

Attachment 6  
Notice of Entry of Order

Attachment 6  
Notice of Entry of Order

1 THOMAS J. DONALDSON  
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2 DYER LAWRENCE, LLP  
2805 Mountain Street  
3 Carson City, Nevada 89703  
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5 *Attorneys for Respondent PATRICIA DEROSA*

6  
7  
8 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
9 IN AND FOR CARSON CITY

10  
11 STATE OF NEVADA, *ex rel.* its  
DEPARTMENT OF CORRECTIONS,

12 Petitioner,

13 vs.

14 PATRICIA DEROSA, an individual, and  
15 STATE OF NEVADA, *ex rel.* its  
DEPARTMENT OF ADMINISTRATION,  
16 PERSONNEL COMMISSION and DIVISION  
OF HEARINGS AND APPEALS,

17 Respondents.  
18

CASE NO.: 18 OC 00150 1B

DEPT NO.: 1

19 **NOTICE OF ENTRY OF ORDER**

20 PLEASE TAKE NOTICE that on the 21<sup>st</sup> day of November, 2018, the Court entered its Order  
21 Granting Motion to Dismiss. A copy of the Order is attached and incorporated herein as Exhibit

22 1.

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**AFFIRMATION**

Pursuant to NRS 239B.030 the undersigned does hereby affirm that the preceding document and any attachments do not contain any personal information.

DATED this 27<sup>th</sup> day of November, 2018.

DYER LAWRENCE, LLP

By: 

Thomas J. Donaldson  
Nevada Bar No. 5283  
2805 Mountain Street  
Carson City, NV 89703  
(775) 885-1896  
Attorneys for Respondent,  
PATRICIA DEROSA

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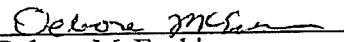
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Dyer Lawrence, LLP, and that on the 27<sup>th</sup> day of November, 2018, I caused a true and correct copy of the within **NOTICE OF ENTRY OF ORDER**, to be deposited in the U.S. Mail addressed to the following persons:

Cameron Vandenberg  
Deputy Attorney General  
5420 Kietzke Lane, Suite 202  
Reno, NV 89511

Lorna L. Ward, Esq.  
Hearing Officer  
State of Nevada Div. of Admin. Appeals  
1050 E. Williams St., Ste. 450  
Carson City, NV 89710

Tasha Eaton  
Supervising Legal Secretary  
State of Nevada Div. of Admin. Appeals  
1050 E. Williams St., Ste. 450  
Carson City, NV 89710

  
Debora McEachin

Office of the Attorney General  
Reno, Nevada

NOV 29 2018

Bureau of Litigation  
Personnel Division

Dyer Lawrence, LLP  
2805 Mountain Street  
Carson City, Nevada 89703  
(775) 885-1896

**EXHIBIT "1"**

**EXHIBIT "1"**

1 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

2 IN AND FOR CARSON CITY 2018 NOV 21 AM 8:44

3 SUSAN HERRIWETHER  
4 CLERK

5 STATE OF NEVADA, *ex rel.* its  
6 DEPARTMENT OF CORRECTIONS,

7 Petitioner,

8 vs.

9 PATRICIA DEROSA, an individual, and  
10 STATE OF NEVADA, *ex rel.* its  
11 DEPARTMENT OF ADMINISTRATION,  
12 PERSONNEL COMMISSION and DIVISION  
13 OF HEARINGS AND APPEALS,

14 Respondents.

BY [Signature]  
CASE NO.: 18 OC 00150 1B

DEPT NO.: 1

15 ORDER GRANTING MOTION TO DISMISS

16 This matter comes before the Court pursuant to a Motion to Dismiss Pursuant to NRCP 4 &  
17 NRCP 12 ("Motion") filed by Respondent PATRICIA DEROSA ("Employee") on October 17, 2018.  
18 An Opposition to Respondent DeRosa's Motion to Dismiss was filed by Petitioner on or about  
19 November 5, 2018. A Reply to Petitioner's Opposition to Motion to Dismiss was filed by Employee  
20 on November 16, 2018. This matter was submitted to the Court for consideration and decision on  
21 November 16, 2018.

22 In Employee's Motion, she requested that the Court dismiss the Petition for Judicial Review  
23 ("Petition") on the basis that Petitioner failed to personally serve Employee in accordance with the  
24 requirements of NRCP 4(d)(6) within forty-five (45) days of filing the Petition as is required by  
25 NRS 233B.130(5). Further, Employee argued that Petitioner cannot show good cause for its failure  
26 to serve Employee.

27 ///

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///

1 In Petitioner's Opposition, NDOC asserted that NRCP 4 does not apply to a petition for  
2 judicial review under NRS Chapter 233B, that service of the Petition on Employee's legal counsel  
3 and, subsequently, on Employee by mail was sufficient and, in the alternative, that there is good  
4 cause for the Court to extend Petitioner's time for serving Employee.

5 According to NRCP 81, to the extent that the NRCP do not conflict with special legislation  
6 specifying otherwise, the NRCP are fully applicable in all proceedings in a Nevada District Court.  
7 This includes special statutory proceedings like a petition for judicial review. *See, Prevost v. State,*  
8 *Dept. of Admin.*, 134 Nev. Adv. Op. 42, footnote 3 (2018). Therefore, under NRCP 12(b)(4), a  
9 petition for the review of an administrative agency's action may be dismissed for insufficiency of  
10 service of process. Under NRCP 4(d)(6), service of process is insufficient where a petitioner fails  
11 to serve an individual respondent either in person or by leaving the summons and complaint with a  
12 resident of his home who is of "suitable age and discretion." Here, Petitioner filed its Petition on  
13 June 20, 2018, and sent a copy of the Petition via U.S. Mail to Employee's counsel in the underlying  
14 administrative action. Petitioner subsequently served copies of the Petition and NDOC's Opening  
15 Brief on Employee by Certified Mail on October 19, 2018, one hundred and twenty-one days after  
16 filing its Petition. Petitioner has not served Employee with the Summons or Petition in person or  
17 left copies with anyone at Employee's home. Therefore, Petitioner failed to comply with NRCP  
18 4(d)(6). Moreover, the time to effectuate service under NRS 233B.130(5) has already passed.  
19 According to *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 190, 42 P.3d 268 (2002), "dismissal is  
20 not mandatory when a party substantially complies with the technical requirements of NRS  
21 233B.130, save the jurisdictional filing requirement." The Court has determined that Petitioner has  
22 failed to substantially comply with the technical requirements of NRS 233B.130(5), namely that  
23 Petitioner failed to properly serve Employee. Failure to effectuate service is more than a technicality.  
24 The service requirement of NRS 233B.130(5) is mandatory and jurisdictional. *See, Heat & Frost*  
25 *Insulators v. Labor Comm'r*, 134 Nev. Adv. Op. 1 (2018); *Washoe County v. Otto*, 128 Nev. 424,  
26 432, 282 P.3d 719 (2012). Furthermore, this Court determines that there was no good cause shown  
27 by Petitioner in its Opposition as to why service was not properly completed within the forty-five  
28 (45) days required.

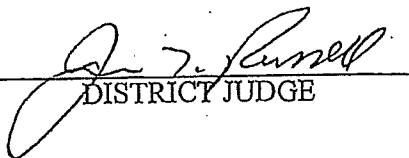
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Therefore, based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that Respondent DeRosa's Motion to Dismiss Pursuant to  
NRCP 4 & 12 is GRANTED and this matter is DISMISSED WITH PREJUDICE.

**IT IS SO ORDERED.**

Dated this 21<sup>st</sup> day of November, 2018.

  
DISTRICT JUDGE



**CERTIFICATE OF MAILING**

Pursuant to NRCp 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 21 day of November, 2018, I deposited for mailing, postage paid, at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

Cameron Vandenberg  
Deputy Attorney General  
5420 Kietzke Lane, Suite 202  
Reno, NV 89511

Lorna L. Ward, Esq.  
Hearing Officer  
State of Nevada Div. of Admin. Appeals  
1050 E. Williams St., Ste. 450  
Carson City, NV 89710

Tasha Eaton  
Supervising Legal Secretary  
State of Nevada Div. of Admin. Appeals  
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Carson City, NV 89710

Thomas Donaldson, Esq.  
2805 Mountain St.  
Carson City, NV 89703



Daniel Judd, Esq.  
Law Clerk, Dept. 1

Attachment 5

Order Granting Motion to Dismiss

Attachment 5

Order Granting Motion to Dismiss

1 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
2 IN AND FOR CARSON CITY

REC'D & FILED  
2018 NOV 21 AM 8:44  
SUSAN MERRIWETHER  
CLERK

3  
4 STATE OF NEVADA, *ex rel.* its  
5 DEPARTMENT OF CORRECTIONS,

6 Petitioner,

7 vs.

8 PATRICIA DEROSA, an individual, and  
9 STATE OF NEVADA, *ex rel.* its  
10 DEPARTMENT OF ADMINISTRATION,  
PERSONNEL COMMISSION and DIVISION  
OF HEARINGS AND APPEALS,

11 Respondents.  
12

BY [Signature] DEPT NO.: 18 OC 00150 1B

DEPT NO.: 1

13 **ORDER GRANTING MOTION TO DISMISS**

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16 An Opposition to Respondent DeRosa's Motion to Dismiss was filed by Petitioner on or about  
17 November 5, 2018. A Reply to Petitioner's Opposition to Motion to Dismiss was filed by Employee  
18 on November 16, 2018. This matter was submitted to the Court for consideration and decision on  
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20 In Employee's Motion, she requested that the Court dismiss the Petition for Judicial Review  
21 ("Petition") on the basis that Petitioner failed to personally serve Employee in accordance with the  
22 requirements of NRCP 4(d)(6) within forty-five (45) days of filing the Petition as is required by  
23 NRS 233B.130(5). Further, Employee argued that Petitioner cannot show good cause for its failure  
24 to serve Employee.

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9 petition for the review of an administrative agency's action may be dismissed for insufficiency of  
10 service of process. Under NRCP 4(d)(6), service of process is insufficient where a petitioner fails  
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12 resident of his home who is of "suitable age and discretion." Here, Petitioner filed its Petition on  
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14 administrative action. Petitioner subsequently served copies of the Petition and NDOC's Opening  
15 Brief on Employee by Certified Mail on October 19, 2018, one hundred and twenty-one days after  
16 filing its Petition. Petitioner has not served Employee with the Summons or Petition in person or  
17 left copies with anyone at Employee's home. Therefore, Petitioner failed to comply with NRCP  
18 4(d)(6). Moreover, the time to effectuate service under NRS 233B.130(5) has already passed.  
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20 not mandatory when a party substantially complies with the technical requirements of NRS  
21 233B.130, save the jurisdictional filing requirement." The Court has determined that Petitioner has  
22 failed to substantially comply with the technical requirements of NRS 233B.130(5), namely that  
23 Petitioner failed to properly serve Employee. Failure to effectuate service is more than a technicality.  
24 The service requirement of NRS 233B.130(5) is mandatory and jurisdictional. *See, Heat & Frost*  
25 *Insulators v. Labor Comm'r*, 134 Nev. Adv. Op. 1 (2018); *Washoe County v. Otto*, 128 Nev. 424,  
26 432, 282 P.3d 719 (2012). Furthermore, this Court determines that there was no good cause shown  
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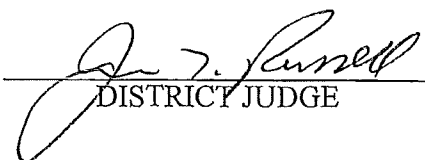
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Therefore, based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that Respondent DeRosa's Motion to Dismiss Pursuant to  
NRCP 4 & 12 is GRANTED and this matter is DISMISSED WITH PREJUDICE.

**IT IS SO ORDERED.**

Dated this 21st day of November, 2018.

  
DISTRICT JUDGE

**CERTIFICATE OF MAILING**

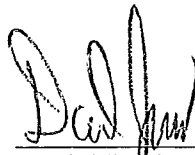
Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 21 day of November, 2018, I deposited for mailing, postage paid, at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

Cameron Vandenberg  
Deputy Attorney General  
5420 Kietzke Lane, Suite 202  
Reno, NV 89511

Lorna L. Ward, Esq.  
Hearing Officer  
State of Nevada Div. of Admin. Appeals  
1050 E. Williams St., Ste. 450  
Carson City, NV 89710

Tasha Eaton  
Supervising Legal Secretary  
State of Nevada Div. of Admin. Appeals  
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Carson City, NV 89710

Thomas Donaldson, Esq.  
2805 Mountain St.  
Carson City, NV 89703



Daniel Judd, Esq.  
Law Clerk, Dept. 1

Office of the Attorney General  
Reno, Nevada

**NOV 26 2018**

Bureau of Litigation  
Personnel Division

## Attachment 4

Petitioner's Response in Opposition to  
Respondent Patricia DeRosa's Motion to  
Dismiss Pursuant to NRCP 4 & 12 or, in the  
Alternative, Motion to Extend Service Period

## Attachment 4

Petitioner's Response in Opposition to  
Respondent Patricia DeRosa's Motion to  
Dismiss Pursuant to NRCP 4 & 12 or, in the  
Alternative, Motion to Extend Service Period

1 ADAM PAUL LAXALT  
Attorney General  
2 CAMERON P. VANDENBERG  
Chief Deputy Attorney General  
3 Nevada Bar No. 4356  
Nevada Office of the Attorney General  
4 Bureau of Business & State Services  
Personnel Division  
5 5420 Kietzke Lane, Suite 202  
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6 Tel: 775-687-2132  
Fax: 775-688-1822  
7 [cvandenberg@ag.nv.gov](mailto:cvandenberg@ag.nv.gov)  
Attorneys for Petitioner  
8 State of Nevada Department of Corrections

REC'D & FILED  
2018 NOV -5 PM 4:13  
SUSAN HERRIWETHER  
CLERK  
BY C. TORRES  
DEPUTY

9 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR CARSON CITY

11 STATE OF NEVADA, *ex rel.* its  
12 DEPARTMENT OF CORRECTIONS,

Case No. 18 OC 00150 1B  
Dept. No. 1

13 Petitioner,

14 vs.

15 PATRICIA DEROSA, an individual, AND  
16 STATE OF NEVADA *ex rel.* its  
17 DEPARTMENT OF ADMINISTRATION,  
PERSONNEL COMMISSION, DIVISION OF  
18 HEARINGS AND APPEALS,

19 Respondents.

20 **PETITIONER'S RESPONSE IN OPPOSITION TO**  
21 **RESPONDENT PATRICIA DEROSA'S MOTION TO DISMISS**  
22 **PURSUANT TO NRCP 4 & 12**  
**OR, IN THE ALTERNATIVE,**  
**MOTION TO EXTEND SERVICE PERIOD**

23 Petitioner, State of Nevada *ex rel.* its Department of Corrections, by and through counsel,  
24 Adam Paul Laxalt, Attorney General, and Cameron P. Vandenberg, Chief Deputy Attorney General,  
25 hereby opposes "Respondent Patricia DeRosa's Motion to Dismiss Pursuant to NRCP 4 & 12," or, in  
26 the alternative, moves to extend the time to serve Respondent Patricia DeRosa. This Opposition or  
27 Motion is made and based upon the attached Memorandum of Points and Authorities and exhibits, all  
28 papers and pleadings filed in this matter, and any oral argument this Court may order or entertain.



1 I.

2 INTRODUCTION

3 Respondent Patricia DeRosa ("DeRosa") has moved pursuant to NRCP 12(b)(1) and (4) to  
4 dismiss the Petition for Judicial Review filed by Petitioner Nevada Department of Corrections'  
5 ("NDOC") on June 20, 2018 for failure to personally serve DeRosa in accordance with NRCP 4(d)(6).

6 II.

7 FACTS AND PROCEDURAL HISTORY

8 This Petition for Judicial Review arises out of an administrative proceeding governed by  
9 NRS 284.390 and NAC 284.774 through NAC 284.818, wherein DeRosa requested an appeal hearing  
10 regarding her March 14, 2018 dismissal from NDOC. Throughout the administrative proceeding,  
11 DeRosa was represented by attorney Thomas J. Donaldson, Esq. See Exhibit 1 (March 30, 2018 email  
12 from Thomas J. Donaldson, Esq.).

13 On May 23, 2018, Personnel Commission Hearing Officer Lorna Ward issued her Findings of  
14 Fact, Conclusions of Law and Decision reversing DeRosa's dismissal and recommending imposition  
15 of "any disciplinary penalty [NDOC] chooses except for dismissal."

16 In accordance with the hearing officer's Decision, DeRosa was reinstated and demoted,  
17 effective June 11, 2018. DeRosa requested an appeal hearing regarding her demotion on June 18,  
18 2018.<sup>1</sup> See Exhibit 2 (Appeal of Dismissal, Suspension, Demotion or Involuntary Transfer dated June  
19 15, 2018). Her request for hearing indicated that Thomas Donaldson, Esq., continued to represent her  
20 in the matter. *Id.*

21 On June 20, 2018, two days after receiving the request for hearing indicating DeRosa's  
22 continued representation by Thomas Donaldson, Esq. (hereinafter "counsel" or "counsel of record"),  
23 NDOC timely filed its Petition for Judicial Review ("Petition") and timely and properly served the  
24 Petition by mailing it to DeRosa's counsel of record. On June 26, 2018, DeRosa filed, through  
25 counsel, a Notice of Intent to Participate in Judicial Review Proceeding.

26 On August 29, 2018, DeRosa stipulated, through counsel, to an extension of time for NDOC to

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<sup>1</sup> DeRosa's demotion was upheld by the hearing officer on October 2, 2018.

1 file its Opening Brief. On September 21, 2018, NDOC filed its Opening Brief. Three judicial days  
2 before DeRosa's Answering Brief was due, she filed, through counsel, her motion to dismiss.

3 Although DeRosa was properly served with NDOC's Petition, out of an abundance of caution,  
4 NDOC served another copy of its Petition, along with its Opening Brief, by certified mail on October  
5 19, 2018 to DeRosa at the address she provided on both of her requests for hearing. *See* Exhibits 2 and  
6 3 (Certificate of Service, copy of Certified Mail Receipt and signature of receipt). DeRosa signed for  
7 delivery on October 30, 2018. *See* Exhibit 3.

### 8 III.

### 9 ARGUMENT

10 Without citing any relevant, supporting authority, DeRosa takes the position that NDOC was  
11 required to personally serve her with the Petition for Judicial Review in this matter in accordance with  
12 NRCP 4(d)(6), *i.e.*, in the same manner that a complaint and summons must be served. A petition for  
13 judicial review is not a complaint. A complaint commences a civil action. NRCP 3. A petition for  
14 judicial review, on the other hand, invokes the appellate jurisdiction of Nevada's district courts.  
15 "Courts have no inherent appellate jurisdiction over official acts of administrative agencies except  
16 where the legislature has made some statutory provision for judicial review." *Crane v. Continental*  
17 *Telephone*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). NRS 284.390 sets forth the statutory  
18 provision for judicial review of a personnel hearing officer's decision. It requires the employee  
19 (aggrieved party) to file a petition for judicial review in accordance with the provisions of chapter  
20 233B of NRS. NRS 284.390(9). Under the provisions of chapter 233B of NRS, judicial review of a  
21 hearing officer's decision is commenced upon the filing of a petition for judicial review within 30  
22 days after service of the hearing officer's decision. NRS 233B.130(2)(d). Nothing within  
23 NRS 233B.130 envisions the initiation of judicial review by the filing of a complaint, to which  
24 Nevada's service of process requirements of NRCP 4 would apply.

25 Further, while NRS 233B.130(5) requires that a petition for judicial review be "served," the  
26 statute makes no reference whatsoever to personal service, service of process, or NRCP 4. The  
27 omission of the term "personally" or any reference to NRCP 4 from the text of NRS 233B.130(5)  
28 creates the presumption that the Legislature did not intend to require personal service or service in

1 accordance with NRCP 4(d)(6). *See Diamond v. Swick*, 117 Nev. 671, 676, 28 P.2d 1087, 1090  
2 (2001) (wherein the Nevada Supreme Court noted that it “has declared that its business does not  
3 include ‘fill [ing] in alleged legislative omissions based on conjecture as to what the legislature would  
4 or should have done.’”); *see also, Dep’t of Taxation v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev.  
5 541, 548, 119 P.3d 135, 139 (2005) (“[O]missions of subject matters from statutory provisions are  
6 presumed to have been intentional.”); *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246  
7 (1967); and 2A Norman J. Singer & J.D. Shambie Singer, *Statutes & Statutory Constr.* § 47:23 (7th  
8 ed. 2014) (“The maxim *expressio unius est exclusio alterius* . . . instructs that, where a statute  
9 designates a form of conduct, the manner of its performance and operation, and the persons and things  
10 to which it refers, courts should infer that all omissions were intentional exclusions.”). Thus, if the  
11 Legislature had intended that petitions for judicial review be personally served on parties in  
12 accordance with NRCP 4(d)(6), it would have indicated as such in NRS 233B.130(5), just as it set  
13 forth the requirement in NRS 233B.133(5) that briefs be in the form provided for appellate briefs in  
14 NRAP 28.

15       There appears to be no *published* Nevada case law interpreting the service requirements of  
16 NRS 233B.130(5), and none is cited by DeRosa in her Motion. There are, however, *unpublished*  
17 Nevada decisions as well as published cases from other jurisdictions finding that personal service on  
18 the parties, or service in accordance with NRCP, 4 is *not required* for petitions for judicial review.

19       For example, in *Metz v. Nev. Div. of Ins.*, 122 Nev. 1704, 178 P.3d 782 (2006), the Nevada  
20 Supreme Court ruled that:

21               NRS 233B.130(5) provides that petitioners must perfect service within  
22               forty-five days of filing the petition. Neither that statute, nor any other  
23               provision within Nevada’s Administrative Procedure Act, specifically  
                requires personal service or specifies which – or even whether – the rule  
                of civil procedure apply to petitions for judicial review.

24               Even assuming, for purposes of this appeal, that the rules of civil  
25               procedure generally apply to petitions for judicial review, a petitioner is  
26               not required to serve process in accordance with NRCP 4. NRCP 4(d)  
27               requires a plaintiff to ensure that personal service “of the summons and  
28               complaint” be made upon the defendants. Thus, even if the rules of civil  
                procedure apply to Metz’ petition, NRCP 4 ostensibly does not; no  
                “complaint” was filed, but rather a petition for judicial review, in which  
                there was no plaintiff or defendant, but rather a petitioner and respondent.

1 As Metz points out, the rules governing service of a summons and  
2 complaint are intended to provide a defendant with notice of an action  
3 against him, and to require his presence in court to defend the action.  
4 Petitions for judicial review, however, involve on-going underlying  
5 proceedings, and only the agency and "parties of record" to the  
6 administrative action may be named as respondents. Thus, the agency and  
7 all parties are already aware of the matter. And unlike the purpose behind  
8 a summons, under NRS 233B.130(3), the agency and any party must file a  
9 notice of intent to participate within twenty days of service of the petition  
10 only if they "desire to participate" in the district court proceedings.

11 As a result, NRCP 4's service of process requirements do not apply to  
12 judicial review proceedings. . . . Instead, even assuming that the rules  
13 of civil procedure are relevant to judicial review proceedings, NRCP  
14 5(b)(2)(B), which governs service of "pleadings and other papers" and  
15 allows for service by mail, is more appropriately applied here.

16 *Id.* (Internal footnotes omitted.) (Emphasis added.)

17 Similarly, in *BAC Home Loans Servicing, LP v. Eighth Judicial District Court*, 126 Nev. 691  
18 (2010), the Nevada Supreme Court concluded that personal service as set forth in NRCP 4 was not  
19 required for a petition for judicial review. "The rules governing service of a summons and complaint  
20 are intended to provide a defendant with notice of an action against it and to require its presence in  
21 court to defend the action. *Id.* (citing *Orme v. District Court*, 105 Nev. 212, 715, 782 P.2d 1325, 1327  
22 (1989) ("The primary purpose underlying the rules regulating service of process is to insure that  
23 individuals are provided actual notice of suit and a reasonable opportunity to defend.")). "Petitions for  
24 judicial review . . . involve ongoing proceedings and only parties to those proceedings may be named  
25 as respondents." *Id.* (citing NRS 233B.130(2)(a) (stating that a petition for judicial review must  
26 "[n]ame as respondents the agency and all parties of record to the administrative proceeding.")).  
27 "Thus, the parties to a petition for judicial review . . . are already aware of the matter, and NRCP 4's  
28 service of process requirements do not apply. Instead, the rule of civil procedure relevant to . . .  
judicial review proceedings is NRCP 5(b)(2)(B), which governs service of 'pleadings and other  
papers' and *allows for service by mail.*" *Id.* (Emphasis added).

And, in *Garcia v. State ex rel. Nevada System of Higher Educ. ex rel. University of Nevada*,  
128 Nev. 897, 381 P.3d 614 (2012), Garcia had attempted to serve the respondent through the court's  
electronic filing system, but was unsuccessful because the respondent had not yet appeared in the  
district court and electronic service therefore could not be accomplished. Therefore, the Supreme

1 Court affirmed the district court's dismissal of Garcia's petition for judicial review for improper  
2 service. However, nowhere in its order did the Court state that personal service in accordance with  
3 NRCP 4 was required.

4 Courts from jurisdictions outside of Nevada have also held that petitions for judicial review do  
5 not have to be personally served, and that mailing suffices. In *Hilands Golf Club v. Ashmore*, 922  
6 P.2d 469, 473-474 (Mont. 1996), the court held that, for purposes of an administrative appeal to the  
7 district court, the service requirement of the Montana Administrative Procedure Act is satisfied by  
8 mailing copies of a petition for judicial review to the parties under MRCP 5, a rule analogous to  
9 NRCP 5, rather than by personal service of summons under MRCP 4, a rule analogous to NRCP 4.  
10 The Court found that MRCP 5 was "the more logical choice for effecting service" in proceedings  
11 concerning petitions for judicial review, which is analogous to an appeal, because "[b]y the time the  
12 matter is before the district court for judicial review, the parties have already been defined through  
13 their appearance at, and participation in, the administrative proceedings. There is no more need to  
14 acquire Rule 4, M.R.Civ. P., personal jurisdiction over these parties than there would be in an appeal  
15 from district court to the Supreme Court." *Id.* See also *Douglas Asphalt Co. v. Pub. Serv. Comm.*,  
16 589 S.E.2d 292, 293 (Ga. Ct. App. 2003) (wherein the Court held that, since the Georgia  
17 Administrative Procedure Act did not expressly require personal service or otherwise specify how to  
18 perfect service, service by mail sufficed.)

19 Here, having appeared at her administrative hearing with counsel, DeRosa was clearly already  
20 aware of this matter and was not required to be personally served in order to provide her "with notice  
21 of an action against [her] and to require [her] presence in court to defend the action." In fact, as noted  
22 in *Metz, supra*, DeRosa's presence in this judicial review proceeding is not required. A respondent  
23 may allow judicial review to proceed without her appearance or defense, and need only file a  
24 statement of intent to participate in the judicial review if she desires to participate. See  
25 NRS 233B.130(3). If she doesn't participate or file a statement of intent to participate, there is no  
26 provision in NRS 233B providing that judgment by default will be rendered against her as it would for  
27 failure to appear and defend after being served with a summons. See NRCP 4(b) and 55.

28 ///

1 The cases cited above make it crystal clear that DeRosa was not required to be personally  
2 served with NDOC's petition for judicial review and that service by mail is legally sufficient. It is  
3 undisputed that DeRosa was timely served by mail to her counsel of record within 45 days of the filing  
4 of NDOC's petition in accordance with NRS 233B.130(5) and NRCP 5(b)(1) and (2)(A)(B). When a  
5 party invokes the appellate jurisdiction of the Supreme Court, "[s]ervice on a party represented by  
6 counsel shall be made on counsel." NRAP 3(d)(1). Logic dictates that it should not be any different  
7 when invoking the appellate jurisdiction of the district court when the party is represented by counsel.  
8 Since being timely and properly served, DeRosa has actively participated in this judicial review  
9 proceeding, through her counsel of record, by filing a Notice of Intent to Participate on or about June  
10 26, 2018 and stipulating to an extension of time for NDOC to file its Opening Brief, which was filed  
11 over a month ago on September 21, 2018.

12 Should the Court find that DeRosa was required to be served by mail to her personal address  
13 rather than to her counsel of record, NDOC then hereby moves for an extension of time from August  
14 6, 2018 to October 19, 2018 to serve DeRosa.<sup>2</sup> "NRS 233B.130(5) does not preclude a petitioner from  
15 moving for an extension of time after the 45-day period has passed. Thus, the district court may  
16 exercise its authority to extend the service period either before or after the 45-day period has run"  
17 upon a showing of good cause. *Heat & Frost Insulators and Allied Workers Local 16 v. Labor*  
18 *Commissioner*, \_\_\_\_ Nev. \_\_\_\_, 408 P.3d 156, 158 (Nev. 2018). The determination of good cause is  
19 within the district court's discretion:

20 [A] number of considerations may govern a district court's analysis of  
21 good cause . . . , and we emphasize that no single consideration is  
22 controlling. Appropriate considerations include: (1) difficulties in locating  
23 the defendant, (2) the defendant's efforts at evading service or  
24 concealment of improper service until after the 120-day period has lapsed,  
25 (3) the plaintiff's diligence in attempting to serve the defendant, (4)  
26 difficulties encountered by counsel, (5) the running of the applicable  
27 statute of limitations, (6) the parties' good faith attempts to settle the  
28 litigation during the 120-day period, (7) the lapse of time between the end  
of the 120-day period and the actual service of process on the defendant,  
(8) the prejudice to the defendant caused by the plaintiff's delay in serving

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<sup>2</sup> Forty-five days from the June 20, 2018 filing date was August 4, 2018, a Saturday. As noted  
earlier, DeRosa was served by certified mail with NDOC's Petition and Opening Brief on October 19,  
2018. See Exhibit 3.

process, (9) the defendant's knowledge of the existence of the lawsuit, and (10) any extensions of time for service granted by the district court.

*Scrimmer v. Eighth Judicial Dist. Ct ex rel, County of Clark*, 116 Nev. 507, 516, 998 P.2d 1190, 1195-96 (2000).

Here, good cause exists for NDOC's extension request because it relied in good faith upon the provisions of NRS 233B.130(5), the case law cited above, NRCP 5(b)(1) and (2)(A)(B), and Rule 4.2 of the Nevada Rules of Professional Conduct<sup>3</sup> in diligently serving DeRosa's attorney by mail within 45 days of filing its Petition. This Court should find good cause in this case to prevent the inequity of case-concluding consequences for NDOC<sup>4</sup> for its good faith, unintentional service error, should the Court actually find error. While NDOC acknowledges that notice is not a substitute for proper service, DeRosa nevertheless clearly had knowledge of the petition for judicial review by service to her known attorney, who has actively been representing DeRosa in this proceeding as well as in the continued administrative proceedings below.

Additionally, if there was any error in NDOC's service of the Petition, it was not intended to create undue delay, and NDOC immediately served DeRosa by mail at her place of residence upon receipt of her Motion to Dismiss, just over two months after the 45-day period elapsed. Prior to that, NDOC moved the case along by drafting and filing NDOC's Opening Brief, expending a great deal of time and effort.<sup>5</sup> DeRosa on the other hand, purposely delayed the case by waiting until a month after the Opening Brief was filed before filing the instant Motion to Dismiss.<sup>6</sup>

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<sup>3</sup> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

<sup>4</sup> As the 30-day period for filing the Petition for Judicial Review has elapsed, if the Court exercises its discretion to deny NDOC's request for extension of time, the case will end without disposition of the case on the merits, which is contrary to what the law and public policy favors. See *Stubli v. Big D Intern. Trucks, Inc.* 107 Nev. 309, 316, 810 P.2d 785, 789 (1991); *Moore v. Cherry*, 90 Nev. 390, 393, 528 P.2d 1018, 1021 (1974).

<sup>5</sup> It is undisputed that DeRosa received NDOC's brief.

<sup>6</sup> Objections to service are waived if not made in a timely motion or not included in a responsive pleading such as an answer. *Hansen v. Eighth Judicial Dist. Court ex rel County of Clark*, 116 Nev. 650, 656, 6 P.3d 982, 986 (2000); NRCP 12(h)(1).

Lastly, DeRosa will suffer absolutely no prejudice by this Court's retroactive extension of time for service. She remains employed with NDOC in accordance with the terms of the hearing officer's May 23, 2018 decision, and she has not credibly asserted in her Motion any actual or risk of prejudice to her by retroactively extending time for service and allowing disposition of this case on the merits. Briefing is already underway and, clearly, DeRosa does not desire to address the compelling arguments raised in NDOC's Opening Brief in favor of reversal of the hearing officer's decision.

## IV.

## CONCLUSION

NDOC properly and timely served DeRosa with its Petition for Judicial Review in accordance with NRS 233B.130(5) by mailing it to DeRosa's known counsel of record. Therefore, DeRosa's Motion to Dismiss should be denied. In the alternative, should the Court find that DeRosa was not properly served by mailing the Petition to her attorney rather than to her, NDOC should be granted a retroactive extension of time to serve DeRosa.

## AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the personal information of any person.

DATED this 5th day of November, 2018.

ADAM PAUL LAXALT  
Attorney General

By: Cameron P. Vandenberg  
CAMERON P. VANDENBERG  
Chief Deputy Attorney General  
*Attorneys for Petitioner Nevada Department of  
Corrections*



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# EXHIBIT 1

## Rebecca M. Zatarain

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**From:** Cameron P. Vandenberg  
**Sent:** Friday, March 30, 2018 11:04 AM  
**To:** Rebecca M. Zatarain  
**Subject:** FW: NDOC Program Officer I Patricia DeRosa--termination  
**Attachments:** derosa.release.pdf

For file

---

**From:** Tom Donaldson [<mailto:TDonaldson@dyerlawrence.com>]  
**Sent:** Friday, March 30, 2018 10:02 AM  
**To:** Cameron P. Vandenberg  
**Cc:** [pattyderosa@att.net](mailto:pattyderosa@att.net); Debora McEachin  
**Subject:** NDOC Program Officer I Patricia DeRosa--termination

Cameron,

Ms. Patricia DeRosa has retained this law firm to represent her in the pending appeal of her termination by NDOC effective 3/14/18. So, please direct all future communications regarding this matter to me.

Her prior representative, Greg Smith, requested copies of all requests and approvals related to the time periods specified in NRS 284.387(2). I believe that you provided to him copies of two (2) 60-day extensions that were requested and granted for Case No. IA-2017-0202-05. I am writing to confirm that NDOC did not request or was granted any extension of time of the initial 90-day period in Case No. IA-2017-228. If this is not correct, please provide the documentation today. I have included a release (attached) signed by Ms. DeRosa. Thank you.

Thomas J. Donaldson  
Dyer, Lawrence, Flaherty,  
Donaldson & Prunty  
2805 Mountain Street  
Carson City, NV 89703  
(775) 885-1896 office  
(775) 885-8728 facsimile  
[tdonaldson@dyerlawrence.com](mailto:tdonaldson@dyerlawrence.com)

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# EXHIBIT 2

# APPEAL OF DISMISSAL, SUSPENSION, DEMOTION, OR INVOLUNTARY TRANSFER

This form is required for an employee or former employee to request a hearing to determine the reasonableness of his or her dismissal, suspension, demotion, or involuntary transfer.

## Appellant Information (required section)

Name: Patricia DeRosa

Mailing Address: 3309 Ponderosa  
Carson City, NV 89701

RECEIVED

JUN 18 2018

Contact Phone: (775) 297-1338

Email: pattyderosa@att.net

Employee I.D. #: 10512

NEVADA DIV. OF HR MANAGEMENT  
GRIEVANCES/APPEALS  
CARSON CITY, NEVADA

Department/Agency at time of Action: Department of Corrections

## Appeal Information (required section)

I am appealing the action of: ☐ Dismissal ☐ Suspension ☒ Demotion ☐ Involuntary Transfer

The effective date of the action was: 6/11/2018

*Note: The appeal will be deemed timely if it is postmarked or received by the Administrator of the Division of Human Resource Management within the first 10 working days after the effective date of the action.*

Immediately prior to the action, were you a permanent, classified, State employee? ☒ Yes ☐ No

*Note: Employees who were probationary, unclassified, or not employed by the Executive Branch or the Nevada System of Higher Education are not eligible to appeal the action.*

The remedy I seek is:

☒ For the dismissal, suspension or demotion to be set aside; and to be reinstated with full pay and benefits for the period the action was in effect.

☐ For the involuntary transfer to be set aside; to be returned to my former position; and if entitled, receive a per diem allowance and travel expenses paid for the period the transfer was in effect.

☐ Other: \_\_\_\_\_

*Note: "Other" remedies may not be within the jurisdiction of the hearing officer to grant.*

Briefly explain why you believe the action taken against you was not reasonable; in the case of an involuntary transfer, please explain how the transfer was made to discipline and/or harass you. Please reference any statute, regulation, policy, or procedure you believe was violated. Attachments may be added.

The demotion was an extremely punitive disciplinary action.

☐ Represent myself

☒ Designate the following representative to act on my behalf during the course of this appeal.

Name: Thomas Donaldson, Esq.

Phone: (775) 885-1896

Address: 2805 Mountain Street, Carson City, NV 89703

Fax:

Email: tdonaldson@dyerlawrence.com

**Signature (required section)**

By signing this form you are requesting a hearing to determine the reasonableness of the action and affirming that the information you provided is true and correct.

Appellant Signature: Valencia DeLone Date: 6/15/18

**Appeal Instructions**

**General:** Permanent, classified State employees are eligible to file an appeal. Attachments to this form may be provided however, evidence and back-up documents need not be provided at this time; prior to the hearing, the clerk will send a request for any supporting material. If you have received a Specificity of Charges or written notice of involuntary transfer, please attach it to this appeal. Notification of a hearing will be sent to you or your designated representative by regular mail.

The appeal procedures and statements made on this form do not include all of the rights available to an appellant. It is advisable to review NRS 284 and NAC 284 prior to requesting a hearing. Appeal hearings are open to the public and decisions by a hearing officer are public information.

**When to File an Appeal:** The appeal will be deemed timely filed if it is either postmarked or received by the Administrator of the Division of Human Resource Management during the period beginning on the first working day after the effective date of the action that is being appealed and ending on the 10<sup>th</sup> working day after the effective date. Appeals received before or after this period may be dismissed as untimely.

**Whistleblower Retaliation Appeal:** If you believe the action you are appealing was based on retaliation due to your disclosure of information concerning improper governmental action, please submit your appeal on the NPD-53 form, "Appeal of Whistleblower Retaliation Under the Provisions of NRS 281.641."

**Where to File an Appeal:** The appeal may be submitted by mail, email, fax or hand delivery. Please submit the appeal to:

Administrator, Division of Human Resource Management  
c/o Employee and Management Services  
100 N. Stewart St., Suite 200  
Carson City, Nevada 89701-4204  
Fax (775) 684-0118 Phone (775) 684-0135  
Email: HearingClerk@admin.nv.gov

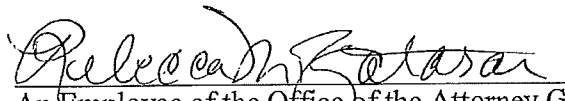
# EXHIBIT 3



1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the State of Nevada, Office of the Attorney  
3 General and that on the 19th day of October, 2018, I served a copy of Petitioner Nevada  
4 Department of Corrections' **PETITION FOR JUDICIAL REVIEW** and **PETITIONER'S**  
5 **OPENING BRIEF** by causing said documents to be placed in the U.S. Mail, certified mail  
6 Number 7016 2710 0000 8131 4939, to the following:

7  
8 Patricia DeRosa  
9 3309 Ponderosa Drive  
10 Carson City, NV 89701

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12   
13 An Employee of the Office of the Attorney General  
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<input type="checkbox"/> Adult Signature Restricted Delivery \$	
Postage \$	
Total Postage and Fees \$	
Sent To Patricia De Rosa	
Street and Apt. No., or PO Box No. 3309 Ponderosa Drive	
City, State, ZIP+4® Carson City, NV 89701	
PS Form 3800, April 2015 PSN 7510-0200-9047 See Reverse for Instructions	

ADAM PAUL LAXALT  
*Attorney General*



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL  
5420 Kietzke Lane, Suite 202  
Reno, Nevada 89511

J. BRIN GIBSON  
*First Assistant Attorney General*

NICHOLAS A. TRUTANICH  
*Chief of Staff*

KETAN D. BHIRUD  
*General Counsel*

October 19, 2018

Via U.S. Postal Service  
Certified Mail 7016 2710 0000 8131 4939

Patricia DeRosa  
3309 Ponderosa Drive  
Carson City, NV 89701

Re: *State of Nevada, ex rel. its Department of Corrections v. Patricia DeRosa, et al.*,  
Case No. 18 OC 00150 1B


Dear Ms. DeRosa:

Please find enclosed the Petition for Judicial Review and Petitioner's Opening Brief,  
filed in the above-named matter.


Thank you,

Sincerely,

ADAM PAUL LAXALT  
Attorney General

By:   
Rebecca M. Zatarain  
Legal Secretary II  
(775) 687-2134  
rzatarain@ag.nv.gov

Enclosures

USPS TRACKING # 

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United States  
Postal Service

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Office of the Attorney General  
5420 Kietzke Ln., Ste. 202  
Reno, NV 89511  
Return Service Requested

NOV 01 2018

ATTORNEY GENERAL  
RENO OFFICE

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<p>■ Complete items 1, 2, and 3.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p> <p>1. Article Addressed to:</p> <p>Patricia De Rosa 3309 Ponderosa Drive Carson City, NV 89701</p> <p>2. Article Number (Transfer from service label)</p> <p>7016 2710 0000 8131 4939</p>	<p>A. Signature</p> <p><i>Patricia De Rosa</i> <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) C. Date of Delivery</p> <p>Patricia De Rosa 10/30/18</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>If YES, enter delivery address below:</p> <p>3. Service Type</p> <p><input type="checkbox"/> Adult Signature <input type="checkbox"/> Priority Mail Express®</p> <p><input type="checkbox"/> Adult Signature Restricted Delivery <input type="checkbox"/> Registered Mail™</p> <p><input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Registered Mail Restricted Delivery</p> <p><input type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Signature Confirmation™</p> <p><input type="checkbox"/> Collect on Delivery Restricted Delivery <input type="checkbox"/> Signature Confirmation Restricted Delivery</p> <p><input type="checkbox"/> Insured Mail <input type="checkbox"/> Signature Confirmation Restricted Delivery (over \$500)</p> <p><input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</p>

PS Form 3811, July 2015 PSN 7530-02-000-9053

Domestic Return Receipt

## Attachment 3

Respondent Patricia DeRosa's Motion to  
Dismiss Pursuant to NRCP 4 & 12

## Attachment 3

Respondent Patricia DeRosa's Motion to  
Dismiss Pursuant to NRCP 4 & 12

1 THOMAS J. DONALDSON  
Nevada Bar No. 5283  
2 DYER LAWRENCE, LLP  
2805 Mountain Street  
3 Carson City, Nevada 89703  
(775) 885-1896 telephone  
4 (775) 885-8728 facsimile  
tdonaldson@dyerlawrence.com

5 *Attorneys for Respondent PATRICIA DEROSA*

REC'D & FILED

2018 OCT 17 PM 3:29

SUSAN MERRIWETHER  
CLERK

BY C. TORRES  
DEPUTY

6  
7  
8 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
9 IN AND FOR CARSON CITY

10  
11 STATE OF NEVADA, *ex rel.* its  
12 DEPARTMENT OF CORRECTIONS,  
13  
Petitioner,

14 vs.

15 PATRICIA DEROSA, an individual, and  
16 STATE OF NEVADA, *ex rel.* its  
DEPARTMENT OF ADMINISTRATION,  
17 PERSONNEL COMMISSION and DIVISION  
OF HEARINGS AND APPEALS,

18 Respondents.

CASE NO.: 18 OC 00150 1B

DEPT NO.: 1

19  
20 **RESPONDENT PATRICIA DEROSA'S MOTION TO DISMISS**  
**PURSUANT TO NRCP 4 & 12**

21 COMES NOW Respondent PATRICIA DEROSA ("Employee"), by and through her legal  
22 counsel, Dyer Lawrence, LLP, and Thomas J. Donaldson, Esq., and moves this Court to dismiss the  
23 Petition for Judicial Review ("Petition") filed by Petitioner STATE OF NEVADA, *ex rel.* its  
24 DEPARTMENT OF CORRECTIONS, ("Petitioner" or "NDOC") filed on June 20, 2018.  
25 Respondent so moves on the grounds that Petitioner, who was required within forty-five (45) days  
26 of filing the Petition to personally serve Employee in accordance with the requirements of  
27 NRCP 4(d)(6), has failed substantially to comply with that Rule for one-hundred and nineteen (119)  
28 days as of the date of this Motion.

1 This Motion is made and based on Rules 4, 12 and 81 of the Nevada Rules of Civil  
2 Procedure; relevant provisions of the Nevada Revised Statutes and Nevada Administrative Code;  
3 the attached Memorandum of Points and Authorities, and attached exhibits; the attached Affidavit  
4 of Patricia DeRosa; all papers and pleadings on file in this matter; and any oral arguments this Court  
5 may entertain.

6 Respectfully submitted this 17<sup>th</sup> day of October, 2018.

7 DYER LAWRENCE, LLP

8 By: 

9 Thomas J. Donaldson  
10 Nevada Bar No. 5283  
2805 Mountain Street  
Carson City, NV 89703  
11 (775) 885-1896  
Attorneys for Respondent,  
12 PATRICIA DEROSA

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. STATEMENT OF FACTS**

15 The underlying administrative proceeding was Employee's appeal (#1802991-LLW) of  
16 NDOC's termination of Employee effective March 14, 2018. Unless otherwise specified, all facts  
17 are derived from the Findings of Fact, Conclusions of Law and Decision ("Decision") dated  
18 May 23, 2018, of Respondent STATE OF NEVADA, *ex rel.* its DEPARTMENT OF  
19 ADMINISTRATION, PERSONNEL COMMISSION and DIVISION OF HEARINGS AND  
20 APPEALS ("Hearing Office"), Hearing Officer Lorna L. Ward, Esq., reversing NDOC's dismissal  
21 of Employee.<sup>1</sup> Petition, Exhibit 1.

22 Employee started with NDOC on August 10, 2015, as a Correctional Caseworker Specialist II  
23 (Grade 38) after working for the Nevada Division of Parole and Probation (P&P) for nearly twenty-  
24 five (25) years, most recently as a Parole and Probation Specialist III (Grade 33). All of  
25 Ms. DeRosa's performance evaluations from P&P were overall "meets" and "exceeds standards."  
26 NDOC has never conducted a formal evaluation of Employee's work performance.

27  
28 <sup>1</sup> The Hearing Office did not file a notice of intent to participate in the instant judicial review.

Effective July 15, 2016, NDOC rejected Employee from probation and she returned to P&P. However, NDOC subsequently rehired her as a Program Officer I (Grade 31) on December 26, 2016, with a promise of reinstating her to a Correctional Caseworker II as soon as a vacancy occurred because the rejection from probation was erroneous. To date, NDOC has not fulfilled this promise.

Employee was assigned to the non-custody Programs Division at Northern Nevada Correctional Center (NNCC) in Carson City, but was working on a critical project (to reduce NDOC's inmate population state-wide) at NDOC's Casa Grande Transitional Center in Las Vegas at the time of her termination. Both Employee and Steve Suwe, her significant other since 2010, who retired from NDOC in 2012 after over twenty-six (26) years of service, resided in Carson City.

After being on administrative leave for over six and one-half (6½) months, Employee received a Specificity of Charges (NPD-41) on February 28, 2018, recommending her termination for computer usage violations (Class 5), neglect of duty (Class 5) and unbecoming conduct (Class 4). The termination was based solely upon Employee sending four (4) email messages from her NDOC computer to Mr. Suwe on March 2, April 18, May 3 and May 4, 2017. NDOC alleged that the messages contained "official" and "confidential" information. Employee admitted to sending the messages to Mr. Suwe out of frustration and for his advice, but did not believe that the information was "confidential" since she was not required to sign an acceptable computer usage policy when she was hired by NDOC. The recommendation was upheld through the Pre-Disciplinary Hearing process (by another NDOC administrator) and imposed on March 14, 2018. Employee filed a timely appeal of the termination on March 19, 2018.

The Hearing Officer conducted a hearing on May 1, 2018, and subsequently issued her Decision dated May 23, 2018. Petition, Exhibit 1. The Hearing Officer determined:

Employee technically violated AR 339.07.14(B) [computer usage] and AR 339.07.15(SS) [neglect of duty], however consideration of the facts, the lack of harm to NDOC, the State and fellow employees or inmates, and the history of NDOC punishment in similar circumstances mandate that dismissal is not warranted in this specific case and is not for the good of the public service.

Petition, Exhibit 1, p. 10 at lines 21-24. Ultimately, the Hearing Officer ordered:

That the preponderance of the evidence establishes that the dismissal of Ms. DeRosa from State service has not been shown to be for the good of the public service, and that the decision of [NDOC] to terminate Employee is REVERSED.



1           This matter is REMANDED to [NDOC] to restore Employee to her prior  
2 position with full back pay and benefits, subject to any appropriate disciplinary  
3 penalties, other than dismissal, for the aforementioned violations of AR 339.07.14(B)  
4 and AR 339.07.15(SS) as discussed above.

5           Petition, Exhibit 1, p. 11 at lines 5-11. The final paragraph of the Decision also contained the  
6 following footnote:

7           NDOC may impose any disciplinary penalty it chooses except for dismissal.

8           Petition, Exhibit 1, p. 11, fn. 8.

9           NDOC subsequently reinstated Employee and retroactively demoted her to an Administrative  
10 Assistant IV (Grade 29) at NNCC effective March 14, 2018. Employee received back pay at the  
11 Grade 29 rate, rather than the Grade 31 (Program Officer I) rate. Employee timely appealed her  
12 demotion, which was subsequently affirmed by Hearing Officer Ward in second decision dated  
13 October 1, 2018.

14           On or about June 20, 2018, NDOC filed the instant Petition for Judicial Review of the  
15 Hearing Officer's Decision pursuant to NRS 284.390(9) and NRS 233B.130. According to the  
16 Certificate of Service attached to the Petition, NDOC mailed copies of the Petition to undersigned  
17 counsel, the Hearing Office and the Hearing Officer, but **never served the Petition on Employee.**  
18 This Court issued its Order for Briefing Schedule ("Order") dated June 2018. The Order reiterated  
19 the procedural requirements of NRS 233B.133, specifically noting that "Petitioner must serve the  
20 Petition for Judicial Review upon the agency and every party *within 45 days after the filing* of the  
21 Petition for Judicial Review." (Emphasis supplied.)

22           On or about June 27, 2018, Employee filed her Notice of Intent to Participate in Judicial  
23 Review Proceeding reserving all rights and privileges pursuant to NRS 233B.130 *et seq.* and the  
24 Nevada Rules of Civil Procedure. On or about September 21, 2018, NDOC filed opening brief in  
25 this matter.

26           Neither Employee nor any person residing at her home has ever received personal service of  
27 the Petition, the opening Memorandum of Points and Authorities, or any other document filed by  
28 NDOC in this case. Declaration of Patricia DeRosa, hereto. Similarly, NDOC has never asked  
undersigned counsel to accept service of process on behalf of Employee.

## II. LEGAL STANDARD

Under NRCP 81, the Nevada Rules of Civil Procedure, to the extent that they do not conflict with special legislation specifying otherwise, are fully applicable in all proceedings in Nevada District Court. This includes special statutory proceedings like the present petition for judicial review. Therefore, under NRCP 12(b)(1) and (4), a petition for the review of an administrative agency's action may be dismissed for, among other grounds, insufficiency of service of process. Under NRCP 4(d)(6), service of process is insufficient where a petitioner fails to serve an individual respondent either in person or by leaving the summons and complaint with a resident of her home who is of "suitable age and discretion." Failure to properly serve the correct process within the proscribed period allotted may be fatal to a petitioner's claim.

## III. ARGUMENT

### A. NDOC has failed to properly serve process upon Employee for 119 days.

NRCP 4(d)(6) specifies that service upon an individual defendant/respondent in a civil matter must be made "to the [respondent] personally, or by leaving copies thereof at the [respondent]'s dwelling ... with some person of suitable age and discretion then residing therein." The purpose behind the personal service requirement is to ensure that "individuals are provided actual notice of suit and a reasonable opportunity to defend." *Orme v. Eighth Juicial ist. Court*, 782 P.2 1325, 1327 (Nev, 1989). Personal service of process is not merely a technical triviality, but a threshold requirement for exercising jurisdiction over a respondent. *Cf. Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9<sup>th</sup> Cir. 2009) (quoting *Benny v. Pipes*, 799 F.2d 489 (9<sup>th</sup> Cir. 1986) ("neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction without substantial compliance with Rule 4."))

Failure to substantially comply with NRCP 4's service requirements ordinarily renders any subsequent judgment void. *See Dobson v. Dobson*, 830 P.2d 1336, 1337 (Nev. 1992) (nullifying a divorce decree after squashing improper service) (citing with approval *Combs v. Nick Garin Trucking*, 825 F.2d 437, 442 (D.C. Cir. 1987)) (holding that an attempt to utilize mail service was insufficient, voiding a default judgment).

///

Petitioner here has failed to serve Employee for nearly (4) months. Petitioner has made no efforts to secure actual service in that time period. Rather, Petitioner has moved forward unilaterally by filing its Opening Brief under the apparent assumption that it had properly complied with its requirements to give Employee legally-sufficient notice of the Petition.

Consequently, Petitioner has failed substantially to comply with the letter and spirit of NRCP 4. Therefore, the Petition for Judicial Review should be dismissed.

**B. NDOC cannot demonstrate good cause for failing to serve the petition timely.**

In *Dallman v. Merrell*, 106 Nev. 929, 803 P.2d 232, 233 (1990), the Nevada Supreme Court affirmed a District Court's dismissal of an action in which service was not accomplished until one-hundred and eight (108) days after the expiration of the deadline. In so doing, the Supreme Court distinguished its earlier decision in *Domino v. Gaughan*, 103 Nev. 582, 748 P.2d 236 (1987), in which it found good cause for an extension after a nine (9) day delay in which there were extenuating circumstances.

As in *Dallman*, Petitioner here has not demonstrated any effort to personally serve Employee, let alone any extenuating circumstances that would prevent such service. Employee is currently employed by NDOC, which through its own agents and representatives, makes contact with Employee every work day. It would not be difficult to personally serve Employee at work. Still, absolutely no efforts have been made. Of course, if NDOC is allowed to proceed with its Petition, Employee would be extremely prejudiced if the Court grants the Petition and upholds her termination now that the period for filing a petition for judicial review has expired. See NRS 233B.130(2)(d) (such a petition must "[b]e filed within 30 days after service of the final decision of the agency).

**C. This case is indistinguishable from *State Dept. of Trans. v. Boice*.**

In *State Dept. Of Trans. v. Boice*, Case No. 14 OC 00158 1B (1<sup>st</sup> Jud. Dist. Ct. of Nev., 2015), this Court issued an Order Granting Motion to Dismiss dated September 21, 2018, under nearly identical circumstances.<sup>2</sup> Exhibit 1, hereto. In *Boice*, NDOT failed to serve its petition for  
///

---

<sup>2</sup> As with NDOC in the instant matter, NDOT was represented by the Nevada Attorney General's Office in *Boice*.

1 judicial review on Mr. Boice for nearly eight (8) months. The Court held:

2 The Court has determined that [NDOT] has failed to substantially comply with the  
3 technical requirements of NRS 233B.130(5), namely that [NDOT] failed to properly  
4 serve Respondent. Failure to effectuate service is more than a technicality.  
Furthermore, there was no good cause shown by [NDOT] in its Opposition as to why  
service was not complied with.

5 Anticipating that NDOC will be unable to show good cause for not properly and timely serving the  
6 Petition on Employee in this case, Employee requests that the Court follow its ruling in *Boice* and  
7 dismiss the instant Petition.

#### 8 IV. CONCLUSION

9 Therefore, for no good cause shown, Petitioner having violated NRCP 4 and NRS 233B.130  
10 by failing to properly serve Employee, Employee respectfully requests that this Court dismiss the  
11 underlying action pursuant to NRCP 4 and NRS 233B.130.

#### 12 AFFIRMATION

13 Pursuant to NRS 239B.030 the undersigned does hereby affirm that the preceding document  
14 and any attachments do not contain any personal information.

15 DATED this 17<sup>th</sup> day of October, 2018.

16 DYER LAWRENCE, LLP

17  
18 By: 

19 Thomas J. Donaldson  
20 Nevada Bar No. 5283  
2805 Mountain Street  
21 Carson City, NV 89703  
(775) 885-1896  
22 Attorneys for Respondent,  
23 PATRICIA DEROSA  
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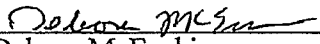
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Dyer Lawrence, LLP, and that on the 12<sup>th</sup> day of October, 2018, I caused a true and correct copy of the within **RESPONDENT PATRICIA DEROSA'S MOTION TO DISMISS PURSUANT TO NRCP 4 & 12**, to be deposited in the U.S. Mail addressed to the following persons:

Cameron Vandenberg  
Deputy Attorney General  
5420 Kietzke Lane, Suite 202  
Reno, NV 89511

Lorna L. Ward, Esq.  
Hearing Officer  
State of Nevada Div. of Admin. Appeals  
1050 E. Williams St., Ste. 450  
Carson City, NV 89710

Tasha Eaton  
Supervising Legal Secretary  
State of Nevada Div. of Admin. Appeals  
1050 E. Williams St., Ste. 450  
Carson City, NV 89710

  
Debora McEachin

**AFFIDAVIT OF PATRICIA DEROSA**

STATE OF NEVADA       )  
                                      : ss.  
CARSON CITY            )

I, Patricia DeRosa, having been duly sworn, do hereby swear and affirm on penalty or perjury that the following is true and correct to the best of my knowledge and recollection:

1. I am one (1) of the Respondents named in the above-captioned matter.

2. I am currently employed as an Administrative Assistant IV for Warden Isidro Baca at the Northern Nevada Correctional Center operated by the Nevada Department of Corrections in Carson City, Nevada.

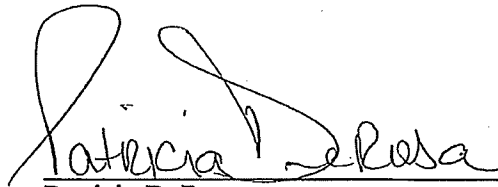
3. According to the Certificate of Service attached to Petitioner's Petition for Judicial Review ("Petition") in the above-captioned matter, Petitioner did not mail a copy of the Petition to me when it was filed on or about June 20, 2018.

4. As of this writing, I have not received personal service of the Petition or any other pleading from Petitioner in this case.

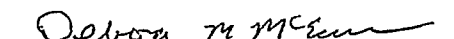
5. As of this writing, no person residing at my home has at any time received personal service of the Petition or any other pleading from Petitioner in this case.

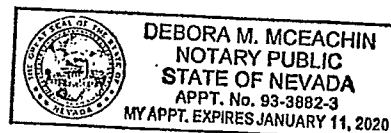
6. I have not authorized my attorney or any other person to accept service on my behalf in this matter.

FURTHER, Affiant sayeth naught.

  
Patricia DeRosa

SUBSCRIBED and SWORN to before  
me this 17<sup>th</sup> day of October, 2018.

  
Notary Public



## INDEX OF EXHIBITS

1			
2	EXHIBIT	DESCRIPTION	PAGE(S)
3	1	Order Granting Motion to Dismiss in	
4		Case No. 14 OC 00158 1B	4
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Dyer Lawrence, LLP  
2805 Mountain Street  
Carson City, Nevada 89703  
(775) 885-1896

**EXHIBIT "1"**

**EXHIBIT "1"**




1 Case No.: 14 OC 00158 1B

2 Dept. No.: 1

REC'D & FILED

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SUSAN MERRIWETHER  
CLERK

BY  DEPUTY

3  
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5  
6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR CARSON CITY

8  
9 STATE OF NEVADA, ex. rel. its  
DEPARTMENT OF TRANSPORTATION,

10 Petitioner,

11 v.

12  
13 ROCKY BOICE,

14 Respondent.

ORDER GRANTING MOTION TO  
DISMISS

15  
16 This matter comes before the Court pursuant to a Motion to Dismiss Pursuant to NRCP 4  
17 & 12 filed by Respondent on March 24, 2015. An Opposition to Respondent's Motion to  
18 Dismiss was filed by Petitioner on April 27, 2015. A Reply to Petitioner's Opposition to Motion  
19 to Dismiss was filed by Respondent on May 15, 2015. A Request for Submission on Motion to  
20 Dismiss was filed by Respondent on July 17, 2015.

21  
22 In his Motion to Dismiss Pursuant to NRCP 4 & 12, Respondent requested that the Court  
23 dismiss the Petition for Judicial Review on the grounds that Petitioner failed to personally serve  
24 Respondent in accordance with the requirements of NRCP 4(d)(6) within forty-five (45) days of  
25 filing the Petition as is required by NRS 233B.130(5). Further, Respondent argued that Petitioner  
26 cannot show good cause for its failure to serve Respondent.  
27  
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1 In its Opposition, Petitioner asserted that Respondent's contention that service was  
2 ineffective in this matter is waived on two (2) separate grounds. First, Respondent's attorney has  
3 acknowledged receipt of the lawsuit. Second, Respondent had knowledge of the lawsuit.

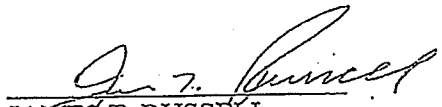
4 According to NRCP 81, to the extent that the NRCP do not conflict with special  
5 legislation specifying otherwise, the NRCP are fully applicable in all proceedings in a Nevada  
6 District Court. This includes special statutory proceedings like a Petition for Judicial Review.  
7 Therefore, under NRCP 12(b)(4), a petition for the review of an administrative agency's action  
8 may be dismissed for insufficiency of service of process. Under NRCP 4(d)(6), service of  
9 process is insufficient where a petitioner fails to serve an individual respondent either in person  
10 or by leaving the summons and complaint with a resident of his home who is of "suitable age and  
11 discretion." Here Petitioner sent Respondent a copy of the Petition for Judicial Review via U.S.  
12 mail. Petitioner did not serve Respondent with the summons or petition in person, nor did  
13 Petitioner leave the summons and petition with anyone at Respondent's home. Therefore,  
14 Petitioner failed to comply with NRCP 4(d)(6). Moreover, the time to effectuate service under  
15 NRS 233B.130(5) has already passed. According to *Civil Service Commission for Reno v.*  
16 *Second Judicial District Court of Nevada*, "dismissal is not mandatory when a party substantially  
17 complies with the technical requirements of NRS 233B.130, save the jurisdictional filing  
18 requirement." 118 Nev. 186, 190 (Nev. 2002). The Court has determined that Petitioner has  
19 failed to substantially comply with the technical requirements of NRS 233B.130(5), namely that  
20 Petitioner failed to properly serve Respondent. Failure to effectuate service is more than a  
21 technicality. Furthermore, there was no good cause shown by Petitioner in its Opposition as to  
22 why service was not complied with.  
23  
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Therefore, based on the foregoing and good cause appearing,

1 IT IS HEREBY ORDERED that Respondent's Motion to Dismiss Pursuant to NRCP 4 &  
2 12 is GRANTED.

3 IT IS SO ORDERED.

4 Dated this 22 day of July, 2015.

5  
6   
7 JAMES T. RUSSELL  
8 DISTRICT JUDGE  
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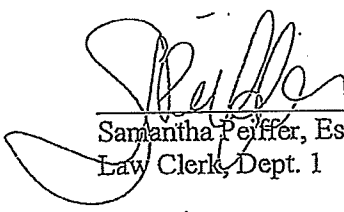
CERTIFICATE OF MAILING

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the 23 day of July, 2015, I served the foregoing to counsel of record, as follows:

☒ By depositing a copy thereof in the United States Mail at Carson City, Nevada, postage paid, addressed as follows:

Scott R. Daniel, Esq.  
The Daniel Firm  
200 So. Virginia Street, 8<sup>th</sup> Floor  
Reno, NV 89501

David R. Keene, II, Esq.,  
Deputy Attorney General  
555 East Washington Avenue, Suite 3900  
Las Vegas, NV 89101

  
Samantha Peiffer, Esq.  
Law Clerk, Dept. 1

Attachment 2  
Petitioner's Opening Brief

Attachment 2  
Petitioner's Opening Brief

1 ADAM PAUL LAXALT  
Attorney General  
2 CAMERON P. VANDENBERG  
Chief Deputy Attorney General  
3 Nevada Bar No. 4356  
Nevada Office of the Attorney General  
4 Bureau of Business & State Services  
Personnel Division  
5 5420 Kietzke Lane, Suite 202  
Reno, NV 89511  
6 Tel: 775-687-2132  
Fax: 775-688-1822  
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9 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR CARSON CITY

11 STATE OF NEVADA, *ex rel.* its  
12 DEPARTMENT OF CORRECTIONS,

Case No. 18 OC 00150 1B

Dept. No. 1

13 Petitioner,

14 vs.

15 PATRICIA DEROSA, an individual, AND  
16 STATE OF NEVADA *ex rel.* its  
DEPARTMENT OF ADMINISTRATION,  
17 PERSONNEL COMMISSION, DIVISION OF  
HEARINGS AND APPEALS,

18 Respondents.  
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22 PETITIONER'S OPENING BRIEF  
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1 Petitioner, State of Nevada *ex rel.* its Department of Corrections (“NDOC”), by and through  
2 counsel, Adam Paul Laxalt, Attorney General, and Cameron P. Vandenberg, Chief Deputy Attorney  
3 General, having filed a Petition for Judicial Review requesting review of the Findings of Fact,  
4 Conclusions of Law and Decision rendered by Hearing Officer Lorna Ward on May 23, 2018, under  
5 administrative Case No. 1802991-LLW, now files this Opening Brief in support of its Petition.

6 This Brief is supported by the following points and authorities, the Record on Appeal (ROA),  
7 and all other papers and pleadings on file herein.

8 I.

9 **STATEMENT OF JURISDICTION**

10 This Court has jurisdiction over this matter pursuant to NRS 284.390(9) and NRS  
11 233B.130(2)(b). Hearing Officer Lorna Ward entered her “Findings of Fact, Conclusions of Law and  
12 Decision” on May 23, 2018. *See* ROA 1-12. Petitioner, State of Nevada *ex rel.* Department of  
13 Corrections (NDOC), filed its Petition for Judicial Review on June 20, 2018. As such, this Petition has  
14 been timely filed within thirty (30) days from the date of the final order.

15 II.

16 **STATEMENT OF ISSUES**

17 Whether the substantial rights of the NDOC have been prejudiced because the hearing officer’s  
18 decision to reverse DeRosa’s termination is in excess of her statutory authority and affected by error of  
19 law; clearly erroneous in view of the reliable, probative, and substantial evidence in the entire record;  
20 and arbitrary, capricious, and characterized by an abuse of discretion because:

- 21 1. The hearing officer reversed DeRosa’s dismissal when just cause clearly supports  
22 DeRosa’s dismissal;
- 23 2. The hearing officer substituted her judgment for that of NDOC with respect to DeRosa’s  
24 dismissal;
- 25 3. The hearing officer found that DeRosa did not violate AR 339.07.18(I) (Unbecoming  
26 Conduct - “unauthorized disclosure of confidential Department matters”) based on a  
27 finding that none of the information contained in the unauthorized emails sent by  
28 DeRosa was confidential;
4. The hearing officer reversed DeRosa’s termination based upon her finding of no intent,  
“nefarious purpose,” or harm, none of which is required by any of the provisions of AR  
339 violated by DeRosa; and

- 1           5.       The hearing officer determined DeRosa's termination was not warranted based upon the  
2           "history of NDOC punishment in similar circumstances."

3                               III.

4                               STATEMENT OF THE CASE

5           Effective March 14, 2018, Respondent Patricia DeRosa (hereinafter, Employee or DeRosa),  
6 then a NDOC Program Officer I, was dismissed for engaging in unbecoming conduct, computer use  
7 violations, and neglect of duty by removing and/or copying official Departmental documents  
8 maintained by the State and using a state computer to send emails outside of the NDOC, containing  
9 confidential information that compromised inmate affairs in violation of: NAC 284.646(2)(b)  
10 ("unauthorized release or use of confidential information"); NAC 284.650(1) ("activity which is  
11 incompatible with an employee's conditions of employment established by law"); NAC 284.650(7)  
12 ("inexcusable neglect of duty") ; NDOC Administrative Regulation ("AR") 339.07.14(L) (Computer  
13 Usage Violations - "unauthorized use [of state computer] to inappropriately . . . distribute information,  
14 files, or other data that is private, confidential or not open to public inspection"); AR 339.07.15(SS)  
15 (Neglect of Duty - "removing, copying, . . . any record, report or other official document maintained  
16 by the State, Department or any other criminal justice agency"; and AR 339.07.18(I) (Unbecoming  
17 Conduct - "unauthorized disclosure of confidential information") . Record on Appeal (ROA) 106-108,  
18 163. AR 339.07.14(L) and AR 339.07.15(SS) are considered "Class 5" violations, for which  
19 termination is the recommended minimum level of discipline for a first offense. ROA 107, 143, 150-  
20 151.

21           After conducting a hearing on May 1, 2018 and taking evidence, Hearing Officer Lorna Ward  
22 issued her Findings of Fact, Conclusions of Law, and Decision ("Decision") on May 23, 2018 wherein  
23 she found that DeRosa's conduct did not violate AR 339.07.18(I), but technically violated NDOC AR  
24 339.07.14(B)<sup>1</sup> and AR 339.07.15(SS) (ROA 8, lines 14-15 and 21-23; ROA 9, line 21) and the hearing  
25 officer acknowledged that termination was the recommended level of discipline for a violation of AR

26  
27                               

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<sup>1</sup> DeRosa was not charged with AR 339.07.14(B) ("unauthorized use or distribution of  
28 Department data or programs for other than the administration of Department duties, responsibilities,  
and business. CLASS 3-5") (ROA 107, 150), but the hearing officer found that "[DeRosa's] computer  
usage violation is more appropriately described AR 339.07.14(B)." ROA 8 at lines 21-24.

1 339.07.15(SS) according to NDOC's administrative regulations. ROA 3, lines 19-23; ROA 9, line 25.  
2 Nevertheless, the Hearing Officer found that "Ms. DeRosa's actions do not rise to the level of a Class 5  
3 dismissal violation" (ROA 8, lines 17-19) and that "dismissal is not warranted in this specific case and  
4 is not for the good of the public service." ROA 10, lines 23-24. The Hearing Officer reversed DeRosa's  
5 termination and prescribed that "NDOC may impose any disciplinary penalty it chooses except for  
6 dismissal." ROA 11, n. 8. Nowhere in her reversal Decision did the Hearing Officer determine there  
7 was no just cause for the dismissal or that said dismissal was not reasonable, as required by NRS  
8 284.390(1) and (7). ROA 11.

9 NDOC filed a Petition for Judicial Review of the hearing officer's Decision on June 20, 2018.

#### 10 IV.

#### 11 STATEMENT OF FACT

12 Patricia DeRosa was, at all times relevant hereto, a Program Officer I with NDOC, assigned to  
13 the Re-Entry Unit, working on a project in Las Vegas to release overdue inmates who had been  
14 released on parole. ROA 52, 69, 106. Beginning in or about October 2017, NDOC conducted an  
15 internal administrative investigation regarding allegations that, in March, April and May 2017, DeRosa  
16 had engaged in unbecoming conduct, computer use violations, and neglect of duty by removing and/or  
17 copying official Departmental documents maintained by the State and using a state computer to send  
18 emails outside of the NDOC containing confidential information that compromised inmate affairs.  
19 ROA 98-99, 115-127.

20 Based upon DeRosa's own admissions, the investigation revealed that, on March 2, 2017, April  
21 18, 2017, May 3, 2014 and May 4, 2017, DeRosa sent and/or forwarded emails, without authorization,  
22 from her state computer to Steve Suwe, a person not employed by NDOC, disclosing information that  
23 was confidential and/or not open to public inspection. ROA 115-127, 175-224. To her May 3, 2017  
24 email, DeRosa attached twelve inmate pre-release reports that she admitted to removing and/or  
25 copying, without authorization, from records maintained by NDOC. ROA 5, lines 1-2; ROA 115-127,  
26 175-224. An adjudication followed the investigation, in which all of the allegations against DeRosa  
27 were sustained. ROA 128-131. NDOC therefore issued a Specificity of Charges to DeRosa on

28 ///

1 February 28, 2018, in which Warden Isidro Baca recommended that DeRosa be dismissed from state  
2 service for the following violations:

3 **Nevada Administrative Code 284.646 Dismissals:**

4 2. An appointing authority may immediately dismiss an employee for  
5 the following causes, unless the conduct is authorized pursuant to a rule or  
6 policy adopted by the agency with which the employee is employed:

7 ...

8 (b) Unauthorized release or use of confidential information.

9 **Nevada Administrative Code 284.650 Causes for disciplinary action:**

10 1. Activity which is incompatible with an employee's conditions of  
11 employment established by law or which violates a provision of NAC  
12 284.653 or 284.738 to 284.771, inclusive.

13 7. NAC 284.650 Inexcusable neglect of duty

14 **NDOC Administrative Regulations:**

15 **AR 339.07.14 COMPUTER USAGE VIOLATIONS**

16 L. Unauthorized use to inappropriately seek, distribute, obtain copies  
17 of, modify, or distribute information, files or other data that is private,  
18 confidential or not open to public inspection. **CLASS 5**

19 **AR 339.07.15 NEGLECT OF DUTY**

20 SS. Removing, copying, concealing, altering, falsifying, destroying,  
21 stealing, or tampering with any record, report or other official document  
22 maintained by the State, Department or any other criminal justice agency.  
(Official Department reports may be removed and/or copied only as  
23 allowed by law and Department policy/procedure) **CLASS 5**

24 **AR 339.07.18 UNBECOMING CONDUCT**

25 I. Unauthorized disclosure of confidential Department matters.  
26 **CLASS 4.**

27 ROA 106-158.

28 With an employee representative, DeRosa attended her pre-disciplinary review conducted by  
Associate Warden William Sandie on March 9, 2018. ROA 160. During the review, DeRosa admitted  
or did not dispute that she had copied the NDOC records and had sent the emails. ROA 160-61.  
Associate Warden Sandie recommended that the disciplinary sanction of termination be upheld. *Id.*  
Thereafter, in accordance with its authority under NRS 284.385(1)(a), NAC 284.646(1)(a) and

///

1 NAC 284.646(2)(b), NDOC considered that the good of the public service would be served by  
2 DeRosa's dismissal from State service, and dismissed DeRosa effective March 14, 2018. ROA 163.

3 DeRosa requested a hearing regarding her termination on March 19, 2018 on the following  
4 basis:

5 1. Violation of NRS 284.387. I was not given notice of the  
6 recommended corrective/disciplinary action within the 90 day timeframe  
as required.<sup>2</sup>

7 2. Violation of DOC AR 339, lack of progressive disciplinary  
8 actions. I have had no prior disciplinary actions, I feel that this is an  
extreme corrective/disciplinary action.

9 ROA 165. Nowhere in her request for hearing did DeRosa dispute the allegations against her. *Id.*

10 V.

11 **SUMMARY OF THE ARGUMENT**

12 The substantial rights of the NDOC have been prejudiced because the hearing officer's decision  
13 to reverse DeRosa's termination is in excess of her statutory authority and affected by error of law; the  
14 Decision is clearly erroneous in view of the reliable, probative, and substantial evidence in the entire  
15 record; and the Decision is arbitrary, capricious, and characterized by an abuse of discretion.

16 The hearing officer found just cause for termination as a matter of law, i.e., the hearing officer  
17 found that DeRosa had violated AR 339.07.15(SS) (Neglect of Duty), which is a Class 5, terminable  
18 offense, in addition to a violation of AR 339.07.14(B) (Computer Usage Violations), which is a Class  
19 3-5 offense. Under NAC 284.646(2)(b), "an appointing authority may dismiss an employee for any  
20 cause set forth in NAC 284.650 if the agency with which the employee is employed has adopted any  
21 rules or policies which authorize the dismissal of an employee for such a cause." The cause set forth in  
22 NAC 284.650 with which DeRosa was charged is NAC 284.650(7) ("inexcusable neglect of duty").  
23 The policy adopted by NDOC that authorizes dismissal for neglect of duty is AR 339.07.15(SS).  
24 Therefore, under NAC 284.646(2)(b), NDOC had the authority to dismiss DeRosa, and the hearing  
25 officer exceeded her limited statutory authority, abused her discretion and committed clear legal error  
26 by substituting her judgment for that of NDOC and reversing said dismissal after finding the violation.

27 ///

28 <sup>2</sup> DeRosa abandoned this argument at her May 1, 2018 hearing.



1 The hearing officer abused her discretion and committed clear error of law by making the  
2 clearly erroneous, arbitrary and capricious finding, without evidentiary basis, that none of the  
3 information contained in the unauthorized emails sent by DeRosa was confidential and that DeRosa  
4 therefore did not violate AR 339.07.18(I) ("unauthorized disclosure of confidential Department  
5 matters") based upon the existence of a community notification website maintained by another agency  
6 in accordance with NRS 179B.250. On the contrary, the reliable, probative and substantial evidence of  
7 the record shows that DeRosa did release confidential information in her emails in violation of AR 569  
8 (Confidentiality of Inmate Records). Further, DeRosa released confidential information, i.e., inmates'  
9 telephone numbers and the names of family members with whom inmates may live, that is *not* among  
10 the information made available on a community notification website pursuant to NRS 179B.250.

11 The hearing officer abused her discretion and committed clear error of law by reversing  
12 DeRosa's termination based upon the absence of intent, "nefarious purpose," or harm, none of which is  
13 required by any of the provisions of AR 339 violated by DeRosa. The Hearing Officer found that  
14 "[t]here was no intent to harm NDOC, P&P, the inmates or provide confidential information to the  
15 public. In fact, no harm occurred and no information was passed beyond Mr. Suwe." However, none  
16 of the violations with which Ms. DeRosa was charged require any intent whatsoever, or any actual  
17 harm. Furthermore, the hearing officer erroneously, arbitrarily and capriciously injected her own  
18 opinion as to the intent of the policies or violations with which DeRosa was charged. As a hearing  
19 officer and not an NDOC official or member of the Board of Prison Commissioners, that approved  
20 these regulations, the hearing officer is not in a position to opine on the intent of the regulations.

21 Lastly, the hearing officer abused her discretion and committed clear error of law by making the  
22 clearly erroneous, arbitrary and capricious conclusion that DeRosa's termination was not warranted  
23 based upon the "history of NDOC punishment in similar circumstances." The "history of NDOC  
24 punishment" referenced by the hearing officer occurred approximately 5-10 years prior to DeRosa's  
25 dismissal. Said history is irrelevant to this case and does not in any way mitigate the severity of  
26 DeRosa's violations or prevent NDOC from enforcing its policies. "The Supreme Court does not  
27 require equal discipline of public employees and any factual determination made on that basis is

28 ///

1 completely irrelevant to the process.” See *NDOC v. Sturm*, Case No. 11OC 00020 1B (June 27, 2012)  
2 (citing *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 603-05 (2008)).

3 Accordingly, this Court should reverse the hearing officer’s Decision because she exceeded her  
4 statutory authority, committed numerous clear legal errors, abused her discretion, and issued a Decision  
5 that was arbitrary, capricious and clearly erroneous in view of the reliable, probative and substantial  
6 evidence of the record. See NRS 233B.135(3). As such, NDOC respectfully urges the Court to grant this  
7 Petition for Judicial Review.

## 8 VI.

### 9 LAW AND ARGUMENT

#### 10 A. Standard of Review.

11 The standard of review for evaluating a hearing officer’s decision is governed by the  
12 Administrative Procedure Act, as set forth in NRS 233B.010, *et seq.* See *Dredge v. State, ex rel., Dep’t*  
13 *of Prisons*, 105 Nev. 39, 43, 769 P.2d 56, 58 (1989). A reviewing court may remand or affirm a final  
14 decision of a hearing officer, or set it aside in whole or in part, if the substantial rights of the petitioner  
15 have been prejudiced because the final decision of an agency is:

- 16 (a) In violation of constitutional or statutory provisions;
- 17 (b) In excess of the statutory authority of the agency;
- 18 (c) Made upon unlawful procedure;
- 19 (d) Affected by other error of law;
- 20 (e) Clearly erroneous in view of the reliable, probative and substantial  
evidence on the whole record; or
- 21 (f) Arbitrary or capricious or characterized by abuse of discretion.

22 See NRS 233B.135(3).

23 Legal determinations made by an administrative hearing officer are subject to a *de novo* standard of  
24 review, including administrative construction of statutes. See *Garcia v. Scolari’s Food & Drug*, 200 P.3d  
514, 520, 125 Nev. 48, 56 (2009) (citing *Riverboat Hotel Casino v. Harold’s Club*, 113 Nev. 1025,  
1029, 944 P.2d 819, 822 (1997)).

25 However, under NRS 233B.135(3), a reviewing court cannot substitute its judgment for that of the  
26 agency on the weight of evidence as to a question of fact. That being said, NRS 233B.135 does not permit  
27 a district court to simply rubber-stamp an erroneous agency decision, *even on an issue of fact*. Instead,  
28 courts must determine if a hearing officer’s decision was supported by the evidence, and whether the

1 hearing officer acted arbitrarily, capriciously, or contrary to the law. *Turk v. Nevada State Prison*, 94 Nev.  
2 101, 103, 575 P.2d 599, 601 (1976); *see also Meadow v. Civil Serv. Bd. of Las Vegas Metro. Police*  
3 *Dep't*, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989) (explaining an administrative agency acts  
4 arbitrarily and capriciously when it acts in disregard of the facts and circumstances involved). The  
5 district court also reviews factual determinations for clear error “in view of the reliable, probative and  
6 substantial evidence on the whole record” or for an “abuse of discretion.” NRS 233B.135(3)(e) and (f).  
7 Indeed, every conclusion reached by an administrative law judge must be supported by “substantial  
8 evidence in the record,” which the Nevada Supreme Court has defined as “that quantity and quality of  
9 evidence which a reasonable man could accept as adequate to support a conclusion.” *Maxwell v. State*  
10 *Indus. Ins. Sys.*, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993) (citing *State, Emp. Security v. Hilton*  
11 *Hotels*, 102 Nev. 606, 608 n. 1, 729 P.2d 497, 498 n. 1 (1986); *see also Grover C. Dils Med. Ctr. v.*  
12 *Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). Thus, even factual findings are properly  
13 overturned if the hearing officer’s findings are not supported by “substantial evidence.” *Taylor v. Dep't of*  
14 *Health & Human Servs.*, 129 Nev. 928, 931, 314 P.3d 949, 951 (2013); NRS 233B.135(3).

15 **B. The Substantial Rights of NDOC Have Been Prejudiced Because the Hearing Officer’s**  
16 **Decision to Reverse DeRosa’s Termination is in Excess of the Hearing Officer’s Statutory**  
17 **Authority, Affected By Clear Error Of Law, Clearly Erroneous, Arbitrary, Capricious,**  
18 **and Characterized by an Abuse of Discretion.**

19 A court may set aside a final decision by a hearing officer where the final decision is clearly  
20 erroneous in view of the “reliable, probative and substantial evidence on the whole record.” NRS  
21 233B.135(3)(e). Moreover, a decision is arbitrary and capricious if not “supported by substantial  
22 evidence in the record” or where a decision is made in disregard of the facts and circumstances  
23 involved. *See Clark Cnty. Educ. Ass’n v. Clark Cnty. Sch. Dist.*, 122 Nev. 337, 342, 131 P.3d 5, 9  
(2006); *see also Meadow*, 105 Nev. at 627.

24 Here, in her May 23, 2018 Decision, Hearing Officer Lorna Ward found that DeRosa’s conduct  
25 did not violate AR 339.07.18(I) (Unbecoming Conduct - “unauthorized disclosure of confidential  
26 Department matters”), based on an arbitrary, capricious and erroneous conclusion that none of the  
27 information disclosed by DeRosa was confidential. ROA 4, lines 21 and 27; ROA 5, line 16; ROA 9,  
28 lines 1-3. The hearing officer found that DeRosa technically violated NDOC AR 339.07.14(B)

1 (Computer Usage Violations - "unauthorized use or distribution of Department data or programs for  
2 other than the administration of Department duties, responsibilities and business")<sup>3</sup> and AR  
3 339.07.15(SS) (Neglect of Duty - "removing, copying, . . . any record, report or other official document  
4 maintained by the State, Department or any other criminal justice agency") (ROA 8, lines 14-15 and  
5 21-23; ROA 9, line 21) and acknowledged that termination was the recommended level of discipline  
6 for a violation of AR 339.07.15(SS) according to NDOC's regulations. ROA 3, lines 19-23; ROA 9,  
7 line 25. Nevertheless, the hearing officer found that "Ms. DeRosa's actions do not rise to the level of a  
8 Class 5 dismissal violation" (ROA 8, lines 17-19) and that "dismissal is not warranted in this specific  
9 case and is not for the good of the public service." ROA 10, lines 23-24. The Hearing Officer's  
10 Decision to reverse DeRosa's dismissal was based on lack of intent or harm and NDOC's history of  
11 discipline in other cases. ROA 8-11. Nowhere in her reversal Decision did the hearing officer  
12 determine there was no just cause for the dismissal or that said dismissal was not reasonable, as  
13 required by NRS 284.390(1) and (7). ROA 11.

14 The hearing officer's decision to reverse DeRosa's termination is in excess of her statutory  
15 authority and affected by error of law; is clearly erroneous in view of the reliable, probative, and  
16 substantial evidence in the entire record; and is arbitrary, capricious, and characterized by an abuse of  
17 discretion. Consequently, the Decision must rightfully be set aside in accordance with NRS  
18 233B.135(3)(b), (c), (d), (e) and (f).

19 **1. The Hearing Officer Exceeded her Statutory Authority, Abused her Discretion and**  
20 **Committed Clear Legal Error by Arbitrarily, Capriciously and Erroneously**  
21 **Reversing DeRosa's Dismissal When Just Cause Clearly Supports DeRosa's**  
**Dismissal.**

22 Within 10 working days after the effective date of an employee's dismissal, the employee may  
23 request in writing a hearing before the hearing officer of the Commission. NRS 284.390(1). If the  
24 hearing officer determines that the dismissal was without just cause, the action must be set aside.  
25 NRS 284.390(7). "A discharge for just cause 'is one which is not for any arbitrary, capricious, or  
26 illegal reason and which is one based on facts (1) supported by substantial evidence, and (2) reasonably

27 

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<sup>3</sup> NDOC did not charge DeRosa with violation of AR 339.07.14(B) (ROA 107, 150), but the  
28 hearing officer found that "[DeRosa's] computer usage violation is more appropriately described AR  
339.07.14(B). ROA 8, lines 21-24. Such a violation is a Class 3-5. ROA 150.

1 believed by the employer to be true.” *Morgan v. State, Dept. of Business and Industry, Taxicab*  
2 *Authority*, 2016 WL 2944701 at \*2 (quoting *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1078, 901  
3 P.2d 693, 701 (1995)). “[R]emoval for just cause means ‘cause sufficient in law.’” *Oliver v. Spitz*, 76  
4 Nev. 5, 10, 358 P.2d 158, 161 (1960).

5 In this case, although the hearing officer’s Decision does not actually make a specific  
6 determination regarding the existence or absence of just cause, the hearing officer found just cause for  
7 dismissal *as a matter of law* when she (1) found that DeRosa had violated AR 339.07.15(SS) (Neglect  
8 of Duty) by removing and copying a record maintained by NDOC (ROA 8, lines 14-15 and 21-23;  
9 ROA 9, line 21), and (2) recognized that a first time violation of AR 339.07.15(SS) is a Class 5 offense,  
10 which at a minimum recommends termination. ROA 3, lines 19-22; ROA 9, lines 2-26. Nevertheless,  
11 the hearing officer erroneously found that “[t]he Neglect of Duty charge for merely copying the  
12 documents to Mr. Suwe does not justify a Class 5 violation in these specific circumstances. Therefore,  
13 dismissal is inappropriate.” ROA 8, lines 24-26.

14 The State of Nevada Personnel Commission has adopted regulations at NAC 284.638 *et seq.*  
15 pursuant to the authority granted under NRS 284.155, which set forth the specific causes for  
16 disciplining employees. These regulations have the full force and effect of law. *Turk v. Nevada State*  
17 *Prison*, 94 Nev. 101, 104, 575 P.2d 599 (1978). The system adopted by the Personnel Commission  
18 provides that in cases of serious violations of law or regulations, severe measures may be applied,  
19 without first imposing progressive discipline. *See* NRS 284.383(1). The Personnel Commission’s  
20 regulations include provisions granting authority for the immediate dismissal of employees for serious  
21 violations without first applying less severe measures of progressive discipline. NAC 284.646(1)(a).  
22 Further, under NAC 284.646(1)(b), “an appointing authority may dismiss an employee for any cause  
23 set forth in NAC 284.650 if the agency with which the employee is employed has adopted any rules or  
24 policies which authorize the dismissal of an employee for such a cause.”

25 The cause set forth in NAC 284.650 with which DeRosa was charged is NAC 284.650(7)  
26 (“inexcusable neglect of duty”). ROA 107. The relevant policy adopted by NDOC that authorizes  
27 dismissal for neglect of duty is AR 339.07.15(SS). ROA 143 and 154. Therefore, under NAC 284.646(1)(b),

28 ///

1 NDOC had explicit authority to dismiss DeRosa for violating AR 339.07.15(SS).<sup>4</sup> The hearing  
2 officer's Decision clearly violated the authority granted to NDOC and exceeded the hearing officer's  
3 limited authority.

4 It is not the role of a hearing officer to step into the shoes of NDOC and substitute her judgment  
5 for that of the employer on the amount of prescribed discipline. *See e.g. Hagblom v. Pers. Advisory*  
6 *Comm'n of State of Nev.*, 97 Nev. 35, 38, 623 P.2d 977, 978 (1981). Indeed, pursuant to NRS 284.020,  
7 agencies and department heads have the authority to "manage the affairs of their department as they see  
8 fit." And, under NRS Chapter 209, the NDOC Director has the duty of "[a]dminister[ing] the  
9 Department under the director of the Board [of Prison Commissioners]" and "[e]stablish[ing]  
10 regulations with the approval of the Board . . ."<sup>5</sup> NRS 209.131. It was not within the limited authority  
11 of this hearing officer to essentially re-write Board-approved prohibitions and penalties as she saw fit  
12 and reverse authorized discipline in response to a confirmed violation of AR 339.07.15(SS) (Neglect of  
13 Duty). Consequently, NDOC had legal authority under NAC 284.646(1)(a) to dismiss DeRosa for her  
14 misconduct and it was clear legal error for the hearing officer to find a violation of a terminable  
15 offense, but then disregard NDOC's authority and overturn such termination based solely on her mere  
16 opinion that termination was too harsh. This is especially true considering the Hearing Officer  
17 additionally found that DeRosa violated AR 339.07.14(B) (Computer Usage Violations), which carries  
18 a penalty ranging from suspension to dismissal (Class 3-5) on a first offense. ROA 143, 150.

19 Just cause was clearly established in this case and the Hearing Officer's order reversing  
20 dismissal was arbitrary and capricious as a matter of law, in excess of her limited authority, a clear  
21 abuse of discretion, and not supported by substantial evidence in the record. The foregoing has resulted  
22 in prejudice to the substantial rights of NDOC and, accordingly, NDOC respectfully urges this Court to  
23 set aside the hearing officer's Decision in accordance with NRS 233B.135(3) and to uphold DeRosa's  
24 termination.

25 \_\_\_\_\_  
26 <sup>4</sup> There are other charges set forth in the Specificity of Charges that also support dismissal;  
27 however, at this time NDOC is addressing the one Class 5 violation that was upheld by the hearing  
28 officer.

<sup>5</sup> The Board of Prison Commissioners is made up of the Governor, the Attorney General and  
the Secretary of State. NRS 209.021; NEV. CONST. art. V, § 21.

1           2.     **The Hearing Officer Exceeded her Statutory Authority, Abused her Discretion and**  
2                   **Committed Clear Legal Error by Substituting her Judgment for that of NDOC**  
3                   **with Respect to DeRosa's Dismissal**

4           While briefly alluded to above, the issue of the hearing officer's limited statutory authority (and  
5 specifically whether she can substitute her judgment for that of NDOC on the amount of prescribed  
6 discipline) is deserving of greater discussion. In this case, the hearing officer found substantial evidence  
7 that DeRosa had committed the terminable offense of removing and/or copying official NDOC records  
8 not open to public inspection without authorization in violation of AR 339.07.15(SS) (Neglect of  
9 Duty). ROA 5, lines 1-2; ROA 8, lines 10-15. However, in spite of her own conclusions of law, the  
10 hearing officer then determined that the amount of prescribed discipline to be imposed (i.e. termination)  
11 was too harsh and reversed the discipline. ROA 8, lines 24-26. As discussed *supra*, NAC  
12 284.646(1)(b) clearly authorized DeRosa to be dismissed for her misconduct and NDOC acted  
13 consistent with its duties, responsibilities and authority under Chapter 284 of the NRS and NAC when  
14 it terminated DeRosa for her violation of NDOC policy and Nevada law. As such, the May 23, 2018  
15 Decision overturning DeRosa's termination for proven unauthorized removal and copying of NDOC  
16 records not open to public inspection was made in excess of the hearing officer's statutory authority and  
17 was clear legal error.

18           It is not the duty of a judge or jury [or hearing officer] to substitute its judgment for the employer's.  
19 *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1077-79, 901 P.2d 693, 700-03 (1995). The Nevada  
20 Legislature has delegated the authority to run State agencies under the executive branch to the  
21 department heads. *See* NRS 284.020(2). Indeed, NRS 284.385 expressly empowers appointing  
22 authorities to dismiss, demote, or suspend permanent classified employees "when **the appointing**  
23 **authority considers** the good of the public service will be served thereby." (Emphasis added).  
24 Likewise, after consulting with the Attorney General, "**the appointing authority may take such lawful**  
25 **action** regarding the proposed discipline **as it deems necessary** under the circumstances." NRS  
26 **284.385(2)** (emphasis added). NAC 284.022 defines "appointing authority" as an official, board or  
27 commission having the legal authority to make appointments to positions in the state service, or a  
28 person to whom the authority has been delegated by the official, board or commission." Notably absent

1 from this definition is any reference to a hearing officer. *See* NAC 284.022. As such, the power to  
2 prescribe the actual discipline imposed on permanent classified state employees lies within the  
3 exclusive province of the appointing authority, which in this case was NDOC and *not* the hearing  
4 officer. *See Taylor*, 129 Nev. at 931 (Nevada law does not “make hearing officers appointing  
5 authorities or provide them with explicit power to prescribe the amount of discipline to be imposed.”);  
6 *see also Hagblom*, 97 Nev. at 38. However, this is exactly what the hearing officer did in this case  
7 when she found a violation of AR 339.07.15(SS) (Neglect of Duty) but then disregarded State law  
8 NDOC’s disciplinary guidelines and arbitrarily concluded that termination was not mandatory and not  
9 warranted. ROA 8, lines 24-26; ROA 9, lines 26-27; ROA 10, lines 23-24.

10 Moreover, while NRS 284.390 permits a hearing officer to set aside a dismissal that was  
11 without “just cause” as provided in NRS 284.385, Nevada law does not permit a hearing officer to step  
12 into the shoes of the appointing authority and substitute her judgment for that of the employer. *Id.* “A  
13 discharge for just cause ‘is one which is not for any arbitrary, capricious, or illegal reason and which is  
14 one based on facts (1) supported by substantial evidence, and (2) reasonably believed by the employer  
15 to be true.’” *Morgan v. State, Dept. of Business and Industry, Taxicab Authority*, 2016 WL 2944701 at  
16 \*2 (quoting *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1078, 901 P.2d 693, 701 (1995)).  
17 “[R]emoval for just cause means cause sufficient in law.” *Oliver v. Spitz*, 76 Nev. 5, 10, 358 P.2d 158,  
18 161 (1960) (internal quotation marks omitted).

19 Here, there is no evidence whatsoever that NDOC’s decision to terminate DeRosa was arbitrary,  
20 capricious, or made for an illegal reason. Instead, NDOC lawfully made a reasonable decision to  
21 terminate DeRosa for violating AR 339.07.15(SS) (Neglect of Duty) and other offenses, since  
22 termination was authorized for such violations. *See* ROA 143 and 154; *see also* NAC 284.646(1).  
23 Nevertheless, by concluding that the termination was not justified (even though the hearing officer  
24 affirmed a violation of AR 339.07.15(SS) and conceded that termination was allowable under NDOC’s  
25 disciplinary guidelines), the hearing officer effectively became the appointing authority, substituted her  
26 judgment for that of the employer and proclaimed the dismissal was reversed because, in her opinion,  
27 dismissal “has not been shown to be for good of the public service.” ROA 11, lines 5-7.

28 ///



1 As a result of the foregoing, the hearing officer arbitrarily exceeded her limited statutory  
2 authority and committed clear legal error, thereby causing prejudice to the substantial rights of NDOC.  
3 Consequently, NDOC submits that the hearing officer's May 23, 2018 Decision must be set aside and  
4 the termination of DeRosa must be affirmed. *See* NRS 233B.135(3)(b),(d) and (f).

5 **3. The Hearing Officer Abused Her Discretion and Committed Clear Error of Law by**  
6 **Making the Clearly Erroneous, Arbitrary and Capricious Finding, Without**  
7 **Evidentiary Basis, That None of the Information Contained in the Unauthorized**  
8 **Emails Sent by DeRosa Was Confidential and That DeRosa Therefore Did Not**  
9 **Violate AR 339.07.18(I) (Unbecoming Conduct - "unauthorized disclosure of**  
10 **confidential Department matters").**

11 In her Decision, the hearing officer stated, numerous times, that none of the information  
12 contained in the records copied and emailed by DeRosa without authorization was confidential and that  
13 DeRosa therefore did not violate AR 339.07.18(I) (Unbecoming Conduct - "unauthorized disclosure of  
14 confidential Department matters"). ROA 4, lines 21 and 27; ROA 5, line 16; ROA 9, lines 1-3 and 21-  
15 22. The hearing officer's finding was based solely upon the existence of a community notification  
16 website maintained by another agency in accordance with NRS 179B.250. ROA 7, lines 1-2; ROA 8,  
17 lines 18-19 ("The information in the inmate release plans would have been available on the community  
18 notification website."). There is no evidence in the record to support the hearing officer's finding.  
19 Rather, the reliable, probative and substantial evidence on the record shows that DeRosa did release  
20 confidential information in her emails, in violation of AR 339.07.18(I) and AR 569.

21 NDOC AR 569 (Confidentiality of Inmate Records), which was admitted into evidence without  
22 objection at the hearing (ROA 18, lines 3-8), specifically states that "[t]he disclosure of inmate  
23 information, whether written or verbal, outside the realm of an employee's duties is prohibited." ROA  
24 167-172. "Information pertaining to an inmate will be disclosed only when a defined need to know has  
25 been ascertained and the identity of the requester has been verified." *Id.* "Inmate information that is  
26 not specifically approved for disclosure within an NDOC Administrative Regulation is considered  
27 confidential for purposes of disclosure, does not constitute a matter of public record, and is not to be  
28 communicated and/or released to the general public or to the news media." *Id.* DeRosa claims  
ignorance of AR 569. ROA 68, lines 15-17. Regardless, all NDOC employees are required and  
expected to be familiar with all NDOC administrative regulations, especially those pertaining to an

1 employee's position. ROA 51, lines 14-18. All NDOC administrative regulations are available to  
2 employees, including DeRosa, online and in the Warden's office. ROA 51, lines 19-25; ROA 52, lines  
3 1-5; ROA 53, lines 1-5.

4 Furthermore, the pre-release forms copied and emailed out by DeRosa contained information,  
5 i.e., inmates' telephone numbers and the names of family members with whom the inmates may live,  
6 that is *not* listed among the information made available on a community notification website pursuant  
7 to NRS 179B.250.<sup>6</sup> ROA 46, lines 3-7; ROA 202, 204, 205.

8 The inmate information contained in the emails sent by DeRosa outside of her duties, without  
9 authorization, to a member of the public was clearly confidential and not subject to public inspection

10  
11 <sup>6</sup> According to NRS 179B.250, the offender information provided by the Central Repository  
12 upon receipt of a request for information is limited to:

13 (1) The name of the offender and all aliases that the offender has used or  
14 under which the offender has been known.

15 (2) A complete physical description of the offender.

16 (3) A current photograph of the offender.

17 (4) The year of birth of the offender.

18 (5) The complete address of any residence at which the offender  
19 resides or will reside.

20 (6) The address of any location where the offender is or will be:

21 (I) A student, as defined in NRS 179D.110; or

22 (II) A worker, as defined in NRS 179D.120.

23 (7) The license plate number and a description of any motor  
24 vehicle owned or operated by the offender.

25 (8) The following information for each offense for which the  
26 offender has been convicted:

27 (I) The offense that was committed, including a citation to  
28 and the text of the specific statute that the offender violated.

(II) The court in which the offender was convicted.

(III) The name under which the offender was convicted.

(IV) The name and location of each penal institution, school,  
hospital, mental facility or other institution to which the offender was  
committed for the offense.

(V) The city, township or county where the offense was  
committed.

(9) The tier level of registration and community notification  
assigned to the offender pursuant to NRS 179D.010 to 179D.550,  
inclusive.

(10) Any other information required by federal law.

1 under AR 569, and was not information available to the public on any community notification website  
2 under NRS 179B.250. ROA 167-172, 174-224. Therefore, it has been demonstrated by the reliable,  
3 probative, and substantial evidence in the entire record that DeRosa's conduct was in clear violation of:  
4 NAC 284.646(2)(b) ("unauthorized release or use of confidential information"); AR 339.07.14(L)  
5 (Computer Usage Violations - "unauthorized use [of state computer] to inappropriately . . . distribute  
6 information, files, or other data that is private, confidential or not open to public inspection"); and AR  
7 339.07.18(I) (Unbecoming Conduct - "unauthorized disclosure of confidential information"). ROA  
8 107. And, because these violations were demonstrated by the reliable, probative, and substantial  
9 evidence in the entire record, the hearing officer abused her discretion and committed clear error by  
10 arbitrarily and capriciously entering a clearly erroneous Decision finding no violation of these  
11 provisions. ROA 8, lines 21-24; ROA 9, lines 1-3 and 21-22; ROA 11, lines 10-11.

12 NAC 284.646(2)(b) authorizes an appointing authority to immediately dismiss an employee for  
13 unauthorized release or use of confidential information. Thus, in addition to the authority granted by  
14 NAC 284.646(1)(a) and AR 339.07.15(SS), NDOC had clear authority to dismiss DeRosa under NAC  
15 284.646(2)(b), AR 339.07.14(L) and AR 339.07.18(I). ROA 150 and 154. The hearing officer's  
16 reversal of DeRosa's dismissal based, in part, on the arbitrary, capricious and erroneous finding that  
17 none of the information disclosed by DeRosa was confidential, is clear legal error and clearly  
18 erroneous in view of the reliable, probative and substantial evidence in the record.

19 **4. The Hearing Officer Abused Her Discretion and Committed Clear Error of Law by**  
20 **Reversing DeRosa's Termination Based Upon Her Clearly Erroneous, Arbitrary**  
21 **and Capricious Finding of No Intent, "Nefarious Purpose," or Harm, None of**  
22 **Which is Required by Any of the Provisions of AR 339 Violated by DeRosa.**

23 In reversing DeRosa's dismissal, the hearing officer arbitrarily found that, in DeRosa's copying  
24 of the inmate forms and sending them to Mr. Suwe, there was "no nefarious purpose as clearly  
25 contemplated by both AR 339.07.14(L) and AR 339.07.15(SS)". ROA 8, lines 11-14. Furthermore, the  
26 hearing officer erroneously, arbitrarily and capriciously injected her own opinion as to the intent of the  
27 policies or violations with which DeRosa was charged. ROA 8, lines 15-17 ("the intent of both the  
28 Computer Usage violation and Neglect of Duty violation involved distribution of private confidential  
information or some form of destruction of or illicit modification of official records.") As a hearing

1 officer, and not the appointing authority or a member of the Board of Prison Commissioners (which  
2 had the sole authority of establishing NDOC's administrative regulations), the hearing officer is not in a  
3 position to speak to the intent of the regulations' provisions. It is clear from the plain, straight-forward  
4 language of the offenses that merely removing or copying official records maintained by the  
5 Department, or using a state computer to send emails containing information not open to public  
6 inspection, is prohibited and punishable by termination. ROA 150, 154. "Destruction of or illicit  
7 modification of official records" is not a required element of the offenses with which DeRosa was  
8 charged. In fact, "unauthorized destruction of State records" an entirely different offense. *See* AR  
9 339.07.13(D). ROA 149.

10 The hearing officer further opined that "[t]here was no intent to harm NDOC, P&P, the inmates  
11 or provide confidential information to the public. In fact, no harm occurred and no information was  
12 passed beyond Mr. Suwe." ROA 8, lines 7-9. None of the violations with which Ms. DeRosa was  
13 charged require any intent whatsoever, or any actual harm. ROA 107. There are numerous other  
14 offenses listed within AR 339 that do require intent or purpose. *See, e.g.,* AR 339.07.08(C)  
15 ("knowingly making false statement on travel claims") (ROA 147); AR 339.07.10(A) ("willful  
16 falsification of application for employment . . .") (ROA 147); AR 339.07.13(K) ("intentional  
17 destruction, damage to, or loss of property . . .") (ROA 149); AR 339.07.14(M) ("intentionally  
18 allowing an inmate to have any password protected file") (ROA 150); AR 339.07.15(O) ("intentionally  
19 initiating or causing a disruption of normal operations") (ROA 152). Similarly, there are other  
20 offenses listed within AR 339 that do require some type of harm. *See, e.g.,* AR 339.07.02(B)  
21 ("discharge of firearm due to negligence, with substantial injury/damage") (ROA 144); AR  
22 339.07.05(A) ("guilty plea of any type . . . or conviction . . . provided the conduct at issue has an  
23 adverse impact upon the Department and/or tends to bring the Department into public discredit . . .")  
24 (ROA 145); AR 339.07.15(MM) ("intentional failure to discharge duties . . . provided that failure  
25 results in (a) escape of a prisoner (b) the serious physical injury (c) sexual assault or (d) death of  
26 another person.") (ROA 153).

27 When interpreting regulations, the goal is to effectuate the regulatory body's intent; to do so, the  
28 court must give the regulation's terms their plain meaning, considering its provisions as a whole. *See*

1 *In re Estate of Murray*, 344 P.3d 419, 421 (2015). When a court “is presented with an issue of  
2 statutory interpretation, it should give effect to the statute's plain meaning.” *MGM Mirage v. Nevada*  
3 *Ins. Guar. Ass'n*, 125 Nev. 223, 228-29 (2009) (citing *Public Employees' Benefits Prog. v. LVMPD*, 124  
4 Nev. 138, —, 179 P.3d 542, 548 (2008)). “Thus, when the language of a statute is plain and  
5 unambiguous, such that it is capable of only one meaning, this court should not construe that statute  
6 otherwise.” *Id.* (citing *Nevada Power Co. v. Public Serv. Comm'n*, 102 Nev. 1, 4, 711 P.2d 867, 869  
7 (1986)).

8 The language of AR 339.07.14(L) (Computer Usage Violations) and 339.07.15(SS) (Neglect of  
9 Duty) is not ambiguous. It is clear from the plain, straight-forward language of the offenses that using  
10 a state computer to distribute confidential information and merely removing or copying official records  
11 maintained by the Department is prohibited and punishable by termination. No “nefarious purpose,”  
12 harm, or further dissemination is required. And, looking at NDOC’s administrative regulations as a  
13 whole, it is clear that if NDOC or the Board of Prison Commissioners had intended for intent or harm  
14 to be present, they would have indicated as such in these offenses. The hearing officer’s reversal of  
15 DeRosa’s dismissal based, in part, on the absence of intent or harm is arbitrary and capricious, clear  
16 legal error, and clearly erroneous in view of the reliable, probative and substantial evidence in the  
17 record.

18 **5. The Hearing Officer Abused Her Discretion and Committed Clear Error of Law by**  
19 **Making the Clearly Erroneous, Arbitrary and Capricious Conclusion That**  
20 **DeRosa’s Termination Was Not Warranted Based Upon the “history of NDOC**  
**punishment in similar circumstances.”**

21 The hearing officer concluded that DeRosa’s termination was not warranted based, in part, upon  
22 the “history of NDOC penalties in similar circumstances and more egregious circumstances.” ROA 10,  
23 lines 19-24. First, there is no evidence in the record of the circumstances of the other cases that  
24 establishes any similarity to this case or that those other cases were “more egregious” than DeRosa’s.  
25 Further, the “history of NDOC punishment” referenced by the hearing officer occurred approximately  
26 5-10 years prior to DeRosa’s dismissal and involved entirely different people, all the way up to the  
27 Director of the Department. ROA 226, 228-295.<sup>7</sup> Said history is irrelevant to this case and does not in

28 <sup>7</sup> In the more recent cases involving computer violations or disclosure of confidential information,

1 any way mitigate DeRosa's violations or prevent NDOC from enforcing its policies. "The Supreme  
2 Court does not require equal discipline of public employees and any factual determination made on that  
3 basis is completely irrelevant to the process." See *NDOC v. Sturm*, Case No. 11OC 00020 1B, Dept. 1  
4 (June 27, 2012) (citing *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591 (2008)).

5 Here, the hearing officer opined that "NDOC may certainly decide to change its policy on  
6 different infractions, however it must do so in a reasonable manner." ROA 10, lines 18-19. There is no  
7 evidence that NDOC has changed any policy. Rather, NDOC is simply enforcing *existing* policy and  
8 exercising *existing* authority under state law. The hearing officer's reliance on the manner in which a  
9 prior NDOC administration handled a 2009 case regarding OJ Simpson's "mug shot" is, quite frankly,  
10 ridiculous, and admitting evidence of such a case is an error of law. ROA 6, lines 1-2; ROA 6, lines 9-  
11 16; ROA 10, lines 18-20 and n. 7. In the *Engquist* case quoted by this Court in *Sturm*, *supra*, the  
12 Supreme Court stated that:

13 [T]he rule that people should be "treated alike, under like circumstances  
14 and conditions" is not violated when one person is treated differently from  
15 others, because treating like individuals differently is an accepted  
16 consequence of the discretion granted. In such situations, allowing a  
17 challenge based on the arbitrary singling out of a particular person would  
18 undermine the very discretion that such state officials are entrusted to  
19 exercise. . . . This principle applies most clearly in the employment  
20 context, for employment decisions are quite often subjective and  
21 individualized, resting on a wide array of factors that are difficult to  
22 articulate and quantify. . . . [T]reating seemingly similarly situated  
23 individuals differently in the employment context is par for the course.  
24 Thus, the class-of-one theory of equal protection—which presupposes that  
25 like individuals should be treated alike, and that to treat them differently is  
26 to classify them in a way that must survive at least rationality review—is  
27 simply a poor fit in the public employment context.

21 *Engquist*, 553 U.S. at 603-05.

22 Here, DeRosa violated numerous NDOC administrative regulations and state regulations that  
23 prohibit copying of Departmental records and disclosure of confidential inmate information, using a  
24 state computer, and is subject to discipline for all of her violations. "[W]hether other employees [who  
25 ///

26  
27 dismissal was recommended by NDOC. ROA 226. One of the cases was settled for unspecified  
28 reasons. *Id.* In another case, discipline was not ultimately pursued at the advice of counsel, again, for  
unspecified reasons. *Id.* In the third case, the employee resigned before the discipline was carried out.  
*Id.*

1 committed similar violations] were similarly disciplined is not a defense.” *Sturm, supra*. “Neither  
2 does it provide mitigation.” *Id.* DeRosa’s dismissal should be reinstated.

3 **VII.**

4 **CONCLUSION**

5 In accordance with the foregoing, Petitioner NDOC respectfully requests that this Court  
6 GRANT its Petition for Judicial Review and REVERSE the May 23, 2018, Decision issued by Hearing  
7 Officer Ward under Case No. 1802991-LLW.

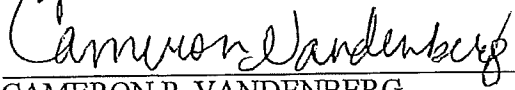
8 **AFFIRMATION**

9 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document  
10 does not contain the personal information of any person.

11 DATED this 21st day of September, 2018.

12 ADAM PAUL LAXALT  
13 Attorney General

14 By:

  
15 CAMERON P. VANDENBERG  
16 Chief Deputy Attorney General  
17 Attorneys for Petitioner Nevada Department of  
18 Corrections  
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**CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12 pt. font in Time New Roman; *or*

☐ This brief has been prepared in a monospaced typeface using Microsoft Word 2013 with 12 pt. font in Times New Roman.

2. I further certify that this brief complies with the page- or type- volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☐ Proportionately spaced, has a typeface of 14 points or more, and contains \_\_\_\_\_ words; or

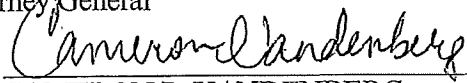
☐ Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text; or

☒ Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of September 2018.

ADAM PAUL LAXALT  
Attorney General

By:   
CAMERON P. VANDENBERG  
Chief Deputy Attorney General  
*Attorneys for Petitioner Nevada Department  
of Corrections*





Attachment 1  
Petition for Judicial Review

Attachment 1  
Petition for Judicial Review

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2018 JUN 20 PM 4:07  
SUSAN HERRIWETHER  
BY C. TORRES DEPUTY

9 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR CARSON CITY

11 STATE OF NEVADA, *ex rel.* its  
12 DEPARTMENT OF CORRECTIONS

13 Petitioner,

14 vs.

15 PATRICIA DEROSA, an individual, AND  
16 STATE OF NEVADA *ex rel.* its  
DEPARTMENT OF ADMINISTRATION,  
17 PERSONNEL COMMISSION and DIVISION  
OF HEARINGS AND APPEALS,

18 Respondents.  
19

Case No. 18 OC 00150 1B

Dept. No. 1

PETITION FOR JUDICIAL REVIEW

20 Petitioner, State of Nevada *ex rel.* its Department of Corrections, by and through counsel, Adam  
21 Paul Laxalt, Attorney General, and Cameron P. Vandenberg, Chief Deputy Attorney General, pursuant  
22 to NRS 284.390(9) and NRS 233B.130, petitions the Court as follows:

- 23 1. Petitioner requests judicial review of the final decision of the Nevada Department of  
24 Administration Hearings Division Hearing Officer dated May 23, 2018, in Case No. 1802991-LLW.
- 25 2. This Court has jurisdiction pursuant to NRS 233B.130.
- 26 3. This Petition has been filed in accordance with NRS 233B.130(1) and (2).
- 27 4. Petitioner has been aggrieved by the final decision of the hearing officer attached hereto  
28 as Exhibit 1, and Petitioner's rights have been substantially prejudiced because the final decision is:

- a) In violation of constitutional or statutory provisions;
- b) In excess of the statutory authority of the agency;
- c) Made upon unlawful procedure;
- d) Affected by other error of law;
- e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and/or
- f) Arbitrary or capricious, and characterized by abuse of discretion.

5. Petitioner will file a Memorandum of Points and Authorities after a copy of the entire record on appeal has been transmitted to the Court in accordance with NRS 233B.133.

6. Petitioner reserves its right to request oral argument in this matter pursuant to NRS 233B.133(4).

WHEREFORE, Petitioner prays as follows:

1. That this Court conduct a review of the final decision(s) of the Nevada Department of Administration Hearings Division Hearing Officer pursuant to NRS 233B.135 and enter an Order reversing or setting aside the decision; and

2. For such further and other relief as the Court deems legal, equitable and just.

DATED this 20th day of June, 2018.

ADAM PAUL LAXALT  
Attorney General

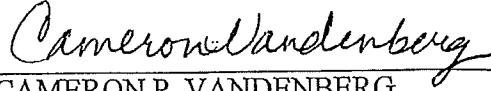
By: Cameron Vandenberg  
CAMERON P. VANDENBERG  
Chief Deputy Attorney General  
*Attorneys for Petitioner Nevada Department of Corrections*

AFFIRMATION

The undersigned hereby affirms pursuant to NRS 239B.030 that the preceding document does not contain the personal information of any person.

DATED this 20th day of June, 2018.

ADAM PAUL LAXALT  
Attorney General

By:   
CAMERON P. VANDENBERG  
Chief Deputy Attorney General  
*Attorneys for Petitioner Nevada Department of  
Corrections*

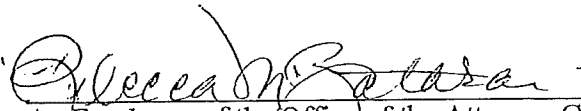
**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the Office of the State of Nevada, Office of the Attorney General and that on the 20th day of June, 2018, I served a copy of the foregoing **PETITION FOR JUDICIAL REVIEW** by causing said document to be placed in the U.S. Mail, first class postage prepaid, and/or by email a true copy to the following:

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An Employee of the Office of the Attorney General

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**EXHIBIT LIST**

**Exhibit 1**  
Appeal No. 1802991-LLW  
Findings of Fact, Conclusions of Law, and Decision.....12 pages

# EXHIBIT 1

Appeal No. 1802991-LLW

Findings of Fact, Conclusions of Law  
and Decision



BEFORE THE NEVADA STATE PERSONNEL COMMISSION  
HEARING OFFICER

1050 E. WILLIAM, SUITE 450  
CARSON CITY, NV 89701

FILED

MAY 23 2018

DEPT. OF ADMINISTRATION  
APPEALS OFFICER

PATRICIA DEROSA,

Petitioner-Employee,

vs

STATE OF NEVADA DEPARTMENT OF  
CORRECTIONS,

Respondent-Employer.

APPEAL NO: 1802991-LLW

FINDINGS OF FACT; CONCLUSIONS OF  
LAW AND DECISION

This matter came on for administrative hearing before the undersigned administrative hearing officer for the Nevada State Personnel Commission on May 1, 2018 pursuant to the Petitioner-Employee's appeal of her dismissal from state service, effective March 14, 2018. The Petitioner-Employee was represented by Thomas J. Donaldson, Esq. of Dyer Lawrence LLP. The Respondent-Employer, Nevada Department of Corrections (NDOC) was represented by and through its counsel, Adam Paul Laxalt, Attorney General of the State of Nevada, and Cameron P. Vandenberg, Chief Deputy Attorney General.

At the conclusion of the May 1, 2018 hearing this matter was submitted for decision. The evidence of record consists of the testimony of four witnesses and Employer Exhibits A-G<sup>1</sup>, and Employee Exhibits 1-4.

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<sup>1</sup> Exhibit C, NDOC pages 29-75 were offered at the hearing under seal.

1 Having heard the testimony and considered the exhibits and the arguments of the parties,  
2 the hearing officer finds as follows:

3 FINDINGS OF FACT

4 Patricia DeRosa worked for the Nevada Division of Parole and Probation (P&P) for  
5 nearly 25 years. At the time she requested a transfer to NDOC she was employed as a Parole and  
6 Probation Specialist III (Grade 33). During her employment at P&P her evaluations were overall  
7 meets or exceeds standards. On August 10, 2015 she started at NDOC as a Correctional  
8 Caseworker Specialist II (Grade 38). On July 15, 2016 she returned to P&P as she did not  
graduate from her probationary period at NDOC.

9 On December 26, 2016 NDOC rehired her as a Program Officer I (Grade 31) with a  
10 promise of reinstating her to a Correctional Caseworker II as soon as there was a vacancy.  
11 During her employment at NDOC she was not evaluated and had no disciplinary actions. See  
12 Exhibit C, page 9. She was placed on a critical project on December 27, 2016. The project was  
13 initiated by a request from Governor Sandoval to facilitate the release of overdue inmates to  
14 decrease crowding in the State prisons.

15 She was sent to Las Vegas from Carson City where she resides, on a temporary basis to  
16 work on the project. Ms. DeRosa testified that there was resistance regarding the project from  
17 NDOC staff and P&P staff. Between December 2016 and May to June 2017 she saw 1000  
18 inmates trying to find them residential placements to reduce overcrowding. She missed her  
19 significant other, Steven Suwe, her family, her dogs and her home. At the same time, she felt  
20 frustration because she was receiving emails from an associate warden and others at NDOC  
21 questioning what she was doing, and attacking her credibility when she was facilitating inmate  
release placements. She had years of experience at P&P in placing released inmates.

22 Patricia DeRosa was served with an October 9, 2017 Notice of Investigation (Non-Peace  
23 Officer) on October 10, 2017. Exhibit A. On October 23, 2017 Russ Fonoimoana, a Criminal  
24 Investigator, Office of the Inspector General, interviewed Ms. DeRosa. A Report of Personnel  
25 Complaint Investigation was issued on November 27, 2017 (Exhibit C, pages 16-22) noting that  
26 the NDOC complaint alleged Unbecoming Conduct, Computer Use Violations and Neglect of  
Duty.

27 //

1 On January 5, 2018 the Department of Administration, Division of Human Resource  
2 Management granted a 60 day extension of the internal administrative investigation. Exhibit B.

3 On February 28, 2018 Patricia DeRosa was served with a Specificity of Charges for the  
4 following violations:<sup>2</sup>

5 A. NAC 284.646 Dismissals.

6 2. An appointing authority may immediately dismiss an employee for the following  
7 causes, unless the conduct is authorized pursuant to a rule or policy adopted by the  
8 agency with which the employee is employed:

9 (b) Unauthorized release or use of confidential information.

10 NAC 284.650 Causes for disciplinary action (NRS 284.065, 284.155, 284.383).  
11 Appropriate disciplinary or corrective action may be taken for the following causes:

- 12 1. Activity which is incompatible with an employee's conditions of employment  
13 established by law or which violates a provision of NAC 284.653 or NAC  
14 284.738 to 284.771, inclusive.  
15 7. Inexcusable neglect of duty.

16 B. AR 339.07 CLASS OF OFFENSES GUIDELINES

17 AR 339.07.14 COMPUTER USAGE VIOLATIONS

18 L. Unauthorized use to inappropriately seek, distribute, obtain copies of, modify,  
19 or distribute information, files, or other data that is private, confidential or not  
20 open to public inspection. CLASS 5

21 AR 339.07.15 NEGLECT OF DUTY

22 SS. Removing, copying, concealing, altering, falsifying, destroying, stealing, or  
23 tampering with any record, report, or other official document maintained by the  
24 State, Department or any other criminal justice agency. (Official Department  
25 Reports may be removed and or copied only as allowed by law and Department  
26 policy/procedure) CLASS 5

27 AR 339.07.18 UNBECOMING CONDUCT

28 I. Unauthorized disclosure of confidential Department matters. CLASS 4

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<sup>2</sup> Exhibit C, pages 7-15.

1 BRIEF SUMMARY OF FACTS:

2 On March 2, 2017, April 18, 2017, May 3, 2017, and May 4, 2017, without  
3 approval from a supervisor, Program Officer I Patricia DeRosa admittedly used  
4 her state computer to send a total of four emails to a member of the public  
5 containing official, confidential information, including copies of records  
6 pertaining to Department matters and inmate affairs.

7 CONCLUSION AND BASIS FOR RECOMMENDATION:

8 Ms. DeRosa is a tenured employee who knows or should know that her actions  
9 are prohibited by Departmental policy and state law. Ms. DeRosa's disclosure of  
10 official, confidential Department information and records to an unauthorized  
11 member of the public exposed both the Department and the State to liability and  
12 cannot be tolerated. The sanction imposed must be commensurate to the level of  
13 the employee's culpability, sufficient to restore and maintain the public  
14 confidence in the integrity of the NDOC, and adequate to deter similar acts of  
15 misconduct in the future. Based on the totality of evidence and circumstances, it  
16 is recommended, for the good of the public service, that Program Officer I  
17 Patricia DeRosa be dismissed from state service.

18 The Specificity of Charges noted the effective date of Ms. DeRosa's termination was  
19 March 14, 2018. Exhibit C, pages 7-15.

20 The Specificity of Charges arose out of 4 emails sent by Ms. DeRosa to Mr. Suwe. On  
21 the dates in question Ms. DeRosa testified that she sent emails to Steve Suwe, her significant  
22 other in Carson City, who was retired from NDOC, because he knew the people she was having  
23 difficulty with at NDOC. She was frustrated, wanted to vent, and needed his advice.

24 The March 2, 2017 email to Mr. Suwe asked him if the attached email to Warden Baker  
25 was "too harsh". The email contained the names and back numbers of nine sex offenders. See  
26 Exhibit C, pages 29-31. None of the information is confidential.

27 The April 18, 2017 email contained a number of emails from an associate warden, and  
28 the Deputy Director Programs regarding an inmate grievance and how to handle it. Exhibit C,  
pages 35-48. Ms. DeRosa attached the NDOC emails and sent to Mr. Suwe "FYI, I can't take  
anymore. My travel claim has not hit my bank. I am ready to seriously give up." Id. at 35.  
Clearly these emails reflect disharmony among the NDOC critical program participants and Ms.  
DeRosa's frustration with the same. None of the information is confidential.

1 The May 3, 2017 email was 12 attached P&P/NDOC Pre-Release Unit Inmate Plan forms  
2 regarding the release plans of sex offenders. The email was sent without an email message to Mr.  
3 Suwe. Exhibit C, pages 49-62. Mr. Suwe testified that he received that email while he was  
4 speaking on the telephone with Ms. DeRosa. She emailed the forms to him because she had  
5 received these forms back from P&P because they said the forms were illegible and had to be  
6 redone. She could read them and asked Mr. Suwe to look at them and asked him if he could read  
7 them. He told her he could. She was upset because if they had to be redone, she would have to  
8 go back to the prison as the forms had to be signed by the inmate and witnessed. The forms  
9 contained family or sponsor names and addresses. The handwriting in question was a Mr.  
10 Manookian's, who was helping with the release of overdue inmates. Ms. DeRosa testified that  
11 she did not believe it was confidential information because sex offenders release addresses, as  
12 well as other information, was open to the public.

12 The May 4, 2017 email to Mr. Suwe was sent in frustration as Ms. DeRosa testified that  
13 she felt she was being attacked by a Major, a Captain and a Sergeant regarding the release of  
14 inmates, and communication problems with the critical release program. Exhibit C, pages 63-75.  
15 This series of email communications also demonstrates the lack of cooperation, and  
16 communication problems within the program. None of the information was confidential.

16 Isidro Baca, Warden of the Northern Nevada Correctional Center, testified that he was  
17 given the case to adjudicate and that he found that all 3 allegations were sustained. See Exhibit  
18 C, pages 76-79. He admitted that he usually looks at similar cases of discipline, however in the  
19 instant case he did not. He was unaware of the O.J. mug shot<sup>3</sup> incident until the hearing and also  
20 had not seen Exhibit 2<sup>4</sup> until the day before he testified.

21 On March 9, 2018 a pre-disciplinary hearing was held with William Sandie, Associate  
22 Warden. Exhibit D, pages 107-108. Ms. DeRosa attended the hearing accompanied by retired  
23 Warden Greg Smith. Ms. DeRosa admitted sending four emails to retired NDOC employee  
24 Steve Suwe. Ms. DeRosa and Greg Smith argued that termination was excessive in light of a

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25  
26  
27 <sup>3</sup> See Exhibit 3.

28 <sup>4</sup> Exhibit 2 is a table of dispositions of 3 similar NDOC disciplinary cases.

1 prior case involving O. J. Simpson's mug shot that was sent out of the agency and out of state by  
2 now Associate Warden Schreckengost with only a suspension. They also stated that Ms. DeRosa  
3 had no sustained disciplinary actions as a Program Officer I.

4 Ms. DeRosa offered 4 exhibits in her defense. Exhibit 1 is a NDOC website screen shot  
5 of an offender's record. The information includes his ID number, crimes convicted of, his  
6 picture and description and parole hearing details. Exhibit 2 notes the disposition of three  
7 NDOC termination cases from 2013-2015: 1) inappropriate and unauthorized email activity,  
8 computer violation/neglect of duty (reduced to 30 day suspension); 2) used state email to  
9 distribute confidential info, falsified document (no discipline); and 3) posted confidential  
10 department matters on Facebook (allowed to resign). Exhibit 3 notes a 2009 settlement  
11 agreement with an employee charged with similar offenses as Ms. DeRosa. The initial  
12 recommendation was a four day suspension for emailing a NOTIS screen shot of O. J. Simpson's  
13 "mug shot" to other NDOC employees and to an individual outside of NDOC, his daughter. The  
14 settlement agreement reduced his suspension to 2 days and NDOC expunged the Specificity of  
15 Charges and the Settlement Agreement from his Department and State records. Sixteen other  
16 NDOC employees were involved in the O.J. Simpson incident. Associate Warden Sandie noted  
17 in his Pre-Disciplinary Hearing Report in this case that "In regard to the other violations and  
18 penalties [re: O.J. Simpson case] my review is solely based on the case at hand and I don't delve  
19 into other cases. I would hope the Department reviews these other cases to ensure the fidelity of  
20 the disciplinary process." Exhibit D, page 108.

21 Ms. DeRosa testified that at the time she sent the emails she did not think that the  
22 information was confidential. She was just frustrated with what was happening at work, was  
23 ventilating to her significant other, Mr. Suwe, and asking for his input and help with her situation  
24 because he knew the people she was dealing with. She also testified that she had never seen AR  
25 569<sup>5</sup> and had no training on confidentiality.

26 Mr. Suwe testified that the emailed information was not shared with anyone and that he  
27 barely read them, and that he was "just trying to figure out what was going on with her."  
28

---

<sup>5</sup> AR 569 Confidentiality of Inmate Records (Exhibit G)

1 All of the information on the inmate release plans was available on the Community  
2 Notification Website regarding sex offenders. See NRS 179B.250.

3  
4 ARGUMENT OF THE PARTIES

5 NDOC argues that Ms. DeRosa admitted to sending the emails outside the realm of her  
6 employment. NDOC argues that it is incredible that she did not know that it was confidential  
7 inmate information and that she had no familiarity with confidentiality. In addition, it argues  
8 that her intent or willfulness in sending the emails is not an element of the offense. NDOC states  
9 that all NDOC employees are required to know AR 569, and that it took five seconds to find it.<sup>6</sup>

10 NDOC notes that there was no progressive discipline in this case because of the  
11 seriousness of the violations. In addition, it notes that while some of the information may have  
12 been available on a public website, the information in this case was taken from a confidential  
13 source, the Offender Information Tracking System, and that the Pre-Release Plans are not on the  
14 website.

15 NDOC argues that termination may not be mandatory, but termination is authorized by  
16 the regulations, and a new department administration must be able to enforce regulations as it  
17 chooses. It also asserts that consistency is the goal of the disciplinary process, but the facts are  
18 different with each case, and something that happened 10 years ago is irrelevant. (O.J. Simpson  
19 case). NDOC also notes that in the prior cases in Exhibit 2 offered by Ms. DeRosa, termination  
20 was recommended, even if that was not the final disposition.

21 Finally, NDOC argues that deference is owed to NDOC in determining reasonableness  
22 and that just cause exists as a matter of law in this case.

23 Ms. DeRosa argues that just cause and due process mandate that the employee have  
24 notice that her conduct was improper. As a Program Officer I, DeRosa had no files and there  
25 was no allegation of a violation of AR 569 in the Specificity of Charges. Additionally, all the  
26 information was available on the NDOC website, or on Parole and Probation or the Department

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27 <sup>6</sup>However, the hearing officer notes that AR 569 (Exhibit G) was not mentioned in the Specificity of Charges and  
28 did not form the basis of the Specificity of Charges, and that the AR was not received by the hearing officer until the  
day before the hearing.

1 of Public Safety websites. DeRosa argues that nothing in the emails was confidential and  
2 therefore there was no violation of AR 569.

### 3 4 DISCUSSION

5 The information was not distributed to the general public or the media. The intent of the  
6 emails was to obtain advice from Mr. Suwe how to handle the lack of cooperation and  
7 coordination within the special project and to demonstrate the difficulty Ms. DeRosa was having  
8 in completing the inmate release plans with P&P. There was no intent to harm NDOC, P&P, the  
9 inmates or provide confidential information to the public. In fact, no harm occurred and no  
10 information was passed beyond Mr. Suwe.

11 AR 339.07.14(L) and AR 339.07.15(SS) prohibit distribution or modification of  
12 information or records that is private and confidential or removing, copying, concealing, altering,  
13 falsifying, destroying, stealing or tampering with any report or official document. Ms. DeRosa  
14 copied the inmate release forms by sending them to Mr. Suwe for the purpose of his review to  
15 confirm that he could read the writing. There was no nefarious purpose as clearly contemplated  
16 by both AR 339.07.14(L) and AR 339.07.15(SS). Technically she violated the AR's when she  
17 copied the inmate forms, however the intent of both the Computer Usage violation and Neglect  
18 of Duty violation involve distribution of private confidential information or some form of  
19 destruction of or illicit modification of official records. Ms. DeRosa's actions do not rise to the  
20 level of a Class 5 dismissal violation. The information in the inmate release plans would have  
21 been available on the community notification website. The other 3 emails, dated March 2, 2017,  
22 April 18, 2017 and May 4, 2018 do not contain confidential or private information.

23 The Computer Usage violation is more appropriately described AR 339.07.14(B):  
24 Unauthorized use or distribution of Department data or programs for other than the  
25 administration of Department duties, responsibilities, and business. CLASS 3-5. See Exhibit C,  
26 page 98.

27 The Neglect of Duty charge for merely copying the documents to Mr. Suwe does not  
28 justify a Class 5 violation in these specific circumstances. Therefore, dismissal is inappropriate.



1 The Unbecoming Conduct violation AR 339.07.18(I): Unauthorized disclosure of  
2 confidential Department matters (Class 4) fails because the emails do not contain confidential  
3 Department matters.

#### 4 CONCLUSIONS OF LAW

5 Ms. DeRosa's appeal to the undersigned Administrative Hearing Officer of the Nevada  
6 State Personnel Commission was timely filed and the determination of the merits of the appeal is  
7 properly within the jurisdiction of the commission.

8 The authority granted the hearing officer is to determine the reasonableness of the  
9 disciplinary action taken against an employee and to determine whether the agency had just  
10 cause for the discipline "as provided in NRS 284.385." NRS 284.390 (1) and (6).

11 The Employer has the burden of proof to present evidence and argument to prove the  
12 allegations presented in the specificity of charges. The "standard of proof is the 'degree or level  
13 of proof demanded' to prove a specific allegation." Nassiri and Johnson v. Chiropractic  
14 Physicians' Board of Nevada, 130 Nev.Ad.Op. 27 (April 3, 2014) at 5. The Supreme Court of  
15 Nevada further opined "that the preponderance-of-the-evidence standard is the minimum civil  
16 standard of proof", and "that the preponderance of the evidence amounts to whether the  
existence of the contested fact is found to be more probable than not." Id. at 8 and 9.

17 In reviewing the actions taken by the employer against the employee, it is the duty of the  
18 administrative hearing officer to make an independent determination as to whether there is  
19 evidence showing that the discipline would serve the good of the public service. Knapp v. State  
20 Dep't of Prisons, 111 Nev. 420, 892 P.2d 575 (1995).

21 Ms. DeRosa violated AR 339.07.14(B) and AR 339.07.15(SS). She did not violate AR  
22 339.07.18(I). NDOC AR 339.06(9) provides:

23 The Department has developed Class of Offense Guidelines which describe many  
24 prohibited employee actions and a Chart of Corrective/Disciplinary Sanctions  
which recommends penalties for inappropriate conduct. See Exhibit C, page 91.

25 NDOC recommends dismissal as a minimum/maximum penalty for a Class 5 offense. Id.  
26 However, the chart is a guide to recommended penalties and therefore dismissal is not mandatory  
27 for a Class 5 offense.

1 Ms. DeRosa's actions did not amount to a breach of security therefore deference to the  
2 appointing authority is not required in this case. See, State Dep't of Prisons v. Jackson, 111 Nev.  
3 770, 773, 895 P.2d 1296 (1995).

4 AR 339.06 outlines the guidelines and goals of the disciplinary system. Exhibit C, page  
5 90. It notes that consistency is the goal, however fairness means that disciplinary  
6 recommendations must consider numerous circumstances that could contribute to unacceptable  
7 behavior and therefore two employees accused of the same misconduct could face different  
8 consequences. Subsection 7 provides:

9 Appointing Authorities and their reviewers should neither rely solely on previously  
10 imposed penalties nor quote them as an authority in penalty rationales. It must  
11 be remembered that this is a historical document of penalties. As such, it may not  
12 reflect an appropriate penalty for the misconduct. Indeed, an appropriate penalty  
13 may be higher or lower depending upon current issues and the impact of the  
14 particular misconduct on the Department and/or fellow employees. Exhibit C, pages 90-  
15 91.

16 The hearing officer notes that in the instant case there was no evidence of "impact of the  
17 particular misconduct on the Department and/or fellow employees." In the O.J. Simpson case,  
18 numerous employees were involved and the "mug shot" became public. In addition, from 2013-  
19 2015 similar cases were initially charged as Class 5 and dismissal was recommended by the  
20 Department, but were settled in various manners, none of which involved dismissal.

21 The NDOC administration may certainly decide to change its policy on different  
22 infractions, however it must do so in a reasonable manner. In the instant case the specific  
23 infractions and the factual basis do not justify dismissal on their own, let alone after review of  
24 NDOC's recent history of penalties in similar and more egregious circumstances.<sup>7</sup>

25 Ms. DeRosa technically violated AR 339.07.14(B) and AR 339.07.15(SS), however  
26 consideration of the facts, the lack of harm to NDOC, the State and fellow employees or inmates,  
27 and the history of NDOC punishment in similar circumstances mandate that dismissal is not  
28 warranted in this specific case and is not for the good of the public service.

---

<sup>7</sup> Warden Baca admitted that he usually looks at prior cases, but did not in this case and was  
unaware of the O.J. Simpson specifics or the cases from 2013-2015 (Exhibit 2) when he adjudicated this matter.

1  
2 DECISION

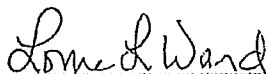
3 Based on the foregoing Findings of Fact, Conclusions of Law and Discussion and Good  
4 Cause Appearing therefore,

5 IT IS HEREBY ORDERED:

6 That the preponderance of the evidence establishes that the dismissal of Ms. DeRosa  
7 from State service has not been shown to be for the good of the public service, and that the  
8 decision of the Nevada Department of Corrections to terminate Ms. DeRosa is REVERSED.

9 This matter is REMANDED to the Nevada Department of Corrections to restore Ms.  
10 DeRosa to her prior position with full back pay and benefits, subject to any appropriate  
11 disciplinary penalties, other than dismissal<sup>8</sup>, for the aforementioned violations of AR  
12 339.07.14(B) and AR 339.07.15(SS) as discussed above.

13 IT IS SO ORDERED.

14 

15 Lorna L. Ward  
16 HEARING OFFICER

17  
18 NOTICE: Pursuant to NRS 233B.130 should any party desire to appeal this final decision of the  
19 Hearing Officer, a Petition for Judicial Review must be filed with the district court within thirty  
20 (30) days after service by mail of this decision.  
21  
22  
23  
24  
25  
26  
27  
28

---

<sup>8</sup> NDOC may impose any disciplinary penalty it chooses except for dismissal.

### CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing Decision was deposited into the State of Nevada Interdepartmental mail system, **OR** with the State of Nevada mail system for mailing via United States Postal Service, **OR** placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, 1050 E. Williams Street, Suite 450, Carson City, Nevada, 89701 to the following:

PATRICIA DEROSA  
3309 PONDEROSA DR  
CARSON CITY, NV 89701

THOMAS DONALDSON ESQ  
2805 MOUNTAIN ST  
CARSON CITY NV 89703

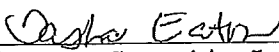
DEPARTMENT OF CORRECTIONS  
DAVID WRIGHT HUMAN RESOURCES MANAGER II  
5500 SNYDER AVE BLDG 17  
CARSON CITY, NV 89702

CAMERON VANDENBERG  
DEPUTY ATTORNEY GENERAL  
5420 KIETZKE LANE SUITE 202  
RENO NV 89511

REBECCA M ZATARAIN  
OFFICE OF THE ATTORNEY GENERAL  
5420 KIETZKE LANE SUITE 202  
RENO NV 89511

JAMES DZURENDA  
DEPARTMENT OF CORRECTIONS  
3955 W RUSSEL RD  
LAS VEGAS NV 89118

Dated this 23 day of May, 2018.

  
Tasha Eaton, Supervising Legal Secretary  
Employee of the State of Nevada

Office of the Attorney General  
Reno, Nevada

MAY 24 2018

Bureau of Litigation  
Personnel Division

# IN THE SUPREME COURT OF THE STATE OF NEVADA

## INDICATE FULL CAPTION:

THE STATE OF NEVADA DEPARTMENT  
OF CORRECTIONS,  
Appellant,

vs.

PATRICIA DEROSA, AN INDIVIDUAL,  
Respondent.

No. 77704

Electronically Filed  
Jan 04 2019 09:35 a.m.

Elizabeth A. Brown  
Clerk of Supreme Court  
DOCKETING STATEMENT  
CIVIL APPEALS



## GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

## WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District First Department 1  
County Carson City Judge Hon. James T. Russell  
District Ct. Case No. 18 OC 00150 1B

**2. Attorney filing this docketing statement:**

Attorney Cameron P. Vandenberg Telephone (775)-687-2132  
Firm State of Nevada, Office of the Attorney General  
Address 5420 Kietzke Lane, Suite 202  
Reno, Nevada 89511

Client(s) State of Nevada ex rel. Department of Corrections

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

**3. Attorney(s) representing respondents(s):**

Attorney Thomas J. Donaldson, Esq. Telephone (775) 885-1896  
Firm Law Office of Dyer, Lawrence, Flaherty, Donaldson & Prunty  
Address 2805 Mountain Street  
Carson City, Nevada 89703

Client(s) Patricia DeRosa

Attorney \_\_\_\_\_ Telephone \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

Client(s) \_\_\_\_\_

(List additional counsel on separate sheet if necessary)

**4. Nature of disposition below (check all that apply):**

- |   |   |
|---|---|
| <input type="checkbox"/> Judgment after bench trial         | <input checked="" type="checkbox"/> Dismissal:  |
| <input type="checkbox"/> Judgment after jury verdict        | <input checked="" type="checkbox"/> Lack of jurisdiction                                |
| <input type="checkbox"/> Summary judgment                   | <input type="checkbox"/> Failure to state a claim                                       |
| <input type="checkbox"/> Default judgment                   | <input type="checkbox"/> Failure to prosecute   |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief  | <input checked="" type="checkbox"/> Other (specify): <u>failure to personally serve</u> |
| <input type="checkbox"/> Grant/Denial of injunction         | <input type="checkbox"/> Divorce Decree:  |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification                 |
| <input type="checkbox"/> Review of agency determination     | <input type="checkbox"/> Other disposition (specify): _____                             |

**5. Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

**6. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None.

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

Respondent was dismissed for misconduct. Respondent appealed her termination to a State hearing officer, who reversed the termination in spite of finding that Respondent's conduct technically violated the agency regulations. On June 20, 2018, Appellant sought judicial review of the hearing officer's decision and served the Petition by mail to Respondent's counsel of record in accordance with NRS 233B.130(5) and NRCP 5. Petitioner also served the Petition and its Opening Brief by certified mail to Respondent's home address on October 19, 2018. Respondent filed a motion to dismiss for failure to personally serve the Petition. Ignoring the Nevada Supreme Court's rulings in at least two unpublished decisions, which both state that NRCP 4's service of process requirements do not apply to petitions for judicial review, the district court found that NRS 233B.130(5) and NRCP 81 require that a Petition for Judicial Review be personally served in accordance with NRCP 4 (d)(6). On November 21, 2018, the district court entered its Order Granting Motion to Dismiss, dismissing the Petition for Judicial Review with prejudice.

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether the district court erred in dismissing Appellant's Petition for Judicial Review with prejudice for failure to personally serve the Petition in accordance with NRCP 4(d)(6).

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None known.



**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

**12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

**13. Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

Pursuant to NRAP 17(b)(10), this case is presumptively assigned to the Nevada Court of Appeals. However, this case should be retained by the Supreme Court pursuant to NRAP 17(a)(11) because the district court's erroneous determination that a petition for judicial review must be personally served in accordance with NRCP 4(d)(6) presents a question of statewide importance.

**14. Trial.** If this action proceeded to trial, how many days did the trial last? \_\_\_\_\_

Was it a bench or jury trial? N/A

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A

## TIMELINESS OF NOTICE OF APPEAL

**16. Date of entry of written judgment or order appealed from** Nov 21, 2018

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

**17. Date written notice of entry of judgment or order was served** Nov 27, 2018

Was service by:

☐ Delivery

☒ Mail/electronic/fax

**18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b)      Date of filing \_\_\_\_\_

☐ NRCP 52(b)      Date of filing \_\_\_\_\_

☐ NRCP 59      Date of filing \_\_\_\_\_

**NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_\_, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion \_\_\_\_\_

(c) Date written notice of entry of order resolving tolling motion was served \_\_\_\_\_

Was service by:

☐ Delivery

☐ Mail

**19. Date notice of appeal filed** Dec 14, 2018

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A

**20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a)(1)

**SUBSTANTIVE APPEALABILITY**

**21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

- |   |  |
|---|--|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205              |
| <input type="checkbox"/> NRAP 3A(b)(2)            | <input checked="" type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3)            | <input type="checkbox"/> NRS 703.376             |
| <input type="checkbox"/> Other (specify) _____    |  |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

Both NRAP 3A(b)(1) and NRS 233B.150 provide a basis for appeal because this is an appeal taken from the final judgment entered by the district court dismissing Appellant's Petition for Judicial Review with prejudice.

**22. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

State of Nevada, Department of Corrections

Patricia DeRosa

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

**23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

Appellant: Service was properly effected in accordance with NRS 233B.130(5) and NRCP 5. Petition for Judicial Review dismissed November 21, 2018.

Respondent: Personal service was required in accordance with NRCP 4(d)(6). Motion to Dismiss granted November 21, 2018.

**24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☐ Yes

☒ No

**25. If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

Whether Appellant's rights have been substantially prejudiced because the final decision of the hearing officer reversing Respondent's termination is: (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the agency; (c) Made upon unlawful procedure; (d) Affected by other error of law; (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and/or (f) Arbitrary or capricious, and characterized by abuse of discretion.

(b) Specify the parties remaining below:

State of Nevada, Department of Corrections

Patricia DeRosa

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

☐ Yes

☒ No

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

☐ Yes

☒ No

**26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

Order is independently appealable under NRAP 3A(b).

**27. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

## VERIFICATION

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

Nevada Department of Corrections  
Name of appellant

Cameron P. Vandenberg  
Name of counsel of record

January 4, 2019  
Date

Cameron Vandenberg  
Signature of counsel of record

Nevada, Washoe  
State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 4th day of January, 2019, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Thomas J. Donaldson, Esq.  
Law Office of Dyer, Lawrence,  
Flaherty, Donaldson & Prunty  
2805 Mountain Street  
Carson City, Nevada 89703

David W. Wasick, Esq.  
P.O. Box 568  
Glenbrook, NV 89413

Dated this 4th day of January, 2019

Rebecca M. Botara  
Signature