

1 have used the prior discipline if he had had all that? He
2 could use it to help explain it, to help give context, to
3 give meaning as to, you know, what happened with those
4 disciplinary matters, whether that suspension from 1997 was
5 well taken, well supported. What were the underlying facts
6 of it? That, we don't know.

7 And, so, what happened was Commissioner -- Hearing
8 Master De La Garza and, then, Commissioner Bulla both had
9 those prior disciplines. It just -- it colors -- it
10 changes the proceeding and the remoteness in time is
11 definitely something that's very strong. Something that
12 the Arbitrator noted.

13 But, again, just so I'm clear with the 289, it is
14 we're alleging for purposes of this hearing, sort of a
15 continuing violation that those prior incidents should
16 never even have been part of consideration, starting with
17 that notice of termination and, then, ending with the
18 arbitration award. And the Arbitrator at least did note
19 that we did have a due process base objections to that.
20 So, I would submit on that.

21 Thank you very much, Your Honor.

22 THE COURT: All right. I'm going to start first
23 with the issue about whether or not the Office of Diversity
24 -- yes?

25 MR. PERDOMO: Your Honor, we just have a point of

1 clarification. My client has indicated that the records
2 that were in the possession of OOD were, based on the
3 record, they were confidential and my client is taking the
4 position that they didn't have access to those records,
5 that those were --

6 THE COURT: I think it's clear in the record that
7 that -- or it's inferred from the record that -- not that
8 the Court didn't -- that those records were not maintained
9 by the Court and that it is the policy of the Office of
10 Diversity -- and this was stated by Officer Knickmeyer's
11 counsel, that they would not -- that these are confidential
12 records and they won't be disclosed. That doesn't mean
13 that the Court couldn't have attempted to get them. Nor
14 does it mean that the Arbitrator couldn't have subpoenaed
15 them, if requested to do so, or issued a subpoena for them,
16 or that someone couldn't have filed a Motion to Compel. It
17 simply means that if you called the Office of Diversity,
18 they would tell you: No. We will not give you that.

19 Whether they would give it to the Court or not, we
20 don't know. That's not part of the record. So, any
21 representation by your client to that effect would be
22 supplementing the record. The inference is that you can't
23 just call up and get it. So --

24 All right. So, I'm going to deal, first, with the
25 argument that the proceedings below were invalid because

1 they violated various provisions of NRS 289, the peace
2 officer's right, with regard to the affirmative duty of the
3 agency to provide the personnel file and the evidence that
4 the agency was going -- was relying upon in the
5 disciplinary proceeding. And there are several statutes
6 cited and, essentially, the citations are part of the
7 record and, yeah, that is what they require.

8 It is clear that the Office of Diversity is a part
9 of the Executive Branch of Clark County and it is not part
10 of the Eighth Judicial District Court. And that in the
11 prior 2003 and 1997 disciplinary actions, the Court used
12 the Office of Diversity to conduct investigations. Based
13 upon the result of that investigation, Judge Mosley
14 determined to issue two reprimands. One and -- or
15 disciplines. I won't say -- I don't want to use the word
16 reprimand because the actual memorandums indicate that they
17 were not reprimands, they were suspensions. But -- or a
18 suspension and I don't remember whether the '97 was a
19 suspension, as well. So, Judge Mosley, based upon whatever
20 that investigation was, determined to issue discipline.

21 The memorandums of the actual discipline were in
22 the Eighth Judicial District Court file. Those memorandums
23 are what the Eighth Judicial District Court was using as a
24 part of its evidence in investigating the 2013 Complaints.
25 So, that evidence that they were using was provided and the

1 personnel file, all of those things, were complied with and
2 the Eighth Judicial District Court did not violate the
3 statute with regard to its file and the information it was
4 relying upon in considering the Complaints and discipline.
5 The issue is whether it had an affirmative duty to attempt
6 to get, from the Office of Diversity, the remainder of the
7 information that led to the two disciplines imposed by
8 Judge Mosely, which were documented in the file.

9 The Court, one can argue -- and I'm not going to
10 make a decision that it was required because I don't have
11 to, in the context of this proceeding. If petitioner --
12 it's certainly a valid argument to make that if you are
13 going to use the memorandums, and you're going to consider
14 those disciplines, you have an affirmative duty to at least
15 attempt to get, from the Office of Diversity, the
16 underlying investigative reports. But since you weren't
17 going to rely on that underlying investigative report in
18 imposing discipline, the only documents you were relying
19 upon was the memorandum, one could also argue that you had
20 no duty to go get the additional documents.

21 Either way, if petitioner considered the failure
22 to obtain those documents to be a violation of the MOU and
23 the MOU's -- the Court's contractual agreement to apply NRS
24 Chapter 239 to the MOU in its dealings with the Marshals,
25 then it was inherent -- or it was the requirement that the

1 petitioner make a specific request and a Complaint during
2 the proceedings that: You haven't given me all the
3 documents I'm entitled to. I'm entitled to the Office of
4 Diversity documents and you need to get them for me. No
5 such request was ever made in step one, step two, the
6 meetings between counsel, petitioner, and the Court. It
7 was never made to the Arbitrator in the arbitration
8 proceeding. So, to the extent that you now want to
9 complain about it, it is waived. You failed to exhaust
10 your administrative remedies.

11 Now, whether that was a strategic decision because
12 counsel, at the time, didn't want that information to be
13 part of the record and, in fact, felt that the better
14 strategy was to try and have the memorandums struck, I
15 don't know. Perhaps, that was the strategy that counsel
16 and petitioner were employing at the time. But petitioner
17 had the opportunity to address what was in the memorandums
18 and, in fact, made some comments with regard to the fact
19 that at the time, he chose not to argue about it with Judge
20 Mosley, and to contest it, and that he let it be.

21 I suppose he could have gone into more detail
22 about it, as well. That would have been up to him. But
23 the -- he can -- he has clearly not exhausted his
24 administrative remedies and clearly waived the ability to
25 say: Affirmatively, you should have given it to him and

1 because you didn't, it was a violation of Chapter NRS 289.

2 Secondly, the memorandums were a part of the
3 Court's consideration, in terms of termination and why
4 progressive discipline wasn't warranted and termination
5 was. It's not clear how key those memorandums were but
6 they certainly were considered. They were also considered
7 at step one by Hearing Master De La Garza.

8 Step two, I believe the record, when read in its
9 entirety, indicates that Hearing Master Bulla did not
10 consider them and, in fact, struck them from consideration.
11 But I acknowledge, Mr. Kennedy, that there's some ambiguity
12 in the way that those findings are written that might
13 suggest that perhaps she did.

14 However, step three, arbitration, is a de novo
15 proceeding with an evidentiary hearing and it's absolutely
16 clear that the arguments that were being made were:
17 Arbitrator McLean, we don't think you should consider these
18 two memorandums and any information contained in them for
19 the following reasons. One, there's no indication that he
20 was denied due process. The due process argument has to be
21 to this proceeding, this arbitration. You can't come in
22 and argue that because he allegedly was denied due process
23 in 1997 or 2003, that this hearing was tainted. That's not
24 the argument. The argument is that because the process for
25 challenging the 1997 and -- in 1997 and in 2003, any

1 disciplinary proceeding isn't clear. We don't know what
2 that process was. We only know it wasn't the same process
3 that's in place under the memorandum of understanding.
4 That is from the record. Whatever people know in their
5 minds but didn't communicate on the record is kind of
6 irrelevant. Or is irrelevant. So, but it was an argument
7 to be made. Look, the procedures back then were different
8 so, we ask that you not consider them because we can't tell
9 -- what was the quality of the investigation? What was my
10 ability to participate in it? Did it meet some sort of due
11 process standard back then? They're too old to be
12 considered.

13 Arbitrator McLean clearly found those arguments
14 persuasive and indicated: I will not consider them. Which
15 indicates they're stricken, in terms of evidence, which is
16 another reason why your argument that they taint the whole
17 proceeding -- I appreciate it when you say that jurors --
18 we don't know if jurors do that. I also appreciate that
19 it's presumed judges do. And, in fact, the record here
20 indicates that because when he started his analysis, then,
21 about whether or not, one, there was just cause for
22 termination. That is: Do the incidents, the allegations
23 that have been alleged -- first, factually, do I believe
24 them to be true? What do I believe has been proven?
25 There's more than substantial evidence to support his

1 factual determinations. His factual determinations were
2 essentially that the comments, as they related to
3 supervisor Moody and other people in the chain of command
4 in the Marshal's unit, as related by Officer Ellis were
5 true. So, we believe Officer Ellis. He meant -- he said
6 he didn't believe Officer Knickmoyer. He's entitled to
7 weigh credibility. It's never pleasant when someone tells
8 you that but that's what he did. He also found Ms. Litt to
9 be credible.

10 So, he found that the statements as alleged had
11 been made. He, then, found that the incident with regard
12 to Litt occurred and, from the factual statements made by
13 Ms. Litt, he came to the conclusion that this was a
14 retaliatory action, that the initial scan and rescan, that
15 was not. But the issue with regard to -- or the initial
16 search of the purse after the initial scan. And, then,
17 running it back through, arguably, was not. But the
18 actions thereafter, which involved a second scan or third
19 scan, as they say, was. And he relied upon a number of
20 things amongst them that he believed that Officer
21 Knickmoyer called a member of the Bar a bitch and referred
22 to the fact that she was a complainant against him in a
23 completely separate proceeding. Now -- and, then, was
24 deliberately using his office to harass her.

25 There's substantial evidence in the record from

1 which he can conclude that. There was discussion in the
2 record with regard to the nature of the previous problems
3 in which Ms. Litt was involved and it begins with the fact
4 that Ms. Litt was a witness to a prior disciplinary issue
5 involving Officer Knickmeyer. As a result of her testimony
6 and other information that is not detailed in the record,
7 there was a decision to issue discipline, and the
8 investigation started, if memory serves me correctly, in
9 September of 2012 and concluded in May of 2013, not too
10 long before these -- or concluded, I believe, in May of
11 2013 with the -- some sort of reprimand. It's not clear
12 from the record whether or not that reprimand was now
13 subject to an appeal, or an arbitration, or where it was
14 going, just that she was a witness in that proceeding and
15 that proceeding ended up in discipline. Substance went to
16 that.

17 She, then, had an encounter with Officer
18 Knickmeyer and she filed a separate Complaint on that
19 encounter, alleging that he was acting inappropriately
20 towards her as a result of her testimony in the first
21 disciplinary proceeding. And, therefore, this was --
22 knowing that he had all of this -- these issues relating to
23 Ms. Litt pending, he still engaged -- and this is the
24 factual finding for which there is substantial evidence in
25 the record to support it, in retaliatory action.

1 Both orally and in his written findings, he, then,
2 goes towards what is the standard the Arbitrator has to
3 use? Under Article 13, the Arbitrator, it says will
4 consider, but that's really must consider, the incident and
5 the discipline in terms of severity of the action, evidence
6 of progressive discipline, and appropriateness of the
7 disciplinary action. The Arbitrator did that.

8 The Arbitrator noted that for purposes of
9 determining the severity of the actions of Officer
10 Knickmeyer and the appropriateness of the disciplinary
11 action, that we had these -- we had the 2012 incident, Ms.
12 Litt's involvement as a witness in that, the discipline
13 that resulted from that, the subsequent Complaint by Ms.
14 Litt that she was being harassed as a result of her
15 witnessing that incident by Officer Knickmeyer. And, then,
16 Officer Ellis' testimony that the scans and rescans were
17 being done for retaliatory purposes because Officer
18 Knickmeyer was mad at her as a result of her involvement in
19 the other disciplinary proceedings.

20 So, why that is not progressive discipline in and
21 of itself because those prior proceedings had not been
22 finalized. At least, it doesn't appear from the record
23 that they were actually final, only that they were in
24 process. But he did take in into consideration in
25 determining the appropriateness of the disciplinary action

1 for the complaints in this case.

2 So, he found just cause based upon all of that
3 evidence for termination. And, as I said earlier, once he
4 found just cause, the question, then, was: Was termination
5 reasonable in response to those actions? Which requires a
6 waive -- a weighing of whether or not the other forms of
7 potential discipline that are listed in the memorandum of
8 understanding, written reprimands, written warnings,
9 demotions, etcetera, suspensions, should have been imposed
10 in this instance.

11 Now, it's true, he doesn't use the word
12 reasonableness but it's very clear in both his oral and his
13 written opinion that he did engage in that weighing
14 process. And, in the end, he determined that it was
15 appropriate. It was reasonable, without using the word.
16 That's, in fact, what he concludes. And it was warranted,
17 one, because of the chain of command issues. But, added to
18 that -- because he says it was just chain of command, maybe
19 not. People in the workplace, as the defense pointed out,
20 you're talking with your fellow employees, you think you've
21 been treated unfairly, you let your mouth wander, is that
22 really such a threat to discipline? He recognized it. But
23 he firmly believed that Officer Knickmeyer, in retaliation
24 for the testimony that Ms. Litt give -- gave, was on a
25 vendetta against her and used his position to do so.

1 whether I agree or disagree or whether anyone else agrees
2 or disagrees isn't the point. The point is, there's
3 substantial evidence in the record from which he could make
4 such a finding. And he made a determination that, under
5 the circumstances, when an employee of the Court engages in
6 a vendetta against an attorney for having complained about
7 that employee's conduct, and while a pending complaint
8 about having done that exists, shows a lack of judgment and
9 control that warranted the termination in this case. And
10 that some other type of discipline was not appropriate.

11 So, I find that the Petition should be denied.
12 The Arbitrator did not exceed the scope of the agreement.
13 There was nothing arbitrary and capricious about the
14 decision. The decision was done in accordance with both
15 the MOU and with the provisions of Chapter 38, which is the
16 Uniform Arbitration Act in Nevada. And, as I had
17 previously discussed, and I'm going to do just once again
18 just so it's all kind of together, why that is the
19 appropriate remedy under the MOU because the MOU makes it
20 the appropriate remedy. And the more specific provisions
21 under Article 13 about judicial review of the Arbitrator's
22 decision speak to the Uniform Arbitration Act. The
23 reference to any other law is more vague.

24 But even if one could argue that the appropriate
25 remedy is something under Chapter 289, what does Chapter

1 289 say? Well, Chapter 289 simply says that you get the
2 ability to go to the courts. It doesn't say what vehicle
3 you use to get there. Arguably, there would be three
4 vehicles under 289.120 to apply for judicial relief. I
5 suppose you could file -- maybe more than that. But you'd
6 file a declaratory relief action. I suppose, potentially,
7 that's a ply for judicial relief. Does it mean you can
8 file a Petition for judicial review under Chapter 233(b)?
9 Well, while a Court is not a law enforcement agency and the
10 only reason 289 would apply in this case is because the
11 Court agreed to have it apply, contractually, does that
12 mean that the Court is also agreeing that it's an agency
13 for purposes of 233(b)130? I would argue not but even if a
14 Petition for Judicial Review was the appropriate vehicle,
15 the standard for review under that is very similar. You
16 have to violate the Constitution or statutory provisions.
17 Well, I find there were not violations because -- of either
18 one. It wasn't in an excess of authority, there wasn't an
19 unlawful procedure, and it wasn't clearly erroneous in view
20 of reliable, probable, substantial evidence, nor was it
21 arbitrary or capricious.

22 And, finally, is apply for judicial relief some
23 reference to extraordinary relief under writ of mandamus,
24 writ of probation, Chapter 34? Well, clearly, that wasn't
25 the relief being requested here, even if one could argue it

1 was. Then, you have the other issue that in order to do
2 such a writ, you have to find that there was an excess of
3 authority or that it was arbitrary and capricious and there
4 wasn't any of that in the Court's actions.

5 So, no matter what standard you use and how you
6 construe the initial pleadings in this case, essentially,
7 you're still back to that same concept. And the record
8 simply doesn't support a violation of 289. The one area
9 where one could argue such a violation wasn't preserved and
10 there's clearly substantial evidence to support the
11 decision.

12 There's no finding that he manifestly disregarded
13 the law. He didn't. Or that he consciously ignored the
14 law. Officer McLean didn't do that. He talked about the
15 MOU. He talked about the requirements. And the fact that
16 he was talking about, in general, labor law, well, that's
17 exactly what the MOU contemplates. It talks about you're
18 supposed to apply labor law. So, that's not outside the
19 scope of it.

20 Policy and procedural matter. Again, the MOU
21 references that. That's a part of what we're to be
22 considered. And there was no objection to it. And, in
23 fact, that was part of the argument that was made below.
24 That's a judicial estoppel argument, that you used the
25 policy and procedural manual. You said it applied. You

1 said that was part of what had to guide the decision and
2 why you needed just cause. You can't argue that now that
3 using it was outside the scope of the MOU.

4 I'm not enamored of your judicial estoppel
5 argument on other grounds. So, I'm not relying upon that
6 to deny the Petition. I think it's not a judicial estoppel
7 argument. I think it's simply a you didn't preserve the
8 issue of the Office of Diversity below for purposes of you
9 should have affirmatively got it and given it to us. You
10 had a duty to bring that up and you didn't. And, so, you
11 can't bring it up on appeal. Nor was the Office of
12 Diversity required to somehow automatically give up the
13 records because it's not a law enforcement agency under
14 289.040. And it can't be made one by virtue of any
15 agreement that the Court entered into with the Marshals.
16 But I suspect if you really wanted those documents, you
17 would have simply filed a Motion for them and ask for a
18 subpoena or said to them: You know, we think these
19 documents should be provided to us. If the Court said:
20 No. We can't get them. Then, you had a remedy.

21 So -- I'm looking through my notes to make sure I
22 have everything. All right. I think I've covered all of
23 the grounds from my notes as to what I thought was
24 important to put in the record, in terms of supporting a
25 denial of the Petition. And, so, that will be the Order.

1 And the Court will prepare the -- or the State of Nevada is
2 to prepare the findings in the Order. Submit it to
3 opposing counsel for his signature. In the event that you
4 can't agree on the form of the document, you can submit a
5 draft to me, together with any comments that you have, Mr.
6 Kennedy.

7 MR. KENNEDY: Okay.

8 THE COURT: And, then, I will make the final
9 decision.

10 MR. KENNEDY: Thanks, Your Honor. Thank you.

11 THE COURT: We'll be in recess.

12 MR. KENNEDY: Okay.

13

14 PROCEEDING CONCLUDED AT 10:13 A.M.

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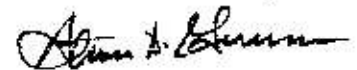
1 CERTIFICATION

2
3
4 I certify that the foregoing is a correct transcript from
5 the audio-visual recording of the proceedings in the
6 above-entitled matter.
7

8 AFFIRMATION

9
10 I affirm that this transcript does not contain the social
11 security or tax identification number of any person or
12 entity.
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21

22 KRISTEN LUNKWITZ
23 INDEPENDENT TRANSCRIBER
24
25



CLERK OF THE COURT

1 NEOJ
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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

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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

12 
13 _____
14 An employee of the
15 Office of the Attorney General
16
17
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EXHIBIT A

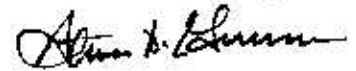
EXHIBIT A

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CLERK OF THE COURT

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9 EIGHTH JUDICIAL DISTRICT COURT

10 CLARK COUNTY, NEVADA

11 In the matter of the Petition of
12 THOMAS KNICKMEYER,
13 Petitioner,
14 vs.
15 STATE OF NEVADA, ex rel., EIGHTH
16 JUDICIAL DISTRICT COURT,
17 Respondent.

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

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

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

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

23 I. SUMMARY OF ARGUMENT

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

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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:

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DECLINED - NO ALTERNATIVE RECEIVED AFTER 7/19/16
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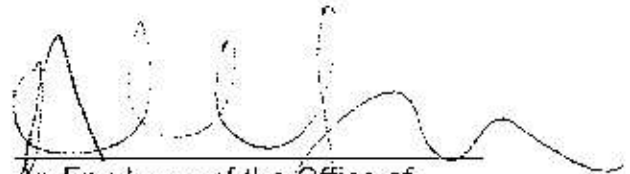
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Submission

CERTIFICATE OF SERVICE

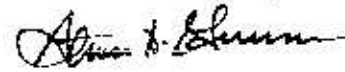
I certify I am an employee of the Office of the Attorney General, State of Nevada, and that on this 1st day of July, 2016, I caused to be served a copy of the foregoing **ORDER DENYING AMENDED PETITION TO SET ASIDE ARBITRATION DECISION, OR, IN THE ALTERNATIVE PETITION FOR JUDICIAL REVIEW**, by District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

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An Employee of the Office of
The Attorney General

422



CLERK OF THE COURT

NOT
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Nevada Bar No: 5032
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Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

vs.
STATE OF NEVADA, ex rel. FIGHTH
JUDICIAL DISTRICT COURT,
Respondent.

NOTICE OF APPEAL

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

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

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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

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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
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IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

THOMAS KNICKMEYER,

No. 71372

Appellant,

Electronically Filed
Feb 13 2017 04:16 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

vs.

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

Respondent.

APPELLANT'S APPENDIX
VOLUME 4

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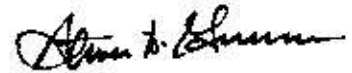
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CERTIFICATE OF SERVICE

I hereby affirm that on this 13th day of February, 2017, I mailed via first class U.S. Mail a copy of the foregoing to the Respondent at the address below:

D. Randall Gilmer
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555 E. Washington Ave., Ste. 3900
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/s/Kirk T. Kennedy
Law Office of Kirk T. Kennedy


CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THOMAS KNICKMEYER,

Appellant,

vs.

STATE OF NEVADA ex rel. EIGHTH
JUDICIAL DISTRICT COURT,

Respondent.

CASE NO. A-14-711200

SENIOR JUDGE DEPARTMENT

Transcript of Proceedings

BEFORE THE HONORABLE NANCY BECKER, SENIOR DISTRICT COURT JUDGE
AMENDED PETITION TO SET ASIDE ARBITRATION DECISION

FRIDAY, MAY 20, 2016

APPEARANCES:

For the Appellant: KIRK T. KENNEDY, ESQ.

For the Respondent: FREDERICK J. PERDOMO, ESQ.
ANDRES MOSES, ESQ.

RECORDED BY: MATTHEW YARBROUGH, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

1 FRIDAY, MAY 20, 2016 AT 9:00 A.M.

2
3 THE COURT: All right. If counsel would please
4 enter their appearances for the record, please?

5 MR. KENNEDY: Your Honor, good morning. Kirk
6 Kennedy, 5032, for the petitioner, Mr. Knickmeyer, who is
7 present.

8 MR. PERDOMO: Rick Perdomo for respondent, 10714,
9 Your Honor.

10 MR. MOSES: Andres Moses, 12827.

11 THE COURT: Representing the Eighth Judicial
12 District Court. Is that correct?

13 MR. MOSES: Yes, Judge.

14 THE COURT: Okay. All right. This is the time
15 set for oral argument on the Amended Petition challenging
16 the disciplinary actions that were imposed against Officer
17 Knickmeyer.

18 Yes. You are standing, Mr. Kennedy?

19 MR. KENNEDY: Oh, I'm sorry. I was -- I thought I
20 was about to approach.

21 THE COURT: You were about to -- you can come to
22 the podium. That's quite all right.

23 MR. KENNEDY: I was going to approach.

24 THE COURT: Because we have extensive written
25 pleadings and because we've had extensive discussions

1 previously with regard to the other Motions that were filed
2 in this, I'm going to limit each side to 15 minutes. Mr.
3 Kennedy, you may reserve any portion of that for rebuttal,
4 should you choose to do so.

5 MR. KENNEDY: Thank you, Your Honor.

6 THE COURT: You may proceed.

7 MR. KENNEDY: Your Honor, I thank Your Honor,
8 opposing counsel.

9 You -- as you've indicated, the -- you know, we're
10 here after several hearings where many of these issues have
11 at least been looked at and fleshed out somewhat in the
12 pleadings themselves and I know you've spent a lot of time
13 reading everything that's been submitted. So, I want to
14 maybe just focus on a couple points and leave the rest to
15 what's in the written word.

16 It's Mr. Knickmeyer's position that, under
17 existing Nevada law -- well, first of all, we recognize
18 that there's much deference given to an arbitration ruling.
19 An Arbitrator has a great deference in reaching his
20 decision, his or her decision, and the Supreme Court will
21 not lightly overturn an arbitration or set aside an
22 arbitration decision. However, it's our position that,
23 under both statutory and common-law remedies that the
24 Arbitrator manifestly disregarded the law when it comes to
25 his application of Article 13, which was the statutory --

1 or, excuse me. The law, for lack of a better word, for
2 this arbitration that -- the guideline for it.

3 THE COURT: The contract between the parties.

4 MR. KENNEDY: I'm sorry?

5 THE COURT: The contract between the parties.

6 MR. KENNEDY: The contract between the parties,
7 that he was there to interpret and apply. And it's quite
8 clear in Article 13 that -- I mean, there is a provision
9 that said the Arbitrator, you know, cannot add to it,
10 cannot modify it, cannot ignore it. He just has to follow
11 it in reaching his decision. And, as you saw from my brief
12 and in my Reply, I made much of this idea of whether the
13 arbitration decision and the Arbitrator's ruling failed to
14 make a reasonableness analysis. There is a provision in
15 Article 13, which I've cited, that indicates that in
16 evaluating and assessing the discipline imposed, it must
17 be, keyword, reasonable.

18 And my interpretation of this and our petitioner's
19 interpretation is that reasonableness requires some form of
20 analysis that the discipline imposed is reasonable under
21 the circumstances and those -- and it's not just -- I'm not
22 saying that there's a magic word that the Arbitrator failed
23 to use the word this is reasonable. And because he failed
24 to use the word reasonable, somehow that means he must give
25 us everything we're looking for. But it is noteworthy that

1 in the arbitration decision, that reasonable missed word
2 and reasonable is not part of any word of the decision when
3 the Arbitrator made his final ruling.

4 Arbitrator McLean did state that when you -- when
5 taking everything into consideration, he found that the
6 petitioner's conduct regarding the -- we'll call it the
7 Amanda Litt purse incident on January 8', was sufficiently
8 egregious, I believe in his words, to support bypassing all
9 forms of progressive discipline and go straight to
10 termination. And I'm paraphrasing but, essentially,
11 towards the end of his decision, he comes to that
12 conclusion. But, before he gets there, and when he gets
13 there in that decision, you don't find any assessment or
14 any analysis that this is the most reasonable or this is --
15 well, not saying most reasonable because he doesn't have to
16 say it's most reasonable. Whether it's reasonable to jump
17 to termination. You don't see that in his written decision
18 and that's something that in our -- it's our contention
19 that Article 13 says the Arbitrator cannot ignore any
20 provision of Article 13. And that's not -- that something
21 that's in black and white of the article.

22 And by failing to assess in writing, and in his
23 decision, that the -- that this discipline was reasonable,
24 as opposed to other forms of discipline and reasonable
25 based on the facts that he's ignored a requirement under

1 Article 13.

2 And we think it's not some sort of minor deal.
3 It's actually a big deal when you're talking about taking
4 away someone's job, which they have a property benefit in.

5 And, so, it's our contention that if the
6 Arbitrator is supposed to go forward and follow Article 13,
7 he has to follow the letter and the spirit of it and to a
8 T. He has to dot the i's and cross the t's. And by
9 failing to address the concept of reasonableness, he's
10 ignored a mandate, a mandate, a mandatory provision of
11 Article 13. And, so, that is, we believe, is the basis to
12 set aside the arbitration decision under both NRS 38 and
13 the common-law remedies that are cited in the caselaw as
14 arbitrary and capricious.

15 I think it's more along the lines of manifest
16 disregard of the law is what I'm sort of hanging my hat on
17 as opposed to arbitrary and capricious standard. I'm
18 really sort of hanging on the hat and the idea that by
19 failing to apply reasonableness or make any assessment of
20 it, he subconsciously disregarded his obligations under
21 Article 13. And I think that's sort of the nut of the --
22 of the -- one of my main arguments on this Petition.

23 The other -- the argument I'd like to just briefly
24 address is, of course, the whole concept of 269 and what
25 does that mean? This Court had previously addressed and

1 pointed out at a hearing last year how like, I believe,
2 it's the first sentence of Article 13 talks about how it
3 was negotiated, at least, that 289 would be applied or
4 considered between the District Court and the Marshal's
5 Association. So, 289 does have some control here. It does
6 have some application for at least an assessment as to what
7 happened. And, as you know from my briefing and our -- the
8 Petition and the Reply, we have contended that Mr.
9 Knickmeyer's 289 rights were violated, essentially, from
10 the get-go.

11 And I want to tie all that in because I appreciate
12 the fact that we're here on the arbitration award, not
13 necessarily on the step one and step two hearings. But
14 it's our contention for purposes of the record that
15 starting with the notice of termination that was given by
16 Lieutenant Newsome in October, I think, of, what was it?
17 2013. And, then, to the step one and the step two, that
18 prior discipline, the 1997 and the 2003 suspensions that
19 occurred to Mr. Knickmeyer was an integral part of the very
20 basis for the discipline and the basis for bypassing all
21 forms of progressive discipline because you look at one of
22 the factors, I believe, you look at in assessing
23 discipline. Okay, what's the guy's record like? If we're
24 going to bypass and go straight to termination, and we're
25 going to jump over reprimand, we're going to jump over

1 suspension, and go straight to termination, what's the
2 guy's history look like?

3 You know, it's no different than if you're
4 sentencing a defendant on a criminal case. This certainly
5 is not the case, but you have a PSI, a PSI, the major part
6 of that PSI is the criminal history section and many times
7 that history will form the basis of a District Court's
8 decision about whether to send -- to give a guy probation
9 or to send him to High Desert, depending on whether he's a
10 one-time felon, or five-time felon, or a no -- or a zero
11 felony.

12 So, that record, in both a criminal context and,
13 in this case, a civil employment record context, is
14 relevant. And it's our contention that, under 289 -- I
15 think it's 289.040. I hope I'm not wrong on that. 289
16 requires, as a peace officer's Bill of Rights, something
17 that every peace officer is intimately aware of in Nevada,
18 it requires the disclosure and the right to see certain
19 items of investigatory nature that are being used against
20 you if you're going through a hearing. It's our contention
21 that starting with that notice of termination which, I
22 believe, is an exhibit in the Petition in the record, Mr.
23 Knickmeyer was not provided the necessary elements
24 underlying -- evidence underlying those two events, those
25 two suspension activities, from 1997 and 2003. That

1 carried over to both the step one and step two hearings
2 where he was represented by --

3 THE COURT: Mr. Kennedy?

4 MR. KENNEDY: Yes, ma'am? Your Honor.

5 THE COURT: You would concede, would you not, that
6 the record indicates that the only evidence of those two
7 previous proceedings were the memorandums that were
8 contained in the file. Those memorandums were provided --

9 MR. KENNEDY: Correct.

10 THE COURT: -- to Officer Knickmeyer. The issue
11 is whether or not, under 289, the Court should have
12 obtained and provided the underlying reports and
13 investigation that might have been maintained and still
14 existed in the Office of Diversity, which is a part of the
15 Human Resources Department of Clark County, and not part of
16 the Court, or the file maintained by the Court, with regard
17 to Officer Knickmeyer. So, your argument has been that it
18 was the Court's responsibility to obtain those documents
19 and provide them, even though the Office of Diversity is
20 not part of the Court.

21 MR. KENNEDY: Fair point. And just -- I, first of
22 all --

23 THE COURT: I'm just clarifying.

24 MR. KENNEDY: Yeah.

25 THE COURT: I'm not making a decision. I'm just

1 clarifying that there are two -- that it's very specific
2 here. He got what was in his file. What he didn't get was
3 what was in the Office of Diversity's file. And the issue
4 that you've been arguing is 289 requires that the Court
5 affirmatively takes steps to go find and give to the
6 officer, that file, as well, because that related to those
7 two disciplines.

8 MR. KENNEDY: Correct. And it was being utilized
9 in the step one and step two hearings.

10 THE COURT: No. The Office of Diversity's files
11 were not being used --

12 MR. KENNEDY: Right.

13 THE COURT: -- in the step one and step two
14 hearings.

15 MR. KENNEDY: Fair point. The memorandums were
16 received. Yes.

17 THE COURT: The memorandum evidencing the
18 discipline that was imposed by Judge Mosley on those two
19 instances was --

20 MR. KENNEDY: Was.

21 THE COURT: -- was part of the step one and step
22 two hearings.

23 MR. KENNEDY: And I can see that it was also part
24 of the joint exhibits at the arbitration hearing. So,
25 there's no --

1 THE COURT: Correct.

2 MR. KENNEDY: Yeah. I -- for purposes of the
3 record, it's very clear that the petitioner had the actual
4 disciplinary -- the final memorandum notices from the step
5 one and step two. And, then, ultimately in the
6 arbitration, it was a joint exhibit. No doubt about that.

7 So, I suppose that what we're trying to say is
8 that the other -- those disciplinary notices were clearly
9 relied upon at the step one hearing. They were a part of
10 Hearing Master De La Garza's decision. And, then, when you
11 go over to the step two hearing, I know the respondent has
12 argued that Discovery Commissioner Buila, who sat in as a
13 Hearing Master, did not rely on that at all. But you may
14 have seen in my Reply, I pointed out a half dozen instances
15 in her own decision where she's referencing the prior
16 disciplinary actions, the prior grievance misconduct.
17 These are her own words in her decision. So, she was
18 continuing to rely on this prior discipline, which was part
19 of the record, and which Mr. Knickmeyer has contended with
20 his other counsel, Mr. Adam Levine, that he did not receive
21 these other supportive information from a separate entity,
22 i.e., the Office of Diversity, fair point.

23 And, I guess, the question is that: Is there an
24 obligation for the District Court to reach out to Office of
25 Diversity and provide this documentation to supplement the

1 memorandums it's relying on? We would contend there is.
2 It's not a difficult process. The Human Resource Manager,
3 I believe -- of course, I got the title wrong. I think
4 during the relevant time frame here was Mr. Ed May,
5 intimately related with -- as far as contact with Office of
6 Diversity, headed by Theresa Scoopy [phonetic] at the time.
7 There is a working relationship between the Office of
8 Diversity and the Human Resources Office of the Eighth
9 Judicial District Court, as far as providing the guidelines
10 and some of the Human Resource functions for the District
11 Court personnel and staff and that's our contention.

12 So, we do not believe -- this is not a case where
13 the District Court would have to go out of its way to get
14 this additional information from an agency. Perhaps, like
15 a federal agency, for example, having to go to FBI or to
16 the DEA, which might be onerous and burdensome. This is
17 just, really, supplemental information from an office
18 that's just a few blocks away at the Clark County
19 Government Center for the Office of Diversity with an
20 agency that the District Court Human Resources Office has
21 an intimate relationship with. It's our contention that
22 they work regularly on a number of Human Resource issues
23 so, it's not the burden that we contend that would preclude
24 the District Court from getting that information.

25 Now, I wanted to address quickly the concern with

1 Arbitrator McLean's decision where he says, on one of the
2 last pages of the decision, I'm paraphrasing but he makes a
3 sentence: Hey, I saw the prior discipline. I'm not
4 relying on it. It's too remote in time. He essentially
5 downplays it as a factor.

6 And, so, one could say -- and, perhaps, the
7 responder would argue that: Hey, what are we complaining
8 about? The Arbitrator said he didn't even look at it,
9 didn't even consider it. It was too remote. What are you
10 worried about? The concern is, Your Honor, that we were
11 there at the arbitration because of the step one and step
12 two hearing process that brought us to the door. And this
13 is a bigger argument that, perhaps, would be heard for --
14 on this 289 argument, this arbitration, this Motion to Set
15 Aside, but we're contending, as I've said in my Petition,
16 that there has been a substantive due process violation
17 from the get-go because Mr. Knickmeyer's had been forced to
18 face these prior, remote, stale disciplinary actions
19 without adequate information at step one and notice of
20 termination, step one, step two, and at the arbitration.

21 So, it's our contention that, although the
22 Arbitrator said he didn't consider it, it's too remote, it
23 was still part of the record, still formed the basis of at
24 least his analysis on the case.

25 And, you know, I kind of compare it to the

1 Arbitrator saying he didn't consider it. Kind of like a
2 trial when something happens -- and something bad happens
3 and the judge turns to the jury: You can disregard that
4 remark. And that's what the order is but they're still
5 human beings and they see it. They're aware of it if
6 something happens in the courtroom and even though the
7 Court says: Disregard that. Or issues a limiting
8 instruction, the jury still -- they're still humans. They
9 see it.

10 Arbitrator McLean still sees it. He's aware of
11 it. He knows that there's this prior disciplinary history.
12 I'm not saying he lied in his decision but I'm saying he is
13 a human being. He's aware of this history and he
14 references it in his arbitration. So, it's our contention
15 that the 289 violation was an ongoing violation and that
16 issue alone would be a separate basis to set aside the
17 Arbitrator's ruling and decision.

18 So, in the summation, Your Honor, I know there's
19 some additional arguments but that's really the core of
20 where we're at here on the 289 issue and under -- analysis
21 under NRS 38.241 and the common-law remedies. So, those
22 two arguments are the out of why we're here and we're
23 asking the Court to grant the Petition and to set aside the
24 arbitration ruling. And, I believe, I may be mistaken on
25 this, if the remedy is to set aside the arbitration ruling,

1 that would necessitate setting a new arbitration hearing
2 and I believe that's what we're requesting in front of a
3 new, neutral Arbitrator.

4 Thank you very much, Your Honor.

5 THE COURT: Thank you. Response?

6 MR. PERDOMO: Good morning, Your Honor. I'd like
7 to just briefly address some of the points that Mr. Kennedy
8 made on behalf of the petitioner. First, he argued about a
9 reasonableness standard. Well, in the specific section
10 that he is referring to, there are two standards: One is
11 appropriate and one is reasonable. And they're used
12 interchangeably. And petitioner has not -- and the
13 record's pretty clear that the Arbitrator made a decision
14 in this case based on whether termination was appropriate.
15 And petitioner has not offered any argument about how the
16 Arbitrator could find that termination was appropriate and,
17 then, simultaneously find that termination was
18 unreasonable. It seems like they're interchangeable
19 standards.

20 They're also interchangeable standards with the
21 just cause standard because petitioner still hasn't argued
22 how he could find that termination is unreasonable but,
23 yet, the Arbitrator could find that the termination was
24 unreasonable but, on the same token, find that there was
25 just cause to terminate him.

1 And the standard that we're applying here is
2 whether the standard applied by the Arbitrator was grounded
3 in the contract and the appropriateness standard is
4 expressly provided for under the contract. There's no
5 indication that he acted outside the contract and -- which
6 is what we're -- is what their argument should be. But he
7 based his ruling based on the expressed language of the
8 contract which is whether termination was appropriate.

9 THE COURT: Well, I'll address. The standard is
10 very clear in the contract, in terms of what the Arbitrator
11 must do. Just cause refers to whether or not there are
12 grounds for termination. Reasonableness is the weighing
13 function as to whether or not, given the facts and the
14 circumstances in this particular case, termination is a
15 reasonable discipline. They are two different things,
16 although one -- each one involves some element of
17 reasonableness, but they are distinct. Just cause, which
18 is incorporated into the MOU because the MOU incorporates
19 provisions of the Policies and Procedures Manual, and the
20 parties below stipulated that in order to have a
21 termination, you have to show just cause.

22 Whether or not that termination was reasonable
23 discipline, in response to the actions taken or not taken
24 by the Marshal, is the standard that the Arbitrator must
25 determine. So, you first have to determine: Would you

1 have grounds for termination in the first place? And, if
2 you so, is termination reasonable, vis a vis some other form
3 of discipline under the actions taken? So, the question is
4 simply: Did the Arbitrator consider both issues and does
5 the record support that?

6 MR. PERDOMO: And I think he did. And, in that
7 same provision, we're talking about Article 13, Section 1 -
8 - Section 3, that expressly states that:

9 The Arbitrator will consider the incident and the
10 discipline in terms of severity of the action, evidence
11 of progressive discipline, and appropriateness of
12 disciplinary action.

13 THE COURT: Correct.

14 MR. PERDOMO: So, that is expressly provided for
15 and that is the decision that he made.

16 THE COURT: That is correct. So, the record must
17 show that the Arbitrator did that.

18 MR. PERDOMO: And he did. And the standard was
19 applied. And I'll point the Court to the Opposition,
20 Exhibit C, which is the arbitration award. EJDOR/62
21 through 64, which is exactly where he applied the
22 appropriateness standard of that decision.

23 THE COURT: Right.

24 MR. PERDOMO: So, he made that decision. So,
25 there's no basis to overturn the case on this

1 reasonable standard. So, just to dispel that or
2 dispense with that argument.

3 Number two, petitioner argues that, at some point,
4 the step one and step two hearings, he was not able to
5 respond to the factual substance of those 1997 and 2003
6 disciplinary investigations, and I've read, and we provided
7 to the Court the transcripts from those meetings, and there
8 is no indication in that transcript that the substance of
9 those investigations ever came up. There is no indication
10 in those transcripts that petitioner ever argued that: I
11 wanted to address the substance of those investigations.

12 What we see in that -- in those two -- in,
13 specifically, the step two transcript is petitioner saying:
14 Hey, I don't think you can consider these disciplines at
15 all because they were too remote in time, that Clark County
16 Office of Diversity, which he acknowledged had maintained
17 those files, had a policy that these were confidential.
18 So, I didn't get to review them. So, you can't consider
19 these as progressive forms of discipline. He didn't take
20 the position: Hey, we're talking about the factual
21 substance of this. I don't have those files. I need these
22 files to be able to address what is being said at these
23 hearings. He never said that. Nor did it -- and, I think,
24 what it comes down to is any --

25 THE COURT: And what was contained in those files

1 was never presented at those hearings.

2 MR. PERDOMO: It was never presented.

3 THE COURT: What was presented was the ultimate
4 disciplinary document, the memorandum, written by Judge
5 Mosley imposing the disciplines. That was what was
6 admitted at the hearings.

7 MR. PERDOMO: That was what was admitted and, as
8 they conceded, it was admitted as a joint exhibit. Now,
9 they also argue: Well, hey --

10 THE COURT: In the arbitration hearing.

11 MR. PERDOMO: In the arbitration hearing, which is
12 what we're here for is to set aside the arbitration
13 hearing. So, you would think that if petitioner thought
14 that the step one and step two hearings were somehow
15 tainted by this evidence, that they would try to keep those
16 step one and step two decisions out of the record for
17 arbitration, but they didn't. What did they do? They
18 admitted both of those as Joint Exhibits 2 and 3 to the
19 arbitration. So, they agreed to admit the very decisions
20 that they argued were tainted, which is a complete waiver
21 by them of any argument for judicial review that somehow
22 those decisions tainted the arbitration process.

23 Now, petitioner also argues that Clark County
24 Office of Diversity was -- you know, they conceded that
25 those files were with the Clark County Office of Diversity.

1 The EDDC, we know, provided them with the investigative
2 file and we know that petitioner was provided with his
3 personnel file, which contained these memorandums. The
4 Court didn't have possession -- at least based on the
5 record and what was discussed at the step two hearing,
6 didn't have possession of these files.

7 Now, what petitioner fails to realize is, you
8 know, just like civil litigation, there's initial
9 disclosures and there's also request for production of
10 documents and there are subpoenas under the Rules of Civil
11 Procedure, 45. There's also a subpoena process under NRS
12 Chapter 38. So, if petitioner thought that he needed those
13 investigative files, which were not in the Court's
14 possession, to present at the arbitration hearing, he had
15 the procedural mechanism available to go get those files.
16 Or he could have asked the Court for those files, or
17 indicated somewhere in the record of the arbitration
18 proceeding: Hey, I requested those files. You didn't give
19 them to me. I don't think that they should -- that any of
20 this evidence should be admitted.

21 But he didn't do that. Instead, he admitted both
22 of the memorandums as a joint exhibit and didn't object to
23 any testimony about those memorandums in the arbitration
24 hearing. Again, a waiver. It's -- he's not preserving the
25 issue for judicial review by not taking any action during

1 The arbitration hearing to exclude evidence of these
2 investigations or the suspensions from the record.

3 Petitioner also indicated that Bonnie -- that
4 Hearing Master Bulla relied on these suspensions in her
5 ruling. Now, I'll tell you that petitioner has very
6 carefully selected, you know, excerpts from these rulings,
7 but has ignored sort of the entire substance of the ruling,
8 which indicates on at least four -- indicates or references
9 on at least four occasions in that ruling that she is
10 making a ruling that her decision to terminate is based on
11 his conduct on January 8th, 2013.

12 On page 3 of that ruling, and this is EJDOR721:

13 Hearing Master Bulla refers to four actions of
14 petitioner on January 8th and expressly states those
15 four acts, when considered in their totality,
16 constitutes sufficient conduct to warrant termination.

17 So, petitioner is arguing that somehow these 1997
18 and 2003 disciplinary suspensions were part of this
19 decision. But, clearly, she's stating that: No. It's
20 your conduct on January 8th that is what I find -- that
21 warrants termination.

22 Again, in the footnote on that same page: While I
23 affirm Special Hearing Master De La Garza's finding in
24 this regard, the conduct that I believe independently
25 upholds the termination without progressive discipline

1 occurred on January 8th, 2013.

2 Petitioner cited to a sentence on page 8 of the
3 decision, which indicates:

4 The foregoing demonstrates sufficient harm under
5 Johnson to support termination especially in light of
6 his other conduct.

7 And petitioner argues that she was taking into
8 account the 1997 and 2003 disciplines. But if you actually
9 read the paragraphs before that, what she's actually
10 talking about is petitioner's conduct towards Ms. Litt on
11 January 8th, 2013. And the other conduct that she's
12 referencing is on page 6, which was the Complaint that was
13 filed against petitioner by Ms. Litt. Those -- that is
14 what immediately proceeds that sentence and that's what was
15 being referred to, not the 1997 and 2003 disciplinary
16 suspensions.

17 And on page 8, again, petitioner relies on this --
18 the last sentence which says:

19 Taking into account his other inappropriate
20 conducts set forth in Special Hearing Master De La
21 Garza's termination -- or petitioner's termination was
22 appropriate and should stand.

23 However, the sentence immediately preceding that
24 statement states that he was specifically -- that she finds
25 that he was -- that the four instances of misconduct or

1 January 8th, 2013 was sufficient to warrant termination.

2 So, we have four instances where she's making it
3 very clear that her decision to find that there is
4 sufficient ground to terminate petitioner was based on his
5 conduct on January 8th, 2013. It wasn't based on the 1997
6 and 2003 disciplinary suspensions. It's very clear.

7 So, the first issue that the Court addressed in
8 its brief is the issue of waiver. And the issue of waiver
9 is that before either a Court or administrative tribunal,
10 you have to preserve the issues for judicial review and he
11 hasn't done that here. And the record is clear that
12 petitioner didn't argue, he didn't try to exclude, he
13 didn't say: Hey, you know, Mr. Arbitrator, you're
14 admitting these, you know, this evidence of prior
15 discipline but I think it should be excluded because I
16 wasn't provided the investigative files. It's not in
17 there.

18 THE COURT: I think it's fair to say that there
19 was -- that it was stipulated as a joint exhibit and that
20 there was no argument made below, at any stage, that those
21 two documents, the memorandums from 1997 and 2003
22 disciplines, should be excluded and should not be
23 considered as evidence.

24 However, there was extensive argument that they
25 could not be considered in determining whether or not there

1 was progressive discipline, nor could they be considered in
2 determining the reasonableness of termination without any
3 other -- or, excuse me. The reasonableness of the
4 discipline that Clark County imposed or the Court imposed
5 in this instance. They made extensive arguments with
6 regard to that. And, in fact, the Arbitrator granted those
7 arguments and did indicate that that evidence would not be
8 considered. And, by doing so, in effect, did exclude it.

9 So, I would agree that there wasn't -- that it was
10 evidence that was subsequently excluded by the Arbitrator
11 based upon the arguments that were made and the argument
12 wasn't: It's not admissible. Rather: You should exclude
13 it from your decision process for the reasons that we gave.

14 MR. PERDOMO: That's correct. And that goes to
15 the Court's judicial estoppel argument, is that throughout
16 this entire process, petitioner argued that the step two
17 hearing officer and the Arbitrator could not consider these
18 two suspensions as progressive forms of discipline. And,
19 now, he's taking a completely inconsistent position during
20 this judicial review, saying: Hey, I wanted to discuss the
21 substance of those matters and you prevented me from doing
22 so during the step two hearing and the arbitration hearing.
23 And, I guess, wanting to -- I guess, presumably, although
24 the strategy is not exactly clear to me, wanting to go back
25 and address those matters when he never indicated that he

1 wanted to address them, never indicated that he thought
2 that they were relevant, never indicated that he wanted to,
3 at all, respond to these matters.

4 So, now, we're here on judicial review and he's
5 going: Surprise. I wanted the -- those investigative -- I
6 wanted the investigative records and I wanted to address
7 those matters when he never brought it up before --

8 THE COURT: I don't think it's entirely
9 inconsistent. I think the issue is: I don't believe that
10 you didn't consider them and since I believe, in fact, they
11 were considered, now I want the opportunity to specifically
12 address them.

13 MR. PERDOMO: Well, and --

14 THE COURT: And the issue is -- that's not
15 necessarily inconsistent. The issue is whether or not the
16 record supports his belief that they were considered, even
17 though they were excluded, which would be improper if
18 that's what the record showed.

19 MR. PERDOMO: The record doesn't show that.

20 THE COURT: I just simply said that's the
21 argument.

22 MR. PERDOMO: Well, and the response is --

23 THE COURT: I haven't made a comment about it.

24 MR. PERDOMO: -- is that, number one, the two
25 decisions that he's relying on expressly stated: Hey, I

1 don't think that this conduct is relevant. What I think is
2 relevant is his conduct on January 8th, 2013 which --

3 THE COURT: January 7th and January 8th. The
4 Arbitrator found both dates.

5 MR. PERDOMO: The Arbitrator -- but the conduct --
6 my understanding is the conduct that he -- that the
7 Arbitrator was relying on which was the retaliatory conduct
8 towards Ms. Litt and some of the undermining comments
9 towards Mr. Knickmeyer's chain of command which, I believe,
10 occurred on January 8th. Although, the record is somewhat
11 unclear on those points.

12 THE COURT: All right.

13 MR. PERDOMO: I will concede that.

14 THE COURT: It was unclear to me. Some of the
15 comments could have occurred on January the 7th.

16 MR. PERDOMO: Yeah.

17 THE COURT: It's really rather -- it's the
18 comments the Arbitrator's decision indicates it was the
19 comments with regard to chain of command, together with the
20 comments with regard to the issue involving attorney Litt
21 that lead to his belief that termination should be upheld.

22 MR. PERDOMO: So, it's a tough position for
23 petitioner to make because if he didn't want that evidence
24 excluded then why did he admit it as a joint exhibit? If
25 he didn't want the step one and step two hearing decisions

1 to be considered by the Arbitrator, why did he admit it as
2 a joint exhibit to the arbitration? Essentially, he's
3 stipulating that the Arbitrator could consider these --
4 this evidence.

5 THE COURT: I can't think so. I think they were
6 stipulating that this is the record of the proceedings.

7 MR. PERDOMO: But --

8 THE COURT: It's difficult to know what that joint
9 stipulation meant. You can certainly argue that they were
10 stipulating that it would be evidence.

11 MR. PERDOMO: But, I guess, if I'm in the
12 petitioner's position and I think that the -- that those
13 decisions are somewhat, you know, tainted or that the
14 Arbitrator can't consider these suspensions, my strategy
15 would be to exclude that evidence from the record and to
16 take some action to exclude that evidence from the record.
17 But there's no evidence of that in either prior to or
18 during the arbitration.

19 So, I think it's a tough position to come back and
20 say: Well, you know, the Arbitrator should not have
21 considered this evidence when it was admitted and it was
22 admitted as a joint exhibit.

23 THE COURT: Why don't you wrap up your argument?

24 MR. PERDOMO: So, in sum, based on the brief,
25 there's really five points that this Court can find to

1 affirm the arbitration decision. And the first is that he
2 waived all the arguments related to his NRS Chapter 289
3 rights and any rights that he asserted under the MOU by not
4 raising these issues below. Judicial estoppel prevents him
5 from taking an inconsistent position with respect to these
6 investigative files on judicial review when he succeeded on
7 his prior argument. And, ultimately, what he's asking to
8 do is go back and address these matters which, quite
9 frankly, any suspensions that result in three
10 [indiscernible] 20-day suspensions, the investigative facts
11 behind those suspensions probably will not be very
12 flattering to the petitioner.

13 The standard of review was expressly provided for
14 under the MOU. The same section says appropriate and
15 reasonable. There is no indication that the Arbitrator
16 acted outside the scope of the agreement. Therefore,
17 there's no basis to find that he manifestly disregarded or
18 ignored the contract between the parties.

19 Interestingly, petitioner does not address the
20 substantial evidence standard in the Reply brief and didn't
21 address that in his Amended Petition. So, I think this
22 Court and the Court -- and this Court can conclude that
23 that's not an issue, that he is conceding that substantial
24 evidence was present to support the factual findings and
25 the decision by the Arbitrator.

1 And, finally, the last standard is whether there
2 was manifest disregard for the law that required a
3 different result. And there's no evidence in the record
4 that petitioner notified the Arbitrator of any issues with
5 disclosure of the -- of these two investigative records.
6 He's not shown that the Court violated any of the cited
7 sections under Chapter 289 or Article 13 of the MOU. And
8 petitioner has not shown that these records, even if
9 disclosed, mandated a different result.

10 And those are the five bases that this Court
11 should uphold the arbitration decision and the Court rest
12 its case.

13 Thank you.

14 THE COURT: Rebuttal, Mr. Kennedy?

15 MR. KENNEDY: Your Honor, I just wanted to point
16 out some issues you've probably already seen but just so
17 this proceeding's clear. The petitioner, in Exhibit 6
18 which is a copy of the arbitration decision attached to the
19 amended Petition, on page 14, is where the Arbitrator
20 indicated that the -- he found that the prior suspensions
21 were too remote in time but:

22 The Arbitrator does acknowledge the grievance's
23 arguments over the lack of due process in the
24 administration of these suspensions are also well
25 taken.

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1 I'm quoting that sentence. So, it is part of the
2 record in this proceeding that the petitioner did argue
3 against those joint exhibits, those memorandums that were
4 part of the record from the get-go.

5 You know, there's a concept of completeness of the
6 record. I heard counsel argue that somehow, I should have
7 -- I represented Mr. Knickmeyer in the arbitration.
8 Somehow, I should have filed a Motion to Exclude the step
9 one and step two hearing decisions. I mean, that's sort of
10 the law of the case. I mean, I don't know how I could --
11 you know, we were there at the arbitration because of those
12 set decisions. I mean, those -- the actual decisions
13 themselves, I don't think you can get away -- I don't see
14 any judge excluding the actual decision from even being
15 considered. It's part of the record. So, I don't think
16 that's realistic to say that you should somehow try to
17 exclude those decisions themselves.

18 And, then, the question of the prior discipline.
19 You know, what would we have done with that? What could
20 Mr. Levine have done with that? The fact is, Knickmeyer
21 had to face this process with having to also be tainted by
22 prior -- in nearly 20 plus year old disciplinary actions
23 that were brought against him. It sort of taints and
24 colors the whole proceeding and is used -- was used to
25 justify bypassing discipline. So, you know, how could he