IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARA O'KEEFE, AN INDIVIDUAL,

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES,

Respondent.

Case No.: 68460

District Court Case No. 14 0C 00103 1 B

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

In Conjunction With Legal Aid Center of Southern Nevada

Malani L. Kotchka
Nevada Bar No. 283
HEJMANOWSKI & McCREA LLC
520 South Fourth Street, Suite 320
Las Vegas, NV 89101
(702) 834-8777

Attorneys for Appellant
Cara O'Keefe

16-900816

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the Appellant Cara O'Keefe is an individual and she has no corporate affiliation. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

HEJMANOWSKI & McCREA LLC

By: Malani L. Kotchka

Malani L. Kotchka
Nevada Bar No. 283
520 South Fourth Street, Suite 320
Las Vegas, NV 89101
(702) 834-8777

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

JURISDICTIONAL STATEMENT

The Hearing Officer's decision reversing the termination of Appellant Cara O'Keefe ("O'Keefe") was served on April 22, 2014. Pursuant to NRS 233B.130 and NRS 284.390(8), Respondent State of Nevada, ex. rel., its Department of Motor Vehicles ("DMV") filed its Petition for Judicial Review on May 21, 2014, in the First Judicial District Court of the State of Nevada in and for Carson City. The district court issued its Order Granting Petition for Judicial Review and Setting Aside Hearing Officer's Decision on June 15, 2015.

DMV served the district court's Order on O'Keefe on June 23, 2015, via its Notice of Entry of Order. Pursuant to NRS 233B.150 and NRAP 3(a)(1) and (2) and 4(a)(1), O'Keefe filed her Notice of Appeal on July 21, 2015. The appeal was timely and this Court has jurisdiction over this case pursuant to NRS 233B.150. The appeal is from a final order of the district court.

ROUTING STATEMENT

On September 21, 2015, the Supreme Court transferred this case to the Court of Appeals pursuant to NRAP 17(b). This is an administrative agency appeal and is presumptively assigned to this Court.

STATEMENT OF ISSUES

The issues are as follows:

(1) Whether the Hearing Officer's decision exceeded her authority under NRS 284.390(1) and (6);

(2) Whether DMV promptly informed O'Keefe of the conduct for which it terminated her; and

(3) Whether DMV violated NAC 284.462 and deprived O'Keefe of her right to transfer back to DMV.

STATEMENT OF THE CASE

O'Keefe was employed as a Revenue Officer for the DMV Motor Carrier Division when she was terminated for accessing DMV's computer database over a year before her termination. She had no prior discipline. She appealed her termination to a Hearing Officer who reversed her termination and ordered that she be reinstated with back pay, except for a 30-day suspension. The DMV filed a petition for judicial review of the Hearing Officer's decision. The district court reversed the Hearing Officer's decision. O'Keefe has filed an appeal and seeks to have this Court reverse the district court's decision and reinstate the Hearing Officer's decision.

///

///

///

STATEMENT OF FACTS

O'Keefe was employed by the State of Nevada from January 2006 through December 16, 2013. RA, Vol. I, pp. 16-18; AA, pp. 12-14.[1] She was employed as a Revenue Officer for the DMV Motor Carrier division from December 11, 2006 until December 5, 2012 and then rehired on September 16, 2013. RA, Vol. I, pp. 1, 6, 23; RA, Vol. II, pp. 20, 203.

DMV has a slogan that it wants to be helpful to **all** its clients. RA, Vol. III, p. 153. It has a motto, "Yes, I Can Help You With That." DMV employees wear buttons with this statement emblazoned on them. AA, pp. 134-35. A Motor Carrier DMV employee was personally instructed by her supervisor to help their customers as much as they could. RA, Vol. II, pp. 198-99.

O'Keefe was regularly stopped by customers "asking all sorts of DMV related questions." AA, p. 134. O'Keefe did not transfer phone calls and aggravate customers further. She found out what they needed and tried to assist them. AA, p. 134.

While O'Keefe worked for the DMV, she was told that she brought in above-average revenue for delinquent licensing fees and taxes. RA, Vol. I, pp. 39-40; RA, Vol. II, pp. 21-22, 205. Her supervisor Karen Stoll ("Stoll") said, "When

[1] "RA" refers to Respondent's Appendix, Volumes I, II or III followed by the applicable page numbers. "AA" refers to Appellant's Appendix followed by the applicable page numbers.

she was there, she always handled her accounts. She **fabulously** handled her accounts." RA, Vol. II, p. 143 (emphasis added).

O'Keefe had not had any prior disciplinary action and all of her performance evaluations were "exceeds standards" except for two in 2007 in which she was rated as "meets standards." RA, Vol. I, pp. 6-7, 23; AA, pp. 6-7.

On January 25, 2012, Stoll, O'Keefe's immediate supervisor for five years, said O'Keefe "exceeds standards". RA, Vol. II, pp. 93, 95; RA, Vol. II, p. 148. Stoll specifically said O'Keefe continued "to follow all policy and procedure" and used "all collection methods" available to her. AA, p. 32. Stoll commented, "Your Payment Plans are structured pursuant to Division Policy and Procedure and you maintain consistent follow-up on your payment plans." AA, p. 32. She said O'Keefe **continued** to be self-motivated and helped others on her team. AA, p. 32. Finally, Stoll said:

> You are receptive to change and will reprioritize work assignments based on the goals/priorities of the Division. You offer suggestions to your team and your supervisor when you think of procedures that might be streamlined, enhanced or changed to help staff or the customer.

AA, p. 32.

In July, August, September, October and November 2012, O'Keefe accessed the DMV database in order to verify the address of two citizens with the male citizens' permission. RA, Vol. I, p. 4; RA, Vol. II, pp. 30-31, 32-33, 226-27, 247-

48; AA, p. 141.[2] The male citizen said he was not getting mail that other DMV employees said had been sent out. O'Keefe was checking to see if the wife had a different address which the system was using. ROA, Vol. II, p. 33, 226-27. The last time O'Keefe checked the database in November 2012, the process was complete and DMV had received the record from the sheriff's department in regard to the male citizen. RA, Vol. II, p. 247-48.

In August 2012, O'Keefe made two calls to the Carson City Sheriff's department on behalf of the same male citizen. RA, Vol. I, p. 4; RA, Vol. II, pp. 47, 65. On December 28, 2012, over **4 months later**, two employees told Administrator Stoll about the calls. RA, Vol. II, pp. 39, 42, 63. When one of the employees had complained to O'Keefe's supervisor Administrator Stoll in the past about procedures O'Keefe did not follow, she was told, "[T]hat is how Cara works her cases; that's her way." ROA, Vol. II, p. 42. The employee felt that if O'Keefe was being considered for another position, "it was important that she be more closely supervised than she had been in the past for this reason." ROA, Vol. II, pp. 45, 49. The second employee was asked by the first to tell Administrator Stoll about the August calls in late December 2012. RA, Vol. II, pp. 66-67, 69-70, 129. Even though O'Keefe was still working for the State of Nevada, Administrator

[2] Essentially, O'Keefe went into the system when she was not supposed to. RA, Vol. II, p. 103. She did nothing for the citizen that she would not do for any other customer. AA, pp. 134, 141.

Stoll decided "**it was not necessary to investigate the allegations.**" RA, Vol. I, p. 4 (emphasis added); RA, Vol. II, p. 128.[3]

On December 5, 2012, O'Keefe left DMV to work as a management analyst at the Nevada Division of Insurance. RA, Vol. I, p. 4; RA, Vol. II, pp. 20, 204; AA, pp. 21, 23. She did not become a permanent employee at the Division of Insurance and in September 2013, she returned to her Motor Carrier DMV job pursuant to her right. AA, pp. 9-11.

Stoll became aware that O'Keefe was returning to DMV around the middle of August 2013. RA, Vol. II, pp. 130, 149. Stoll knew that O'Keefe had "that security to come back to that position" and that Stoll "had to make room for her." RA, Vol. II, pp. 132-33; AA, p. 11. Stoll testified that she "was **instructed by my supervisor** that we **must revisit** the issue of the witnesses coming forward about misrepresentation. . . ." RA, Vol. II, pp. 130, 155 (emphasis added). A week prior to her return to DMV, O'Keefe called supervisor Stoll who told O'Keefe to come in at 8:00 and that her desk was cleaned up and ready for her to go. RA, Vol. II, p. 207. When she returned to DMV on September 16, 2013, O'Keefe received a notice informing her that she was the subject of an internal administrative investigation relevant to a violation of the DMV's Computer Usage Policy. RA, Vol. I, pp. 2, 23; RA, Vol. II, pp. 131-32, 150-51, 208. She received a notice that

[3] DMV admitted that "promptly dealing with discipline is an important factor in dealing with employees." RA, Vol. II, pp. 123, 161.

she was being placed on paid administrative leave effective that day. RA, Vol. I, pp. 2, 24; Vol. II, p. 209.

Other than two brief interviews after September 16, O'Keefe was not told what was going on. She called in daily and was told by Stoll that Stoll had no idea what was going on. RA, Vol. II, p. 209. On November 22, 2013, more than 2 months after she had returned to DMV, O'Keefe received the Specificity of Charges. RA, Vol. I, p. 3; Vol. II, p. 212.

O'Keefe was charged with conduct which occurred **15 months earlier**: making calls on August 8, 2012 and August 10, 2012 to the Carson City Sheriff's office regarding an individual's driver's license and "representing yourself to be an employee whose job it was at the DMV to assist individuals with driver's license issues." RA, Vol. I, p. 4. The Specificity of Charges said, "Since you have transferred out of the Department, accepting a promotional opportunity on December 5, 2012, the administrator **decided it was not necessary to investigate the allegations**." RA, Vol. I, p. 14 (emphasis added).[4] On November 23, 2013, O'Keefe was also charged with accessing the confidential DMV database information for reasons outside her scope of duty in July, August, September,

[4] O'Keefe was told by a prior supervisor that even if an employee was working in a different division of the State, the State could still discipline the employee. RA, Vol. II, p. 240.

October and November, 2012, **ranging from 16 months to more than one calendar year**, prior to her receipt of the Specificity of Charges. RA, Vol. I, p. 4.[5]

At her pre-disciplinary hearing on December 6, 2013, before Teri Carter, O'Keefe explained that a family friend had given her permission to resolve an issue with the friend's address because he had not received any notifications from DMV regarding his driver's license status. She said she had assisted other non-motor carrier customers during the course of her employment and she did not manipulate any data but looked up the data to validate the information the family friend gave her. RA, Vol. I, p. 14; RA Vol. II, pp. 215-16, 217-18, 221, 223, 226-27; AA, p. 132. **O'Keefe considered her review of the DMV database on behalf of the family friend to be DMV business**. RA, Vol. II, pp. 215, 221, 225. O'Keefe said if this was a terminable offense, it should have been addressed sooner. RA, Vol. I, p. 15; RA Vol. II, pp. 214, 221. Carter recommended O'Keefe's termination. RA, Vol. I, p. 15.[6]

On December 13, 2013, DMV terminated O'Keefe and said:

> During the pre-disciplinary hearing you provided an excerpt from the State of Nevada Employee Handbook and referenced NAC 284.638 and expressed concern regarding the timeframe in which this situation was

[5] The delay in the charges deprived O'Keefe of the opportunity to defend herself. RA, Vol. II, p. 214.

[6] Stoll testified she recommended terminating O'Keefe because she had accessed the DMV software that was outside the scope of her job. RA, Vol. II, p. 168.

> handled. The Department was not aware of this situation until after you had promoted to another Department, and you were no longer under our authority. Once the Department was notified you were returning, we were obligated to investigate.

RA, Vol. I, p. 17. DMV **never** cited any authority for this "obligation to investigate." The Director of DMV said, ". . . it is in the best interest of the State of Nevada to terminate your employment effective December 16, 2013" and said she had the right to appeal the decision. RA, Vol. I, p. 18.

The Motor Carrier Administrator Wayne Seidel said the policy pursuant to which O'Keefe was terminated was discretionary, **not zero tolerance**. RA, Vol. II, p. 180; AA, p. 129. The human resources administrator at DMV agreed that a first offense "can" result in termination, leaving the decision discretionary. RA, Vol. II, pp. 78, 88, 92; RA, Vol. I, p. 33.

O'Keefe appealed the termination. The Hearing Officer ordered "that the action of Employer to terminate Employee Cara O'Keefe from State Service should therefore be and hereby is REVERSED, with a recommendation that Employee be returned to state employment and given a thirty (30) calendar day suspension without pay." RA, Vol. I, p. 52.

In her Findings of Fact, Conclusions of Law and Decision, the Hearing Officer summarized the testimony at the hearing and said:

> NRS 284.385 allows an appointing authority to discipline a permanent classified employee with the State

> of Nevada "when he considers the good of the public service will be served thereby." Thus, in reviewing the actions taken by the employer against the employee, it is the duty of the administrative hearing officer to make an independent determination as to whether there is sufficient evidence showing that the discipline would serve the good of the public service.

RA, Vol. I, pp. 46-47. Citing NRS 284.383(1), the Hearing Officer concluded that discipline must comply with the principles of progressive discipline. RA, Vol. I, p. 47. While the Hearing Officer concluded that O'Keefe should be disciplined, the Hearing Officer also concluded 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)**. It is undisputed that Employee's supervisor did not learn about Employee's conduct until December 2012, and several of Employer's witnesses testified that they cannot pursue discipline on a DMV Employee who no longer works for them. Nonetheless, **there is no written policy in this regard**. Moreover, it seems disingenuous that the DMV considered this a "serious" offense on the one hand, but did not initiate disciplinary action until nearly nine months after it learned of the alleged violations, and **after Employee was scheduled to return to work at the DMV**. Furthermore, although Employer argued that Employee's termination was commensurate with disciplinary action imposed on five other DMV employees involved in similar incidents, Employer did not provide any specific evidence to corroborate this assertion. In fact there was credible testimony by both parties' witnesses that prior to 2011, employees were not terminated for similar conduct, including an incident where an employee accessed DMV

> information to stalk her ex-husband, and that employee only received a suspension.[7]

RA, Vol. I, p. 49 (emphasis added).

The Hearing Officer said:

> The plain language in NRS 284.387 suggests legislative intent to provide state employees with due process and fundamental fairness, which includes **prompt** adjudication of possible disciplinary actions and notice of the allegations. The reliable, substantial and probative evidence supports a finding that Employer did not take immediate corrective actions when it learned about the alleged conduct in December of 2012. Moreover, undersigned Hearing Officer has Due Process concerns about the fact that DMV staff did not notify Employee about the investigation prior to the day she thought that she was returning to work, on September 16, 2013, when they informed her that she was not returning to work but rather she was being placed on administrative leave. Moreover, her first questioning session was not until September 18, 2013, more than 9 months after her supervisor was informed by her co-workers about the incident.

RA, Vol. I, p. 50 (emphasis added).

Finally, the Hearing Officer concluded:

---

[7] O'Keefe's supervisor Sobel testified that although she did not know "all the details," she knew of a DMV employee who accessed confidential records of her ex-boyfriend and stalked his girlfriend and she received only a suspension. RA, Vol. II, p. 152. Tammy Holt-Still and Lisa Fredley also were aware of this discipline of a two-week suspension for a DMV employee accessing DMV information to obtain an address. RA, Vol. II, pp. 183-84, 195-98. **That employee has been suspended multiple times and still works for DMV Motor Carriers**. RA, Vol II, p. 198, 201.

> The reliable, substantial and probative evidence also indicates an inconsistency between Prohibition and Penalty G(1), Misuse of Information Technology, and the Memorandum regarding this offense from then-DMV Director Bruce Breslow. **[Exhibit A, p. 48].** Whereas Prohibition and Penalty G(1) is a Class 5 violation which strictly prohibits the "use, or manipulation of production data or information outside the scope of one's job responsibilities, or for non-business or personal reasons," the Memorandum merely states that a first offense of the Prohibition and Penalty G(1) "can result in termination" and "[a]ppropriate disciplinary action" will be taken if violations of this policy occur, suggesting that the level of discipline for this offense is discretionary.
>
> In light of the above, this Hearing Officer concludes that the reliable, substantial and probative evidence does not establish that termination will serve the good of the public service, and therefore the decision to terminate Employee should be reversed. A thirty (30) calendar day suspension without pay is more appropriate for this conduct, particularly considering the nature of the offense, **including the fact that Employee did not manipulate data or disclose data, Employee's seven years of State service without prior discipline, and the DMV's failure to promptly investigate this matter and take immediate corrective action. Therefore, it is the opinion of this Hearing Officer that discipline commensurate with these violations should be imposed**. [Emphasis added.]

RA, Vol. I, p. 51. *See* AA, p. 129.

O'Keefe learned from this process that she "certainly wouldn't help anybody outside of Motor Carrier ever again" and that she would forward people's questions on to someone else. RA, Vol. II, p. 228.

DMV filed a Petition for Judicial Review and the district court entered an Order Granting the Petition for Judicial Review and Setting Aside Hearing Officer's Decision. RA, Vol. I, pp. 54-62. Although the district court recognized that it could not substitute its judgment for that of an administrative agency as to the weight of evidence on a question of fact, it concluded that pursuant to NAC 284.650, DMV had adopted a policy which authorized the dismissal of an employee for use of data or information outside the scope of one's job responsibilities or for non-business or personal reasons. RA, Vol. I, pp. 59-60.

The district court held that an administrative hearing officer could set aside the dismissal if he determined the dismissal was without just cause. However, the district court also concluded that if DMV proved an offense for which the prohibitions and penalties provided a minimum discipline of termination, a hearing officer had no discretion regarding just cause or reasonableness of the termination to exercise. RA, Vol. I, pp. 60-61. The district court cited no authority for this conclusion other than to say that the hearing officer's conclusion "exceeded the hearing officer's authority under NRS 284.390(1) and (6), was an error of law, and arbitrary and capricious." RA, Vol. I, p. 61. O'Keefe appealed the district court's decision to this Court. RA, Vol. I, p. 63.

SUMMARY OF THE ARGUMENT

The Hearing Officer complied with her task to determine whether there was evidence showing that a dismissal would serve the good of the public service. She looked at the facts as a whole from a neutral perspective to determine if there was a factual basis supporting termination. She complied with NRS 284.390(1) and (6) and determined that O'Keefe's termination was unreasonable. She correctly found that it was disingenuous of DMV to consider O'Keefe's conduct a "serious" offense but not to initiate discipline until nine months after it learned of the alleged violations and after O'Keefe was scheduled to return to work at the DMV. The DMV did not treat O'Keefe the same as it treated an employee who had used computer information to stalk her ex-boyfriend's girlfriend. That employee had been suspended multiple times and still works for DMV Motor Carriers. The Hearing Officer was correct when she found that just cause did not support O'Keefe's termination.

DMV did not promptly inform O'Keefe of the conduct. DMV acknowledged that it was aware of O'Keefe's conduct on December 28, 2012 and did not decide to investigate the conduct until O'Keefe was scheduled to return to her DMV position. DMV did not comply with its own Supervisor's Guide or its Employee Handbook when it waived the right to investigate O'Keefe's conduct and then initiated an investigation nine months later.

O'Keefe had a right pursuant to NAC 284.462 to return to her DMV position when she did not become a permanent employee at the Department of Insurance. By terminating O'Keefe for conduct which occurred over a year prior to her transfer back to DMV, DMV violated O'Keefe's right to be restored to her former position. The district court's decision should be reversed and the Hearing Officer's decision should be affirmed. O'Keefe should be reinstated to her prior position with all back pay and benefits.

ARGUMENT

I. STANDARD OF REVIEW

The function of this Court ". . . is to review the evidence presented to the administrative body and ascertain whether that body acted arbitrarily or capriciously, thus abusing its discretion." *Gandy v. State ex rel. Div. Investigation*, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980). This Court will generally defer to a hearing officer's findings of fact and conclusions of law "where those conclusions are closely related to the agency's view of the facts" and are supported by substantial evidence. *State v. Tatalovich*, 129 Nev. _____, _____, 309 P.3d 43, 44 (2013). The *Tatalovich* Court held, "In construing a statute, this court considers the statutory scheme as a whole and avoids an interpretation that leads to absurd results." *Id.*

In *Knapp v. State ex rel. Dep't of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995), the Nevada Supreme Court held that a hearing officer's task is to determine whether there is evidence showing that a dismissal would serve the good of the public service. That is exactly what the Hearing Officer did in this case. After reviewing the record on appeal, this Court should conclude that the Hearing Officer applied the correct standard of review, looking at the facts as a whole from a neutral perspective to determine if there was a factual basis supporting termination. This Court should uphold the Hearing Officer's decision that there was not.

II. THE HEARING OFFICER'S DECISION DID NOT EXCEED HER AUTHORITY UNDER NRS 284.390(1) AND (6), WAS NOT AN ERROR OF LAW AND WAS NOT ARBITRARY AND CAPRICIOUS

The district court relied on NRS 284.390(1) and (6) in determining that the Hearing Officer exceeded her authority. NRS 284.390(1) provides:

> Within 10 working days after the effective date of an employee's dismissal, demotion or suspension pursuant to NRS 284.385, the employee who has been dismissed, demoted or suspended may request in writing a hearing before the hearing officer of the Commission to determine the reasonableness of the action. The request may be made by mail and shall be deemed timely if it is postmarked within 10 working days after the effective date of the employee's dismissal, demotion or suspension.

Thus, the Hearing Officer is "to determine the reasonableness of the action." Here, the Hearing Officer complied with the statute's dictate. She cited *Knapp* and said:

> Generally a hearing officer does not defer to the appointing authority's decision. A hearing officer's task it to determine whether there is evidence showing that the dismissal would serve the good of the public. Dredge, at 42, 769 P.2d at 58 (citing NRS 284.385(1)(a)). A hearing officer 'determines the reasonableness' of the dismissal, demotion, or suspension. NRS 284.390(1). 'The hearing officer shall make no assumptions of innocence or guilt but shall be guided in his decision by the weight of the evidence as it appears to him at the hearing.' NAC 284.788.

RA, Vol. I, p. 47. Although the district court cited *Knapp*, it did not comply with *Knapp's* holding that a hearing officer does not defer to the appointing authority's decision.

The Hearing Officer found it was disingenuous of DMV to consider O'Keefe's conduct a "serious" offense but not to initiate discipline until 9 months after it learned of the alleged violations and "after Employee was scheduled to return to work at the DMV." RA, Vol. I, p. 49. Moreover, the DMV's action against O'Keefe was not commensurate with its prior disciplinary action against other DMV employees. RA, Vol. I, p. 49.

NRS 284.390(6) provides:

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

Here, the Hearing Officer found that O'Keefe's dismissal was without just cause as provided in NRS 284.385. NRS 284.385 specifically provides that an appointing authority may dismiss the permanent classified employee only when the appointing authority considers that the good of the public service will be served thereby. The Hearing Officer determined that the good of the public service would not be served by dismissing O'Keefe. RA, Vol. I, pp. 46, 51. She said, "In light of the above, this Hearing Officer concludes that the reliable, substantial and probative evidence does not establish that termination will serve the good of the public service, and therefore the decision to terminate Employee should be reversed."[8] RA, Vol. I, p. 51.

The district court ignored NRS 284.390(7) which states that, **"The decision of the hearing officer is binding on the parties."** (Emphasis added.) The district court also entirely ignored NRS 284.383(1) which provides for progressive discipline. Specifically, that section of the law states:

> The Commission shall adopt by regulation a system for administering disciplinary measures against a state employee in which, except in cases of serious violations of law or regulations, less severe measures are applied at first, after which more severe measures are applied only

[8] DMV conceded before the Hearing Officer that the Hearing Officer's job was to determine whether DMV had just cause to support its decision on discipline. AA, pp. 144-45, 146. DMV **never** argued that the Hearing Officer had no discretion regarding just cause if DMV proved an offense for which the prohibitions and penalties provided a minimum discipline of termination. Therefore, the district court should not have considered such an argument.

> if less severe measures have failed to correct the employee's deficiencies.

The Hearing Officer concluded that discipline must comply with the principles of progressive discipline and O'Keefe was not provided with progressive discipline. RA, Vol. I, pp. 47, 49.[9] The Hearing Officer concluded, "Nonetheless, 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)**." RA, Vol. I, p. 49. The Hearing Officer said:

> A thirty (30) calendar [day] suspension without pay is more appropriate for this conduct, particularly considering the nature of the offense, including the fact that Employee did not manipulate data or disclose data, Employee's seven years of state service without prior discipline, and the DMV's failure to promptly investigate this matter and take immediate corrective action. Therefore, it is the opinion of this Hearing Officer that discipline commensurate with these violations should be imposed.

RA, Vol. I, p. 51.

As long ago as 1960, the Nevada Supreme Court held in *Oliver v. Spitz*, 76 Nev. 5, 348 P.2d 158, 160 (1960), that employees in the classified service of the State may be dismissed only for just cause. DMV was precluded from dismissing

[9] The State of Nevada's Employee Handbook provides, "Disciplinary action will typically be of a progressive nature depending on the severity of the offense." AA, p. 139.

Oliver, the Director of the Driver's License Division, without just cause. *Id.* The Court directed DMV to reinstate Oliver as the Director of the Driver's License Division with pay. *Id.* at 161. Here, DMV had to have just cause to terminate O'Keefe. It did not. She should be reinstated with pay.

In *Schall v. State ex rel. Dept. of Human Resources*, 94 Nev. 660, 587 P.2d 1311 (1978), a hearing officer found that Dr. Schall, a psychologist for the Reno Mental Health Center, had discussed personal matters with patients, sometimes causing them to be upset. The hearing officer characterized this conduct as disgraceful personal conduct justifying termination. The Nevada Supreme Court held that there was nothing in the evidence presented to the hearing officer to even remotely suggest disgraceful personal conduct on the part of Dr. Schall. While the district court found that the evidence did not support a finding of disgraceful personal conduct, it sustained the dismissal on the ground that Dr. Schall's activity was incompatible with employment, a charge that had never been asserted against him. The Nevada Supreme Court concluded that the district court was not empowered to sustain Dr. Schall's dismissal for a reason never asserted against him. 587 P.2d at 1312. The Court reversed and ordered the reinstatement of Dr. Schall with all accrued back pay and rights. *Id.*

In *State, Dept. of Human Resources, Welfare Division v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993), the Welfare Division had terminated Fowler from his

position as a computer system programmer because he allowed another individual to have unauthorized access to the Welfare Division's computer system. Fowler appealed and after a hearing, the hearing officer found that Fowler violated the Welfare Division's requirements in permitting the unauthorized access to the computer system. However, finding no further evidence of indiscretions on Fowler's part, the hearing officer held that Fowler's **discipline must be progressive** and that the Welfare Division was not justified in terminating Fowler. 858 P.2d at 375-76. The hearing officer ordered the Welfare Division to reinstate Fowler with full back pay and benefits. The Nevada Supreme Court held that Fowler's only remedy was set forth in NRS 284.390(5) which provided for reinstatement and full pay for the period of dismissal, demotion or suspension. The Court upheld the hearing officer's decision.

Here, the Hearing Officer made a similar finding to that of the hearing officer in *Fowler*. The Hearing Officer found that O'Keefe was entitled to progressive discipline and that she received none. The district court applied the wrong legal standard in this case contrary to over 50 years of jurisprudence. It was up to the Hearing Officer to determine whether O'Keefe was terminated for just cause. The Hearing Officer determined she was not and substantial evidence supported her decision.

In *Taylor v. Department of Health and Human Services*, 129 Nev. Adv. Op. 99, 314 P.3d 949, 951 (2013), the Nevada Supreme Court held that if the hearing officer's interpretation of NRS Chapter 284 and its associated regulations was within the language of the statute, this Court would defer to that interpretation. The Court concluded, "The hearing officer's interpretation of her authority is within the language of NRS Chapter 284 and its associated regulations, and we therefore do not disturb that interpretation on appeal." 314 P.3d at 952. Thus, because the Hearing Officer's interpretation of her authority was within the language of NRS Chapter 284 and its associated regulations, the district court should have upheld the Hearing Officer's decision that the good of the public service would not be served by dismissing O'Keefe. Since O'Keefe's dismissal was without just cause, the Hearing Officer's decision should be affirmed and the district court should be reversed.

There is no authority for the district court's conclusion, and the district court cites no authority for its conclusion, that if DMV proved an offense for which the prohibitions or penalties provided a minimum discipline of termination, a Hearing Officer had no discretion regarding just cause or reasonableness of the termination to exercise. First, DMV told the Hearing Officer that the issue before her was just cause. AA, pp. 144-46. Second, the Hearing Officer found that the computer usage policy provided for discretionary discipline **not** a minimum discipline of

termination. RA, Vol. 1, p. 51; AA, p. 129. DMV agreed there was always a scale of discipline which could be imposed. RA, Vol. II, pp. 180, 78, 88, 92. The policy itself states, "Appropriate disciplinary action will be taken if violations of policy occur as they concern DMV records." AA, p. 129. Thus, this was not even a policy which provided a minimum discipline of termination.

In *Morgan v. State of Nevada Department of Business and Industry, Taxicab Authority*, Court of Appeals No. 67944 (May 16, 2016) (unpublished disposition), the district court had denied a petition for judicial review of an administrative hearing officer's decision affirming an 80-hour suspension. This Court said, "Consequently, we are limited to the record before the agency and cannot substitute our judgment for that of the agency on issues concerning the weight of the evidence on questions of fact." *Id.* at 1. This Court reviewed an administrative agency's factual findings for clear error or an abuse of discretion and said it will only overturn those findings if they are not supported by substantial evidence. In addition, this Court said that although it reviewed purely legal issues de novo, "we ordinarily defer to an agency's conclusions of law that are closely related to the facts if they are supported by substantial evidence." *Id.* at 2.

In reviewing an appointing authority's decision to dismiss, demote or suspend an employee, this Court held that the hearing officer was tasked with determining the reasonableness of the action and cited NRS 284.390(1). *Id.* at 3.

This Court concluded that the hearing officer did not err by affirming the suspension because substantial evidence supported the hearing officer's findings that Morgan improperly arrested one person without probable cause and engaged in inappropriate conduct in connection with the arrest of the second person. Under those facts, this Court could not say the suspension was without just cause. This Court affirmed the hearing officer's decision. *Id.* at 4.

The district court ignored part of the *Knapp* decision. In *Knapp*:

> The district judge adopted the hearing officer's findings of fact and accepted his conclusions as to the offenses proven, but reversed the officer's reversal of Knapp's dismissal. The judge erroneously assumed that DOP's decision to fire Knapp was entitled to deference and concluded that the hearing officer had acted arbitrarily and capriciously by substituting his judgment for DOP's.

892 P.2d at 577; RA, Vol I, p. 47. Here, the district court made the same mistake as the district court in *Knapp*.

The Hearing Officer applied the correct standard of review looking at the facts as a whole from a neutral perspective to determine if there was a factual basis supporting termination. To be arbitrary and capricious, the Hearing Officer's decision must be in disregard of the facts and circumstances involved. Questions of credibility are for the Hearing Officer who heard the testimony and saw the witnesses as they testified and on appeal, this Court does not re-weigh the evidence presented. The Hearing Officer's findings and conclusions are supported by

substantial evidence. O'Keefe respectfully requests that this Court reverse the district court's decision and uphold the Hearing Officer's decision.

III. DMV DID NOT INFORM O'KEEFE PROMPTLY OF THE CONDUCT

Here, DMV did not comply with the law when it terminated O'Keefe. NAC 284.638 specifically provides:

> 1. If an employee's conduct comes under one of the causes for action listed in NAC 284.650, **the supervisor shall inform the employee promptly and specifically of the conduct.**
> 2. If appropriate and justified, following a discussion of the matter, a reasonable period of time for improvement or correction may be allowed before initiating disciplinary action.

(Emphasis added). O'Keefe was not given any progressive discipline and she was not notified promptly and specifically of the conduct which merited discipline. In the Specificity of Charges, DMV said that DMV was aware on December 28, 2012 that O'Keefe had made calls to the Carson City Sherriff's office regarding an individual's driver's license and that "the administrator decided it was not necessary to investigate the allegations." RA, Vol. I, p. 4. DMV specifically waived any right to take any further disciplinary action on that date.

O'Keefe's supervisor did not inform her promptly and specifically of the conduct. AA, pp. 115-116, 117. DMV's Supervisor's Guide To Prohibitions and Penalties provides, "If disciplinary issues arise, they need to be brought to the

employee's attention immediately to avoid future problems." AA, p. 118. The Guide states:

> **You, as a supervisor, are charged with the responsibility for promptly taking corrective disciplinary action when it is appropriate for employees under your direction. It is also your responsibility to promptly bring instances that require such action to the attention of your Personnel Bureau. The administration of prompt, fair, and effective corrective disciplinary action is just as essential to effective operations and good employee relations as is the commendation of employees for work well done.**
>
> . . . .
>
> . . . The longer the corrective action is delayed, the more unjustified and unfair it will seem to the employee and co-workers. Be sure you get the employee's [sic] perspective and objectively assess discrepancies before taking any action. Avoid the impression you have made up your mind prior to hearing the employee.

AA, p. 119, 120 (emphasis added). DMV did not comply with its own Guide.

Moreover, DMV did not provide written notice of the allegations before questioning O'Keefe, as required by the Supervisor's Guide. AA, p. 122. If it was not necessary to investigate the allegations in December 2012, then they should not have been investigated in August 2013. DMV waived its right to investigate and discipline when it waited for 9 months to initiate any investigation of O'Keefe's conduct of which it was aware.

IV. DMV VIOLATED NAC 284.462 AND DEPRIVED O'KEEFE OF HER RIGHT TO TRANSFER BACK TO DMV

NAC 284.462(2) provides, "An employee promoted pursuant to subsection 1 who fails to retain permanent status in the position to which he or she was promoted or who is dismissed for cause other than misconduct or delinquency on his or her part from the position to which he or she was promoted, either during the probationary period or at its conclusion, **must** be restored to the position from which he or she was promoted." (Emphasis added.) DMV was notified on August 12, 2013 that O'Keefe would be returning. AA, p. 10. By terminating O'Keefe for conduct which occurred over a year prior to her transfer back to DMV, DMV violated O'Keefe's right to be restored to her former position. There is and was no authority for DMV to take such action.

Despite the fact that O'Keefe's supervisor knew she had to make room for O'Keefe to come back, she said she was instructed by her supervisor "that we must revisit the issue of the witnesses coming forward about misrepresentation. . . ." RA, Vol. II, pp. 130, 155. DMV never introduced such a policy. It used greatly delayed discipline to avoid a legal obligation to restore O'Keefe to her position at DMV. DMV violated the law. It used termination as a subterfuge for not restoring O'Keefe to her former position at DMV.

CONCLUSION

O'Keefe received kudos in her last evaluation for following procedures. AA, p. 32. The policy she was charged with violating provided:

> Information contained in DMV system records is for use only for Departmental and business and is proprietary information. Information from the DMV system should not be used for any purpose other than for completing authorized transactions for customers.

AA, p. 132. The policy does not apply to access or "looking up records", only use. The male citizen authorized O'Keefe to access the DMV system on his behalf. AA, p. 141. O'Keefe did not use or manipulate any DMV information outside the scope of her job. Her perception was that she was within the scope of her job duties as a DMV employee when she attempted to help the male citizen. RA, Vol. II, pp. 215-16, 221, 225; RA, Vol. I, p. 14. She treated him like all other DMV customers.

The purpose of prompt progressive discipline was to tell O'Keefe that DMV did not interpret this policy the way she did. She testified that she learned that she would not help any customer who is not a motor carrier customer.

DMV testified that discipline for a violation of this policy was discretionary, not zero tolerance. RA, Vol. II, p. 180; RA, Vol. I, p. 38. DMV agreed that there was always a discretionary scale of discipline which could be imposed. RA, Vol. II, pp. 180, 78, 88, 92; RA, Vol. I, p. 33.

According to the Supervisor's Guide, O'Keefe should not have been questioned regarding the allegations until she was provided notice in writing of the allegations against her. AA, p. 122. O'Keefe was interviewed twice before receiving the Specificity of Charges which was her notice in writing.

Moreover, O'Keefe was not treated like the other DMV Motor Carrier employee still working there who received only a suspension when she accessed DMV records and stalked her ex-boyfriend's new girlfriend.

The Hearing Officer's Decision is based on substantial evidence and she followed the law. She concluded that O'Keefe's termination was not for just cause. The district court did not limit its review and did not apply the appropriate legal standard of review. O'Keefe respectfully requests that the district court's decision be reversed, that the Hearing Officer's decision be affirmed and that O'Keefe be reinstated to her position as a Revenue Officer in DMV Motor Carriers with full back pay and benefits, less a 30-day suspension.

HEJMANOWSKI & McCREA LLC

By: Malani L. Kotchka

Malani L. Kotchka
Nevada Bar No. 283
520 South Fourth Street, Suite 320
Las Vegas, NV 89101
(702) 834-8777

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE WITH NRAP RULE 28.2

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(2)(6) because this brief has been prepared in a proportionally-spaced typeface using 14 point Times New Roman typeface in Word.

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 proportionately spaced, has a typeface of 14 points or more and contains 6956 words.

Finally, I hereby certify that I have read this 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