

**NO. 62493**

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

---

NADINE GOODWIN,

Appellant,

vs.

CYNTHIA JONES and RENEE OLSON, as former and present Administrators;  
STATE OF NEVADA, DEPARTMENT OF EMPLOYMENT, TRAINING AND  
REHABILITATION, EMPLOYMENT SECURITY DIVISION; and  
BRISTLECONE FAMILY RESOURCES, a Nevada Corporation, as Employer,

Respondents.

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On Appeal from an Order Denying Petition for Judicial Review  
of the Second Judicial District Court of  
The State of Nevada, in and for Washoe County  
District Court Case No. CV12-00253

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**RESPONDENT ESD'S ANSWERING BRIEF**

---

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1                                    **STATEMENT OF ISSUES ON APPEAL**

2                    1.     DID THE DISTRICT COURT PROPERLY AFFIRM THE DECISION  
3 OF THE AGENCY BECAUSE SAID DECISION WAS FACTUALLY BASED UPON  
4 SUBSTANTIAL EVIDENCE IN THE RECORD?

5                    2.     DID THE AGENCY PROPERLY HOLD THAT THE APPELLANT  
6 WAS INELIGIBLE TO RECEIVE UNEMPLOYMENT INSURANCE BENEFITS BECAUSE  
7 SHE WAS GUILTY OF INDUSTRIAL MISCONDUCT UNDER NRS 612.385?

8                                    **STATEMENT OF THE CASE**

9                    Appellant Nadine Goodwin (hereinafter referred to as  
10 “claimant”) was employed as an adult and family drug court administrator  
11 from September 2, 2003, to July 8, 2011, by Respondent Bristlecone Family  
12 Resources (hereinafter referred to as “employer”). (Joint Appendix  
13 [hereinafter “JA”], pp. 27-28) Claimant was terminated by the employer for  
14 misconduct. (JA, 27-29)

15                    Claimant filed a claim for unemployment insurance benefits.  
16 The claim was assigned by the Administrator of ESD to an investigator  
17 (hereinafter “adjudicator”) for investigation. The Administrator issued a  
18 determination through the adjudicator on August 1, 2011, finding that the  
19 claimant was not entitled to receive unemployment insurance benefits  
20 because the claimant was guilty of industrial misconduct under NRS  
21 612.385. (JA, 88) Claimant appealed and an evidentiary hearing was held

1 before the Administrative Tribunal (hereinafter referred to as "referee") on  
2 September 13, 2011. (JA, 30-72) The referee issued a decision on October  
3 3, 2011, affirming the determination denying benefits under NRS 612.385.  
4 (JA, 27-29)

5 Claimant then filed an appeal to the Board of Review  
6 (hereinafter referred to as "Board" or "Board of Review"). The Board  
7 issued an order on January 3, 2012, declining further review under NRS  
8 612.515; thereby adopting the findings of fact and conclusions of law of the  
9 referee and affirming the decision denying benefits. (JA, 24) In its order,  
10 the Board notified the claimant that any appeal to the District Court had to  
11 be filed by January 30, 2012. (JA, 24)

12 Claimant filed a Petition for Judicial Review with the District  
13 Court on January 30, 2012. (JA, 1-2) Claimant then filed an Amended  
14 Petition on February 14, 2012. (JA, 3-4; 16-17)

15 The Petition was fully briefed before the District Court. (JA,  
16 104-143) The District Court issued an Order on December 20, 2012, finding  
17 that there was substantial evidence in the Administrative Record to support  
18 the decision of the referee and the Board of Review. The Court concluded  
19 that under its limited authority of review, the decision of the Board was not  
20 defective and thus was affirmed. (JA, 144-146)

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1           5.     The claimant obtained an associate's degree from  
2 Truckee Meadows Community College (hereinafter referred to as "TMCC")  
3 in 2010. (JA, 27) The claimant took two classes thereafter every six weeks  
4 online with Walden University. (JA, 27)

5           6.     On May 6, 2011, the Board of Examiners sent the  
6 claimant a letter requesting her school transcripts to verify her completion of  
7 a bachelor's degree. Claimant was informed if she had not obtained her  
8 degree by June 30, 2011, her internship certification would not be renewed.  
9 (JA, 28; 94)

10          7.     The claimant did not obtain her bachelor's degree by  
11 June 30, 2011. She had five more credits to take to obtain her degree and  
12 hoped to complete the degree by February of 2012. (JA, 28; 92-93)

13          8.     The claimant requested that the Board of Examiners  
14 extend her intern certification for six months to allow her time to obtain her  
15 bachelor's degree. The Board of Examiners denied the claimant's request to  
16 extend her internship, but allowed the claimant to reapply for an internship  
17 after she obtained her degree. (JA, 28; 92-93; 98-99; 101) The claimant  
18 was unable to obtain her Bachelor of Science degree until approximately six  
19 months after her ten-year internship authorization expired on June 30, 2011.  
20 (JA, 103) Thereafter, the claimant would have to take and pass the  
21 certification examination before she could be recertified. The soonest she

1 could have taken the examination was in March or, perhaps even June of  
2 2012, depending upon when she completed and obtained her degree. (JA,  
3 103)

4           9. There is no evidence in the record that the Board of  
5 Examiners could have “extended” an internship past the ten-year limit under  
6 existing Nevada law. During the Board of Examiners meeting on January  
7 28, 2011, the Board of Examiners decided that it would allow interns who  
8 had lost their certification for failing to complete their degree within ten  
9 years to reapply for certification after they completed their degree.  
10 Decisions regarding allowing recertification would be made on a case-by-  
11 case basis. (JA, 98-99)

12           10. On July 11, 2011, the employer was notified by The  
13 Board of Examiners that the claimant’s internship certification had not been  
14 renewed. Claimant could not perform her job without the intern  
15 certification. The claimant acknowledged to the Board of Examiners in an  
16 email dated July 15, 2011, that she understood that she could not “do any  
17 substance abuse counseling” until she was recertified. (JA, 28; 103)

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1           11. The claimant was aware when she submitted her  
2 application to become an intern in 2001 that in order to maintain her  
3 internship certification she would have to obtain her bachelor's degree  
4 within ten years. (JA, 28)

5           12. Claimant knew when she commenced working for the  
6 employer in 2003 that she had to obtain her bachelor's degree by June 30,  
7 2011 in order to retain her certification and that she could not continue to  
8 work without having the certification. (JA, 28)

9           13. Despite having ten years to obtain a four-year degree, the  
10 claimant did not obtain the degree within the time limit. She speculated that  
11 the Board of Examiners would extend the time for her to obtain her degree.  
12 The Board did not extend the time as she had hoped. (JA, 28)

13           14. The claimant did not act in a proactive manner in  
14 scheduling her classes to ensure that she met the requirements to keep her  
15 job. (JA, 28)

16           15. The employer had a reasonable expectation that the  
17 claimant would comply with the requirements of the Board of Examiners  
18 and comply with the protocols to maintain her certification. (JA, 29)

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1           16. Claimant's failure to obtain her degree demonstrates a  
2 deliberate disregard of her employer's reasonable requirements. Claimant's  
3 conduct also shows such a degree of negligence as to show a disregard for  
4 the employer's interests and her duties as an employee. (JA, 29)

5           17. Claimant's conduct was wrongful. NRS 612.385  
6 misconduct has been established. (R, 29)

7           18. The claimant's certification expired on June 30, 2011;  
8 she could not have performed services for the employer as a counselor for  
9 six months to a year after she lost her certification. (JA, 101; 103) The  
10 decision of the employer to terminate the claimant for failing to comply with  
11 the certification requirements for her job was reasonable and appropriate.  
12 (JA, 29)

13           Additional facts will be discussed during argument.

14                           **STANDARD OF REVIEW**

15           If supported by evidence and in the absence of fraud, the  
16 decision of the Board is conclusive. NRS 612.530(4); *State Employment*  
17 *Sec. Dept. v. Weber*, 100 Nev. 121, 676 P.2d 1318 (1984). In reviewing the  
18 Board's decision, the District Court is limited to determining whether the  
19 Board acted arbitrarily or capriciously. *State Emp. Sec. Dept. v. Taylor*, 100  
20 Nev. 318, 683 P.2d 1 (1984); *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d

1 552 (1982); *Bryant v. Private Investigator's Lic. Bd.*, 92 Nev. 278, 549 P.2d  
2 327 (1976); *Lellis v. Archie*, 89 Nev. 550, 516 P.2d 469 (1973).

3 In performing its review function, the District Court may not  
4 substitute its judgment for that of the Board of Review, *Weber, supra*;  
5 *McCracken, supra*, nor may the District Court pass upon the credibility of  
6 witnesses or weigh the evidence, but must limit review to a determination  
7 that the Board's decision is based upon substantial evidence. NRS  
8 233B.135(3).

9 Substantial evidence has been defined as that which "a  
10 reasonable mind might accept as adequate to support a conclusion."  
11 *Richardson v. Perales*, 402 U.S. 389 (1971). Stated another way, it has been  
12 held that "substantial evidence" means only competent evidence which, if  
13 believed, would have a probative force on the issues. *State ex rel. Util.*  
14 *Consumers Council v. P.S.C.*, 562 S.W.2d 688 (Mo. App. 1978). Evidence  
15 sufficient to support an administrative decision is not equated with a  
16 preponderance of the evidence, as there may be cases wherein two  
17 conflicting views may each be supported by substantial evidence. *Robinson*  
18 *Transp. Co. v. P.S.C.*, 159 N.W.2d 636 (Wis. 1968).

19 The burden to be met by Respondent ESD is to show that the  
20 Board's decision is one which could have been reasonably reached under the  
21 facts of this case. The District Court was confined to a review of the record

1 presented below, *Lellis, supra*, at 553-554; and the Board's action is not an  
2 abuse of discretion if it is supported by substantial evidence in the record.  
3 *State, Dept. of Commerce v. Soeller*, 98 Nev. 579 at 586, 656 P.2d 224  
4 (1982); *Lellis, supra*; *North Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 278,  
5 426 P.2d 66 (1967); *Rondono v. Nev. Real Estate Comm'n*, 79 Nev. 132, 379  
6 P.2d 537 (1963).

7 In the case of *Clark County School District v. Bundley*, 122  
8 Nev. 1440, 148 P.3d 750 (2006), this Court stated as follows:

9 When reviewing an administrative unemployment  
10 compensation decision, this court, like the district  
11 court, examines the evidence in the administrative  
12 record to ascertain whether the Board acted  
13 arbitrarily or capriciously, thereby abusing its  
14 discretion. With regard to the Board's factual  
15 determinations, we note that the Board conducts de  
16 novo review of appeals referee decisions.  
17 Therefore, when considering the administrative  
18 record, the Board acts as 'an independent trier of  
19 fact,' and the Board's factual findings, when  
20 supported by substantial evidence, are conclusive.

21 Accordingly, we generally review the Board's  
decision to determine whether it is supported by  
substantial evidence, which is evidence that a  
reasonable mind could find adequately upholds a  
conclusion. In no case may we substitute our  
judgment for that of the Board as to the weight of  
the evidence. Thus, even though we review de  
novo any questions purely of law, the Board's fact-  
based legal conclusions with regard to whether a  
person is entitled to unemployment compensation  
are entitled to deference.

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1           Therefore, while a party who is appealing an adverse  
2 determination may have the burden of producing sufficient evidence to  
3 convince the administrative tribunal that his case has been proved by a  
4 preponderance of the evidence, the reviewing court may only determine  
5 whether there was substantial evidence in the record from which a  
6 reasonable fact-finder could have concluded whether the case was proved by  
7 a preponderance of the evidence. In other words, the burden to be met by  
8 Respondent, at the District Court level, is to show that the Board's decision  
9 is one which could have been reached under the evidence in the record; not  
10 that it is the "only" decision or even the "best" decision which may be  
11 suggested by the evidence contained within the record.

### 12                                   ARGUMENT

13           The facts of this case establish that the claimant lost her  
14 certification (license) and thus was unable to continue working in her  
15 position with the employer. (JA, 46) The claimant was notified in 2001, ten  
16 years before she lost her job, that in order to be employed in the position of a  
17 drug counselor she had to obtain a bachelor's degree by June 30, 2011. (JA,  
18 46-48; 79) The license was renewed each year by the Board of Examiners  
19 for Alcohol, Drug and Gambling Counselors (Board of Examiners). The  
20 Board of Examiners is a licensing board of the State of Nevada and is not  
21 connected with the employer. (JA, 79)



1           The claimant testified that she was fully aware of the  
2 requirement that she maintain her licensure in 2003, when she accepted the  
3 job with the employer. (JA, 55) As a matter of fact, the claimant  
4 acknowledged that she was informed by the Board of Examiners in 2001 of  
5 the requirement. (JA, 55) Despite knowing of the requirement, the claimant  
6 did not complete the condition in order to renew her license and keep her  
7 employment. (JA, 49; 56)

8           Claimant has set forth various arguments in her brief to support  
9 her contention that she was improperly denied unemployment insurance  
10 benefits. ESD responds to those arguments as follows:

11           I. CLAIMANT HAS NO INHERENT RIGHT  
12           TO UNEMPLOYMENT BENEFITS UNDER  
              NEVADA LAW.

13           Claimant argues that she was involuntarily rendered  
14 unemployed through no fault of her own and that she has an absolute right to  
15 collect unemployment insurance benefits under Nevada law. (Opening  
16 Brief, 4) Claimant is wrong. She has no “right” to receive unemployment  
17 insurance benefits under Nevada law.

18           In the case of *Kame v. Employment Security Department*, 105  
19 Nev. 22, 769 P.2d 66 (1989), this Court held that claimants have no inherent  
20 right to unemployment insurance benefits in Nevada. Instead, the  
21 unemployment insurance system was created by the Legislature and the

1 Legislature adopted procedures for eligibility and review of claims.  
2 Claimants are required to comply with those statutory rules. This Court  
3 stated:

4 It is true that dismissal of [an] appeal may cause  
5 [the petitioner] some hardship. However, the  
6 legislature is the parent of unemployment benefits.  
7 [Citations Omitted] These benefits are not  
8 inherent rights of Nevada citizens. [Citations  
Omitted] Therefore, the legislature may enact any  
reasonable and nondiscriminatory conditions  
regarding *eligibility* and procedure. *Kame, supra*,  
105 Nev. 22 at 26 (Emphasis Supplied).

9 The facts show, and the referee and Board found, that the  
10 claimant was not “involuntarily” rendered unemployed. Instead, the referee  
11 and Board found that the claimant failed to complete the requirement  
12 necessary to keep her license and that her conduct fell below the standard  
13 her employer had the reasonable right to expect. (JA, 28-29) Indeed,  
14 claimant testified that she knew the deadline was coming up and that she  
15 could have taken more classes. However, claimant just figured that she  
16 would get an extension from the Board of Examiners and decided not to take  
17 the extra classes necessary to meet the deadline. (JA, 59)

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1                   II. THE FINDING THAT CLAIMANT'S  
2                   MISCONDUCT WAS WRONGFUL IS  
3                   SUPPORTED BY SUBSTANTIAL EVIDENCE  
4                   IN THE ADMINISTRATIVE RECORD.

5                   Claimant argues that she cannot be denied benefits because her  
6                   conduct was not "wrongful" and therefore while she was properly  
7                   discharged from her job, she is still entitled to unemployment insurance  
8                   benefits. Claimant primarily bases her contention upon the argument that  
9                   she did not deliberately violate a policy of her employer. While there is  
10                  evidence in the Administrative Record that the claimant did intentionally  
11                  and deliberately let the deadline pass regarding the requirements for  
12                  licensure, the record also shows that the claimant acted negligently by  
13                  disregarding the conditions attendant to maintaining her license. (JA, 59)

14                  The definition of misconduct was established by this Court  
15                  many years ago:

16                  The term misconduct is used in an industrial sense,  
17                  not a criminal sense. Nevada's highest  
18                  administrative appeal body, the Board of Review,  
19                  has defined misconduct as a deliberate violation or  
20                  disregard on the part of the employee of standards  
21                  of behavior which his employer has the right to  
                  expect. Carelessness or negligence on the part of  
                  the employee of such a degree as to show a  
                  substantial disregard of the employer's interests or  
                  the employee's duties and obligations to his  
                  employer are also considered misconduct  
                  connected with the work. Mere inefficiency or  
                  failure of performance because of inability or

1           incapacity, ordinary negligence in isolated  
2           instances, or good faith errors in judgment or  
3           discretion are excluded in the definition of  
          misconduct. *Barnum v. Williams*, 84 Nev. 37, at  
          41; 436 P.2d 219 (1968).

4           Claimant maintains that she did not obtain her degree within the  
5           time allowed because she believed that the Board of Examiners would  
6           extend the time. (JA, 58) The evidence in the record does not support the  
7           claimant's contention that the Board of Examiners had ever extended the  
8           ten-year deadline for anyone. In fact, NAC 641C.290(5) is very clear. All  
9           education requirements must be completed within ten (10) years. There is  
10          no procedure in the law by which the Board of Examiners can "extend" the  
11          ten- year deadline. Evidence in the Administrative Record establishes that  
12          the Board of Examiners did discuss the possibility of allowing an intern to  
13          reapply for an intern license after completing the education requirement.  
14          (JA, 98-99) In fact, the claimant was notified by the Board of Examiners,  
15          after her license was denied for extension renewal, that she could reapply for  
16          the license once she had obtained her degree. (JA, 103)

17          Claimant testified that she started attending TMCC in 1999.  
18          (JA, 64) She transferred to an online university named "Walden" in 2010.  
19          (JA, 64) Claimant testified that "...I've always took [sic] the maximum  
20          classes that I could..." (JA, 64) When making that statement, the claimant  
21          was referring to the classes she was taking online through "Walden." Yet,

1 claimant attended classes at TMCC for eleven (11) years before starting  
2 classes with Walden. The Administrative Record supports the Board's  
3 conclusion that the claimant did not act prudently and reasonably in pursuing  
4 her degree. (JA, 28; 24) Indeed, the evidence shows that the claimant  
5 deliberately disregarded the deadline. It also shows that her conduct was  
6 grossly negligent and that her conduct fell below the standard of conduct her  
7 employer had the right to expect. Under the decisions of this Court, the  
8 claimant's conduct was "wrongful."

9           In the case of *Fremont Hotel v. Esposito*, 104 Nev. 394, 760  
10 P.2d 122 (1988), this Court considered a case where Esposito cut her hand  
11 while at home and took prescribed sleeping medication. Esposito called her  
12 employer and reported that she could not come to work because she was ill.  
13 Esposito was directed to come to work anyway. Esposito explained that she  
14 had cut herself and had taken prescription drugs. She was again told to  
15 report for work anyway. When she arrived, she worked for a while and  
16 appeared to be disoriented. The employer directed her to submit to a drug  
17 test in accordance with its policy because the employer had a reasonable  
18 suspicion that Esposito was under the influence of drugs or alcohol.  
19 Esposito initially refused to take the test. She had advised her employer  
20 before she reported for work that she had taken sleeping medication. After  
21 further consideration, however, Esposito changed her mind and agreed to the

1 test approximately 45 minutes later. The employer terminated her anyway  
2 claiming that her initial refusal to take the test was a violation of the  
3 employer's drug policy.

4 This Court held that Esposito's conduct of failing to comply  
5 with the employer's policy showed a "deliberate violation or disregard on  
6 the part of the employee of standards of behavior which her employer has  
7 the right to expect." 104 Nev. at 397. This Court went on to say that  
8 misconduct was "any improper or wrong conduct." 104 Nev. at 397. This  
9 Court held that wrongfulness exists if the trier-of-fact, *i.e.*, the Board of  
10 Review, applies the facts to the law and reasonably concludes that the  
11 claimant acted contrary to the manner which the employer had the right to  
12 expect. (*Id.*, at 397-398)

13 Since 2001, the claimant in the instant case knew that she could  
14 not work as a drug counselor in Nevada without a license and that she had to  
15 obtain a Bachelor's Degree by June of 2011 to maintain her licensure. (JA,  
16 79) She knew when she was hired in 2003, which such requirements were  
17 reiterated when she was promoted in 2006, that her employer's policy  
18 required her to comply with all protocols necessary to maintain her intern  
19 status and licensure. (JA, 66-67) Indeed, the employer could not have  
20 allowed the claimant to work as a drug counselor under Nevada law if she  
21 was not licensed to do so by the Board of Examiners. The employer had the

1 right to expect the claimant to honor the agreed upon condition of her  
2 continued employment and complete her degree within the time established  
3 by the Board of Examiners.

4 Claimant's deliberate decision to ignore the deadline based  
5 upon her hope or assumption that the Board of Examiners would give her an  
6 extension amounted to a deliberate violation of the employer's policy and a  
7 disregard for the employer's reasonable expectations. Substantial evidence  
8 of wrongful behavior was presented at the evidentiary hearing and the Board  
9 of Review acted within the law when it found that the claimant acted  
10 wrongfully. This Court has no authority to retry this case or to substitute its  
11 judgment for that of the Board of Review.

12 In *Kraft v. Nev. Emp. Sec. Dept*, 102 Nev. 191, 717 P.2d 583  
13 (1986), this Court, quoting *Leeson v. Basic Refractories*, 101 Nev. 384, 705  
14 P.2d 137 (1985), stated:

15 Pursuant to NRS 612.515(3), the Board of Review  
16 is authorized to affirm, modify or reverse a  
17 decision of the appeals referee. The Board may act  
18 solely on the basis of evidence previously  
19 submitted, or upon the basis of such additional  
20 evidence as it may direct to be taken.

21 The district court's power to review a decision of  
the Board, however, is more limited. Where  
review is sought the factual findings of the Board,  
if supported by evidence ... shall be conclusive,  
and the jurisdiction of the court shall be confined  
to questions of law. NRS 612.530(4). Our

1 decisional law is to the same effect. ... In short,  
2 while the Board of Review is empowered to  
3 conduct a de novo review of the decisions of the  
4 appeals referee, the district court has no similar  
5 authority with respect to the decisions of the  
6 Board. (Emphasis Supplied)

7 This Court has held that the Board of Review's fact-based  
8 conclusions of law must be given deference by a reviewing court. *Bundley*,  
9 *supra*; *Esposito, supra*. See also, *Garman v. State, Employment Security*  
10 *Department*, 102 Nev. 563, 729 P.2d 1335 (1986) in which this Court stated:

11 Findings of misconduct must be given deference  
12 similar to findings of fact, when supported by  
13 substantial evidence in the lower court. *Id.*, at 565.

14 NRS 612.530(4) provides that the factual findings of the Board  
15 of Review if supported by evidence in the record are conclusive. Applying  
16 the holding in *Garman, supra*, it must follow that the conclusions of law of  
17 the Board of Review if supported by evidence in the Administrative Record  
18 are also conclusive.

19 **III. THE CLAIMANT'S OFF-DUTY**  
20 **MISCONDUCT HAD A REASONABLE NEXUS**  
21 **TO HER EMPLOYMENT; AND THUS, IS**  
**MISCONDUCT UNDER NRS 612.385.**

22 The claimant also argues that her conduct was "off-duty" and  
thus it did not amount to conduct connected with the work. This Court has  
held that off-duty conduct which has a reasonable nexus to an employee's



1 job is connected with her work under NRS 612.385. *Clevenger v.*  
2 *Employment Security Department*, 105 Nev. 145, 770 P.2d 866 (1989);  
3 *Nevada Employment Security Department v. Holmes*, 112 Nev. 275, 914  
4 P.2d 611 (1996).

5           Expecting an employee to maintain a license or certification  
6 which will allow the employee to continue to work is intimately connected  
7 with work. Doctors must maintain medical licenses, attorneys must  
8 maintain licenses to practice law, teachers must maintain their teaching  
9 certification, *etc.* There is no question that the employer's requirement that  
10 the claimant maintain her license was connected with the claimant's work.

11           The claimant, in fact, testified that she knew in 2003 when she  
12 started working for the employer that she had to have her bachelor's degree  
13 by 2011 or she would lose her certification and, consequently, lose her job.  
14 (JA, 55) The referee found and the Board affirmed that the employer had  
15 the reasonable right to expect the claimant to maintain her license. The  
16 employer could not legally allow the claimant to perform her job functions  
17 without a license. (JA, 29; 79; 80; 81; 82; 103)

18           The referee and the Board both concluded that the claimant was  
19 guilty of misconduct because she did not act prudently in scheduling and  
20 taking her classes in order to insure that she met the conditions of her  
21 employment of which she was informed years in advance. The definition of

1 misconduct not only includes a deliberate violation of an employer's policy;  
2 it also includes: "Carelessness or negligence on the part of the employee of  
3 such a degree as to show a substantial disregard of the employer's interests  
4 or the employee's duties and obligations to her employer..." *Barnum, supra.*

5           Claimant carelessly allowed the time to slip by and waited until  
6 the very eve of her termination with the hope she would get an extension  
7 from the Board of Examiners. She then failed to obtain an extension and  
8 placed her employer in a situation where it had no choice but to terminate  
9 her. (JA, 51-52) The employer had no ability to control the requirements or  
10 actions of the Board of Examiners. (JA, 51-52)

11           Claimant's lack of concern about obtaining the degree within  
12 the legal time limits can only be considered indifference to the reasonable  
13 expectations of her employer and her duties to maintain her employment.  
14 "... [T]here must be a point when inaction can only be viewed as the product  
15 of indifference. Implicit in the board's decision is a finding that the  
16 appellant failed to act reasonably and in good faith under the  
17 circumstances." *Kraft, supra*, 102 Nev. at 194. The *Kraft* decision, while  
18 factually different from the case at bar, is legally on-point. This Court has  
19 held that an employee must take prudent steps to comply with the reasonable  
20 expectations of her employer.

21 ///

1 In this case, claimant failed to take prudent steps to insure that  
2 she obtained her required degree within the time allowed under the terms  
3 established by the governing Board with authority over her profession. The  
4 Board of Examiners concluded that giving an intern ten years to obtain a  
5 four-year degree was reasonable and proper. (JA, 98-99) NAC 241C.290(5).

6 IV. THE EMPLOYER HAD NO DUTY TO  
7 OFFER THE CLAIMANT A JOB WHICH DID  
8 NOT REQUIRE A LICENSE.

9 Claimant argues that the employer had a duty to find the  
10 claimant another job which she could perform legally until she was able to  
11 obtain her college degree. The employer testified that they would have  
12 given claimant another job, but there was no such job available. (JA, 52)  
13 Thus, it appears that the claimant maintains that since she has an absolute  
14 "right" to be paid unemployment benefits, the employer had a duty to find  
15 her another job in order to avoid being taxed based upon her claim.  
16 Claimant provides no authority to support this novel argument. The  
17 employer never agreed to provide the claimant with alternative employment  
18 if she failed to meet the conditions she agreed to when she was hired in  
19 2003.

20 ///

21 ///

///

1           V.   THERE IS SUBSTANTIAL EVIDENCE IN  
2           THE RECORD THAT THE CLAIMANT WAS  
3           REQUIRED TO BE LICENSED IN ORDER TO  
4           KEEP HER JOB.

5           Claimant argues that no evidence was presented by the  
6           employer that the claimant had to have a license to remain in her job as a  
7           Drug Court Administrator. The testimony at the hearing, however, directly  
8           refutes the claimant's argument. The employer presented testimony that  
9           licensure was a necessary requirement of the claimant's job. (JA, 47-51; 80)  
10          *See*, letter of July 18, 2011, signed by the Human Resources Manager of the  
11          employer stating as follows:

12                 Nadine Viser-Goodwin was terminated from  
13                 Bristlecone Family Resources on July 8, 2011 for  
14                 violation of Bristlecone Policy #02-23a, Renewal  
15                 of Internship Certification. Ms. Viser-Goodwin  
16                 was expected to maintain an internship  
17                 certification in order to fulfill her responsibilities  
18                 as a Drug Court Administrator. (JA, 79;  
19                 Administrative Record Exhibit 4)

20           Additionally, the claimant herself testified that she knew she  
21           had to obtain her degree within ten years in order to keep her job. (JA, 55)  
22           In fact, the claimant's arguments contradict themselves. On the one hand,  
23           the claimant argues that she was terminated for not having a license even  
24           though she was not required to hold a license; but, on the other hand,  
25           claimant argues that she was such a good worker that the employer wanted

1 to give her another job, but had to let her go because she did not have a  
2 license and there was no other job available that did not require a license.  
3 (OB, 5, 7)

4 VI. CLAIMANT MISUNDERSTANDS THE  
5 DEFINITION OF THE TERM "MISCONDUCT"  
6 AS SET FORTH IN NRS 612.385.

7 The claimant argues that for the referee and the Board of  
8 Review to find that the claimant was ineligible for unemployment benefits  
9 under NRS 612.385, the employer has to assert that the claimant was  
10 terminated for misconduct and the facts must show that the claimant  
11 intended to harm the employer. The claimant provides no citation for this  
12 definition of misconduct.

13 As stated above, this Court has defined misconduct in *Barnum*,  
14 *supra*, and specifically held that the term "misconduct" as used in NRS  
15 612.385 must be read in the "industrial sense" and not in the "criminal  
16 sense." This Court went on to hold that misconduct exists when a claimant  
17 acts deliberately or in disregard of an employer's policy or reasonable  
18 expectations. This Court further held that misconduct exists when a  
19 claimant acts negligently or carelessly to such a degree as to show a  
20 substantial disregard of the employer's interest or the employee's duties and  
21 obligations to the employer.

21 ///

1 Under NRS 612.385, a finding of misconduct does not require  
2 proof that the claimant acted with criminal intent or acted maliciously. It  
3 simply requires that evidence exists that the claimant disregarded the  
4 legitimate expectations of her employer or was careless regarding those  
5 obligations to her employer.

6 The claimant was properly determined to be guilty of  
7 misconduct under NRS 612.385. The claimant failed to maintain her  
8 counselor's certification and licensure. In the case of *Jones v*  
9 *Unemployment Compensation Board of Review*, 518 A.2d 1150 (Pa, 1986),  
10 the Pennsylvania court held that a teacher who did not meet the requirements  
11 to maintain her teaching license by failing to complete required educational  
12 courses was not entitled to unemployment insurance benefits due to  
13 misconduct. The court held that the teacher's excuse that she was busy  
14 working and taking care of her family did not excuse her from completing  
15 the requirements of maintaining her license. As in the instant case, the  
16 Pennsylvania Board of Review, as affirmed by the Pennsylvania Supreme  
17 Court, concluded that the claimant freely made a decision not to prudently  
18 plan her schedule in order to meet the requirements necessary to maintain  
19 her licensure. The Pennsylvania Supreme Court, while recognizing that  
20 Jones had work and family obligations, held that Jones rendered herself  
21 unemployed because she made the decision to assume the additional

1 responsibility of maintaining her license in order to remain employed. Thus,  
2 the failure to plan ahead in order to meet the requirements of one's  
3 employment is nobody's responsibility but that of the employee.

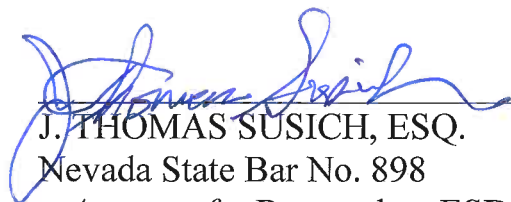
4 In the instant case, the claimant attempts to deflect  
5 responsibility by blaming her employer and the Board of Examiners for her  
6 failure to act prudently. The Nevada Board of Review rejected her argument  
7 and that rejection was proper under Nevada's statutory and case law.

### 8 CONCLUSION

9 The decision reached by the referee and the Board of Review in  
10 this case is consistent with Nevada's statutory and case law and is supported  
11 by substantial evidence in the record. The decision was neither arbitrary nor  
12 capricious. The claimant was given a full and fair hearing and was not  
13 denied due process of law.

14 The District Court properly affirmed the decision of the Board  
15 of Review and this Court should affirm the decision of the District Court.

16 **DATED** this 9<sup>th</sup> day of September, 2013.

17   
18 J. THOMAS SUSICH, ESQ.  
19 Nevada State Bar No. 898  
20 *Attorney for Respondent ESD*

1                                    **ATTORNEY'S CERTIFICATE OF COMPLIANCE**

2                    1.     I hereby certify that this Answering Brief complies with  
3 the formatting requirements of NRAP 32(a)(4), the typeface requirements of  
4 NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because  
5 this Answering Brief has been prepared in a proportionally spaced typeface  
6 using Microsoft Word 2003 in 14 point Times New Roman.

7                    2.     I further certify that this Answering Brief complies with  
8 the page- or type-volume limitations of NRAP 32(a)(7) because, excluding  
9 the parts of the Answering Brief exempted by NRAP 32(a)(7)(C), it does not  
10 exceed 30 pages.

11                   3.     Finally, I hereby certify that I have read this appellate  
12 brief, and to the best of my knowledge, information, and belief, it is not  
13 frivolous or interposed for any improper purpose. I further certify that this  
14 Answering Brief complies with all applicable Nevada Rules of Appellate  
15 Procedure, in particular NRAP 28(e)(1), which requires every assertion in  
16 the brief regarding matters in the record to be supported by a reference to the  
17 page and volume number, if any, of the transcript or appendix where the  
18 matter relied on is to be found.

19     ///

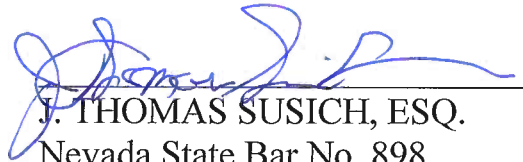
20     ///

21     ///



1 I understand that I may be subject to sanctions in the event that  
2 the accompanying Answering Brief is not in conformity with the  
3 requirements of the Nevada Rules of Appellate Procedure.

4 **DATED** this 9<sup>th</sup> day of September, 2013.

5   
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