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

Appeal from Order Denying Petition for Judicial Review

Eighth Judicial District Court

JOINT APPENDIX

VOLUME IV of IV

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

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

DATED this 8 day of May, 2017.

Nancy L Alf
DISTRICT COURT JUDGE
DC

APPROVED AS TO FORM AND CONTENT:

OFFICE OF THE NEVADA ATTORNEY GENERAL

By: Michelle D Silvestro Alanis
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Respectfully submitted by:

LAW OFFICE OF DANIEL MARKS

By: _____
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7/7/2017 10:32 AM
Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

NEVADA STATE DEPARTMENT OF CORRECTIONS, PETITIONER(S) VS. BRIAN LUDWICK, RESPONDENT(S)	CASE NO.: A-16-741032-J DEPARTMENT 27

CIVIL ORDER TO STATISTICALLY CLOSE CASE

Upon review of this matter and good cause appearing,

IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to statistically close this case for the following reason:

DISPOSITIONS:

- ☐ Default Judgment
- ☐ Judgment on Arbitration
- ☐ Stipulated Judgment
- ☐ Summary Judgment
- ☐ Involuntary Dismissal
- ☐ Motion to Dismiss by Defendant(s)
- ☐ Stipulated Dismissal
- ☐ Voluntary Dismissal
- ☒ Transferred (before trial)
- ☐ Non-Jury – Disposed After Trial Starts
- ☐ Non-Jury – Judgment Reached
- ☐ Jury – Disposed After Trial Starts
- ☐ Jury – Verdict Reached
- ☐ Other Manner of Disposition

DATED this 23rd day of June, 2017.

Nancy L Allf

NANCY ALLF
DISTRICT COURT JUDGE

#53

Electronically Filed
7/31/2017 8:40 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA STATE DEPARTMENT OF CORRECTIONS, Plaintiff, vs. BRIAN LUDWICK, Defendant.	CASE NO. A-16-741032-J DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, APRIL 19, 2017

TRANSCRIPT OF PROCEEDINGS

PETITION FOR JUDICIAL REVIEW

APPEARANCES:

For the Plaintiff: MICHELLE DI SILVESTRO ALANIS, ESQ.

For the Defendant: ADAM LEVINE, ESQ.

RECORDED BY: TRACI RAWLINSON, COURT RECORDER

TRANSCRIBED BY: BRITTANY MANGELSON, INDEPENDENT TRANSCRIBER

WEDNESDAY, APRIL 19, 2017 AT 9:29 A.M.

THE COURT: So let me call State Department of Corrections versus Ludwick. And I apologize for displacing everyone, but I want to make sure you have all the time you need.

Come on forward, Counsel.

Appearances, please.

MS. DI SILVESTRO ALANIS: Good morning, Your Honor, Michelle Di Silvestro Alanis on behalf of the State of Nevada Department of Corrections.

THE COURT: Thank you.

MR. LEVINE: Adam Levine, Bar Number 4673 for former correctional officer Brian Ludwick.

THE COURT: Thank you. All right. And please, Ms. Di Silvestro Alanis, please proceed.

MS. DI SILVESTRO ALANIS: Thank you, Your Honor. Your Honor, we're here on our petition for our judicial review. Very briefly, on the facts of this case, Mr. Ludwick was a correctional officer with the NDOC and on April 4th of 2015 he left his assigned post without authorization. He was assigned to a unit that was one of the largest units in that particular institution and housed about one-third of the inmates. And he admits that he did leave his post.

He was ultimately terminated on December 28th of 2015 and a hearing was held on -- in May of 2016 where there was substantial testimony that leaving a post is a serious infraction, that officers are assigned to meet -- assigned to posts to meet the safety and security of the institution. This could lower their response time to any incidents that would arise, it causes accountability for the security of the

institution, knowing where an officer is at all times for the safety of that particular officer, inmates, and other officers and staff.

NDOC feels and had determined that this type of offense is a Class 5 offense, which would warrant a termination. At the hearing the Hearing Officer found that Mr. Ludwick did in fact engage in this conduct and committed the violation. More importantly she found that he violated a very important safety and security policy, but despite that she then ruled that the termination was too harsh and gave him a -- and recommended a suspension.

We're filing this PJR for four reasons. We feel that the Hearing Officer has clearly erred when she found that AR 229, NDOC's administrative regulation, was invalid and she didn't rely on it in making her decision. The second reason is we feel that she clearly erred when she substituted her judgment and determined that a Class 5 offense should warrant a suspension versus a termination. And that she clearly abused her discretion and failed to give the *Dredge* deference on this decision. And fourth, that she clearly erred in reversing despite the substantial evidence on the record.

Looking at our very first reason on AR 339 -- and I know we went into it in great detail so I'll try to summarize it as best as possible.

THE COURT: That's fine.

MS. DI SILVESTRO ALANIS: First, you know, it's very interesting even why she reached that decision to begin with because it's NDOC's position that in looking at the AR 339 and going into the analysis she went into was completely outside of her jurisdiction and scope. NDOC feels that AR 339 is a valid regulation. The legislature has exempted NDOC from the APA and has dedicated NRS Chapter 209 to the administration of the prisons.

Further, the Nevada Constitution has created the Board of Prison Commissioners and this board is heading NDOC and has supervision over all matters relating to NDOC. In looking at Chapter 209, 209.111 gives the Board full control of NDOC and specifically to regulate the number of officers and employees and prescribe regulations for the business of NDOC. NRS 209.131 gives the director the power to administer at the NDOC to supervise the administration of the institution and to establish regulations with the approval of the Board.

We also have case law that clearly describes the powers of the Board the director in administering NDOC specifically the *Craig v. Hocker* case that the Board is to govern these matters due to the difficulties with prison administration. AR 339 was presented to the Board for approval and it was approved. And there was a great deal of time spent on this AR.

We cited that in our opening brief, went through all the minutes, it was presented to the Board several times, there was testimony that this AR was given a lot of consideration, that they drafted it in accordance with Chapter 284 and that it was consistent with 284. They describe the process that employees had the opportunity to review and provide comments on it.

And so it's not like this was just passed in a vacuum without any consideration, there was great consideration given to AR 339. The employee does not dispute this process or that AR 339 was approved by the Board and the -- you know, the specific steps that went into that.

By making the Personnel Commission approve this regulation would undermine this entire -- the entire purpose of the Board and the director's position. We provided in our brief that one Hearing Officer -- while it's not, you know, conclusive for Your Honor, but we do have a Hearing Officer that rejected this

argument and said that AR 339 is an enforceable, valid regulation.

Also, the employee did mention that in the Constitution there is a conflicting article in the Constitution. However, as we provided in our reply brief, the Constitution must be read -- the Nevada Constitution must be read as a whole and should not be superseded but read in harmony.

Our second reason was that the Hearing Officer clearly erred in exceeding her scope on making this decision. The Hearing Officer's position is to determine just cause; whether just cause was there for this particular discipline. And she is to look at the evidence and conclude that the good of the public was served thereby. In determining just cause she should look at whether it's supported by substantial evidence and whether the appointing authority reasonably believed this to be true.

Only the appointing authority has the power to prescribe the appropriate level of discipline. And as we described there was substantial evidence which showed there was an investigation conducted by NDOC, by the inspector general's office. Then we have testimony from the Warden and the Associate Warden on the seriousness of this offense; that there was safety and security concerns raised by this conduct.

We have AR 339 the determines that this particular type of conduct is a Class 5 offense and the disciplinary chart that NDOC relies on calls it a Class 5 offense even for a first-time offense could be -- is terminable conduct because in preparing the AR 339 they went through and gave various levels of -- various offenses different levels. And so it can range from a Class 1 to Class 5, but clearly they feel that this particular offense is serious and warrants a dismissal.

We also have testimony that this threatened the safety and security of

the institution. There was significant testimony on the process, what the Warden considered, that she spoke to the director in making -- who ultimately made the decision to terminate, that human resources also chimed in on this decision. And so there was a lengthy process in determining whether or not the employee should have been disciplined and whether or not he should receive a termination.

But despite all this the Hearing Officer found -- or I'm sorry, not despite. She found that he committed the offense but felt that a suspension was more appropriate and she cannot do this. She cannot step into the shoes of the appointing authority. She's basically overstepped her bounds at that point.

The third reason was whether or not the Hearing Officer should have given *Dredge* deference. Now these cases are still valid, they have not been overruled. *Dredge* says that the appointing authority should be given deference whenever security concerns are implicated. And the *Jackson* case further provides that this exception is considered when there are -- when the facts indicate a clear and serious security threat.

Again, here we have Mr. Ludwick who violated a serious security violation. He left his assigned post without authorization. And the appointing authority with their -- with his special expertise on the prison and prison administration determined that this was a serious offense and that it should result in a termination.

The facts indicated a clear and serious security threat because, again, there was substantial evidence at this hearing through the testimony of the Warden, who also testified regarding her discussions with the director. We have testimony from the Associate Warden who was a supervisor at the time. There was testimony on AR 339, that this was a Class 5 violation.

And while I know there's been some arguments made that a Class 5 violation does not mandate termination, again, in preparing this AR, NDOC has determined this to be a serious offense and recommends a termination. There was still an individual analysis conducted, there was still an investigation, there was still discussion, and ultimately they determined that he should have been terminated.

And, again, the Hearing Officer found that he violated a very important safety and security policy. So she essentially contradicts herself a bit in finding that he -- in -- finding that he violated this important safety and security policy, but then saying she doesn't need to consider *Dredge* deference or AR 339.

Lastly, we feel she erred in light of the reliable and probative and substantial evidence on the record. Your Honor can set aside its decision where the final decision is erroneous in light of this reliable, probative, and substantial evidence. The substantial evidence is what one, which a reasonable mind might accept as adequate to support the termination.

Again -- and I know we raised it in our reply brief and I'm sure Counsel will have some comments on it but there was a recent appellate decision that the proper standard is substantial evidence at these hearings, not a preponderance of the evidence standard, which the Hearing Officer clearly stated in her decision. And so she relied on the preponderance of the evidence standard and not the substantial evidence standard.

In looking at the substantial evidence, again, not to be too repetitive here, but we had substantial evidence on the safety and security threat. We heard from the Warden, we heard from the now Associate Warden who was a supervisor at the time, we had AR 339 showing that this was a serious offense. Every -- they relied on AR 339 in making this determination.

But, again, despite all this evidence the Hearing Officer found that it didn't warrant a termination. And so even though she found that he left his post without authorization and this was a very important safety and security policy, somehow she felt that a suspension would be more reasonable.

For these reasons we feel that our Petition for Judicial Review should be granted and that Mr. Ludwick's Termination, or the decision of the Hearing Officer should be reversed and Mr. Ludwick should be terminated.

THE COURT: Thank you. And the Opposition, Mr. Levine.

MR. LEVINE: Yes. Okay. First and foremost, the Hearing Officer did not find that AR 339 was invalid as argued by NDOC. She ruled that she is not bound by it because first and foremost it was not approved by the Personnel Commission as NRS 284.150(2) makes it very clear that for members of the classified service, they cannot be dismissed except in conformance with the statutes and the regulations promulgated under Chapter 284. Those regs of course are promulgated by the Personnel Commission.

Now, the legitimacy, the binding effect or nonbinding effect of AR 339 is something of a red herring because AR 339 does not mandate termination. AR 339 -- and I quoted subsections 5 and 6 and from the regs, says very clearly it's a recommended penalty.

It says: Appointing authorities and employees must recognize that the 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 the professional judgment when authorities and the reviewers should need to rely solely on previously imposed or penalties nor quote them as authority in penalty rationales. It must be remembered this is a historical

document of penalties, as such it may not reflect the appropriate penalty for the misconduct.

It was never binding on anybody anyway. The regulation says this is sort of a guide -- historical guide, but you got to look at the individual facts of the case. But the Hearing Officer did get it right because regulation of the classified service of the state of Nevada has been vested by the legislature exclusively in the Personnel Commission, not the Nevada Board of Prison Commissioners.

Now, the reply brief erroneously argues that oh, this was approved. No, it wasn't. If you look at the minutes, the Board of Prison Commissioners looked at their own regs and said to themselves we think this in compliance with Chapter 284 and Chapter 289, the Peace Officer's Bill of Rights. They may believe that, but they're not excused from the requirement to seek approval from the Personnel Commission. But, again, it's something of a red herring because it's not binding.

The law is very, very clear. After the *Dredge* decision was decide the Court revisited the issue in *Knapp versus Department of Prisons*, wherein they adopted the wisdom of the dissent from *Dredge* and they said no, the dissent in *Dredge* was correct; that Hearing Officers are to take a new and independent view of the evidence. And the only time you defer to the appointing authority is if the security of the institution is jeopardized.

And then within a year or two after *Knapp* they came back and clarified in *Jackson*, the deferral doctrine for security violations is only to be used in the most egregious of security violations and that the job protections of classified service are not be undermined by light claims of oh, there's a security violation.

In this particular case, Officer Ludwick had been granted intermittent FMLA leave to use as he needed it. He became ill. Federal law supersedes even

the Nevada Constitution, the Board of Prison Commissioners, Chapter 284. Federal law governs. He had a right to that leave. He tried calling the shift commander's office to say hey, I'm not feeling well, I can't stay on this post. Nobody answered.

So he walked 60 yards. Probably take him 10 seconds, 7 seconds if he had to run back in an emergency, to the shift commander's office to find the shift commander to say hey, I can't stay here. Wither you can transfer me to a less intense post or I have to go home. Basically he said I can't put you on another post, he's like then I have to go home and Lieutenant Piccinini said fine. And he went home.

The Hearing Officer faulted him, not for abandoning his post but for not making additional efforts before he left it to walk to down there, maybe making a second or a third call. But he had a right to leave and NDOC could not hold him there because he had been granted intermittent family medical leave.

Now let's be really clear, there was no substantial evidence of a security violation. I introduced into evidence the adjudication of the investigator general's report which was the evaluation and the determination made by Warden Gentry.

And she wrote: It is recommended that Brian Ludwick receive a specificity of charges consisting of one five-day suspension from state service in lieu of a Class 5 dismissal of state service since there was no security breach resulting from him leaving his post.

That was the finding of the Warden. There was no security breach. And then the Hearing Officer, which I quoted on page 16 of my Opposition, made the same finding, that there was no security breach.

For the following reasons this Hearing Officer finds the termination was

too harsh of a penalty. Mr. Ludwick had no prior discipline. The minimum penalty permitted -- the minimum permitted staffing on the day in question was two officers. Had there been a serious security risk by having less than the three scheduled officers, presumably Lieutenant Piccinini would have assigned someone else to the post after Mr. Ludwick was allowed to leave the institution on FMLA leave.

Where the Hearing Officer makes a determination based on the evidence that there was no security breach, this Court is not permitted to substitute its judgment for that finding on a contested issue of fact by the Hearing Officer. And the Hearing Officer properly concluded, minimum staffing was met at all times, there is no security breach, therefore, the *Dredge* deference does not apply. The case is decided under *Knapp*. She determined that termination is too harsh of a penalty.

And, you know, quite frankly when the Warden writes hey, there's no security breach, I think five days is appropriate, and the testimony was, when I crossed her on it, well somebody in human resources made me change it, they don't bring the person from human resources, the Hearing Officer got it right, Your Honor.

The decision was reasonable by the Hearing Officer. You cannot force somebody to work when they're granted FMLA leave and in the absence of as exclusion breach, much less the egregious breach required by *Jackson,* I believe you have to affirm the decision.

THE COURT: My only question is whether or not the evidentiary standard was appropriately applied. Was it -- should it have been substantial and was it preponderance? And --

MR. LEVINE: No, it should not have been substantial --

THE COURT: And did the law change after this decision?

MR. LEVINE: No. First and foremost you're talking about -- the case that

they're citing afterwards is a Court of Appeals decision dealing with a license revocation -- or a license penalty, okay? The series says in the absence of a statute to the contrary, the preponderance standard must be used. It is the minimal standard consistent with due process.

Now, in a licensing hearing you have the ability to use something less because a license is a privilege, it is not a right. In this particular case, as a post-probationary member of the classified service, Brian Ludwick had a property interest in his employment, protected within the meaning of the due process clause of the 14th Amendment and he cannot be deprived of that by any standard less than a preponderance of the evidence.

THE COURT: Thank you. And your response, please, Ms. Di Silvestro Alanis.

MS. DI SILVESTRO ALANIS: Yes, Your Honor. I'm going to go a little backwards here because you just asked the question --

THE COURT: Sure.

MS. DI SILVESTRO ALANIS: -- about the substantial evidence standards. Again, the Hearing Officer did, and we cited to it in our reply brief, in Volume I, pages 92 to 93: She held that the standard of proof in these administrative hearings was preponderance of the evidence more probable than not.

And she cited that she relied on *Nassiri*. Then the Court of Appeals decision did come out and specifically said -- and I think the licensing Opposing Counsel's getting confused on because the Court of Appeals noted that: *Nassiri* created confusion on the standard of proof. And that substantial evidence is evidence that a reasonable mind could accept as adequately supporting the agencies deci -- conclusions.

We recognize that *Nassiri* may have caused confusion because it noted the standard of proof was by 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.

So we do feel that the incorrect standard of proof was used and substantial evidence standard is a much lower standard than the preponderance of evidence standard. So we do feel that she incorrectly applied the standards.

As far as the other points that Opposing Counsel made he said that it -- AR 339 was not approved by the Board. Again, it's our position that AR 339 was approved by the Board of State Prison Commissioners. And the Hearing Officer, he said she said that she was not bound by it. She did not rely on AR 339 at all in making her decision. And so the Hearing Officer is to look at the evidence that NDOC looked at in making the determination.

And there was testimony that NDOC relied on AR 339 in coming to this decision. And so when she made her determination, the Hearing Officer said well, I'm not going to rely or consider AR 339. And that was incorrect. She should have looked to AR 339 because NDOC is a valid regulation and that's one of the things they relied on in making their decision.

AR 339, Opposing Counsel said, does not mandate termination. And I spent a great deal in our reply brief explaining the AR, the chart of discipline that's recommended. AR 339 addresses about 170 different violations that an employee can engage in -- inappropriate conduct. And then it goes through and addresses whether or not it is a Class 1 offense, 2, 3, 4, or 5, and gives a range of penalties.

So it's not that all of them are addressed as a Class 5 offense and then

the hearing -- or and then the appointing authority is supposed to give discretion, they already guide the appointing authority on what would be appropriate.

And as I said that Section 5 where they -- where they could have discretion and use an individual analysis, the evidence did show that an individual analysis was conducted. I'm not going to go through it again but essentially the director went through -- we heard the evidence from the Warden and so forth that this was a serious security threat.

Very briefly, Opposing Counsel discussed *Dredge* and that it's only in the consideration of an egregious security violation. It is not the Hearing Officer to determine whether or not this conduct is egregious or a safety and security violation. That's why we have the director of the prison and the Board of Prison Commissioners. A prison has very unique and difficult things to consider in its administration.

And we have the testimony from the Warden and she also gave testimony regarding her discussions with the director that they consider this to be a serious security violation because leaving an assigned post can jeopardize the safety of that officer who left his assigned post without authorization, other officers, other staff, inmates, because anything could happen and now we have an officer unaccounted for because they expect him to be in one location and he's not. So the substantial evidence did support that there was a clear and serious security threat.

Again, the FMLA issue we feel is a red herring. The Hearing Officer did not make this determination based on the FMLA. In fact, she said that while he was there and had approved FMLA, he still had to comply with the rules of his employer in seeking permission before he left his post. So when he left his post he was going to talk to his supervisor that he wasn't feeling well and wanted to leave. He didn't

just have the authority to leave at any given time and the Hearing Officer said that he should have complied with those policies.

Lastly, the adjudication report. Again, the adjudication report where Warden Gentry originally talked about a five-day suspension is not a mandatory portion of the process, nor is it binding. She is not the final decision maker. So after the investigation happened with the Inspector General's office, the Warden then looked at the investigator's comments and findings and adjudicated him and found that he did in fact violate that policy and left his post without authorization.

And initially, yes, she wrote down I think a five-day suspension, but that was before the specificity of charges was prepared, before she conducted her analysis, before human resources was consulted, before the director then reviewed it and gave his final determination. So it was in the very initial step in this process and ultimately we have the evidence that the director determined this to be a serious violation and felt that Mr. Ludwick leaving his assigned post without authorization was terminable and he should be dismissed from state service. And we don't feel that that adjudication report has any bearing on this decision.

So, again, Your Honor, we would ask that the Petition be granted and the Hearing Officer's decision be reversed.

MR. LEVINE: It's not my intent to argue further, but simply to clarify the record on something that she said which she attributed to me an incorrect argument. She said that I argued that AR 339 was not approved by the Board of Prison Commissioners, that's not what I said. I said it wasn't approved by the Nevada Personnel Commission.

THE COURT: It was your Petition, you get the last word. Did you have a response to that?

MS. DI SILVESTRO ALANIS: No, Your Honor, I'm okay.

THE COURT: Thank you both. This is the Petition for Review brought by the State of Nevada Department of Corrections. The Petition for Review will be denied for the following reasons. I find that the decision of the Hearing Officer was reasonable given that the facts found by her supported the decision. I find there is no clear error in the application of law. I find that the Hearing Officer did not exceed her authority or abuse her discretion, nor do I find that her decision is arbitrary or capricious.

I also find that the evidentiary standard used by the Hearing Officer was sufficient to justify the result, given the facts of the pleadings. And that's after review of all of the -- everything in this case. I read all of the briefs in all of the indexes.

So the Petition is denied. Mr. Levine to prepare the order. Ms. Di Silvestro Alanis, do you wish to sign off on it?

MS. DI SILVESTRO ALANIS: Yes, Your Honor.

THE COURT: Then present an order that's agreed as to form and you can incorporate by reference the findings on the record.

MR. LEVINE: Thank you, Your Honor.

THE COURT: Thank you both.

MS. DI SILVESTRO ALANIS: Thank you, Your Honor.

[Proceeding concluded at 9:58 a.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case.

Brittany Mangelson
Independent Transcriber