of public affairs, social conscience and legal expertise.

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

The Board pursuant to the authority vested in it by the Nevada Constitution and State statute approved AR 339. *See e.g.*, Nev. Const. art. 5, § 21. AR 339 is a valid and lawful administrative

1 regulation that has the force and effect of law. *See United States v. Short*, 240 F.2d 292, 298 (9th Cir.  
2 1956) (“An administrative regulation promulgated within the authority granted by statute has the force  
3 of law and will be given full effect by the courts.”).

4 As stated in NDOC’s Opening Brief, AR 339 has been presented to the Board for approval  
5 several times. The version of AR 339 that was approved and in effect prior to January 2016 was  
6 approved by the Board on May 17, 2012. The most recent version of AR 339 was approved by the  
7 Board on January 14, 2016. At the January 14, 2016 meeting, it was specifically explained to the Board  
8 that:

9 . . . [T]he revisions to this AR actually began in 2011 due to a statutory  
10 change regarding all classified state employees prohibitions and penalties  
11 along with the process for discipline. She also discussed progressive  
12 discipline *in relationship with Chapter 284 – State Personnel System  
where discipline is included. This AR was compared line by line with  
both Chapter 284 and chapter 289 – Peace Officers, to make sure the  
NDOC is compliant with the NRS’s. . .*

13 *Minutes of the Meeting of the Board of Prison Commissioners*, January 14, 2016,  
14 [http://doc.nv.gov/Home/Prison\\_Commissioners/Board\\_of\\_State\\_Prison\\_Commissioners/](http://doc.nv.gov/Home/Prison_Commissioners/Board_of_State_Prison_Commissioners/) (emphasis  
added).

15 NDOC cited to these minutes in its Opening Brief and Employee did not attempt to refute the  
16 fact that NDOC and the Board carefully considered the provisions of AR 339 and its consistency with  
17 the system of discipline in Chapter 284 of the NRS and the NAC. Employee’s silence on this matter is a  
18 tacit admission that AR 339 is not only a lawful administrative regulation but it is also consistent with  
19 Chapter 284 of the NRS and the NAC.

20 Furthermore, Chapter 284 of NRS and NAC do not require agencies to start with the lowest  
21 form of discipline. Rather Chapter 284 of the NRS and the NAC identifies a system of progressive  
22 discipline where serious violations warrant a more severe punishment. In fact, NAC 284.64 (1), allows  
23 an appointing authority to dismiss for any cause set forth in NAC 284.650 if the seriousness of the  
24 offense or condition warrants such dismissal. Additionally, NAC 284.646 (2) allows an appointing  
25 authority to immediately dismiss an employee for certain causes enumerated therein. Thus, Employee’s  
26 argument that NDOC failed to apply a system of progressive discipline is unsupported and misplaced.

27 Moreover, *State ex rel. Fox v. Hubbart* is distinguishable from the instant case. In *Hubbart*, the  
28 Court held that Article 5 § 21 of the Nevada Constitution only gives the Board supervision of such

1 matters as may be provided by law and turns to the statutes for a definition of those powers. *State ex*  
2 *rel. Fox v. Hubbard*, 13 Nev. 419, 420 (1878). In *Hubbard*, the Court held that the power to appoint a  
3 physician or “all necessary help” was transferred from the Board to the Warden based on new statutes  
4 enacted by the legislature.

5 Here, NRS 209.111 clearly defines that that Board shall [p]rescribe regulations for carrying on  
6 the business of the Board and the Department.” Furthermore, NRS 209.131 provides that the Director  
7 of NDOC shall “[a]dminister the Department under the direction of the Board[,] . . . [s]upervise the  
8 administration of all institutions and facilities of the Department [and] . . . ***[e]stablish regulations with***  
9 ***the approval of the Board*** and enforce all laws governing the administration of the Department and the  
10 custody, care and training of offenders.” NRS 209.131(1) and (6) (emphasis added). Therefore, the  
11 matter at issue in this case is not whether the Warden or the Board has the power to appoint an officer  
12 such as Employee, but rather whether NDOC, particularly the Director, has the power to establish  
13 regulations with the approval of the Board. Based on the language of NRS 209.111 the power to  
14 establish regulations for NDOC is clearly within the existing law.

15 Employee also incorrectly argues that any authority given to the Board under Article 5 § 21 of  
16 the Nevada Constitution is superseded by Article 15 §15 of the Constitution because Article 15 §15 was  
17 ratified in 1970 making it the more recent of the constitutional articles. However, “the Nevada  
18 Constitution should be read as a whole, so as to give effect to and harmonize each provision.”  
19 *Nevadans for Nevada v. Beers*, 122 Nev. 930, 944, 142 P.3d 339, 348 (2006). Thus, one Article does  
20 not supersede or negate another Article. Furthermore, the *Corzine* Court, which was decided in 2015,  
21 held that NRS Chapter 209 plainly gives authority to the Board and NDOC Director to create and  
22 implement ***regulations for the prison*** and prisoners and that ***deference should be given to the***  
23 ***professional judgment of prison administrator*** for defining the goals of the prison system. See  
24 *Corzine*, No. 68086, 2015 WL 5517030 at \*2 (unpublished)(emphasis added).

25 Therefore, the Hearing Officer clearly erred when she determined that AR 339 needed approval  
26 from the Personnel Commission to be valid and did not give AR 339 full consideration in her decision  
27 to overturn Employee’s termination. This Court should grant NDOC’s Petition for Judicial Review and  
28 remand so the Hearing Officer can rely on AR 339 as a valid and lawful regulation in making a



determination just as NDOC relied on AR 339 in terminating Employee.

**2. Kassebaum did not rule on AR 339.**

Employee relies on the Nevada Court of Appeals recent unpublished decision in *Kassebaum v. State Dep't of Corr.* No. 69468, 2017 WL 881950, at 3 (Nev. App. Feb. 28, 2017). However, *Kassebaum* did not address AR 339 in the context of whether it needs to be approved by the Personnel Commission. In fact, the Nevada Court of Appeals specifically noted that it declined to rule on this issue in Footnote 5:

We have considered Kassebaum's remaining arguments that NDOC's administrative regulations were not properly approved by the Personnel Commission, **but conclude they are irrelevant to the ultimate questions on appeal.** Even if NDOC's regulations were not properly approved, or even if NDOC did not have any regulations at all, in this case the EMC acted within its authority to adjust grievances and did not do so arbitrarily or capriciously.

*Id.*

Further, *Kassebaum* is distinguishable because *Kassebaum* was not before a Hearing Officer but rather before the Employee-Management Committee. The Employee-Management Committee is an entirely different body governed by an entirely different set of rules that do not involve the necessity of a finding of just cause. *See* NRS 284.073.

**B. Employee's Argument that AR 339 Does Not Mandate Termination is Misleading and Irrelevant As To How NDOC Determined Termination Was the Appropriate Discipline.**

Employee argues that AR 339.04 sections (5) and (6) allow NDOC appointing authorities to deviate from the prescribed penalties listed in AR 339.05 and AR 339.04 section 8, Chart of Corrective/Disciplinary Sanctions. *See* Answering Brief at 6. Specifically, in this case, Employee asserts that a Class 5 Offense would not mandate termination pursuant to AR 339. However, Employee is misconstruing AR 339, particularly the provisions allowing NDOC to use their discretion and conduct an individual analysis of the incident.

First, AR 339.05 identifies approximately 172 different offenses for prohibited employee conduct. ROA, Vol. I, pp. 163-176. Each offense is then identified as a Class 1, Class 2, Class 3, Class 4 or Class 5 offense, with the exception of a few offenses which are given a range such as "Class 1-5." *Id.* Once NDOC determines the offense(s) an employee's conduct violated, NDOC would look at the Chart of Corrective/Disciplinary Sanctions (Chart), which prescribes the recommended penalties for the

offense. ROA, Vol. p. 163. The Chart is displayed in AR 339.04 section (8) as follows:

	First Offense		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				

It is clear in looking at the Chart that a first offense of a Class 1-4 violation prescribes penalties with a range. For example, the Chart recommends that an employee who has engaged in conduct which is considered a Class 4 Offense, should receive a minimum penalty of suspension or demotion and a maximum penalty of dismissal. A suspension can range from 1-30 days. ROA, Vol. I, p. 162. Therefore, an employee engaging in a Class 4 Offense can face a range of penalties and the appointing authority would use discretion and an individual analysis to determine the appropriate penalty.

The 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. ROA, Vol. I, p. 162. AR 339.04 (2) states "Penalties for prohibited activities should be *assessed based upon criteria established in the Chart of Corrective/Disciplinary Sanctions*." ROA, Vol. I, p. 162.

AR 339.04 Section (5) states:

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 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.

ROA, Vol. I, p. 162-163.

Here, Employee violated AR 339.05.15 UU, Leaving an assigned post while on duty without

1 authorization of a supervisor which is a Class 5 Offense. In looking at the Chart, NDOC has determined  
2 that the prescribed penalty for a first offense would be dismissal from State Service. A Class 5 Offense  
3 does not give a range of penalties as a Class 4 offense. NDOC has deemed that leaving an assigned post  
4 while on duty without authorization of a supervisor to be a serious offense warranting classification as a  
5 Class 5 Offense. The penalty does not have a range associated with it but rather provides that a first  
6 time offense should result in a dismissal from state service.

7 Further, as provided in AR 339.04 section (5), the appointing authority conducted an individual  
8 analysis of Employee's incident and exercised their professional judgment and discretion. The matter  
9 was assigned for investigation to the Office of the Inspector General and assigned to Investigator  
10 Arthur Emling. ROA, Vol. I, pp. 310-359; ROA, Vol. II, pp. 88-89. The investigation led to a sustained  
11 allegation of misconduct for neglect of duty for Employee leaving his assigned post without  
12 authorization from a supervisor. ROA, Vol. I, pp. 360-363. Following the investigation, Warden Gentry  
13 prepared an Employee Misconduct Adjudication Report and referred the matter for a Specificity of  
14 Charges. ROA, Vol. I, p. 360-363. The Specificity of Charges was prepared and Warden Gentry  
15 recommended termination. ROA, Vol. I, pp. 304-359. Prior to the Specificity of Charges being served  
16 on the Employee, it was reviewed, analyzed and discussed by Warden Gentry, NDOC Human  
17 Resources, the Attorney General's Office, and the Director of NDOC. ROA, Vol. I, pp. 125-128.  
18 Warden Gentry recommended termination and Acting Director E.K. McDaniel made the final decision  
19 to terminate Employee. ROA, Vol. II, p. 111.

20 Second, not only does AR 339 classify leaving an assigned post while on duty without  
21 authorization of a supervisor as a serious Class 5 terminable offense, but the substantial evidence in the  
22 record supports that NDOC views leaving an assigned post as a serious offense. Piccinini testified that  
23 when an officer leaves his post without authorization, it is a serious and grave infraction. ROA, Vol. II,  
24 p. 74. Officers are assigned to various posts to meet the institution's needs of safety and security.  
25 ROA, Vol. II, p. 74-75. The chain of command is to know at all times where officers are assigned for  
26 these safety reasons. ROA, Vol. II, 75. If an officer leaves their assigned post without authorization  
27 from their supervisor or chain of command, then they have left the unit vulnerable, particularly if an  
28 incident occurs and the officer is not there to ensure the safety of inmates and other staff in the unit.

1 ROA, Vol. II, p. 75. Warden Gentry testified that leaving post without authorization is a serious  
2 infraction **because it significantly reduces incident or emergency response time and jeopardizes**  
3 **inmate and officer safety.** ROA, Vol. II, p. 107.

4 This is the exact type of conduct which is classified as a Class 5 Offense and would warrant  
5 termination. Therefore, while AR 339 may allow appointing authorities to exercise discretion, it is clear  
6 that AR 339 deems a Class 5 offense a serious offense which calls for termination. Furthermore, the  
7 substantial evidence in the record supports that NDOC conducted an individualized analysis of the  
8 incident, exercised their professional judgment and discretion and determined it was a serious infraction  
9 warranting termination.

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

12 Employee incorrectly argues that the Hearing Officers do not defer to the appointing  
13 authorities. *See* Answering Brief at 13. “[W]hile hearing officers may determine the reasonableness of  
14 disciplinary actions and recommend appropriate levels of discipline, only appointing authorities have  
15 the *power to prescribe the actual discipline* imposed on permanent classified state employees.” *Taylor*  
16 *v. Dep’t of Health and Human Servs.*, 129 Nev. \_\_\_, \_\_\_, 314 P.3d 949, 951 (2013)(emphasis added). It  
17 is not the role of a hearing officer to step into the shoes of employer and substitute his judgment for that  
18 of the employer in disciplinary matters relating to the operation of the department. *Hagblom v. Pers.*  
19 *Advisory Comm’n of State of Nev.*, 97 Nev. 35, 38, 623 P.2d 977, 978 (1981).

20 Here, the Hearing Officer determined that Employee engaged in an inexcusable neglect of duty  
21 and violated NAC 284.650(7) when he left his assigned post without authorization of a supervisor and  
22 that he violated a “very important safety and security policy.” ROA, Vol. I, p. 93, 95. Despite this  
23 determination, the Hearing Officer concluded that the circumstances warranted a suspension—not  
24 giving any weight to NDOC testimony regarding the severity of the offense or the penalty prescribed  
25 by in AR 339 for the offense. Based upon the evidence in the record, NDOC had just cause to terminate  
26 Employee, yet the Hearing Officer improperly stepped into the Employer’s shoes and substituted her  
27 judgment for that of the Employer. Therefore, the Hearing Officer’s Decision must be reversed.

28 ///

1 **D. Substantial Evidence in the Record Demonstrates that Employee committed a Serious**  
2 **Security Violation Requiring the Hearing Officer to Apply *Dredge* deference.**

3 Contrary to Employee's assertions, the holding in *Dredge* has not been overruled. As set forth in  
4 NDOC's Opening Brief, the substantial evidence in the record demonstrates that the Hearing Officer  
5 should have, but did not apply the *Dredge* deference.

6 In *Dredge*, the Court held that the "critical need to maintain a high level of security within the  
7 prison system *entitles the appointing authority's decision to deference by the hearing officer*  
8 *whenever security concerns are implicated.*" *Dredge v. State, ex. rel., Dep't of Prisons*, 105 Nev. 39,  
9 42, 769 P.2d 56, 58 (emphasis added). See NAC 284.650(3).

10 In *Knapp v. State ex rel. Dept. of Prisons*, the Court did not overrule *Dredge* but rather  
11 distinguished that Knapp's termination did not implicate security concerns. Specifically the Court held:

12 A decision by DOP to dismiss an employee is entitled to deference by the  
13 hearing officer "*whenever security concerns are implicated in an*  
14 *employee's termination.*" *Dredge*, 105 Nev. At 42, 769 P.2d at 58. In this  
15 case, *Knapp was not charged with security violations, and no security*  
16 *concerns were raised at the hearing.* Thus, the district court erred in  
17 assuming that the hearing officer was required to defer to DOP's  
18 decision.

19 *Knapp v. State ex rel. Dep't of Prisons*, 111 Nev. 424, 892 P.2d at 578 (emphasis added).

20 *Department of Prisons v. Jackson*, which affirmed rather than superseded *Dredge*, also  
21 establishes that NDOC's termination decision is entitled to deference. *State of Nev., ex rel. Dep't of*  
22 *Prisons v. Jackson*, 111 Nev. 770, 773, 895 P.2d 1296, 1297 (1995). The Nevada Supreme Court  
23 upheld the appointing authority's decision to terminate because *Dredge* "requires deference to the  
24 appointing authority in cases of breaches of security" and in light of the administrative regulation at  
25 issue, the case "clearly f[ell] within the ambit of a security breach." *Id.* at 733. The Court then  
26 explained that *Dredge* deference applies in instances of "*a clear and serious security threat.*" *Id.*  
27 (emphasis added). In analyzing this standard, the Court upheld employee's termination because there  
28 was "a written administrative regulation addressing authorized accessibility to the control center" and  
the regulation "addressed the need and reasons for the stricter security." *Id.*

Here, Ludwick was charged with security violations and security concerns were raised at the  
hearing. Specifically in the SOC, Ludwick was charged with violating NAC 284.650(3), the employee

1 of any institution administering a security program in the considered judgment of the appointing  
2 authority, *violates or endangers the security of the institution*. Additionally, Ludwick was charged  
3 with violating NDOC AR 339.05.15 (UL) Leaving an assigned post while on duty without  
4 authorization of a supervisor. At the hearing both Piccinini and Warden Gentry testified that leaving an  
5 assigned post while on duty is considered a serious infraction and a security violation jeopardizing the  
6 Employee himself, NDOC staff, the inmates and the public.

7 Interestingly enough, while Employee spends significant time quoting *Dredge*, *Knapp* and  
8 *Jackson*, Employee does not make any arguments which would demonstrate that *Dredge* deference is  
9 inappropriate. In fact, Employee admits in his Answering Brief that Unit 1 “is the most challenging  
10 unit, and the most intense and stressful environment because it houses inmates coming out of solitary  
11 confinement. There are more inmate fights, more inmate violence, and more challenging of authority  
12 than any other unit.” See Answering Brief, pp. 1-2, ll. 23-2. Despite evidence indicating Employee  
13 committed an offense that constitutes a clear and serious security threat, the Hearing Officer did not  
14 give NDOC’s appointing authority deference and instead reversed the termination—even after the  
15 Hearing Officer made the determination that Employee violated a “*very important safety and security*  
16 *policy*.” ROA, Vol. I, p. 95 (emphasis added).

17 The Supreme Court has long held “[t]he administration of a prison is at best an extraordinarily  
18 difficult undertaking” and the safety of an institution’s inmates and employees is perhaps the most  
19 fundamental responsibility of the prison administration. *Hudson v. Palmer*, 468 U.S. 517, 526-527  
20 (1984); *Hewitt v. Helms*, 459 U.S. 460, 473 (1983). Based upon the unique difficulty of correctional  
21 work, prison administrators “should be accorded wide-ranging deference in the adoption and execution  
22 of policies and practices that in their judgment are needed to preserve internal order and discipline and  
23 maintain institutional security.” *Hudson*, 468 U.S. at 526-27. Further, judicial deference should be  
24 accorded not merely because prison administrations have a better grasp of correctional considerations  
25 and risks, but also because correctional operations are specifically the authority of the Legislative and  
26 Executive Branches of our Government, not the Judicial. *Bell v. Wolfish*, 441 U.S. 520, 547-549  
27 (1979); see Nev. Const. art. 5, § 21.

28 NDOC cited the foregoing binding authority in its opening brief and Employee did not attempt

1 to refute or distinguish the authority. Employee's silence on this matter is a tacit admission that  
2 NDOC's Appointing Authority, and not the Hearing Officer, is vested with the authority to determine  
3 whether a serious security violation occurred and the appropriate level of discipline for the serious  
4 security violation.

5 **E. The Hearing Officer Clearly Erred When She Applied the Wrong Burden of Proof<sup>1</sup> And**  
6 **Acted Arbitrarily and Capriciously in Reversing the Termination in View of the Reliable**  
7 **Probative and Substantial Evidence.**

8 In her Decision, the Hearing Officer held that the standard of proof in administrative hearings  
9 was preponderance of the evidence or "more probable than not." ROA, Vol. 1, pp. 92-93. The Hearing  
10 Officer relied on *Nassiri and Johnson v. Chiropractic Physicians' Board of Nevada*, 130 Nev. Adv. Op.  
11 27 (April 3, 2014), which held that preponderance of the evidence is the standard of proof for an  
12 agency to take disciplinary action against an employee. ROA, Vol. I, pp. 92-93.

13 On January 30, 2017, after NDOC filed its Opening Brief, the Nevada Court of Appeals,  
14 decided *Nevada Dep't of Motor Vehicles v. Adams* and held that the correct standard of review in  
15 administrative hearings is the substantial-evidence standard. *Nevada Dep't of Motor Vehicles v. Adams*,  
16 68057, 2017 WL 521774, at \*2 (Nev. App. Jan. 30, 2017) (unpublished). The Court of Appeals found  
17 that the hearing officer applied the preponderance of the evidence standard and should have ruled on  
18 whether *substantial evidence* supported the agency's decision to discipline. *Id.* (emphasis added). Since  
19 the preponderance of the evidence standard is higher than the substantial evidence standard, the Court  
20 of Appeals reversed and remanded the case to the hearing officer to determine under the correct  
21 standard of proof. *Id.*

22 Critically, the Court of Appeals noted that *Nassiri* created confusion on the standard of proof:

23 Substantial evidence is "evidence that a reasonable mind could accept as  
24 adequately supporting the agency's conclusions." *Nassiri v. Chiropractic*  
25 *Physicians' Bd.*, 130 Nev. —, —, 327 P.3d 487, 489 (2014). We recognize  
26 that *Nassiri* may have caused confusion because it noted the standard of  
27 proof was by a preponderance of the evidence, but that was in relation to the  
agency's determination for its licensing proceedings; "*substantial evidence*"  
*is the proper standard of review to be used during the hearing officer's*  
*review.* See *Morgan*, 2016 WL 2944701, at \*1.

28 <sup>1</sup> Petitioner did not raise this argument in its Opening Brief because the decision in *State of Nevada Department of*  
*Motor Vehicles v. Adams*, No. 68057 was filed on January 30, 2017.



1 *Id.* (Emphasis added).

2 Here, the Hearing Officer applied the preponderance of the evidence standard to determine  
3 whether there was just cause for NDOC to terminate Employee. ROA, Vol. I, pp. 92-93. This was the  
4 **wrong** standard of proof. As set forth in Petitioner's Opening Brief and in this Reply Brief, the  
5 substantial evidence in the record supports NDOC's decision to terminate Employee. In other words, a  
6 reasonable mind could accept the substantial evidence as adequately supporting NDOC's decision to  
7 terminate. Therefore, the Hearing Officer's decision was based on an error of law and the Decision  
8 should be reversed and remanded for the Hearing Officer to utilize the correct standard of review.

9 In his Answering Brief, Employee incorrectly argues that the evidence did not establish a  
10 security breach. *See* Answering Brief, pp. 15. *Jackson* held that *Dredge* deference applies in instances  
11 of "a clear and serious security threat." *Jackson*, 111 Nev. at 773.

12 As stated above, the hearing Officer erroneously relied on the preponderance of the evidence  
13 standard in making her Decision. Further, the substantial evidence in the record demonstrates that  
14 NDOC lawfully terminated Employee. The Hearing Officer confirmed in her decision that the evidence  
15 demonstrated that Employee violated NAC 284.650(7) and engaged in an inexcusable neglect of duty  
16 when he abandoned his assigned post without permission—the exact conduct that AR 339 deems  
17 terminable. The evidence included testimony from the Warden and the supervisor on duty that  
18 abandoning post puts the correctional officer, the NDOC staff, and the public in a vulnerable and  
19 precarious position. Additionally, the Warden testified there are safety and security concerns  
20 underlying this policy which make it a serious infraction. Critically, the Hearing Officer determined  
21 that Employee violated a "**very important safety and security policy**." ROA, Vol. I, p. 95 (emphasis  
22 added). Yet, rather than relying on the reliable and substantial evidence in the record and upholding  
23 NDOC's termination of Employee for committing this serious offense of abandoning post, the Hearing  
24 Officer indicated that a suspension of 30 days or less was more appropriate. ROA, Vol. I, p. 96.  
25 Accordingly, the reliable, probative, and substantial evidence on the whole record demonstrates that the  
26 Hearing Officer erred in reversing the termination and refusing to defer to NDOC on clear and serious  
27 security threat.

28 ///



1 **IV. CONCLUSION**

2 Based on the foregoing, NDOC respectfully requests entry of this Court's Order reversing said  
3 Decision in its entirety, and granting Petitioner's Petition for Judicial Review.

4 Dated: April 13, 2017.

5 ADAM PAUL LAXALT  
6 Attorney General

7 By: /s/ Michelle Di Silvestro Alanis  
8 Michelle Di Silvestro Alanis (Bar No. 10024)  
9 Deputy Attorney General  
10 Attorneys for Petitioner  
11 State of Nevada ex rel. Department of Corrections  
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read the foregoing brief and that, to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief complies with all applicable provisions of the Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires assertion in the brief regarding matters in the record to be supported by appropriate references to the record. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: April 13, 2017.

ADAM PAUL LAXALT  
Attorney General

By: /s/ Michelle Di Silvestro Alanis  
Michelle Di Silvestro Alanis (Bar No. 10024)  
Deputy Attorney General

Attorneys for Petitioner  
State of Nevada ex rel. Department of Corrections

## CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 13<sup>th</sup> day of April, 2017, I electronically filed the foregoing **PETITIONER'S REPLY BRIEF** with the Clerk of the Court by using the electronic filing system. Parties that are registered with this Court's electronic filing system will be served electronically. For those parties not registered, service was made by depositing a copy for mailing in the United States Mail, first-class postage pre-paid, at Las Vegas, Nevada to the following:

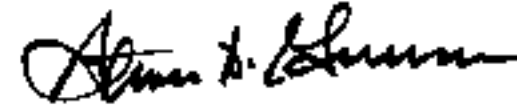
Adam Levine, Esq.  
Law Office of Daniel Marks  
610 S. Ninth Street  
Las Vegas, NV 89101

/s/ Anela Kaheaku  
Anela Kaheaku, an employee of the  
Office of the Nevada Attorney General

ORIGINAL

Electronically Filed  
05/09/2017 02:13:58 PM

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



CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Petitioner,

v.

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

Respondents.

**ORDER DENYING PETITION FOR JUDICIAL REVIEW**

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

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

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

8 DATED this 3 day of May, 2017.

9  
10 Nancy Alv  
DISTRICT COURT JUDGE  
11

12 APPROVED AS TO FORM AND CONTENT:


13 OFFICE OF THE NEVADA ATTORNEY GENERAL

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

18 Respectfully submitted by:

19 LAW OFFICE OF DANIEL MARKS

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



CLERK OF THE COURT

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

7  
8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 STATE OF NEVADA ex rel, ITS  
DEPARTMENT OF CORRECTIONS

Case No.: A-16-741032-J  
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11 Petitioner,

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14 STATE OF NEVADA ex rel; ITS  
DEPARTMENT OF ADMINISTRATION  
15 PERSONNEL COMMISSION, HEARING  
OFFICER,

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

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

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

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

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

22 ///

23 ///

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

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

4 LAW OFFICE OF DANIEL MARKS

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

10 **CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

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

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

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

ORIGINAL

Electronically Filed  
05/09/2017 02:13:58 PM

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

  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

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

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

12 Petitioner,

13 v.

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

19 Respondents.

**ORDER DENYING PETITION FOR JUDICIAL REVIEW**

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



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

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

8 DATED this 8 day of May, 2017.

9  
10 Nancy L. Alf  
DISTRICT COURT JUDGE DC

11  
12 APPROVED AS TO FORM AND CONTENT:

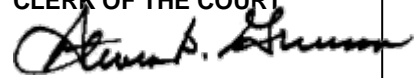
13 OFFICE OF THE NEVADA ATTORNEY GENERAL

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

18 Respectfully submitted by:

19 LAW OFFICE OF DANIEL MARKS

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



ADAM PAUL LAXALT  
Attorney General  
CAMERON P. VANDENBERG (Bar No. 4356)  
Chief Deputy Attorney General  
MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)  
Deputy Attorney General  
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555 E. Washington Ave., Ste. 3900  
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(775) 687-2132 (phone)  
(702) 486-3773 (fax)  
cvandenberg@ag.nv.gov  
[malanis@ag.nv.gov](mailto: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.* its  
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

**CASE APPEAL STATEMENT**

Pursuant to Nev. R. App. P. 3(f), the State of Nevada, Department of Corrections, Petitioner  
above named, hereby files its Case Appeal Statement:

**1. Name of appellant filing this Case Appeal Statement:**

State of Nevada, Department of Corrections

///

**JA 0737**

1       **2. Identify the judge issuing the decision, judgment, or order appealed from:**

2       Hon. Nancy L. Allf

3       **3. Identify each appellant and the name and address of counsel for each appellant:**

4       Appellant: State of Nevada, Department of Corrections.

5       Counsel for Appellant: Michelle Di Silvestri Alanis, Deputy Attorney General, Office of the  
6 Attorney General, 555 E. Washington Ave., Suite 3900, Las Vegas, Nevada 89101-1068, Tel: (702)  
7 486-3268, Fax: (702) 486-3768, and Cameron P. Vandenberg, Chief Deputy Attorney General, 5420  
8 Kietzke Lane, Suite 202, Reno, Nevada 89511, Tel: (775) 687-2132, Fax: (775) 688-1822.

9       **4. Identify each respondent and the name and address of appellate counsel, if known, for**  
10 **each respondent (if the name of a respondent's appellate counsel is unknown, indicate as**  
11 **much and provide the name and address of that respondent's trial counsel):**

11       Respondent: Brian Ludwick

12       Counsel for Respondent in the district court proceeding: Adam Levine, Esq., Law Office of  
13 Daniel Marks, 610 South Ninth Street, Las Vegas, Nevada 89101, Tel: (702) 386-0536, Fax: (702) 386-  
14 6812.

15       Counsel for Appellant is without information as to whether or not Respondent has or will retain  
16 the same counsel for the appellate proceeding.

17       **5. Indicate whether any attorney identified above in response to question 3 or 4 is not**  
18 **licensed to practice law in Nevada and, if so, whether the district court granted that**  
19 **attorney permission to appear under SCR 42 (attach a copy of any district court order**  
20 **granting such permission):**

20       N/A.

21       **6. Indicate whether appellant was represented by appointed or retained counsel in the**  
22 **district court:**

23       Appellant was represented by retained counsel in the district court.

24       **7. Indicate whether appellant is represented by appointed or retained counsel on appeal:**

25       Appellant is represented by retained counsel on appeal.

26       **8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date**  
27 **of entry of the district court order granting such leave:**

28       No.

**JA 0738**

1       **9. Indicate the date the proceedings commenced in the District Court (e.g., date complaint,**  
2       **indictment, information or petition was filed):**

3               On August 1, 2016, Petitioner State of Nevada, Department of Corrections, commenced this  
4               action by filing a Petition for Judicial Review.

5       **10. Provide a brief description of the nature of the action and result in the district court,**  
6       **including the type of judgment or order being appealed and the relief granted by the**  
7       **district court:**

8               Effective March 31, 2016, Respondent Brian Ludwick, a correctional officer assigned to the  
9       Florence McClure Women's Correctional Center, was dismissed for abandoning his post without prior  
10       authorization in violation of the Department of Corrections' Code of Ethics and Prohibitions and  
11       Penalties (Administrative Regulation or "AR" 339) and NAC 284.650(1), (3) and (7).

12              Ludwick appealed his termination to a State Administrative Hearing Officer in accordance with  
13       NRS 284.390. After conducting a hearing and considering evidence, the Hearing Officer found that  
14       Ludwick knew or should have known that he had a duty to obtain permission from a supervisor prior to  
15       leaving his post and that Ludwick did in fact leave his post on April 1, 2015 without obtaining prior  
16       authorization. The Hearing Officer further found that such conduct constitutes inexcusable neglect of  
17       duty and violated a "very important safety and security policy." Despite these determinations, on June  
18       27, 2016, the Hearing Officer improperly reversed Ludwick's termination based on her determination  
19       that AR 339 had not been approved by the Nevada Personnel Commission and therefore was not given  
20       any weight with respect to the penalty associated with the proscribed conduct. The Hearing Officer  
21       decided, without giving the Department of Corrections' decision any *Dredge* deference, that dismissal  
22       was too harsh and recommended a suspension not to exceed thirty (30) days.

23              On August 1, 2016, the Nevada Department of Corrections filed a Petition for Judicial Review  
24       of the Hearing Officer's Findings of Fact, Conclusions of Law and Decision. Following full briefing  
25       and oral argument, the district court denied the Petition for Judicial Review on May 10, 2017.

26       **11. Indicate whether the case has previously been the subject of an appeal to or original writ**  
27       **proceeding in the Supreme Court and, if so, the caption and Supreme Court docket**  
28       **number of the prior proceeding:**

              This case has not been the subject of an appeal to or original writ proceeding in the Nevada  
              Supreme Court.

////

**JA 0739**

1 **12. Indicate whether this appeal involves child custody or visitation:**

2 This appeal does not involve child custody or visitation.

3 **13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:**

4 This appeal is unlikely to involve the possibility of settlement.

5 Dated: June 8, 2017.

6 ADAM PAUL LAXALT  
7 Attorney General

8 By: /s/ Cameron P. Vandenberg  
9 CAMERON P. VANDENBERG (Bar No. 4356)  
10 Chief Deputy Attorney General  
11 MICHELLE DI SILVESTRI ALANIS (Bar No.  
12 10024)  
13 Deputy Attorney General  
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**JA 0740**

**AFFIRMATION**  
**(Pursuant to NRS 239B.030)**

The undersigned does hereby affirm that the foregoing document does not contain the social security number of any person.

Dated: June 8, 2017.

ADAM PAUL LAXALT  
Attorney General

By: /s/ Cameron P. Vandenberg  
CAMERON P. VANDENBERG (Bar No. 4356)  
Chief Deputy Attorney General  
MICHELLE DI SILVESTRI ALANIS (Bar No.  
10024)  
Deputy Attorney General

**JA 0741**

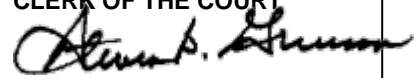
1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that  
3 on June 8, 2017, I filed the foregoing **CASE APPEAL STATEMENT** via this Court's electronic filing  
4 system. Parties that are registered with this Court's EFS will be served electronically.

5  
6 Daniel Marks, Esq.  
Adam Levine, Esq.  
7 Law Offices of Daniel Marks  
610 S. Ninth Street  
8 Las Vegas, Nevada 89101  
9

10  
11 /s/ Anela Kaheaku  
12 Anela Kaheaku, an employee of the office  
13 of the Nevada Attorney General  
14  
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**JA 0742**



ADAM PAUL LAXALT  
Attorney General  
CAMERON P. VANDENBERG (Bar No. 4356)  
Chief Deputy 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 NV 89101-1068  
(775) 687-2132 (phone)  
(702) 486-3773 (fax)  
cvandenberg@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

**NOTICE OF APPEAL**

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**JA 0743**



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Dated: June 8, 2017.

By: /s/ Cameron P. Vandenberg  
CAMERON P. VANDENBERG (Bar No. 4356)  
Chief Deputy Attorney General  
MICHELLE DI SILVESTRI ALANIS (Bar No.  
10024)  
Deputy Attorney General

2

**AFFIRMATION**  
**(Pursuant to NRS 239B.030)**

The undersigned hereby affirms that the foregoing document does not contain the social security number of any person.

Dated: June 8, 2017.

ADAM PAUL LAXALT  
Attorney General

By: /s/ Cameron P. Vandenberg  
CAMERON P. VANDENBERG (Bar No. 4356)  
Chief Deputy Attorney General  
MICHELLE DI SILVESTRI ALANIS (Bar No.  
10024)  
Deputy Attorney General

**JA 0745**

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that  
3 on June 8, 2017, I filed the foregoing **NOTICE OF APPEAL** via this Court's electronic filing system.  
4 Parties that are registered with this Court's EFS will be served electronically.

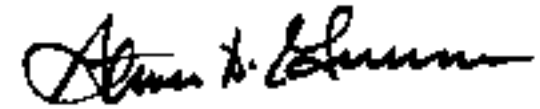
5  
6 Daniel Marks, Esq.  
Adam Levine, Esq.  
7 Law Offices of Daniel Marks  
610 S. Ninth Street  
8 Las Vegas, Nevada 89101  
9

10  
11 /s/ Anela Kaheaku  
12 Anela Kaheaku, an employee of the office  
13 of the Nevada Attorney General  
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**JA 0746**

# EXHIBIT A

# EXHIBIT A



CLERK OF THE COURT

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

7  
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16 Respondents.  
17 \_\_\_\_\_/

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

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

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

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

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

4 LAW OFFICE OF DANIEL MARKS

5  
6 /s/ Adam Levine, Esq.  
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10 **CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

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

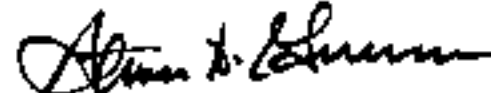
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CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

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

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

12 Petitioner,

13 v.

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

19 Respondents.

**ORDER DENYING PETITION FOR JUDICIAL REVIEW**

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

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

STATE OF NEVADA, ex rel.  
DEPARTMENT OF CORRECTIONS,

Appellant,

v.

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

Respondents.

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Case No. 73277  
District Court No. A-16-741032

Appeal from Order Denying Petition for Judicial Review

Eighth Judicial District Court

**JOINT APPENDIX**

**VOLUME III of IV**

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1           A           I don't like to bother them if they're in  
2   the bathroom.

3           Q           Is that a "yes" or a "no"?

4           A           No.

5           Q           Okay. Was this an emergent situation?

6           A           Yes.

7           Q           It was?

8           A           Yes.

9           Q           And you didn't feel it was urgent enough to  
10   use the hand-held radio?

11          A           No. I wanted to talk to him personally. I  
12   was not going to put it on the radio.

13          Q           You didn't want to put on the radio that you  
14   you wanted to go to shift command office?

15          A           No. I was not going to contact him by  
16   radio. I went up to shift command to speak to my  
17   lieutenant that was running shift.

18          Q           Okay. If you would take a look at the  
19   exhibit binder, and I believe it's Exhibit 3. We talked  
20   about this as your time sheet.

21                    Is this also known or actually known as an  
22   attendance card?

23          A           Yes. This is -- I read this wrong. Yes,  
24   I've never seen this before.

25          Q           Okay. Do you know what these -- what these

JA 0501

1 abbreviations mean?

2 A SL I do. The rest of them, no, I do not.

3 Q Okay. Do you know the abbreviation for  
4 perimeter?

5 A No.

6 Q Okay. According to this, you worked on  
7 April 1st, 2nd and 3rd as well as April 4th; is that  
8 correct -- or part of April 4th?

9 A Yes.

10 Q Okay. You did work for the 1st, 2nd and  
11 3rd, excuse me?

12 A Yes.

13 Q Okay. Where were you assigned those three  
14 days?

15 A It says Unit 5.

16 Q Okay. Does that comport with your  
17 recollection?

18 A Not really because when I put in for my  
19 shift bid, I was granted Unit 3A which is a roving  
20 officer position. They put you wherever they need you.

21 Q Okay. Would that be -- if you look at April  
22 3rd?

23 A Yes.

24 Q Would that be -- U3A, would that be Unit 3A?

25 A Yes. That's minimum custody and there is no

JA 0502

1 officer inside there.

2 Q Okay.

3 A They utilize you wherever they need you.

4 Q Okay. But you weren't on the perimeter that  
5 week. Is that fair to say?

6 A Yes. I don't know what the code is for  
7 perimeter, but no.

8 Q Okay. And if you take a look at -- I'm  
9 looking at the line above it. That would be March of  
10 2015?

11 A Yes.

12 Q In March of 2015, did you work on the  
13 perimeter?

14 A No.

15 Q No. Okay. Before April 4th, when was the  
16 last time you had worked on the perimeter?

17 A I had never worked on the perimeter until  
18 after April 4th, until after I was put under  
19 investigation.

20 Q Okay. So your testimony that you were  
21 working the perimeter and didn't have access to the  
22 computer to read Lieutenant Piccinini's email, was that  
23 inaccurate?

24 A Obviously, yes.

25 Q Okay. Thank you. You testified before

**JA 0503**

1     that -- that Unit 1 is a bit of a rough unit.

2                     How many -- is the unit divided into  
3     subsections called wings?

4             A         Not wings.

5             Q         What are they called?

6             A         A unit. There is four separate units.

7             Q         Are there four separate units in Unit 1  
8     itself?

9             A         There is four quads per unit.

10            Q         Okay. There aren't six units?

11            A         For a total of Unit 1, yes.

12            Q         Unit -- let me see if I have this correct.

13                     You're saying that Unit 1 has a total of  
14     six -- I'm going to call them sub units just to clarify.

15            A         Okay.

16            Q         You're saying that Unit 1 has a total of six  
17     sub units; is that correct?

18            A         No. It has four.

19            Q         It has four. All right. And of these sub  
20     units, how many of them have inmates who have just --  
21     you mentioned had come -- I believe your termination was  
22     out of the hole, and that is out of segregation.

23                     How many of the sub units have inmates who  
24     come from segregation?

25            A         I don't know. Most of them do come out of

JA 0504

1     there and go into Unit 1.

2           Q        Okay.  Had you worked Unit 5 previous to  
3     April 4th?

4           A        Yes.

5           Q        Okay.  When you were working Unit 5, were  
6     you -- did you come into contact with inmates?

7           A        Yes.

8           Q        Would it be fair to say that regardless of  
9     which unit you worked that you as a correctional officer  
10    would encounter inmates?

11          A        Yes.  But with the exception of Unit 1, I  
12    wouldn't be on the floor.  I would be on the bubble in  
13    Unit 5.

14                   MS. SLIWA:  Court's indulgence.

15    BY MS. SLIWA:

16          Q        Did you -- when you went to shift command  
17    office and talked to Lieutenant Piccinini, did you  
18    specifically ask to be put into the bubble on Unit 5 or  
19    did you ask to go to Unit 5 in general?

20          A        Unit 5 in general.

21          Q        Was your intention to go into the bubble?

22          A        I would have been placed in the bubble.

23          Q        Why do you think that?

24          A        Because of the officer that had worked in  
25    there that I had worked with before.  The only time that

JA 0505

1 I was required to go out on the floor was to do a unit  
2 tour, and that was the only time I was on the floor.

3 Q Was there another officer in Unit 5 on that  
4 day who was on light duty?

5 A I believe it was Enniss.

6 Q So the answer is "yes"?

7 A Yes.

8 Q And do you know what that light duty  
9 entails?

10 A No.

11 Q Would it be fair to say that if an officer  
12 was on light duty that working in the bubble would  
13 probably be a more optimal position for them than  
14 working the floor?

15 A Yes.

16 Q Why is that?

17 A She's a female officer. I'm a male officer.  
18 But when Enniss was on light duty, she worked in the  
19 bubble.

20 Q On Unit 5?

21 A And 1.

22 Q On that day she was on Unit 5?

23 A Yes, and she volunteered she would trade  
24 positions with me.

25 Q When did you talk to her?

JA 0506



1           A           I called her before I called Piccinini  
2 before I called shift command, and I called Officer Day,  
3 Senior Day.

4           Q           So you were going -- it was your intention  
5 to take a position in the bubble from an officer who was  
6 already on light duty?

7           A           Yes. That's what she wanted to do.

8           Q           If indeed that swap of positions for the day  
9 had occurred, would the other officer who was on light  
10 duty have been able to work the floor in Unit 1?

11          A           If she was on light duty?

12          Q           Yes.

13          A           No.

14          Q           Then how would it have been feasible for you  
15 to work in the bubble on Unit 5?

16          A           Because that's where I usually stayed was in  
17 the bubble on the computer.

18          Q           But if there was another officer who was on  
19 light duty in the bubble on Unit 5, how could they be  
20 moved to your floor position in Unit 1?

21          A           I wasn't on the floor.

22          Q           What was your position in Unit 1 that day?

23          A           There was three officers inside that bubble  
24 that morning. Nobody was on the floor. The shift  
25 barely even started. Work didn't even begin.

JA 0507

1           I left the bubble and I went to the  
2 bathroom, and I went back into the bubble. All three  
3 officers were inside that bubble. Nobody was on the  
4 floor.

5           Q       Would any of the officers have gone onto the  
6 floor during the shift?

7           A       To open the doors to let them out to go to  
8 chow, yes. Or you could have popped the doors from the  
9 inside of the bubble.

10                  The only time the officers were on the floor  
11 is to make sure that those inmates went to the culinary  
12 with no interruptions going down the hallway.

13          Q       And is that important duty?

14          A       To make sure there is no skirmishes, yes.

15          Q       So you claim -- there is a reference in the  
16 investigative report to an email that was sent, and it  
17 was a page we were looking at -- to an email sent by  
18 Lieutenant Piccinini about leaving your post.

19                  Do you recall discussing that email?

20          A       Yes.

21          Q       Did you eventually read --

22          A       What exhibit was that?

23          Q       I beg your pardon?

24          A       What page was that?

25          Q       I'm looking. It's before the addendums. **JA 0508**

1           A       Oh, okay.

2           Q       It is on Page 19 of the investigation  
3 report, and that is in that binder that is Exhibit 5.

4                   Did you ever read that -- that particular  
5 email?

6           A       No.

7           Q       Never?

8           A       Not until after I was notified of it  
9 afterwards.

10          Q       Okay. That wasn't my question. My question  
11 was: Did you read it?

12          A       Did I read it?

13          Q       Yes.

14          A       After April 4th, yes.

15          Q       Okay. Do you remember the date on which you  
16 read it?

17          A       No, I do not.

18          Q       Prior to that email going out, did it need  
19 to be made clear that an officer was not supposed to  
20 leave their post without authorization?

21          A       No.

22          Q       You had never -- you had never read or  
23 reviewed any type of administrative regulations that  
24 prohibited this?

25          A       No.

**JA 0509**

1 Q When you started -- I'm sorry.

2 When did you start at Florence McClure  
3 again, please?

4 A February 19th, 2015.

5 Q When you started with the Department, did  
6 you read and sign off on a set of administrative  
7 regulations?

8 A Yes.

9 Q Did those regulations include AR 339?

10 A Yes.

11 Q So you read -- you did read and understand  
12 those regulations?

13 A Nobody reads them. There is no time to read  
14 them. Everybody just signed. So no, I was not familiar  
15 with AR 339.

16 Q But you signed a form that said you were?

17 A Absolutely.

18 Q Why did you do that?

19 A Because it's required.

20 Q When you did that did you ask for time to  
21 review the regulations?

22 A No.

23 Q Why is that? Why is that?

24 A I just didn't.

25 MS. SLIWA: Okay. Okay. I think that is

JA 0510

1 all I have right now. Thank you very much, Mr. Ludwick.

2 HEARING OFFICER BROWN: Thank you. May I  
3 please, I've got a few clarifying questions.

4 MR. LEVINE: Yeah, and I have a few  
5 follow-ups afterwards that I would like to do now rather  
6 than have to call him back in a couple hours.

7 HEARING OFFICER BROWN: Okay. That's fine.

8 Mr. Ludwick, I got a little confused during  
9 the testimony when you were speaking about an Officer  
10 Enniss being on light duty.

11 Was that in Unit 1 or in Unit 5?

12 THE PETITIONER: Unit 5.

13 HEARING OFFICER BROWN: Okay. That's what I  
14 thought. And -- okay. And so when you mentioned that  
15 there were three officers in the bubble, that was in  
16 Unit 1?

17 THE PETITIONER: Yes, ma'am. Yes.

18 HEARING OFFICER BROWN: Okay. Very good.  
19 Thank you. That's all I have for you right now. I  
20 believe your counsel may have some --

21 THE PETITIONER: Yeah, correct.

22 HEARING OFFICER BROWN: I guess this would  
23 be recross.

24 MR. LEVINE: Correct. We're going to do it  
25 as recross rather than have to recall you, you know, in

JA 0511

1 an hour or so since you're sitting there already.

2 THE PETITIONER: Okay.

3

4 RECROSS-EXAMINATION

5 BY MR. LEVINE:

6 Q A couple things. One, originally you  
7 indicated -- you indicated you were confused, and after  
8 looking at the card, you don't believe you were on  
9 perimeter until after April 4, correct?

10 A Correct.

11 Q So do you know why you never saw the email?

12 A No, I do not.

13 Q Okay. But the fact is you never saw it?

14 A No.

15 Q You were asked about where the rest room is  
16 in relation to the bubble in Unit 1.

17 Do you recall that question?

18 A Yes.

19 Q Are there some units that you worked where  
20 there is no rest room in the unit at all?

21 A Yes.

22 Q Which units?

23 A 5.

24 Q Okay.

25 A And 4.

JA 0512

1           Q           4 and 5. After April 4, how long did the  
2 Department continue to have you work as a correctional  
3 officer?

4           A           I was placed on administrative leave  
5 December 9th.

6           Q           So May, June, July, August -- seven months?

7           A           Yes.

8           Q           Were you -- did you do forced overtime  
9 during that seven months?

10          A           Yes.

11          Q           Mandatory overtime. Why is it that there is  
12 mandatory overtime?

13          A           Because of the call-offs, short staffing.

14          Q           That call-off and short staffing, is that  
15 why you tried to tough it out on April 4?

16          A           Yes.

17          Q           And just so we're clear with regard to  
18 Officer Enniss being on light duty, who were the three  
19 officers, including yourself -- or the other two besides  
20 yourself initially assigned at the beginning of the  
21 shift to Unit 1? You said Officer Day and who else?

22          A           Officer Towers.

23          Q           Oh, Towers?

24          A           And Officer White.

25          Q           So if Enniss had been willing to swap with

JA 0513

1 you, even though she's on light duty and she went to the  
2 bubble in Unit 1, if somebody had to go down on the  
3 floor, White or Towers could have done it, correct?

4 A Yes.

5 MR. LEVINE: Nothing further.

6 MS. SLIWA: I have just a couple more, if I  
7 may.

8 HEARING OFFICER BROWN: Oh, certainly. Go  
9 ahead.

10 MS. SLIWA: Thank you.

11 MR. LEVINE: Oh, I'm sorry. I'm sorry, I  
12 just forgot one.

13 MS. SLIWA: Go ahead.

14 BY MR. LEVINE:

15 Q Exhibit 3, the attendance card, is this  
16 something you fill out or is this something somebody --  
17 your supervisor fills out?

18 A I don't fill this out.

19 Q Okay. So then you do know that you were --  
20 you went out sick leave on the 4th and the 5th --

21 A Yes.

22 Q -- for your hypertension?

23 Other than that, do you know whether any of  
24 these are actually accurate?

25 A No.

JA 0514



1 MR. LEVINE: Nothing further.

2

3 RE-REDIRECT EXAMINATION

4 BY MS. SLIWA:

5 Q Okay. But just to clarify, you did testify  
6 that you hadn't worked the perimeter in April or March  
7 of 2015?

8 A Correct.

9 Q Okay. Thank you. Just a few more.

10 You had testified that there were three  
11 officers on Unit 1 on April 4th, and that the -- what  
12 was the general staffing amount for Unit 1 at that point  
13 in time?

14 A Two officers.

15 Q Why were there three officers that day?

16 A I do not know.

17 Q Subsequent to April 4th, was the -- was the  
18 minimum staffing amount changed on Unit 1?

19 A Before April 4th?

20 Q After.

21 A Yes.

22 Q From what to what?

23 A From what I understand it, it went from two  
24 to three officers.

25 Q Okay. Why was that done?

JA 0515

1           A           I do not know.

2           Q           But these -- the minimum staffing amount did  
3 change from two to three?

4           A           Yes.

5                   MS. SLIWA: That is all I have, and I think  
6 I'm finally finished. Thank you.

7                   HEARING OFFICER BROWN: Very good. Thank  
8 you. Thank you. I appreciate your time, Mr. Ludwick.

9                   MS. SLIWA: Thank you.

10                  HEARING OFFICER BROWN: Ms. Sliwa, you may  
11 call your next witness.

12                  MS. SLIWA: Yes. We would like to call  
13 Associate Warden Gary Piccinini, and if I may go fetch  
14 him. Thank you.

15                  HEARING OFFICER BROWN: You may.

16                  MR. LEVINE: Before you go and fetch him, it  
17 is 11:30. Do we plan on taking a short lunch and -- I  
18 have a feeling we are not going to be here all day.

19                  HEARING OFFICER BROWN: I'm glad to -- I am  
20 glad that you all are moving quickly. I think you're  
21 doing a wonderful job. I'm flexible in terms of when  
22 you want to have a lunch break.

23                  Do you want to start with him or do you want  
24 to --

25                  MR. LEVINE: No.

**JA 0516**

1 MS. SLIWA: I would actually -- if it  
2 pleases your Honor and Mr. Levine and everyone involved,  
3 I would be fine just to push straight through.

4 MR. LEVINE: That's what I was going to say  
5 is I don't know what your thoughts are, but between what  
6 Gary has left us in the way of new trends --

7 MS. SLIWA: And I have some protein bars  
8 that I'm willing to share.

9 MR. LEVINE: It's something that I would be  
10 willing to contemplate, and that's really where I was  
11 going.

12 MS. SLIWA: Is that okay with you?

13 MS. GENTRY: I brought my own granola bars,  
14 too, hoping that we could push all the way through.

15 MS. SLIWA: Perfect.

16 MR. LEVINE: I don't mind doing that.

17 HEARING OFFICER BROWN: And I would love to  
18 push through. However, I do like taking, you know,  
19 short breaks so --

20 MS. SLIWA: Sure.

21 HEARING OFFICER BROWN: -- 10, 15 minutes --

22 MR. LEVINE: Right.

23 MS. SLIWA: -- every couple of hours just so  
24 everybody --

25 MS. SLIWA: Of course.

JA 0517

1 HEARING OFFICER BROWN: -- can stretch your  
2 legs and --

3 MR. LEVINE: Right.

4 HEARING OFFICER BROWN: -- stay fresh and  
5 alert.

6 MR. LEVINE: But I'm not going to need a  
7 one-hour lunch.

8 HEARING OFFICER BROWN: No. Heavens no.  
9 Okay.

10 MS. SLIWA: That's great for me. Thank you.

11 HEARING OFFICER BROWN: And so with that  
12 being said, do you want to call your next witness now --

13 MS. SLIWA: Yes.

14 HEARING OFFICER BROWN: -- or does anyone  
15 need a break before we start with Officer --

16 MS. SLIWA: Yes, please. I would like to  
17 call my next witness.

18 MR. LEVINE: And I don't have a problem. I  
19 don't need a break.

20 MS. SLIWA: After the next witness, we can  
21 take a little break?

22 HEARING OFFICER BROWN: Sounds good.

23 (Off the record)

24 THE WITNESS: -- i-c-c-i-n-i-n-i.

25 HEARING OFFICER BROWN: Okay, Counselor, you

JA 0518

1 may proceed.

2 MS. SLIWA: Thank you.

3

4 DIRECT EXAMINATION

5 BY MS. SLIWA:

6 Q Are you currently employed?

7 A Yes, ma'am.

8 Q Who is your employer?

9 A Nevada Department of Corrections.

10 Q Where -- at which institution are you  
11 stationed?

12 A Florence McClure Women's Correctional  
13 Center.

14 Q How long have you been with NDOC?

15 A For 14 and a half, almost 15 years.

16 Q How long have you been with Florence  
17 McClure?

18 A Since 2012, the end of 2012.

19 Q Okay. What is your position there?

20 A Currently I'm the Associate Warden of  
21 Operations.

22 Q In April -- on April 4th of 2015, what was  
23 your position?

24 A Correctional lieutenant.

25 Q Okay. What were your job duties -- briefly,

JA 0519

1     what are your job duties as an associate warden?

2           A       As an associate warden I'm sent to the area  
3     of operations which I'm in charge of custody staff, the  
4     operations of the facilities, security, employee  
5     evaluations, so on and so forth, and in that particular  
6     chain of command.

7           Q       When you were a correctional lieutenant,  
8     what were your job duties?

9           A       I was assigned to a shift, and I was  
10    assigned as a shift supervisor, the lead shift  
11    supervisor in charge of sergeants, seniors and COs  
12    directly.

13          Q       Okay. On April 4th of 2015, what shift did  
14    you supervise?

15          A       It was day shift.

16          Q       How long had you been a supervisor at that  
17    point approximately?

18          A       How long? Since 2007 I was promoted to the  
19    rank of sergeant.

20          Q       Okay.

21          A       In 2010, I was promoted to the rank of  
22    lieutenant.

23          Q       And when were you promoted to associate  
24    warden?

25          A       It was December of 2015.

**JA 0520**

1 Q Okay. Prior to working at Florence McClure,  
2 where did -- at which institution did you work?

3 A I worked at Carlin Conservation Camp as the  
4 camp lieutenant. Prior to that, it was Wells  
5 Conservation Camp as a lieutenant and sergeant. And  
6 then prior to that, I worked at Ely State Prison.

7 Q Okay. Are you acquainted with Mr. Brian  
8 Ludwick?

9 A Yes, ma'am.

10 Q Did you work with him previously?

11 A Yes, ma'am, at Florence McClure.

12 Q Okay. Do you currently or have you ever had  
13 a relationship with Mr. Ludwick outside of work?

14 A No, ma'am.

15 Q Thank you. On April 4th of 2015, were you  
16 involved in an incident with Mr. Ludwick?

17 A Yes.

18 Q Can you tell us what happened, please?

19 A I was a shift supervisor. I posted my  
20 shifts, and about a half hour into the shift, he came  
21 into the supervisor's office wanting to switch with  
22 another officer in Unit 5 from Unit 1.

23 I posted him to Unit 1, and I told him no  
24 and he wanted to know why.

25 Q Did you give him a reason why?

JA 0521

1           A           He explained he wanted to go to Unit 5  
2           because he was more familiar with 5 and he was not  
3           familiar with 1.

4           Q           When he came in to the shift command office  
5           on that day, had you given him authorization to leave  
6           his post?

7           A           No, ma'am.

8           Q           Had he called you asking --

9           A           No, ma'am.

10          Q           -- for said authorization?

11                    Had he tried to contact you by the hand-held  
12          radio for authorization?

13          A           No, ma'am.

14          Q           Okay. When he walked into the shift command  
15          office, you were in the shift command office, correct?

16          A           Yes.

17          Q           Did he appear to be in any medical distress?

18          A           No.

19          Q           Did Mr. Ludwick tell you that he was in any  
20          kind of medical distress?

21          A           At what point? I mean --

22          Q           When he walked in and asked to go to Unit 5.

23          A           No, he did not.

24          Q           Does Florence McClure have a procedure for  
25          dealing with a medical episode by an officer?

JA 0522



1           A           I'm not familiar with a specific procedure  
2           dealing with a medical episode. We do have --

3           Q           How about on a practical level? Say an  
4           officer has some sort of medical distress. What -- what  
5           should be done next?

6           A           They should report it to their supervisor if  
7           they could. If not, then their peers would report it.

8           Q           Did any of Mr. Ludwick's peers report any  
9           type of medical episode or distress --

10          A           No, ma'am.

11          Q           -- to you on that day?

12          A           No.

13          Q           No? Thank you.

14                   In discussing -- in discussing Mr. Ludwick's  
15           request to move to Unit 5 on April 4th, you said he  
16           asked you to move to Unit 5. You told him no. What was  
17           his demeanor?

18          A           After that point, after I told him no, he  
19           became angry.

20          Q           Okay. What makes you say that?

21          A           His tone of his voice, his posture. It was  
22           stiff. And then what he said after that. "How about I  
23           go home FMLA because I haven't taken my blood pressure  
24           medication?" And then he said "How's that?" And then  
25           he stormed out of the office.

JA 0523

1           Q       Okay.  And he appeared to be angry when he  
2   said that?

3           A       Uh-huh.  He raised his voice, his words were  
4   very short.

5           Q       Did it appear to you as his supervisor that  
6   he was actually having some kind of medical or blood  
7   pressure episode?

8                   MR. LEVINE:  Objection; foundation.  How is  
9   somebody by observation going to be able to see what  
10   somebody's blood pressure is?

11                  MS. SLIWA:  Withdrawn.

12                  HEARING OFFICER BROWN:  Thank you.

13   BY MS. SLIWA:

14           Q       And I believe you testified he did not  
15   appear to be in any medical distress when he came to  
16   shift command office; is that correct?

17           A       Not according -- no, I did not see anything  
18   that I would --

19           Q       Did anything -- did that -- did that change  
20   from the time he came into the shift command office to  
21   the time he stormed out?

22           A       Yes.

23           Q       What changed?

24           A       He came in with a calmer demeanor at first  
25   when he asked to go to 5.

**JA 0524**

1 Q But he got angry?

2 A Yeah. It appeared that way, yes.

3 Q Okay. Did he appear to be in medical -- in  
4 any medical distress by the time he left the shift  
5 command office?

6 A No. He appeared to be angry.

7 Q Okay. Did you determine that -- that Brian  
8 Ludwick left his post and neglected his duty when he  
9 came to the shift command office that morning?

10 A Yes.

11 Q How did you reach that conclusion? What  
12 made you think that?

13 A Because he did not call requesting  
14 permission to leave his post to come talk to me.

15 Q Okay. If indeed an officer were to call you  
16 in shift command office and for whatever reason you were  
17 not able to answer the phone, are there other ways to  
18 communicate with you other than the telephone?

19 A Yes.

20 Q What would those be?

21 A The radio. We have in shift command two  
22 radios, portable and then a base station.

23 Q And does each correctional officer have a  
24 hand-held radio?

25 A Yes.

JA 0525

1           Q       To your knowledge, did Officer Ludwick have  
2 a hand-held radio that day?

3           A       Yes.

4           Q       Once you reached the conclusion that  
5 Mr. Ludwick had neglected his duty and left his post,  
6 what did you do with that information?

7           A       I began writing my report and I called the  
8 administrative officer of the day, Associate Warden  
9 Hill.

10          Q       And what did you tell Associate Warden Hill?

11          A       I told Associate Warden Hill what I had just  
12 observed had occurred of Officer Ludwick coming to shift  
13 command without permission and becoming angry when he  
14 couldn't get moved to Unit 5.

15          Q       Had you assigned the officers to the various  
16 units that morning?

17          A       Yes. Yeah, I believe I did.

18                   HEARING OFFICER BROWN: Okay, I'm going to  
19 ask -- I'm so sorry, Ms. Sliwa.

20                   I'm going to ask you to please speak  
21 audibly. You know, I can hear you --

22                   THE WITNESS: I'm sorry.

23                   HEARING OFFICER BROWN: -- at the beginning  
24 but you trail off a little bit. So I need -- this is an  
25 amplifying mic so you don't have to yell, but just

JA 0526

1 please speak clearly because we're recording the  
2 proceedings for today.

3 THE WITNESS: Yes, ma'am.

4 HEARING OFFICER BROWN: Thank you.

5 BY MS. SLIWA:

6 Q Thank you. How many officers did you assign  
7 to Unit 3 on April -- excuse me, Unit 1 on April 4th,  
8 2015?

9 A Three.

10 Q Okay. What was the minimum staffing  
11 requirement at that time for that unit?

12 A Two.

13 Q Why did you assign three?

14 A Because I had the staff to be able to put  
15 three into the three legislatively-approved posts for  
16 Unit 1.

17 Q Okay. So there were three  
18 legislatively-approved posts for Unit 1?

19 A Yes.

20 Q Okay. What is the significance of having a  
21 higher number of officers on the unit?

22 A More security for the units, less  
23 possibility that an incident is going to occur.

24 Q Okay.

25 A Unit 1 at Florence McClure is unique to all

JA 0527

1 the other units at our facility.

2 Q How is that?

3 A It has six pods and can hold upwards of  
4 approximately 325 inmates.

5 Q How many inmates are at Florence McClure  
6 total if you know?

7 A Right now approximately 937 as of  
8 yesterday's total.

9 Q Okay. So would it be fair to say that you  
10 assigned three officers to Unit 1 on that day instead of  
11 Unit 2 to make the unit more secure?

12 A Yes.

13 Q Did having two officers instead of three  
14 once the shift commenced make the unit less secure?

15 A Yes.

16 Q Does that put inmates at risk?

17 A Yes.

18 Q Does it put staff at risk?

19 A Yes.

20 Q Would it put anyone else who may happen to  
21 be on the unit who is neither an inmate or staff put  
22 those people at risk?

23 A Yes.

24 Q Thank you. Subsequent to April 4th, 2015,  
25 was the recommended staffing number for Unit 1 changed?

JA 0528

1           A           Yes, it was.

2           Q           What was it -- from what to what?

3           A           The minimum staffing was increased to three  
4 officers from two.

5           Q           Okay. Who made that change?

6           A           That change was made by the administration  
7 of the facility and the Deputy Director of Operations at  
8 the time.

9           Q           Do you know -- do you know why that was  
10 changed?

11                   MR. LEVINE: I'm going to object on  
12 relevance grounds. Something happened after April 4 is  
13 not relevant to what happened on April 4.

14                   MS. SLIWA: And I would argue that it is  
15 relevant seeing as the requirement was changed that  
16 shows that there was a need for that many officers on  
17 the unit.

18                   HEARING OFFICER BROWN: I'm going to  
19 overrule your objection.

20                   MR. LEVINE: All right.

21                   MS. SLIWA: Thank you.

22                   HEARING OFFICER BROWN: You may proceed.

23 BY MS. SLIWA:

24           Q           Is an officer leaving their post, would you  
25 say that's a neglect of duty?

JA 0529

1           A       Yes.

2           Q       Would you say that it is a serious  
3   infraction?

4           A       Yes, I would.

5           Q       Why would you say that?

6           A       If an officer leaves their post -- I would  
7   say it first off because our administrative regulations  
8   dictates that it is a grave -- a grave -- my words are  
9   missing.

10          Q       You know, why don't --

11          A       It is a serious infraction.

12          Q       Okay.

13          A       A grave infraction.

14          Q       Okay. I don't particularly want to talk  
15   about the administrative -- are you talking about AR  
16   339?

17          A       Yes, ma'am.

18          Q       I don't think we want to talk about that  
19   right at this point in time, and that's fine that you  
20   mentioned it. That's not a problem.

21                   But on a practical level --

22          A       Yes.

23          Q       -- why is an officer leaving their post such  
24   a grave infraction? Why is it such a problem?

25          A       Officers are assigned to various posts

JA 0530



1 throughout the institution to meet the institution's  
2 needs of safety and security of the facility, of the  
3 staff to protect the public in the end result.

4 If an officer leaves their post, they're  
5 neglecting their duties in that assigned post. They're  
6 posted there. Their chain of command knows they're  
7 there. If incidents arise or occur and they're not  
8 there, then that puts other inmates and staff at risk.

9 Q Okay. Would it be fair to say that when an  
10 officer walks away from their post without authorization  
11 that that increases the vulnerability level of the  
12 inmate, staff and public?

13 A Yes, it does.

14 MS. SLIWA: Thank you. That's all I have  
15 right now. Thank you very, very much, Associate Warden.  
16 And I think the Hearing Officer and Mr. Levine may have  
17 some questions for you as well.

18 THE WITNESS: Yes, ma'am.

19

20 CROSS-EXAMINATION

21 BY MR. LEVINE:

22 Q Congratulations on your promotion.

23 A Thank you, sir.

24 Q If I slip up and call you lieutenant, it's  
25 not intentional, but I didn't know until today that you

JA 0531

1 had -- were now an associate warden.

2 MS. SLIWA: We'll flog him.

3 BY MR. LEVINE:

4 Q You put -- just to be clear, you put three  
5 people in Unit 1 on April 4 because you had the bodies  
6 available to do it, correct?

7 A Correct.

8 Q More bodies always means less risk, correct?

9 A Yes.

10 Q Okay. And the NDOC is chronically short  
11 staffed, correct? That's a different matter?

12 A Generally speaking, yes.

13 Q So while more bodies are always better, as  
14 of April 4, the Department had determined that two  
15 bodies is sufficient, correct?

16 A I don't know if that terminology would -- I  
17 can agree with that. It determined minimum staffing  
18 would be two bodies.

19 Q Right. And minimum staffing means minimum  
20 acceptable, correct?

21 A Correct.

22 Q You perceived Officer Ludwick as becoming  
23 angry per your testimony, correct?

24 A Yes.

25 Q Were you aware that irritability is a

JA 0532

1 symptom of chronic -- or severe hypertension?

2 A No.

3 Q You did know that he had already been  
4 granted intermittent FMLA leave as needed, correct?

5 A Yes.

6 Q Okay. And that FMLA leave says that if he  
7 needs the leave, he's entitled to it, correct?

8 A Yes.

9 Q So he is authorized to leave his post for  
10 purposes of FMLA leave, correct?

11 A If he has authorization to leave his post.

12 Q FMLA -- if he has an episode that requires  
13 him to take his intermittent FMLA leave, he is  
14 preauthorized, isn't he?

15 MS. SLIWA: Objection; asked and answered.

16 HEARING OFFICER BROWN: I will sustain the  
17 objection.

18 MR. LEVINE: I don't think it was asked and  
19 answered. When did he -- when did I ask that question  
20 previously? I don't recall.

21 HEARING OFFICER BROWN: I thought you asked  
22 it just before.

23 MR. LEVINE: No. It was a slightly  
24 different question right before.

25 MS. SLIWA: Correct.

JA 0533

1 HEARING OFFICER BROWN: Okay.

2 BY MR. LEVINE:

3 Q Let me ask it this way: Associate Warden,  
4 do you understand that FMLA constitutes preapproval to  
5 leave?

6 A No, I don't.

7 Q You didn't understand that?

8 A No. I do not believe that having  
9 preapproved FMLA constitutes somebody who is approved  
10 FMLA to just up and leave without following certain  
11 steps.

12 Q Do you believe you have the authority to  
13 deny him --

14 A I do not --

15 Q -- the leave?

16 A -- have the authority to deny him that  
17 leave.

18 Q Okay. So if he needs it, he's preapproved  
19 to take it?

20 MS. SLIWA: Objection; asked and answered.

21 HEARING OFFICER BROWN: If you could ask the  
22 question. So I'm going to sustain the objection.

23 MR. LEVINE: Okay. All right. Okay.

24 BY MR. LEVINE:

25 Q After you reported it to -- is it Associate

JA 0534

1 Warden Hill or Assistant?

2 A Associate Warden.

3 Q Associate Warden Hill, he gave you  
4 directions to do something with regard to -- well, he  
5 gave you instructions to change Ludwick on April 4 to  
6 FMLA, correct?

7 A Correct.

8 Q And if we go to Exhibit -- there is a binder  
9 there. If we go to -- let me see if I can find it. The  
10 first page is Ms. Sliwa's letter to me. The second page  
11 is an October 20 memo. I want to go to the third and  
12 fourth page.

13 HEARING OFFICER BROWN: Which tab are you  
14 at?

15 MR. LEVINE: Exhibit 5.

16 HEARING OFFICER BROWN: Exhibit 5, okay.

17 BY MR. LEVINE:

18 Q I'm showing you an investigation detail  
19 report. Is this a NOTIS entry by the way? Is this what  
20 we would call a NOTIS entry?

21 A Oh --

22 Q I've seen reference to NOTIS, N-O-T-I-S,  
23 before. I didn't know if this was --

24 A It looks like it comes from NOTIS, but I'm  
25 not -- I do not have authorization for these tabs.

JA 0535

1 Q Okay. The reason being is if we go to Page  
2 2 of 2 -- is the Hearing Officer there?

3 HEARING OFFICER BROWN: Yes.

4 MR. LEVINE: Page 2 of 2?

5 HEARING OFFICER BROWN: Yes.

6 BY MR. LEVINE:

7 Q It says at the bottom "Reference Name,"  
8 N-O-T-I-S. That's why I was wondering if this is a  
9 NOTIS entry.

10 Is it a NOTIS entry?

11 A It appears to be, yes.

12 Q Okay. And we look at the very last entry,  
13 it says "G. Piccinini, 4-4-2015, 10:20:01, per A.W. Hill  
14 leave Officer Ludwick on FMLA status until investigation  
15 is complete. NSIS records changed to indicate FMLA."

16 Is that -- is it at 10:20:01 when you logged  
17 him -- his leave as FMLA?

18 A On that -- yes.

19 Q So that very day him departing his post and  
20 the institution was deemed FMLA?

21 MS. SLIWA: Objection. I don't think that  
22 was his testimony.

23 MR. LEVINE: I'm asking him to validate  
24 that's what happened.

25 MS. SLIWA: Oh, fair enough. Thank you.

JA 0536

1 THE WITNESS: Initially he was placed on  
2 AWOL, and then it was changed from AWOL to FMLA.

3 BY MR. LEVINE:

4 Q And he did in his conversation tell you he  
5 was taking FMLA when he wasn't going to be moved,  
6 correct?

7 A Yes.

8 MR. LEVINE: Nothing further.

9 MS. SLIWA: If I may?

10 HEARING OFFICER BROWN: Yes.

11 MS. SLIWA: Unless your Honor has some  
12 questions.

13 HEARING OFFICER BROWN: No.

14

15 REDIRECT EXAMINATION

16 BY MS. SLIWA:

17 Q Associate Warden, is your understanding of  
18 FMLA, that a person who has been granted FMLA can just  
19 come and go as they please without following policies  
20 and procedures?

21 A No, it's not.

22 Q Would it be fair to say that a person who,  
23 although they have been granted intermittent FMLA, must  
24 still request permission to leave their post?

25 MR. LEVINE: I'm going to object. That

JA 0537

1 calls for a legal conclusion and it's simply not the  
2 law.

3 HEARING OFFICER BROWN: Do you have any  
4 response to that?

5 MS. SLIWA: I'm asking him for his  
6 understanding of FMLA. I'm not asking him to quote any  
7 kind of code.

8 MR. LEVINE: I asked him foundations as to  
9 what his understanding is and how he would have his  
10 understanding. I don't think the question lacks  
11 foundation if that is her intent.

12 HEARING OFFICER BROWN: There you go. Okay.

13 MS. SLIWA: Fair enough. I will --

14 HEARING OFFICER BROWN: So I will -- I will  
15 then sustain the objection on the grounds that you need  
16 to lay a foundation first. You may proceed.

17 MS. SLIWA: Thank you. I'll take it in a  
18 different direction.

19 HEARING OFFICER BROWN: Okay.

20 BY MS. SLIWA:

21 Q When Brian Ludwick came into the shift  
22 command office on April 4, did he initially state that  
23 his intent was to leave on FMLA?

24 MR. LEVINE: Objection; asked and answered.  
25 He's already testified what he said when he walked in.

JA 0538



1 and then after the request was denied to transfer, he  
2 said that "I'm taking FMLA."

3 HEARING OFFICER BROWN: Objection sustained.

4 MS. SLIWA: Okay.

5 BY MS. SLIWA:

6 Q We had talked -- you talked with myself and  
7 Mr. Levine about the minimum staffing requirements for  
8 the unit and what was sufficient and what wasn't.

9 In your opinion as a -- as a shift  
10 supervisor on April 4th, 2015, do you believe that two  
11 officers on Unit 1 was sufficient?

12 A No.

13 Q Do you believe that three officers was  
14 sufficient?

15 A No.

16 Q How many officers would you like to see on  
17 Unit 1?

18 A At least six.

19 Q How many -- to your knowledge how many  
20 legislatively-approved positions are there for Unit 1?

21 A Three.

22 Q And at the time there were two or were there  
23 three?

24 A At what time?

25 Q I beg your pardon. On April 4th, 2015, how

JA 0539

1 many legislatively-approved positions were there for  
2 Unit 1?

3 A Three.

4 MS. SLIWA: Thank you. That's all I have.

5 MR. LEVINE: I would like to follow up on  
6 something.

7 HEARING OFFICER BROWN: Okay. You may.

8

9 RECROSS-EXAMINATION

10 BY MR. LEVINE:

11 Q When you use the word  
12 "legislatively-approved positions," you're talking  
13 funded positions, correct?

14 A Yes, sir.

15 Q The legislature has provided funding to the  
16 Department for it. That's what you're referring to as  
17 legislatively-approved?

18 A Yes, sir.

19 Q Okay. Would I be correct that at no point  
20 when -- on April 4 when Officer Ludwick came into your  
21 office, at no point did you order him back to Unit 1?

22 A At no point did I order --

23 Q Yeah.

24 A No, I did not give him an order to go back  
25 to Unit 1 at that point.

JA 0540

1 MR. LEVINE: Okay. Nothing further.

2 MS. SLIWA: I have nothing further. Thank  
3 you.

4 HEARING OFFICER BROWN: Okay. Thank you for  
5 your time. I appreciate it.

6 THE WITNESS: You're welcome.

7 HEARING OFFICER BROWN: I will ask that you  
8 please not discuss this matter with anyone outside of  
9 your counsel until the matter has concluded.

10 THE WITNESS: Yes, ma'am.

11 HEARING OFFICER BROWN: Thank you.

12 MS. SLIWA: I have no intention of recalling  
13 this witness. I don't know if Mr. --

14 MR. LEVINE: I have none.

15 MS. SLIWA: -- Levine does. If for some  
16 reason that comes up, maybe we could do it by phone?

17 MR. LEVINE: Yeah.

18 MS. SLIWA: I don't anticipate that.

19 MR. LEVINE: I don't have a problem with  
20 that.

21 MS. SLIWA: Thank you.

22 HEARING OFFICER BROWN: Very good. You're  
23 excused for the day. Thank you.

24 THE WITNESS: Thank you, ma'am.

25 MS. SLIWA: Your honor, may we take just a

JA 0541

1 short --

2 MR. LEVINE: Yes.

3 MS. SLIWA: -- a short break?

4 HEARING OFFICER BROWN: Certainly.

5 Certainly.

6 We will take a break. Now it is 12:00 noon

7 and we will reconvene at 12:15.

8 MS. SLIWA: Thank you.

9 HEARING OFFICER BROWN: Does that work for  
10 everyone?

11 MS. SLIWA: Perfect.

12 MR. LEVINE: Yeah, it works for me.

13 HEARING OFFICER BROWN: Thank you.

14 (Recess)

15 HEARING OFFICER BROWN: We are back on the  
16 record in the matter of Brian Ludwick versus the State  
17 of Nevada Department of Corrections.

18 When we stopped, the State was presenting  
19 its case.

20 Would you like to call your next witness,  
21 Ms. Sliwa?

22 MS. SLIWA: Yes, your Honor. We would like  
23 to call Arthur Emling, and I will go get him.

24 HEARING OFFICER BROWN: Hello. How are you?  
25 Would you please remain standing and raise your right

JA 0542

1 hand so that I can give you the oath.

2 Do you swear or affirm that the testimony  
3 you're about to give will be the truth, the whole truth  
4 and nothing but the truth?

5 THE WITNESS: I swear.

6 HEARING OFFICER BROWN: Thank you. You may  
7 take a seat.

8 And before I turn you over as a witness to  
9 Ms. Sliwa, will you please state your full name for the  
10 record and spell it.

11 THE WITNESS: Arthur Ray Emling, Jr.,  
12 A-r-t-h-u-r, Ray, R-a-y, Emling, E-m-l-i-n-g, Jr, J-r.

13 HEARING OFFICER BROWN: Thank you.  
14 Ms. Sliwa.

15 MS. SLIWA: Thank you.

16

17 DIRECT EXAMINATION

18 BY MS. SLIWA:

19 Q Are you currently employed?

20 A Yes.

21 Q Who are you employed with?

22 A Nevada Department of Corrections.

23 Q All right. What do you do there?

24 A I work for the Inspector General's office.

25 I'm a criminal investigator.

JA 0543

1 Q Okay. What are your job duties?

2 A I investigate crimes that have a nexus to  
3 the prison, within the prison, around the prison. I  
4 also conduct internal affairs investigations.

5 Q How long have you been an investigator?

6 A Two years and two months approximately.

7 Q Okay. How long have you been with the  
8 Department of Corrections?

9 A Approximately seven years and five months.

10 Q Okay. What did you do before you were an  
11 investigator with the department?

12 A Prior to being an investigator, I was a  
13 sergeant, a correctional sergeant.

14 Q Okay. At which institution?

15 A High Desert State Prison.

16 Q Okay. Have you ever been assigned to  
17 conduct an investigation regarding Brian Ludwick?

18 A Yes, I have.

19 Q Do you currently or have you ever had a  
20 relationship with Mr. Ludwick outside of work?

21 A No, I have not.

22 Q Okay. When were you assigned to that  
23 investigation?

24 A Specifically I'm not sure. I believe it was  
25 sometime last year.

JA 0544

1 Q Last year being 2015?

2 A Yes.

3 Q Okay. Were you the only investigator?

4 A I was.

5 Q Okay. What were you assigned to  
6 investigate?

7 A I was assigned to investigate the  
8 allegations of Mr. Ludwick leaving his post without  
9 authorization.

10 Q Was that a neglect of duty allegation?

11 A Yes, it was.

12 Q If you would take a look at the packet --  
13 If I may approach the witness, please.

14 HEARING OFFICER BROWN: Yes.

15 BY MS. SLIWA:

16 Q Take a look at -- it is our Exhibit A, and  
17 it is Page A-18.

18 I didn't Bates stamp but my assistant was  
19 kind enough to write all that on there.

20 HEARING OFFICER BROWN: Thank you. I  
21 appreciate it.

22 MS. SLIWA: She's wonderful. And then she  
23 left me to go on vacation.

24 BY MS. SLIWA:

25 Q In looking at Page A-18, it's got the

JA 0545

1 heading at the top of the page, it says "Investigator  
2 Notes."

3 Do you recognize this page?

4 A I do.

5 Q And if you -- if you go back to the  
6 beginning of Exhibit A actually.

7 Is this a document that you recognize?

8 A I do.

9 Q What is this?

10 A This is the document that I would submit  
11 referencing an administrative investigation.

12 MR. LEVINE: Which page are we looking at?

13 MS. SLIWA: Right now, I'm just looking at  
14 the first page of Exhibit A.

15 MR. LEVINE: Where is Exhibit A? Is that at  
16 the beginning or --

17 MS. SLIWA: It is.

18 BY MS. SLIWA:

19 Q So this is your investigation report; is  
20 that correct?

21 A That is correct.

22 HEARING OFFICER BROWN: Okay. I'm sorry to  
23 interrupt. Ms. Sliwa --

24 MS. SLIWA: Yes.

25 HEARING OFFICER BROWN: -- to make sure I'm

JA 0546



1 at the same place with you --

2 MS. SLIWA: Yes.

3 HEARING OFFICER BROWN: -- the first page of  
4 Exhibit A starts with the Specificity of Charges.

5 MS. SLIWA: And I apologize, it is after the  
6 Specificity of Charges.

7 HEARING OFFICER BROWN: Okay.

8 MS. SLIWA: It begins with Exhibit A --

9 HEARING OFFICER BROWN: On the bottom right.

10 MS. SLIWA: -- to our Exhibit A, yes.

11 HEARING OFFICER BROWN: Got it.

12 MR. LEVINE: Okay. What page, A --

13 MS. SLIWA: It starts, it says, Exhibit A  
14 and then it starts with A-1 for whatever reason.

15 HEARING OFFICER BROWN: So I think it's  
16 right after the Specificity of Charges.

17 MS. SLIWA: Correct. It's right after the  
18 SOC and I apologize.

19 MR. LEVINE: Okay.

20 MS. SLIWA: All right.

21 MR. LEVINE: Got it.

22 MS. SLIWA: Okay. Thank you.

23 BY MS. SLIWA:

24 Q When you were assigned to investigate this  
25 matter, what was your process?

JA 0547

1           A       Well, once I was assigned the case, the  
2 process of investigation that I took, and it's typical  
3 that I would take in most cases is I would first review  
4 whatever reports are in the Nevada Offender Tracking  
5 Information System, also known as NOTIS.

6                   After reviewing whatever reports were in the  
7 NOTIS system referencing the IR, which is the incident  
8 report -- there is an IR and there is an IA. The IA is  
9 basically linked to the IR.

10                I review those reports. After reviewing  
11 those reports, I would determine the next course of  
12 action that I would take which would normally be to  
13 interview any witnesses.

14           Q       Is that what you did in this case?

15           A       I did.

16           Q       Okay. Who did you -- who did you interview?

17           A       I first -- if I recall correctly, I first  
18 interviewed Lieutenant Piccinini.

19           Q       Okay. Did -- at any point did you interview  
20 Brian Ludwick?

21           A       I did. He was my final interview --

22           Q       Okay.

23           A       -- in my investigation.

24           Q       Who else did you talk to?

25           A       I also spoke with Officer Day, also Officer

JA 0548

1 Towers and Officer White.

2 Q Okay. What were -- what were the results of  
3 your investigation? What were your findings in a  
4 nutshell?

5 A In most of these cases, we don't -- as an  
6 investigator, we don't come to a conclusion. In  
7 criminal cases, I do. I form an opinion based on the  
8 facts and the circumstances that surround the case and  
9 submit it for charges.

10 In administrative investigations,  
11 specifically even this investigation, I do not come to a  
12 conclusion. However, what I did find was that  
13 Mr. Ludwick was assigned to work that day, on the day in  
14 question, whichever day that was. I believe it was  
15 sometime in April.

16 I found that based off of testimony,  
17 specifically even Mr. Ludwick's testimony that he did  
18 leave his assigned post to meet with Piccinini and then  
19 subsequently left the institution.

20 My findings were that he was given  
21 permission to leave, according to Mr. Ludwick and  
22 according to testimony from Piccinini, that they had  
23 both agreed upon that he was given permission to leave  
24 the institution. However, I could not find anything  
25 that would confirm him receiving permission to leave his

JA 0549

1 post, which is what I was specifically investigating.

2 Q Okay. And that would be -- the specific  
3 leaving of a post without authorization, that would fall  
4 under neglect of duty?

5 MR. LEVINE: Objection; that's leading.

6 THE WITNESS: That's correct.

7 BY MS. SLIWA:

8 Q Would that fall under neglect of duty?

9 HEARING OFFICER BROWN: Hold on just one  
10 moment.

11 MS. SLIWA: I beg your pardon.

12 HEARING OFFICER BROWN: There is an  
13 objection on the floor. How would you respond to the  
14 objection?

15 MS. SLIWA: I would be happy to rephrase.

16 HEARING OFFICER BROWN: Thank you.

17 BY MS. SLIWA:

18 Q Would leaving -- would an officer leaving  
19 their post without authorization to do so constitute  
20 neglect of duty?

21 A Yes.

22 Q Is it fair to say that your investigation --  
23 one of the findings in your investigation was that  
24 Mr. Ludwick left his post without authorization?

25 MR. LEVINE: Objection; asked and answered.

JA 0550

1 He said he didn't reach any conclusions.

2 MS. SLIWA: I asked for one of his findings.

3 HEARING OFFICER BROWN: She did.

4 MR. LEVINE: I don't think -- is there a  
5 difference between finding and conclusion?

6 MS. SLIWA: I think there is a finding -- I  
7 would argue that a finding is factual whereas a  
8 conclusion has an opinion component.

9 MR. LEVINE: I would disagree. That's why  
10 we have findings of fact and conclusions of law. It's  
11 not just opinions.

12 HEARING OFFICER BROWN: I am going to  
13 overrule the objection because Mr. Ludwick did testify  
14 as to what he found. He said he doesn't reach  
15 conclusions but he found X, Y and Z.

16 Am I correct, Mr. -- Officer?

17 THE WITNESS: Yes, that's correct.

18 MR. LEVINE: You said Ludwick. It's  
19 actually Emling.

20 HEARING OFFICER BROWN: I'm sorry.

21 MR. LEVINE: That's okay.

22 THE WITNESS: That is correct.

23 HEARING OFFICER BROWN: Mr. Emling, I'm  
24 sorry. And so thus, I'm going to overrule the objection  
25 and you may ask the question -- or reask. I don't think

JA 0551

1 he had an opportunity to answer the last question.

2 BY MS. SLIWA:

3 Q Did you find that --

4 MR. LEVINE: One, it's leading. The

5 question should be: What were your findings?

6 BY MS. SLIWA:

7 Q Was one of your findings that Mr. Ludwick

8 left his post without authorization?

9 MR. LEVINE: Object. The question has the  
10 answer contained within it which is the absolute  
11 definition of a leading question.

12 HEARING OFFICER BROWN: Uh-huh, it is.  
13 Would you like to rephrase?

14 MS. SLIWA: Yes, please.

15 BY MS. SLIWA:

16 Q What were your findings?

17 A My findings were that I did not receive -- I  
18 did not find -- my findings were that I did not find  
19 that he received any authorization to leave his post.

20 MS. SLIWA: Thank you. I don't have any  
21 further questions.

22 HEARING OFFICER BROWN: Thank you. Would  
23 you like to cross the witness?

24 MR. LEVINE: Yeah. 25 ///

1 CROSS-EXAMINATION

2 BY MR. LEVINE:

3 Q Arthur, do you go by Art or Arthur?

4 A You can call me Art.

5 Q Art. I think that's what I called you  
6 previously. I just couldn't remember.

7 Are you specifically trained in the FMLA?

8 A No.

9 Q Do you know whether the FMLA would draw a  
10 distinction between receiving permission to leave the  
11 institution and receiving permission to leave your post  
12 to get permission to leave the institution?

13 Do you know whether the law would even draw  
14 a distinction on it?

15 A I am not sure.

16 Q When I looked at -- let's go to Exhibit 5 in  
17 the binder, the binder right there.

18 I would like you to turn to your  
19 investigator notes which is Page -- begins on Page 19 of  
20 your investigation.

21 Before we go into this, when you testify you  
22 don't come to conclusions --

23 A That's correct.

24 Q What you do is in an administrative  
25 investigation, you determine what you find to be the

JA 0553

1 facts and leave decisions as to whether that constitutes  
2 a violation and whatnot to somebody else?

3 A That is correct.

4 Q Okay. So stated another way, unlike some  
5 other internal affairs bureaus, you don't sustain,  
6 exonerate and not sustain?

7 A I do not.

8 Q Who does?

9 A It typically, not always, but typically the  
10 warden of the institution that the employee works under.

11 Q Okay. If we take a look at your  
12 investigator's notes, I draw your attention to Item 7  
13 with regards to an email.

14 You wrote, "However, information was  
15 discovered that the email was not read by Brian Ludwick  
16 until the email was resent to him a few days following  
17 April 4, 2015."

18 Do you see that?

19 A I do.

20 Q Am I correct -- would I be correct that the  
21 manner in which you discovered it had not been read by  
22 him was that the email has a function whereby if you  
23 read it, it creates a record like an acknowledgement  
24 record?

25 A That is correct.

JA 0554



1           Q       Okay. So when Officer Ludwick testified  
2 here today that he had not read that email prior to  
3 April 4, 2015, through electronic verification you were  
4 able to ascertain that is correct?

5           A       That is correct.

6           Q       And did you review the operational  
7 procedures, specifically 326 for the staffing for Unit  
8 1? Flip to the next page.

9           A       Operational Procedure 326?

10          Q       Yeah.

11          A       Yes, I did.

12          Q       And what did you conclude was the minimum  
13 staffing as of April 4?

14          A       Minimum staffing, if I recall correctly, was  
15 two officers: One in the control room and one -- well,  
16 a total of two officers.

17          Q       And after Officer Ludwick left with  
18 permission the institution on FMLA, there was still two  
19 officers there, correct?

20          A       That's correct.

21                   MR. LEVINE: Nothing further.

22                   HEARING OFFICER BROWN: Thank you.

23                   MS. SLIWA: Just a couple more.

24                   HEARING OFFICER BROWN: Yes.

25                   ///

**JA 0555**

1 REDIRECT EXAMINATION

2 BY MS. SLIWA:

3 Q As far as the minimum staffing on Unit 1 at  
4 Florence McClure on April 4th of 2015, you testified  
5 that was two officers.

6 Where would the officer positions be on the  
7 unit?

8 A That would typically be one officer on the  
9 floor and one officer in the control room.

10 Q Okay. Was it your understanding -- were you  
11 able to find during the course of your investigation  
12 that there were more than two officers assigned to Unit  
13 1 on April 4th?

14 A There was assigned more than two officers,  
15 yes. Ludwick would have been the third officer.

16 Q Do you know which -- do you know where the  
17 third officer would have been positioned, stationed?

18 A On the floor.

19 MS. SLIWA: Thank you. That's all I have.

20 HEARING OFFICER BROWN: Thank you. You are  
21 excused.

22 Do you think either of you will want to  
23 recall him?

24 MR. LEVINE: I'm not going to see a need.

25 MS. SLIWA: I don't think so.

JA 0556

1 HEARING OFFICER BROWN: Okay. You are  
2 excused for the day. Thank you for your time.

3 THE WITNESS: Thank you.

4 HEARING OFFICER BROWN: And I will simply  
5 say please do not discuss your testimony or anything  
6 else regarding the case except with your lawyer until  
7 these proceedings have concluded.

8 THE WITNESS: Yes, sir.

9 HEARING OFFICER BROWN: Thank you.

10 MS. SLIWA: Thank you. Thank you so much.

11 HEARING OFFICER BROWN: Okay, Ms. Sliwa, who  
12 would you like to call as your next witness?

13 MS. SLIWA: Our final witness will be Warden  
14 Jo Gentry.

15 HEARING OFFICER BROWN: Okay.

16 Ms. Gentry, do you swear and affirm that the  
17 testimony you're about to give is the truth, the whole  
18 truth and nothing but the truth?

19 THE WITNESS: Yes, ma'am.

20 HEARING OFFICER BROWN: Thank you kindly and  
21 you may have a seat.

22 Would you please state for the record your  
23 name and spell it.

24 THE WITNESS: Jo Gentry, J-o, G-e-n-t-r-y.

25 HEARING OFFICER BROWN: Okay. Ms. Sliwa

JA 0557

1 your witness.

2 MS. SLIWA: Thank you.

3

4 DIRECT EXAMINATION

5 BY MS. SLIWA:

6 Q Where are you employed, Warden Gentry?

7 A State of Nevada Department of Corrections at

8 Florence McClure Women's Correctional Center.

9 Q Excuse me. And what is your position there?

10 A The warden.

11 Q The warden for the entire prison?

12 A I am. And I oversee Jean Conservation Camp

13 and Casa Grande Transitional Housing as well.

14 Q Okay. Briefly what are your job duties?

15 A I oversee all three institutions to ensure

16 that the policies and procedures are being followed;

17 that if any corrective measures within those policies

18 that need to be adapted to ensure the staff had been

19 trained; any revisions to those policies overall to

20 ensure that the mission of the Department is being

21 followed, and that's why making sure all the staff are

22 following the regulations and the inmates are.

23 Q Thank you. How long have you been with the

24 Department of Corrections?

25 A 21 years.

JA 0558

1 HEARING OFFICER BROWN: And before you move  
2 forward, I'm sorry, I didn't catch clearly. You oversee  
3 the operations at the Jean facility, did you say?

4 THE WITNESS: Yes, ma'am.

5 HEARING OFFICER BROWN: Please state the  
6 full name of the facility again.

7 THE WITNESS: Jean Conservation Camp.

8 HEARING OFFICER BROWN: Okay.

9 THE WITNESS: And Casa Grande Transitional  
10 Housing.

11 MR. LEVINE: There is a pun in there because  
12 Casa Grande is big house.

13 MS. SLIWA: It means big house, yes, it  
14 does. Somebody had a sense of humor when they named  
15 that one.

16 HEARING OFFICER BROWN: Okay. Thank you.

17 MS. SLIWA: Thank you.

18 BY MS. SLIWA:

19 Q How long have you been the warden at  
20 Florence McClure?

21 A I believe July 2013 I was promoted to that  
22 position.

23 Q Okay. What -- were you at Florence McClure  
24 before you were promoted to warden?

25 A Off and on, yes.

JA 0559

1           Q       Okay. What was your immediate position  
2 before you were appointed to be the warden? If you can  
3 remember.

4           A       I can, but it's actually easier if I start  
5 from the beginning and work my way up. Can I do that?

6           Q       Briefly, please.

7           A       I was -- started out with Northern Nevada  
8 Women's Correctional Center in 1994, transferred to  
9 Southern Nevada Correctional Center and worked there as  
10 well as High Desert State Prison as a correctional  
11 officer, senior correctional officer, case worker  
12 specialist.

13                   Went to Florence McClure Women's  
14 Correctional Center in 2005 as a lieutenant. In 2007,  
15 went to Jean Conservation Camp as a camp lieutenant. In  
16 2011 went to Florence McClure Women's Correctional  
17 Center as an Associate Warden of Programs.

18                   In 2012, went to Seven Desert Correctional  
19 Center as Associate Warden of Operations. 2013 became  
20 warden of Florence McClure Women's Correctional Center.

21           Q       Wow. Thank you. On April 4th of 2015, was  
22 Brian Ludwick one of the correctional officers at  
23 Florence McClure?

24           A       Yes.

25           Q       Do you currently or have you ever had a

JA 0560

1 relationship with Mr. Ludwick outside of work?

2 A No.

3 Q Okay. At any time on or following April  
4 4th, were you made aware of an incident involving  
5 Mr. Ludwick?

6 A Yes.

7 Q What were you notified of?

8 A I believe from what I can recall on April  
9 4th, Associate Warden Ms. Hill, Tawney Hill was the  
10 administrative officer of the day. She notified me via  
11 State cell phone of an incident that had taken place.  
12 She had informed me that Officer Ludwick had  
13 left his assigned post from Unit 1, went to shift  
14 command without authorization and then had gone home  
15 after not being granted to move to another position.

16 I believe at that time she had instructed  
17 that she -- or she had informed me that she instructed  
18 the lieutenant to place the officer on absent without  
19 leave status. I believe I was the one that told her no,  
20 that is not correct, and you need to have that changed  
21 and he would be granted FMLA as requested.

22 I believe that's when she contacted -- went  
23 and contacted Lieutenant Piccinini, had that changed.

24 When I returned back to work the following  
25 workday, which would have been a Monday, I'm sure that

JA 0561

1 the incident was entered into our NOTIS informational  
2 system and that it was properly referred to the  
3 Inspector General's office for investigation.

4 And then once the investigation was  
5 completed, that's when I was notified again from the  
6 Inspector General's office that the investigation had  
7 been completed and that I was assigned to do the  
8 adjudication of that investigation.

9 Q Okay. And did you conduct that  
10 adjudication?

11 A Yes, ma'am.

12 Q When was that done approximately?

13 A I can't -- I can't recall the exact date.

14 Q Okay. Do you recall what the outcome of  
15 that adjudication was?

16 A Yes. The allegation of leaving one's  
17 assigned post without authorization was sustained.

18 Q Okay. Would that constitute neglect of  
19 duty?

20 A Yes, ma'am.

21 Q Okay. Is neglect of duty and leaving one's  
22 post without authorization, is that considered a serious  
23 infraction?

24 A Yes, ma'am.

25 Q Why is that?

JA 0562



1           A           For several reasons. When any staff member  
2 from any post leaves their assigned area, if they were  
3 to leave their assigned area, it reduces the immediate  
4 response to any incidences that would require immediate  
5 assistance from any staff members or inmates.

6                       That would include if any inmates were  
7 needing assistance if they were getting physically  
8 assaulted, sexually assaulted or if they had a medical  
9 emergency that required immediate attention.

10                      That would also include any staff members in  
11 the area that would require assistance for what we call  
12 backup as an additional responder to either deescalate a  
13 situation or to protect that officer to remove them from  
14 that area so they can control and contain that incident  
15 so that it doesn't spread throughout the institution.

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

25           Q           Okay. If you would take a look at the

JA 0563

1 packet right in front of you, the one that has Exhibit A  
2 on the front. If you would go down to Exhibit B, and  
3 that one I apologize is not tabbed.

4 Exhibit B -- if I may approach the witness.

5 HEARING OFFICER BROWN: Yes.

6 THE WITNESS: "B" as in boy?

7 BY MS. SLIWA:

8 Q "B" as in boy.

9 A I have it.

10 Q Oh, thank you. Thank you much.

11 Do you recognize this document?

12 A Yes, ma'am.

13 Q What is this?

14 A This is the adjudication report I completed  
15 and forwarded it over to the -- he was the acting  
16 director at the time, E.K. McDaniel, for review and  
17 approval.

18 Q Okay. What's the date of your adjudication  
19 report?

20 A October 13th, 2015.

21 Q Okay. And if you could -- if you could just  
22 briefly read the two sentences that are right underneath  
23 the line that goes underneath the header beginning with  
24 "The adjudication of the above."

25 A I'm sorry?

JA 0564

1 Q On the first page.

2 A On this one, Exhibit B, correct?

3 Q Exhibit B, yes. I have -- the page I'm  
4 looking at is B-3 it says on there.

5 A Thank you. Okay. Okay.

6 Q Okay. Sorry.

7 A This one?

8 Q Yes, please.

9 A This was the result of the adjudication  
10 business after I completed the adjudication and had it  
11 reviewed and approved by the Deputy Director. This is  
12 the form that was provided to Mr. Ludwick to inform him  
13 what the results of that adjudication was.

14 Q Okay.

15 A And you wanted me to read the sentence?

16 Q Yes, please.

17 A "The adjudication of the above-referenced  
18 personnel --"

19 MR. LEVINE: I'm sorry, which page are you 20 on, B-3?

21 MS. SLIWA: B-3.

22 MR. LEVINE: Okay.

23 THE WITNESS: "The adjudication of the  
24 above-referenced personnel misconduct complaint. The  
25 investigation has been completed. The misconduct

1 allegation was classified as sustained and the matter is  
2 being referred for Specificity of Charges."

3 MS. SLIWA: Thank you.

4 BY MS. SLIWA:

5 Q Did you present this to Mr. Ludwick?

6 A No.

7 Q How did Mr. Ludwick receive this document?

8 A According to this form, Lieutenant

9 Piccinini --

10 Q Okay.

11 A -- provided it.

12 Q Thank you. Thank you.

13 A And, I'm sorry, he was the acting associate  
14 warden at that time, too.

15 Q Okay. When did he become the acting  
16 associate warden if you recall?

17 A I believe it was in the beginning of October  
18 when Associate Warden Wickham received -- was promoted  
19 to warden at Warner Springs Correctional Center, and I  
20 formally put Lieutenant Piccinini as a acting position.

21 Q Okay. Thank you. Does a correctional  
22 officer leaving their post without prior authorization  
23 violate any of your administrative regulations?

24 A Yes, ma'am.

25 Q Which one?

JA 0566

1           A       AR 339.

2           Q       And what is AR 339?

3           A       It's our code of ethics, penalties,  
4 disciplinary. It's basically our rule book of what you  
5 can and cannot do on and off duty.

6           Q       Without discussing what the prescribed  
7 penalties are, would neglect of duty, leaving one's post  
8 without prior authorization, would that be considered a  
9 serious violation?

10          A       It is a serious violation.

11          Q       Why is that?

12          A       Because it puts the jeopardy of not only the  
13 entire institution but one's self in jeopardy of  
14 self-harm -- or putting themselves in a position or  
15 their staff member in a position, their coworkers or  
16 other inmates which ultimately would put the jeopardy of  
17 the security of the institution in harm's way.

18          Q       Did you make the decision to terminate Brian  
19 Ludwick?

20          A       Did I make the decision?

21          Q       Decision, yes.

22          A       No. I made the recommendation.

23          Q       Who made the ultimate decision?

24          A       The acting director at that time.

25          Q       Okay. And would that be E.K. McDaniel? **JA 0567**

1           A           Yes, ma'am.

2           Q           Where was Brian Ludwick assigned on April  
3 4th, 2015? What unit if you recall?

4           A           He was assigned to Unit 1 floor position  
5 post, floor post.

6           Q           Floor post. What -- what is a floor post?

7           A           Well, the Unit 1 floor post, their  
8 responsibilities are to maintain the safety and security  
9 within all the housing wings associated to that unit.

10                    So they are the officers that's present that  
11 does all the tours. They do cell checks to ensure that  
12 all the inmates are healthy, that they're alive, that  
13 they're breathing, that they have not had any medical  
14 emergencies, that they have not had any physical  
15 altercations, that they have not been sexually  
16 assaulted.

17                    They are the ones that are the officer  
18 presence to detour any negative behaviors that could  
19 arise within those housing wings.

20                    They have normal daily duties that they have  
21 to complete by regulations to include doing formal  
22 counts, informal counts to make sure all the inmates are  
23 present. They assist inmates with any questions they  
24 may have, provide supplies to the inmates when needed so  
25 the inmates can make sure their health or their

JA 0568

1 sanitation of their cells are clean.

2 They hand out forms when required. They do  
3 inventorying of property when an inmate is moved from  
4 that unit and placed into more secured housing. They  
5 may be required to inventory all the inmates' property.

6 They -- it's numerous, all day long normal  
7 tasks that they have to do. And then on top of that,  
8 making sure that everybody is still living and breathing  
9 and not injured in any way.

10 Q How many -- on April 4th of 2015, how  
11 many -- what was the minimum staffing number in Unit 1?

12 A It's a difficult question to answer.

13 Q Okay. Why is that?

14 A Our legislative approved post chart is what  
15 we use to create a staffing pattern. Our staffing  
16 pattern is what generates what posts are within the  
17 institution that is mandated to hold.

18 So Unit 1 has one control room post. It has  
19 to be manned by one person 24 hours a day seven days a  
20 week.

21 Unit 1 has two floor positions that  
22 legislative says that we can have -- that they'll fund  
23 two floor positions.

24 Q Okay.

25 A So when staff shift bid every year, they

JA 0569

1 shift bid to those three posts. One officer will be bid  
2 for the control room. One officer will bid for the  
3 floor, Floor A, and one officer will bid for Floor B.

4 At that time, one of the four positions --  
5 one of the two floor positions was considered a pull or  
6 shut-down position.

7 Q What's a pull or shut-down position?

8 A So a pull and shut-down position would be if  
9 another mandated area inside the institution that wasn't  
10 designated as a shut or pull down would be required.  
11 That position could be shut down and put into that  
12 position. Or if that person that had shift bidded for  
13 that floor position was on approved leave status, we can  
14 shut that down.

15 So you would have to have at least one floor  
16 officer at that time to run minimum staffing to complete  
17 normal operations, daily operations. With Unit 1 having  
18 such a significant high amount of inmates, even if an  
19 officer of the Floor B position was on approved leave  
20 status or was out on training, they were not there  
21 physically for that day, we can utilize and pull and  
22 shut down other various shut and pull-down positions  
23 throughout the institution and pull them in to work that  
24 other floor position. So you would have your two floor  
25 officers, and that's what we did on a normal basis.

JA 0570



1           So even though you say what is your minimum  
2 staffing, our minimum staffing is one floor officer. On  
3 a very normal basis we always had -- on a regular basis,  
4 we had at least two floor officer positions.

5           Q       And would that be to increase the security  
6 and safety of the unit?

7           A       Definitely. Unit 1 holds over 325 --  
8 approximately between 320 and 325 inmates, 325 inmates.  
9 It has a total of six housing wings. Two of the four  
10 housing wings are dormitory. The other four wings are  
11 two-man cells.

12          Q       Okay. Approximately how many of those  
13 housing wings housed inmates that have recently come out  
14 of segregation?

15          A       Two.

16          Q       Two of the six?

17          A       Two of the six. The remaining four houses,  
18 the inmate workers and the inmates that are programming.

19          Q       Okay. Now, we were just discussing at the  
20 time the minimum staffing amount for Unit 1 was two  
21 officers.

22                   Was that minimum staffing amount changed  
23 after April 4?

24          A       It was.

25          Q       Changed from what to what?

JA 0571

1           A           It was changed from a minimum of two  
2 floor -- or one floor officer to be on all shifts to two  
3 floor officers to be at -- on shift at all times.

4           Q           And one control officer?

5           A           And one control officer.

6           Q           Does there always need to be someone in the  
7 control room?

8           A           Always that has the access to the intercoms,  
9 the doors, the cameras, all the safety equipment so  
10 there is no inmate access to that control room.

11          Q           Okay. Why was -- why was the minimum  
12 staffing amount changed from two to three?

13          A           There was -- the increase of incidences down  
14 in Unit 1 just had skyrocketed. It was on an increase  
15 for several months, and then we had a lot of security  
16 threat group incidences. There was a lot of staff  
17 assaults -- or not staff assaults, I'm sorry, inmate  
18 assaults.

19          Q           On staff? Is that right?

20          A           Not on staff. Inmate-on-inmate assaults.  
21 There was a lot of allegations of sexual assaults,  
22 inmate-on-inmates, which was a lot of prison rape  
23 elimination allegations were being submitted for  
24 inmate-on-inmate allegations.

25                   There was a lot of inmates that because **JA 0572**

1 there wasn't enough staffing down there, they would  
2 sneak into each other's wings because they're not  
3 allowed to go into each other's wings. So without the  
4 staff present down there, they were going into each  
5 other's wings and either assaulting other inmates,  
6 stealing, sexually assaulting. A lot of drugs were  
7 being passed back and forth. Positive urinalysis  
8 testings had increased drastically within that area.

9           So for the warden, it's my responsibility to  
10 ensure that the safety measures are met for all the  
11 inmates and my staff. Particularly, I made the decision  
12 to change the minimum staffing that there would be  
13 always two floor officers on day shift and on swing  
14 shift at all times down there.

15           HEARING OFFICER BROWN: And I've got a  
16 question -- sorry to interrupt, Ms. Sliwa. I missed --  
17 I did not hear clearly what you said at the beginning.

18           You said because of the increase in the  
19 number of incidents that had occurred and then kind of  
20 skyrocketed or peaked around this time, you said there  
21 were security group --

22           THE WITNESS: They're called security threat  
23 groups.

24           HEARING OFFICER BROWN: Okay.

25           THE WITNESS: So what you would understand

JA 0573

1 it as gangs. In corrections, we call them security  
2 threat groups.

3 HEARING OFFICER BROWN: Got it. Thank you  
4 kindly. Ms. Sliwa.

5 MR. LEVINE: You say gangs?

6 THE WITNESS: Gangs.

7 MR. LEVINE: Okay. I couldn't --

8 THE WITNESS: I mean --

9 MR. LEVINE: I wasn't sure if you said  
10 gates, g-a-t-e-s or g-a-n-g-s.

11 THE WITNESS: My head is really stuffy so I  
12 apologize.

13 MS. SLIWA: Like the Sharks and the Jets in  
14 Westside Story.

15 HEARING OFFICER BROWN: So g-a-n-g-s.

16 THE WITNESS: So the public understands it  
17 as gangs.

18 MR. LEVINE: Surenos and the Nortenos.

19 HEARING OFFICER BROWN: The Crypts and the  
20 Bloods.

21 MS. SLIWA: We call them security threat  
22 groups.

23 MR. LEVINE: They're different groups in the  
24 correctional settings.

25 MS. SLIWA: Yes. Probably not Sharks and

JA 0574

1 Jets.

2 HEARING OFFICER BROWN: Yeah.

3 MR. LEVINE: J-e-t-s, Jets, Jets, Jets.

4 HEARING OFFICER BROWN: Yeah, you can tell  
5 how little we know about it. Sorry, yes.

6 THE WITNESS: No, that's okay.

7 MS. SLIWA: Thank you, Warden.

8 BY MS. SLIWA:

9 Q I believe you testified you were the one  
10 that made the termination recommendation?

11 A Yes, ma'am.

12 Q Why did you recommend termination for  
13 Mr. Ludwick?

14 A I recommended it based off of the neglect of  
15 duty in accordance with AR 339 due to the significant  
16 impact of the safety breaches that I felt that could  
17 have arose not having that staffing down there.

18 There is a reason why we need the officers  
19 down there. We need it for each other for backup, for  
20 protecting one's selves, but also our mission is to  
21 protect the inmates down there as well.

22 So although we did not have any breaches  
23 that day because he was allowed to go home, I count that  
24 as a blessing that nothing happened.

25 Q Disregarding the disciplinary

JA 0575

1 recommendations found in AR 339, even if AR 339 did not  
2 have any disciplinary recommendations at all, do you  
3 believe that Brian Ludwick's conduct warranted  
4 termination?

5 A Yes, ma'am.

6 Q Conduct on April 4th, excuse me.

7 A Yes, ma'am.

8 MS. SLIWA: Thank you. Thank you, Warden.  
9 That's all I have right now.

10

11 CROSS-EXAMINATION

12 BY MR. LEVINE:

13 Q I'm going to make this very brief, Warden.

14 Am I correct that you have not been -- have  
15 you received specific training under the Family Medical  
16 Leave Act?

17 A Can I ask a question?

18 Q You may but I'm not obligated to answer it  
19 if I don't like it.

20 A What would you consider specific training  
21 because I have had Department training regarding FMLA.

22 Q You have had Department training. That  
23 answers my question.

24 And you are aware then that you cannot deny  
25 the leave once it's been certified by a physician,

JA 0576

1 correct?

2 A I am aware that we cannot deny their leave  
3 of absence from assignment from their job.

4 Q Right. Stated another way, FMLA --  
5 intermittent FMLA is preapproval to leave, correct?

6 A It's preapproval for leave status.

7 Q Yes.

8 A It's leave status.

9 Q As needed if it's intermittent, correct?

10 A Correct.

11 Q I said I'm going to make this really quick.

12 Warden, please turn to Exhibit -- well,  
13 let's back up.

14 As somebody who has been working corrections  
15 for a very long time, you know that correctional  
16 officers are peace officers, correct?

17 A Yes, sir.

18 Q And I presume as a warden, you've had  
19 training in the Peace Officers Bill of Rights, correct?

20 A Yes.

21 Q And you know that under 289.080, we are  
22 entitled to the entire internal affairs file, correct?

23 A Yes.

24 Q Okay. I would like you to turn to Exhibit 5  
25 in my binder which I'm going to represent is the same

JA 0577

1 document that appears as B -- Exhibit B, 1, 2 and 3 and  
2 Exhibit C in the State's.

3 When I say the same document, the last three  
4 pages of Exhibit 5, three pages from the back.

5 A I should probably --

6 HEARING OFFICER BROWN: So Exhibit 5, where  
7 do you want us to go?

8 MR. LEVINE: Third from the back. The  
9 document that says "Employee Misconduct Adjudication  
10 Report," Tab 5.

11 HEARING OFFICER BROWN: Thank you. Thank  
12 you.

13 BY MR. LEVINE:

14 Q That's your signature, correct?

15 A Yes, sir.

16 Q And you signed it on October 13, 2015?

17 A Yes, sir.

18 Q And the way it works is, as Art indicated,  
19 he gives you his findings and then you take those  
20 findings and you make a decision as to if something is  
21 sustained and what should be the recommended discipline?

22 A I'm sorry, can you repeat that one more  
23 time?

24 Q The process is after Art Emling gives you  
25 his investigation findings, without drawing conclusions.

JA 0578



1 you draw conclusions or make decisions as to whether or  
2 not it's going to be sustained and what the recommended  
3 discipline should be, correct?

4 A That's correct.

5 Q I would like you to go to Page 2 of 3 and  
6 read into the record your corrective disciplinary action  
7 recommendation.

8 MS. SLIWA: At the bottom of the page?

9 MR. LEVINE: Yes.

10 BY MR. LEVINE:

11 Q Please read it into the record.

12 A "It is recommended that Brian Ludwick  
13 receive Specificity of Charges consisting of one  
14 five-day suspension from State service in lieu of the  
15 Class 5 dismissal of State service since there is no  
16 security breach resulting from him leaving his post."

17 Q And if we go to the next page, Deputy  
18 Director concurrence, please read that into the record.

19 A "E.K. McDaniel has reviewed this  
20 adjudication and agrees with the recommendations  
21 contained."

22 Q And then read into the record "Employee  
23 Notification."

24 A "On October 21st, 2015 Officer --  
25 Correctional Officer Ludwick met with acting Associate

JA 0579

1 Warden Piccinini and notified him concerning the outcome  
2 of the investigation. Correctional Officer Ludwick was  
3 provided a copy of the result of adjudication report."

4 Q Now, if we go to Exhibit -- State's exhibit,  
5 Exhibit B, can you turn to the 10-21 -- there is a  
6 document that's entitled "To Brian Ludwick from Jo E.  
7 Gentry" dated 10-21-2015.

8 HEARING OFFICER BROWN: Just one moment,  
9 please. Exhibit B.

10 MR. LEVINE: The first page.

11 HEARING OFFICER BROWN: B-3.

12 MS. SLIWA: It's marked B-3.

13 HEARING OFFICER BROWN: Yes, thank you.

14 MR. LEVINE: B-3.

15 BY MR. LEVINE:

16 Q This is the -- this is the memorialization  
17 of Lieutenant Piccinini's meeting with Brian Ludwick to  
18 receive the document we just reviewed which is the --  
19 your adjudication report, correct?

20 A Yes, sir.

21 Q And you refused to sign for it?

22 A That's what the document says.

23 Q And that was one week after you issued your  
24 adjudication report for a five-day suspension, correct?

25 A What do you mean by "issued"? You mean

JA 0580

1 recommended?

2 Q Signed your name to a document saying "I  
3 think he should get a five-day"?

4 A Yes, it was my recommendation for that.

5 Q Okay. And there was no further  
6 investigation or no new investigation opened after he is  
7 served the adjudication of complaint, correct? That's  
8 the end of the process.

9 MS. SLIWA: Is that a question?

10 MR. LEVINE: Yes.

11 THE WITNESS: It's not the end of the  
12 process.

13 BY MR. LEVINE:

14 Q Well, he's supposed to get an MPD 41,  
15 correct?

16 A I don't know what an MPD -- I would have to  
17 look at the form.

18 Q That's the Specificity of Charges.

19 A Correct.

20 Q So you heard Officer Ludwick's testimony  
21 that he continued to work until December when he was put  
22 out on leave?

23 A Correct.

24 Q So in October, you finish your adjudication,  
25 and it's a five-day. And then he gets terminated in

JA 0581

1 December or January without any new investigation?

2 A Correct.

3 Q So how -- why is it that since we're  
4 entitled to the entire internal affairs investigation  
5 pursuant to NRS 289.080, Sub 8 that the only  
6 adjudication that we've been provided is for a five-day  
7 suspension saying there is no security breach?

8 Why is that?

9 A After the adjudication process was  
10 completed, it was forwarded over to the Human Resources  
11 Department. They completed the Specificity of Charges.  
12 That was reviewed by myself and the Deputy Director or  
13 the acting director, went to the Attorney General's  
14 office for their review.

15 They reviewed it and determined that it  
16 should have been the Class 5 in regards to the AR 339.  
17 The Specificity of Charges was -- I'm sorry. It was not  
18 sent over to the Attorney General's office at that time.

19 The Human Resource Department had reviewed  
20 it, and they determined that it should have been the  
21 Class 5. That was what was represented into the  
22 Specificity of Charges then. That was forwarded over to  
23 the Attorney General's office.

24 Q So stated another way, my client was served  
25 with the Specificity of Charges recommending a

JA 0582

1 discipline different than what you recommended and had  
2 served on him on October 21, 2015?

3 A My recommendations was a recommendation. It  
4 was not a decision. I did not have the authority. It  
5 was a recommendation.

6 Q Does Human Resources make the decision or do  
7 you as the warden?

8 A Human Resources reviewed it. They informed  
9 the Director at the time. The Director had made the  
10 change and they informed me of it.

11 Q The, Director, though was E.K. McDaniel who  
12 according to the document you signed on October 13  
13 agreed with you it should be five days?

14 A On that form, yes. And then when it was  
15 forwarded over to Human Resources for the Specificity of  
16 Charges, it was reviewed within accordance with the 339.  
17 They had said it should be this. It was referred back  
18 to the Director and spoken with the Attorney General's  
19 office and then the Specificity of Charges.

20 Q So if I understand what happened correctly  
21 here, based upon somebody's belief that AR 339 is what  
22 governs as opposed to the progressive discipline under  
23 Chapter 284 of the Personnel Commission, your  
24 recommendation for five days was changed to termination?

25 A What they informed me was that the reason

JA 0583

1     why it was changed to that is to make it consistent  
2     within the Department.  Prior cases that had employees  
3     that did not have authorization of leaving post received  
4     that penalty.

5           Q       I don't know if I asked this earlier:  Does  
6     your Department have a recommend -- or did your  
7     Department have a regulation or an established written  
8     procedure as to how somebody is to go about taking or  
9     notifying somebody in the Department that they're taking  
10    their preapproved family medical leave?

11          A       I'm sorry, one more time.

12          Q       Is there a written procedure that officers  
13    are given that tells them if you have to take your  
14    preapproved family medical leave, this is what you must  
15    do?

16          A       It may be in -- is it 301, within our 300  
17    series of our leave.

18          Q       May?

19          A       I'm not positive.  I don't have it in front  
20    of me.  You asked me.  It may be in that.

21          Q       So the short answer is you don't really  
22    know?

23          A       I know there is a section within that AR  
24    that governs FMLA.

25          Q       Right, but you don't know whether it says

JA 0584

1     you must get permission to leave your post to get  
2     permission to take your FMLA or whether or not you just  
3     have to tell somebody you're taking FMLA, right?

4           A        I would have to review the policy.

5           MR. LEVINE: I have no further questions.

6           HEARING OFFICER BROWN: Thank you.

7           MS. SLIWA: Yes, thank you.

8

9                       REDIRECT EXAMINATION

10    BY MS. SLIWA:

11           Q        Your initial recommendation in a case such  
12    as this, is that binding?

13           A        No.

14           Q        Is it a process -- is the -- is the final  
15    determination of discipline a process that is -- that  
16    has several different entities operating within it?

17           A        Yes.

18           Q        While you are the warden of Florence  
19    McClure, you are not -- are you the final word in  
20    disciplinary actions? Do you make all those decisions?

21           A        No.

22           Q        It does say initially that that E.K.  
23    McDaniel did -- did approve or concur with your  
24    recommendation.

25                    Did that -- to your knowledge, did that

JA 0585

1 opinion change?

2 MR. LEVINE: Hold on a second. I'm going  
3 to -- the question calls for hearsay, particularly since  
4 E.K. McDaniel, I don't believe, is even around anymore  
5 and is not going to be here to testify himself.

6 I don't believe that's -- while you may take  
7 hearsay, I don't think you should under these  
8 circumstances.

9 HEARING OFFICER BROWN: And your question  
10 again was?

11 MS. SLIWA: My question is to her knowledge  
12 did E.K. McDaniel's recommendation or opinion change?

13 HEARING OFFICER BROWN: Okay. I don't think  
14 she can testify to that unless she can testify as to  
15 some conversation that he had with her about it, but  
16 just in her opinion, that's a little bit -- that's  
17 stretching it.

18 I'm going to have to sustain the objection.  
19 If you want to rephrase, you can feel free to do so.

20 MS. SLIWA: Thank you.

21 BY MS. SLIWA:

22 Q Did you have any conversations with E.K.  
23 McDaniel on the subject?

24 A Yes.

25 Q Do you remember when those were?

JA 0586



1           A           After Human Resources contacted me stating  
2           that the penalty would require to be changed.

3           Q           What was the substance of that conversation  
4           that you had with him?

5                       MR. LEVINE:   Okay.   Anything that E.K.  
6           McDaniel would have said on the subject is going to be  
7           hearsay.   They should have E.K. McDaniel here for this,  
8           not through this witness.

9                       HEARING OFFICER BROWN:   I understand, but  
10          the rules of evidence are relaxed here, and I'm going to  
11          overrule the objection and let her testify as to what  
12          E.K. McDaniel said to her.

13                      MS. SLIWA:   The conversation she had.

14                      HEARING OFFICER BROWN:   The conversation she  
15          had with Mr. McDaniel.

16          BY MS. SLIWA:

17          Q           What was the substance of your conversation  
18          with Mr. McDaniel?

19          A           We discussed what Human Resources informed  
20          us, and he stated that we will follow with what Human  
21          Resources has indicated based on the fact that it would  
22          be consistent with what past incidences or penalties  
23          were in the past for the Department.   And I said yes,  
24          sir.

25          Q           Was E.K. McDaniel your boss at the time?

JA 0587

1           A       Yes.

2           Q       Did E.K. McDaniel have the final word as to  
3 what disciplinary -- disciplinary actions would be  
4 levied?

5           A       Yes.

6                   MS. SLIWA:  Okay.  That's all I have.  Thank  
7 you.

8                   MR. LEVINE:  I've got nothing further.

9                   HEARING OFFICER BROWN:  Okay.  Thank you.  I  
10 appreciate your time.  You may take your seat at the  
11 witness table, and as I've said to the other witnesses,  
12 please do not discuss your testimony until after the  
13 conclusion of the case.

14                  MS. SLIWA:  And that, your Honor, was our  
15 last witness.

16                  HEARING OFFICER BROWN:  Okay, Ms. Sliwa, do  
17 you want to now rest your case --

18                  MS. SLIWA:  Yes.

19                  HEARING OFFICER BROWN:  -- on behalf of the  
20 Department of Corrections?

21                  MS. SLIWA:  Yes.

22                  HEARING OFFICER BROWN:  All right.

23                  MR. LEVINE:  Like a 10-minute comfort break  
24 and then I'm going to put on a number of witnesses in  
25 rapid fire form.

**JA 0588**

1 HEARING OFFICER BROWN: Sounds good to me so  
2 we will come back in at 1:25. Thank you.

3 (Recess)

4 HEARING OFFICER BROWN: Would you please  
5 stand and be sworn in. Raise your right hand.

6 Do you swear or affirm that the testimony  
7 you're about to give will be the truth, the whole truth  
8 and nothing but the truth?

9 THE WITNESS: Yes, ma'am.

10 HEARING OFFICER BROWN: Thank you kindly.  
11 You may have a seat.

12 Would you please state your name for the  
13 record and spell it.

14 THE WITNESS: Ernest Van Kline, E-r-n-e-s-t,  
15 V-a-n K-l-i-n-e.

16 HEARING OFFICER BROWN: Okay. Your witness.

17 MR. LEVINE: No. My witness.

18 HEARING OFFICER BROWN: I'm sorry, your  
19 witness.

20 MS. SLIWA: Your witness, yes.

21 HEARING OFFICER BROWN: My apologies.

22

23 DIRECT EXAMINATION

24 BY MR. LEVINE:

25 Q Officer Van Kline, where -- as of today's

JA 0589

1 date, where are you employed?

2 A I'm employed at North Las Vegas Detention  
3 Center.

4 Q Okay. For it to be technically, is it the  
5 City of Las Vegas Detention Center and the wings that  
6 are rented by North Las Vegas?

7 A That is correct, sir.

8 Q Okay. How long have you been a correctional  
9 officer in general?

10 A Approximately nine years.

11 Q And how long have you been with North Las  
12 Vegas?

13 A I've been with North Las Vegas since August  
14 of last year.

15 Q August 2015?

16 A That's correct.

17 Q Prior to August 2015, where were you  
18 employed?

19 A Florence McClure Women's Correctional  
20 Center.

21 Q In what capacity?

22 A As a correction officer.

23 Q And how long were you at Florence McClure?

24 A Three years.

25 Q So from 2012 to August 2015?

**JA 0590**

1           A           That is correct.

2           Q           Can you please tell the Hearing Officer what  
3           was the custom and practice at Florence McClure Women's  
4           Correctional Center in 2015 with regard to when an  
5           officer could leave his unit to go to shift command?

6           A           Well, the only thing I know is whenever I  
7           needed to go to shift command, I went to shift command.

8           Q           Did you have to get advanced permission?

9           A           Not that I'm aware of.

10          Q           So were there instances where you left your  
11          unit to go talk to the shift commander in the shift  
12          commander's office without having to call on the radio  
13          or the cell phone first?

14          A           That is correct.

15          Q           Did you ever get in trouble for that?

16          A           I did not.

17          Q           Did anyone ever tell you you can't do that?

18          A           Well, there is a policy that you're not  
19          supposed to leave your post without supervisor  
20          permission.

21          Q           Was that policy customarily enforced or  
22          followed in your experience?

23          A           Not in my experience, no.

24                   MR. LEVINE:  Nothing further.

25                   HEARING OFFICER BROWN:  Thank you.

**JA 0591**

1 Ms. Sliwa.

2 MS. SLIWA: No questions, thank you.

3 HEARING OFFICER BROWN: Okay. Anything  
4 further for this witness?

5 MR. LEVINE: Nope. Would you send in -- is  
6 it -- what's her first name, Glenda?

7 THE PETITIONER: Glenda.

8 MR. LEVINE: Would you please send in  
9 Glenda?

10 HEARING OFFICER BROWN: Okay. Thank you,  
11 Mr. Van Kline.

12 THE WITNESS: Yes, ma'am.

13 HEARING OFFICER BROWN: We appreciate it. I  
14 would ask that you please not discuss your testimony or  
15 anything about the case with anyone other than the  
16 attorney until the case is concluded.

17 THE WITNESS: Okay. Am I free to go go  
18 or --

19 MR. LEVINE: Yes.

20 HEARING OFFICER BROWN: You are free to go  
21 go.

22 MS. SLIWA: Wake me up before you do.

23 HEARING OFFICER BROWN: Thank you for your  
24 time.

25 MR. LEVINE: I think I overestimated how

JA 0592

1 long you were going to be on the stand by about a factor  
2 of 12 minutes.

3 HEARING OFFICER BROWN: And that made up for  
4 the --

5 MR. LEVINE: Right.

6 HEARING OFFICER BROWN: -- the time, yes.  
7 Very good. Thank you.

8 And the next witness will be?

9 MR. LEVINE: Glenda Stewart.

10 HEARING OFFICER BROWN: Would you remain  
11 standing please and raise your right hand.

12 Do you swear or affirm that the testimony  
13 you're about to give will be the truth, the whole truth  
14 and nothing but the truth?

15 THE WITNESS: Yes, I do.

16 HEARING OFFICER BROWN: You may have a seat.

17 And would you please state clearly for the  
18 record your name and then spell it for us.

19 THE WITNESS: Okay. Glenda Stewart,  
20 G-l-e-n-d-a, S-t-e-w-a-r-t.

21 HEARING OFFICER BROWN: Thank you. Your  
22 witness.

23 ///

24 ///

25 ///

JA 0593

1 DIRECT EXAMINATION

2 BY MR. LEVINE:

3 Q Ms. Stewart, where are you currently  
4 employed or I should say Officer Stewart?

5 A With the Department of Corrections at  
6 Florence McClure.

7 Q And how long have you been a correctional  
8 officer?

9 A Almost four and a half years.

10 Q Has the entire four and a half years been at  
11 Florence McClure?

12 A No, it hasn't.

13 Q Where else did you serve?

14 A I worked at JCC prior to working at Women's.

15 Q And JCC would be -- I presume Jean  
16 Conservation Camp?

17 A Yes, I'm sorry.

18 Q Okay. I was thinking junior college --

19 HEARING OFFICER BROWN: Or Jewish Community  
20 Center.

21 MR. LEVINE: Yeah, Jewish Community Center,  
22 maybe even better. They really put you on lockdown  
23 there.

24 BY MR. LEVINE:

25 Q How long have you been at Florence McClure?

JA 0594



1           A       All of four months. So I have spent four  
2 months at JCC and --

3           Q       Okay.

4           A       And then the rest of my time at --

5           Q       So basically for approximately four years?

6           A       Yeah.

7           Q       The four years would be from then  
8 approximately 2012 to 2016?

9           A       Yes.

10          Q       Can you tell the Hearing Officer what the  
11 custom and practice has been in your observation and  
12 experience with regard to going to the shift command  
13 office and whether you need permission?

14          A       You just go. You just don't really -- I  
15 mean if you need to go, I mean most times you would call  
16 and ask, okay, is there somebody there, make sure  
17 someone is there and you just go.

18          Q       Okay. Have there been times where you -- or  
19 officers that you're aware of go without calling in  
20 advance?

21          A       Oh, yes.

22          Q       Okay.

23          A       Definitely.

24          Q       Are you aware -- other than Brian Ludwick,  
25 are you aware of anybody ever being disciplined over

JA 0595

1     that?

2             A           No, not to my knowledge.

3                   MS. SLIWA:  Objection.  Disciplinary action  
4     is confidential.

5                   MR. LEVINE:  No, it is not.  In fact, one of  
6     the -- well, I don't want to be responding before I have  
7     permission from the Hearing Officer.

8                   HEARING OFFICER BROWN:  Yes.

9                   MR. LEVINE:  One of the elements of just  
10    cause is whether the rules applied in a  
11    nondiscriminatory and even-handed factor.  That is one  
12    of the legitimate concerns that a Hearing Officer may  
13    look at in deciding whether there is or is not just  
14    cause to take for a demotion, suspension or dismissal.

15                  MS. SLIWA:  That doesn't address the fact  
16    that what happened to another employee -- that employees  
17    that were not involved in that particular incident  
18    aren't privy to the disciplinary action.

19                  MR. LEVINE:  I asked her if she was aware of  
20    it I think.

21                  HEARING OFFICER BROWN:  Well, why don't  
22    you -- to be clear, why don't you rephrase the question.

23                  MR. LEVINE:  Okay.

24                  MS. SLIWA:  Thank you.

25                  HEARING OFFICER BROWN:  Because I agree with

JA 0596

1     what you're saying.

2     BY MR. LEVINE:

3           Q       Are you aware of any other employees who  
4     have been disciplined for going to shift command without  
5     calling and getting permission first?

6           A       Not to my knowledge, no.

7           Q       Have you done it?

8           A       Yes.

9           Q       Did you get into trouble for it?

10          A       No.

11          Q       Did anybody ever tell you you're not  
12     supposed to do that?

13          A       No.

14                   MR. LEVINE:  I'll pass the witness.

15                   MS. SLIWA:  Thank you.

16

17                               CROSS-EXAMINATION

18     BY MS. SLIWA:

19           Q       Officer Stewart, do you have any type of  
20     relationship with Brian Ludwick outside of the working  
21     relationship you had when he was at Florence McClure?

22          A       No.  I didn't really have -- I've never  
23     worked with him either in the building.

24          Q       Okay.  You haven't hung out with him after  
25     work or --

**JA 0597**

1           A       No.

2           Q       Okay.  You mentioned that you yourself had  
3 left your post without authorization.

4                   When did you do that?

5           A       I have done it working in Unit 1 to report,  
6 write reports or whatever I needed help.  There is  
7 several incidences that I've done that.  Trans office  
8 back and forth.  So it's not that big of a deal.

9           Q       Are you familiar with the Department's  
10 administrative regulations?

11          A       Yes.

12          Q       Are you familiar with AR 339 which I believe  
13 is entitled "Code of Ethics"?

14          A       Yes.

15          Q       Are you aware that -- well, actually, we can  
16 take a look at that.

17                   If you look at the packet that is marked  
18 Exhibit A, please.  And it is in Exhibit A itself, and  
19 if you go down to -- it will be marked in the bottom  
20 right-hand corner.  Let me find it.

21                   Actually, keep going down there.  It looks  
22 like it is A --

23                   MR. LEVINE:  42?

24                   MS. SLIWA:  It is 42.  I was looking for  
25 the -- trying to find the beginning of the -- okay.

JA 0598

1     Actually A-42, that is correct, thank you.

2                   HEARING OFFICER BROWN:   Is A-28 a beginning?

3                   MS. SLIWA:   I believe it is.   It is.   A-28  
4     is the beginning.

5     BY MS. SLIWA:

6           Q       Can you look at A-28 for me, please.

7           A       Okay.

8           Q       Do you recognize this document?

9           A       Yes.

10          Q       Okay.   Would this be AR 339 that we were  
11     just discussing?

12          A       Yes, it is.

13          Q       And if you turn to what is Page A-40.   If  
14     you look down, you see the number 15 near the top?

15          A       Yes.

16          Q       What is the heading for 15?

17          A       "Neglect of Duty."

18          Q       Okay.   And if you turn to Page A-42, please.

19          A       Okay.

20          Q       And you go down to Item UU, U like uniform?

21          A       Yes.

22          Q       Can you read what it says after UU period?

23          A       "Leaving an assigned post while on duty  
24     without authorization of a supervisor."

25          Q       Okay.   Thank you.   So leaving an assigned

JA 0599

1 post without authorization of a supervisor would be a  
2 violation; is that right?

3 A Yes.

4 Q Okay. And when you say -- when you say it  
5 was no big deal, what do you base that on?

6 A The fact that everybody has done it.  
7 Everyone that I've worked with, every -- that's the  
8 mentality of the officers. They leave Unit 4 to go to  
9 Unit 5. They leave culinary to go to shift command.  
10 They leave Unit 5 to go to culinary.

11 Q Have you discussed this issue with everyone  
12 that you are referencing to know for certain that they  
13 did not receive authorization?

14 A Yes. I've called on it actually several  
15 times.

16 Q When you say called on it, what does that  
17 mean?

18 A I reported it to shift command because I  
19 needed that officer back in the unit.

20 Q So you reported an officer leaving their  
21 post without authorization?

22 A I've reported the officer leaving and not  
23 coming back and I needed them back. I had shift command  
24 call that officer in the unit to get her back.

25 Q I'll ask again. So you did -- you have

JA 0600

1 reported in the past an officer leaving their post  
2 without authorization?

3 A Yes.

4 MS. SLIWA: That's all I have. Thank you.

5

6 CROSS-EXAMINATION

7 BY MR. LEVINE:

8 Q Is that officer still employed there?

9 A Yes.

10 MR. LEVINE: Nothing further.

11 HEARING OFFICER BROWN: Okay. Thank you so  
12 kindly for your time. I ask that you please not discuss  
13 your testimony or anything regarding today's hearing  
14 with anyone except the attorney until these proceedings  
15 have fully concluded.

16 THE WITNESS: Okay.

17 HEARING OFFICER BROWN: Thank you. Have a  
18 great weekend.

19 THE WITNESS: Thanks.

20 MR. LEVINE: Can you send in Joel?

21 Take the witness stand, yes, thank you.

22 HEARING OFFICER BROWN: Hello. Would you  
23 please remain standing.

24 Good afternoon. Are you Mr. Tynning?

25 THE WITNESS: I am.

JA 0601

1                   HEARING OFFICER BROWN: Wonderful. Would  
2 you please raise your right hand.

3                   Do you swear or affirm that the testimony  
4 you're about to give will be the truth, the whole truth  
5 and nothing but the truth?

6                   THE WITNESS: I do.

7                   HEARING OFFICER BROWN: Thank you kindly.  
8 You may have a seat.

9                   Would you please state your name for the  
10 record and spell it for us.

11                  THE WITNESS: Sure. It's Joel Tynning,  
12 J-o-e-l T-y-n-i-n-g.

13                  HEARING OFFICER BROWN: Just one "N"?

14 THE WITNESS: One "N" before and after the 15 "I."

15                  HEARING OFFICER BROWN: Okay. Before and  
16 after the "I"?

17                  THE WITNESS: Yes.

18                  HEARING OFFICER BROWN: Thank you kindly.  
19 Okay, Mr. Levine.

20

21

22                                 DIRECT EXAMINATION

23 BY MR. LEVINE:

24           Q           Officer Tynning, where are you currently  
25 employed?



1           A       Florence McClure Women's Correctional  
2 Center.

3           Q       How long have you been employed with NDOC in  
4 the entirety of your careers?

5           A       Just over 15 years.

6           Q       15 years. How many years at Florence  
7 McClure?

8           A       A little over eight.

9           Q       The last eight years which would be going  
10 back to 2008?

11          A       February 2008, correct.

12          Q       And could you please tell the Hearing  
13 Officer based on your eight years of experience at  
14 Florence McClure what is the custom and practice with  
15 regard to officers going to shift command without  
16 receiving prior authorization?

17          A       They're not supposed to do it.

18          Q       Not supposed to, but what is the custom and  
19 practice?

20          A       They do.

21          Q       Okay. Is it a rule that has been enforced  
22 in the past -- in your experience, is it a rule that is  
23 enforced?

24          A       Sporadically.

25          Q       Okay. And what are the factors based upon

JA 0603

1 your observations as to its sporadic enforcement?

2 A It seems to be certain people get away with  
3 it and certain people don't.

4 Q Okay. And based on your perception, who is  
5 it who's allowed to do so? What is the factors that  
6 you're able to observe that determines whether somebody  
7 is going to say something to you or not about it?

8 A It seems to me people that that are a little  
9 more buddy buddy with the shift managers than those that  
10 aren't.

11 Q And in the course of working there at  
12 Florence McClure, did you have an opportunity to observe  
13 the interactions sort of when they would talk between  
14 Lieutenant Piccinini and Officer Ludwick?

15 A On occasion, yes.

16 Q And did they appear to be buddy buddy?

17 A Absolutely not.

18 Q What did they appear to be?

19 A It was more of a -- what's a good word to  
20 use? Unkind.

21 Q It was an animosity?

22 A Animosity. That would be a perfect word.

23 MR. LEVINE: I will pass the witness.

24 MS. SLIWA: Thank you. 25 ///

1 CROSS-EXAMINATION

2 BY MS. SLIWA:

3 Q Officer Tynning, you stated in your testimony  
4 just a few moments ago that an officer is not supposed  
5 to leave their post without authorization. Is that  
6 correct?

7 A Yes, ma'am.

8 Q Okay. Are there any regulations or policies  
9 that prohibits the leaving of the post without  
10 authorization?

11 MR. LEVINE: I will stipulate to what AR 339  
12 UU states.

13 HEARING OFFICER BROWN: Thank you kindly.

14 MS. SLIWA: Okay. Fair enough. Thank you,  
15 Mr. Levine. Much appreciated.

16 MR. LEVINE: It's not the text that's at  
17 issue.

18 THE WITNESS: I'll go with a "yes."

19 MS. SLIWA: Thank you. Thank you.

20 BY MS. SLIWA:

21 Q Now, you had testified that -- that it  
22 appeared to you that -- that the enforcement of any  
23 penalty for that act might be somewhat selective; is  
24 that fair?

25 A Yes, ma'am.

JA 0605

1 Q Okay. Are you privy to the  
2 administrative -- the administration's decision --  
3 disciplinary decisions on other officers?

4 A No, ma'am.

5 Q Okay. Thank you. Do you -- do you now or  
6 have you ever had a relationship outside of work with  
7 Mr. Ludwick?

8 A No, ma'am.

9 MS. SLIWA: That is all I have, thank you.

10

11 REDIRECT EXAMINATION

12 BY MR. LEVINE:

13 Q Let me just follow up.

14 When you say you're not privy to  
15 administration's disciplinary decisions, when an officer  
16 gets days on the beach, you're going to find out about  
17 it, aren't you?

18 A Through the grapevine, yes.

19 Q And -- right, and the fact that they're not  
20 there at work?

21 A Correct.

22 Q When somebody gets a reprimand, people talk  
23 about it, don't they?

24 A They do.

25 Q So -- and if somebody gets terminated, you

JA 0606

1 know because they're not at work anymore and other  
2 people have to cover their shifts, correct?

3 A Correct.

4 Q Do you know anybody who has ever been  
5 terminated for not calling first before they walk from a  
6 unit to the shift commander's office for a legitimate  
7 reason?

8 A I am not aware of that.

9 MR. LEVINE: Nothing further.

10 MS. SLIWA: Just a few follow-up.

11

12 RECROSS-EXAMINATION

13 BY MS. SLIWA:

14 Q You said you're not aware of that?

15 A Yes, ma'am.

16 Q Are you aware of -- would there be any  
17 reason other than days on the beach, as Mr. Levine put  
18 it, I believe we're talking about a suspension, that an  
19 officer wouldn't be working that day? Are there any  
20 other reasons for that?

21 A There could be, yes.

22 Q What would those be?

23 A Sick leave, annual leave, any kind of leave.

24 Q Okay. Okay. And every time someone leaves  
25 the institution and is no longer employed there, in your

JA 0607

1 experience, is termination the only reason that they are  
2 no longer employed?

3 A No, ma'am.

4 Q People leave for other reasons?

5 A Yes, ma'am.

6 MR. LEVINE: I'll stipulate the pay sucks.

7 MS. SLIWA: That's the State for you. I'll  
8 stipulate to that.

9 Thank you. That's all I have, Officer  
10 Tyning, thank you very much.

11 MR. LEVINE: I've got nothing further.

12 HEARING OFFICER BROWN: All right. Thank  
13 you very much, Officer Tyning. You are dismissed, and I  
14 would ask that you please not discuss your testimony  
15 today or anything regarding these proceedings with  
16 anyone other than the lawyer until the matter has fully  
17 concluded.

18 THE WITNESS: Yes, ma'am.

19 HEARING OFFICER BROWN: Thank you kindly and  
20 have a great weekend.

21 THE WITNESS: Thank you.

22 MS. SLIWA: You got a telephonic witness?

23 MR. LEVINE: Well, I was going -- I was  
24 going to make -- you don't have to set the proffer, but  
25 I was going to call Pinapfel and Will Rubart who are

JA 0608

1 going to be testifying to the exact same thing.

2 MS. SLIWA: I think we've heard three  
3 witnesses who testified to that, and as far as a  
4 proffer, I don't know that I'm able to agree that that  
5 is what they were going to say, and I, of course, cannot  
6 dictate how long you present your case.

7 MR. LEVINE: Then I'm going -- I would try  
8 to take a break. I would like to get my cell phone out  
9 of the car which is charging to call Will to see if he's  
10 done at the range.

11 HEARING OFFICER BROWN: Okay.

12 MR. LEVINE: And then from inside here, why  
13 don't we try to call Pinapfel directly because I have  
14 her number.

15 HEARING OFFICER BROWN: Certainly.

16 MR. LEVINE: See if we can get ahold of her.

17 HEARING OFFICER BROWN: Okay. Let's see.

18 MR. LEVINE: See how this works.

19 HEARING OFFICER BROWN: And if we need some  
20 assistance, I can get one of the assistants to come in.  
21 I'm not familiar with --

22 MR. LEVINE: I'm not sure --

23 HEARING OFFICER BROWN: Let's do that  
24 because I'm not certain if you dial --

25 MR. LEVINE: Are you saying you don't

JA 0609

1 want --

2 HEARING OFFICER BROWN: I don't know if it's  
3 a dedicated line.

4 MR. LEVINE: -- me to push buttons at random  
5 and see what happens?

6 HEARING OFFICER BROWN: Exactly. Have some  
7 beach time.

8 MR. LEVINE: All right. While you're doing  
9 that, I'm going to go down to my car and retrieve my  
10 cell phone.

11 HEARING OFFICER BROWN: Certainly. We will  
12 take a five-minute break and we'll reconvene at 2:00  
13 o'clock. Does that give you enough time?

14 MR. LEVINE: Yes.

15 MS. SLIWA: Thank you.

16 (Recess)

17 HEARING OFFICER BROWN: We're now back on  
18 the record in the case of Brian Ludwick versus the  
19 Nevada Department of Corrections.

20 And Mr. Levine is trying to get his next  
21 witness on the line.

22 OPERATOR: Please leave your message for 702 23 328-  
0462.

24 MR. LEVINE: Dana, Adam Levine for Brian  
25 Ludwick. Can you call me if you get this message

JA 0610



1 relatively soon. Can you call me on my cell phone 702  
2 808-1766 because we're in hearing.

3 I have the ringer off, but I will see that  
4 you are calling, and then I could try to recall you to  
5 give telephonic testimony. Thank you.

6 All right. She's not available.

7 HEARING OFFICER BROWN: Okay.

8 MR. LEVINE: So what I would like to do is  
9 have another quick five-minute break, and what I will do  
10 in the interim is since Will Rubart is also unavailable  
11 since he's qualifying at the range for NDOC, I may just  
12 put Brian back on for two or three minutes. And then if  
13 we can't get ahold of either of them, I think I've got  
14 enough anyway on the record.

15 HEARING OFFICER BROWN: Okay, very good.  
16 Thank you. We will take a recess for five minutes and  
17 we will reconvene at 10 minutes after 2:00.

18 (Recess)

19 HEARING OFFICER BROWN: Okay. Mr. Ludwick,  
20 I will swear you in again just because it's best to do  
21 that.

22 Would you please raise your right hand.

23 Do you solemnly swear or affirm that the  
24 testimony you're about to give is the truth, the whole  
25 truth and nothing but the truth?

JA 0611

1 THE PETITIONER: Yes.

2 HEARING OFFICER BROWN: Thank you kindly.

3 You may have a seat.

4 Your witness, Mr. Levine.

5

6 DIRECT EXAMINATION

7 BY MR. LEVINE:

8 Q Officer Ludwick, did you believe you always  
9 had authorization to go from Unit 1 to shift command to  
10 speak with your supervising officer?

11 A Yes.

12 Q Why?

13 A Because my post is considered -- well, my  
14 supervisor is my supervisor, and I need to speak to him.  
15 That's what I consider my post. I didn't believe that I  
16 needed authorization to speak to my supervisor.

17 Q Okay. So in other words, stated another  
18 way, did you believe that shift command could be  
19 construed as part of your post on any given day if you  
20 needed to speak with your supervisor?

21 A Yes.

22 Q When you looked -- I know you never had a  
23 chance to read, you said by your own testimony; you just  
24 signed and moved on when you were given AR 339, but when  
25 you look at Subsection 15, you leaving an assigned post

JA 0612

1 while on duty without authorization of the supervision,  
2 did you believe that going to talk to your supervising  
3 officer violated that rule?

4 A No.

5 Q Had anybody told you previously that going  
6 to talk to your supervisor about a matter which affected  
7 your health or the security of the institution or any  
8 other matter would violate that rule?

9 A No.

10 MR. LEVINE: Nothing further.

11 MS. SLIWA: I don't have anything further.

12 HEARING OFFICER BROWN: Okay. Thank you.  
13 You are excused, Mr. Ludwick.

14 MR. LEVINE: So I think we can probably  
15 unless that prompted a need for a rebuttal witness, I --

16 MS. SLIWA: I don't believe so, no.

17 MR. LEVINE: We can probably just move to  
18 close.

19 HEARING OFFICER BROWN: Okay. Very good.  
20 So we will then move to closing arguments.

21 Would you all like to take five minutes or  
22 so to review your notes or otherwise prepare or do you  
23 want to jump right in?

24 MS. SLIWA: I'm ready.

25 MR. LEVINE: I'm ready.

JA 0613

1                   HEARING OFFICER BROWN:  You're ready.  All  
2  right.  Then, Ms. Sliwa, the floor is yours for closing  
3  arguments.

4                   MS. SLIWA:  Thank you, your Honor.

5                   MR. LEVINE:  Oh, wait, I'm getting a call.  
6  It could be one of my witnesses.

7                   HEARING OFFICER BROWN:  Well, let's hold the  
8  horses.

9                   MS. SLIWA:  Horses held.

10                  MR. LEVINE:  This is Adam.

11                  MS. PINAPFEL:  Hey, this is Dana.

12                  MR. LEVINE:  Hey, are you available for  
13  telephonic testimony?

14                  MS. PINAPFEL:  When?

15                  MR. LEVINE:  Right now, if I were to just  
16  call you right now.  We're in a hearing for Brian.  
17  Would you be available to testify right now for five  
18  minutes?

19                  MS. PINAPFEL:  I am.

20                  MR. LEVINE:  All right.  I'm going to call  
21  you right back on the official recorded -- the official  
22  line in the hearing office.  All right.  So 328-0462.

23                  When the phone rings, please answer it,  
24  okay.  It will be coming from us in like one minute.

25                  MS. PINAPFEL:  Okay.

JA 0614

1 MR. LEVINE: Thank you, bye.

2 I would move to reopen my case.

3 HEARING OFFICER BROWN: Okay, yes, you may  
4 reopen your case. And we are going to have you dial in.  
5 Is it Dana?

6 MR. LEVINE: Yes.

7 MS. PINAPFEL: Hello?

8 MR. LEVINE: Hi Dana. Adam Levine. I'm  
9 going to put you on with the Hearing Officer.

10 MS. PINAPFEL: Okay.

11 HEARING OFFICER BROWN: Hello, Ms. Pinapfel.  
12 How are you this afternoon?

13 MS. PINAPFEL: Doing good.

14 HEARING OFFICER BROWN: Thank you for  
15 agreeing to participate telephonically in the hearing  
16 for Mr. Ludwick.

17 Mr. Levine is putting on his case and he is  
18 calling you as a witness, and in that capacity, I'm  
19 going to swear you in and then ask you to state your  
20 name and spell it for the record.

21 This is a recorded proceeding, and so I'm  
22 going to need you to speak clearly just as you are now.  
23 So would you please raise your right hand while I  
24 administer the oath.

25 MS. PINAPFEL: Okay.

JA 0615

1           HEARING OFFICER BROWN: Do you swear or  
2 affirm that the testimony you are about to give will be  
3 the truth, the whole truth and nothing but the truth?

4           THE WITNESS: Yes.

5           HEARING OFFICER BROWN: Thank you. And  
6 would you please state and then spell your full name for  
7 the record.

8   THE WITNESS: My name is Dana Pinapfel, 9D-a-n-a, P-  
i-n-a-p-f-e-l.

10          HEARING OFFICER BROWN: Thank you.

11          Mr. Levine, your witness.

12          MR. LEVINE: Thank you. I won't say may I  
13 approach the witness. May I approach the telephone?

14          HEARING OFFICER BROWN: Yes, you may.

15          MR. LEVINE: Thank you.

16

17                               DIRECT EXAMINATION

18   BY MR. LEVINE:

19       Q       Officer Pinapfel, where are you currently  
20 employed?

21       A       Florence McClure Women's Correctional  
22 Center.

23       Q       In what capacity?

24       A       A correctional officer.

25       Q       And how long have you been a correctional

JA 0616

1 officer at Florence McClure?

2 A Three and a half years.

3 Q So that would be from approximately 2013 to  
4 the present?

5 A Correct.

6 Q And, Officer Pinapfel, could you please tell  
7 the Hearing Officer your observations as to the customs  
8 and practices regarding leaving a unit to go to shift  
9 command or other areas at the facility.

10 A Yes, we can.

11 Q Okay. In your experience -- in your  
12 experience, do you have to call and get permission  
13 before you do so in all instances?

14 A In all, no, but in most cases, if it's just  
15 to leave to go up to the gatehouse or to shift command  
16 without bringing an inmate, then yes, we have to call  
17 and get permission.

18 Q Okay. And is this uniformly enforced in  
19 your experience?

20 A It depends on the shift supervisor.

21 Q Okay. So let me make sure I understand,  
22 that there are times where if you have an inmate with  
23 you, you don't have to call ahead?

24 A Correct, because most times they'll know  
25 because we call it out on the radio, and call via phone.

JA 0617

1 and let them know "Hey, I'm bringing an inmate down."

2 Q So if I understand you correct -- understood  
3 your prior answer correctly, some shift commanders want  
4 you to call before you leave to come to shift command;  
5 others don't make you do it?

6 A Correct.

7 Q Okay. Just depends on the commander?

8 A Correct.

9 MR. LEVINE: I will pass the witness.

10 MS. SLIWA: Thank you. If I may approach.

11 HEARING OFFICER BROWN: Yes, you may.

12

13 CROSS-EXAMINATION

14 BY MS. SLIWA:

15 Q Hi, Officer Pinapfel. My name is Susanne  
16 Sliwa. I'm with the Attorney General's office. I  
17 represent the Department. I just have a couple  
18 questions for you.

19 A All right.

20 Q Do you now or have you ever had any type  
21 of -- any type of relationship with Brian Ludwick  
22 outside of work?

23 A No.

24 Q You've never hung out outside of work?

25 A No. I don't hang out with anybody outside

JA 0618



1 of work.

2 Q Okay. Have you yourself ever left your post  
3 without -- without receiving prior authorization --  
4 without receiving authorization to do so?

5 A Yes, I do all the time. We don't have a  
6 current printer in our unit like everybody else does so  
7 I have to go to property all the time to get new  
8 rosters, new spaces for inmates that move in, drop off  
9 property unauthorized, et cetera.

10 Q Is that part of your duties?

11 A Yes.

12 MS. SLIWA: Okay. I don't think I have  
13 anything else. Thank you, Officer Pinapfel.

14

15 REDIRECT EXAMINATION

16 BY MR. LEVINE:

17 Q Just very briefly. If I understood you  
18 correctly, you leave your unit to which you're assigned  
19 to go get supplies or things of that nature; is that  
20 correct?

21 A Yes. Also when mail is ready or newspapers  
22 were left at the gatehouse. Nobody had time to deliver  
23 them to the unit, either myself or my partner depending  
24 on who I'm with, mostly my partner tends to do it, he'll  
25 go leave to go pick up the papers because inmates tend

JA 0619

1 to complain if they're not delivered by a certain time.

2 Q Does he have to call out in advance to the  
3 shift commander to get permission before he does it?

4 A Sometimes. Sometimes. Depends on who is  
5 the shift supervisor.

6 Q So probably the same answer; it just depends  
7 on who's working as to whether or not you have to do it?

8 A Correct.

9 MR. LEVINE: Nothing further.

10 MS. SLIWA: I have nothing further.

11 HEARING OFFICER BROWN: Okay. Thank you  
12 very kindly, Ms. Pinapfel, for taking time to speak with  
13 us today. That will conclude your testimony.

14 I ask that you please not discuss your  
15 testimony or anything about this case with anyone except  
16 for the attorney. And with that said, have a nice  
17 weekend.

18 THE WITNESS: All right. Thank you.

19 HEARING OFFICER BROWN: Thank you kindly.

20 MR. LEVINE: Enjoy your vacation, thank you.

21 THE WITNESS: Bye-bye.

22 MR. LEVINE: I don't think I need to wait  
23 for Will Rubart. We can go to close now.

24 HEARING OFFICER BROWN: Okay. Thank you  
25 kindly. Are you sure there won't be a ringing phone?

JA 0620

1 MR. LEVINE: Not sure of anything.

2 HEARING OFFICER BROWN: That's right.

3 MR. LEVINE: Well, I'm sure it won't ring.  
4 It may light up.

5 HEARING OFFICER BROWN: Okay. But it will  
6 not ring.

7 MR. LEVINE: It will not ring. It didn't  
8 ring before.

9 HEARING OFFICER BROWN: That's right. Okay.  
10 So are you ready, Ms. Sliwa?

11 MS. SLIWA: Yes, ma'am.

12 HEARING OFFICER BROWN: Okay. We will then  
13 move on to closing arguments and we will start with  
14 closing on behalf of the Nevada Department of  
15 Corrections.

16 MS. SLIWA: Thank you, your Honor. It's  
17 been shown here today that on April 4th, then  
18 Correctional Officer Brian Ludwick left his position on  
19 Unit 1 to go to the shift command office to request to  
20 be moved to another unit.

21 When he was denied this request, he told his  
22 shift supervisor that he needed to go home on FMLA  
23 because he had forgotten to take his blood pressure  
24 medication. He then left the institution. He was  
25 granted FMLA for the day. That does not change the fact

JA 0621

1     that he did not receive authorization to leave his post.

2                 We've heard several people testify today  
3     that they leave their posts all the time without  
4     authorization.   Well, the people were under oath and,  
5     you know, we don't have any evidence to show that they  
6     were not being -- that they were not being truthful  
7     about that.   That does not change the fact that leaving  
8     your post without authorization is a violation of  
9     Administration Regulation 339.

10                You heard testimony that leaving a post  
11     without authorization is neglect of duty.   You heard  
12     testimony that it is a serious violation that makes the  
13     inmates, staff and other personnel who may be on the  
14     unit more vulnerable.   It speaks to safety.

15                You heard Associate Warden Piccinini testify  
16     that he assigned three officers to Unit 1 instead of the  
17     minimum staffing level of two on that day to make the  
18     unit more secure.   You heard testimony stating that the  
19     minimum staffing number for Unit 1 was changed from  
20     three -- excuse me, from two to three following this  
21     incident to make the unit more secure.

22                Mr. Ludwick testified that while he  
23     signed -- while he signed a document stating that he  
24     read and understood the administrative regulations, he  
25     didn't really do that and that nobody does that.

**JA 0622**

1           Well, simply because Mr. Ludwick did not  
2   read the regulations and signed a document stating that  
3   he did does not -- does not absolve him of knowing the  
4   contents of those regulations, and that includes AR 339.  
5   And if you take a look at AR 339, Section 15, Subsection  
6   UU, it states that leaving a post without authorization  
7   is a violation.

8           The Nevada Department of Corrections  
9   terminated Brian Ludwick. He was terminated, and his  
10   termination was proper pursuant to NAC -- I believe it  
11   is NAC 650. Court's indulgence. 284.650.

12           The Court's indulgence again, please, I  
13   apologize.

14           HEARING OFFICER BROWN: Certainly.

15           MS. SLIWA: I had it in my head and it went  
16   away. Yes. NAC -- excuse me, NAC 284.646 states that  
17   an appointing authority may dismiss an employee for any  
18   cause set forth in NAC 284.650, and if the seriousness  
19   of the offense or condition warrants such a dismissal.

20           We submit that Brian Ludwick's leaving his  
21   post without authorization was a violation of NAC  
22   284.650, Subsection 7 in that it was inexcusable neglect  
23   of duty. It was not part of his duties to go to the  
24   shift command office and ask to be moved.

25           You heard Officer Pinapfel describe that

**JA 0623**

1    when she, quote, unquote, leaves her post, she is  
2    performing her job duties.  There is a large distinction  
3    between the performance of a duty and the performance --  
4    and the -- I won't call it a personal errand, but  
5    leaving the post for a personal reason.  Asking to be  
6    moved to another unit would be considered a personal  
7    reason.

8                   NDOC was within its authority to terminate  
9    Officer Ludwick, and the termination was justified.

10                  HEARING OFFICER BROWN:  Thank you kindly.  
11                  Mr. Levine.

12                  MR. LEVINE:  Yes.  As Ms. Sliwa has pointed  
13    out, NAC 284.650, Subsection 7 authorizes discipline for  
14    inexcusable neglect of duty.  He was charged with  
15    neglect of duty, but it has to be inexcusable in order  
16    to constitute grounds for discipline under the  
17    regulation.

18                  This was not an inexcusable neglect of duty.  
19    Officer Ludwick was not -- did not go to shift command  
20    for personal reasons.  He was having a hypertension  
21    attack.  He thought he could tough it out if he were  
22    moved to a less intense unit.  So it was entirely -- he  
23    was entirely within his rights to go to his commander,  
24    the shift commander to see if he could be moved so that  
25    he could stay and try to complete his shift.  And if the

JA 0624

1 answer is no, well then, he would have to take FMLA,  
2 which is what he did and which is what he was entitled  
3 to do.

4 FMLA leave cannot be denied. The Department  
5 is trying to engage in a major hair splitting here.  
6 They admit that he is entitled to leave his post to go  
7 home on FMLA leave and they cannot deny him that right,  
8 but what they're trying to claim is that they can  
9 discipline him for leaving his post to notify his  
10 commander that he has to do so.

11 If you are entitled to leave the institution  
12 to go home on FMLA leave, you are entitled to leave unit  
13 1 to tell your commander "Hey, I need to be moved, and  
14 if you can't move me, I need to go home on FMLA leave."

15 Stated simply, FMLA leave is preapproval  
16 since it cannot be denied. He was already preapproved  
17 to leave his post if he needed to do so because of his  
18 medical condition.

19 Now, the first rule of just cause  
20 analysis -- and remember what this Hearing Officer  
21 tribunal is to determine is whether there was just cause  
22 for dismissal. 284.390, Sub 6 says if the Hearing  
23 Officer finds there was not just cause, and it uses the  
24 word "just cause," the officer is entitled to be  
25 reinstated with full back pay and benefits for the

JA 0625

1 period of suspension, demotion or dismissal.

2           The first rule of just cause is was there a  
3 rule that was -- that the employee was on clear notice  
4 of that the conduct would result in this particular  
5 penalty? The rule is not so clear that you had to get  
6 permission to leave Unit 1 to go to the shift  
7 commander's office, and if you do it, you are  
8 terminated.

9           It's anything but clear. That's why  
10 Pinapfel says no, you know, it depends on who your shift  
11 commander is whether or not you need to do it. Other  
12 officers said yeah, in our experience we do it all the  
13 time. Nobody gets in trouble.

14           It is anything but clear, and it was not  
15 clear to Brian Ludwick that he had to get permission.  
16 He tried. He called. There was no answer from the  
17 Lieutenant for whatever reason. So because he's not  
18 feeling well and because being on an intense unit like  
19 Unit 1 when he is not at 100 percent, staying would  
20 constitute a potential risk to the health and safety of  
21 himself, his fellow officers and the inmates.

22           He did the right thing which was when he  
23 couldn't get ahold, he went down to the shift  
24 commander's office, which he was entitled to do, to see  
25 if he could be moved.

JA 0626



1           Now, there was no security breach in this  
2 case. All you have to do is take a look at the  
3 adjudication of complaint that was signed off on by the  
4 warden October 13. That is the adjudication report, the  
5 last three pages of our Exhibit 5 and was served on  
6 Officer Ludwick which he refused to sign.

7           It clearly states that the recommendation is  
8 for a five-day suspension since, quote, there was no  
9 security breach resulting from him leaving his post,  
10 period, close quote.

11           In truth, they're not even entitled to give  
12 him a five-day because he was preapproved to leave his  
13 post any time he needed to under FMLA. But what really  
14 happened in this case was the recommendation got changed  
15 by some faceless bureaucrat in Human Resources who  
16 doesn't appear here, doesn't have to be accountable,  
17 doesn't have to testify and presumably did so because  
18 that faceless Human Resource person reads AR 339, says  
19 "Oh, it says Class 5, we have to terminate." And, of  
20 course, that HR person probably doesn't know that HR  
21 339 -- I'm sorry, AR not HR -- AR 339 was never approved  
22 by the State of Nevada Personnel Commission.

23           One of the things I put into evidence was  
24 the Vaughn Malochek (phonetic) decision which issued  
25 from Officer Gary Pulliam six days after the incident

JA 0627

1     that we're here for in this case.  It is dated April 10,  
2     2015.

3                 And Officer Malochek who works at Florence  
4     McClure and was on hospital duty that day, what she did  
5     was she left her post, took her firearm with her, went  
6     out to her car and got a sandwich and then stopped to  
7     have a cigarette.

8                 Gary Pulliam held that there is no -- there  
9     was no security breach and that she was actually  
10    authorized to leave her post even though she didn't get  
11    her permission to go get the sandwich out of her car  
12    because they're forced to eat their lunches while  
13    they're there and bring their lunches.  He had no  
14    problem with that.  His only problem was he found that  
15    she left her post and neglected her duty because she  
16    stopped to smoke a cigarette out in the parking lot  
17    after getting her sandwich.

18                He overturned that decision and found that  
19    that warranted 30 days, and that decision was recently  
20    upheld by the District Court.

21                This case isn't even close to that.  He was  
22    allowed to go under FMLA leave.  He shouldn't even get  
23    the five-day that was recommended, but he surely should  
24    not be terminated, discharge an employee with no prior  
25    discipline and a good service history because he

JA 0628

1 exercised his rights under the Family Medical Leave Act.

2 FMLA is written in a manner which says that  
3 the Employer cannot interfere or restrain for the  
4 exercise of the rights. Saying you must get permission  
5 to leave Unit 1 to talk to your commander because you  
6 may need to invoke FMLA, your FMLA rights, that is by  
7 definition interference and restraint.

8 I don't care whether AR 339 was adopted by  
9 the State Board of Prison Commissioners, whether it was  
10 adopted by the legislature of the State of Nevada, the  
11 Supremacy clause of the US Constitution says that the  
12 laws of the United States take priority over state laws  
13 or certainly state administrative regulations.

14 Where the Family Medical Leave Act gives him  
15 an unconditional right to leave his post to take leave,  
16 by definition trying to discipline him for leaving his  
17 post to talk to his commanding officer about the  
18 possible need to take it is by definition interference  
19 and restraint.

20 For that reason we would request that you  
21 overturn the dismissal, find it to be without just cause  
22 and reinstate him with full back pay and benefits and  
23 not impose the five-day suspension because even the  
24 five-day suspension that was recommended by the warden  
25 after she reviewed the facts of the case would actually

JA 0629

1 be an interference or restraint of his unconditional  
2 right to take the leave when he's having a hypertension  
3 attack.

4 Thank you.

5 HEARING OFFICER BROWN: Thank you very  
6 kindly. I appreciate the arguments. Appreciate the  
7 testimony today. I will take the case under submission  
8 and we'll issue a decision within 30 days.

9 Thank you kindly.

10 MR. LEVINE: Thank you very much.

11 HEARING OFFICER BROWN: This matter has  
12 concluded at 2:27.

13 MR. LEVINE: Four and a half hours, that's  
14 not too bad.

15 HEARING OFFICER BROWN: Not at all.

16 (Proceedings concluded at 2:28 p.m.)

17 \* \* \*

18

19

20

21

22

23

24

25

JA 0630

## C E R T I F I C A T I O N

TITLE: BRIAN LUDWICK

DATE: May 27, 2016

LOCATION: Las Vegas, Nevada

The below signature certifies that the proceedings and evidence are contained fully and accurately in the tapes and notes as reported at the proceedings in the above referenced matter before the Department of Administration, Appeals Office.

\_\_\_\_\_  
KELLY PAULSON

\_\_\_\_\_  
DATE

CERTIFIED COURT REPORTER #628

JA 0631

## C E R T I F I C A T I O N

TITLE: BRIAN LUDWICK

DATE: May 27, 2016

LOCATION: Las Vegas, Nevada

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*Kelly Paulson*

09/07/2016

KELLY PAULSON

DATE

CERTIFIED COURT REPORTER #628

JA 0632

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**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

**PETITIONER'S OPENING BRIEF**



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I.

**STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to NRS 233B.130(2)(b). Petitioner, State of Nevada ex. rel. Department of Corrections (NDOC), timely filed the Petition for Judicial Review on August 1, 2016, within 30 days of the Nevada State Personnel Administrative Hearing Officer's final decision dated July 1, 2016. See NRS 233B.130(2)(d).

II.

**STATEMENT OF ISSUES**

1. Did the Hearing Officer clearly err when she found that NDOC's Administrative Regulation (AR) 339, which sets forth NDOC's Code of Ethics, Employee Conduct and Prohibitions and Penalties required approval by the Nevada Personnel Commission and therefore only admitted AR 339 for the limited purpose of showing the kind of conduct NDOC deemed to be misconduct but not for the purpose of proving the penalty associated with the proscribed conduct?

2. Did the Hearing Officer clearly err and exceed her statutory authority when she substituted her judgment for that of NDOC in determining the appropriate penalty for a class 5 terminable offense?

3. Did the Hearing Officer clearly err and/or abuse her discretion when she reversed the termination despite finding Employee committed an offense for which AR 339 deems a Class 5 terminable offense, failing to give *Dredge* deference to NDOC's decision to terminate?

4. Did the Hearing Officer clearly err and/or act arbitrarily and capriciously in reversing the termination in view of the reliable probative and substantial evidence on the whole record?

III.

**STATEMENT OF THE CASE**

Respondent, Brian Ludwick (Employee), is a correctional officer with NDOC assigned to Florence McClure Women's Correctional Center. ROA, Vol. I, p. 000083; ROA, Vol. II, p. 000021<sup>1</sup>. NDOC terminated Employee when he left his assigned post without prior authorization from a

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<sup>1</sup> The Record on Appeal filed on August 26, 2016, will be referenced as ROA, Vol. I. The Supplemental Transmittal of Record on Appeal filed September 8, 2016, which contains the transcript of the hearing, will be referenced as ROA, Vol. II.

1 supervisor. ROA, Vol. I, pp. 000087, 0000304-363. ROA, Vol. II, pp. 000019-20. Employee appealed  
2 his termination to the Department of Administration Personnel Commission pursuant to NRS 284.390.  
3 ROA, Vol. I, pp. 000087, 0000417. A hearing was held on May 27, 2016, before Hearing Officer Cara  
4 L. Brown. ROA, Vol. I, pp. 000082-97, 0000412.

5 The evidence presented at the hearing in this matter clearly demonstrated that Employee  
6 abandoned his post, and NDOC properly terminated Employee for his misconduct. Specifically, the  
7 Hearing Officer found that Employee knew or should have known that Employee had a duty to obtain  
8 permission from a supervisor prior to leaving his post and found that credible testimony supported a  
9 finding that Employee left his post in Unit 1 on April 1, 2015 without obtaining prior authorization  
10 from a supervisor. ROA, Vol. I, p. 93. Further, the Hearing Officer found that Employee engaged in  
11 inexcusable neglect of duty by leaving his post without prior permission of a supervisor and that he  
12 violated a “very important safety and security policy.” ROA, Vol. I, p. 000095. However, the Hearing  
13 Officer determined that AR 339, which sets forth NDOC’s Code of Ethics, Employee Conduct, and  
14 Prohibitions and Penalties, had not been approved by the Nevada Personnel Commission and therefore,  
15 admitted AR 339 for the “limited purpose of showing the kind of conduct NDOC deemed to be  
16 misconduct but not for the purpose of proving the penalty associated with the proscribed conduct.” ROA,  
17 Vol. I, pp. 00005-14, 000082. As a result, the Hearing Officer did not give any weight to why NDOC  
18 deems a correctional officer abandoning his post to be a terminable offense. Believing the discipline to be  
19 too harsh, the Hearing Officer then reversed the termination and recommended a suspension not to exceed  
20 30 days. ROA, Vol. I, pp. 000096.

21 Importantly, the Hearing Officer reversed Employee’s termination despite making findings of fact  
22 and conclusions of law that Employee engaged in inexcusable neglect of duty under NAC 284.650(7)—an  
23 offense for which the minimum penalty is termination under NDOC AR 339. Additionally, pursuant to  
24 well-established Nevada Supreme Court authority, the Hearing Officer was required to but did not give  
25 *Dredge* deference to the appointing authority’s decision to terminate when the facts indicated Employee’s  
26 conduct implicated serious security concerns for NDOC. *State of Nev., ex rel. Dep’t of Prisons v.*  
27 *Jackson*, 111 Nev. 770, 773, 895 P.2d 1296, 1297 (1995).

28 NDOC appeals the Hearing Officer’s final decision to this Court and requests that this Court

reverse the decision on the following grounds: (1) The Hearing Officer committed clear error in her interpretation and application of AR 339, NRS 284.150, NRS 284.383, and NAC 284.742 when she found that AR 339 requires approval from the Personnel Commission to be valid; (2) She exceeded her statutory authority and committed clear error of law when she substituted her judgment for that of the employer in imposing discipline; (3) She clearly erred and abused her discretion when she failed to apply *Dredge* deference in this case where the facts indicate a clear and serious security threat; and (4) She committed clear error and acted arbitrarily and capriciously in reversing the termination in view of the reliable probative and substantial evidence on the whole record.

#### IV.

#### STATEMENT OF THE FACTS

##### **A. Employee's Employment with NDOC**

Employee began his employment as a correctional officer with NDOC on January 7, 2013. ROA, Vol. II, pp. 000021-22. Prior to commencing his employment, Employee signed NDOC's AR Acknowledgement form, acknowledging that it was his responsibility to familiarize himself with NDOC's ARs, including AR 339. ROA, Vol. I, p. 000337. Employee began working at Florence McClure Women's Correctional Center (FMWCC) on February 19, 2015. ROA, Vol. II, p. 000022. As a correctional officer, he was responsible for the supervision of inmates, which included escorting inmates to culinary from the Unit, making sure inmates received their supplies, and making sure inmates reported to work. ROA, Vol. II, pp. 000022-23. Correctional officers are posted throughout the institution to meet the safety and security needs of the facility, the staff and the public. ROA, Vol. II, pp. 74-75.

##### **B. Misconduct**

On April 4, 2015, Employee was working the 5:00 a.m. to 1:00 p.m. shift at FMWCC. ROA, Vol. II, p. 000023. When Employee reported to work at approximately 4:45 a.m., he reported to shift command to find out where he was assigned. ROA, Vol. II, pp. 000024-25. Lieutenant Gary Piccinini (Piccinini)<sup>2</sup>, Employee's direct supervisor, assigned Employee to Unit 1. ROA, Vol. II, pp. 000024-25.

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<sup>2</sup> Piccinini was promoted to Associate Warden in December 2015. Therefore, at the time of the incident Piccinini was a Lieutenant; however, at the time of the hearing Piccinini was an Associate Warden.

1 On that day, three correctional officers, including Employee, were assigned to Unit 1. ROA, Vol. II, pp.  
2 000025-26. Employee reported to Unit 1 as assigned. ROA, Vol. II, p. 000023.

3 When Employee reported to work, he was not feeling well, and he told the other officers in Unit  
4 1 that he was not feeling well. ROA, Vol. II, p. 000026. Employee contacted Senior Correctional  
5 Officer Terry Day regarding this but Senior Day told him that he was not in charge of shift and to  
6 contact Piccinini. ROA, Vol. II, pp. 000027-28. Piccinini was assigned as the lead shift supervisor in  
7 charge of the sergeants, senior correctional officers and correctional officers. ROA, Vol. II, p. 000064.  
8 Employee called Piccinini, but there was no answer. ROA, Vol. II, pp. 000027-28. Although Employee  
9 had a radio, he did not use his radio to contact Piccinini. ROA, Vol. II, pp. 000044, 000066. At  
10 approximately 5:15 a.m., Employee left his post in Unit 1 to go to the shift command office. ROA, Vol.  
11 II, p. 000026. However, Employee did not have authorization to leave his assigned post. ROA, Vol. II,  
12 pp. 000028, 000066.

13 Once at the shift command office, Employee asked Piccinini if he could be moved to Unit 5,  
14 stating that he was more familiar with Unit 5 than Unit 1. ROA, Vol. I, p. 0000336; ROA, Vol. II, pp.  
15 000065-66. According to Employee, he told Piccinini he forgot to take his medication and was not  
16 feeling well. ROA, Vol. II, p. 000028. According to Piccinini, Employee did not state he was  
17 experiencing any medical distress, only that he wanted to be moved to Unit 5. ROA, Vol. II, p.  
18 000066. Piccinini declined to move Employee to Unit 5 because he wanted Employee to learn Unit 1.  
19 ROA, Vol. I, p. 0000336; ROA, Vol. II, pp. 000028, 000065. After denying his request, Piccinini stated  
20 that Employee became angry and told Piccinini, "Well how about I use FMLA then because I have not  
21 taken my blood pressure medication, how's that?" ROA, Vol. I, p. 0000336; ROA, Vol. II, p. 000067.  
22 Piccinini told Employee that is fine, and Employee stormed out of the office and left the institution.  
23 ROA, Vol. I, p. 0000336.

### 24 C. Staffing and Security

25 Unit 1 is one of the largest units at FMWCC because it has six pods and can house up to 325  
26 inmates, which is approximately one third of the inmate population at FMWCC. ROA, Vol. II, pp.  
27 000071-72. On April 4, 2015, there were three legislatively approved posts for Unit 1. ROA, Vol. II,  
28 p. 000071. On that day, mandated minimum staffing for Unit 1 was two officers. ROA, Vol. II, p.



1 000071. Subsequently, the minimum staffing was changed from two to three officers because there had  
2 been an increase in incidents involving inmate assaults. ROA, Vol. II, pp. 000073, 0000116. Piccinini  
3 testified that he would like to see six officers assigned to Unit 1 because three officers are not sufficient  
4 to staff the large unit. ROA, Vol. II, p. 000083.

5 Piccinini assigned three officers to Unit 1 on April 4, 2015, because he had the staff available  
6 for the three legislatively approved posts and having more officers meant more security for the unit.  
7 ROA, Vol. II, p. 000071. Having two officers instead of three officers in Unit 1 makes the unit less  
8 secure and puts the inmates and staff at risk. ROA, Vol. II, p. 000072. Warden Jo Gentry testified that  
9 while minimum staffing at the time in Unit 1 was one floor position and one control position, on a  
10 regular basis FMWCC, had a least two floor positions and one control position for a total of three  
11 officers in Unit 1. ROA, Vol. II, p. 0000115.

12 When an officer leaves his post without authorization, it is a serious and grave infraction. ROA,  
13 Vol. II, p. 000074. Officers are assigned to various posts to meet the institution's needs of safety and  
14 security. ROA, Vol. II, p. 000074-75. The chain of command is to know at all times where officers are  
15 assigned for these safety reasons. ROA, Vol. II, 000075. If an officer leaves their assigned post without  
16 authorization from their supervisor or chain of command, then they have left the unit vulnerable,  
17 particularly if an incident occurs and the officer is not there to ensure the safety of inmates and other  
18 staff in the unit. ROA, Vol. II, p. 000075. Warden Gentry testified that leaving post without  
19 authorization is a serious infraction:

20  
21 When any staff member from any post leaves their assigned area, if they  
22 were to leave their assigned area, it reduces the immediate response to any  
23 incidences that would require immediate assistance from any staff  
24 members or inmates. That would include if any inmates were needing  
25 assistance if they were getting physically assaulted, sexually assaulted or  
26 if they had a medical emergency that required immediate attention. That  
27 would also include any staff members in the area that would require  
28 assistance for what we call backup as an additional responder to either  
deescalate a situation or to protect that officer to remove them from that  
area so they can control and contain that incident so that it doesn't spread  
throughout the institution.

The other reason is the accountability. We need to know where our staff  
are at all times. If they were to just be permitted or it was a practice of

1 letting them leave whenever they wanted, we wouldn't know where they  
2 were at. So if they had a medical emergency or if they were placed in a  
3 hostage situation, and we didn't know where they were at, then we  
4 wouldn't be able to assist them when it was needed for their needs.

ROA, Vol. II, p. 0000107.

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

6 After Employee left the institution, Piccinini wrote a report regarding Employee leaving his  
7 assigned post without authorization and his possible abuse of FMLA. ROA, Vol. I, p. 0000336; ROA,  
8 Vol. II, pp. 000069-70. The matter was assigned for investigation to the Office of the Inspector General  
9 and assigned to Investigator Arthur Emling. ROA, Vol. I, pp. 0000310-0359; ROA, Vol. II, pp.  
10 000088-89. The investigation led to the following sustained allegation of misconduct: neglect of duty  
11 for Employee leaving his assigned post without authorization from a supervisor. ROA, Vol. I, pp.  
12 0000360-363. As a result, NDOC served Employee with a Specificity of Charges for neglect of duty.  
13 ROA, Vol. I, pp. 0000304-0359. Warden Gentry recommended termination and Acting Director E.K.  
14 McDaniel made the final decision to terminate Employee. ROA, Vol. II, p. 0000111. NDOC terminated  
15 Employee effective December 28, 2015, for his misconduct on April 4, 2015. ROA, Vol. I, pp.  
16 0000304-0359.

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

18 Employee appealed his termination to a Hearing Officer of the Nevada State Personnel  
19 Commission pursuant to NRS 284.390. ROA, Vol. I, pp. 000087, 0000417. A hearing was held on May  
20 27, 2016, before Hearing Officer Cara L. Brown. ROA, Vol. I, pp. 0000412, 000082-97. On June 27,  
21 2016, Hearing Officer Brown issued her Findings of Fact, Conclusions of Law and Decision reversing  
22 Employee's termination and ordering Employee's reinstatement and reimbursement for back pay and  
23 benefits from December 28, 2015 until May 27, 2016. ROA, Vol. II, pp. 000082-97. Further, in her  
24 decision, the Hearing Officer determined that AR 339, which sets forth NDOC's Code of Ethics,  
25 Employee Conduct, and Prohibitions and Penalties had not been approved by the Personnel Commission  
26 and therefore, admitted AR 339 for the "limited purpose of showing the kind of conduct NDOC deemed to  
27 be misconduct but not for the purpose of proving the penalty associated with the proscribed conduct." *Id.*

28 On June 29, 2016, Employee filed a Petition for Reconsideration arguing that Employee should

1 receive full pay for the period of dismissal pursuant to NRS 284.390(6). ROA, Vol. II, pp. 000072-81. On  
2 July 1, 2016, an Order was filed granting Employee's Petition for Reconsideration and ordering that  
3 Employee receive back pay and benefits for the full period of his dismissal rather than until May 27, 2016.  
4 ROA, Vol. II, pp. 000070-71.

5 On July 15, 2016, NDOC filed a Petition for Reconsideration arguing that the Hearing Officer's  
6 order was in error because AR 339 did not require approval by the Personnel Commission and AR 339 is a  
7 lawful Administrative Regulation that should have been given full weight in the Hearing Officer's final  
8 decision. ROA, Vol. II, pp. 000064-70. NDOC argued that Article 5 § 21 of the Nevada Constitution and  
9 NRS Chapter 209 created the Board of State Prison Commissioners to head NDOC and authorized it to  
10 prescribe regulations for the operation of NDOC; therefore, NDOC was exempt from obtaining  
11 approval of AR 339 from the Personnel Commission. *Id.*

12 On July 25, 2016, the Hearing Officer denied NDOC's Motion for Reconsideration and upheld her  
13 previous ruling that AR 339 had to be approved by the Personnel Commission, essentially invalidating  
14 NDOC's prohibitions and penalties for its employees. ROA, Vol. II, p. 000005.

15 On August 1, 2016, NDOC filed a Petition for Judicial Review appealing the final decision in this  
16 matter and requesting the Court reverse the Hearing Officer's decision to reinstate the Employee.

## 17 V.

### 18 SUMMARY OF THE ARGUMENT

19 The Hearing Officer's final decision is contrary to Nevada law, which affords employer-  
20 agencies the right to discipline their employees in accordance with Nevada law and regulations. NRS  
21 284.020(2). The Hearing Officer's ruling that NDOC's AR 339 requires approval from the Personnel  
22 Commission was in clear error. AR 339 has the full force and effect of law, having been approved by  
23 the Board of State Prison Commissioners pursuant to its authority under the Nevada Constitution and  
24 State statute to oversee all aspects of Nevada's prisons.

25 Pursuant to AR 339.05.15, leaving an assigned post while on duty without authorization of a  
26 supervisor is a Class 5 offense. The prescribed penalty for a first offense of a Class 5 offense is  
27 dismissal from State service. The Hearing Officer found that Employee did in fact leave his assigned  
28 post without authorization of a supervisor but determined that dismissal was too harsh of a penalty and

1 reversed the termination. In reversing the termination—despite finding that Employee engaged in  
2 misconduct—the Hearing Officer exceeded her statutory role. In addition, the hearing officer’s  
3 decision was arbitrary and capricious and an abuse of discretion because the record revealed that  
4 Employee committed a serious security violation and deference should have been given to the  
5 appointing authority where the evidence indicated a clear and serious security threat.

6 This Court should reverse the Hearing Officer’s final decision because the Hearing Officer  
7 exceeded her statutory authority, acted in clear error of law, abused her discretion, and issued a decision  
8 that was arbitrary and capricious and clearly erroneous in view of the reliable, probative and substantial  
9 evidence of the record.

## 10 VI.

### 11 ARGUMENT

#### 12 A. Standard of Review

13 The standard of review for evaluating a hearing officer’s decision is governed by the  
14 Administrative Procedure Act, NRS 233B. *See Dredge v. State, ex rel., Dep’t of Prisons*, 105 Nev. 39,  
15 43, 769 P.2d 56, 58 (1989). NRS 233B.135(3) provides, in pertinent part, as follows:

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

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

23 Accordingly, a court may reverse an agency’s decision “if the aggrieved party has been prejudiced by  
24 administrative findings, inferences, conclusions or decisions that are, *inter alia*, affected by error of law,  
25 clear error in view of the reliable, probative, and substantial evidence of record or an abuse or clearly  
26 unwarranted exercise of discretion.” *Dredge*, 105 Nev. at 43, 769 P.2d at 58-59. *See Meadow v. The*  
27 *Civil Serv. Bd. of LVMPD*, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989) (explaining an administrative  
28 agency acts arbitrarily and capriciously when it acts in disregard of the facts and circumstances

involved). The burden of the proof is on the party attacking the decision to show the final decision is invalid. NRS 233B.135(2).

The construction of a statute is a question of law subject to review *de novo*. *Diamond v. Swick*, 117 Nev. 671, 674, 28 P.3d 1087, 1089 (2001). However, the reviewing court defers to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute. *Dutchess Business Svc., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

Purely legal questions are reviewed *de novo*. *Garcia v. Scolari's Food & Drug*, 200 P.3d 514, 520, 125 Nev. 48, 56 (2009) citing *Riverboat Hotel Casino v. Harold's Club*, 113 Nev. 1025, 1029, 944 P.2d 819, 822 (1997). However, in reviewing questions of fact, the court is prohibited from substituting its judgment for that of the agency. NRS 233B.135(2); *Garcia*, 200 P.3d at 520, 125 Nev. at 56. Therefore, on factual issues, this court is limited to determining whether there is substantial evidence in the record to support the agency's decision. *Id.* "Substantial evidence is evidence that a reasonable mind might accept as adequate to support the appeals officer's conclusion." *Garcia*, 200 P.3d at 520, 125 Nev. at 56 (citing *Grover C. Dils Med. Ctr. V. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005)).

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

AR 339 sets forth, in part, the conduct prohibited by NDOC employees as well as a Chart of Corrective/Disciplinary Sanctions that NDOC is to look to when an employee engages in the proscribed conduct. The Chart of Corrective/Disciplinary Sanctions categorizes offenses as ranging from a Class 1 to a Class 5 offense. A Class 5 offense is the most severe offense resulting in termination. A Class 1 offense is the least severe offense resulting in verbal counseling. Employee admitted that he signed the AR Acknowledgment Form prior to commencing his employment, recognizing that it is his responsibility to review and become familiar with NDOC's ARs including AR 339. ROA, Vol. II, p. 000054.

In December 2015, NDOC charged Employee with violating AR 339.05.15, Neglect of Duty, Section UU, which provides that leaving an assigned post while on duty without authorization of a