IN THE SUPREME COURT OF THE STATE OF NEVADA

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CARA O'KEEFE, AN INDIVIDUAL Appellant, vs. STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES, Respondent.	Case No. 68460	Electronically Filed May 22 2017 08:25 a.m. Elizabeth A. Brown Clerk of Supreme Court

RESPONDENT'S RESPONSE TO APPELLANT'S PETITION FOR REVIEW

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QUESTION PRESENTED

1. NRS 284.390(6) permits a hearing officer to set aside an executive branch agency's termination of a state employee if the hearing officer determines that the dismissal was without "just cause." This Court, in *Southwest Gas Corp. v. Vargas*, defined "just cause" in the employment-termination context to mean that the employer based its decision on substantial evidence of misconduct. And, in *Lapinski*, this Court indicated that the only issue before a hearing officer is whether substantial evidence exists to support the finding of misconduct. Here, the Hearing Officer found substantial evidence to support DMV's finding of misconduct yet did not defer to DMV's decision to terminate O'Keefe and, instead, conducted an "independent" or *de novo* review of DMV's disciplinary action. Did the Hearing Officer err?

I. INTRODUCTION

The standard of review that hearing officers should apply in public employment disputes has divided lower tribunals and even this Court.[1] In a recent unpublished decision, the Court of Appeals "acknowledge[d] there may be tension in the Nevada Supreme Court's caselaw regarding the standard of review a hearing officer must apply to the appointing authority's decisions and findings between *Dredge*, *Jackson*, and *Knapp*, on the one hand and, on the other *Lapinski v. City of Reno*, 95 Nev. 898, 603 P.2d 1088 (1979)."[2] But, in this case, the District Court and Court of Appeals correctly determined that the Hearing Officer erred by using a *de novo* standard of review to reassess the Department of Motor Vehicles's decision to dismiss Appellant O'Keefe.

Despite contrary statements in case law, the governing statutes require hearing officers, in their appellate capacity, to defer to the appointing authority's disciplinary decision because hearing officers have only the power to evaluate whether substantial evidence supports the appointing authority's action. A deference-free standard of review, like the one that O'Keefe advocates, impermissibly allows hearing officers to usurp the Executive Branch's power to discipline its employees and, in some cases like this one, permits hearing officers to rewrite the disciplinary policies approved by the

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1 *See, e.g., State v. Costantino*, Case No. 65611 (Nev. May 31, 2016) (denying NRAP 40B petition for review with Justices Hardesty, Parraguirre, and Pickering dissenting) (unpublished disposition) (Appellant's Ex. 3).

2 *State v. Malcic*, Case No. 70341, 2017 WL 1806807, at *1 n.3 (Nev. App. Apr. 28, 2017) (unpublished disposition).

Personnel Commission.

To clarify the appropriate standard of review, this Court should accept O'Keefe's Petition for Review but, because the District Court and Court of Appeals rightly reversed the Hearing Officer's decision, the District Court should be affirmed.

II. STATEMENT OF FACTS

A. O'Keefe Commits Terminable Misconduct.

O'Keefe worked as a revenue officer for the DMV Motor Carrier Division from January 2006 until December 16, 2012, when she transferred to the Division of Insurance ("DOI"). AA012; AA0021-23. Shortly after transferring to DOI, two of O'Keefe's former co-workers reported that O'Keefe violated DMV policies by misrepresenting her official capacity to the Carson City Sheriff's Office as a favor for a personal friend. 1RA004. The co-workers separately reported that they overheard O'Keefe call the sheriff's office to discuss a "customer's" DUI and related driver's license revocation even though, as a motor carrier division employee, O'Keefe did not deal with driver's licenses, DUIs, or have "customers" at her desk. *See id.*; 2RA038-42; 2RA063-66. Even so, DMV did not investigate the allegations because O'Keefe was no longer a DMV employee. 1RA004.

Nine months later, O'Keefe failed her probationary period at DOI and, as a result, she automatically reverted to her former position at DMV. 2RA132; NAC 284.462. "In light of [her] return to the department and due to the seriousness of the allegations brought forth in December 2012," DMV determined that "it became

pertinent to investigate the alleged conduct." 1RA004. After completing her re-hire paperwork on her first day back, DMV placed O'Keefe on paid administrative leave pending an investigation. *Id*; 2RA131-32; 2RA208. O'Keefe also received a "Notice of Employee Rights During an Internal Investigation." 1RA002.

B. DMV Terminates O'Keefe.

On November 22, 2013, DMV served the Specificity of Charges detailing its investigative findings. 1RA003; NAC 284.656. The investigation confirmed—and O'Keefe admitted—that she called the Carson City Sheriff's Office "representing [her]self as an employee of the DMV, for personal reasons outside [her] normal scope of duty." 1RA004. O'Keefe conceded that she was helping a family friend "with a DUI situation" and she "clarified the help [she] provided was not Motor Carrier [Division] business." *Id.*

DMV's investigation also discovered that O'Keefe accessed DMV's confidential computer system (known as DMV CARRS) seven times to review her friend's records. *Id.* O'Keefe accessed the computer system three other times to review the records of her friend's wife. *Id.* O'Keefe failed to explain her reasons for accessing the wife's records. *Id.*

DMV charged O'Keefe with violating NAC 284.650(6)'s prohibition on insubordination and willful disobedience, as well as NAC 284.650(18)'s ban on misrepresentation of official capacity or authority. 1RA009. DMV also charged her with numerous violations of its internal Prohibitions and Penalties. *Id.* The chart

below outlines the policy offenses and disciplinary ranges with which she was charged.

Department of Motor Vehicles Prohibitions & Penalties

	1st Offense		2nd Offense		Additional	
	Min.	Max.	Min.	Max.	Min.	Max.
B. Performance on the job						
23. Disregard and/or deliberate failure to comply with or enforce statewide, department or office regulations and policies.	2	5	3	5	4	5
C. Neglect of, or inexcusable absence from, the job.						
4. Conducting personal business during working hours.	1	2	3	5	3	5
G. Misuse of Information Technology						
1. The use, or manipulation of production data or information outside the scope of one's job responsibilities, or for non-business or personal reasons, is strictly prohibited and may be subject to prosecution under NRS 205.481.	5	-	-	-	-	-
H. Other acts of misconduct or incompatibility						
4. Unauthorized or improper disclosure of confidential information.	1	5	2	5	3	5
7. Acting in an official capacity without authorization.	1	5	2	5	3	5

1RA006; 1RA013. The Personnel Commission approved these offenses and penalty ranges. NRS 284.383; *see also* AA113-15.[3] The available disciplinary actions increase in severity from a class one-oral reprimand to a class five-termination. AA121-23.

[3] In 2011, before O'Keefe transferred to DOI, DMV's Director issued a memo addressing computer misuse. AA129. O'Keefe received, signed, and understood the memo. 1RA027. The memo quoted Prohibition and Penalty G(1) and reminded employees that "'[t]he use, or manipulation of, production data or information outside the scope of one's job responsibilities, or for non-business or personal reasons, is strictly prohibited and may be subject to prosecution under NRS 206.481.'" AA129. The memo reiterated that "[t]he first offense can result in termination." *Id.* (emphasis omitted). This statement is consistent with the Prohibitions and Penalties and did not change the available level of discipline. *Cf.* Pet. Review 11. Nor could the memo override the Personnel Commission-approved policies. *Cf.* 1RA050-51. Even if, as O'Keefe contends, the discipline imposed is discretionary, that discretion belongs to the appointing authority—not the hearing officer.

Termination was a possible disciplinary action for most of O'Keefe's charges, and it was the minimum disciplinary level for G(1) Misuse of Information Technology. 1RA006.

The Specificity of Charges recommended that DMV terminate O'Keefe. 1RA010. It stated that, when O'Keefe misrepresented her capacity and purpose, it "cause[d] the Department to lose credibility with the customers, the public and the other government entities with which [the Department] work[s]." *Id.* DMV's relationship with law enforcement played an important role in the recommendation. "If working relationships with law enforcement agencies are breached by misrepresenting the authority you have to obtain information, then the trust between these agencies is violated and…confidentiality is breached." *Id.* The Specificity of Charges continued, "[i]f confidentiality of records and data is compromised for personal gain or use, then the state is at risk for liability for breach of confidentiality." *Id.* It concluded that "[b]ased on the severity of the violation and the failure to follow and adhere to Department policies it [was the] recommendation, for the good of the state, [O'Keefe's] employment be terminated." *Id.*

A pre-disciplinary hearing was held on December 6, 2013. 1RA012. After the hearing, the pre-disciplinary hearing officer agreed with the recommendation to terminate O'Keefe. 1RA015. The officer found that O'Keefe's conduct "was outside the scope of her responsibilities and was done for personal reasons….In addition, misuse of information technology is a terminable offense for a first time violation."

Id.

Following the pre-disciplinary hearing, the Motor Carrier Division Administrator informed O'Keefe that it was his "determination, after review of the Specificity of Charges; [her] statements during the pre-disciplinary hearing; the recommendation of the [pre-disciplinary hearing officer]; and the recommendation of [her] supervisor, it is in the best interest of the State of Nevada to terminate [her] employment effective December 16, 2013." 1RA018. The Administrator informed O'Keefe of her appellate rights. *Id.*

C. The Hearing Officer Applies an Incorrect Standard of Review.

O'Keefe promptly requested a hearing to challenge her dismissal. 1RA019. A hearing officer conducted an administrative hearing on March 24, 2014. 1RA022. The evidence presented at the hearing confirmed DMV's investigative findings. *See* 1RA023-44. O'Keefe "admitted that she first called the Carson City Sheriff's Office and asked them about the process after a DUI, and she provided them with [her friend's] driver's license…." 1RA028. She acknowledged that she identified herself "as Cara from Motor Carrier" when she called the sheriff's office. 1RA041. She also "stated that she accessed the confidential DMV database for her friend…and to look up his wife's records, and she had a discussion with both of them about accessing the records." 1RA028. O'Keefe further testified that Motor Carrier Division employees "do not deal with DUI's," the friend and his wife were not her customers, and she committed these acts during work hours. 1RA027-29.

The Hearing Officer concluded that "[t]he reliable, substantial and probative evidence" supports finding that O'Keefe improperly accessed the DMV database on ten occasions and called the sheriff's office twice to assist a non-motor carrier client-friend. 1RA047-48. Accordingly, the Hearing Officer found that substantial evidence supported disciplining O'Keefe for violating:

> NAC 284.650(1) – activity which is incompatible with employees conditions of employment or violates NAC 284.738 to NAC 284.711;
> NAC 284.650(6) – insubordination or willful disobedience;
> NAC 284.650(18) – misrepresentation of official capacity or authority;
> DMV Prohibition and Penalties:
>
> B(23) – performance on the job: disregard and/or deliberate failure to comply with or enforce statewide, department, or office regulations and policies;
> C(4) – conducting personal business during work hours;
> G(1) – misuse of information technology; and
> H(7) – acting in official capacity without authorization.

1RA048.

Although the Hearing Officer found "reliable, substantial and probative evidence" supporting DMV's investigation and disciplinary decision, the Hearing Officer said that "[n]onetheless, this Hearing Officer concludes that Employee's conduct was not a 'serious violation of law or regulation' to merit termination prior to imposition of less severe disciplinary measures. NRS 284.383(1)." 1RA0049. The Hearing Officer determined that she need not defer to the appointing authority. Instead, she was "mak[ing] *an independent determination* as to whether there is *sufficient* evidence showing that the discipline would serve the good of the public service." 1RA046-47 (emphasis added). She also rendered her own judgment on whether

O'Keefe's misconduct was a "'serious violation of law or regulation.'" 1RA049 (quoting NRS 284.383(1)). Ultimately, the Hearing Officer held that, in her own judgment, terminating O'Keefe would not serve the good of the public service and she reversed DMV's decision. *Id.* 1RA051. The Hearing Officer imposed a thirty-day suspension without pay instead. *Id.*

D. The Hearing Officer is Reversed.

DMV filed a petition for judicial review. 1RA054-56. The District Court granted DMV's petition and set aside the Hearing Officer's decision. 1RA057-62. The District Court determined that "[a] hearing officer does not have authority to second-guess the DMV's Prohibitions and Penalties offense classification. If DMV proves an offense for which the Prohibitions and Penalties provide a minimum discipline of termination, a hearing officer has no discretion regarding just cause or reasonableness of the termination to exercise." 1RA061. Moreover, if substantial evidence supports an offense for which termination is the minimum discipline, then "just cause for termination is established and termination is reasonable as a matter of law." *Id.* Thus, the District Court correctly held that the Hearing Officer committed an error of law, and acted arbitrarily and capriciously, by determining that O'Keefe's violations were not serious enough to merit termination after simultaneously finding that substantial evidence supported DMV's decision. *Id.*

O'Keefe appealed the District Court's order, 1RA063, but the Court of Appeals affirmed. (Appellant's Ex. 1.) The Court of Appeals agreed that the Hearing

Officer abused her discretion when she ruled that DMV's Prohibitions and Penalties permitted discretionary discipline. (*Id.* at 3.) "Because the DMV's Prohibitions and Penalties mandated dismissal for O'Keefe's actions," the Court of Appeals deduced that "there is not substantial evidence in the record to support the hearing officer's determination that O'Keefe's dismissal would not serve the good of the public service." (*Id.*) The Personnel Commission had already determined that O'Keefe's conduct was a "serious violation[] of law or regulation justifying dismissal." (*Id.*) (quotation omitted). Therefore, the Court of Appeals concurred that the Hearing Officer's ruling was arbitrary and based on an error of law. (*Id.*) This Petition for Review followed.

III. ARGUMENT

A. Standard of Review

This Court reviews a petition for judicial review in the same way a district court reviews a hearing officer's decision. *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010). Thus, this Court may set aside a hearing officer's decision if it is, among other things, affected by an error of law or "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3)(d), (f). A hearing officer abuses its discretion when it applies an incorrect legal standard. *See Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007). And a hearing officer's conclusions of law—like questions of statutory interpretation—are reviewed *de novo*. *See City Plan Dev., Inc. v. Office of Labor Com'r*, 121 Nev. 419, 426, 117 P.3d 182,

187 (2005); *Dykema v. Del Webb Communities, Inc.*, 132 Nev. Adv. Op. 82, 385 P.3d 977, 979 (2016).

B. Hearing Officers are Limited to Reviewing for Substantial Evidence.

NRS 284.390 sets forth the standard of review that hearing officers must apply when reviewing an executive branch agency's disciplinary decision. The relevant subsection states that "[i]f 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." NRS 284.390(6) (emphasis added).[4] In turn, NRS 284.385(1)(a) provides that "[a]n appointing authority may…[d]ismiss or demote any permanent classified employee *when the appointing authority considers* that the good of the public service will be served thereby." (emphasis added).

When those provisions are read together, a hearing officer's review is limited to determining whether "just cause," NRS 284.390(6), supports the "appointing

[4] NRS 294.390(1) also indicates that the hearing officer "determine[s] the reasonableness of the action." Courts equate reasonableness review with abuse of discretion review. *See, e.g., Gall v. U.S.*, 552 U.S. 38, 46 (2007) ("Our explanation of 'reasonableness' review…made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies…."); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 390 (7th Cir. 1984) (Posner, J.) (discussing standards of review and stating "discretion is abused only where no reasonable man would take the view adopted by the trial court.") (quotation omitted). And this Court has held that there is no abuse of discretion if substantial evidence supports the discretionary act. *City of Las Vegas v. Laughlin*, 111 Nev. 557, 558, 893 P.2d 383, 384 (1995). Therefore, hearing officers properly review for substantial evidence even if "reasonableness" is the appropriate standard instead of "just cause."

authority's" decision "that the good of the public service will be served" by the appointing authority's chosen disciplinary action. NRS 284.385(1)(a); *see also Hernandez v. Bennett-Haron*, 128 Nev. Adv. Op. 54, 287 P.3d 305, 316 (2012) (noting that this Court will read statutes in harmony). The only remaining question is the meaning of "just cause" in NRS 284.390(6).

But this Court defined "just cause" in the employee-termination context in *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. Later, the terminated employee sued for breach of contract contending that the company agreed that he could only be terminated for cause following progressive discipline. *Id.* at 1068, 901 P.2d at 695. The employee asserted that his conduct did not amount to "good cause" to terminate. *Id.* at 1073, 901 P.2d at 698. Eventually, a jury returned a verdict for the terminated employee and the company appealed. *Id.* at 1070-71, 901 P.2d at 697.

Before this Court, the parties disputed the role of the jury. *Id.* at 1073, 901 P.2d at 698. The company argued that the jury was limited to assessing whether the company had a "reasonable belief" that the employee committed sexual harassment. *Id.* at 1073-74, 901 P.2d at 698-99. On the other hand, the employee asserted 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, 901 P.2d at 698-99.

This Court sided with the company. It held that "the employer is the ultimate finder of facts constituting good cause for termination." *Id.* at 1075, 901 P.2d at 700. This Court warned that allowing a jury to trump the good faith factual findings of the employer "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.* at 1075, 901 P.2d at 699. This Court continued, "[t]his ex officio 'fact-finding board,' unattuned to the practical aspects of employee suitability over which it would exercise consummate power, and unexposed to the entrepreneurial risks that form a significant basis of every state's economy, would be empowered to impose substantial monetary consequences on employers whose employee termination decisions are found wanting." *Id.* This Court ruled that, unless expressly stated in contract or statute, employers have not ceded to reviewing bodies the authority to define "serious misconduct." *See id.* at 1080, 901 P.2d at 703.

To guard against these concerns, this Court held "that 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, 901 P.2d at 701 (emphasis added). Hence, a reviewing body is restricted to assessing whether the employer's decision was made in good faith and supported by substantial evidence. *Id.* at 1079, 901 P.2d at 702. Under that standard, this Court reversed the jury's verdict in favor of the terminated

employee. *Id.* at 1079-80, 901 P.2d at 702-03.

Applying the *Southwest Gas* definition of "just case" to NRS 284.390(6) is consistent with the statutory scheme and protects the same interests that the Executive Branch possesses as an employer. Indeed, the Court of Appeals has relied on *Southwest Gas* when reviewing other hearing officer decisions in state employment disputes. *Morgan v. State, Dep't of Bus. & Indus., Taxicab Auth.*, No. 67944, 2016 WL 2944701, at *2 (Nev. App. May 16, 2016) (unpublished disposition) (citing *Southwest Gas* and affirming 80-hour suspension because the Administrator's decision was with "just cause" and supported by substantial evidence).

The *Southwest Gas* standard is also consistent with this Court's earlier case law. For instance, 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 hearing function was not to make a fresh determination. *See id.*

Thus, under both *Southwest Gas* and *Lapinski*, any review of an adverse employment action is limited to assessing whether substantial evidence exists to support the employer's decision. The inquiry is not whether the hearing officer would have made the same determination "that the good of the public service will be served

thereby." NRS 284.385(1)(a). Rather, the inquiry is whether substantial evidence supports the *appointing authority's* "good of the public service" decision. This standard mandates that the hearing officer give deference to the appointing authority's view of the facts.

Dredge v. State ex. rel. Department of Prisons also supports giving deference to an appointing authority's disciplinary decision. Citing NRS 284.385 and NRS 294.390, the *Dredge* court held that "[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." 105 Nev. 39, 42, 769 P.2d 56, 58 (1989). This is the same inquiry that *Southwest Gas* and *Lapinski* require.

But *Dredge* is most often cited for the next sentence: "Moreover, the critical need to maintain a high level of security within the prison system entitles the appointing authority's decision to deference by the hearing officer whenever security concerns are implicated in an employee's termination." *Id.* While security concerns may entitle the Department of Prisons or other "security programs" to an extra measure of deference in their employment decisions, nothing in *Dredge* or the statutory scheme indicates that hearing officers *only* give deference to the Department of Prisons or "security programs." And nothing in *Dredge* hints that hearing officers review *de novo* all other executive agency decisions. The statutes mandate the same approach for all executive branch agencies and they are entitled to deference when

reviewing their employment decisions.

A non-deferential standard of review allows hearing officers to second guess an appointing authority's employment decisions and exercise functions that belong solely to the Executive Branch. *See Costantino*, at 3 n.2 (Hardesty, J., dissenting). Under the statutory scheme, "[i]t is not the duty of the hearing officer to substitute its judgment for the employing agency's judgment." *Id.* (citing *see City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005)).

This Court has previously stressed that hearing officers cannot exercise the power of appointing authorities. *Taylor v. Dep't of Health & Human Servs.*, 129 Nev. Adv. Op. 99, 314 P.3d 949, 950-51 (2013). In *Taylor*, this Court rejected an employee's suggestion "that the hearing officer should make the decision about the appropriate level of discipline because the hearing officer is the 'fact finding tribunal….'" *Id.* at 950. The Court held "that pursuant to the clear and unambiguous 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.* at 950-51.

Likewise, under the plain language of NRS 284.385(1)(a), only appointing authorities have the power to decide that dismissal or demotion will serve the good of the public service. And just as hearing officers cannot prescribe the amount of discipline, they also cannot "consider[] [if] the good of the public service will be

served" by dismissal or demotion. *Cf.* NRS 284.385(1)(a); *Taylor*, 129 Nev. Adv. Op. 99, 314 P.3d at 950-51. A hearing officer's only function is to determine if there was substantial evidence before the appointing authority from which it could conclude that the employee committed misconduct warranting dismissal. *See Lapinski*, 95 Nev. at 901, 603 P.2d at 1090; *Southwest Gas*, 111 Nev. at 1078, 901 P.2d at 701.[5] Or, in other words, the only issue before a hearing officer is whether the appointing authority's decision to terminate was based on evidence that would enable the appointing authority to conclude that the good of the public service would be served by dismissal. *See* NRS 284.385(1)(a); *see also Dredge* 105 Nev. at 42, 769 P.2d at 58.

The Court's contrary statements in *Knapp v. State ex rel. Department of Prisons*, 111 Nev. 420, 892 P.2d 575, (1995) are an aberration. Without discussing *Lapinski* or citing any authority at all, the *Knapp* Court proclaimed that "[g]enerally, a hearing officer does not defer to the appointing authority's decision." *Id.* at 424, 892 P.2d at 577.[6] And the Court said that "[a] hearing officers task is to determine whether there is evidence showing that a dismissal would serve the good of the public service. *Id.* But this statement is directly contradicted by NRS 284.385(1)(a), which provides that demotion or dismissal is appropriate "when the *appointing authority* considers that the good of the public service will served thereby." (emphasis added). By statute, it is the appointing authority's task—not the hearing officer's—to decide whether dismissal

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5 *See also Costantino*, at 1 (Hardesty, J., dissenting).

6 *State ex rel. Dep't of Prisons v. Jackson*, 111 Nev. 770, 773, 895 P.2d 1296, 1298 (1995) (similar).

serves the good of the public service. *Id.*; *see also Taylor*, 129 Nev. Adv. Op. 99, 314 P.3d at 950-51 (holding that hearing officers cannot exercise the powers of appointing authorities).[7] To the extent that Knapp conflicts with NRS 284.385(1)(a), it should be overruled.

Even if this Court declines to overrule *Knapp*, it is factually distinguishable from this case. In *Knapp*, the Department of Prisons conceded before the district court "that dismissal was not appropriate absent the additional charges which the hearing officer had found unproven." *Knapp*, 111 Nev. at 425, 892 P.2d at 578. By contrast, DMV made no such concession here and the Hearing Officer actually found that substantial evidence existed to support DMV's finding that O'Keefe committed the misconduct. *Knapp* therefore should be limited to its facts.

In this case, the Hearing Officer improperly conducted "independent" *de novo* determinations about whether O'Keefe's termination would serve the good of the public service and whether O'Keefe's misconduct was "serious" under NRS 284.383. 1RA047-52. 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

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[7] The *Knapp* Court also quoted NAC 284.798's statement that "[t]he 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." 111 Nev. at 424, 892 P.2d at 577. This statement is reconcilable with NRS 284.385 and NRS 284.390 because it simply means that the hearing officer should not make assumptions about the presence of substantial evidence of innocence or guilt. *See Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988) ("Administrative regulations cannot contradict or conflict with the statute they are intended to implement.").

284.390(6) restricts hearing officers to reviewing the appointing authority's conclusion for "just cause"—defined in *Southwest Gas* as substantial evidence—the Hearing Officer applied an incorrect standard of review and did not defer to DMV's decision.

Moreover, the Hearing Officer did not possess the authority to make her own determination that O'Keefe's misconduct was not "serious" under NRS 284.383. NAC 284.646(1) allows an appointing authority to dismiss an employee for any cause set forth in NAC 284.650 if the agency has adopted policies governing dismissal and the seriousness of the conduct warrants dismissal. NAC 284.650 contains the administrative provisions that the Hearing Officer found O'Keefe violated. NAC 284.650(1) (activity incompatible with conditions of employment); NAC 284.650(6) (insubordination or willful disobedience); NAC 284.650(18) (misrepresentation of official capacity); *see also* 1RA048. NAC 284.646(2)(b) also allows immediate dismissal for "[u]nauthorized release or use of confidential information."

Similarly, DMV has adopted policies in the form of the Prohibitions and Penalties controlling employee dismissal. NAC 284.646(1)(a). The Personnel Commission has approved these policies and the designation of certain conduct as first-time terminable offenses. NRS 284.383; AA113-15. Consequently, by administrative regulation or internal policy, O'Keefe's conduct has been deemed "serious" as a matter of law, and the Hearing Officer did not have the power to override those designations and adopt her own definition of "seriousness." Once the Hearing Officer found (as she did) that substantial evidence existed to support DMV's

conclusion that O'Keefe committed a "serious" offense, the analysis should have been at its end.

IV. CONCLUSION

For these reasons, DMV respectfully requests that the Court accept O'Keefe's Petition for review, clarify the appropriate standard of review, and affirm the District Court.

Dated: May 19, 2017.

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CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 Garamond font.

I further certify that this brief complies with the page or type-volume limitations of NRAP 40B because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 4,643 words (less than 4,667) as calculated by the Microsoft Word Count function.

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 that every assertion in this 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.

By: /s/ Jordan T. Smith
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on this 18th day of May, 2017, I filed and served a copy of the foregoing **RESPONDENT'S RESPONSE TO APPELLANT'S PETITION FOR REVIEW** through the Supreme Court Electronic Filing System. A copy was served electronically to the following:

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