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 REPLY BRIEF

In Conjunction With Legal Aid Center of Southern Nevada

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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.

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ARGUMENT

I. THE HEARING OFFICER'S DECISION DID NOT EXCEED HER AUTHORITY UNDER NRS 284.390(1) and (6).

It is undisputed that on December 28, 2012, two employees told Administrator Stoll about O'Keefe's two calls to the Carson City Sheriff's Department in August 2012. RA, Vol. II, pp. 39, 42, 63. Stoll decided "**[i]t was not necessary to investigate the allegations.**" RA, Vol. I, p. 4 (emphasis added). Even though Stoll had earlier decided it was **not** necessary to investigate the allegations, in August 2013 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). DMV has **never** identified any policy that required DMV almost nine months later to revisit the allegations that Stoll had earlier decided were not necessary to investigate.

Although DMV argues that O'Keefe had committed a class five offense which provided the minimum discipline of termination,[1] that is not true. At the hearing before the Hearing Officer, the DMV Motor Carrier Administrator Wayne Seidel testified that the policy pursuant to which O'Keefe was terminated was a

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[1] In DMV's Statement of the Issues on page 1 of their Supplemental Answering Brief, DMV refers to "a class-5 offense *recommending* termination as the minimum discipline. . . ." (Emphasis added.) Furthermore, DMV refers to the "recommendation for termination" or "recommended termination" on pages 8 and 9 of its Supplemental Answering Brief. Thus, DMV admits that termination was **not** compulsory.

discretionary policy, **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. If the discipline for a violation of a policy is discretionary, then termination is **not** the minimum discipline. Contrary to the district court's conclusion, DMV did **not** prove an offense for which the prohibitions and penalties provided a minimum discipline of termination. Therefore, the Hearing Officer had discretion to exercise regarding just cause or reasonableness of the termination.

The April 25, 2011 memo which notified O'Keefe of the policy against use or manipulation of information outside the scope of one's job responsibilities states, "**The first offense can result in termination**." AA, p. 129 (emphasis in original). To be compulsory, the memo would have to have said, "the first offense **will** result in termination." This policy did **not** provide a minimum discipline of termination.

The specific G1 policy cited in the Specificity of Charges, RA, Vol. I, p. 6, states:

> 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.

In regard to this policy, the Hearing Officer specifically found:

> 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.

RA, Vol. I, pp. 50-51. In addition to finding an inconsistent policy, the Hearing Officer also specifically found that O'Keefe "**did not manipulate data or disclose data**." ROA, Vol. I, p. 51 (emphasis added). Thus, DMV's representation of what the Hearing Officer found is not accurate.

Moreover, the district court cited no legal authority for its conclusion that the Hearing Officer's decision exceeded her authority under NRS 284.390(1) and (6). While termination might have been possible, it was **not** compulsory discipline. Thus, the Hearing Officer reasonably concluded:

> . . . 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 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.

RA, Vol. I, p. 51.

The human resources administrator for DMV (RA, Vol. II, p. 78) said "appropriate disciplinary action" would be taken for a violation of policy G1. RA, Vol. II, p. 88. She said "it would depend on the circumstances." RA, Vol. II, p. 88. Thus, DMV conceded at the hearing that violation of this policy did not require the discipline of termination.

Regardless of the label on the policies allegedly violated, O'Keefe engaged in the following conduct:

> Q And where did you get that driver's license number?
>
> A From Daniel.
>
> Q And you didn't get it from the DMV database?
>
> A No.
>
> Q And why were you checking his records so many different times?
>
> A I can't -- because it was so long ago, I can't tell specifically each incident that I pulled it up and looked, and he was asking me to help him fill out some paperwork. He didn't understand the paperwork. And I did not know the process, but I knew who I could ask. But he didn't have certain information, and that's why I looked into his record.
>
> Q Why didn't you refer him to Field Services?

A Because he trusted me. He had just gotten a new job.

Q Why didn't you refer him to Field Services?

A Because I told him I would help him fill the paperwork out.

Q Isn't it true that you should refer him to Field Services or Central Services for such questions?

A I -- yes, I could have. Yes.

Q Isn't it true that you should have done that?

A At this point, yes, I should have.

Q Okay. Why did you access the records of his wife?

A Because Daniel stated he was not getting information mailed to him that the DMV employees were saying had been sent out. I was informed about a glitch in the system, where if a -- even though they're separate records, if the husband and wife have -- if there's a different address, if they separate and they change anything or they move and it's changed on one and not on the other, that something in the system would send it to a specific address. So if the husband has one address and the wife has a different address that the mail possibly could have gone to the wife's address.

Q Why didn't you refer him to Field Services?

A Because he was embarrassed. He knows people there and he did not -- he trusted me. He asked for my help.

RA, Vol II, pp. 32-33. The underlying conduct was the same for every alleged policy violation. The conduct did **not** personally benefit O'Keefe. RA, Vol. II, pp. 221, 225. She believed she was helping another member of her small community. RA, Vol. II, pp. 211, 215-28.

In her last evaluation by Stoll which was signed by DMV Administrator Wayne Seidel (AA, p. 28), Stoll said O'Keefe:

> Demonstrates ability to accept work assignments and adapt to change in routine or other process. Demonstrates ability to willingly accept authority, instruction and constructive criticism. Maintain harmonious work relationship and self-control and is not unduly influenced by co-workers opinions or attitudes.

AA, p. 31. Surely, such an exemplary employee would meet the DMV's stated goal "to keep the employees employed." RA, Vol. II, p. 107. O'Keefe's willingness to respond to constructive criticism makes her ideal for progressive discipline.

NRS 284.390(1) provides that any state employee who has been dismissed may request in writing a hearing before the hearing officer "to determine the reasonableness of the action." Furthermore, NRS 284.390(6) provides that if the Hearing Officer determines the dismissal was without just cause "the action must be set aside and the employee must be reinstated, with full pay for the period of dismissal. . . ."

On page 16 of its Supplemental Answering Brief, DMV admits that the Hearing Officer "can set aside the discipline if the hearing officer determines that the discipline was without just cause." That is exactly what the Hearing Officer decided here. The Hearing Officer found, "In light of the above, this Hearing Officer concludes that the reliable, substantial and probative evidence does not establish that termination would serve the good of the public service, and therefore the decision to terminate Employee should be reversed." RA, Vol. I, p. 51.

The Hearing Officer did what she was instructed by the Nevada Supreme Court to do in *Knapp v. State ex rel. Department of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577-78 (1995). The *Knapp* Court specifically held that the hearing officer was **not** supposed to defer to the appointing authority's decision and that the district court erred in assuming that the hearing officer was required to defer to the appointing authority's decision.

The Nevada Supreme Court specifically held that a system of progressive discipline of state employees must be followed and affirmed the hearing officer's conclusion that dismissal was too severe a penalty for Knapp's two violations. The Court said:

> We agree with DOP, with the hearing officer, and with the district court that Knapp's misconduct was serious, showed shocking misjudgment, and warranted discipline. **The only dispute is over the degree of that discipline.** The hearing officer considered that Knapp's outside business activity, although incompatible with his job and

> of little if any social value, was legal in this state. He also considered that Knapp's past work performance had been generally satisfactory or above and that DOP had not shown that Knapp's actions had significantly or permanently affected his ability to perform his work duties. These were also Knapp's first offenses.
>
> The officer therefore concluded that Knapp's conduct did not warrant dismissal and remanded the matter to DOP for imposition of progressive discipline, ranging from suspension for ten to thirty days up to demotion. This range of potential discipline is not light; demotion is next only to dismissal in severity. The officer's conclusion was reasoned and based on the evidence before him. **We conclude that he did not clearly err or abuse his discretion in deciding that dismissal was too severe a disciplinary measure in this case.**
>
> Although the district court or this court might have weighed the facts differently and reached different conclusions, it is not the role of courts to do so in reviewing administrative decisions. Substantial evidence supported the hearing officer's decision, and it does not appear to be arbitrary or capricious in any way. On the contrary, the officer explicitly set forth his factual findings and legal reasoning in great detail in a forty-eight page decision.
>
> Accordingly, we reverse the order of the district court and affirm the decision of the hearing officer.

111 Nev. at 425, 829 P.2d at 578 (emphasis added).

This Hearing Officer decided that dismissal was too severe for O'Keefe and that O'Keefe should have been given progressive discipline, a 30-day suspension. RA, Vol. I, p. 51. She issued a 31-page decision and set forth her factual findings and legal reasoning in great detail. RA, Vol. I, pp. 22-53.

DMV misrepresents the holding in *Taylor v. Department of Health and Human Services*, 129 Nev. Adv. Op. 99, 314 P.3d 949 (2013). Taylor was dismissed from state employment by the Division of Child and Family Services ("DCFS"). The Nevada Supreme Court said:

> Taylor administratively appealed his dismissal pursuant to NRS 284.390, and following an evidentiary hearing, the State Personnel Commission hearing officer issued a decision setting aside Taylor's dismissal and remanding the case to DCFS to determine the appropriate level of discipline for Taylor's infraction. In her decision, the Hearing Officer recommended that DCFS impose a suspension and require remedial training concerning the use of force. Taylor sought reconsideration of the decision, arguing that the hearing officer, as opposed to the employer, should determine the appropriate amount of discipline where modified discipline is required. The hearing officer denied reconsideration, and Taylor subsequently filed a petition for judicial review to have a district court decide the issue of who determines the appropriate level of discipline in his situation. Following briefing by the parties, the district court denied Taylor's petition for judicial review, concluding that hearing officers are **not** required to determine the appropriate level of discipline after finding that dismissal was unreasonable. This appeal followed.

314 P.3d at 950 (emphasis added). The hearing officer's decision in which she set aside the termination of the employee was affirmed in the *Taylor* case. 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. Accordingly, we affirm the district

court's order denying judicial review." *Id.* at 952. Similarly here, the Hearing Officer's decision is within the language of NRS Chapter 284 and its associated regulations and it should be affirmed.

In *Morgan v. State of Nevada Department of Business and Industry, Taxicab Authority*, Nev. Ct. App. 67944 (May 16, 2016), this Court affirmed a hearing officer's decision which upheld an 80-hour suspension for an employee who improperly arrested one person without probable cause and engaged in inappropriate conduct in connection with the arrest of a second person. This Court said, "However, in light of the hearing officer's findings concerning the underlying misconduct, we conclude the Administrator's decision to suspend Morgan without first applying less severe measures is justified."

Here, the Hearing Officer found that O'Keefe deserved a 30-day suspension rather than termination. This Court should affirm the Hearing Officer's decision that pursuant to NRS 284.383(1), DMV's discipline "must comply with the principles of progressive discipline." RA, Vol. I, p. 47. The Hearing Officer concluded that O'Keefe'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. "[L]ess severe measures are applied at first, after which more severe measures are applied only if less severe measures have failed to correct the employee's deficiencies." NRS 284.383(1).

DMV is wrong when it repeatedly alleges that the test is whether substantial evidence supports DMV's termination decision. The test is whether the Hearing Officer's decision reinstating O'Keefe and determining that termination was too severe prior to imposition of less severe disciplinary measures is supported by substantial evidence. As the Hearing Officer said, if O'Keefe's conduct was such a serious violation of law or regulation to merit termination prior to imposition of less severe disciplinary measures, surely the DMV would have promptly investigated and taken immediate corrective action. RA, Vol. I, p. 49. O'Keefe's conduct was unimportant until O'Keefe was scheduled to return to DMV.

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

NAC 284.638 required Stoll to notify O'Keefe promptly and specifically of the conduct. The Hearing Officer found, "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." RA, Vol. I, p. 49.

The Hearing Officer also noted that:

> . . . NRS 284.387 sets forth the procedural rights of employees in disciplinary actions, including the right to written notice of allegations before questioning, the right to have an attorney present when they are questioned regarding the allegations, and deadlines for the

> completion of an internal investigation. 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 nine months after her supervisor was informed by her co-workers about the incident.

RA, Vol. I, pp. 49-50. Apparently the Hearing Officer disagrees with DMV's interpretation of due process requirements.

Although DMV makes an argument in footnote 10 on page 27 of its Supplemental Answering Brief that the *Notice of Employee Rights During an Internal Investigation* provided notice of the allegations before questioning, that is not true. The Notice O'Keefe received before questioning is located at RA, Vol. I, p. 2. It states:

> This is to advise you that you are the subject of an internal administrative investigation relevant to the following allegation(s):
>
> **Violation of Department of Motor Vehicles Computer Usage policy:**

Information Abuse

> As found in NRS 242.105, NRS 281 section 1, and NAC 284.650: Information contained in DMV system records is for use only for Departmental 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.
>
> 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.

That *Notice* is no notice. It does not inform O'Keefe of the conduct about which she was going to be questioned. It tells her only the policy involved. The information in the "SUMMARY OF FACTS" in the Specificity of Charges (RA, Vol. I, p. 4) should have been given to O'Keefe prior to any questioning. That is the conduct. Clearly, the Hearing Officer's concern about due process compliance with NRS 284.387 is supported by DMV's failure to promptly inform O'Keefe of the conduct.

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

O'Keefe is not raising this issue for the first time on appeal. The Hearing Officer found:

> 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.**

RA, Vol. I, p. 49 (emphasis added). NAC 284.462(2) is compulsory. It does not give DMV the discretion to terminate an employee such as O'Keefe. It states she "**must** be restored to the position from which he or she was promoted." It is clear that DMV used termination[2] as a subterfuge for not restoring O'Keefe to her former position at DMV.

CONCLUSION

The Hearing Officer's decision that O'Keefe's termination was not for just cause should be affirmed by this Court. It was undisputed in the record made before the Hearing Officer that a violation of policy G1 did **not** require termination as the only possible discipline. DMV agreed that there was always a discretionary scale of discipline which could be imposed for a violation of that policy.

The Hearing Officer's decision is based on substantial evidence and she followed the law set out by the Nevada Supreme Court in *Knapp*. Since the Hearing Officer concluded "that the reliable, substantial and probative evidence does not establish that termination will serve the good of the public service,"

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[2] "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." Hearing Officer's Decision, RA, Vol. I, p. 49.

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 office in DMV Motor Carriers with full backpay and benefits less a thirty-day suspension.

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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 3,412 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

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 30th day of September, 2016, I caused service of a true and correct copy of the above and forgoing **APPELLANT'S REPLY BRIEF** by U.S. first class mail, postage prepaid, to the following:

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