IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA
DEPARTMENT OF CORRECTIONS,

DOCKET NO. 73277

Appellant,

v.

BRIAN LUDWICK, AN INDIVIDUAL,

Respondent
_____/

RESPONDENT'S ANSWERING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

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

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

Attorneys of Record for Respondent Brian Ludwick

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JURISTICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to NRAP 3A(b)(1) and NRS 233B.150.

ROUTING STATEMENT

Respondent Brian Ludwick agrees with the State of Nevada Department of Corrections that this matter should remain with the Nevada Supreme Court. In unpublished dispositions, the Nevada Court of Appeals has erroneously applied the definition of "just cause" from *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995). That definition of just cause arose in the private sector as an exception to at-will employment based upon an implied contract of continuing employment contained in a unilaterally promulgated handbook.

This case presents an opportunity for this Court to set clear precedent regarding the standards to be used in connection with suspension, demotion or dismissal of members of the classified service of the State of Nevada pursuant to NRS 284.390(6). Because members of the classified service have a property interest in their employment within the meaning of the United States Constitution's Fourteenth Amendment's due process clause, the standards employed in connection with termination from the classified service raise constitutional concerns.

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STATEMENT OF ISSUES ON APPEAL

1. Should the definition of "just cause" from *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995) have any applicability to the definition of "just cause" as utilized in NRS 284.390(6).

2. Would depriving an employee of their property interest in their job under a standard of proof less than preponderance of the evidence violate the Due Process Clause of Fourteenth Amendment.

3. Are State Hearing Officers bound by regulations adopted by appointing authorities which have not been submitted for approval by the State of Nevada Personnel Commission as required by NAC 284.742.

4. Did the District Court properly affirm the decision of a State of Nevada Hearing Officer that the termination of correctional officer Brian Ludwick from the classified service of the State of Nevada was without just cause under NRS 284.390(6).

STATEMENT OF THE CASE

Brian Ludwick appealed his dismissal from the Nevada Department of Corrections ("NDOC"). A State Hearing Officer ordered Ludwick reinstated with back pay. (JA Volume I at 006-020). NDOC filed a Petition for Judicial Review pursuant to NRS 233B.130. (JA Volume I at 002-003). The district court denied

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judicial review and affirm the decision of the Hearing Officer. (JA Volume III at 731-732).

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. (JA Vol. II at 486). When he has a hypertension attack it causes heart palpitations, irritability, headaches, dizziness and loss of sensation in his hands and arms. (JA Vol. II at 488). 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. (JA Vol. I at 133-138; Vol. II at 486-488).

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. (JA Vol. I at 139-146).

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. (JA Vol. I at 1337-138, 144-145; Vol. II at 487-488).

On April 4, 2015 while driving to work Ludwick started feeling ill from an oncoming hypertension attack. (JA Vol. II at 490). 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 inmates coming out of solitary confinement. There are more inmate fights, more inmate violence, and more challenging of authority than any other Unit. (JA Vol. II at 488-489).

While in the control room of Unit 1, Ludwick informed two (2) fellow officers that he was not feeling well. (JA Vol. II at 482). He attempted to contact the Shift Commander, Lieutenant Piccinini, by telephone. However, the Shift Command office would not pick up. (JA Vol. II at 483-484).

Having a correctional officer who is not at 100% capacity in a Unit such as Unit 1 is a danger to the safety of the inmates and the institution. (JA Vol. II at 489-490). When Officer Ludwick could not reach Piccinini by telephone, he walked 60 yards from the Unit 1 control room to the Shift Command Office. (JA Vol. II at 483-484, 494). He was able to locate Piccinini and informed him that he wasn't feeling well. Ludwick requested a transfer to another Unit in order to try to "tough it out" rather than go home because calling in sick is frowned upon. (JA Vol. II at 483). Piccinini informed Ludwick that he would not transfer him to another Unit. At that point Ludwick informed Piccinini that he would have to take FMLA leave. Piccinini responded "That is fine with me". (JA Vol. II at 484-485).

While the facilities minimum staffing requirements would have to yield to federal law in any event, there were still two (2) officers left in Unit 1 which met the minimum staffing requirements. (JA Vol. I at 183; Vol. II at 394, 493).

Despite the fact that Ludwick was exercising his right under federal law to his intermittent FMLA leave, and despite the fact that Piccinini told Ludwick that he may do so, Piccinini initially logged Ludwick as AWOL. However, after speaking with Associate Warden Hill, Ludwick's status was changed to FMLA. (JA Vol. I at 149; Vol. III at 534-535). Ludwick was also forced to take a sick day the following day on April 5, 2015. (JA Vol. II at 498).

Officer Ludwick was investigated by the Office of the Inspector General ("OIG") regarding an allegation that he have neglected his duty and abandoned his post at Unit 1 without authorization. The investigation uncovered that while Lt. Piccinini had sent out an e-mail a few days before April 4, 2015 informing officers they may not leave their post without prior authorization, that Officer Ludwick never received that e-mail. (JA Vol. I at 182; Vol. III at 512). The Report further confirmed that the minimum staffing levels for Unit 1 had been maintained. (JA Vol. I at 183).

OIG Investigators do not adjudicate complaints; they merely compile information. (JA Vol. III at 553-554). Following the OIG's investigation, the investigatory report was forwarded to Warden Jo Gentry to adjudicate. (JA Vol. I

at 163). Gentry sustained Officer Ludwick on one (1) count of Neglect of Duty when he left Unit 1 to go to the Shift Command office. She did not sustain the other count of Neglect of Duty alleging that he failed to perform his assigned security function. Warden Gentry then concluded:

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

(JA Vol. II at 394). Deputy Director of NDOC E.K. McDaniel agreed with the disciplinary recommendation. (JA Vol. II at 395).

However, on December 19, 2015 Ludwick was served with an NPD-41 Specificity of Charges recommending his dismissal from State Service for leaving his post to walk to the Shift Command Office. (JA Vol. II at 337-342). This Specificity of Charges alleged a violation of NAC 284.650 (3) which authorizes discipline where "The employee of any institution administering a security program, and the considered judgment of the Appointing authority, violates or endangers the security of the institution" (JA Vol. II at 338) despite the fact that there was an express finding that no such security breach had occurred. ((JA Vol. II at 394-395).

Officer Ludwick timely appealed his termination to a State of Nevada Department of Administration hearing officer. Following an evidentiary hearing

on May 27, 2016, Hearing Officer Cara L. Brown determined that Ludwick's termination was without just cause as required by NRS 284.390(6). The hearing officer determined that Ludwick's actions were not serious enough to warrant termination without resort to the statutorily mandated system of progressive discipline, and ordered Officer Ludwick reinstated with back pay and benefits (along with a recommendation for a suspension). (JA Vol. I at 006-020).

NDOC filed a Petition for Reconsideration with the hearing officer arguing that NDOC Administrative Regulation 339 mandates termination for Neglect of Duty, and that the hearing officer erred in ruling that she would consider A.R. 339, but was not bound by its prescribed punishments. (JA Vol. I at 097-102). Ludwick opposed this Petition because (1) A.R. 339 and never been approved by the State of Nevada Personnel Commission as required by NAC 284.742, and (2) A.R. 339 does not mandate termination in all circumstances for Neglect of Duty. (JA Vol. I at 049-096). The Hearing Officer denied reconsideration agreeing that any regulation prescribing disciplinary penalties for the classified service must be approved by the Personnel Commission. (JA Vol. I at 038-046)

NDOC filed a Petition for Judicial Review. Following Ludwick's reinstatement with back pay, and while the matter was pending on Judicial Review, Ludwick voluntarily resigned his position in order to pursue a corrections

officer position with a local government employer. The district court denied the Petition for Judicial Review. (JA Vol. III at 731-732).

SUMMARY OF ARGUMENT

The Hearing Officer correctly determined that NDOC did not have just cause to terminate the employment of correction officer Brian Ludwick. The evidence at the hearing clearly demonstrated that Brian Ludwick did not endanger the security of the institution so as to require the hearing officer to defer to the Appointing authority under *Dredge v. Department of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989).

The Hearing Officer correctly decided the case under the preponderance of the evidence standard. Unlike employees in the private sector who are presumptively employed at will, post probationary members of the classified service of the State of Nevada may only be terminated for just cause. This creates a constitutionally protected property interest in their employment within the meaning of the Fourteenth Amendment's Due Process Clause. The evidentiary hearing provided for under NRS 284.390 is the post-termination hearing required by constitutional due process. It would violate the Fourteenth Amendment to deprive an employee of their property interest in their employment under standard of proof less than preponderance of the evidence.

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In unpublished decisions Nevada's Court Appeals has applied the definition of just cause in *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995). However, *Vargas* is not applicable to public employees who have a constitutionally protected property interest in their employment. *Vargas* arose in the private sector under an implied contract of continuing employment arising from an employee handbook. *Vargas* was premised on the notion that an employer's unilateral declaration that it would not terminate an employee without just cause, without more, does not establish that an employer has contracted away its fact-finding prerogative. Such an approach has no application where, as in the classified service of the State of Nevada, the Legislature has by statute placed the fact-finding prerogative with a State Hearing Officer.

STANDARD OF REVIEW

The provisions of NRS 233B.135(3) state:

> The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
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> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.

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).

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

In reviewing the decision of an administrative agency, this court may not substitute its own judgment for that of the hearing officer with regard to the weight of the evidence or the credibility of the witnesses. *Gilman v. Nevada State Board of Veterinary Medical Examiners*, 120 Nev. 263 (2004); *Knapp v. State Department of Prisons*, 111 Nev. 420, 423, 892 P.2d 575 (1995); *Nevada Industrial Commission v. Williams*, 91 Nev. 686, 541 P.2d 905 (1975). This Court

may not disturb the hearing officer's decision unless the Court finds that the decision was "arbitrary and capricious". To be "arbitrary and capricious", the decision of the administrative agency must be in "disregard to the facts and circumstances involved". *Meadow v. The Civil Service Board of LVMPD,* 105 Nev. 624, 781 P.2d 772 (1989).

ARGUMENT

I. THE HEARING OFFICER WAS NOT OBLIGATED TO DEFER TO THE APPOINTING AUTHORITY BECAUSE THERE WAS INO EGREGIOUS SECURITY BREACH.

NDOC's Opening Brief erroneously argues that the State Hearing Officer abused her discretion in failing to defer to the Appointing authority citing *Dredge v. Department of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989). NDOC's Opening Brief further erroneously argues that the hearing officer did not make any findings with regard to whether there was a "clear and serious security threat" caused by Ludwick's use of approved FMLA leave.

At the outset, it must be recognized that the taking of approved FMLA leave can never constitute a "clear and serious security threat" as a matter of law. Congress, as a matter of public policy, has determined that the needs of employees to care for their own serious health conditions, and those of their families, outweigh the interests of employers subject to the FMLA. See 29 U.S.C. §2601. It is the responsibility of employers subject to the FMLA, such as NDOC, to

properly staff their facilities in a manner such that the exercise of statutory rights does not create a security concerns.

No deference to the decision of NDOC was required in this case. Contrary to the arguments of NDOC, the Hearing Officer did in fact make express findings that there were no security concerns.

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

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

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

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

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

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

111 Nev. at 773, 895 P.2d at 1298.

There was no such egregious security breach in this case. Rather, Warden Gentry specifically found to the contrary in her adjudication:

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

(JA Vol. I at 361).

Under cross-examination, Warden Gentry conceded that she found no security violation and had recommended only a five (5) day suspension, however Human Resources informed Gentry that the discipline had to be changed to termination to remain consistent with what had been done in the past at NDOC. (JA Vol. III at 583-584). Ironically, the notion that the discipline must be consistent for what occurred in the past for the same offense is directly contrary to the provisions of A.R. 339 which states "There is no requirement that charges similar in nature must result in identical penalties" and Appointing Authorities and reviewers "should neither rely solely on previously imposed penalties nor quote them as authority in penalty rationales". (JA Vol. I at 195-196).

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

> Based upon the foregoing, this Hearing Officer finds that Mr. Ludwick engaged in inexcusable neglect by leaving his post without

> the prior permission of a supervisor. The question now is whether it was reasonable to terminate Mr. Ludwick for violating NRS 284.650(7). For the following reasons, this Hearing Officer finds that termination was too harsh a penalty. Mr. Ludwick had no prior discipline. The minimum permitted staffing on the day in question was two officers. Had there been a serious security risk by having less than three scheduled officers, presumably, Lieutenant Piccinini would have assign someone else to the post after Mr. Ludwick was allowed to leave the institution on FMLA leave.

(JA Vol. I at 019). Accordingly, NDOC's argument that the Hearing Officer did not make any findings of fact on the issue of whether the security of the prison was impacted is clearly without merit.

Whether there was an egregious security breach was a contested issue of fact at the hearing. NRS 233B.135(3) states "The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact." Where, as here, the Hearing Officer finds that there was no security breach based upon the evidence received at the hearing, this court may not disturb that finding.[1]

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[1] 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 it employee "must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." (JA Vol. I at 018). 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-

II. THE HEARING OFFICER PROPERLY DECIDED THE ISSUSE OF WHETHER THERE WAS JUST CAUSE TO TERMINATE OFFICER LUDWICK UTILIZING THE PREPONDERANCE OF THE EVIDENCE STANDARD OF PROOF.

NRS 284.390(6) states:

> If the hearing officer determines that the dismissal, demotion or suspension was without just cause as provided in NRS 284.385, the action must be set aside and the employee must be reinstated, with full pay for the period of dismissal, demotion or suspension.

NDOC's Opening Brief argues that the hearing officer erred by utilizing the preponderance of the evidence standard, rather than the lesser substantial evidence standard, to determine whether there was just cause to terminate Officer Ludwick. This argument by NDOC is based upon the language discussing just cause found in *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995) (hereafter "*Vargas*") stating:

> A discharge for "just" or "good" cause is one which is not for any arbitrary, capricious or illegal reason and which is based on facts (1) supported by substantial evidence, and (2) reasonably believed by the employer to be true.

111 Nev. at 1078, 901 P.2d at 701.

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mail as of the date of the incident. (JA Vol. I at 182; Volume III at 512). 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.

In a recent unpublished opinion, Nevada's Court of Appeals, without any critical analysis, has cited this language from *Vargas* to hold a hearing officer erred by utilizing the preponderance of the evidence standard. *Nevada Department of Motor Vehicles v. Adams*, 2017 WL 521774 (January 30, 2017); see also *Morgan v. Department of Business and Industry, Taxicab Authority*, 2016 WL 2944701 (May 16, 2016). However, the term "just cause" may have different meanings in different contexts. See *Adams v. Harding Machine Co., Inc.*, 56 Ohio JA.3d 150, 565 N.E.2d 858 (1989) ("just cause" as used in the unemployment compensation statute has a different meaning than as that term is used in an employment contract); *Vann v. Town of Cheswold*, 945 A. 2d 1118 (De. 2008); *Cotran v. Rollins Hudig Hall International, Inc.*, 69 Cal. Rptr. 2nd 900, 948 P.2d 412 (1998) (J. Mosk concurring).

As detailed below the standard from *Vargas* was developed in the context of private sector at-will employment and has no applicability to a determination of just cause in the classified service. Utilizing a standard lower than a preponderance of the evidence to deprive members of the classified service of their property interest in their employment would violate due process.

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A. The Definition of Just Cause From *Vargas* Was For Implied Contracts Of Continuing Employment And Has No Applicability Where The Legislature Has Assigned The Fact Finding Function To A State Hearing Officer.

This Court's decision in *Vargas* arose in the private sector where employment is presumptively at will, and involved a unilateral promise made in an employee handbook. The approach from *Vargas* was taken from the Oregon Supreme Court's decision in *Simpson v. Western Graphics Corp.*, 643 P.2d 1276 (Or. 1982) which addressed the extent to which a unilateral promise made in an employer's handbook should be given contractual effect. 111 Nev. at 1073, 901 P.2d at 699. The *Simpson* decision relied upon by the Court stated:

> Although an employer's statement of employment policy has a degree of contractual effect, see *Yartzoff v. Democrat-Herald Publishing Co.*, supra, its terms are not necessarily to be construed in the same way as those of a negotiated labor contract. The handbook was not negotiated. It is a unilateral statement by the employer of self-imposed limitations upon its prerogatives. It was furnished to plaintiffs after they were hired and the evidence *affords no inference that they accepted or continued in employment in reliance upon its terms*. In such a situation, the meaning intended by the drafter, the employer, is controlling and there is no reason to infer that the employer intended to surrender its power to determine whether facts constituting cause for termination exist. Nor is there evidence of extrinsic agreement, practice or mutual understanding to that effect. In the absence of any evidence of express or implied agreement whereby the employer contracted away its fact-finding prerogative to some other arbiter, we shall not infer it.

643 P.2d at 1297 (emphasis added).

In adopting the *Simpson* approach for giving a degree of contractual effect to employer declarations in handbooks, this Court in *Vargas* explained:

> In comparatively recent years, Oregon and many other jurisdictions including Nevada, have crafted exceptions to the common law at-will doctrine in order to give contractual effect to company termination policies upon which employees rely. *Unfortunately, such exceptions have spawned the additional task of defining the extent to which employees should be afforded traditional contract rights in connection with that reliance.*

111 Nev. at 1074-1075, 901 P.2d at 699. (emphasis added).

The Court further recognized "There are obvious policy concerns implicated in treating an employment contract implied from an employee manual *in the same manner as a negotiated contract.*" *Id.* at 1075, 901 P.2d at 699. Agreeing with the Oregon Court of Appeals that an employer's unilateral declaration in an employee handbook should not be construed as contracting away the employer's fact-finding prerogative the *Vargas* court held:

> We believe that a qualified Simpson approach strikes the proper balance between a recognition of the legitimate business judgment of employers and the contractual rights of employees impliedly or expressly grounded in employee handbooks and other forms of evidence of continuing employment. Therefore, absent substantial evidence of an express or implied agreement contracting away its fact-finding prerogatives to some other arbiter, the employer is the ultimate finder of facts constituting good cause for termination.

Id.

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Three (3) years after the Nevada Supreme Court's decision in *Vargas*, the California Supreme Court adopted the same definition of "just cause" for such implied contracts in *Cotran v. Rollins Hudig Hall International, Inc.*, 69 Cal. Rptr. 2nd 900, 948 P.2d 412 (1998). However, even the California Supreme Court recognized at the time of its adoption that it was limited to implied promises. Footnote 1 to the opinion states "[w]rongful termination claims founded on an explicit promise that termination will not occur except for just or good cause may call for a different standard, depending upon the precise terms of the contract provision." 69 Cal. Rptr. 2d 900, 948 P.2d 412. Justice Mosk in his concurring opinion specifically noted this definition of just cause would not apply under a collective bargaining agreement.

However, after the adoption of the *Simpson/Vargas/Cotran* definition of just cause, trial courts in various states began making the same mistake made by our Court of Appeals: they assumed this definition of just cause applied in all contexts. As a result, the Oregon courts, which developed the legal theory in *Simpson* upon which *Vargas* was based, were subsequently forced to reject application of this standard to traditional contracts. As explained by the Oregon Court of Appeals in *Janoff, DDS v. Gentle Dental, P.C.*, 986 P.2d 1278 (Or. JA. 1999):

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> The obvious, and decisive, distinction between *Simpson* and this case is that plaintiff's right not to be terminated does not come from a unilaterally adopted employee handbook, which formed no basis of the employee's decision to accept employment, but from a bilateral employment contract that the parties executed as part of the hiring process. In that contract, defendant gave up its prerogative to make factual determinations about termination in a way that the employer in *Simpson* did not. Under paragraph 5 of that contract, defendant may terminate plaintiff before the contract's natural expiration only if he "consistently fails" to render proper treatment or to adhere to written policies. There is no reason to treat that contract differently from every other contract, including plaintiff's right to a judicial determination of all factual issues related to whether he had consistently failed to do what the contract required or whether, in contrast, defendant breached its provisions when it terminated his employment.

986 P.2d at 1280. Similarly, the California Court of Appeals in *Khajavi v. Feather River Anesthesia Medical Group*, 84 Cal. JA. 4th 32, 100 Cal.Rptr.2nd 627 (2000) held *Cotran*'s approach was limited to "implied-employment agreements" and not traditional contracts. 84 Cal. JA. 4th at 57-58, 100 Cal. Rptr. 2nd at 645-646.

In *Vetter v. Cam Wall Electric Cooperative, Inc.*, 711 N.W.2d 612 (2006) the Supreme Court of South Dakota held that the *Vargas/Cotran* "just cause" standard would not be applied where a collective bargaining agreement negotiated by the parties stated that the employer was empowered to "reprimand, suspend, discharge or otherwise discipline employees for cause."

The entire premise of the holding in *Vargas* was that a unilateral declaration by an employer in an employee handbook that it would not discharge

an employee without cause, without more, did not permit a second-level fact finder such as a jury to review the employer's decision. This was made clear by the Court in *Vargas* when it stated "Therefore, *absent substantial evidence of an express or implied agreement contracting away its fact-finding prerogatives to some other arbiter*, the employer is the ultimate finder of facts constituting good cause for termination." 111 Nev. at 1075, 901 P.2d at 700 (emphasis added).

This rationale has no application to appeals of disciplinary action in the classified service of the State of Nevada because the right not to be suspended, demoted or dismissed does not arise from a unilateral declaration by NDOC. Rather, such job protections are statutory under NRS 284.385 and 284.390(6).

Moreover, unlike the private sector where a unilateral promise, without more, will not be deemed to contract away the employer's "fact-finding prerogatives to some other arbiter", the Nevada Legislature has statutorily removed the ultimate fact-finding prerogative from the appointing authority and vested it with State Hearing Officers pursuant to NRS 284.390. Accordingly the definition of just cause from *Vargas* has no application to termination appeals for the classified service.[2]

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[2] "Cause" is defined for the classified service at NAC 284.650

B. Utilizing Vargas and Its Substantial Evidence Standard Would Violate Due Process Of Law.

There are significant differences between private sector employment and the public sector. The most significant is the fact that the Fourteenth Amendment's Due Process Clause has no application to the private sector.

NRS 284.150(2) states:

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

NRS 284.385 and NRS 284.390(6) prohibit the termination of a post-probationary member of the classified service without just cause. This creates a property interest in employment protectable under the Fourteenth Amendment's Due Process Clause. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985).

Unlike a private sector employee who may be terminated at will in the absence of a fixed duration contract or implied contract of continuing employment (such as found in *Vargas*), it is the State which bears the burden of proof when it seeks to deprive an employee of their property interest in their employment.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to instruct the factfinder

concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 422, 99 S. Ct. 1804, 1808 (1979).

In *Nassiri v. Chiropractic Physician's Board*, ___ Nev. ___, 327 P.3d 487 (2014) this Court held that in the absence of a specific governing statute identifying the standard of proof, in administrative proceedings the preponderance-of-the-evidence standard is the minimum standard of proof consistent with due process. 130 Nev. ___, 327 P.3d at 491. In footnote 3 to *Nassiri* the Court observed with regard to standards lower than a preponderance "If there were a lower standard, it would be nonsensical; it would allow a tribunal to reach a conclusion even after reasoning that the conclusion is more likely to be incorrect than it is to be correct."

NRS 284.390 does not provide a standard of proof. Therefore under *Nassiri* the default standard is preponderance of the evidence. It would violate constitutional due process to deprive employees of their property interest in their employment by utilizing the lower substantial evidence standard from *Vargas* because, as recognized under footnote 3 to *Nassiri*, it would permit hearing officers to reach conclusions on the issue of just cause "more likely to be incorrect than it is to be correct".

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III. THE HEARING OFFICER DID NOT ERR IN CONCLUDING THAT A.R. 339 WAS NOT BINDING ON STATE HEARING OFFICERS.

NDOC has promulgated Administrative Regulation 339 which identifies conduct prohibited by NDOC employees, and a Chart of Corrective/Disciplinary Sanctions for violations of delineated offenses. (JA Vol. I at 192-210). NDOC argues that under A.R. 339 "leaving an assigned post while on duty without authorization of a supervisor is a Class 5 terminable offense for a first violation", and therefore the Hearing Officer erred in determining that progressive discipline should be utilized.

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

> 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 the 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 maintained the public trust.

There is no requirement that charges similar in nature must result in identical penalties.

6. Appointing Authorities and their reviewers should neither rely solely on previously imposed penalties nor quote them as authority in penalty rationales. It must be remembered that this is a historical document of penalties. As such it may not reflect an appropriate penalty for the misconduct. Indeed, an appropriate penalty may be higher or lower depending upon current issues and the impact of the particular misconduct on the Department and/or fellow employees.

(JA Vol. I at 195-196). If appointing authorities are not bound by the prescribed penalties, Hearing Officers cannot be. As set forth above, Hearing Officers do not even defer to the appointing authority in cases such as this which do not implicate security concerns.

Moreover, A.R. 339 was never submitted to the State of Nevada Personnel Commission for approval. As set forth above NRS 284.150(2) prohibits discharge of members of the classified service "in any manner or by any means other than those prescribed in this chapter and the regulations adopted in accordance therewith". NAC 284.742 entitled "**Appointing authorities required to determine prohibited conflicting activities and identify such activities and explain process of progressive discipline in policy**" states:

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

> 2. If an appointing authority revises the policy described in subsection 1, the appointing authority shall provide a copy of the revised policy to each employee.
>
> 3. An appointing authority shall include in the policy described in subsection 1 an explanation of the process of progressive discipline as administered by the appointing authority. The process must conform to the provisions of NRS 284.383 and NAC 284.638 to 284.6563, inclusive.

(Emphasis added). If an appointing authority such as NDOC wishes to adopt Prohibitions and Penalties setting forth certain discipline for certain offenses, it may do so "subject to the approval of the [Personnel] Commission". It was undisputed that A.R. 339 has never been submitted to, much less approved, by the Personnel Commission. (JA Vol. II at 464-465).

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

> 1. The Commission shall adopt by regulation a system for administering disciplinary measures against a state employee in which, except in cases of serious violations of law or regulations, less severe measures are applied at first, after which more severe measures are applied only if less severe measures have failed to correct the employee's deficiencies.
>
> 2. The system adopted pursuant to subsection 1 must provide that a state employee is entitled to receive a copy of any findings or recommendations made by an appointing authority or the representative of the appointing authority, if any, regarding proposed disciplinary action.

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

> 2. If appropriate and justified, following a discussion of the matter, a reasonable period of time for improvement or correction may be allowed before initiating disciplinary action.
>
> 3. In situations where an oral warning does not cause a correction of the condition or where a more severe initial action is warranted, a written reprimand prepared on a form prescribed by the Department of Personnel must be sent to the employee and a copy placed in the employee's personnel folder which is filed with the Department of Personnel.

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

> 1. If other forms of disciplinary or corrective action have proved ineffective, or if the seriousness of the offense or condition warrants, an employee may be:
>
> (a) Suspended without pay for a period not to exceed 30 calendar days for any cause set forth in this chapter; or
>
> (b) Demoted for any cause set forth in this chapter.
>
> 2. An exempt classified employee may only be suspended without pay in increments of one or more full workweeks.
>
> 3. The rights and procedures set forth in NAC 284.655 to 284.6563, inclusive, apply to any disciplinary action taken pursuant to this section.

Regulations adopted by the Personnel Commission "have the force and effect of law". *Turk v. Nevada State Prison*, 94 Nev. 101, 104, 575 P.2d 599, 601 (1978).

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

NDOC's Opening Brief argues that A.R. 339 did not need to be approved by the Personnel Commission because it was approved by the Board of State Prison Commissioners. ("BOSPC"). NDOC cites to Article 5 §21 of the Nevada Constitution to argue that the BOSPC has authority over all matters connected with Nevada's prisons. This is incorrect.

Article 5 §21 states that the BOSPC has "supervision of all matters connected with the State Prison *as may be provided by law*." (Emphasis added). Over 100 years ago the Nevada Supreme Court rejected claims that the

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constitutional authorization of the BOSPC superseded the legislature's statutory authority to limit the BOSPC's authority.

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

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

13 Nev. at 420-421.

Moreover, any authority over employees which may have previously vested in the BOSPC by Art. 5 §21 has been superseded by Article 15 §15 of the Nevada Constitution which states "*The legislature shall provide by law for a state merit system governing the employment of employees in the executive branch of state government.*" That merit system is codified at NRS Chapter 284. See Legislative declaration of purpose at NRS 284.010.

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

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

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> 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.

The reference to "labor" in NRS 209.111 defining the Powers and duties of the BOSPC is a reference to prisoner (convict) labor, not employees of the classified service of the State of Nevada. Subsection of the statute speaks in terms of "officers and employees" of the Department, as opposed to a reference to "labor".[2]

In contrast, NRS 284.150(2) states:

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

(Emphasis added).

It is well-established that "When a specific statute is in conflict with a general one, the specific statute will take precedence." *Lader v. Warden*, 121 Nev.

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

682, 120 P.3d 1164 (2005); *Gaines v. State*, 116 Nev. 359, 365, 998 P.2d 166, 170 (2000). NRS 209.111 is a general statute and must yield to NRS 284.150(2). This is self-evident from the language "Except as otherwise provided in... NRS 209.161".

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

> 1. The Director shall appoint a warden for each institution of the Department.
>
> 2. Each warden is in the classified service of the State except for purposes of appointment and retention.
>
> 3. Each warden is responsible to the Director for the administration of his or her institution, including the execution of all policies and the enforcement of all regulations of the Department pertaining to the custody, care and training of offenders under his or her jurisdiction.

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

The Legislature has created no such exemptions for correctional officers. As members of the classified service, the Legislature has mandated under NRS 284.150(2) that they cannot be dismissed except in conformance with the regulations adopted by the Personnel Commission. Accordingly, NDOC's

argument that A.R. 339 supersedes the legislative requirement that progressive discipline be utilized where appropriate is without merit.

CONCLUSION

For all the reasons set forth above, the judgment of the district court denying NDOC's Petition for Judicial Review should be AFFIRMED.

DATED this 3rd day of January, 2018.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28(e) AND NRAP 32(a)(8)

I hereby certify that I have read this Answering Brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that it complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the Answering Brief regarding any material issue which may have been overlooked to be supported by a reference to the page of the transcript or Appendix where the matter overlooked is to be found. I further certify that this Answering Brief is formatted in compliance with NRAP 32(a)(4-6) as it has one (1) inch margins and uses New Times Roman - font size 14, has 33 pages, double spaced, and contains 7,654 words. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of January, 2018.

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CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 3rd day of January, 2018, I did serve the above and forgoing RESPONDENT'S ANSWERING BRIEF, by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, to the following email address on file for:

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