

APET
KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
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(702) 385-5534
Attorney for Petitioner

In the matter of the Petition of
THOMAS KNICKMEYER,
Petitioner,

vs.

STATE OF NEVADA, ex rel., EIGHTH
JUDICIAL DISTRICT COURT,
Respondent.

COMES NOW, the Petitioner, THOMAS KNICKMEYER, by and through his undersigned counsel, KIRK T. KENNEDY, ESQ., who files this amended petition to set aside the arbitration decision pursuant to NRS 38.241, or, in the alternative a petition for judicial review pursuant to N.R.S. 289.120 to seek judicial review of the Arbitration decision submitted on November 24, 2014, in the matter of the arbitration between Petitioner and Respondent resulting in Petitioner's termination.

1

1 In support hereof, Petitioner relies on the following points and authorities and
2 exhibits on file herein.

3 Dated this 15th day of December, 2015.

4 /s/Kirk T. Kennedy
KIRK T. KENNEDY, ESQ.
5 Nevada Bar No: 5032
815 S. Casino Center Blvd.
6 Las Vegas, NV 89101
(702) 385-5534
7 Attorney for Petitioner

8
9 **NOTICE OF HEARING**

10 TO: Frederick Perdomo, Deputy Attorney General Counsel for Respondent

11 YOU AND EACH OF YOU WILL PLEASE TAKE NOTE that the
12 undersigned will bring the foregoing matter on for hearing on the ____ day of January,
13 2015, at the hour of ____ am before the Senior Judge Department of the District Court,
14 or as soon thereafter as counsel may be heard.

15 Dated this 15th day of December, 2015.

16 /s/Kirk T. Kennedy
KIRK T. KENNEDY, ESQ.
17 Nevada Bar No: 5032
815 S. Casino Center Blvd.
18 Las Vegas, NV 89101
(702) 385-5534
19 Attorney for Petitioner

20
21 **POINTS AND AUTHORITIES**

22 **I. Procedural Background:**

23 I. Petitioner Knickmeyer is a peace officer as defined under Nevada law in NRS 289 et
24 seq. He was formerly employed with the Respondent as a judicial bailiff from 1995 to
25 February, 2012, wherein he worked as the judicial bailiff for the Honorable Judge
26 Donald Mosley. Thereafter, in March, 2012, he was employed with the Respondent as an
27 administrative marshal.

28 Pursuant to N.R.S. 289.150(4), the definition of peace officers who are permitted

the rights set forth in N.R.S. 289 et seq., such as Knickmeyer, specifically includes:

“4. The bailiffs and deputy marshals of the district courts, justice courts and municipal courts whose duties require them to carry weapons and make arrests.”

2. Following incidents which occurred on January 7 and 8, 2013, the Respondent conducted an investigation into Petitioner’s alleged conduct, which resulted in the preparation of an investigative report dated May 20, 2013. Exhibit 1- Notification of Internal Investigation and Interview. Petitioner was given a written reprimand and placed on administrative leave with pay on the same date. Exhibit 2-Relief of Duty.

3. In October, 2013, Respondent served Petitioner notice that it was seeking his termination from employment premised upon the allegations documented in the May 20, 2013, written reprimand. Exhibit 3- Notice re: Termination, 10/23/2013.

4. Petitioner Knickmeyer challenged his termination at a Step 1 hearing allowed by the Respondent which occurred in November, 2013. The Step 1 decision upheld the recommendation for termination of Knickmeyer’s employment. Exhibit 4- Step 1 Decision.

5. Petitioner then requested a Step 2 hearing which occurred on February 5, 2014. The Step 2 decision also upheld his termination and the findings from the Step 1 decision. Exhibit 5- Step 2 Decision, 2/20/14.

6. Petitioner was represented by union counsel at both the Step 1 and Step 2 hearings.

7. Petitioner requested an arbitration to challenge the Step decisions upholding his termination. On September 11, 2014, an arbitration was held before Harry Maclean, an independent arbitrator selected by the parties from the American Arbitration Association. The Arbitration was conducted pursuant to the procedures set forth in Article 13 of the applicable Collective Bargaining Agreement between the Clark County Deputy Marshal’s Association and the District Court. Exh. 7. On November 24, 2014, the arbitrator issued his decision which upheld the termination of Knickmeyer. Exhibit 6- Arbitration Decision

8. Pursuant to NRS 289.120, Petitioner Knickmeyer now seeks judicial review of the arbitration decision.

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9. Pursuant to Article 13 of the applicable collective bargaining agreement (CBA) between the parties, the parties acknowledge that the requirements and protections of N.R.S. 289 et seq. apply to the court marshalls, to wit: "1. The Courts recognize and agree that all deputy marshalls will be afforded their rights as provided for in NRS Chapter 289." Petitioner's Exhibit 7-Article 13 Grievance and Disciplinary Procedures, pg. 6 (EJDC 001002).

10. Article 13 also provides as follows:

"Step 3-Arbitration

2. The arbitrator's decision shall be final and binding on all parties to this Agreement as long as the arbitrator does not exceed his/her authority as set forth below and as long as the arbitrator performs his/her functions in accordance with the case law regarding labor arbitration, the provisions of the U.S. Uniform Arbitration Act, and where applicable, Nevada Revised Statutes-(NRS)." Exhibit 7, Article 13, pg. 10 (EJDC 001006).

11. The limitations on the authority provided to an arbitrator by Article 13 include the following:

- a. the arbitrator shall not have the authority to modify, amend, alter, ignore, add to or subtract from any of the provisions of the CBA;
- b. the arbitrator is without power to issue an award that is inconsistent with the governing statutes and/or ordinances of the jurisdiction;
- c. an arbitrator's decision and award shall be based solely on his/her interpretation of the application of the express terms of the CBA. Exhibit 7- CBA, Article 13, pgs. 10-11 (EJDC 001006-001007).

II. Standards of Review:

In Ruiz v. City of North Las Vegas, 255 P.3d 216 (Nev. 2011), the Nevada Supreme Court recognized that peace officers, as defined in NRS 289 et seq., have a right to seek judicial relief following an arbitration decision, as occurred in this case, pursuant to NRS 289.120, to wit:

"Any peace officer aggrieved by an action of the employer of the peace officer in

1 violation of the Peace Officers Bill of Rights may, after exhausting any applicable
2 internal grievance procedures, grievance procedures negotiated pursuant to collective
3 bargaining and other administrative remedies, apply to the district court for judicial
4 relief.” *Id.*, at 222-223.

5 Pursuant to NRS 289.120, the Ruiz case and Article 13 of the CBA, as noted
6 above, the Petitioner Knickmeyer is properly before the Court seeking judicial review to
7 set aside the arbitration decision. Also, under N.R.S. 289.150(4), Petitioner is a peace
8 officer, since he was a marshal working for the district court.

9 Under authority of NRS 289.040(4), a peace officer “must be given a copy of any
10 comment or document that is placed in an administrative file of the peace officer
11 maintained by the law enforcement agency.”

12 Regarding the findings of an investigation, NRS 289.057(3)(a) provides that a
13 peace officer may review the content of all files and documents related to an
14 investigation. Further, NRS 289.057(3)(b) provides that if a law enforcement agency is
15 required to remove a record of an investigation or the imposition of punitive action, then
16 the agency shall not keep or make a record of such investigation or punitive action after
17 the record is required to be removed from an administrative file.

18 Upon a finding that evidence against a peace officer was obtained unlawfully,
19 then an arbitrator or court must exclude the evidence from any administrative proceeding
20 or civil action, pursuant to NRS 289.085.

21 Regarding the standards related to the arbitration procedures, Article 13 sets forth
22 specific requirements which delineate both the procedure to conduct an arbitration, as
23 well as the scope and limitations of an arbitrator’s authority. Exh. 7, Article 13, pgs. 6-
24 11.
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III. Factual Background:

As set forth in the investigative report, Exhibit 1, Petitioner was accused of the following offenses occurring on January 7 and 8, 2013, which allegedly supported the Respondent's termination action:

1. Knickmeyer said "fuck this place" while on duty.
2. Knickmeyer told co-worker, Marshal Dave Ellis, that then security director Bob Bennett "was going to be fired."
3. Knickmeyer referred to his supervising Lt. Steve Moody as a "motherfucker" and told Marshal Ellis that he was going to "throw Moody under the bus." Further, Petitioner said that Lt. Moody had falsified his application for employment as a marshal with the Respondent.
4. Knickmeyer allegedly showed Ellis a copy of a lawsuit involving Lt. Moody, which was on Petitioner's cell phone.
5. Knickmeyer allegedly said he was going to show the lawsuit involving Lt. Moody to others.
6. Knickmeyer, while working the security gate scanners on January 8, 2013, unnecessary scanned and re-scanned the purse of attorney Amanda Litt and then allegedly called her a bitch to Marshal Ellis after she walked away from the gate.

At the September 11 arbitration, Arbitrator Maclean found that the Respondent had established the foregoing allegations by a preponderance of the evidence. Exhibit 6, pg. 9. The Arbitrator also found the allegations regarding the re-scanning of Amanda Litt's purse sufficiently egregious to warrant termination. *Id.*, pg. 13-14.

At issue in this Petition is (1) whether the Respondent properly followed the mandates set forth in NRS 289, given Knickmeyer's status as a peace officer and (2) whether the Arbitrator followed the requirements, procedures and limitations imposed by Article 13 related to the parties' arbitration.

A. The Arbitration Decision:

1 The evidence presented at the Arbitration indicated that Knickmeyer was
2 terminated, in part, off the conversations he had with fellow co-worker David Ellis on
3 the mornings of January 7-8, 2013. Exh. 6, pgs. 2-7. No other witnesses or evidence
4 was presented at the hearing which indicated that any other person, employee or
5 customer of the courthouse was privy to the alleged conversation between Knickmeyer
6 and Ellis at the security gate area on January 7-8, 2013.

7 The alleged content of the conversations, as testified to by Ellis, included
8 Knickmeyer making off-color comments about his supervisor, Lt. Moody; Knickmeyer
9 expressing his opinion regarding his supervision by Moody and Knickmeyer showing a
10 screenshot from his cell phone of a pleading from litigation in the California federal
11 court involving Lt. Moody as a defendant. Id. Again, there was no independent
12 evidence from any third party indicating that they heard this conversation or that they
13 saw the subject screenshot on Knickmeyer's cell phone of the federal court case paper
14 involving Moody. Further, there was no evidence presented that Knickmeyer did
15 anything with the California case information involving Lt. Moody or that he
16 disseminated the document to any other parties. Id.

17 Marshal Ellis' testimony revealed only that Knickmeyer voiced off hand remarks
18 and complaints about the work environment. Blowing off steam and complaining about
19 management is an accepted part of nearly every job in every working environment. Even
20 Ellis admitted that he witnessed such conduct and statements on numerous occasions
21 with his prior law enforcement work over the last 22 years. Ellis Arbitration Transcript,
22 pg. 42-43.

23 Ellis also testified that over the course of the time he worked with Knickmeyer at
24 the gate area, throughout 2012, he shared numerous conversations about events in his
25 own life, as well as those events involving Knickmeyer. Ellis, Trans., pg. 40. It was
26 commonplace for the two marshals to exchange words and to relate events occurring in
27 their own lives to each other, while standing at the gate area. Ellis agreed that when
28 Knickmeyer said something to the effect of "fuck this place" to him on January 7, that he

1 was blowing off steam or just upset to some degree. Id., pg. 45-46. Again, typical
2 language among men in the working environment. The alleged statements by
3 Knickmeyer to Ellis on the next day, January 8, are also of the same ilk.

4 The Respondent presented absolutely no evidence at the Arbitration that
5 Knickmeyer's comments adversely impacted the work environment in any negative
6 fashion or that his alleged comments caused any disruption to the work performance of
7 Marshal Ellis, or any other district court employee. Marshal Ellis did not stop his work
8 because of these statements, nor did he immediately report them to his supervisor.

9 Regarding the incident on January 8, 2013, wherein attorney Amanda Litt had her
10 handbag scanned at least twice through the scanner, Knickmeyer's uncontroverted
11 testimony was that he thought he saw something notable when the bag was first scanned.
12 Arb. Decision, pg. 7. He directed Ellis to search the bag and Ellis indicated he found
13 nothing. Id. Knickmeyer agreed that he directed the bag to be scanned at least one more
14 time.

15 It is the job of the marshals working the security gates to insure the safety of all
16 courthouse personnel and the public by properly clearing each and every visitor to the
17 building, attorneys included. Amanda Litt admitted that every time she enters the
18 courthouse, her purse is scanned. Litt Testimony, Trans., pg. 137. She did testify that on
19 January 8, 2013, her purse was scanned several times. Id., pg. 137-138.

20 Additionally, the area where this occurred was under constant video surveillance.
21 The Respondent produced no video evidence of this incident at any of the hearings in
22 this case.

23 Litt admitted that following the incident she did not think much about it
24 afterwards, so clearly it was not an incident that adversely impacted her when it
25 occurred. Id., pg. 139. Only after the Respondent chose to interview Litt about the
26 matter did Litt *then* say she felt harassed. Id. Litt did not file any formal complaint
27 immediately after the incident occurred. Id. Litt was not interviewed by the
28 Respondent (Lt. Thomas Newsome) until March 25, 2013. *It is undisputed that Litt
never filed any complaint or other claim regarding the incident of January 8, until*

nearly 3 months later when she was interviewed by Lt. Newsome.

Litt also admitted that she had been through the security gate prior to January 8, 2013, when Knickmeyer was working there and she reported no issues or concerns. *Id.*, pgs. 146-147. Litt also testified that she did not hear Knickmeyer say anything derogatory to her when she was in the scanner/gate area on January 8, 2013. *Id.*, pg. 150.

The Step 1 and 2 decisions both inflated the Litt incident into some dramatic event. Yet, the whole matter was of such little consequence to Ms. Litt, that she never felt the need or urgency to file a complaint with the district court or with the Marshal's office. Rather, she took her bag and got on with her day on January 8. Only after the Respondent deliberately chose to make an issue of it and then interview Litt nearly 3 months later did she now say she felt "harassed." Clearly, she did not feel that way before being pressured and prodded by the Respondent into making a statement about the incident months afterwards.

The Arbitrator's Decision held that some of the allegations against Knickmeyer would normally only subject him to "corrective discipline," not termination. Exh. 6-Arbitration Decision, pgs. 12-13.

However, the Arbitrator held that the evidence of Knickmeyer showing Marshal Ellis a copy of a lawsuit involving Lt. Steve Moody was a "serious offense" which warranted "severe discipline." *Id.*, pg. 13. Further, the Arbitrator held that the most serious offense was the alleged unnecessary scanning of Amanda Litt's purse at the gate scanner area. *Id.*, pg. 13. The Arbitrator found that "unnecessarily scanning Litt's purse was retaliatory and constituted harassment." *Id.*

The Arbitrator essentially predicated his finding of just cause to uphold Knickmeyer's termination on the Litt purse scanning incident. The Arbitrator held "[T]his misconduct is sufficiently egregious, in the Arbitrator's view, to warrant termination in and of itself." *Id.*

IV. Argument:

A. Knickmeyer was deprived of his procedural due process rights mandated by NRS 289:

Knickmeyer was subjected to discipline and ultimately termination pursuant to the Article 13 Grievance and Disciplinary Procedures set forth in the Memorandum of Understanding between the Eighth Judicial District Court and the Clark County Deputy Marshals Association. Exhibit 7, Article 13.

Article 13 acknowledges that all deputy marshals are afforded those rights set forth in Nevada Revised Statutes 289 et seq. Pursuant to those statutes, NRS 289.040, 289.060 and 289.080 provide requirements that all of the investigative files, notes and documents used against a peace officer during an investigation into misconduct must be made available to and disclosed to the peace officer.

Article 13 also has a disclosure requirement, to wit:
“.. both parties will make full disclosure of the facts and evidence which bear on the grievance, including but not limited to furnishing copies of evidence, documents, reports written statements and witnesses relied upon to support their basis of action.” Exh. 7, Article 13(5).

Regarding the subject of discipline, Article 13, Section 1(3) provides, in part, that “the decision to uphold the disciplinary action will be based on the reasonableness of the discipline imposed by the supervisor in response to the actions taken or not taken by the marshal.”

Article 13 also provides that a deputy marshal shall have complete access to review all items in his personnel file. Article 13, Sect. 1(6).

The termination action against Knickmeyer was initiated by the Respondent in October, 2013, when Knickmeyer received written notification of the allegations and notice that he was being placed on administrative leave pending termination. Exh. 3, Notice re: Termination.

The subject notice recommended termination premised on Knickmeyer’s overall disciplinary history, which included a written reprimand from May 20, 2013; a 20 day

1 suspension from July, 2003; and a 3 day suspension from July, 1997. Id. This Notice
2 failed to provide copies of any relevant documentation in support of the 2003 or the
3 1997 incidents. Id. Additionally, the Investigation Report prepared by Lt. Thomas
4 Newsome, and relied upon to initiate termination, also failed to include any relevant
5 documentation regarding the 2003 and 1997 suspension incidents. Exhibit 1-
6 Investigative Report.

7 This disciplinary history was relied upon at Knickmeyer's Step 1 hearing on
8 November 7, 2013. Exhibit 4, Step 1 Decision. This same history was also relied upon
9 at the Step 2 hearing conducted February 5, 2014. Exhibit 5, Step 2 Decision. The
10 Respondent utilized this history as a means to improperly and unfairly bypass other
11 forms of progressive discipline in this matter.

12 Petitioner Knickmeyer was not provided *any discovery* related to the suspension
13 matters from 2003 and 1997, nor any meaningful opportunity to defend against that
14 disciplinary history which was used against him at both Step hearings. The Respondent
15 willfully failed and refused to provide any of the background reports and statements
16 regarding both suspension incidents prior to either Step hearing. The Respondent's
17 conduct was a willful violation of NRS 289.040(4) and 289.057.

18 The Respondent utilized the prior disciplinary history to support its termination
19 action and to support its unreasonable decision to bypass other forms of progressive
20 discipline to redress what were essentially relatively minor incidents from January, 2013.
21 Pursuant to Nevada Revised Statutes 289.040, 289.057, 289.060 and 289.080, the
22 Respondent was legally obligated to provide Knickmeyer access to all information and
23 documents being utilized at each hearing, i.e. Step 1, Step 2 and Arbitration.

24 It is established that public employees are entitled to procedural due process
25 protections related to their work for a government employer. Public employees have a
26 protected property interest in their employment. Board of Regents v. Roth, 408 U.S.
27 564, 576-77 (1972). Additionally, in Vanelli v. Reynolds School District No. 7, 667
28 F.2d 773, 777 (9th Cir. 1982), the Ninth Circuit held, based on Roth, that the Fourteenth
Amendment's procedural due process guarantees apply when a constitutionally protected

liberty or property interest is at stake.

Vanelli further held that “there is a strong presumption that a public employee is entitled to some form of notice and opportunity to be heard before being deprived of a property or liberty interest. Id., at 778. Further, “an individual must have an opportunity to confront all the evidence adduced against him, in particular that evidence with which the decisionmaker is familiar.” Id. 780.

Vanelli explicitly provides that Knickmeyer is entitled to “all the evidence adduced against him,” which necessarily must include access to the prior suspension records and documentation from 2003 and 1997. Nevada law provides the same disclosure mandates for peace officers to be allowed complete access to any files or records used to support a disciplinary action. NRS 289.040, 289.057, 289.060, 289.080.

In this instance, as evidenced by the findings at the Step 1 and Step 2 hearings, Knickmeyer was deprived of a meaningful opportunity to contest and explain the nature of his prior disciplinary background, because of the Respondent’s refusal to disclose any of the subject records and documentation related to that history. The Respondent’s refusal was a direct and explicit violation of NRS 289.

This violation supports the setting aside of the arbitration decision, because, from the start, Knickmeyer’s 289 rights were deliberately ignored by the Respondent. The entire process from the Step 1 to the final arbitration was infected with substantive defects related to the willful violations of NRS 289 by the Respondent.

These defects and willful violations had the net effect of depriving Petitioner of a full and fair hearing or the opportunity to effectively challenge his termination *prior* to the final Arbitration hearing. The Respondent’s refusal to follow the rules of full and fair disclosure, as required by NRS 289, equates to the total denial of important Due Process rights and statutory rights held by peace officer Knickmeyer.

B. The Arbitration Decision is in derogation to Nevada law and the mandates of Article 13 of the CBA:

Article 13 specifically and unambiguously mandates that an arbitrator's decision and award can *only* be based "solely on his/her interpretation of the application of the *express* terms of this Agreement." Exh. 7, Article 13, Step 3-Arbitration, paragraph 4, pgs. 10-11, (Emphasis Added). Therefore, under the clear mandates of Article 13, an arbitrator's decision cannot be based upon any other authority, except what is provided by the existing Article 13 provisions.

Furthermore, Article 13 requires a reasonableness analysis for the assessment of a disciplinary action by an arbitrator, to wit:

"The decision to uphold the disciplinary action will be based on the reasonableness of the discipline imposed by the supervisor in response to the actions taken or not taken by the marshal." Exhibit 7, Article 13, Section 1-Discipline (3), pg. 7.

In this case, the Arbitrator violated both noted mandates from Article 13. Under N.R.S. 38.241(1)(d), the Arbitrator has exceeded his authority granted under Article 13 and his decision must be vacated and set aside.

1. The Arbitrator Exceeded his Limited Authority:

A review of the Arbitration Decision indicates that the Arbitrator based his decision, in part, on Article 13, but also upon the Clark County Marshal's Division Policy and Procedure Manual. Exh. 6, Arbitration Decision, pg. 8. The Decision cites to various provisions regarding conduct standards for marshals. *Id.*

Additionally, the Decision relies upon various cited publications which define the concept of progressive discipline and its application to the facts presented at the Arbitration hearing. Exh. 6, Arb. Decision, pgs. 11-12.

Of course, the Respondent may contend that these citations to the Marshal's Manual and various other publications are nothing more than persuasive authority to buttress the Arbitrator's findings. However, in this particular circumstance, the arbitration was predicated solely upon the authority granted by Article 13, which allowed this procedure to occur following Knickmeyer's Step 1 and Step 2 hearings. Therefore,

1 the only controlling authority to govern the Arbitrator's decision is found exclusively in
2 his interpretation of Article 13's disciplinary procedures

3 The Arbitrator's citation to and reliance upon any authority, other than that
4 granted by Article 13, exceeds the permissible scope of his limited and defined powers
5 for this process. Given that the Arbitrator clearly looked beyond the authority of Article
6 13 in reaching his conclusions, the Decision must be set aside.

7 Article 13 states in unambiguous language that an arbitration decision must be
8 "based solely" on an interpretation of the "express terms of the Agreement." Exh. 7,
9 pgs. 10-11. This distinction is not trivial or to be lightly applied. The Agreement
10 between the Marshal's Association and the District Court explicitly chose this limiting
11 language, which limited the scope and breadth of an arbitrator's decision making power.
12 The Arbitrator in this case exceeded those limitations and ignored the requirements
13 imposed upon him. For this reason, the Decision should be set aside.

14 **2. The Arbitrator Failed to Make Findings Regarding Reasonableness:**

15 The mandates of Article 13 require an arbitrator to make findings of
16 reasonableness regarding the propriety of the discipline imposed. Exhibit 7, Article 13,
17 Section 1-Discipline (3), pg. 7.

18 The Arbitrator's findings appear predicated upon his ruling that the re-scanning
19 of Amanda Litt's purse was "sufficiently egregious" to support termination. Exh. 6,
20 Arbitration Decision, pg. 13. The Arbitrator specifically found that Knickmeyer's
21 conduct, in this instance alone, was sufficiently egregious to support termination. Id.,
22 pg. 14.

23 Missing from the Arbitrator's findings was any analysis that the termination was
24 reasonable, in light of other less severe forms of discipline. The Arbitrator failed to
25 make a specific finding that the District Court's decision to terminate was reasonable as
26 to this specific incident.

27 Recall that Litt admitted that after the incident she did not think much about it, so
28 clearly it was not an incident that adversely impacted her when it occurred. Exh. 8,
Arbitration Transcript, pg. 139. Only after the Respondent chose to interview Litt about

1 the matter did Litt *then* say she felt harassed. Id. Litt did not file any formal complaint
2 immediately after the incident occurred. Id. Litt was not interviewed by the
3 Respondent (Lt. Thomas Newsome) until March 25, 2013. *It is undisputed that Litt*
4 *never filed any complaint or other claim regarding the incident of January 8, until*
5 *nearly 3 months later when she was interviewed by Lt. Newsome.*

6 Litt also admitted that she had been through the security gate prior to January 8,
7 2013, when Knickmeyer was working there and she reported no issues or concerns. Id.,
8 pgs. 146-147. Litt also testified that she did not hear Knickmeyer say anything
9 derogatory to her when she was in the scanner/gate area on January 8, 2013. Id., pg. 150.

10 The foregoing facts from Litt's own testimony directly contradict the Arbitrator's
11 findings of "egregious misconduct" related to this incident. More importantly, however,
12 the Arbitrator failed to *expressly* indicate how termination was reasonable for this
13 incident.

14 The Arbitrator again failed to follow the requirements of Article 13 in his
15 Decision. Article 13 states that the arbitrator shall not have the authority to modify,
16 amend, alter, ignore, add to or subtract from any of the provisions of the CBA. Exhibit
17 7- CBA, Article 13, pgs. 10-11. By failing to expressly provide a reasonableness
18 analysis, the Arbitrator has ignored a mandatory provision of Article 13. Yet again, this
19 is a basis to set aside the Decision in this matter.
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IV. Conclusion:

For all the foregoing reasons, the Arbitrator's decision must be set aside as the entire process from the Step 1 through the Arbitration was infected with substantive NRS 289 violations and the Arbitrator failed to follow the mandates of Article 13 in his final decision.

Dated this 15th day of December, 2015.

/s/Kirk T. Kennedy
KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 385-5534
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby affirm that on this 15th day of December, 2015, I mailed via first class U.S. Mail to the Respondent a copy of the foregoing to:

Frederick J. Perdomo
Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701

/s/Kirk T. Kennedy
Law Office of Kirk T. Kennedy

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AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS

I hereby affirm that the foregoing contains no social security numbers.

Dated this 15th day of December, 2015.

/s/Kirk T. Kennedy
KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 385-5534
Attorney for Petitioner



CLERK OF THE COURT

1 NOT
2 KIRK T. KENNEDY, ESQ.
3 Nevada Bar No: 5032
4 815 S. Casino Center Blvd.
5 Las Vegas, NV 89101
6 (702) 385-5534
7 Attorney for Petitioner

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 In the matter of the Petition of
11 THOMAS KNICKMEYER,
12
13 Petitioner,

Case No: A-14-711200-P
Dept. No: XXXII

14 vs.

15 STATE OF NEVADA, ex rel., EIGHTH
16 JUDICIAL DISTRICT COURT,
17
18 Respondent.

19 **NOTICE OF APPEAL**

20 NOTICE IS HEREBY GIVEN, that the Petitioner, THOMAS KNICKMEYER,
21 by and through his undersigned counsel, KIRK T. KENNEDY, ESQ., appeals to the
22 Nevada Supreme Court from the final order and decision of the district court denying the
23 amended petition to set aside the arbitration decision or in the alternative petition for
24 judicial review, said notice of entry of order filed on August 25, 2016. See Notice and
25 Order Attached.

26 Dated this 21st day of September, 2016.

27 /s/Kirk T. Kennedy
28 KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 385-5534
Attorney for Petitioner

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CERTIFICATE OF SERVICE

I hereby affirm that on this 21st day of September, 2016, I mailed via first class
U.S. Mail to the Respondent a copy of the foregoing to:

Frederick J. Perdomo
Senior Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701

/s/Kirk T. Kennedy
Law Office of Kirk T. Kennedy

AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS

I hereby affirm that the foregoing contains no social security numbers.

Dated this 21st day of September, 2016.

/s/Kirk T. Kennedy
KIRK T. KENNEDY, ESQ.
Nevada Bar No: 5032
815 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 385-5534
Attorney for Petitioner


CLERK OF THE COURT

1 NEOJ
2 ADAM PAUL LAXALT
3 Attorney General
4 FREDERICK J. PERDOMO
5 Senior Deputy Attorney General
6 Nevada Bar No. 10714
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8 Public Safety Division
9 100 N. Carson Street
10 Carson City, Nevada 89701-4717
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13 Attorneys for Defendants

8
9 **EIGHTH JUDICIAL DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 THOMAS KNICKMEYER,
12 Plaintiff,

Case No.: A-14-711200-P

Dept. No. XXXII

13 vs.

14 STATE OF NEVADA, et al.,
15 Defendants.

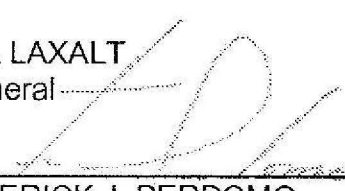
16 **NOTICE OF ENTRY OF ORDER DENYING AMENDED PETITION TO SET ASIDE**
17 **ARBITRATION DECISION, OR, IN THE ALTERNATIVE PETITION FOR JUDICIAL REVIEW**

18 TO: Plaintiff, THOMAS KNICKMEYER, and his counsel of record, Kirk T. Kennedy, Esq.

19 PLEASE TAKE NOTICE that on the 23rd day of August, 2016, the above Court entered
20 its Order Denying Amended Petition to Set Aside Arbitration Decision, or, in the Alternative
21 Petition for Judicial Review. A true and correct copy of this Court's Order is attached hereto
22 as Exhibit A.

23 DATED this 25th day of August, 2016.

24 ADAM PAUL LAXALT
25 Attorney General

26 By: 
27 FREDERICK J. PERDOMO,
28 Senior Deputy Attorney General
Bureau of Litigation - Public Safety Division
Attorneys for Defendants

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the Office of the Attorney General, State of Nevada,
3 and that on August, 25, 2015, I caused to be served a copy of the foregoing, **NOTICE OF**
4 **ENTRY OF ORDER DENYING AMENDED PETITION TO SET ASIDE ARBITRATION**
5 **DECISION, OR, IN THE ALTERNATIVE PETITION FOR JUDICIAL REVIEW**, by District
6 Court's Electronic Filing system to the following:

7 Attorney for Petitioner:
8 Kirk T. Kennedy, Esq.
9 815 S. Casino Center Blvd
10 Las Vegas, NV 89101
11 ktkennedylaw@gmail.com

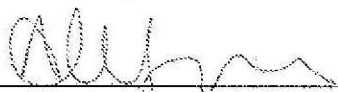
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13 An employee of the
14 Office of the Attorney General
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EXHIBIT A

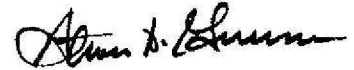
EXHIBIT A

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CLERK OF THE COURT

1 ORDR
2 ADAM PAUL LAXALT
3 Attorney General
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

11 In the matter of the Petition of
12 THOMAS KNICKMEYER,
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Petitioner,

CASE NO.: A-14-711200-P
DEPT. NO: 32

Hearing Date: May 20, 2016
Hearing Time: 9:00 a.m.

vs.

STATE OF NEVADA, ex rel., EIGHTH
JUDICIAL DISTRICT COURT,

Respondent.

**ORDER DENYING AMENDED PETITION TO SET ASIDE ARBITRATION DECISION, OR,
IN THE ALTERNATIVE PETITION FOR JUDICIAL REVIEW**

Before this Court is Petitioner Thomas Knickmeyer's "Petitioner" Amended Petition to Set Aside Arbitration Decision, or, in the alternative Petition for Judicial Review filed on December 15, 2015. The matter has been fully briefed and argued.

I. SUMMARY OF ARGUMENT

Petitioner's Amended Petition to Set Aside Arbitration Decision, or, in the alternative Petition for Judicial Review "Amended Petition" sought to set aside an arbitration award, which denied his grievance challenging his termination from employment as an administrative marshal for the Eighth Judicial District Court of the State of Nevada in and for Clark County "EJDC". Relying on certain sections of a Memorandum of Understanding "MOU" between the

1 Clark County Deputy Marshals Association "CCDMA" and the EJDC and Nevada Revised
2 Statutes "NRS" Chapter 289, Petitioner argued that he was improperly denied discovery
3 related to the underlying records supporting his 1997 and 2003 disciplinary suspensions.
4 Petitioner also argued that the arbitrator exceeded the scope of his authority under the MOU
5 when he upheld Petitioner's termination without specifically finding that the punishment was
6 reasonable, considered violations of the Clark County Marshals Division Policy and Procedure
7 Manual in finding that just cause existed for termination, and referred to outside sources to
8 define the purpose for and limits of progressive discipline.

9 Respondent argued that Petitioner waived his argument that he was improperly denied
10 discovery related to the underlying records supporting his 1997 and 2003 disciplinary
11 suspensions. Respondent argued that the arbitrator's finding that termination was appropriate
12 and just satisfied the reasonableness standard provided for under the MOU. Respondent also
13 argued that the express terms of the MOU stated that violations of the Clark County Marshals
14 Division Policy and Procedure Manual could be considered in making a finding that just cause
15 existed to terminate Petitioner. Respondent further argued that consideration of outside
16 sources in determining the underlying purpose for and limits of progressive discipline was well
17 within the arbitrator's discretion under the terms of the MOU. Even though not addressed in
18 Petitioner's briefing, Respondent argued that there was more than substantial evidence to
19 support the factual and legal conclusions made by the arbitrator and that there was no
20 evidence in the record that the arbitrator manifestly disregarded the law.

21 **II. PROCEDURAL HISTORY**

22 The termination process commenced on October 23, 2013, when Petitioner received a
23 notice that Respondent was placing him on administrative leave and recommending
24 termination as a result of various forms of misconduct he engaged in on January 7 and 8,
25 2013. (OAP, Exhibit B, EJDC_ARB 0727-29).¹ The termination process was guided by the
26 MOU, which provided for a three-step grievance procedure. (*Id.* at EJDC_ARB 0687-707).

27
28 ¹ Respondent filed the administrative record in support of its Motion to Dismiss, or in the alternative,
Response to Petition to Set Aside Arbitration Award filed on February 6, 2015. Excerpts of these records
supported Petitioner's Amended Petition and Respondent's opposition to the Amended Petition.

1 Petitioner was represented by counsel for CCDMA during the first two steps of this process
2 and private counsel during the last step of this process.

3 Petitioner received a Step 1 Pre-termination meeting on November 7, 2013, before
4 Special Hearing Master Melisa De La Garza, Esq. ("Hearing Master De La Garza"). (*Id.* at
5 EJDC_ARB 0711). The meeting concluded without a resolution between Respondent and
6 Petitioner. (*Id.*). Following the meeting, Hearing Master De La Garza entered an eleven page
7 written ruling, which sustained six of the seven allegations of misconduct against Petitioner
8 and upheld Respondent's recommendation to terminate him. (*Id.* at EJDC_ARB 0708–18).
9 The EJDC's Court Administrator, Steven Grierson, adopted these findings on November 14,
10 2013, and terminated Petitioner. (*Id.* at EJDC_ARB 0681).

11 On November 18, 2013, Petitioner, through CCDMA counsel, appealed this decision
12 and requested a Step 2 Post-termination meeting. (*Id.* at EJDC_ARB 0682–83). Petitioner
13 received a Step 2 Post-termination meeting on February 5, 2014, before Bonnie Bulla ("Ms.
14 Bulla"), who was designated by Respondent to preside over the meeting. (*Id.* at EJDC_ARB
15 0719). The meeting concluded without a resolution between Respondent and Petitioner.
16 (*Id.*). After the meeting, Ms. Bulla entered an eight page written ruling, which found that
17 Respondent had just cause to terminate Petitioner. (*Id.* at EJDC_ARB 0719–26).

18 Petitioner requested that the matter be submitted to arbitration. The parties selected
19 an arbitrator under the procedures provided for in the MOU. (*Id.* at EJDC_ARB 0691). The
20 arbitration hearing was held on September 11, 2014. (OAP, Exhibit A, Arbitration Transcript,
21 EJDC_ARB 0001–0276). On November 3, 2014, the parties submitted written briefs in
22 support of their respective positions. (OAP, Exhibit C, EJDC_ARB 0752). The arbitrator
23 entered his written decision on November 24, 2014, which found that Respondent had just
24 cause to terminate Petitioner and denied Petitioner's grievance on this basis. (*Id.* at
25 EJDC_ARB 0752–65).

26 Petitioner commenced this action on December 16, 2014, by filing a Petition to Set
27 Aside Arbitration Decision "Petition." The Petition sought an order from this Court setting
28 aside the arbitration award. Respondent filed a Motion to Dismiss, or in the alternative,

1 Response to Petition to Set Aside Arbitration Decision on February 6, 2015. Petitioner filed an
2 opposition to the motion on March 2, 2015. Respondent's motion was heard and denied by
3 the court on November 9, 2015. In denying the motion, the court ordered Petitioner to file an
4 amended petition, which clarified the jurisdictional basis for judicial review. An order was
5 entered to that effect on November 16, 2015.

6 Petitioner filed the Amended Petition on December 15, 2015. Respondent filed a
7 Motion to Dismiss the Amended Petition on January 15, 2016. Petitioner filed an opposition to
8 that motion on February 3, 2016 and Respondent filed a reply brief on February 11, 2016.
9 Respondent's motion was heard on February 12, 2016, and denied by the court. An order
10 was entered to that effect on February 25, 2016. Respondent was directed to file an
11 opposition to the Amended Petition by April 15, 2016, and Petitioner was directed to file his
12 reply brief by May 5, 2016. The briefs were timely filed and the matter was heard by this Court
13 on May 20, 2016.

14 **III. LEGAL STANDARD**

15 Judicial review of an arbitration award is provided for under Article 13, Step 3(2) of the
16 MOU. This section provides as follows:

17 The arbitrator's decision will be final and binding on all parties to
18 this Agreement as long as the arbitrator does not exceed his/her
19 authority as set forth below and as long as the arbitrator performs
20 his/her functions in accordance with the case law regarding labor
arbitration, the provisions of the U.S. Uniform Arbitration Act, and
where applicable, Nevada Revised Statutes-(NRS).

21 (OAP, Exhibit B, EJDC_ARB 0691). The language of this provision provides two bases to
22 challenge an arbitration award.

23 First, this section of the MOU states that an arbitration award is final and binding "as
24 long as the arbitrator does not exceed his/her authority" under its terms. (*Id.*). This standard
25 mirrors NRS 38.241(1)(d), which states that "[u]pon motion to the court by a party to an
26 arbitral proceeding, the court shall vacate an award made in the arbitral proceeding if: . . . an
27 arbitrator exceeded his or her powers." Under this standard, "[c]ourts presume that arbitrators
28 are acting within the scope of their authority." *Health Plan of Nevada, Inc. v. Rainbow*

1 *Medical, LLC.*, 120 Nev. 689, 697, 100 P.3d 172, 178 (2004). Review for excess of authority
2 is limited and "only granted in very unusual circumstances." *Id.* at 698. The party moving to
3 vacate an arbitration award carries the burden of "demonstrating by clear and convincing
4 evidence how the arbitrator exceeded that authority." *Id.* at 697. "Absent such a showing,
5 courts will assume that the arbitrator acted within the scope of his or her authority and confirm
6 the award." *Id.*

7 Second, this section of the MOU states that the arbitrator's decision is final and binding
8 "as long as the arbitrator performs his/her functions in accordance with the case law regarding
9 labor arbitration . . ." (OAP, Exhibit B, EJDC_ARB 0691). "There are two common-law
10 grounds recognized in Nevada under which a court may review private binding arbitration
11 awards: (1) whether the award is arbitrary, capricious, or unsupported by the agreement; and
12 (2) whether the arbitrator manifestly disregarded the law." *Clark County Educ. Ass'n v. Clark*
13 *County School Dist.*, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006). "[T]he arbitrary and capricious
14 standard limits a reviewing court's consideration to whether the arbitrator's findings are
15 supported by substantial evidence, while the manifest-disregard-of-the-law standard limits the
16 reviewing court's concern to whether the arbitrator consciously ignored or missed the law." *Id.*
17 at 342. Under the substantial evidence standard, "[a]n arbitrator's decision must be upheld
18 unless it is "completely irrational"" *Wichinsky v. Mosa*, 109 Nev. 84, 90, 847 P.2d 727, 731
19 (1993) (quoting *French v. Merrill Lynch, Pierce, Fenner & Smith*, 784 F.2d 902, 906 (9th Cir.
20 1986)). Under the manifest-disregard-of-the-law standard, the moving party must
21 demonstrate that the arbitrator "knowing the law and recognizing that the law required a
22 particular result, simply disregarded the law." *Clark County Educ. Ass'n*, 122 Nev. at 342.

23 The MOU also states that "[t]he Courts recognize and agree that all deputy marshals
24 will be afforded their rights as provided for in NRS Chapter 289." (OAP, Exhibit B, EJDC_ARB
25 0687). NRS 289.020 through 289.120 is the Peace Officer's Bill of Rights. Under NRS
26 289.120, "[a]ny peace officer aggrieved by an action of the employer of the peace officer in
27 violation of this chapter may, after exhausting any applicable internal grievance procedures,
28 grievance procedures negotiated pursuant to chapter 288 of NRS and other administrative

1 remedies, apply to the district court for judicial relief.” This section is not specific as to the
2 means by which judicial relief should be requested or the standard governing requests for
3 judicial relief. Petitioner’s right to judicial relief under NRS 289.120 only exists by virtue of the
4 MOU, as NRS 289.020 through 289.120 regulates the conduct of law enforcement agencies
5 with regard to peace officers and Respondent is not a law enforcement agency. In the
6 absence of express procedures and standards governing an application for judicial relief
7 under NRS 289.120, Petitioner is limited to the procedures and standards expressly provided
8 for under the MOU, NRS Chapter 38, and Nevada common law.

9 IV. DISCUSSION

10 A. Waiver

11 “It is well-established that arguments raised for the first time on appeal need not be
12 considered by [the] court.” *Diamond Enterprises, Inc. v. Lau*, 113 Nev. 1376, 1378, 952 P.2d
13 73, 74 (1997). “A point not urged in the trial court, unless it goes to the jurisdiction of that
14 court, is deemed to have been waived and will not be considered on appeal.” *Britz v.*
15 *Consolidated Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 915 (1971). Similarly,
16 “[a]rguments not raised before the appropriate administrative tribunal . . . cannot be raised for
17 the first time on appeal.” *Carrigan v. Commission on Ethics of the State of Nevada*, 129 Adv.
18 Op. 95, 313 P.3d 880, 887, n. 6 (2013).

19 The Amended Petition argued that Petitioner was improperly denied discovery of the
20 investigative records supporting his 1997 and 2003 disciplinary suspensions. The
21 memorandums by Judge Mosley memorializing these suspensions were admitted as a joint
22 exhibit during the arbitration hearing. (OAP, Exhibit A, EJDC_ARB 0004; Exhibit B,
23 EJDC_ARB 0737–38). These memorandums were part of Petitioner’s personnel file, which
24 was provided to Petitioner prior to that hearing. (OAP, Exhibit F, EJDC_ARB 0966–67).
25 Petitioner did not receive the investigative records supporting these suspensions, which were
26 maintained by the Clark County Office of Diversity “OOD.” OOD is part of the executive
27 branch of Clark County. While there is a question as to whether Respondent had an
28 affirmative duty to attempt to obtain these records from OOD, this Court does not need to

1 reach a decision on this issue. Petitioner was required to make a complaint about or a
2 request for these records at some time during the administrative proceedings. Petitioner did
3 not raise this issue during the administrative proceedings, and Petitioner's arguments are
4 waived as he failed to exhaust his administrative remedies.

5 Rather than seeking to address the substance of these investigations during the
6 arbitration hearing, Petitioner argued that the 1997 and 2003 disciplinary suspensions were
7 too remote in time to constitute earlier incidents of progressive discipline. (OAP, Exhibit C,
8 EJDC_ARB 0765). Petitioner also argued that there was a lack of due process with respect to
9 the administration of these suspensions. (*Id.*). The record reflects that the process for
10 challenging Petitioner's 1997 and 2003 suspensions, if any, was different than what was
11 provided for under the MOU. (OAP, Exhibit D, EJDC_ARB 0833; Exhibit E, EJDC_ARB
12 0890-95, 902-03). There was no evidence presented at any stage of the administrative
13 proceedings that established the quality of the investigation and procedures used to discipline
14 Petitioner in 1997 and 2003. The arbitrator found Petitioner's arguments persuasive and
15 effectively struck this evidence from the record by not considering these suspensions as
16 progressive forms discipline. (OAP, Exhibit C, EJDC_ARB 0765).

17 Review of the arbitration award is confined to issues raised during that proceeding.
18 Petitioner did not preserve for judicial review discovery issues related to Respondents duty, if
19 any, to attempt to obtain the investigative records supporting Petitioner's 1997 and 2003
20 disciplinary suspensions. Rather, the record reflects that Petitioner successfully argued for
21 striking evidence of these suspensions from the record. Petitioner did not exhaust his
22 administrative remedies, and his Amended Petition must be denied on this issue.

23 **B. Statutory and Common Law Standards of Review**

24 Review of the arbitration award is confined to the standards provided for under NRS
25 38.240(1)(d) and Nevada common law. While Petitioner did not make arguments to set-aside
26 the arbitration award under Nevada common law, this Court will still consider both standards
27 of review.

28 ///

1 **1. Statutory Standard of Review**

2 Under Nevada law, the arbitrator is presumed to have acted within the scope of his
3 authority. *Health Plan of Nevada, Inc.*, 120 Nev. at 697. Petitioner carries the burden of
4 demonstrating by clear and convincing evidence that the arbitrator exceeded his authority. *Id.*
5 Absent such a showing, this Court must assume that the arbitrator acted within the scope of
6 his authority and confirm the award. *Id.* A finding that the arbitrator acted in excess of his
7 authority requires Petitioner to show that the arbitrator addressed issues "outside the scope of
8 the governing contract." *Id.*

9 Petitioner argued that the arbitrator exceeded his authority by applying an incorrect
10 standard. Specifically, Petitioner argued that the MOU required the arbitrator to make a
11 finding that Respondent's disciplinary action was reasonable in order to reach his conclusion
12 that just cause existed to terminate Petitioner. Article 13, Section 1(3) of the MOU provides
13 that "[t]he decision to uphold the disciplinary action will be based on the reasonableness of the
14 discipline imposed by the supervisor in response to the actions taken or not taken by the
15 marshal." (OAP, Exhibit B, EJDC_ARB 0688). This section also provides that "[t]he arbitrator
16 will consider the incident and the discipline in terms of severity of the action, evidence of
17 progressive discipline and appropriateness of the disciplinary action." (*Id.*). The arbitrator
18 made specific findings as to whether termination was more appropriate than progressive
19 discipline. While the arbitrator did not make an express finding that termination was
20 reasonable, the arbitrator still applied this standard as it required the same type of weighing
21 analysis he engaged in to determine that Respondent's decision to terminate Petitioner was
22 appropriate. (OAP, Exhibit C, EJDC_ARB 0762-64).

23 Petitioner also argued that the arbitrator improperly relied on prior arbitration decisions
24 and legal journals to define the purpose for and application of progressive discipline. Article
25 13, Step 3(4) of the MOU states that "[t]he arbitrator shall consider and decide only the
26 particular issues presented by the CCDMA and the County, and the decision and award shall
27 be based solely on his/her interpretation of the application of the express terms of [the MOU]."
28 (OAP, Exhibit B, EJDC_ARB 0692). Article 13, Step 3(2) of the MOU required the arbitrator to

1 perform his functions in accordance with case law regarding labor arbitration. (*Id.* at
2 EJDC_ARB 0691). Weighing the appropriateness or reasonableness of termination over
3 progressive discipline required knowledge of the underlying purpose for and the limits of
4 progressive discipline. Referring to legal treatises or articles, which are informed by labor
5 arbitration law, to interpret this express term in the MOU was well within his discretion under
6 Article 13, Step 3 of the MOU.

7 Petitioner finally argued that the arbitrator improperly considered his violations of
8 certain provisions of the Clark County Marshals Division Policy and Procedure Manual as
9 support for his findings in the arbitration award. Article 13, Section 1(3) of the MOU states
10 that “[t]he CCDMA recognizes the need for more severe initial disciplinary action in the event
11 of major violation of established rules, regulations or policies of the Courts.” (*Id.* at
12 EJDC_ARB 0688) Article 13, Section 1(5) of the MOU also states that “[j]ust cause may
13 include, but not be limited to: . . . [a] violation of established departmental work rules and
14 procedures.” (*Id.*). The Clark County Marshals Division Policy and Procedure Manual falls
15 within scope of “established rules, regulations, or policies of the Court” or “departmental work
16 rules and procedures” that may be considered in determining whether there was just cause to
17 terminate Petitioner.

18 Petitioner has not carried his burden to demonstrate by clear and convincing evidence
19 that the arbitrator acted outside the scope of his authority. Petitioner’s challenge to the
20 arbitration award on the basis that the arbitrator exceeded his powers granted by the MOU is
21 denied.

22 **2. Common Law Standard of Review**

23 **a. Substantial Evidence**

24 Under the substantial evidence standard, an arbitration award may only be set-aside if
25 its findings are “completely irrational.” *Wichinsky*, 109 Nev. at 90. While the Amended
26 Petition did not specifically address this standard of review, it disputed the arbitrator’s factual
27 findings with respect to Petitioner’s conduct on January 7 and 8, 2013. The arbitrator found
28 that the six allegations, which formed the factual basis for the discipline imposed

1 by Respondent, were established by a preponderance of the evidence. The allegations were
2 as follows:

- 3 1. That Petitioner said, "fuck this place" while on duty and in uniform;
- 4 2. That Petitioner while on duty and in uniform told Marshal Ellis that Director Robert
5 Bennett was going to be fired;
- 6 3. That Petitioner referred to Lieutenant Moody as a "motherfucker" and told Marshal Ellis
7 that he was going to throw Lieutenant Moody under the bus;
- 8 4. That Petitioner showed Marshal Ellis a copy of a civil lawsuit involving Lieutenant
9 Moody on his phone and told him he was going to distribute a copy of the lawsuit
10 around the courthouse;
- 11 5. That Petitioner unnecessarily scanned Ms. Litt's purse three times; and
- 12 6. That Petitioner commented to Marshal Ellis after Ms. Litt left the scanning station that,
13 "That was the bitch who complained on me."

14 (OAP, Exhibit C, EJDC_ARB 0760).

15 In addition to these factual findings, the arbitrator found that Ms. Litt was a witness to a
16 prior incident, which resulted in a disciplinary reprimand against Petitioner and that Ms. Litt
17 filed a separate complaint against Petitioner alleging that Petitioner acted inappropriately
18 toward her. (*Id.* at EJDC_ARB 0761).

19 There was more than substantial evidence in the record to establish these facts, which
20 included Marshal Ellis and Ms. Litt's testimony at the arbitration hearing and the reports and/or
21 interviews they provided during Respondent's investigation of Petitioner's conduct on January
22 7 and 8, 2013. (OAP, § III, 6:22-9:13). While these factual findings required the arbitrator to
23 weigh Marshal Ellis and Ms. Litt's credibility against Petitioner's credibility, the arbitrator's role
24 as fact finder entitled him to make these determinations in issuing the arbitration award. The
25 record from the arbitration hearing supports the factual findings made by the arbitrator, which
26 satisfies the substantial evidence standard.

27 ///

28 ///

1 **b. Manifest Disregard of the Law**

2 To establish manifest disregard for the law, Petitioner must demonstrate that the
3 arbitrator knew of a law, recognized that it required a particular result, and disregarded it.
4 *Clark County Educ. Ass'n*, 122 Nev. at 342. Because Petitioner waived arguments as to
5 whether Respondent had an affirmative duty to obtain the underlying investigative records
6 supporting his 1997 and 2003 disciplinary suspensions under Article 13 of the MOU and NRS
7 Chapter 289, Petitioner cannot establish that he notified the arbitrator of these legal issues.
8 Petitioner was provided with Respondents records pertaining to his 1997 and 2003
9 disciplinary suspensions, which is all that was required by NRS Chapter 289. The arbitrator
10 properly applied the standards of review stipulated to by the parties and provided for under the
11 MOU as well as applicable labor law. Therefore, this Court finds that there is no evidence in
12 the record that the arbitrator manifestly disregarded the law.

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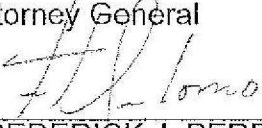
1 Accordingly,

2 **IT IS ORDERED THAT** the Amended Petition to Set Aside Arbitration Decision, or, in
3 the alternative Petition for Judicial Review is DENIED.

4
5 DATED this 4 day of ^{August} ~~July~~, 2016.

6
7 
8 Senior District Court Judge

9 SUBMITTED BY:
10 ADAM PAUL LAXALT
11 Attorney General

12 
13 FREDERICK J. PERDOMO
14 Senior Deputy Attorney General
15 Nevada Bar No. 10714
16 Bureau of Litigation
17 Public Safety Division
18 100 N. Carson Street
19 Carson City, Nevada 89701-4717
20 Tel: (775) 684-1250
21 *Attorneys for Respondent*

22 APPROVED AS TO FORM AND CONTENT BY:

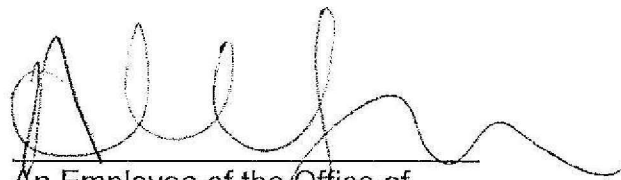
23 DECLINED - NO ALTERNATIVE RECEIVED AFTER 7/19/16
24 Kirk T. Kennedy, Esq. *NAC* *Submission*
25 815 S. Casino Center Blvd
26 Las Vegas, NV 89101
27 T (702) 385-5534
28 *Attorney for Petitioner*

CERTIFICATE OF SERVICE

I certify I am an employee of the Office of the Attorney General, State of Nevada, and that on this 1st day of July, 2016, I caused to be served a copy of the foregoing **ORDER DENYING AMENDED PETITION TO SET ASIDE ARBITRATION DECISION, OR, IN THE ALTERNATIVE PETITION FOR JUDICIAL REVIEW**, by District Court's Electronic Filing system to:

Attorney for Petitioner:

Kirk T. Kennedy, Esq.
815 S. Casino Center Blvd
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T (702) 385-5534
Ktkennedylaw@gmail.com


An Employee of the Office of
The Attorney General

1 KIRK T. KENNEDY, ESQ.
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3 815 S. Casino Center Blvd.
4 Las Vegas, NV 89101
(702) 385-5534
Attorney for Appellant

Electronically Filed
Oct 21 2016 10:22 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

6 THOMAS KNICKMEYER,
7 Appellant,

No.: 71372

8 vs.

9 STATE OF NEVADA ex rel EIGHTH
10 JUDICIAL DISTRICT COURT,

11 Respondent.

12 **DOCKETING STATEMENT**

13 1. Judicial District: Eighth Department: Senior Judge Dept. County: Clark
14 Judge: Senior Judge Nancy Becker

15 District Court Docket No: A-14-711200-P

16 2. Attorney filing this docket statement:

17 Kirk T. Kennedy, Esq.

18 815 S. Casino Center Blvd.

19 Las Vegas, NV 89101

20 (702) 385-5534

21 Attorney for Appellant Knickmeyer

22 3. Attorney representing respondent:

23 Frederick J. Perdomo, Senior Deputy Attorney General, 100 N. Carson St., Carson City,
24 NV 89701, (775) 684-1250, Attorney for Respondent State of Nevada
25
26
27
28

4. Nature of disposition below:

<input type="checkbox"/> Judgment after bench trial	<input type="checkbox"/> Grant/Denial of NRCP 60(b) relief
<input type="checkbox"/> Judgment after jury verdict	<input type="checkbox"/> Grant/Denial of injunction
<input type="checkbox"/> Summary Judgment	<input type="checkbox"/> Grant/Denial of declaratory relief
<input type="checkbox"/> Default Judgment	<input type="checkbox"/> Review of agency determination
<input checked="" type="checkbox"/> Dismissal	<input type="checkbox"/> Divorce decree
	<input type="checkbox"/> - other disposition:

5. This appeal does not raise any issues regarding child custody, venue, adoption, termination of parental rights, the grant/denial of an injunction or TRO, or juvenile matters.

6. Pending and prior proceedings in this court. None.

7. Pending and prior proceedings in other courts: None.

8. Nature of this action: Appellant filed a petition to set aside an arbitration decision which was later amended to be a petition to set aside an arbitration decision or in the alternative a petition for judicial review. After a full hearing on the matter, the district court entered an order denying the petition. This appeal now follows.

9. Issues on appeal:

a. Whether the district court abused its discretion in denying the amended petition.

10. Pending proceedings in this court raising the same or similar issues: None.

11. Constitutional issues: Not Applicable.

12. Other issues: None.

13. Assignment to the Court of Appeals or retention in the Supreme Court: This case should be assigned to the Court of Appeals under NRAP 17(b) as it does not fit the criteria set forth in NRAP 17(a) for appeals to be presumptively assigned to the Supreme Court.

14. Trial: N/A

15. Judicial disqualification: N/A

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TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from: August 18, 2016. A copy is attached.

17. Date written notice of entry of judgment or order served: August 25, 2016. A copy is attached with proof of service by mail.

18. If the time for filing the notice of appeal was tolled by a post-judgment motion? No..

19. Date notice of appeal was filed: September 21, 2016

20. Specify statute or rule governing the time limit for filing the notice of appeal: NRAP Rule 4(a)(1).

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from: NRAP 3A(b)(1).

Explain how the authority provides a basis for appeal from the judgment or order:

This is an appeal from a final judgment of the district court. Direct appellate review is permissible.

22. List of all parties involved in the action in the district court:

Petitioner: Thomas Knickmeyer

Respondent: State of Nevada ex rel. Eighth Judicial District Court

(a) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal: N/A

23. Give a brief description of each party's claims: Knickmeyer challenged his termination from district court employment through mandatory arbitration. He thereafter sought review by way of a petition for judicial review of the decision. The district court ultimately denied his petition, which effectively confirmed his termination. This appeal

now follows from that denial.

1 24. Did the judgment or order appealed from adjudicate all the claims alleged below and
2 the rights and liabilities of all the parties to the action below: Yes.

3 25. If you answered No to the immediately previous question, complete the following:

4 (a) Specify the claims remaining pending below:

5 (b) Specify the parties remaining below:

6 (c) Did the district court certify the judgment or order appealed from as a final judgment
7 pursuant to NRCP 54(b):

8 Yes: ____ No: ____

9 (d) Did the district court make an express determination, pursuant to NRCP 54(b) that
10 there is no just reason for delay and an express direction for the entry of judgment:

11 Yes: ____ No: ____

12 26. If you answered No to any part of question 25, explain the basis for seeking appellate
13 review:

14 27. Attach file stamped copies of the following documents:

15 -latest filed complaint, counterclaims, cross-claims or third party claims

16 -any tolling motions and orders

17 -orders of NRCP 41(a) dismissals formally resolving each claim asserted in action below
18 even if not an issue on appeal

19 -any other order challenged on appeal


20 -notices fo entry of each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Name of Appellant: Thomas Knickmeyer Name of counsel of record: Kirk T. Kennedy, Esq.

Date: 10/21/16



Signature of counsel of record

State and County: Clark County, Nevada

CERTIFICATE OF SERVICE

I hereby affirm that on this 21st day of October, 2016, I mailed a copy via first class U.S. Mail of the foregoing docketing statement to the Appellee at the address below:

Frederick J. Perdomo
Senior Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701


Law Office of Kirk T. Kennedy, Esq.