IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

THOMAS KNICKMEYER, Appellant, vs. STATE OF NEVADA ex rel. THE EIGHTH JUDICIAL DISTRICT COURT, Respondent.	)	No. 71372

APPELLANT'S OPENING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the Appellant hereby certifies that there are no persons or entities that must be disclosed, other than the Appellant and his undersigned counsel, as set forth herein. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Dated this 13th day of February, 2017.

/s/Kirk T. Kennedy
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1. JURISDICTIONAL STATEMENT:

Pursuant to Nevada Constitution, Article 6, section 4, the Supreme Court has appellate jurisdiction over the within appeal in that it arises from a civil action before the District Court.

The district court entered a final order denying an amended petition to set aside an arbitration decision, which is subject to direct appellate review under NRAP 3 and 4.

2. STATEMENT OF ISSUES PRESENTED FOR REVIEW:

a. Whether the district court erred in denying Knickmeyer's amended petition to set aside an arbitration decision based on a de novo review.

b. Whether the arbitration decision violated Knickmeyer's Due Process Clause rights.

c. Whether the underlying arbitration decision was premised upon a manifest disregard of the law.

3. Routing Statement: 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.

4. STATEMENT OF THE CASE

Appellant Thomas Knickmeyer was a judicial bailiff for the Respondent Eighth Judicial District Court (EJDC) from 1995 to February, 2012, for the now retired Honorable Judge Donald Mosley. From March, 2012 to October, 2013, Knickmeyer was thereafter employed as an administrative marshal for the EJDC.

Knickmeyer was terminated in November, 2013, following Step 1 and Step 2 hearings with the EJDC. Appellant's Appendix (App.), Vol. 4, 411-412, Order Denying Amended Petition, 8/23/16. Thereafter, Knickmeyer challenged that termination through an arbitration process on September 11, 2014. Id. On November 14, 2014, the Arbitrator issued his decision upholding Knickmeyer's termination. App., Vol. 1, 58, Arbitration Decision, Exhibit 6, Petition to Set Aside.

Knickmeyer then filed a Petition to Set Aside the Arbitration Decision on December 16, 2014. App., Vol. 1, 1. Petition to Set Aside Arbitration Decision. The EJDC filed a response to the Petition along with a motion to dismiss the matter on February 6, 2015. App., Vol. 1, 76, Motion to Dismiss, Or in the Alternative, Response to Petition to Set Aside Arbitration Decision. Knickmeyer filed his opposition to the motion to dismiss on March 2, 2015. App., Vol. 1, 100, Opposition to Motion to Dismiss.

On November 9, 2015, Senior Judge Nancy Becker issued an order denying the EJDC motion to dismiss and directing Knickmeyer to file an amended petition which clarified the jurisdictional basis for judicial review in the matter. App., Vol. 2, 148, Order, 11/16/15.

Knickmeyer then filed his Amended Petition to Set Aside Arbitration Decision, Or In the Alternative Petition for Judicial Review on December 15, 2015. App., Vol. 2, 150, Amended Petition to Set Aside Arbitration Decision, Or In the Alternative Petition for Judicial Review. The EJDC filed its response and motion to dismiss the amended petition on January 15, 2016. App., Vol. 2, 231, Motion to Dismiss Amended Petition. Knickmeyer filed his opposition to the motion to dismiss on February 3, 2016. App., Vol. 2, 254, Petitioner's Opposition to Respondent's Motion to Dismiss Amended Petition. The EJDC filed its reply in support of the motion to dismiss the amended petition on February 11, 2016. App., Vol. 3, 266, Reply In Support of Motion to Dismiss, 2/11/16.

On February 12, 2016, the Honorable Judge Becker heard the EJDC motion to dismiss and denied the matter. App., Vol. 3, 321, Order, 2/25/16. The district court ordered the EJDC to file its opposition to the Amended Petition and for Knickmeyer to file his reply. App., Vol. 3, 323, Opposition to Amended Petition; Vol. 3, 350, Petitioner's Reply to Respondent's Opposition to the Amended

Petition.

A final hearing on the matter occurred on May 20, 2016, wherein the district court entered its oral decision denying Knickmeyer's Amended Petition. App.,Vol. 4, 360, Transcript 5/20/16.

A final order reflecting that decision was filed on August 23, 2016, and served by notice of entry of order on August 25, 2016. App., Vol. 4, 407, Order Denying Amended Petition to Set Aside Arbitration Decision, 8/23/16.

Knickmeyer timely filed his notice of appeal on September 21, 2016. App., Vol. 4, 423, Notice of Appeal.

It is also notable that after the original Petition to Set Aside Arbitration Decision was filed on December 15, 2014, Knickmeyer subsequently filed a motion to disqualify the Eighth Judicial District Court from hearing the matter. App., Vol. 1, 96, Motion to Disqualify, EJDC, 2/26/15. Without a hearing, on March 17, 2015, the Honorable Chief Judge of the EJDC, David Barker, issued a minute order finding sufficient grounds to reassign the case to the Senior Judge Department, which is administered by the Nevada Supreme Court. App., Vol. 1, 102, Minute Order re: Reassignment, 3/17/15.

After the reassignment, Appellant was advised that the Honorable Chief Justice Michael Cherry had selected the Honorable Senior Judge Nancy Becker to

hear and decide this matter. Knickmeyer filed a renewed motion to disqualify the EJDC and to challenge Judge Becker's appointment. App., Vol. 1, 103, Renewed Motion to Disqualify the EJDC, 7/2/15. The Respondent opposed the motion and, ultimately, Judge Becker issued an order denying the renewed motion to disqualify. App., Vol. 1, 108, Order Denying Petitioner's Renewed Motion to Disqualify the EJDC.

For the reasons stated in the Order, Judge Becker found that there was no legal or factual basis to disqualify herself from hearing this matter in the district court. Id.

5. STATEMENT OF THE FACTS:

At all relevant times herein, Knickmeyer was a peace officer as defined under Nevada law in NRS 289 et seq. App., Vol.2, 151, Amended Petition. He was formerly employed with the Respondent as a judicial bailiff from 1995 to February, 2012, wherein he worked as the judicial bailiff for the Honorable Retired Judge Donald Mosley. Id. Thereafter, in March, 2012, he was employed with the Respondent as an administrative marshal until October, 2013. Id.

In 2013, Knickmeyer found himself the subject of an investigation related to certain conduct occurring on January 7 and 8, 2013, at the EJDC. App., Vol. 1, 13, Petition Set Aside, Exhibit 1-Notification of Internal Investigation and

Interview Report, 5/20/13. The investigative report prepared by the EJDC documented the allegations as follows:

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 California lawsuit pleading involving Lt. Moody, which was on Knickmeyer's cell phone.

5. Knickmeyer allegedly said he was going to show the lawsuit involving Lt. Moody to others, according to David Ellis.

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.

Knickmeyer was given a written reprimand by the EJDC and placed on administrative leave with pay on the same date of May 20, 2013. App., Vol. 1, 17-18, Petition to Set Aside, Exhibit 2-Relief of Duty.

In October, 2013, Respondent EJDC served Knickmeyer a notice that it was seeking his termination from employment premised upon the allegations documented in the May 20, 2013, written reprimand. App., Vol. 1, 20, Petition to Set Aside, Exhibit 3- Notice re: Termination, 10/23/2013.

With the aid of union counsel, 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. App., Vol. 1, 24, Petition to Set Aside, Exhibit 4- Step 1 Decision.

Knickmeyer 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. App., Vol. 1, 36,Petition to Set Aside, Exhibit 5- Step 2 Decision, 2/20/14.

Thereafter, Knickmeyer requested an arbitration to challenge the Step decisions upholding his termination. On September 11, 2014, an arbitration was held before Mr. 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. App., Vol. 1, 60, Petition to Set Aside, Exh. 7, Article 13-

Grievance and Disciplinary Procedures, Collective Barganing Agreement excerpt.

On November 24, 2014, the arbitrator issued his decision which upheld the termination of Knickmeyer. App., Vol. 1, 45, Petition to Set Aside, Exhibit 6-Arbitration Decision. Arbitrator Maclean found that the EJDC had established the noted allegations by a preponderance of the evidence. App., Vol. 1, 53, Arbitration Decision Exhibit 6. The Arbitrator also found the allegations regarding the re-scanning of Amanda Litt's purse sufficiently egregious to warrant termination. Id., 57-58.

A. Application of Article 13:

Based on NRS 289.120, Knickmeyer initially sought judicial review of the arbitration decision. Pursuant to Article 13 of the applicable collective bargaining agreement (CBA), 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 marshals will be afforded their rights as provided for in NRS Chapter 289." App., Vol. 1, 60, Exhibit 7-Article 13 Grievance and Disciplinary Procedures.

Regarding the utilization of arbitration, 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)." App., Vol. 1, 64, Exhibit 7, Article 13.

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. App., Vol. 1, 64-65, Exhibit 7-CBA, Article 13.

B. The Arbitration Decision:

The evidence presented at the Arbitration indicated that Knickmeyer was terminated off the conversations he had with fellow co-worker David Ellis on the mornings of January 7-8, 2013. App., Vol. 1, 46-51, Arbitration Decision, Exh. 6. No other witnesses or evidence was presented at the hearing which indicated that any other person, employee or customer of the courthouse was privy to the alleged

conversation between Knickmeyer and Ellis at the security gate area on January 7-8, 2013.

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

Marshal Ellis' testimony revealed only that Knickmeyer voiced off hand remarks and complaints about the work environment. Blowing off steam and complaining about management is an accepted part of nearly every job in every working environment. Even Ellis admitted that he witnessed such conduct and statements on numerous occasions with his prior law enforcement work over the last 22 years. App., Vol. 1, 70, Petition to Set Aside, Exh. 8, Ellis Arbitration

Transcript.

Ellis also testified that over the course of the time he worked with Knickmeyer at the gate area, throughout 2012, he shared numerous conversations about events in his own life, as well as those events involving Knickmeyer. App., Vol. 1, 69-70, Ellis, Trans. It was commonplace for the two marshals to exchange words and to relate events occurring in their own lives to each other, while standing at the gate area. Ellis agreed that when Knickmeyer said something to the effect of "fuck this place" to him on January 7, that he was blowing off steam or just upset to some degree. Id., 70. The alleged statements by Knickmeyer to Ellis on the next day, January 8, are also of the same ilk.

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

Regarding the incident on January 8, 2013, wherein attorney Amanda Litt had her handbag scanned at least twice through the scanner, Knickmeyer's uncontroverted testimony at the hearing was that he thought he saw something

notable when the bag was first scanned. App., Vol. 1, 51, Arb. Decision. He directed Ellis to search the bag and Ellis indicated he found nothing. Id. Knickmeyer agreed that he directed the bag to be scanned at least one more time.

It is the job of the marshals working the security gates to insure the safety of all courthouse personnel and the public by properly clearing each and every visitor to the building, attorneys included. Amanda Litt admitted that every time she enters the courthouse, her purse is scanned. App., Vol. 1, 73, Petition to Set Aside, Exh. 8, Litt Testimony, Trans. She did testify that on January 8, 2013, her purse was scanned several times. App., Vol. 1, 73-74.

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

Litt admitted that following the incident she did not think much about it afterwards, so clearly it was not an incident that adversely impacted her when it occurred. App. Vol. 1, 73. Only after the Respondent chose to interview Litt about the matter did Litt *then* say she felt harassed. Id. Litt did not file any formal complaint immediately after the incident occurred. Id. Litt was not interviewed by the Respondent's investigator (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. App., Vol. 1, 74. 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. App., Vol. 1, 75.

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. App., Vol. 1, 56-57, Exh. 6-Arbitration Decision.

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." App., Vol. 1, 57, Arbitration Decision. 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. 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.

C. Application of NRS 289 To This Matter:

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 violation of the Peace Officers Bill of Rights may, after exhausting any applicable internal grievance procedures, grievance procedures negotiated pursuant to collective bargaining and other administrative remedies, apply to the district court

for judicial relief." Id., at 222-223.

Under N.R.S. 289.150(4), Knickmeyer qualified as a peace officer, since he was a marshal working for the district court. Pursuant to NRS 289.120, the Ruiz case and Article 13 of the CBA, as noted above, Knickmeyer properly filed his initial petition seeking judicial review to set aside the arbitration decision in the district court. App., Vol. 1, 60, Petition to Set Aside Arbitration Decision, 12/2014

6. ARGUMENT:

Standards of Review:

This Court's review of a district court decision to vacate or confirm an arbitration award is de novo. Thomas v. City of North Las Vegas, 122 Nev. 82, 97 (2006). The scope of a district court review of an arbitration award is limited since the party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award. Health Plan of Nevada, Inc. V. Rainbow Medical LLC, 120 Nev. 689, 695 (2004).

Arbitrators are afforded broad discretion in making determinations of issues under an arbitration agreement. City of Reno v. Int'l Union of Operating

Engineers Stationary Local 39, 281 P.3d 1162 (Nev., 2009).

When interpreting a collective bargaining agreement, an arbitrator's award may not be contradictory to the express language of the agreement. City of Reno, at 1162, citing to International Association of Firefighters v. City of Las Vegas, 107 Nev. 906, 910, 823 P.2d 877, 879 (1991). If an arbitration award is based on the collective bargaining agreement, courts must enforce the award even if the arbitrator's interpretation is ambiguous or would be different from the court's interpretation. Id.

Under the Nevada Arbitration Act there are statutory grounds under NRS 38.241 to invalidate an arbitration award, however, there are also common-law grounds to vacate an award, i.e. " (1) if the award is arbitrary, capricious or unsupported by the agreement or (2) if the arbitrator manifestly ignored the law." Clark County Education Association v. Cark County School District, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006).

"An arbitrator's finding is not arbitrary or capricious when it is a mere misinterpretation of the law, but only when it is a finding that is not supported by substantial evidence in the record." Id., at 343-344.

The judicial inquiry under the manifest disregard of the law standard is limited. Bohlmann v. Bryon John Printz & Ash, Inc., 120 Nev. 543, 547 (2004),

overruled on other grounds by Bass-Davis v. Davis, 122 Nev. 442 (2006). Arbitrators are given great deference and even an error of fact or misapplication of the law is not, in and of itself, a manifest disregard of the law. Health Plan of Nevada, 120 Nev. At 699. "Manifest disregard of the law goes beyond whether the law was correctly interpreted, it encompasses a conscious disregard of applicable law." Id.

The Supreme Court has ruled that:

"Arbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement. **The question is whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided**. Review under excess of authority grounds is limited and only granted in very unusual circumstances. An award should be enforced so long as the arbitrator is arguably construing or applying the contract. If there is a colorable justification for the outcome, the award should be confirmed." Health Plan, 100 P.3d 178, (Emphasis added).

A. Knickmeyer was deprived of his procedural due process rights mandated by NRS 289 and the Due Process Clause:

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. App., Vol. 1, 60, 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.

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

Regarding the findings of an investigation, NRS 289.057(3)(a) provides that a peace officer may review the content of all files and documents related to an investigation. Further, NRS 289.057(3)(b) provides that if a law enforcement agency is required to remove a record of an investigation or the imposition of

punitive action, then the agency shall not keep or make a record of such investigation or punitive action after the record is required to be removed from an administrative file.

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

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." App., Vol. 1, 60, 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. App., Vol. 1, 60-61, Article 13, Sect. 1(6).

The termination action against Knickmeyer was initiated by the EJDC in October, 2013, when Knickmeyer received written notification of the allegations

and notice that he was being placed on administrative leave pending termination. App., Vol.1, 20, 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 suspension from July, 2003; and a 3 day suspension from July, 1997. Id. This Notice failed to provide copies of any relevant documentation in support of the 2003 or the 1997 incidents. Id. Additionally, the Investigation Report prepared by Lt. Thomas Newsome, and relied upon to initiate termination, also failed to include any relevant documentation regarding the 2003 and 1997 suspension incidents. App., Vol. 1, 13, Exhibit 1- Investigative Report.

This disciplinary history was utilized and relied upon at Knickmeyer's Step 1 hearing on November 7, 2013. App., Vol. 1, 33-34, Exhibit 4, Step 1 Decision. This same history was also relied upon at the Step 2 hearing conducted February 5, 2014. App., Vol. 1, 55-58, Exhibit 5, Step 2 Decision. The EJDC utilized this history as a means to improperly and unfairly bypass other forms of progressive discipline in this matter, by relying on stale, improper disciplinary actions against Knickmeyer.

In the district court below Knickmeyer argued that he was not provided ***any discovery*** related to the suspension matters from 2003 and 1997, nor any

meaningful opportunity to defend against that disciplinary history which was used against him at both Step hearings. App., Vol. 2, 159-160, Amended Petition to Set Aside. The EJDC willfully failed and refused to provide any of the background reports and statements regarding both suspension incidents prior to either Step hearing. Id. The Respondent's conduct was a willful violation of NRS 289.040(4) and 289.057, as well as Article 13's disclosure requirements.

The EJDC utilized the prior disciplinary history to support its termination action and to support its unreasonable decision to bypass other forms of progressive discipline to redress what were essentially relatively minor incidents from January, 2013. Pursuant to Nevada Revised Statutes 289.040, 289.057, 289.060 and 289.080, the EJDC was legally obligated to provide Knickmeyer access to all information and documents being utilized at each hearing, i.e. Step 1, Step 2 and Arbitration. The EJDC failed to abide by these statutory provisions, which deprived Knickmeyer of a meaningful hearing opportunity.

Furthermore, the EJDC, as well as the district court Order, ignored Article 13's disclosure requirement, as stated above, which requires that:

".. 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." App., Vol. 1, 60, Exh. 7, Article 13(5). The EJDC relied on the prior disciplinary proceedings, yet failed to fulfill their disclosure mandates under Article 13 at both Step hearings.

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 as required by NRS 289 and Article 13(5).

This violation supported the setting aside of the arbitration decision, because, from the outset, Knickmeyer's NRS 289 rights were deliberately ignored by the EJDC and the EJDC failed to adhere to the disclosure requirements of Article 13. The entire process from the Step 1 to the final arbitration was infected with substantive and procedural due process violations and defects related to these willful violations.

In a Nevada based federal case, the Ninth Circuit has previously upheld the applicability of the Due Process Clause to protect government based employees, such as court marshals. In Beckwith v. Clark County, 827 F.2d 595, 596-597 (9th Cir. 1987), the Ninth Circuit held:

"The Supreme Court has recognized that a government employee is entitled to due

process when the employee has a property interest in a benefit, such as continued employment, despite the lack of tenure or formal contract. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)."

These defects and willful violations had the net effect of depriving Knickmeyer of a full and fair hearing or the opportunity to effectively challenge his termination ***prior*** to the final Arbitration hearing. This constituted both a procedural and substantive due process violation. The EJDC's refusal to follow the rules of full and fair disclosure, as required by NRS 289 and Article 13, equated to the total denial of important Due Process rights and statutory rights held by peace officer Knickmeyer.

In ruling against Knickmeyer on this issue, the district court order found that:

"Petitioner was required to make a complaint about or a request for these records at some time during the administrative proceedings. Petitioner did not raise this issue during the administrative proceedings, and Petitioner's arguments are waived as he failed to exhaust his administrative remedies." App., Vol. 4, 416, Order Denying Amended Petition.

The Honorable Judge Becker found that Knickmeyer did not properly preserve his due process claims related to the admission of the prior disciplinary

records. Id. The district court also found that at the Arbitration, Knickmeyer did object to the Arbitrator relying on the prior disciplinary history and the Arbitrator did agree to strike any consideration of that history in his decision. App., Vol. 4, 416, Order; Vol. 1, 57-58, Arbitration Decision.

While the Arbitrator MacLean did agree to ignore those prior matters, the hearing officers for Knickmeyer's Step 1and Step 2 hearings did the opposite. Both hearing officers expressly relied on the prior disciplinary matters as justification to support termination as opposed to a lesser form of progressive discipline.

The Honorable Judge Becker's Order inappropriately shifted the burden to Knickmeyer to assert any claims related to the reliance and admission of the prior disciplinary records at his prior Step hearings. Yet, NRS 289 et seq. and Article 13(5) impose the burden of production on the employer EJDC to provide all such documentation that they relied upon to support the termination action. The notion that Knickmeyer *waived* his objections to the admission of the prior disciplinary matters ignores the disclosure and production requirements imposed on the EJDC by the provisions of Chapter 289 and Article 13(5).

Knickmeyer contended in the district court below that he did object to the admission of the subject exhibits at both his Step 1 and Step 2 hearings, due to the

lack of full disclosure by the EJDC prior to each hearing. App., Vol. 3, 356, Reply to Respondent's Opposition to the Amended Petition. The EJDC has acknowledged the fact that Knickmeyer did make an objection to the admission of the prior records during the Step hearing process. App., Vol. 3, 278, Reply in Support of State's Motion to Dismiss Amended Petition, filed 2/11/16.

The Arbitrator's Decision conceded that Knickmeyer had valid due process arguments related to the utilization of the prior 1997 and 2003 disciplinary history and that such records were too remote in time to be utilized as prior discipline. App., Vol. 1, 58, Exh. 6, Arbitration Decision. This concession by the Arbitrator disputes the utilization by the Step 1 and Step 2 hearing masters of the same prior disciplinary events to justify the termination decision of Knickmeyer for the January, 2013, incidents.

As an example of how the prior disciplinary incidents were relied upon at the Step decision process, Knickmeyer points to the written decision of the Step 2 hearing. App., Vol. 1, 36, Exh. 5, Step 2 Decision. The Step 2 Hearing Officer, Bonnie Bulla, declared the following:

1. Bulla specifically stated in her decision that she incorporated the findings of the Step 1 hearing officer into her decision. App., Vol. 1, 36-37, Petition, Exh. 5, Step 2 Decision.

2. Bulla admitted that she relied on Knickmeyer's prior disciplinary history when she stated that "[T]here are other instances of misconduct referenced in the Step 1 decision." App., Vol. 1, 41. She stated there was not only one instance of misconduct involving Knickmeyer, which may have justified progressive discipline as opposed to termination. Id.

3. Bulla held as well that: "I believe the foregoing demonstrates sufficient harm under *Johnson* to support termination, especially in light of the Grievant's other conduct. App. Vol. 1, 48.

4. Bulla also stated in conclusion "taking into account his other inappropriate conduct set forth in Special Hearing Master De La Garza's decision, Grievant Knickmeyer's termination was appropriate and should stand." Id.

The prior discipline should not have been used or admitted against Knickmeyer in any of the grievance hearings due to the failure of the EJDC to provide proper disclosure of all matters related to the prior conduct in violation of NRS 289 and CBA Article 13(5). The fact that the 1997 and 2003 discipline memorandums were allowed as joint exhibits for the final arbitration does not excuse the fact that the Respondent EJDC still failed to disclose the investigative files associated with each incident throughout the history of the Step hearings to arbitration.

The prior discipline was clearly referenced and relied upon in each Step hearing decision and part of the record of the proceedings in the Arbitration. It is indisputable that both Step hearing officers relied on the prior discipline to support a finding of termination as opposed to implementing lesser progressive discipline for Knickmeyer. The existence of Knickmeyer's prior, remote discipline in 1997 and 2003 was a foundational factor for the discipline resulting in his termination.

The Respondent EJDC argued below, and the district court's order agreed, that the claimed NRS 289 violations regarding prior discipline would not have changed the final result of the Arbitrator. App., Vol. 3, 348, Respond. Opp. Even though the Arbitrator found the 1997 and 2003 actions too remote in time to be utilized in Knickmeyer's termination action, both the Step 1 and Step 2 hearing masters utilized and relied upon the same, remote incidents of discipline to support their earlier termination decisions.

Herein lies the basis of Knickmeyer's procedural and substantive due process violations, as the Step hearing masters relied upon the same stale, remote disciplinary actions in reaching their termination decisions, which the Arbitrator claimed he ignored. The admission of these prior events at the Step hearings, without adequate disclosure by the EJDC, improperly supported the bypassing of progressive discipline and imposition of the sanction of termination, as stated in

each Step decision. If the prior, remote disciplinary actions were not admitted into evidence in both Step hearing decisions, then the termination decision would be wholly unsupported as there would be no justification to ignore progressive discipline against Knickmeyer at the pre-arbitration hearings.

The district court's finding that Knickmeyer waived any due process based claims is in error. Knickmeyer waived no challenge to this due process violation. Instead, the EJDC's clear failure to properly disclose the prior disciplinary matters at the Step hearing level caused immediate and irreparable harm, which abrogated any chance for a fair, meaningful hearing.

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." App., Vol. 1, 64-65, Exh. 7, Article 13, Step 3-Arbitration, paragraph 4. (Emphasis Added). Therefore, under the express 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." App., Vol. 1, 61, Exhibit **7**, Article 13, Section 1-Discipline (3).

Under the Nevada Arbitration Act there are statutory grounds under NRS 38.241 to invalidate an arbitration award, however, there are also common-law grounds to vacate an award, i.e. " (1) if the award is arbitrary, capricious or unsupported by the agreement or (2) if the arbitrator manifestly ignored the law." Clark County Education Association v. Cark County School District, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006).

Regarding the determination of whether an arbitrator manifestly ignored the law, an arbitrator's error of fact or misapplication of the law does not ordinarily meet this standard. Health Plan of Nevada, 120 Nev. At 699. "Manifest disregard of the law goes beyond whether the law was correctly interpreted, it encompasses a conscious disregard of applicable law." Id.

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. App., Vol. 1, 52, Exh. 6, Arbitration Decision.

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. App., Vol. 1, 55-56. Exh. 6, Arb. Decision.

The district court's Order found that the Arbitrator was within his discretion to rely upon other authorities in reaching his decision. App., Vol. 4, 418, Order. The court found no error in the Arbitrator's reliance on such other authority. Id.

Knickmeyer contends that the only controlling authority to govern the Arbitrator's decision is found exclusively in his interpretation of Article 13's disciplinary procedures**.** The Arbitrator's citation to and reliance upon any authority, other than that granted by Article 13, exceeds the permissible scope of his limited and defined powers for this process. Given that the Arbitrator clearly looked beyond the authority of Article 13 in reaching his conclusions, the District Court's Order allowing such conduct is erroneous.

Article 13 states in unambiguous language that an arbitration decision must be "based solely" on an interpretation of the "express terms of the Agreement." App., Vol. 1, 64-65, Exh. 7. This distinction is not trivial or to be lightly applied. The Agreement between the Marshal's Association and the EJDC explicitly chose this limiting language, which limited the scope and breadth of an arbitrator's

decision making power. The Arbitrator in this case exceeded those limitations and consciously ignored the requirements imposed upon him by the controlling authority of Article 13.

2. The Arbitrator Failed to Make Required Findings Regarding Reasonableness:

The mandates of Article 13 require an arbitrator to make findings of reasonableness regarding the propriety of the discipline imposed. App., Vol. 1, 61, Exhibit 7, Article 13, Section 1-Discipline (3).

The district court's Order stated the following regarding reasonableness: "The arbitrator made specific findings as to whether termination was more appropriate than progressive discipline. While the arbitrator did not make an express finding that termination was reasonable, the arbitrator still applied this standard as it required the same type of weighing analysis he engaged in to determine that Respondent's decision to terminate petition was appropriate." App., Vol. 4, 417, Order Denying Amended Petition, lines 18-22.

The Arbitrator's findings are predicated upon his ruling that the re-scanning of Amanda Litt's purse was "sufficiently egregious" to support termination. App., Vol. 1, 57, Exh. 6, Arbitration Decision. The Arbitrator specifically found that Knickmeyer's conduct, in this instance alone, was sufficiently egregious to

support termination. App. Vol. 1, 58.

Missing from the Arbitrator's findings was any analysis that the termination was reasonable, in light of other less severe forms of discipline. The Arbitrator failed to make a specific finding that the EJDC's decision to terminate was reasonable as to this specific incident. He failed to balance the choice of termination verses other forms of progressive discipline.

As stated above, Litt admitted that after the incident she did not think much about it, so clearly it was not an incident that adversely impacted her when it occurred. App., Vol. 1, 73, Exh. 8, Arbitration Transcript. Only after the EJDC chose to interview Litt about the matter did Litt *then* say she felt harassed. Id. Litt did not file any formal complaint immediately after the incident occurred. Id. 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. App. Vol. 1, 74. 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., 75.

The foregoing facts admitted at the arbitration through Litt's own testimony directly contradict the Arbitrator's findings of "egregious misconduct" related to this incident. More importantly, however, the Arbitrator failed to ***expressly*** indicate how termination was reasonable for this incident, as opposed to other forms of lesser discipline.

The Arbitrator's Decision relied primarily upon a credibility determination, rather than any analysis of reasonableness, as shown in the Arbitrators' concluding remarks:

"All of the evidence, as summarized above, when coupled with the findings regarding the credibility of the witnesses, can only lead to the conclusion that Grievant's conduct in unnecessarily rescanning Litt's purse was retaliatory and constituted harassment. . . This misconduct is sufficiently egregious, in the Arbitrator's view, to warrant termination in and of itself." App., Vol. 1, 58, Arbitration Decision, pg. 13.

Contrary to the District Court Order, the Arbitrator did not make "specific findings as to whether termination was more appropriate than progressive discipline." App., Vol. 4, 417, Order. The Arbitrator failed to follow the requirements of Article 13 in his Decision and exhibited a conscious disregard for those mandates.

Article 13 states that the arbitrator shall not have the authority to modify, amend, alter, ignore, add to or subtract from any of the provisions of the CBA. App., Vol. 1, 64-65, Exhibit 7- CBA, Article 13. By failing to expressly provide a reasonableness analysis, the Arbitrator has *ignored* a mandatory provision of Article 13. To ignore the requirements of the CBA is to commit a conscious disregard of an arbitrator's obligations and equates to a prohibited manifest disregard of applicable law. Health Plan of Nevada, 120 Nev. At 699.

The Arbitrator knew that he was required to make a reasonableness analysis as mandated by Article 13, yet he chose to disregard this obligation. This Court has stated that when an arbitrator knows the law and that the law requires a particular result, but the arbitrator disregards the law, this equates to a manifest disregard of the law sufficient to vacate an arbitration award. Bohlmann v. Bryon John Printz & Ash, Inc., 120 Nev. 543, 547 (2004), overruled on other grounds by Bass-Davis v. Davis, 122 Nev. 442 (2006). This case is one of those limited situations under the manifest disregard of the law standard, where it is clear the arbitrator deliberately and/or consciously chose to ignore a mandatory requirement of his decision making process.

Arbitrator MacLean's decision was both unsupported by the provisions of Article 13 and evidenced a conscious disregard for the mandates of Article 13, as

set forth herein. The district court's Order gave scant attention to these matters, while grudgingly acknowledging that the Arbitrator did not expressly address the reasonableness issue.

Based on the foregoing, Knickmeyer contends that both statutory grounds exist under NRS 38.241 to invalidate the arbitration award and common-law grounds to vacate the award, as set forth above. Clark County Education Association v. Cark County School District, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006). Clear and convincing evidence supports the setting aside of that award based on these harmful errors.

7. **CONCLUSION:**

For all the foregoing reasons, the district court order denying Knickmeyer's amended petition should be reversed. The arbitration decision should be set aside and the matter remanded for a new hearing.

Dated this 13th day of February, 2017.

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8. CERTIFICATE OF COMPLIANCE WITH NRAP 28.2 AND NRAP 32:

As undersigned counsel for the Appellant, I hereby certify as follows:

1. I have prepared and read the foregoing opening brief;

2. To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

3. I certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and

4. I certify that the brief complies with the formatting requirements of Rule 32(a)(4)-(6) and the page and/or type volume limitations stated in Rule 32 (a)(7).

5. I hereby further certify that this brief complies with the typeface and type style requirements of Rule 32(a)(4)-(6) an it utilizes times new roman type face with a 14 point type style. Further, this brief is in compliance with the type-volume limitations as it contains less than 14,000 words and has a word count of

7,862 words in the countable sections of the brief.

Dated this 13th day of February, 2017.

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9. 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 brief to the Respondent at the address below:

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