

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS KNICKMEYER,
Appellant,
vs.
THE STATE OF NEVADA, ex. rel.
EIGHTH JUDICIAL DISTRICT COURT,
Respondent.

No. 71372

FILED

DEC 18 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Silver C.J.
Silver

Tao J.
Tao

Gibbons J.
Gibbons

cc: Hon. Rob Bare, District Judge
Kirk T. Kennedy
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk

IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

THOMAS KNICKMEYER,)

No. 71372

Appellant,)

vs.)

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

Respondent.

APPELLANT'S PETITION FOR REHEARING

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Attorney for Respondent

Exh. 2

COMES NOW, the Appellant, THOMAS KNICKMEYER, by and through his undersigned counsel, KIRK T. KENNEDY, ESQ., who files this petition for rehearing of the Court's Decision filed on November 16, 2017, in this appeal, pursuant to NRAP 40.

NRAP Rule 40(c) provides that rehearing is appropriate under these circumstances:

1. When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
2. When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision controlling a dispositive issue in the case.

The Court of Appeals decision filed on November 16, 2017, relies principally upon the proposition that the protections afforded peace officers under NRS 289 et seq. do not apply, in full, to district court administrative marshals. See Knickmeyer v. State of Nevada, 133 Nev. Adv. Op. 84 (November 16, 2017), attached.

The Court of Appeals stated that the protections under NRS 289 that Knickmeyer advanced on his appeal, only apply to those peace officers employed by a law enforcement agency. *Id.* The Court found that the Eighth Judicial District Court cannot be construed as a law enforcement agency, as it is not

defined as such by the Nevada Legislature or any other authority. Id. The Court stated that the NRS 289 “provisions can apply to Knickmeyer only if his employer, the EJDC, can be considered a “law enforcement agency” within the meaning of NRS Chapter 289.” Id., at 8.

In reaching the conclusion that the EJDC is not a law enforcement agency, the Decision notes that there is no definition of a law enforcement agency in NRS 289. Id., pg. 9. The Court looked to other Nevada statutes, i.e. NRS 179D.050 and NRS 62A.200, which indicate that a law enforcement agency is a sheriff’s office or a police department. Id.

The Court’s Decision overlooked and misapplied existing law when it found that “the plain text of the relevant statutes makes clear that the term “law enforcement agency” does not encompass a judicial court such as the EJDC.” Id., pg. 10.

The term “peace officer” is defined in NRS 289.010(3), which states that a peace officer “means any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to NRS.360, inclusive.”

Under NRS 289.150(4), the Nevada Legislature determined that “bailiffs and deputy marshals of the district courts, justice courts and municipal courts whose duties require them to carry weapons and make arrests” are granted

the powers of a peace officer. Thus, given the statutory inclusion of deputy marshals appointed by the courts in the definition of peace officers, there is no limitation carved out for deputy marshals to have less statutory rights than those peace officers employed with a police department. All of the due process rights allowed by NRS 289 apply, without limitation, to deputy marshals. The Legislature has stated nothing to the contrary in the existing Chapter NRS 289.

The mere fact that the Legislature used the term “law enforcement agency” in certain statutes within NRS 289 does not limit the applicability of the enumerated rights and protections for deputy marshals. The deputy marshals are entitled to no lesser protections than police officers under NRS 289, as the Legislature provided no indication to the contrary on that point.

Regarding the only factually relevant, legal definition of an “agency” in Nevada, under NAC 289.015, the Legislature dictated that an “Agency means an agency of the State or of a local government which employs one or more persons as peace officers.”

Under NRS 3.310(10), the district court is required to have deputy marshals who are certified as peace officers under the Peace Officers Standards and Training Commission (POST).

Thus, pursuant to existing law, the EJDC is required to have deputy

marshals who hold POST certification as peace officers. As peace officers, the deputy marshals are authorized to carry weapons and make arrests. Also, as peace officers, the deputy marshals are entitled to the full range of protections, without limitation, provided by NRS 289, as the Legislature has not indicated otherwise.

The Court of Appeals Decision creates an unsupported limitation on the statutory rights of the deputy marshals afforded by NRS 289. Under NAC 289.015, the Nevada Legislature mandated that the POST requirements for peace officers apply to any agency of the State that employs one or more persons as police officers. This POST requirement includes the EJDC, which is statutorily mandated by NRS 3.310 to employ POST certified deputy marshals as peace officers.

There is no exception found in any provision of NRS 289, which indicates that the deputy marshals, who are peace officers required to have POST certifications, are not entitled to the due process protections afforded by NRS 289.040, 289.057, 289.060 or 289.080. To the contrary, the Nevada Legislature has indicated in NRS 289.150, that the term peace officer is broadly construed to include not only sheriffs, police officers or corrections officers, but also court bailiffs and deputy marshals. Under this statutory construction, there is no discernable difference between a police officer and a court deputy marshal. Both

carry weapons, both are subject to POST certification requirements and both have the power to conduct arrests to enforce Nevada law.

The Court of Appeals stated that the EJDC does not investigate or prosecute crimes as part of its judicial functions. *Id.*, pg. 11. This statement overlooks the fact that courtroom deputy marshals actively enforce the law in the courthouse setting. Deputy marshals investigate crimes involving threats to judges, as well as crimes which occur when someone brings an unlawful weapon inside the courthouse or illegal drugs through the security entrance area. The deputy marshals do enforce the law and make arrests, no different than a typical Metro officer, as their POST certified training and statutory authorization as peace officers mandates this power.

The EJDC engages in law enforcement functions through the actions and conduct of its POST certified, statutorily recognized peace officers, i.e. deputy marshals. The protections afforded by NRS 289 apply, without limitation, to all court deputy marshals, such as Knickmeyer. The Court of Appeals Decision overlooked the foregoing Nevada authority, when it found that certain sections of NRS 289 do not apply to the district court's employment of deputy marshals. This selective reading of NRS 289 is unsupported in that Chapter and contrary to the stated Legislative intent to provide designated, due process protections for all

peace officers, including Deputy Marshal Knickmeyer.

Additionally, the Court's selective reading of NRS 289 also overlooks and ignores the applicable collective bargaining agreement between the EJDC and the marshals which was in effect at the time of Knickmeyer's termination proceedings.

As stated in the Appellant's Opening Brief, 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. Appellant's App., Vol. 1, 60, Exhibit 7, Article 13.

In very clear and unequivocal terms, the collective bargaining agreement's Article 13 acknowledged that all deputy marshals are afforded those rights set forth in NRS 289 et seq. This statement in the CBA provided no qualification nor any limitation on the applicability of the entirety of NRS 289 to the deputy marshals.

Thus, neither NRS Chapter 289, nor the underlying applicable CBA, provided any proscription or limitation on which sections of NRS 289 applied to the deputy marshals. The fact remains that no such limitations exist. The Nevada Legislature specifically provided that deputy marshals are entitled to NRS 289 protections and this intention is clear from the plain text of the statutes.

For all the foregoing reasons, the Appellant moves that this petition for rehearing be granted and the filed Opinion set aside for further proceedings.

Dated this 4th day of December, 2017.

A handwritten signature in black ink, appearing to read 'Kirk T. Kennedy', is written over a horizontal line.

KIRK T. KENNEDY, ESQ.

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Attorney for Appellant

CERTIFICATE OF COMPLIANCE

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

1. I certify that the petition for rehearing complies with the formatting requirements of Rule 32(a)(4); the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

It has been prepared in a proportionately spaced typeface using Wordperfect X6 in 14 point font size under Time News Roman type style;

2. It further certify that this brief complies with the page or type volume limitations of NRAP 40 because it is proportionately spaced, has a typeface of 14 points and contains 1,622 words in the countable sections of the petition and is less than 10 pages in overall length.

Dated this 4th day of December, 2017.



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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby affirm that on this 4th day of December, 2017, I mailed via first class U.S. Mail a copy of the foregoing petition to the Respondent at the address below:

D. Randall Gilmer
Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701



Law Office of Kirk T. Kennedy

THOMAS KNICKMEYER, Appellant,
v.
THE STATE OF NEVADA, ex. rel.
EIGHTH JUDICIAL DISTRICT COURT,
Respondent.

133 Nev., Advance Opinion 84
No. 71372

COURT OF APPEALS OF THE STATE
OF NEVADA

November 16, 2017

Appeal from a district court order denying a petition to set aside an arbitration order. Eighth Judicial District Court, Clark County; Nancy Becker, Senior Judge.

Affirmed.

Kirk T. Kennedy, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Clark G. Leslie, Chief Deputy Attorney General, Carson City; D. Randall Gilmer, Senior Deputy District Attorney, Las Vegas, for Respondent.

BEFORE TAO and GIBBONS, JJ.

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OPINION

By the Court, TAO, J.:

The principal legal question addressed in this appeal is whether certain provisions of NRS Chapter 289 (namely, NRS 289.040, 289.057 and 289.060), intended to provide job-related protections to peace officers employed by law enforcement agencies, apply to bailiffs and marshals employed by the Eighth Judicial District Court. We conclude that judicial marshals are "peace officers" within the meaning of those statutes, but the Eighth Judicial District Court is not a "law enforcement agency" as statutorily defined. Accordingly, the provisions at issue do not apply to Knickmeyer, and we affirm the

district court's denial of his petition to set aside the arbitration award in this case.

FACTUAL AND PROCEDURAL HISTORY

The Eighth Judicial District Court (EJDC) employed Thomas Knickmeyer first as a bailiff, and then later as an administrative marshal. Knickmeyer's employment was governed by the terms of a written Memorandum of Understanding (MOU) between the Clark County Marshal's Union and the EJDC which stipulated that adverse employment actions, including possible termination, were to be resolved through a series of administrative proceedings, eventually culminating in a binding arbitration hearing if necessary.

The EJDC sought to terminate Knickmeyer's employment after co-workers reported several incidents of insubordination, vulgar language, and unprofessional behavior. The allegations included reports that Knickmeyer used foul language in the presence of a co-worker, publicly referred to an attorney who had complained about him as a "bitch," and retaliated against her by ordering that her purse be searched

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and re-scanned even after being told it contained no suspicious items. He also openly used an obscenity to refer to a superior officer. In seeking termination, the EJDC noted that Knickmeyer had previously been subject to lesser disciplinary actions in 1997, 2003, and 2013.

During the various administrative proceedings below, every hearing officer agreed that termination was appropriate and warranted. Knickmeyer appealed each step as outlined in the MOU, ultimately seeking arbitration. The arbitrator upheld the EJDC's decision to terminate Knickmeyer, finding that a preponderance of the evidence demonstrated that Knickmeyer committed



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the infractions in question and that termination was an appropriate response. The arbitrator's decision specifically noted that his conclusion was based only upon the immediate incidents at stake and not upon the previous complaints from 1997, 2003, or 2013.

Knickmeyer petitioned the district court to set aside the arbitrator's decision, arguing that the EJDC violated his statutory rights under NRS Chapter 289 by improperly disclosing and relying upon his prior disciplinary history as justification for termination in this case. The district court denied the petition, and Knickmeyer appeals, repeating the same arguments made to the district court.

ANALYSIS

This court reviews a district court decision to confirm an arbitration award de novo. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). But the scope of the district court's review of an arbitration award (and, consequently, our own de novo review of the district court's decision) is extremely limited, and is "nothing like the scope of an appellate court's review of a trial court's decision." *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 695, 100 P.3d 172,

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176 (2004). "A reviewing court should not concern itself with the 'correctness' of an arbitration award and thus does not review the merits of the dispute." *Bohlmann v. Printz*, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004) (quoting *Thompson v. Tega-Rand Int'l.*, 740 F.2d 762, 763 (9th Cir. 1984)), overruled on other grounds by *Bass-Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006).

Rather, when a contractual agreement mandates that disputes be resolved through

binding arbitration, courts give considerable deference to the arbitrator's decision. Judicial review is limited to inquiring only whether a petitioner has proven, clearly and convincingly, that one of the following is true: the arbitrator's actions were arbitrary, capricious, or unsupported by the agreement; the arbitrator manifestly disregarded the law; or one of the specific statutory grounds set forth in NRS 38.241(1) was met. *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006); *Health Plan of Nev.*, 120 Nev. at 695, 100 P.3d at 176.

In this appeal, Knickmeyer asserts that the EJDC violated his due process rights by failing to comply with certain provisions of NRS Chapter 289 relating to discovery. He also contends that the arbitrator manifestly disregarded relevant law and exceeded his authority by determining that Knickmeyer's conduct violated standards not articulated within the MOU and by failing to make required findings of reasonableness.

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NRS Chapter 289

Knickmeyer first argues that his statutory rights under NRS Chapter 289 were violated because he was not provided with discovery relating to three prior disciplinary incidents (from 1997, 2003, and 2013) that were used against him during the arbitration, in violation of the requirements of NRS 289.040, NRS 289.057, and NRS 289.060.

As an initial observation, however, Knickmeyer waived this objection by failing to ever request any such discovery below or object to any failure to receive it to the arbitrator. See *Carrigan v. Comm'n on Ethics*, 129 Nev. 894, 905 n.6, 313 P.3d 880, 887 n.6 (2013) ("Arguments

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not raised before the appropriate administrative tribunal and in the district court normally cannot be raised for the first time on appeal."). Moreover, the arbitrator expressly stated that he was not relying upon the prior incidents in reaching his decision and that the instant incident alone provided sufficient grounds for termination. Consequently, any discovery relating to those incidents is entirely irrelevant to the case at hand. See NRCP 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); see also *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) ("[W]hat is clear from our caselaw is that prejudice must be established in order to reverse a district court judgment; it is not presumed and is established by providing record evidence showing that, but for the error, a different result might have been reached.").

To overcome these defects, Knickmeyer argues on appeal that, under NRS Chapter 289, all discovery relating to prior disciplinary actions must automatically be provided whether any party individually requests it or not, and whether or not the arbitrator ultimately ended up relying upon it in his final decision. Knickmeyer's argument hinges on two contentions: first, that the statutes in question apply to him as a judicial marshal employed by the EJDC and, second, if they do apply, that they were violated by the EJDC in this case despite his never having requested discovery or objected to its absence. Both contentions must be true for Knickmeyer to win this appeal; if either fails, then we must decide the issue against him.

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NRS Chapter 289 grants certain procedural protections to "peace officers" whenever adverse employment actions are initiated against them by their employers. See NRS 289.010(3). See generally *Bisch v. Las*

Vegas Metro. Police Dep't, 129 Nev. 328, 336-37, 302 P.3d 1108, 1114 (2013). Judicial marshals are specifically identified as peace officers in NRS 289.150(4). Knickmeyer thus argues that all of the protections of NRS Chapter 289 must apply to him. Knickmeyer is partially correct in that judicial marshals are "peace officers" covered by the statute and therefore certain sections of NRS Chapter 289 indisputably apply to judicial marshals such as him.

This, however, doesn't quite resolve the question at hand. Peace officer or not, portions of Chapter 289 apply only to petitioners who are employed by a "law enforcement agency." See, e.g., NRS 289.020(1) ("A law enforcement agency shall not use punitive action . . ."); NRS 289.025 ("the home address of a peace officer and any photograph in the possession of a law enforcement agency are not public information"). Other portions of this chapter do not contain this limitation. See, e.g., NRS 289.810(1) ("A peace officer shall not use a choke hold on any other person"); NRS 289.820(1) ("A peace officer shall not engage in racial profiling"). We must presume that the inclusion or omission of these words from different parts of the statute was purposeful. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[A] material variation in terms suggests a variation in meaning."). Consequently, the plainest and most obvious meaning of Chapter 289 is that many portions of it apply broadly to any peace officer employed by any entity, but other portions apply in a more limited way only to peace officers employed by a "law enforcement agency."

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The statutes that Knickmeyer alleges that the EJDC violated in this case are NRS 289.040, NRS 289.057, and NRS 289.060," which set forth procedures that must be employed before a peace officer can be

subjected to adverse employment action. NRS 289.040 prohibits law enforcement agencies from inserting unfavorable comments into the peace officer's administrative file unless certain requirements are met. NRS 289.057 governs how a law enforcement agency may investigate allegations of misconduct and initiate discipline, including discovery procedures. NRS 289.057(3)(a) permits the peace officer to review any recordings, notes, and interview transcripts pertaining to the investigation after the investigation has concluded. NRS 289.060 describes how law enforcement agencies may conduct disciplinary hearings.

But all of these statutes expressly apply only when a "law enforcement agency" seeks to impose discipline against one of its peace officers. Thus, these provisions can apply to Knickmeyer only if his employer, the EJDC, can be considered a "law enforcement agency" within the meaning of NRS Chapter 289. This presents a question of statutory interpretation.

We review questions of statutory meaning de novo. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). In interpreting a statute, we begin with its plain meaning and consider the statute as a whole, awarding meaning to each word, phrase, and provision, while striving to avoid interpretations that render any words superfluous or meaningless. *Haney v. State*, 124 Nev. 408, 411-12, 185 P.3d 350, 353

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(2008). If the Legislature has independently defined any word or phrase contained within a statute, we must apply that definition wherever the Legislature intended it to apply because "[a] statute's express definition of a term controls the construction of that term no matter where the term appears in the statute." *Williams v. Clark Cty. Dist. Attorney*, 118 Nev. 473, 485, 50 P.3d 536, 544 (2002); 1A Norman J. Singer & J.D. Shambie

Singer, Statutes and Statutory Construction § 20:8 (7th ed. 2009). The words of a statute must be given their plainest and most ordinary meaning unless the Legislature clearly used them differently, or the words are used in an ambiguous way. See *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) ("We must attribute the plain meaning to a statute that is not ambiguous." (citing *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004)); see also Scalia & Garner, *supra*, at 56 ("The words of a governing text are of paramount concern . . .").

NRS Chapter 289 does not contain its own definition of "law enforcement agency." However, NRS 179D.050 and NRS 62A.200 both define the phrase "local law enforcement agency" as referring to a sheriff's office or police department. Furthermore, the word "agency" is typically used by the Nevada Supreme Court and in administrative regulations to refer to subdivisions of the executive branch, not divisions of the judiciary. Cf. NAC 239.690; *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. ___, ___ n.4, 343 P.3d 608, 613 n.4 (2015). "We presume that the Legislature enact[s a] statute with full knowledge of existing statutes relating to the same subject." *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010) (internal quotation marks omitted). Thus, the plain text of the relevant statutes makes clear that the term "law enforcement agency" does not encompass a

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judicial court such as the EJDC. We ought to conclude that the Legislature said what it meant and meant what it said, and we could end our inquiry there.

But there's more. Knickmeyer's argument betrays a fundamental misunderstanding of the respective roles of the three branches of Nevada government. To conclude that the

EJDC is a "law enforcement agency" is to conflate the roles of the judicial and executive branches and to presume that the Legislature used words in a most unnatural way. See Nev. Const. art III, § 1 ("The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.").

Under our state constitution, the Legislature writes the laws. See Nev. Const. art. 4, § 1; *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). The Judiciary hears justiciable controversies and issues judgments and decrees in individual cases. See Nev. Const. art 6, § 6; *Galloway*, 83 Nev. at 20, 422 P.2d at 242. And the Executive "enforces" the laws. *Galloway*, 83 Nev. at 20, 422 P.2d at 242 ("The executive power extends to the carrying out and enforcing the laws enacted by the Legislature."); see Nev. Const. art. 5, § 7 (the Governor "shall see that the laws are faithfully executed"); see also *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (prosecuting crimes is a "quintessentially executive function"). The separation of these powers between three independent branches of government with the power to

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check-and-balance each other is a central tenet of our constitutional structure and a fundamental bulwark of democratic freedom. See *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting) (citing *The Federalist* No. 47 (James Madison) (Random House 1941)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 640 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty"; "The purpose of the Constitution was not only to

grant power, but to keep it from getting out of hand."); cf. *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1027, 1103-04 (2009) (discussing differences between Nevada Constitution and U.S. Constitution). The powers of the EJDC are enumerated in Article 6, Section 6 of the Nevada Constitution, and Knickmeyer does not contend that the EJDC engages in investigating and prosecuting crimes as part of its constitutionally-assigned judicial functions.

Thus, the judiciary is not empowered to engage in "law enforcement" functions any more than the executive or legislative branches are empowered to engage in judicial functions. See generally John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993) ("Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches."). The phrase "law enforcement agency" as used in NRS Chapter 289 therefore cannot be naturally read to encompass the EJDC, and the statutes cited by Knickmeyer—NRS 289.040, NRS 289.057, and NRS 289.060, all of which apply only to "law enforcement agencies"—

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do not apply to the EJDC. See *Mangarella v. State*, 117 Nev. 130, 134-35, 17 P.3d 989, 992 (2001) (holding that Nevada courts must interpret statutes so that they do not conflict with the state or federal constitutions). The EJDC could not have violated statutes that do not apply to it, and consequently the EJDC committed no discovery violations that would entitle Knickmeyer to relief.

Whether the arbitrator exceeded his authority

Knickmeyer also argues that the arbitrator exceeded his authority by relying upon the Clark County Marshal's Division Policy and Procedure Manual, and upon

certain law review articles, as guidelines for acceptable conduct when the MOU makes no explicit reference to either.

When reviewing whether an arbitrator exceeded his powers, this court begins by presuming that arbitrators act within the scope of their authority. *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 697, 100 P.3d 172, 178 (2004). Arbitrators can exceed their authority when they act outside the scope of the governing contract, but this court will not vacate an arbitrator's award—even if erroneous—if the arbitrator's interpretation is rationally grounded in the agreement or there is "colorable justification" for construing and applying the contract the way the arbitrator did. *Id.* at 698, 100 P.3d at 178. Thus, the central question is "whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided." *Id.*

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The parties agree that the governing agreement here is the MOU. Knickmeyer argues that the MOU did not allow the arbitrator to consider the Clark County Marshal's Division Policy and Procedure Manual, or any other sources such as law review articles, because the MOU did not explicitly reference them. But the arbitrator could have rationally interpreted those sources to represent accurate summaries of the "established rules, regulations or policies of the Courts" that the MOU permits to be considered. *See id.* ("Arbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement."). Consequently, "[t]he arbitrator's total findings demonstrate that he was construing the contract, and the record supports more than a colorable justification for the outcome." *Id.* at 698-99, 100 P.3d at 179. Accordingly, Knickmeyer has not met his burden of demonstrating, by clear and convincing evidence, that the arbitrator exceeded his authority.

Whether the arbitrator disregarded the law

Knickmeyer's final argument is that the arbitrator consciously disregarded relevant law by failing to determine whether the termination was reasonable in light of less severe forms of discipline. A court may vacate an arbitration decision if the arbitrator manifestly disregarded relevant law. *Bohlmann v. Printz*, 120 Nev. 543, 545-47, 96 P.3d 1155, 1156-58 (2004), *overruled on other grounds by Bass-Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006). Relief is "extremely limited" and manifest disregard occurs only when an arbitrator

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"recognizes that the law absolutely requires a given result and nonetheless refuses to apply the law correctly." *Id.*

Here, Knickmeyer's argument is belied by the record. The arbitrator's decision contains numerous references to the available options of progressive discipline and explains quite clearly why Knickmeyer's conduct was "sufficiently egregious" to justify termination without first imposing less severe forms of discipline. Thus, Knickmeyer has not met his heavy burden of showing, by clear and convincing evidence, that the arbitrator consciously ignored applicable law in deciding that termination was appropriate.

CONCLUSION

For the foregoing reasons, Knickmeyer has failed to demonstrate that the arbitrator either exceeded his authority or manifestly disregarded the law, and we affirm the district court's denial of his petition to set aside the arbitration order.

/s/ _____
Tao

J.

I concur:



/s/ _____,
Gibbons

J.

NRS Chapter 289 and the MOU as due process problems without identifying or discussing any other independent procedural or substantive due process violation.

Footnotes:

¹ The Honorable Abbi Silver, Chief Judge, voluntarily recused herself from participation in the decision of this matter.

² Knickmeyer's brief also includes two other arguments that we need not separately address. He contends that the MOU itself imposed contractual discovery obligations above and beyond those set forth in NRS Chapter 289, but this argument is presented only cursorily and is less than cogent. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider claims that are not cogently argued or supported by relevant authority). Moreover, Knickmeyer did not raise this argument before the arbitrator, belatedly raising it for the first time only before the district court. See *State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) ("Because judicial review is limited to the administrative record, arguments made for the first time on judicial review are generally waived by the party raising them."). Consequently, the arbitrator did not make any factual findings relating to whether the EJDC breached the MOU. Without these factual findings, we are unable to address this issue—unlike his argument relating to the applicability of NRS Chapter 289, which presents a pure question of law that does not depend on facts outside of the appellate record. See *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877-78 n.9 (1999) (explaining that the court would resolve an issue of statutory interpretation not litigated below "in the interests of judicial economy"). Finally, Knickmeyer's brief also references an alleged constitutional due process violation, but he merely re-frames his arguments about the scope and application of

³ Knickmeyer also mentions NRS 289.080 in his brief as a statute that applies to him, but doesn't allege that 289.080 was violated.

⁴ A potentially interesting question exists relating to whether, by signing the MOU, the EJDC contractually agreed to assume some of the responsibilities outlined in those statutes even if they otherwise would not have applied. But as noted above in footnote 2, Knickmeyer did not argue this issue before the arbitrator, the arbitrator made no factual findings relating to it, and therefore we need not address it.

IN THE SUPREME COURT FOR THE STATE OF NEVADA

THOMAS KNICKMEYER,

Appellant,

vs.

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

Respondent.

No. 71372

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Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S PETITION FOR REVIEW BY THE SUPREME COURT

PURSUANT TO NRAP 40B

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COMES NOW, the Appellant, THOMAS KNICKMEYER, by and through his undersigned counsel, KIRK T. KENNEDY, ESQ., who files this petition for review of the Court of Appeal's Decision filed on November 16, 2017, pursuant to NRAP 40B. Exh. 1, Decision. The Appellant previously filed a petition for rehearing to the Court of Appeals, which was denied on December 18, 2017. Exh. 2, Petition for Rehearing; Exh. 3 Order Denying Rehearing.

Under NRAP Rule 40B(a)(1) and (2) this appeal sets forth issues of both first impression and general statewide importance which supports review by the Supreme Court of the Court of Appeals' Decision.

The Court of Appeals decision filed on November 16, 2017, relied principally upon the proposition that the protections afforded peace officers under NRS 289 et seq. do not apply, in full, to district court administrative marshals. Exh. 1, Knickmeyer v. State of Nevada, 133 Nev. Adv. Op. 84 (November 16, 2017).

The Court of Appeals stated that the protections under NRS 289 that Knickmeyer advanced on his appeal, only apply to those peace officers employed by a law enforcement agency. *Id.* The Court of Appeals found that the Eighth Judicial District Court cannot be construed as a law enforcement agency, as it is not defined as such by the Nevada Legislature or any other authority. *Id.* The

Court stated that the NRS 289 “provisions can apply to Knickmeyer only if his employer, the EJDC, can be considered a “law enforcement agency” within the meaning of NRS Chapter 289.” *Id.*, at 8.

In reaching the conclusion that the EJDC is not a law enforcement agency, the Decision stated that there is no definition of a law enforcement agency in NRS 289. *Id.*, pg. 9. The Court looked to other Nevada statutes, i.e. NRS 179D.050 and NRS 62A.200, which indicate that a law enforcement agency is a sheriff’s office or a police department. *Id.*

The Court of Appeals Decision overlooked and misapplied existing law when it found that “the plain text of the relevant statutes makes clear that the term “law enforcement agency” does not encompass a judicial court such as the EJDC.” *Id.*, pg. 10. This misinterpretation of existing law is a matter of statewide importance to all courts, law enforcement agencies and all those classified as peace officers.

The term “peace officer” is defined in NRS 289.010(3), which states that a peace officer “means any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to NRS.360, inclusive.”

Under NRS 289.150(4), the Nevada Legislature determined that “bailiffs and deputy marshals of the district courts, justice courts and municipal

courts whose duties require them to carry weapons and make arrests” are granted the powers of a peace officer. Thus, given the statutory inclusion of deputy marshals appointed by the courts in the definition of peace officers, there is no limitation carved out for deputy marshals to have less statutory rights than those peace officers employed with a police department. All of the due process rights allowed by NRS 289 apply, without limitation, to deputy marshals. The Legislature has stated nothing to the contrary in the existing Chapter NRS 289.

The mere fact that the Legislature used the term “law enforcement agency” in certain statutes within NRS 289 does not limit the applicability of the enumerated rights and protections for deputy marshals. The deputy marshals are entitled to no lesser protections than police officers under NRS 289, as the Legislature provided no indication to the contrary on that point.

Regarding the only factually relevant, legal definition of an “agency” in Nevada, under NAC 289.015, the Legislature dictated that an “Agency means an agency of the State or of a local government which employs one or more persons as peace officers.”

The term “agency” is defined at common law as “relation in which one person acts for or represents another by the latter’s authority, either in the relationship of principal and agent, master and servant, or employer or proprietor

and independent contractor.” Blacks Law Dictionary (5th ed.). Therefore, if the district court is in fact the employer of a deputy marshal, then it is a law enforcement agency.

Additionally, under NRS 3.310(10), the district court is required to have deputy marshals who are certified as Category I peace officers under the Peace Officers Standards and Training Commission (POST). A Category I peace officer is defined as a “peace officer who has *unrestricted* duties and who is not otherwise listed as a category II or category III peace officer under NRS 289.460 (emphasis added). The minimum training standards for Category I peace officers include “law and legal procedures” relating to all types of subjects reserved to the executive branch of law enforcement. See NAC 289.140(1). More significant to the Court of Appeals Decision, they are further required to be trained in “Patrol operations and investigations.” NAC 289.140(2).

Because Deputy Marshals are unrestricted in their law enforcement capabilities, they can and do conduct investigations and make arrests. They are responsible for enforcing the laws not only at the Regional Justice Center in Las Vegas, but also at other designated locations (under NRS 3.100(1), the board of county commissioners may establish one or more additional locations within the county for the district court to hold court).

Thus, pursuant to existing law, the EJDC is required to have deputy marshals who hold POST certification as peace officers. As peace officers, the deputy marshals are authorized to carry weapons and make arrests. Also, as peace officers, the deputy marshals are entitled to the full range of protections, without limitation, provided by NRS 289, as the Legislature has not indicated otherwise.

Furthermore, the Court of Appeals Decision creates an unsupported limitation on the statutory rights of the deputy marshals afforded by NRS 289. Under NAC 289.015, the Nevada Legislature mandated that the POST requirements for peace officers apply to any agency of the State that employs one or more persons as police officers. This POST requirement includes the EJDC, which is statutorily mandated by NRS 3.310 to employ POST certified deputy marshals as peace officers.

There is no exception found in any provision of NRS 289, which indicates that the deputy marshals, who are peace officers required to have POST certifications, are not entitled to the due process protections afforded by NRS 289.040, 289.057, 289.060 or 289.080. To the contrary, the Nevada Legislature has indicated in NRS 289.150, that the term peace officer is broadly construed to include not only sheriffs, police officers or corrections officers, but also court bailiffs and deputy marshals. Under this statutory construction, there is no

discernable difference between a police officer and a court deputy marshal. Both carry weapons, both are subject to POST certification requirements and both have the power to conduct arrests to enforce Nevada law.

The Court of Appeals Decision erroneously stated that the EJDC does not investigate or prosecute crimes as part of its judicial functions. *Id.*, pg. 11. This statement overlooks the fact that courtroom deputy marshals actively enforce the law in the courthouse setting. Deputy marshals investigate crimes involving threats to judges, as well as crimes which occur when someone brings an unlawful weapon inside the courthouse or illegal drugs through the security entrance area. The deputy marshals do enforce the law and make arrests, no different than a typical Metro officer, as their POST certified training and statutory authorization as peace officers mandates this power.

The EJDC engages in law enforcement functions through the actions and conduct of its POST certified, statutorily recognized peace officers, i.e. deputy marshals. The protections afforded by NRS 289 apply, without limitation, to all court deputy marshals, such as Knickmeyer. The Court of Appeals Decision overlooked and ignored the foregoing Nevada authority, when it found that certain sections of NRS 289 do not apply to the district court's employment of deputy marshals. This selective reading of NRS 289 is unsupported in that Chapter and

contrary to the stated Legislative intent to provide designated, due process protections for all peace officers, including Deputy Marshal Knickmeyer.

Additionally, the Court of Appeals selective interpretation of NRS 289 also overlooks and ignores the applicable collective bargaining agreement between the EJDC and the marshals which was in effect at the time of Knickmeyer's termination proceedings. As stated in the Appellant's Opening Brief, 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. Appellant's App., Vol. 1, 60, Exhibit 7, Article 13.

In very clear and unequivocal terms, the collective bargaining agreement's Article 13 acknowledged that all deputy marshals are afforded those rights set forth in NRS 289 et seq. This statement in the CBA provided no qualification nor any limitation on the applicability of the entirety of NRS 289 to the deputy marshals.

The Court of Appeals Decision further overlooked and ignored the fact that the statutory term "law enforcement agency" is not limited only to the Peace Officers Bill of Rights in NRS 289, but is central to the Legislature's intent that peace officers performing law enforcement in the State of Nevada be properly

qualified, trained and regulated through certification by POST. The Legislature created POST through NRS 289.500 and provided that the Governor shall make the appointment to the Commission “from recommendations submitted by Clark County, Washoe County, professional organizations of sheriffs and police chiefs of this State and employee organizations that represent only peace officers of this State that were certified by the Commission.” NRS 289.500(3).

The Legislature empowered the Commission to adopt regulations setting minimum standards for training and education of peace officers. Nevada Revised Statute 289.510(2)(a) states that “[R]egulations adopted by the Commission apply to all agencies of this State and of local governments in this State that employs persons as peace officers.”

The decision of the Court of Appeals that the Legislature intended peace officers employed by “agencies” to have greater rights than those employed by “non-agencies” is contrary to the very purpose of Chapter 289, which is to ensure minimum standards and qualifications for peace officers. The Decision creates a scenario where courts purport to employ unrestricted law enforcement personnel operating outside of the regulation and quality standards for peace officers mandated by the Legislature through POST. Not only does such a holding violate separation of powers, but it is a threat to public safety.

Thus, neither NRS Chapter 289, nor the underlying applicable CBA, provided any proscription or limitation on which sections of NRS 289 apply to the deputy marshals. The fact remains that no such limitations exist. The Nevada Legislature specifically provided that deputy marshals are entitled to NRS 289 protections and this intention is clear from the plain text of the statutes. The Court of Appeals' selective interpretation of the applicability of NRS 289 is unsupported and contrary to existing Nevada law.

For all the foregoing reasons, the Appellant moves that this petition for review be granted and that the Court of Appeals Decision be set aside for further proceedings.

Dated this 5th day of January, 2018.

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CERTIFICATE OF COMPLIANCE

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

1. I certify that the petition for rehearing complies with the formatting requirements of Rule 32(a)(4); the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

It has been prepared in a proportionately spaced typeface using Wordperfect X6 in 14 point font size under Time News Roman type style;

2. It further certify that this brief complies with the page or type volume limitations of NRAP 40B because it is proportionately spaced, has a typeface of points and contains 2,192 words in the countable sections of the petition and is less than 10 pages in overall length.

Dated this 5th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby affirm that on this 5th day of January, 2018, I mailed via first class U.S. Mail a copy of the foregoing petition to the Respondent at the address below:

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