Case No. 71372

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS KNICKMEYER

Appellant,

v.

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

Respondent.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK DISTRICT COURT CASE NO. A–14–711200–P

RESPONDENT'S ANSWERING BRIEF

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Respondent, State of Nevada, *ex rel*. Eighth Judicial District Court (EJDC), by and through counsel, Nevada Attorney General Adam Paul Laxalt, Chief Deputy Attorney General Clark G. Leslie, and Senior Deputy Attorney General D. Randall Gilmer, and in conformity with NEV. R. APP. P. 28(b), respectfully submits its Answering Brief.

PREAMBLE

"Fuck this place." "Motherfucker." "Bitch." Appellant Thomas Knickmeyer (Knickmeyer) said each of these vulgar and offensive terms, while on duty, in uniform, and in a location open to the public over a two–day span in January, 2013. These comments were made about his work place, his supervisor, and a member of the public and bar. He also harassed the same member of the bar by requiring a co–worker to search and re–scan her purse even though the co–worker informed Knickmeyer it did not contain any suspicious or contraband items.

These, as well as other unprofessional statements and actions, led to Knickmeyer's paid suspension pending a termination hearing. The termination recommendation was upheld at the Step 1 Pre-Termination Meeting. The termination was then upheld on administrative review and, following that review, by an independent arbitrator. The District

Court concluded there was no legal basis to set aside the arbitrator's binding decision. Knickmeyer has not, and cannot, provide any legal error with these decisions.

Accordingly, this Court should affirm the District Court's decision in this case, refuse to set aside the arbitration award, and remand this case with instruction to close this case.

I. JURISDICTIONAL STATEMENT

Under NEV. R. APP. P. 3A(b)(1) Knickmeyer has the right to seek appellate review of the August 23, 2016 order of the District Court as it was a final decision in a civil case. Under NEV. R. APP. P. 4(a)(1), Knickmeyer timely filed his Notice of Appeal on September 21, 2016.

II. ROUTING STATEMENT

This case does not seem to squarely fit under either of the presumptively assigned categories set forth in NEV. R. APP. P. 17(a) & (b), and therefore does not have any serious disagreement with Knickmeyer's request that this case be routed to the Court of Appeals.

That said, this case involves an appeal of the District Court's decision to not set aside an arbitration decision, which upheld the termination of a government employee. As such, the Court may decide

this case should remain under its jurisdiction pursuant to NEV. R. APP. P. 17(a)(8) and (13).

III. STATEMENT OF THE ISSUES PRESENTED

A. Did the District Court correctly rule there was no justification for setting aside the arbitrator's decision to uphold Knickmeyer's termination when the evidence presented established that: (1) the arbitrator did not exceed his authority; (2) the decision was rationally grounded in the agreement between the parties; (3) the evidence provided a colorable justification for the arbitrator's decision; (4) the award was not arbitrary, capricious or unsupported by the record; and (5) the arbitrator did not manifestly disregard the law?

B. Were Knickmeyer's due process rights violated even though the arbitrator specifically agreed with him that his 1997 and 2003 disciplinary issues could not be used to justify his termination?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This case began on December 16, 2014 when Knickmeyer sought judicial review of a binding and final arbitration award upholding his

termination (Petition).[1] On February 6, 2015, the EJDC filed its Motion to Dismiss the Petition (First MTD).[2] Knickmeyer filed his opposition to the First MTD on March 2, 2015.[3]

On November 9, 2015, the District Court[4] heard arguments on the First MTD.[5] Following argument, the District Court denied the EJDC's First MTD while also ordering Knickmeyer to file an amended Petition.[6]

Knickmeyer filed his Amended Petition on December 15, 2015.[7] The EJDC responded by filing another motion to dismiss (Second MTD) on January 15, 2016.[8] Following Knickmeyer's response[9] and the

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[1] Appellant's Appendix, Vol. 1, pp. 1–10. For the remainder of this brief, the Appellant's Appendix will be referred to as "AA," with the volume number provided immediately before the AA abbreviation and the relevant page numbers following the AA abbreviation. Therefore, this citation, will be referred to as "1 AA 1–10." In addition, if a particular line number is being referenced, then the original page number of the document and the document's line numbers will be included in parenthesis following the AA citation.

[2] 1 AA 76–94.

[3] 1 AA 100–106.

[4] "EJDC" is used when referring to the Respondent. "District Court" will be used when referring to the lower court proceedings.

[5] 2 AA 112–147.

[6] 2 AA 134–135, 148–149.

[7] 2 AA 150–165.

[8] 2 AA 231–252.

[9] 2 AA 254–264.

EJDC's reply brief,[10] the District Court heard oral argument regarding the Second MTD on February 12, 2016.[11] An order denying the Second MTD was entered on February 25, 2016.[12]

Because both MTDs dealt with procedural reasons for dismissing the Petitions,[13] the District Court ordered the EJDC to file its substantive opposition to the Amended Petition on or before April 15, 2016.[14]

The EJDC filed its substantive opposition to the Amended Petition (Opposition) on April 15, 2016.[15] Knickmeyer replied on May 4, 2016.[16]

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[10] 3 AA 266–280.

[11] 3 AA 282–319.

[12] 3 AA 312, 321. Volume 3 of the AA skips from page number 321 to page number 323. It would appear as if Knickmeyer intended page number 322 to be the second page of the order denying the Second MTD.

[13] The EJDC respectfully states the District Court erred in not dismissing the Petitions on procedural grounds, as the EJDC continues to believe that Chapter 289 of the Nevada Revised Statutes does not apply to the EJDC for several reasons, including most importantly, the separation of powers doctrine. *See* 1 AA 85–91; 2 AA 242–249. These issues will be addressed, where appropriate, in order to provide this Court with additional reasons to affirm the District Court's decision. *See Ford v. Showboat Operating Co.*, 110 Nev. 752, 755–756, 877 P.2d 546 (1994) (appellee's may rely on any argument raised before the lower court in seeking affirmance).

[14] 3 AA 317.

[15] 3 AA 323–348.

[16] 3 AA 349–358.

The District Court heard oral argument on May 20, 2016.[17] Following arguments from both parties, the District Court denied Knickmeyer's Amended Petition as it was convinced there were no factual or legal grounds for setting aside the valid arbitration decision.[18] Consistent with its on–the–record denial, the District Court entered its well-reasoned twelve (12) page order on August 23, 2016.[19]

Knickmeyer filed his Notice of Appeal regarding the District Court's well-reasoned and correct decision on September 21, 2016.[20]

B. STATEMENT OF RELEVANT FACTS

1. KNICKMEYER'S UNPROFESSIONAL CONDUCT LEADING TO INVESTIGATION AND TERMINATION

Knickmeyer's suspension pending a termination hearing resulted from his vulgar and unprofessional conduct on January 7–8, 2013.[21] On those dates, it was alleged, and subsequently determined by three separate factfinders, that Knickmeyer committed the following acts while (1) in uniform, (2) on-duty, and (3) stationed at the North Gate

[17] 4 AA 360–405.

[18] 4 AA 401–405.

[19] 4 AA 410–421.

[20] 4 AA 423.

[21] 1 AA 13–15, 20–22.

Security Entrance — the public entrance — of the Regional Justice Center (RJC):

- In referring to his employment at the RJC and with the EJDC, stated "fuck this place" to a fellow co–worker;[22]
- Informed at least one co–worker that the Director of Security was going to be fired;[23]
- Referred to one of his superior officers, a Lieutenant, as a "mother fucker" who he was going to "throw . . . under the bus" for allegedly falsifying his employment application;[24]
- Attempted to undermine his assigned Lieutenant by showing at least one co–worker "a copy of a civil suit involving [the Lieutenant's] actions at a former employer;[25]
- Informed at least one co–worker that he planned to disseminate copies of the civil lawsuit involving the Lieutenant;[26]
- Instructed "a co–worker to unnecessarily and inappropriately search and re–scan a female" attorney's purse even though the co–worker had informed Knickmeyer "the purse contained no suspicious . . . items;"[27]

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[22] 1 AA 14 (Allegation No. 1); 1 AA 20.

[23] *Id*. (Allegation No. 2).

[24] *Id*. (Allegation No. 3), 20.

[25] *Id*. (Allegation No. 4), 20.

[26] *Id*. (Allegation No. 5), 20.

[27] 1 AA 15 (Allegation No. 6), 20.

- Referring to the female attorney as a "bitch" and identifying her "as the same person who filed a complaint against him;"[28] and

- Performed his duties in a negligent manner by engaging "in inappropriate, unnecessary and unprofessional conduct that distracted and prevented him and a co–worker from performing their official duties."[29]

On May 20, 2013, Knickmeyer was informed he was being investigated due to this egregious behavior.[30] Knickmeyer was also informed that he had certain rights under the Nevada Revised Statutes (NRS) and was provided a copy of Chapter 289 of the NRS.[31]

He was placed on administrative leave with pay pending the results of the investigation.[32]

2. THE OCTOBER 23, 2013 INVESTIGATION REPORT

On October 23, 2013, Knickmeyer was provided a copy of the Investigation Report (Report).[33] The Report concluded that, while

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[28] 1 AA 15 (Allegation No. 6), 20.

[29] *Id.* (Allegation No. 7).

[30] 1 AA 13.

[31] 1 AA 15.

[32] 1 AA 17–18.

[33] 1 AA 20–22.

Knickmeyer "failed to provide clear and concise answers to various questions" while being interviewed, he admitted he:

- "[M]ight have said 'fuck this place;'"[34]
- Showed a co–worker, Deputy Marshall (DM) Ellis, "a copy of the civil judgment relating to Lt. Moody;"[35]
- Re–scanned attorney Amanda Litt's purse, but claimed this would have been routine "if you saw something suspicious;"[36] and
- Told DM Ellis Litt filed a complaint against him.[37]

Based on those admissions, the Report concluded Knickmeyer:

- "[E]ngaged in inappropriate and unprofessional conduct by unnecessarily re–scanning and searching Ms. Litt's purse;"[38]
- Distracted and possibly "prevented DM Ellis and [himself] from performing your official duties," which included "visibl[e] monitoring the public entrance and screening additional court patrons awaiting entrance;"[39] and
- Harassed and retaliated against attorney Litt.[40]

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[34] 1 AA 21.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

The Report also concluded Knickmeyer was provided a written reprimand on May 20, 2013 for apparently falling "asleep while on duty in Court."[41]

a. PREVIOUS UNPROFESSIONAL CONDUCT

While (eventually) not used to provide support for Knickmeyer's termination, the Report also noted two previous suspensions:[42] the first suspension for three days due to inappropriate behavior on or about July 17, 1997; the second was a twenty (20) day suspension for inappropriate behavior on or about July 14, 2003.[43] At the time of the 2003 suspension, Knickmeyer was advised that if the behavior is repeated "in the future" it "shall be grounds for immediate termination."[44]

b. JUNE 2013 OFFICE OF DIVERSITY INVESTIGATION

The Report also noted a third–party complaint regarding sex, race, and religious misconduct brought against Knickmeyer.[45] The Office of Diversity (OOD) concluded Knickmeyer engaged in the alleged

[41] 1 AA 21.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

misconduct and "if unchecked [the conduct] could raise to the level of unlawful conduct."[46]

c. TERMINATION RECOMMENDED

The Report recommended termination.[47] Knickmeyer was informed he would remain on administrative leave with pay "pending the Step 1 pre–termination meeting" (Step 1 Hearing).[48]

3. THE STEP 1 HEARING, FINDINGS, AND CONCLUSIONS

The Step 1 Hearing was held before Special Hearing Master Melisa De La Garza on November 7, 2013.[49] Master De La Garza issued an eleven (11) page ruling (Step 1 Decision) in which she sustained six of the seven allegations that arose out of Knickmeyer's actions on January 7–8, 2013.[50] She concluded the seventh allegation was "not pled with specificity and therefore [was] unsubstantiated."[51]

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[46] 1 AA 21.

[47] *Id.*

[48] *Id.*

[49] 1 AA 27, 34. A transcript of the Step 1 Hearing was provided to the District Court as Exhibit D to the EJDC's First MTD. Knickmeyer did not include it in the AA.

[50] 1 AA 34.

[51] *Id.*

She also concluded the six substantiated allegations warranted termination.[52]

In concluding termination was warranted, Master De La Garza concluded Knickmeyer violated numerous provisions of the Clark County Courts Marshal's Division Policy and Manual (Manual).[53] She also concluded Knickmeyer became: (1) "irate" and used profanity while going on "a tirade while on duty and in uniform;"[54] (2) stated "fuck this place" while discussing his employment and admitting he was going to throw Lt. Moody "under the bus;"[55] (3) the comments were not protected by the First Amendment, and even if they were, the EJDC would be entitled to restrict the speech because it "severely damaged office harmony and working relationships;"[56] (4) referred to Litt as a "bitch" and harassed her by re–scanning her purse even though DM Ellis had

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[52] 1 AA 34.

[53] 1 AA 29–33. In addition to citing to provisions of the Manual in the Step 1 Decision, the Manual is contained in the lower court record as part of Exhibit B (Segment 2 of 3) to the EJDC's First MTD (EJDC_ARB 0526–0623). Knickmeyer did not include it in the AA.

[54] 1 AA 29.

[55] 1 AA 30.

[56] 1 AA 31–32 (citing *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992).

already concluded it "look[ed] good;"[57] and (5) Litt "felt harassed and [] expressed [] fear of [] Knickmeyer."[58]

Master De La Garza also noted Knickmeyer's 1997 and 2003 suspensions.[59] However, while she noted those suspensions, she specifically rejected Knickmeyer's argument that the use of profanity did not warrant termination.[60]

The EJDC adopted Master De La Garza's findings on or about November 14, 2013.[61] Knickmeyer was terminated the same day.[62]

4. THE STEP 2 HEARING UPHELD TERMINATION

Knickmeyer appealed the Step 1 Decision[63] under Article 13, Section 2 of the Memorandum of Understanding (MOU).[64] Discovery Commissioner Bonnie A. Bulla (Hearing Officer Bulla) held the Step 2

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[57] 1 AA 32.

[58] 1 AA 33.

[59] *Id.*

[60] 1 AA 30.

[61] 1 AA 36, 47.

[62] 1 AA 47.

[63] 1 AA 36.

[64] *Id.* Knickmeyer only provided certain portions of the MOU in the AA. The entire MOU can be located in the lower court record as part of Exhibit B (Segment 3 of 3) to the EJDC's First MTD, EJDC_ARB 0693–0707.

Hearing on February 5, 2014.[65] She issued her written findings and conclusions on February 20, 2014 (Step 2 Decision).[66]

Hearing Officer Bulla was required to "determine whether terminating [] Knickmeyer, without first imposing progressive discipline, was reasonable, or alternatively if the recommendation should be reversed and some lesser form of discipline imposed."[67] She concluded that it was appropriate for her to affirm the Step 1 Decision terminating Knickmeyer.[68]

In affirming the termination, Hearing Officer Bulla noted the EJDC Marshal Division Code of Conduct generally requires progressive discipline, but also notes "there will be times when non–progressive discipline, up to termination, may be warranted and implemented."[69]

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[65] 1 AA 36, 43. The transcript of the Step 2 Hearing can be located in the lower court record at Exhibit E, EJDC_ARB 0850–0965, to the EJDC's First MTD.

[66] 1 AA 36–43.

[67] 1 AA 36.

[68] 1 AA 37.

[69] *Id.* (citing § 12.00.05 of the EJDC Marshal Division Code of Conduct (which can be located in the lower court record as part of Exhibit B (Segment 2 of 3) of the First MTD, EJDC_ARB 0659)).

Hearing Officer Bulla then conclude that under the totality of the circumstances, termination was reasonable without progressive discipline.[70] She based this conclusion on the following four actions:[71]

- His inappropriate and unprofessional comments regarding his employment ("fuck this place") and his supervisor, Lt. Moody ("mother fucker") and statement "that he was going to 'throw Lt. Moody under the bus;'"
- "Showing at least one co–worker a copy of a civil lawsuit, involving Lt. Moody during his previous employment;"
- His threat to distribute a copy of the lawsuit around the RJC; and
- Inappropriately and unnecessarily searching Litt's purse for retaliatory purposes given her previous complaint against him.[72]

Hearing Officer Bulla found the Step 1 Decision was "detailed and fully support[ed] termination without progressive discipline."[73] She concluded the factual record developed during the Step 1 Hearing was not "seriously disputed during the Step 2" Hearing.[74]

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[70] 1 AA 37–38.

[71] 1 AA 38.

[72] *Id.*

[73] *Id.*

[74] *Id.*

Hearing Officer Bulla also concluded Knickmeyer's statements regarding Lt. Moody established "his intent [] to cause disruption at the workplace" and were a "baseless distraction that unnecessarily shift[ed] . . . attention[] away from the security screening" process.[75]

The evidence convinced Hearing Officer Bulla that placing Knickmeyer "back into his former position . . . would be unreasonable" and that there was no reason to have confidence in Knickmeyer's ability to comply with his superiors' instructions if permitted to return to work.[76]

The Step 2 Decision also expressed the importance of not tolerating the conduct Knickmeyer evinced toward a member of the State Bar of Nevada,[77] as it "was retaliatory in nature . . . because she made a prior complaint against" Knickmeyer.[78]

> The detention of the lawyer at the screening area under the pretext of re–examining her briefcase, even for the relatively brief additional amount of time, was intended to embarrass and harass the lawyer in front of the general public. The lawyer was forced to wait in the screening area and

[75] 1 AA 40.

[76] 1 AA 40–41.

[77] 1 AA 41.

[78] *Id.*

endure a meaningless search of her personal effects in full display of those waiting in line behind her. The conduct of [Knickmeyer] was not intended to double check a purse that may have contained contraband, but instead was an act of retaliation. During her interview, the attorney reported feeling harassed. . . . She stated that [Knickmeyer] had a "serious vendetta" against her because she had previously filed a complaint against him. The complaint at issue was related to events that occurred in September 2012, *months* before January 2013. This supports the inability of [Knickmeyer] to let go of his negative feelings and do his job in a professional manner. In his statement, Marshal Ellis indicated that [Knickmeyer] leaned over, and referred to the detained lawyer as she walked away, told him, "That's the bitch that complained on me."

The distasteful nature of [Knickmeyer's] conduct is supported not only by the testimony of the lawyer herself, but also [by] Marshall Ellis. He found the incident so distasteful and inappropriate as to warrant reporting the allegations of misconduct to his superiors.

* * *

A Marshal's duty is first and foremost to efficiently and respectfully serve all those who pass through the portal of the courthouse without harassment. When this does not happen because of a Marshal's personal agenda, then termination . . . is warranted. This is because no amount of progressive discipline will modify this type of behavior. This incident occurred because of [Knickmeyer's] clear desire to publically embarrass a former court employee, who had only done her duty in reporting [Knickmeyer]. [] Knickmeyer's conduct of demanding an unnecessary search of the lawyer's personal

> belongings was uncalled for — and the entire event caused the lawyer to feel "scared" of [Knickmeyer]. I believe the foregoing demonstrates sufficient harm under *Johnson*[79] to support termination, especially in light of [Knickmeyer]'s other conduct. If there had been no history between the lawyer and [Knickmeyer], and [Knickmeyer] had ordered a search that turned out to be unnecessary, lesser discipline may have been warranted. But these are not the circumstances here. This one event of retaliatory conduct combined with [Knickmeyer's] other conduct on January 8, 2013 — distracting a co–worker by showing him his cell phone with a civil complaint on it; commenting amount Lt. Moody in an unprofessional matter; bringing up Lt. Moody's past in order to undermine his supervisor; making derogatory comments about his job and his superiors — supports termination based on the "totality of the incident" provision of DCMD 12.00.05.[80]

Finally, while the Step 2 Decision referenced the 1997 and 2003 incidents (as well as at least one other incident of misconduct), Hearing Officer Bulla did not rely on the previous suspensions. Rather she concluded "the conduct that [she] believe[d] independently [upheld] the termination without progressive discipline occurred on January 8, 2013."[81]

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[79] *Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir. 1995).

[80] 1 AA 41–43.

[81] 1 AA 38.

5. THE ARBITRATION DECISION UPHELD TERMINATION

On September 11, 2014, at Knickmeyer's request, an arbitration hearing was held before independent arbitrator Harry MacLean (Arbitrator MacLean).[82] During the process, "[b]oth sides were given the opportunity to present oral and documentary evidence" and to provide post-hearing briefs to the arbitrator.[83]

The parties stipulated the following two issues were before Arbitrator MacLean: (1) "Did the [EJDC] have just cause to terminate" Knickmeyer; and (2) "[i]f not, what [was] the appropriate remedy?"[84]

Arbitrator MacLean issued his fourteen (14) page decision on November 24, 2014 (Arbitration Decision).[85] After summarizing the facts[86] and relevant contractual and policy provisions at issue,[87] the

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[82] 1 AA 45. As with the Step 1 and Step 2 Hearing transcripts, the arbitration hearing transcript can be found in the lower court record as Exhibit A to the EJDC's First MTD, EJDC_ARB 0001–0276. Certain portions of the transcript have been provided by Knickmeyer in the AA (*see* 1 AA 68–75; 2 AA 223–230).

[83] 1 AA 45.

[84] 1 AA 46.

[85] 1 AA 45–58.

[86] 1 AA 46–51.

[87] 1 AA 51–53.

Arbitration Decision spent nearly six (6) pages analyzing the issues.[88] In analyzing the issues, Arbitrator MacLean specifically found the previous six allegations affirmed in the Step 1 and Step 2 Decisions were established by a preponderance of the evidence.[89]

a. CREDIBILITY DETERMINATIONS

Arbitrator MacLean found Knickmeyer less credible than both DM Ellis and Litt.[90] In finding DM Ellis credible, Arbitrator MacLean determined "there was no apparent reason for [him] to make up statements about [Knickmeyer's] conduct on January 7 and 8" as both he and Knickmeyer "testified . . . they got along well" and Knickmeyer was surprised that DM Ellis "was the source of the allegations against him" as he considered DM Ellis a friend whom he had worked with "for almost a year without any conflict or disagreement."[91]

DM Ellis' credibility was also evident by his demeanor at the hearing: he answered questions in a "straightforward and convincing" manner; did not contradict himself; and was consistent with both his

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[88] 1 AA 53–58.

[89] 1 AA 53.

[90] *Id.*

[91] *Id.*

previous written statement and transcribed interview.[92] The testimony was also corroborated by independent evidence and Litt's testimony.[93]

Similarly, Arbitrator MacLean found Litt's testimony credible based on "attitude and affect on the witness stand."[94] He believed Litt did not file a grievance against Knickmeyer as a result of the January 8 events "because she was scared of him" because he "was on a vendetta against her" for reporting three previous incidents, two of which were substantiated.[95] She was concerned filing another grievance would cause "additional 'chaos.'"[96] Further, both DM Ellis and Litt testified they believed Knickmeyer's actions on January 8 were intended to harass Litt.[97]

In contrast, Arbitrator MacLean found Knickmeyer not credible. This determination was based on the contrast between his testimony and that of DM Ellis and Litt, noting that, unlike DM Ellis and Litt,

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[92] 1 AA 54.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

Knickmeyer had "an obvious reason to be less than truthful."[98] Knickmeyer's testimony was also "inconsistent, contradictory, and sometimes vague."[99]

Specifically, Knickmeyer provided inconsistent statements regarding whether he called Lt. Moody a "mother fucker" or a "fucking asshole."[100] Knickmeyer provided contradictory explanations as to how he learned about the previous lawsuit against Lt. Moody as well as the context of the use of the term "under the bus."[101] Knickmeyer's demeanor while testifying also suggested his desire to convince the arbitrator of the wrongs he believed had occurred to him, rather than trying to testify "to events to the best of his recollection."[102]

Finally, given the "firm and consistent" testimony of both DM Ellis and Litt regarding her purse being scanned "at least three times without any reason," it was more probable to conclude Knickmeyer "was either mistaken or less than truthful about his behavior" than it would

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[98] 1 AA 53.

[99] 1 AA 54.

[100] *Id.*

[101] *Id.*

[102] *Id.*

be to conclude DM Ellis and Litt were mistaken or not telling the truth.[103]

b. PROGRESSIVE DISCIPLINE WAS NOT WARRANTED

The Arbitration Decision next addressed why progressive discipline was not warranted.[104] Arbitrator MacLean addressed the various principles underlying when progressive discipline should be used as opposed to termination, as well as when termination is appropriate for a first offense.[105]

> In applying [those] principles to the case at hand, it is important to keep in mind that the workplace is a courthouse and that [Knickmeyer] was an armed, uniformed peace officer charged with the safety of the general public and court employees. Accordingly, he must be held to a higher standard of professionalism than employees in ordinary work places, such as [a] factory or a warehouse. The safety and security of fellow citizens may well depend on how conscientiously and professionally the marshals perform[] their duties.[106]

Arbitrator MacLean then concluded that while some of the January 7 and January 8, 2013 actions, standing by themselves, "would

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[103] 1 AA 55.

[104] 1 AA 55–58.

[105] 1 AA 55–56.

[106] 1 AA 56.

have warranted progressive discipline" as opposed to termination, Knickmeyer's conduct crossed "the line when he show[ed] Ellis a copy of the lawsuit against Lieutenant Moody," accused Moody of falsifying "his application," and when he threatened to disseminate "the lawsuit throughout the courthouse."[107] With respect to those actions, Arbitrator MacLean found the

> behavior constitute[d] the undermining of supervisory authority, a serious offense in any work place but totally unacceptable when done by peace officers charged with the safety and security of a government building. The armed marshals must be prepared to respond to a threat as a cohesive and effective team, and this means that there must be a functioning and respected chain of command. Any effort to undermine this command structure can only be seen as serious misconduct warranting severe discipline.[108]

Despite the seriousness of Knickmeyer's actions in undermining the chain of command, Arbitrator MacLean concluded Knickmeyer's "most serious offense" was his treatment of Litt as the evidence could "only lead to the conclusion that [Knickmeyer's] conduct in unnecessarily rescanning Litt's purse was retaliatory and constituted

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[107] 1 AA 56–57.

[108] 1 AA 57.

harassment."[109] Arbitrator MacLean agreed with the Step 2 Decision in this regard:

> The hearing officer in the second hearing found that [Knickmeyer's] behavior in this regard constituted harassment and would alone, without consideration of previous discipline, justify termination. The Arbitrator agrees. [Knickmeyer's] willingness to misuse his position as a peace officer to get even with or retaliate against Litt for filing a complaint against him distracted him from his duties and could easily have jeopardized the safety and security of the building and the people in it. This misconduct is sufficiently egregious, in the Arbitrator's view, to warrant termination in and of itself.[110]

Based on these findings, Arbitrator Maclean found that the EJDC had just cause to terminate Knickmeyer.[111]

c. THE ARBITRATOR DISREGARDED KNICKMEYER'S 1997 AND 2003 BEHAVIOR AND SUSPENSIONS

Arbitrator MacLean agreed with Knickmeyer that his 1997 and 2003 suspensions were "too remote in time to constitute earlier incidents of progressive discipline."[112] Arbitrator MacLean also agreed that due process concerns required those suspensions not be taken into

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[109] 1 AA 57.

[110] *Id.*

[111] *Id.*

[112] 1 AA 58.

account in deciding whether termination was appropriate.[113] Nonetheless, these issues were of no import given the finding that Knickmeyer's "retaliatory conduct toward Litt [was] sufficient on the first offense to warrant discharge."[114]

6. KNICKMEYER'S FAILED JUDICIAL REVIEW

As noted above, Knickmeyer initiated judicial review by the filing of his *Petition to Set Aside Arbitration Decision* on December 16, 2014.[115] Knickmeyer filed his *Amended Petition to Set Aside Arbitration Decision, or in the Alternative Petition for Judicial Review* (Amended Petition) on December 15, 2015.[116] As with the First MTD, the EJDC sought dismissal of the Amended Petition based on procedural grounds.[117]

a. THE DISTRICT COURT'S DENIAL OF THE EJDC'S PROCEDURAL MOTIONS TO DISMISS

The EJDC primarily argued judicial review of the Arbitration Decision was governed by either the Uniform Arbitration Act as codified

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[113] 1 AA 58.

[114] *Id.*

[115] 1 AA 1–76.

[116] 2 AA 150–164.

[117] 2 AA 231–252.

as Chapter 38 of the NRS.[118] The EJDC also argued Chapter 289 of the NRS did not control because, while Knickmeyer has certain rights provided to him in the MOU, the EJDC is not bound by other rights since they are not a law enforcement agency.[119] Most importantly, the EJDC argued applying Chapter 289 of the NRS to the courts would violate the separation of powers.[120]

While the District Court denied the Second MTD, it did not specifically rule on the separation of powers issue. Instead, the District Court assumed, based on the language of the MOU, NRS 289.120 conferred jurisdiction over this dispute.[121] The District Court also stated that while there may be constitutional arguments to be made, it believed that the EJDC had voluntarily agreed to be bound by Chapter 289 of the NRS in the MOU. Thus, the District Court concluded that while the EJDC did not waive the jurisdictional question, it did agree "to forego

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[118] 2 AA 232, 242–243.

[119] 2 AA 233, 243–244.

[120] 2 AA 244–246.

[121] 3 AA 312.

challenging the constitutionality of the statute" during the time governed by the MOU.[122, 123]

The District Court then instructed the EJDC to provide its substantive response to Knickmeyer's Amended Petition.[124]

b. THE DISTRICT COURT'S DISMISSAL OF THE AMENDED PETITION AND AFFIRMANCE OF KNICKMEYER'S TERMINATION

Despite refusing to dismiss the Amended Petition on procedural grounds, the Amended Petition was dismissed on the merits.[125]

The District Court specifically noted Arbitrator MacLean "didn't believe [] Knickmeyer" and found both DM Ellis and Litt to be

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[122] 3 AA 313 (32:14–21). The EJDC disagrees with the District Court's determination that it could agree to either waive or forego the separation of powers issues based on the language of the MOU or any other action. This disagreement will be addressed *infra* at pages 46–50.

[123] On March 10, 2017, the EJDC filed an Amicus Curiae brief detailing how any contractual or statutory infringement on the EJDC's constitutional right to independently govern its employees would run afoul of the separation of powers doctrine. *See* Amicus Curiae Brief of the Eighth Judicial District Court in Support of the Local Government Employee–Management Relations Board and Affirmance of the Order of the First Judicial District Court, filed in the pending case of *Clark Co. Dep. Marshals Assoc. v. Clark Co. et al.*, No. 68660. The EJDC believes that the reasoning set forth in that Amicus Brief applies with equal force to the instant case.

[124] 3 AA 317.

[125] 4 AA 410–421.

credible.[126] The District Court also concluded there was substantial evidence supporting the conclusion Knickmeyer "deliberately us[ed] his office to harass" a member of the bar for the purpose of retaliating against her for filing complaints against him.[127]

The District Court then noted Arbitrator MacLean weighed all of the appropriate factors regarding whether progressive discipline or termination was the appropriate consequence for Knickmeyer's action and "found just cause based upon all of [the] evidence for termination."[128] The District Court further noted whether he or someone else would have reached a different decision was not relevant, as there was substantial evidence supporting Arbitrator MacLean's findings and conclusions.[129]

> The point is, there's substantial evidence in the record from which he could make such a finding. And he made a determination that, under the circumstances, when an employee of the Court engages in a vendetta against an attorney for having complained about that employee's conduct, and while a pending complaint about having done that exists, shows a lack of judgment

[126] 4 AA 397.

[127] 4 AA 397–399.

[128] 4 AA 400.

[129] 4 AA 400–401.

> and control that warranted the termination in this case. And that some other type of discipline was not appropriate.[130]

The District Court found that the Amended

> Petition should be denied [because] [t]he Arbitrator did not exceed the scope of the agreement. There was nothing arbitrary and capricious about the decision. The decision was done in accordance with both the MOU and with the provisions of Chapter 38, which is the Uniform Arbitration Act in Nevada. And, as [the District Court] had previously discussed, and I'm going to do just once again just so it's all kind of together, why that is the appropriate remedy under the MOU because the MOU makes it the appropriate remedy. And the more specific provisions under Article 13 about judicial review of the Arbitrator's decision speak to the Uniform Arbitration Act. The reference to any other law is more vague.
>
> But even if one could argue that the appropriate remedy is something under Chapter 289, what does Chapter 289 say? Well, Chapter 289 simply says that you get the ability to go to the courts. It doesn't say what vehicle you use to get there.
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> * * *
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> I would argue [that] even if a Petition for Judicial Review [under Chapter 289] was the appropriate vehicle, the standard of review under that is very similar. You have to violate the Constitution or statutory provisions. Well, I find there were not violations . . . of either one. It wasn't in an excess of authority, there wasn't an unlawful procedure,

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[130] 4 AA 401 (42:2–10).

> and it wasn't clearly erroneous in view of reliable, probable, substantial evidence, nor was it arbitrary or capricious.
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> * * *
>
> So, no matter what standard you use and how you construe the initial pleadings in this case, essentially, you're still back to that same concept. And the record simply doesn't support a violation of 289.
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> * * *
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> There's no finding that [the arbitrator] manifestly disregarded the law. He didn't. Or that he consciously ignored the law. [Arbitrator] MacLean didn't do that. He talked about the MOU. He talked about the requirements. And the fact that he was talking about, in general, labor law, well, that's exactly what the MOU contemplates. It talks about you're supposed to apply labor law. So, that not outside the scope of it.
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> * * *
>
> All right. I think I've covered all of the grounds . . . in terms of supporting a denial of the Petition. And, so, that will be the Order.[131]

Consistent with these findings and conclusions, the District Court entered its twelve (12) page order denying the Amended Petition on August 18, 2016.[132] The order referenced the relevant portion of Article 13, Step 3(2):

> The arbitrator's decision will be final and binding on all parties to this Agreement as long as the

[131] 4 AA 401–404.

[132] 4 AA 410–421.

> arbitrator does not exceed his/her authority . . . 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).[133]

The order also referenced the similarity between the language in Article 13 quoted above and the language of NRS 38.241(1)(d) which provides that a "court shall vacate an [arbitration] award made in the arbitral proceeding if . . . an arbitrator exceeded his or her powers."[134]

Likewise, the order made clear the MOU language required the arbitration decision to be "final and binding . . . as long as the arbitrator performs his/her duties in accordance with the case law regarding labor arbitration" and requires a court to consider the "two common–law grounds . . . under which a court may review private binding arbitration awards: (1) whether the award is arbitrary, capricious, or unsupported by the agreement; and (2) whether the arbitrator manifestly disregarded the law."[135] The order also addressed why the Amended Petition was appropriately denied under both statutory and common

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[133] 4 AA 413 (4:17–20).

[134] 4 AA 413 (4:23–27).

[135] 4 AA 414 (citing *Clark County Educ. Ass'n v. Clark County Sch. Dist.*, 122 Nev. 337, 341, 131 P.3d 5 (2006)).

law.[136] Consistent with those findings, the order denied Knickmeyer's Amended Petition.[137]

Knickmeyer now seeks review from this Court.[138]

V. STANDARD OF REVIEW

A. THIS COURT'S REVIEW OF THE DISTRICT COURT'S DECISION

This Court reviews a district court's decision regarding whether to affirm or set aside an arbitration award de novo.[139]

B. THIS COURT'S REVIEW OF THE ARBITRATION DECISION

While this Court reviews the District Court's decision de novo, the District Court's review of an arbitration award is "limited and is nothing like the scope of an appellate court's review of a trial court's decision."[140] In order to be successful under this limited scope of judicial review, the party seeking review of the arbitration award "has the

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[136] 4 AA 418—420.

[137] 4 AA 421.

[138] 4 AA 423.

[139] *Thomas v. City of North Las Vegas*, 122 Nev. 82, 98, 127 P. 3d 1057 (2006) (citing *Health Plan of Nevada v. Rainbow Medical, LLC*, 120 Nev. 689, 695, 100 P.3d 172, 177 (2004); *Clark County Sch. Dist. v. Rolling Plains*, 117 Nev. 101, 104, 16 P.3d 1079 (2001), *disapproved of on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates*, 117 Nev. 948, 35 P.3d 964 (2001)).

[140] *Health Plan of Nevada*, 120 Nev. at 695 (citing *Bohlmann v. Printz*, 120 Nev. 543, 546, 96 P.3d 1155 (2004), *overruled on other grounds*, *Bass–Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006)).

burden of proving, by clear and convincing evidence, the statutory or common–law ground" that justifies reversing the arbitrator's decision.[141]

VI. SUMMARY OF ARGUMENT

Three factfinders determined Knickmeyer's actions on January 7 and January 8, 2013 justified termination without progressive discipline. One of these factfinders was an arbitrator. Arbitration proceedings are afforded great deference. Knickmeyer has the burden to establish by clear and convincing evidence that the arbitrator (1) exceeded the authority provided to him under the MOU, (2) manifestly disregarded the law, or that (3) the arbitrator's decision was so arbitrary and capricious, the conclusion reached was completely irrational.

Here, a review of the MOU, other governing documents, and law establish the arbitrator neither exceeded his authority nor manifestly disregarded the law. In addition, the record developed during the arbitration hearing — and presented to the District Court —contains

[141] *Health Plan of Nevada*, 120 Nev. at 695 (citing *E.D.S. Constr. v. North End Health Center*, 412 N.W.2d 783, 785 (Minn. Ct. App. 1987); *Saville Intern., Inc. v. Galanti Group, Inc.*, 107 Ill. App.3d 799, 438 N.E.2d 509, 511 (1982); *Korein v. Rabin*, 29 A.D.2d 351, 287 N.Y.S.2d 975, 981 (1968)).

substantial evidence to support the arbitrator's decision. The arbitrator's decision was consistent with both the Step 1 and Step 2 Decision termination proceedings.

Knickmeyer cannot establish any error in the arbitration proceedings or decision — let alone an error that would permit this Court to reverse the District Court's decision.

Accordingly, this Court should affirm the District Court's denial of Knickmeyer's Amended Petition, dismiss this appeal, and remand this case to the District Court with instructions to close the case.

VII. ARGUMENT

Knickmeyer contends this Court should reverse the District Court's denial of his Amended Petition, set aside the Arbitration Decision, and remand this case for a new hearing.[142] Knickmeyer's contention is based on the following three main arguments:

- He was deprived of his procedural due process rights required under Chapter 289 of the NRS and the Due Process Clause of the United States Constitution;[143]
- The arbitrator exceeded the scope of the authority provided to him under Article 13 of the MOU;[144] and

[142] Appellant's Opening Brief (Opening Brief), p. 36.

[143] *Id*. at 18–28.

[144] *Id*. at 29–31.

- Failed to make an express determination that the termination was reasonable.[145]

Each of these allegations fail.

A. KNICKMEYER'S DUE PROCESS RIGHTS WERE NOT VIOLATED

Knickmeyer first argues NRS 289.040, 289.057, 289.060 and 289.080 required the EJDC to provide him with "access to all information and documents [] utilized at" the Step 1 Hearing, Step 2 Hearing, and Arbitration Hearing.[146] He then argues that because each of the hearings relied on his previous suspensions, his due process rights were violated when the EJDC did not provide him with a copy of all documents relating to the 1997 and 2003 disciplinary proceedings.[147]

This argument fails for at least three separate and distinct reasons: first, neither Hearing Officer Bulla nor Arbitrator MacLean relied on the 1997 or 2003 disciplines, making the argument moot; second, Knickmeyer waived the issue by failing to properly address it during the arbitration proceeding; and third, the EJDC is not a law enforcement agency, and therefore under the separation of powers doctrine, it cannot be bound by the provisions of Chapter 289.

[145] Opening Brief at 31–35.

[146] *Id* at. 21.

[147] *Id*. at 20–21, 26–28.

1. KNICKMEYER'S DUE PROCESS ARGUMENT IS MOOT

Hearing Officer Bulla did not rely on the 1997 or 2003 suspensions. Rather, the Step 2 Decision concluded Knickmeyer's actions on January 8, 2013 independently warranted termination "without progressive discipline."[148]

Arbitrator MacLean went one step further. He explicitly agreed with Knickmeyer "that the 1997 and 2003 suspensions [were] too remote in time to constitute earlier incidents of progressive discipline."[149] Arbitrator MacLean also ruled Knickmeyer's "arguments over the lack of due process in the administration of these suspensions [were] well taken."[150]

Despite that agreement, Arbitrator MacLean determined that termination was warranted based solely on Knickmeyer's "retaliatory conduct toward Litt" and therefore the due process argument and potential violation were moot.[151]

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[148] 1 AA 38; 3 AA 340 (18:13–19); *see also* 3 AA 339 (17:18–18:12).

[149] 1 AA 58; 3 AA 340 (18:21–27).

[150] *Id.*

[151] *Id.*

In addition to specifically noting the due process concerns associated with the 1997 and 2003 suspensions, the arbitrator explicitly concluded Knickmeyer's retaliatory and harassing conduct toward Litt on January 8, 2013 was "sufficiently egregious . . . to warrant termination in and of itself."[152]

As such, any due process concerns relating to the reference of the 1997 and 2003 suspensions are, as the arbitrator and District Court concluded, moot given the termination was appropriate even without taking into account the 1997 and 2003 suspensions — neither of which were relied on by the arbitrator.[153]

2. KNICKMEYER WAIVED THE ARGUMENT BELOW

The District Court noted Knickmeyer never requested access to the 1997 and 2003 disciplinary files during the administrative

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[152] 1 AA 57.

[153] 1 AA 57–58; 4 AA 416; *see also Rogers v. State*, 83 Nev. 376, 379, 432 P.2d 331 (1967), *overruled on other grounds*, *Alford v. State*, 111 Nev. 1409, 906 P.2d 714 (1995) (the court's improper ruling permitting admission of evidence was moot when the evidence was never offered and therefore not relied on); *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. ___, 327 P.3d 487, 492 (Adv. Op. 27, April 3, 2014) (because the disciplinary proceedings used the appropriate standard of proof, the appellant's equal protection argument was moot); *Sasser v. State*, 130 Nev. ___, 324 P.3d 1221, 1224 (Adv. Op. 41, May 29, 2014) (the appellant's arguments relating to "alleged inaccuracies in his PSI will affect his ability to receive parole . . . is moot" given "that the remaining information in [the] PSI" was not inaccurate).

proceedings.[154] Rather, Knickmeyer argued — successfully as referenced above — the "disciplinary suspensions were too remote in time to constitute earlier incidents of progressive discipline" and that there was a lack of due process regarding "the administration of [those] suspensions."[155]

The record is replete of any suggestion Knickmeyer ever challenged the introduction of — or reliance on — the 1997 and 2003 suspensions based on the fact that he was not provided a copy of the disciplinary records. To the contrary, Knickmeyer specifically agreed to introduce the memorandum "memorializing these suspensions" as a joint exhibit.[156]

In *Carrigan v. Commission on Ethics of the State of Nevada*,[157] this Court reiterated that "[a]rguments not raised before the appropriate administrative tribunal *and* in the district court normally cannot be raised for the first time on appeal."[158] Based on this

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[154] 4 AA 416 (7:1–4).

[155] 4 AA 416 (7:5–16) (citing 1 AA 58).

[156] 4 AA 415 (6:20–24); 3 AA 344 (22:7–16).

[157] 129 Nev. ____, 313 P.3d 880 (Adv. Op. 95, Nov. 27, 2013).

[158] 313 P.3d at 887 n. 6 (citing *Valley Health Sys., L.L.C. v. Eight Judicial Dist. Court*, 127 Nev. 167, 172–173, 252 P.3d 676 (2011);

principle, this Court has held that parties have a duty to raise discovery issues before the discovery commissioner in order to preserve district court review of the issue.[159] In reaching this result, this Court noted that "[a]ll arguments, issues, and evidence should be presented at the first opportunity and not held in reserve to be raised" before a different tribunal.[160]

Similarly, here, Knickmeyer had an obligation to raise the issue of access to the disciplinary files at the earliest possible stage. Because Knickmeyer failed to raise this issue during the administrative proceedings, the issue has been waived.[161] Thus, this Court should not consider the issue. This is especially true given that, in addition to being waived, the argument is moot for the reasons addressed above.

3. CHAPTER 289 OF THE NRS DOES NOT APPLY

Finally, even assuming the due process issues raised by Knickmeyer are not moot and not waived, Knickmeyer's reliance on Chapter 289 fails on the merits.

Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 571, 170 P.3d 989 (2007) (emphasis added)).

[159] *Valley Health*, 127 Nev. at 172–173.

[160] *Id.* at 173.

[161] 3 AA 337–338 (15:16–16:12).

Knickmeyer argues that NRS 289.040, 289.057, 289.060 and 289.080 required the EJDC to provide him with all documents relating to his previous discipline. The EJDC disagrees for several reasons.

First, each of these NRS provisions contain explicit language establishing that they apply to certain duties of law enforcement agencies — not courts. Specifically, NRS 289.040(4) provides that "[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*." Likewise, NRS 289.057(3)(a) requires a *law enforcement agency* to permit a peace officer to "review any administrative or investigative failed maintained by the *law enforcement agency* relating to the investigation."[162] Similarly, NRS 289.060(1) mandates "a *law enforcement agency*" to provide "written notice to the peace officer" of an investigation within forty–eight (48) hours of its initiation. By the same token, NRS 289.080 unambiguously refers to a peace officer's rights when he or she is subjected to an investigation being performed by a law enforcement agency.[163]

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[162] *See also* NRS 289.057(2) & (3)(b) (both referencing law enforcement agencies).

[163] *See*, *e.g.*, NRS 289.080(3), (6)(b), & (7).

Chapter 289 of the NRS does not define "law enforcement agency." However, at least two other provisions of the NRS define a "local law enforcement agency" as the county sheriff's office, a "metropolitan police department" or a "police department of an incorporated city."[164] Obviously, the EJDC does not fit within this definition. It is therefore not a law enforcement agency.[165]

Article 6 of the Constitution vests the judicial power of this State in a court system that is comprised of a Supreme Court, an appellate court, district courts, and justices of the peace.[166] As a district court, Article 6 clearly applies to the EJDC.

This Court has defined "judicial power" as "the capability or potential capacity to exercise a judicial function."[167] Similarly, "judicial function is the exercise of judicial authority to hear and determine

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[164] *See* NRS 179D.050; NRS 62A.200.

[165] To the extent Knickmeyer may attempt to rely on any definition of "agency" or "law enforcement agency" that may be contained in the Nevada Administrative Code (NAC) to support his argument, the term "agency" as defined in the NAC applies to subdivisions of the executive branch, not the judicial branch. *See* NAC 239.690; *LVMPD v. Blackjack Bonding, Inc.*, 343 P.3d 608, 613 n. 4 (Nev. 2015).

[166] NEV. CONST., ART. 6, § 1; *see also Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237 (1967).

[167] *Galloway*, 83 Nev. at 20.

questions in controversy that are proper to be examined in a court of justice."[168]

Conversely, "executive power" "extends to the carrying out and enforcing the laws enacted by the Legislature."[169] There is no question law enforcement agencies are used to enforce the laws. Thus, law enforcement agencies fall under the executive branch of our tripartite government.[170]

The plain reading of Chapter 289 and the Constitution make it clear the duties and obligations of law enforcement agencies referenced in Chapter 289 of the NRS do not apply to the EJDC. As such, Knickmeyer's reliance on various portions of Chapter 289 fails on its face.

In addition, any attempt to expand the plain meaning and language of Chapter 289 to include the EJDC would run afoul of the Separation of Powers Doctrine. The Constitution dictates that each branch of government is independent from the other two. Any requirement that one branch "exercise the powers of the other two"

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[168] *Galloway*, 83 Nev. at 20.

[169] *Id.*

[170] *Id.* at 19; NEV. CONST., ART. 3, § 1.

would be unconstitutional.[171] A branch of government cannot decide to voluntarily overlook or "waive constitutionally based structural protections such as the separation of powers doctrine."[172]

This Court held in *Galloway* "that the Legislature can impose *no duties* on the judiciary but such as are of a judicial character."[173] Requiring the EJDC to comply with obligations mandated of law enforcement would clearly mean the legislature was imposing non–judicial duties on the court system. As simply put in *Galloway*: "non–judicial functions cannot be imposed upon courts and judges unless expressly stated in the Constitution."[174]

The general principles delineated in *Galloway* have been specifically applied in a similar context to the instant case in *City of Sparks v. Sparks Municipal Court*.[175] There, this Court noted the court's constitutional and "inherent authority to manage its own affairs [and] the legislative and executive branches are strictly prohibited from

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[171] *Galloway*, 83 Nev. at 19.

[172] *Commission on Ethics v. Hardy*, 125 Nev. 285, 288, 299, 212 P.3d 1098 (2009).

[173] *Id*. at 24 (emphasis added).

[174] *Galloway*, 83 Nev. at 27 (also noting that this principle applies even when the Constitution is considered a living, flexible thing).

[175] 129 Nev. ___, 302 P.3d 1118 (Adv. Op. 38, May 30, 2013).

infringing on the court's . . . day–to–day functioning or regular management of its internal affairs."[176] This authority includes the power of courts "to exercise control over [its] employees . . . to ensure that . . . the tasks are performed in a satisfactory manner, and *proper sanctions* and rewards are available when necessary."[177]

Based on these factors, this Court explicitly held that "the City [was prohibited] from interfering with the Municipal Court's management of its [marshals], *enforcing or entering into collective bargaining agreements on behalf of Municipal Court employees"* or applying certain provisions of the municipal charter to the "Municipal Court and its employees."[178]

It is anticipated Knickmeyer will argue the MOU, which was voluntarily entered into by the EJDC, takes this issue outside of the realm of constitutional concern. However, the EJDC is not suggesting that the MOU does not apply.

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[176] *City of Sparks*, 302 P.3d at 1129 (citing *Goldberg v. Eighth Judicial Dist. Court*, 93 Nev. 614, 616, 572 P.2d 521 (1977)).

[177] *Id.* at 1129 (citing *Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 770, 32 P.3d 1263, 1273 (2001)) (emphasis added).

[178] *Id.* at 1134.

Rather, the EJDC concedes that it "recognize[d] and agree[d] that all deputy marshals will be afforded their rights as provided in NRS Chapter 289."[179] Those rights were provided to Knickmeyer. Thus, as the MOU provided, Knickmeyer was provided a Step 1 Hearing, a Step 2 Hearing, and an Arbitration Hearing.[180] Tellingly, while the MOU references the progressive discipline process, the Clark County Deputy Marshals Association (CCDMA) also explicitly recognized "the need for more severe initial disciplinary action in the event of a major violation of established rules, regulations or policies of the Courts."[181]

What the MOU does not — and cannot — do is expand the rights further than contemplated under the plain reading of Chapter 289 or in a manner that would violate the Constitution. In other words, nothing in the MOU requires or permits the EJDC to be considered a law enforcement agency.[182]

In sum, the EJDC complied with the MOU by providing Knickmeyer with rights associated with the disciplinary process as

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[179] 1 AA 60 (6, ¶ 1).

[180] *Id.* at 63–65.

[181] 1 AA 61 (7, ¶ 3).

[182] *See City of Sparks*, 302 P.3d at 1134; *Hardy*, 125 Nev. at 299—300.

contemplated by Chapter 289. However, the rights provided to Knickmeyer do not include redefining the EJDC as a law enforcement agency as such an interpretation would violate the Constitution.[183]

4. CONSTITUTIONAL DUE PROCESS WAS PROVIDED

Knickmeyer next argues the United States Court of Appeals for the Ninth Circuit case of *Beckwith v. Clark County*[184] makes it clear he is entitled to certain due process protections.[185] However, this general proposition is of no assistance to Knickmeyer.

In *Beckwith*, a twenty-one (21) year employee of the EJDC resigned his position as bailiff after the judge to which he was assigned lost reelection.[186] Beckwith was then appointed by another judge to be his personal bailiff in the Justice Court.[187] That position was permanent and afforded "civil service protection."[188] After that judge was elected to the EJDC, Beckwith transferred to the EJDC "in the

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[183] As noted above, this Court currently has before it an Amicus Brief regarding the separation of powers doctrine as it relates to court employees. *See Clark Co. Dep. Marshals Assoc. v. Clark Co. et al.*, No. 68660.

[184] 827 F.2d 595 (9th Cir. 1987).

[185] Opening Brief, p. 22.

[186] *Beckwith*, 827 F.2d at 596.

[187] *Id.*

[188] *Id.*

position of personal bailiff" to the same judge.[189] Following the judge's resignation, the EJDC required Beckwith to resign.[190] He refused.[191] The EJDC then terminated his employment.[192]

Beckwith brought a civil rights claim against the EJDC arguing "his termination was 'without warning or cause' and violated his statutory rights and his right to due process under the United States Constitution."[193] In agreeing with Beckwith, the Ninth Circuit stated that "a government employee is entitled to due process when the employee has a property interest in a benefit, such as continued employment."[194]

The Ninth Circuit noted there was no question Beckwith "had a property interest in his [Justice Court] job . . . because that job was a permanent civil service position."[195] But the court concluded there was

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[189] *Beckwith*, 827 F.2d at 596.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.* at 596–597 (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972)).

[195] *Id.* at 597 (citing *Dorr v. County of Butte*, 795 F.2d 875, 876 (9th Cir. 1986)).

a question as to whether Beckwith's due process rights were violated by the failure of anyone informing him that the EJDC job was at will, not a job with civil service protections.[196] The court also noted that because Beckwith's job at the Justice Court was a civil service position, "he was entitled to due process before he could be divested of that property right."[197]

Due process required "notice and an opportunity to decide whether to give up the relevant right." This Court has similarly held that when due process attaches to a disciplinary proceeding, it requires both "notice and an opportunity to be heard."[198]

The EJDC does not disagree with this general principle set forth in *Beckwith*. Nonetheless, this general principle provides no assistance to Knickmeyer as he was provided both notice and an opportunity to be heard.

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[196] *Beckwith*, *supra* at 596–597.

[197] *Id.*

[198] *Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. ___, 319 P.3d 1078, 1082 (Adv. Op. 11, Feb. 27, 2014); *see also Watson v. Housing Authority of City of North Las Vegas*, 97 Nev. 240, 242, 627 P.2d 405 (1981) (due process provides "notice of the proposed action" and "the right to respond, either orally or in writing., to the authority initially imposing discipline").

To this end, it is undisputed Knickmeyer was provided with notice of the allegations against him stemming from the events of January 2013. It is also undisputed he was provided two opportunities to challenge the termination decision administratively and provided with an opportunity to have the termination decision reviewed by a neutral arbitrator. The notice and three hearings not only comply with *Beckwith*, but also comply with the requirements of the MOU.

Accordingly, even assuming *Beckwith* applies in this context, it is clear Knickmeyer was afforded all due process to which he was entitled under the federal constitution. Indeed, it was those very due process concerns the arbitrator relied on when he refused to consider Knickmeyer's 1997 and 2003 suspensions.

B. THE ARBITRATOR DID NOT EXCEED HIS AUTHORITY UNDER NEVADA LAW OR ARTICLE 13

Knickmeyer next argues the District Court erred when it concluded the arbitrator did not exceed his authority. The EJDC disagrees.

This Court has explicitly held there is a presumption that arbitrators act within the scope of their authority.[199] To overcome this

[199] *Beckwith*, 827 F.2d at 597.

presumption, Knickmeyer must provide clear and convincing evidence to the contrary.[200] If the burden is not met, courts are required to "assume [] the arbitrator acted within the scope of his or her authority."[201]

Arbitrators only exceed their authority "when they address issues or make awards outside the scope of the governing contract."[202] This issue goes to whether the arbitrator had authority to decide a particular issue under the governing agreement.[203] Whether the issue was correctly decided is not a consideration.[204] This Court will conclude the arbitrator exceeded his or her authority only "in very unusual circumstances."[205] An erroneous determination by the arbitrator does not reach the level of an "unusual circumstance" so long as the arbitrator's decision is "rationally grounded in the agreement."[206]

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[200] *Beckwith*, 827 F.2d at 597.

[201] *Id.*

[202] *Health Plan of Nevada*, 120 Nev. at 697.

[203] *Id.* at 698.

[204] *Id.*

[205] *Id.*

[206] *Id.*

Here, a review of the applicable MOU language makes it clear the arbitrator acted within the scope of his authority. Indeed, Knickmeyer specifically stipulated to the fact that the issue before the arbitrator was whether his termination was based on just cause.[207]

The MOU explicitly provided for just cause being necessary for either demotions or terminations.[208] The MOU also notes "insubordination" and "violation[s] of established departmental work rules or procedures," among other actions, are considered just cause.[209]

In deciding whether termination (or demotion) was based on just cause, the MOU required the arbitrator to "consider the incident and the discipline in terms of severity of the action, evidence of progressive discipline and appropriateness of the disciplinary action."[210] The arbitrator also referenced the Manual's Code of Conduct where it was acknowledged "that there might be 'major violations' . . . warrant[ing] more 'severe initial discipline.'"[211]

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[207] 1 AA 46.

[208] 1 AA 61 (7, ¶ 5).

[209] *Id.*

[210] 1 AA 61 (7, ¶ 3).

[211] 1 AA 56; *see also id.* at 52 (citing various sections of the Manual).

Based on the explicit terms of the MOU, as well as the implicit terms incorporated by reference within the MOU, Arbitrator MacLean determined Knickmeyer's unprofessional harassing and retaliatory behavior exhibited toward a member of the bar and public on January 8, 2013 established just cause.

Knickmeyer is wrong as a matter of law when he claims it was improper for Arbitrator MacLean to rely on legal authorities not referenced in Article 13.[212]

To this end, the MOU incorporates by reference the Manual. In addition, it was appropriate for Arbitrator MacLean to consider how other arbitrators ruled in similar contexts, as those decisions provided explanations relevant to the issue of whether progressive discipline should have been awarded as opposed to termination.

Arbitrators regularly rely on authorities outside the four corners of the arbitration agreement in order to assist in reaching their decision. This is no different than attorneys and judges relying on previous precedent in order to support their arguments. Nothing in

[212] *See* Opening Brief, pp. 29–31.

Article 13 or elsewhere within the MOU precluded Arbitrator MacLean from engaging in this routine practice.

Further, even assuming it was error for Arbitrator MacLean to rely on extrinsic authorities to assist him in rendering his decision, any error would merely be a misinterpretation of the agreement leading to a reasonable error on the part of the arbitrator. It does not reach the level of an "unusual circumstance" warranting either the District Court or this Court to conclude the arbitrator exceeded the scope of his authority.[213]

Accordingly, Knickmeyer cannot establish clear and convincing evidence that Arbitrator MacLean exceeded his authority. Rather, Arbitrator MacLean concluded precisely what the parties and the MOU requested that he decide: whether the decision to terminate Knickmeyer was based on just cause. Thus, Knickmeyer has failed to show any error requiring reversal in this regard.

C. THE ARBITRATOR DID NOT MANIFESTLY DISREGARD THE LAW

Just as the arbitrator did not exceed the scope of his authority, he also did not manifestly disregard the law.

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[213] *Health Plan of Nevada*, 120 Nev. at 697–698.

In order to vacate an arbitration decision "based on a manifest disregard of the law" challenge, Knickmeyer is required to "show that 'the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law.'"[214] A misapplication of the law does not rise to this level.[215] In fact, recognizing the law but misapplying it undermines any argument that the law was disregarded.[216]

Rather, to be successful under this extremely limited challenge, Knickmeyer must establish "a conscious disregard of [the] applicable law"[217] by Arbitrator MacLean. This simply cannot be shown.

Here, the Arbitration Decision references the MOU and the Manual governing Knickmeyer's employment duties. It also discusses legal precedent regarding when progressive discipline should and should not be used. The Arbitration Decision also addressed the previous hearings relating to Knickmeyer's termination and specifically

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[214] *Bohlmann*, 120 Nev. at 547.

[215] *Id.*

[216] *Id.*

[217] *Summa Emergency Associates, Inc. v. Emergency Physicians Ins. Co.*, No. 67124, 2016 WL 1619340, * 2 (Nev. April 21, 2016) (citing *Health Plan of Nevada*, 120 Nev. at 699); *see also Sylver v. Regents Bank, N.A.*, 129 Nev. ___, 300 P.3d 718, 722–723 (Adv. Op. 30, May 2, 2013).

referenced factual allegations and findings during the administrative review process at all three levels.[218]

As the District Court stated on the record:

> There's no finding that [the arbitrator] manifestly disregarded the law. He didn't. Or that he consciously ignored the law. [Arbitrator] MacLean didn't do that. He talked about the MOU. He talked about the requirements. And the fact that he was talking about, in general, labor law, well, that's exactly what the MOU contemplates. It talks about you're supposed to apply labor law.[219]

Accordingly, the record establishes the arbitrator's recognition of the appropriate law, the arbitrator's analysis of the facts to the governing policies, procedures and law, and concludes just cause was present. Under such circumstances, these actions cannot constitute manifest disregard of the law.[220]

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[218] *See* 1 AA 45–58.

[219] 4 AA 403 (44:12–17); *see also* 4 AA 420 (11:2–12).

[220] *See Clark County Educ. Ass'n.*, 122 Nev. at 342.

D. THE ARBITRATION DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Finally, Knickmeyer asserts Arbitrator MacLean failed to "make findings of reasonableness regarding the propriety of the discipline imposed."[221] The EJDC again disagrees.

As noted above, the MOU required the arbitrator to find just cause for the termination. The Arbitration Decision is fourteen (14) pages long.[222] The analysis portion is five (5) pages long.[223]d

Arbitrator MacLean addressed at length the credibility of Knickmeyer, DM Ellis, and Litt.[224] He then addressed why, based on the factual findings, termination as opposed to progressive discipline was appropriate.[225]

The District Court explicitly stated there was "substantial evidence in the record" to support the arbitrator's findings. Specifically,

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[221] Opening Brief, p. 31; *see also id.* at 32–35.

[222] 1 AA 45–58.

[223] *Id.* at 53–58.

[224] *Id.* at 53–55.

[225] *Id.* at 55–57.

the District Court reiterated Knickmeyer's "vendetta against an attorney for having complained about [his] conduct."[226]

Based on these and other findings, the District Court concluded the Arbitration Decision was not "arbitrary and capricious," but rather made in accordance both the MOU and Uniform Arbitration Act as codified in Chapter 38 of the NRS.[227] The District Court likewise concluded the Arbitration Decision complied with common law.[228]

Indeed, not only was the Arbitration Decision not arbitrary or capricious; it was based on substantial evidence. To be sure, Arbitrator MacLean, based on his credibility determination of the witnesses, determined that six of the seven allegations against Knickmeyer were established by a preponderance of the evidence.[229] He also concluded, without taking into account the 1997 and 2003 discipline, that Knickmeyer's treatment of Litt was sufficient in itself to justify termination.[230]

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[226] 4 AA 401 (42:6–7).

[227] 4 AA 401 (42:14–16).

[228] 4 AA 416–418.

[229] 4 AA 418–419 (9:24–10:14); 1 AA 53.

[230] 1 AA 53–58; *see also* 4 AA 418–419.

Thus, while the Arbitration Decision does not contain the word "reasonable," it is clear that just cause existed for Knickmeyer's termination. The Arbitration Decision was not arbitrary, capricious or unsupported by the record. Thus, it cannot be considered "completely irrational."

Accordingly, there is no statutory ground to reverse the District Court's denial of the Amended Petition.[231]

VIII. CONCLUSION

It is undisputed that Knickmeyer used profanity and foul language while in public, on duty, and in uniform. It is also undisputed that Knickmeyer used the power of his position as a deputy marshal to harass, embarrass, and retaliate against a member of the public and bar.

It is also undisputed that two different administrative officers and an independent arbitrator concluded that based on Knickmeyer's actions toward the attorney alone, termination as opposed to progressive discipline, was warranted.

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[231] *Wichinsky v. Mosa*, 109 Nev. 84, 90, 847 P.2d 727 (1993) (internal citations omitted); *Clark County Educ. Ass'n.*, 122 Nev. at 344 (because the seventeen (17) page arbitration decision "specifically recount[ed] the factual underpinning of the award . . . we conclude that the arbitrator's decision is supported by substantial evidence and therefore is not arbitrary and capricious").

Knickmeyer was provided all due process he was afforded under Article 13 of the MOU. He was given notice of the charges and an opportunity to contest the termination in three separate hearings.

The record clearly establishes that the arbitrator did not exceed his authority under the MOU or the Uniform Arbitration Act. The record also confirms that the arbitrator did not reach his findings and conclusions in manifest disregard to the law. Finally, the arbitrator's decision was based on substantial evidence and therefore was neither arbitrary nor capricious.

Consequently, Knickmeyer has no statutory or common law grounds to have the Arbitration Decision set aside. The District Court was correct in denying the Amended Petition. This Court should affirm the District Court's denial.

Respectfully submitted this 16th day of March, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25(5)(c), I hereby certify that, on the 16th day of March, 2017, I electronically served the foregoing **RESPONDENTS' ANSWERING BRIEF** by electronic means to all parties who are registered users of the court's electronic filing system as follows:

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Dated this 16th day of March, 2017.

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