IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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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

APPELLANT'S REPLY BRIEF

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I.

DISPUTED FACTS

A. Employee's Approved FMLA Leave is Not at Issue

In his Answering Brief, Employee discusses that he applied for and was approved leave under the Family Medical Leave Act (FMLA). However, while Employee's approved FMLA leave was raised before the hearing officer, it was not determinative in the hearing officer's Decision, it was not an issue raised in the Petition for Judicial Review, it was not raised in a Cross Petition for Judicial Review and it certainly is not an issue in this Appeal. 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. JA Vol. I, p. 0018. 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." JA Vol. I, pp. 0018-0019. 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. JA Vol. I, p. 0017. Further, the hearing officer found that Employee engaged in inexcusable neglect of duty by leaving his post without prior permission of a

supervisor and that he violated a "very important safety and security policy." JA Vol. I, p. 0019. Employee did not challenge or seek 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 are more inmate fights, more inmate violence, and more challenging of authority than any other Unit." *See* Answering Brief, pp. 4, ll. 3-6.

B. The Adjudication Report is Not Binding

Employee also refers to NDOC's adjudication report in which Warden Jo Gentry initially recommended a five (5) day suspension without pay. Warden Gentry is not the appointing authority, and the adjudication report is neither a required step of the investigative process under NRS or NAC Chapter 284 or a final binding determination of the discipline imposed on the employee. *See generally* NRS Chapter 284, NAC Chapter 284; *See also* JA Vol. III, pp. 0585-0588; JA Vol. II, pp. 0393-0396. The **final decision** is made by the Director of NDOC, who is the appointing authority. JA Vol. III, pp. 0567, 0585. It is clear from Warden Gentry's testimony that in making a determination of the appropriate discipline for Employee, Acting Director E.K. McDaniel, amongst other things, considered and relied on AR 339, which prescribed termination for the misconduct. JA Vol. III, pp. 0583-0588.

II.

ARGUMENT

A. The Hearing Officer Erred When She Failed to Apply *Dredge* Deference.

Employee left his assigned post "in the most challenging Unit" while on duty without the authorization of a supervisor. JA, Vol. I, p. 0128. While Employee's abandonment of his post may not have resulted in actual harm, it nevertheless jeopardized the safety and security of FMWCC in violation of NAC 284.650(3). JA, Vol. I, p. 0128; JA, Vol. II, pp. 0337-0392; JA, Vol. III, pp. 0530-0531, 0563. Such a violation entitles NDOC's disciplinary decision to deference. *See Dredge v. State ex rel Dep't of Prisons*, 105 Nev. 39, 42, 769 P.2d 56, 58 (citing NAC 284.650(3) for the proposition that NDOC's disciplinary decision is entitled to deference); *State ex rel Dep't of Prisons v. Jackson*, 111 Nev. 770, 772-73, 895 P.2d 1296, 1298 (recognizing NAC 284.650(3) violation entitled NDOC to deference). Under the *Dredge* line of cases, actual harm is not required before a hearing officer must give deference to the decision of the appointing authority.

Here, the decision of the Acting Director, i.e., appointing authority, was that Employee's conduct warranted termination. JA, Vol. III, pp. 0567-0568. Evidence supporting the appointing authority's dismissal decision included testimony from Associate Warden Piccinini that Employee's failure to obtain prior permission to leave his post put himself, his fellow staff members and the public in a vulnerable

position. JA, Vol. I, p. 0126, JA Vol. III, pp. 0530-0531. The evidence further included testimony from Warden Gentry that Employee's misconduct was a serious infraction for several reasons including when there is a hostage situation or medical emergency involving an officer and management is not aware of the officer's whereabouts then timely assistance cannot be provided and there is a decrease in response time when there are less officers at a post than what was assigned by the supervisor. JA, Vol. I, pp. 0126-0127, JA Vol. III, p. 0563. Even the hearing officer found Employee violated a "***very important safety and security policy***." JA, Vol. I, p. 0128 (emphasis added). Despite this finding, the hearing officer did not defer to NDOC's decision to terminate and instead reversed the termination.

The substantial evidence in the record demonstrates that Employee's abandonment of his post was egregious and a clear and serious security threat. Accordingly, the hearing officer's and the District Court's failure to defer to NDOC's decision to terminate Employee is clear error.

B. The Hearing Officer Made No Findings or Determination Regarding the Application of *Dredge* Deference.

In his Answering Brief, Employee argues that the hearing officer did make findings of fact regarding whether Employee's conduct did or did not rise to the level of being a "clear and serious security threat" as defined in *Jackson* and cites to page 14 of the hearing officer's Decision. *See* Answering Brief at 14-15.

However, the findings cited by Employee were the hearing officer's findings regarding the existence of just cause. But her findings regarding just cause were limited to Employee's violation of NAC 284.650(7) and whether termination was too harsh a penalty for said violation. The hearing officer made no finding whether or not Employee violated NAC 284.650(3), violating or endangering the security of an institution, and the hearing officer did not conclude that she was not going to apply *Dredge* deference. The hearing officer's failure to apply *Dredge* deference or make a decision regarding *Dredge* deference based on specific findings of fact was clear error. *See Jackson*, 111 Nev. 770 at 895 P.2d at 1298; *State v. Malcic*, No. 70341, 2017 WL 1806807, *2 (Nev. Ct. App. Apr. 28, 2017) (unpublished) (If a hearing officer is not going to apply *Dredge* deference, then the decision must be based on specific findings that the facts of this case do not indicate a clear and serious security threat. Otherwise, the hearing officer must give deference to the appointing authority.) (internal citation omitted).

The hearing officer did not even analyze whether Ludwick violated NAC 284.650(3). She simply concluded he violated NAC 284.650(7) inexcusable neglect of duty and then determined that termination was too harsh a penalty. Thus, the hearing officer's failure to make *Dredge* findings was clear error.

C. The Hearing Officer Erred and Abused Her Discretion When She Used Preponderance of the Evidence Standard Instead of Substantial Evidence Standard in Reviewing the Appointing Authority's Decision to Terminate.

The hearing officer held that the standard of proof in administrative hearings was preponderance of the evidence or "more probable than not." JA, Vol. I, pp. 0125-0126. The hearing officer improperly relied on *Nassiri v Chiropractic Physicians' Bd.,* 130 Nev. __, __, 327 P.3d. 487 (2014), concluding that the preponderance of the evidence is the standard of proof for an agency to take disciplinary action against an employee." JA, Vol. I, p. 0126. However, *Nassiri* expressly considered only "what standard of proof applies in an agency's occupational license revocation proceedings[.]" *Nassiri* at 491.

Employee argues that the preponderance of the evidence standard set forth in *Nassiri,* supra, rather than the substantial evidence standard set forth in *Southwest Gas,* is the correct standard of review to apply in determining the existence of just cause to terminate Employee. *See Answering Brief* at 18-22. On the one hand, Employee attempts to distinguish *Southwest Gas* from this case, as well as other Nevada State employment cases recently decided by this Court, because *Southwest Gas* did not involve NRS Chapter 284. Then on the other hand, Employee attempts to support his position by citing cases from other jurisdictions which also do not involve NRS Chapter 284 and which have no persuasive value to the instant appeal. None of those cases sets forth a standard of preponderance of the evidence.

Furthermore, the fact that *Southwest Gas* involved a private employment contract rather than government employment in the classified system is not relevant. The *Nassiri* case, which Employee claims is the controlling case, did not involve employment at all; rather, *Nassiri* concerned a license revocation hearing pursuant to NRS 233B. *Nassiri* did *not* establish a standard for an employee's hearing regarding a dismissal from State service pursuant to NRS 284.390.

1. "Just Cause" as Defined in *Southwest Gas* is the Correct Standard.

In *Southwest Gas*, this Court defined "just cause" in an employee-termination context. *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995). There, after an extensive investigation, an employee was terminated for sexual harassment. *Id.* at 1065-68, 901 P.2d at 694-95. The terminated employee sued for breach of contract arguing that the company agreed he could only be terminated for cause following progressive discipline. *Id.* at 1068, 695. The employee argued his alleged misconduct for which he was terminated did not amount to good cause. *Id.* at 1073, 698. A jury returned a verdict for the terminated employee and the company appealed. *Id.* 1070-71, 697.

On appeal before this Court, the parties disputed the role of the jury. *Id.* at 1073, 698. The company argued that the jury was limited to determining whether the company had a "reasonable belief" that the employee committed sexual harassment. *Id.* at 1073-74, 698-99. The terminated employee argued that the

lower court properly allowed the jury to review the employee's conduct *de novo* and determine whether he actually committed sexual harassment. *Id.* at 1073-74, 698-699. This Court held that "the employer is the ultimate finder of facts constituting good cause for termination." *Id.* at 1075, 700.

While *Southwest Gas* involved a private employer, the role of the jury and a hearing officer are similar because they both evaluate the employer's disciplinary decision. This Court cautioned, "allowing a jury to trump the factual findings of an employer that an employee has engaged in misconduct rising to the level of 'good cause' for discharge, made in good faith and in pursuit of legitimate business objective, is a highly undesirable prospect." *Id.* at 1075, 699. This Court further stated that this "would create the equivalent of a preeminent fact-finding board unconnected to the challenged employer that would have the ultimate right to determine anew whether the employer's decision to terminate an employee was based upon an accurate finding of misconduct…" *Id.* This Court ruled, unless expressly stated in contract or statute, employers have not ceded to reviewing bodies the authority to define "serious misconduct." *Id.* at 1080, 703. Thus, the Court held "a discharge for '*just*' or 'good' cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) *supported by substantial evidence*, and (2) reasonably believed by the employer to be true." *Id.* at 1078, 701 (emphasis added). In other words, the hearing officer's

review is limited to determining whether the employer's decision to terminate was made in good faith and supported by substantial evidence. *Id.* at 1079, 702. Based on this standard, this Court reversed the jury's verdict which was in favor of the employee. *Id.* at 1079-80, 901 P.2d at 702-03.

When applying the *Southwest Gas* definition of "just cause" to NRS 284.390(6) it is consistent with the statutory scheme and protects the same interests that the Executive Branch possesses as an employer. If hearing officers are allowed to overrule every disciplinary decision, then state employers face the same dangers as private employers face from a de novo jury review. The hearing officers are not connected to the challenges faces by the state agencies and their review should be limited to the existence of substantial evidence. *See id*. at 1075, 699.

Further, the *Southwest Gas* standard is consistent with this Court's earlier case law. In *Lapinski v. City of Reno*, 95 Nev. 898, 603 P.2d 1088 (1979), a city employee was terminated and he sought a hearing before the city council to contest the decision. On appeal, this Court said that "[t]he determinative issue in this case is whether there was substantial evidence placed before the city council from which it could have made a finding that legal cause existed to terminate [the employee's] employment with the City of Reno." *Id.* at 901, 603 P.2d at 1090. The city council's function in *Lapinski* was akin to the role of a hearing officer or a civil jury and this Court found the city council was not to make a new factual

determination. *See id.*

Therefore, under *Southwest Gas* and *Lapinski*, any review of an adverse employment action should be limited to determining whether substantial evidence exists to support the *appointing authority's* decision that the discipline imposed will serve the good of the public service. This standard requires the hearing officer to give some deference to the appointing authority's view of the facts.

In *Dredge*, this Court held "[i]t was the task of the hearing officer to determine whether NDOP's decision to terminate Dredge was based upon evidence that would enable NDOP to conclude that the good of the public service would be served by Dredge's dismissal." *Dredge, 105* Nev. 39, 42, 769 P.2d 56, 58 (1989). This is the same standard set forth in *Southwest Gas* and *Lapinski.* However, as stated above, *Dredge* also requires extra deference where a security concern is implicated in an employee's termination. *Id.*

As Employee has acknowledged, the Nevada Court of Appeals recently applied *Southwest Gas*, to the dismissal of a state employee and held "the hearing officer should reverse dismissal if he or she concludes dismissal is (1) not based on substantial evidence or (2) for a purpose other than the good of the public service." *See Nevada Dept. of Motor Vehicles v. Adams*, No. 68507, 2017 WL 521774 (Nev. App. 2017); *see* also *Morgan v. State, Dep't of Bus.& Indus., Taxicab Auth.,* No. 67944, 2016 WL 2944701 (Nev. App. May 16, 2016) (unpublished).

Employee's position that *Southwest Gas* should be limited and/or does not apply to this case fails to refute that the hearings officer's decision was clear error in this case. Employee spends a significant portion of this Answering Brief attempting to distinguish *Southwest Gas* from this case, by citing to cases from other jurisdictions for the proposition that just cause has different meanings in different cases and that *Southwest Gas's* definition of just cause is limited to a unilateral promise in an employee handbook. Employee further argues that the rationale in *Southwest Gas* does not apply to classified service because the protection afforded employees does not come from a unilateral declaration from NDOC but rather from NRS 284.385 and 284.390(6). Yet, as noted above the application of "just cause" as set forth in *Southwest Gas,* is not only consistent with Nevada case law but also with Nevada's statutory scheme.

Here, the hearing officer conducted "independent" non-deferential *de novo* determinations about whether Employee's termination would serve the good of the public service and whether Employee's misconduct was sufficiently "serious" under NRS 284.383 to warrant termination. However, because NRS 284.385(1)(a) vests only appointing authorities with the power to conduct the "good of the public service" assessment, and NRS 284.390(6) restricts hearing officers to reviewing the appointing authority's conclusion for "just cause" – defined in *Southwest Gas* and *Lapinski* as substantial evidence – the hearing officer applied an incorrect

standard of review and did not properly defer to NDOC's decision.

2. Employee's Statement of Issues on Appeal and Related Arguments Regarding Due Process Violations Have Been Raised for the First Time in This Appeal and May not be Considered.

The Nevada Supreme Court will not consider arguments that a party raises for the first time on appeal. *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) citing *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 365 n. 9, 989 P.2d 870, 877 n. 9 (1999).

Here, Employee raises the issue of whether depriving an employee of their property interest in their job under a substantial evidence standard violates the Due Process Clause of the Fourteenth Amendment. Plaintiff never raised this issue to the hearing officer or to the district court and cannot raise it for the first time to the Nevada Supreme Court on appeal. Any argument regarding this issue should not be considered.[1]

With that said, should this Court address this argument, Employee's argument is misplaced and confuses the standard of proof with a standard of

[1]Employee also argues here for the first time that taking approved FMLA leave cannot create a security concern and that *Dredge* deference therefore cannot be applied in this case. This absurd argument was not raised below at either the personnel hearing or district court level. The issue here is simply whether Employee left his post without authorization of supervisor, thereby jeopardizing the safety and security of the institution. The issue is not whether the alleged sudden need to take intermittent FMLA leave allows a correctional officer to abandon his post at will with no consequences, which seems to be the incredible position asserted by Employee.

review. Standard of proof refers to the "degree or level of proof demanded" to prove a specific allegation. *See Nassiri v. Chiropractic Physician's Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487, 489-90 (2014) citing Black's Law Dictionary 223, 1535 (9th ed. 2009). A substantial evidence standard of review refers to the reviewing body's inquiry of whether the agency's factual determinations are reasonably supported by evidence of sufficient quality and quantity. *Id.* at 490. *See* also *Nevada Dep't of Motor Vehicles v. Adams*, No. 68057, 2017 WL 521774, at *2 (Nev. App. Jan. 30, 2017) (unpublished) (noting that *Nassiri* may have caused confusion because it noted the standard of 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.)

Here, the hearing officer's failure to use a substantial evidence standard of review was clear error and would not be a violation of due process.

D. AR 339 is a Valid, Lawful Regulation and the Hearing Officer Erred When She Found that AR 339 Required Approval by the Personnel Commission and Did Not Rely on It.

Employee argues that NDOC's AR 339 does not comply with NAC 284.742 because AR 339 has not been approved by the Personnel Commission. *See* Answering Brief pp. 26-27. However, AR 339 does not require approval from the Personnel Commission. The legislative history establishes that the Board of State

Prison Commissioners (Board) and not the Personnel Commission are responsible for establishing NDOC's Administrative Regulations. *See generally* NRS Chapter 209; Nev. Const. art. 5, § 21.

As stated in NDOC's Opening Brief, AR 339 has been presented to the Board for approval several times. 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 most recent version of AR 339 was approved by the Board on January 14, 2016. At the January 14, 2016 meeting, it was specifically explained to the Board that AR 339 was compared line by line with both NRS Chapter 284 and NRS Chapter 289. *See Opening Brief at 32*.

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

Furthermore, Chapter 284 of NRS and NAC do not require agencies to start with the lowest form of discipline. Rather Chapter 284 of the NRS and the NAC identifies a system of progressive discipline where serious violations warrant a more severe punishment. In fact, NAC 284.646 (1), allows an appointing authority

to dismiss for any cause set forth in NAC 284.650 if the seriousness of the offense or condition warrants such dismissal. Additionally, NAC 284.646 (2) allows an appointing authority to immediately dismiss an employee for certain causes enumerated therein. Thus, Employee's argument that NDOC failed to apply a system of progressive discipline is unsupported and misplaced.

Moreover, *State ex rel. Fox v. Hubbart* is distinguishable from the instant case. In *Hubbart,* the Court held that Article 5 § 21 of the Nevada Constitution only gives the Board supervision of such matters as may be provided by law and turns to the statutes for a definition of those powers. *State ex rel. Fox v. Hubbart*, 13 Nev. 419, 420 (1878). In *Hubbart*, the Court held that the power to appoint a physician or "all necessary help" was transferred from the Board to the Warden based on new statutes enacted by the legislature.

Here, NRS 209.111 clearly defines that that Board shall[p]rescribe regulations for carrying on the business of the Board and the Department." Furthermore, 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] . . . ***[e]stablish regulations with the approval of the Board*** and enforce all laws governing the administration of the Department and the custody, care and training of offenders." NRS 209.131(1) and (6) (emphasis added). Therefore, the matter at

issue in this case is not whether the Warden or the Board has the power to appoint an officer such as Employee, but rather whether NDOC, particularly the Director, has the power to establish regulations with the approval of the Board. Based on the language of NRS 209.111 the power to establish regulations for NDOC is clearly within the existing law.

Employee also incorrectly argues that any authority given to the Board under Article 5 § 21 of the Nevada Constitution is superseded by Article 15 §15 of the Constitution because Article 15 §15 was ratified in 1970 making it the more recent of the constitutional articles. However, "the Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision." *Nevadans for Nevada v. Beers*, 122 Nev. 930, 944, 142 P.3d 339, 348 (2006). Thus, one Article does not supersede or negate another Article.

Furthermore, while unpublished, in *Corzine v. State ex rel Dep't of Prisons*, the Court held that "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, including education programs." *Corzine v. State ex rel Dep't of Corrections*, No. 68086, 2015 WL 5517030 (Nev. Ct. App. Sept. 15, 2015) (unpublished). The *Corzine* case was decided in 2015, and held that *deference should be given to the professional judgment of prison administrator* for defining the goals of the prison

system and determining how to accomplish them. *Id.* at *2. Article 15 §15 did not change the Court's opinion on the Board's authority to prescribe regulations for NDOC.

Therefore, the hearing officer clearly erred when she determined that AR 339 needed approval from the Personnel Commission to be valid and did not give AR 339 full consideration in her decision despite the fact that NDOC relied on AR 339, a lawful regulation, in terminating Employee.

E. Employee's Argument that AR 339 Does Not Mandate Termination is Misleading. It is not the Duty of the Hearing Officer to Substitute its Judgment or Discretion for that of the Appointing Authority.

Employee argues that AR 339.04 sections (5) and (6) allow NDOC's 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 25-26. Specifically, in this case, Employee asserts that a Class 5 Offense would not mandate termination pursuant to AR 339.

AR 339.05 identifies approximately 172 different offenses for prohibited employee conduct. JA Vol. II, pp. 0375-0388. 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. JA, Vol. II p. 0375.

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. JA, Vol. II, p. 374. AR 339.04 (2) states "Penalties for prohibited activities should be ***assessed based upon criteria established in the Chart of Corrective/Disciplinary Sanctions***." *Id.*

In his Answering Brief, Employee argues "if appointing authorities are not bound by the prescribed penalties, Hearing Officers cannot be." *See Answering* Brief at 26. This is an absurd interpretation of AR 339.

AR 339.04.05 states that "appointing authorities must conduct an individual analysis of each employee for each incident and exercise their professional judgment and discretion, then recommend a penalty." While AR 339 grants the appointing authority the ability to use their judgment and discretion this does not mean a hearing officer can use their discretion to determine the discipline. "It is not the duty of the hearing officer to substitute its judgment for the employing agency's judgment." *State v. Costantino,* Case No. 65611 at 3 n.2 (Nev. May 31, 2016) (unpublished decision) (citing *City of Rancho Palos Verges v. Abrams,* 544 U.S. 113, 128 (2005)). Only the agency can determine the level of discipline. *See Taylor v. Dep't. of Health & Human Services,* 129 Nev. Adv. Op. 99, 314 P.3d. 949 (2013).

In *Taylor*, this Court explained how the role of a hearing officer is distinct from that of an appointing authority and rejected the argument that the hearing officer should make the decision about the appropriate level of discipline. *Id.* At 950-51, 951-92. The Court held that pursuant to the plain language of NRS Chapter 284, while 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. *Id.* hearing officers are not within the regulatory definition of "appointing authority" and thus lack "explicit power to prescribe the amount of discipline to be imposed." *Id.* at 951 (citing NAC 284.022). "At best, then, a hearing officer's only influence on the prescription of discipline in a matter on administrative appeal comes from his or her ability to determine the reasonableness of the disciplinary decision and to recommend what may constitute an appropriate amount of discipline." *Id.* (citations omitted).

Therefore, while AR 339 may allow appointing authorities to exercise discretion, it is clear that NDOC in drafting AR 339 deemed a Class 5 offense a serious offense which calls for termination. Furthermore, the substantial evidence in the record supports that NDOC conducted an individualized analysis of the incident, exercised their professional judgment and discretion and determined it was a serious infraction warranting termination.

III.

CONCLUSION

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

Dated: February 16, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 14 pt. Times New Roman; or

[ ] This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of February, 2018.

ADAM PAUL LAXALT
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By: /s/ Michelle Di Silvestro Alanis
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on February 16, 2018, I electronically filed the foregoing document via this Court's electronic filing system. I certify that the following participants in this case are registered electronic filing systems users and will be served electronically and by U.S. Mail first class postage prepaid:

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