IN THE SUPREME COURT OF THE STATE OF NEVADA

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Clerk of Supreme Court

THE STATE OF NEVADA,
DEPARTMENT OF CORRECTIONS,

Appellant,

vs.

PATRICIA DEROSA,

Respondent.

Case No. 77704
District Court No. 18 OC 00150 1B

Appeal from Order Denying Petition for Judicial Review

First Judicial District Court

JOINT APPENDIX

VOLUME I of I

AARON D. FORD
Attorney General
Cameron P. Vandenberg (Bar No. 4356)
Chief Deputy Attorney General
State of Nevada
Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 687-2132 (telephone)
(775) 688-1822 (fax)
cvandenberg@ag.nv.gov

Attorneys for Appellant

Docket 77704 Document 2019-26421

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on June 18, 2019, I electronically filed the foregoing document via this Court's electronic filing system. I certify that the following participants in this case are registered electronic filing system users and will be served electronically and by U.S. Mail first class postage prepaid:

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

/s/ Rebecca M. Zatarain
Rebecca M. Zatarain, and employee
of the State of Nevada,
Office of the Attorney General

ADAM PAUL LAXALT
Attorney General
CAMERON P. VANDENBERG
Chief Deputy Attorney General
Nevada Bar No. 4356
Nevada Office of the Attorney General
Bureau of Business & State Services
Personnel Division
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Tel: 775-687-2132
Fax: 775-688-1822
cvandenberg@ag.nv.gov
Attorneys for Petitioner
State of Nevada Department of Corrections

REC'D & FILED
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SUSAN MERRIWETHER
CLERK
BY C. TORRES
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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

Petitioner,

vs.

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

Respondents.

Case No. 18 OC 00150 1B

Dept. No. 1

PETITION FOR JUDICIAL REVIEW

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

1. Petitioner requests judicial review of the final decision of the Nevada Department of Administration Hearings Division Hearing Officer dated May 23, 2018, in Case No. 1802991-LLW.

2. This Court has jurisdiction pursuant to NRS 233B.130.

3. This Petition has been filed in accordance with NRS 233B.130(1) and (2).

4. Petitioner has been aggrieved by the final decision of the hearing officer attached hereto 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 Vandenberg
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:

Thomas J. Donaldson, Esq.
Dyer Lawrence Law Firm
2805 Mountain Street
Carson City, NV 89703
tdonaldson@dyerlawrence.com

Department of Administration
State of Nevada Personnel Commission
Division of Hearings and Appeals
1050 E. William Street, Suite 450
Carson City, Nevada 89701
teaton@admin.nv.gov

Lorna L. Ward
Appeals Officer
Department of Administration
State of Nevada Personnel Commission
1050 E. William Street, Ste. 450
Carson City, Nevada 89701
lward@admin.nv.gov

An Employee of the Office of the Attorney General

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 DEPARTMENTOF 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[1], and Employee Exhibits 1-4.

[1] Exhibit C, NDOC pages 29-75 were offered at the hearing under seal.

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

FINDINGS OF FACT

Patricia DeRosa worked for the Nevada Division of Parole and Probation (P&P) for nearly 25 years. At the time she requested a transfer to NDOC she was employed as a Parole and Probation Specialist III (Grade 33). During her employment at P&P her evaluations were overall meets or exceeds standards. On August 10, 2015 she started at NDOC as a Correctional 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.

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

She was sent to Las Vegas from Carson City where she resides, on a temporary basis to work on the project. Ms. DeRosa testified that there was resistance regarding the project from NDOC staff and P&P staff. Between December 2016 and May to June 2017 she saw 1000 inmates trying to find them residential placements to reduce overcrowding. She missed her significant other, Steven Suwe, her family, her dogs and her home. At the same time, she felt frustration because she was receiving emails from an associate warden and others at NDOC 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.

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

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

On February 28, 2018 Patricia DeRosa was served with a Specificity of Charges for the following violations:[2]

A. NAC 284.646 Dismissals.

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

(b) Unauthorized release or use of confidential information.

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

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

B. AR 339.07 CLASS OF OFFENSES GUIDELINES

AR 339.07.14 COMPUTER USAGE VIOLATIONS

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

AR 339.07.15 NEGLECT OF DUTY

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

AR 339.07.18 UNBECOMING CONDUCT

I. Unauthorized disclosure of confidential Department matters. CLASS 4

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[2] Exhibit C, pages 7-15.

BRIEF SUMMARY OF FACTS:

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

CONCLUSION AND BASIS FOR RECOMMENDATION:

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

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

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

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

The April 18, 2017 email contained a number of emails from an associate warden, and 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.

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

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

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

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

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[3] See Exhibit 3.

[4] Exhibit 2 is a table of dispositions of 3 similar NDOC disciplinary cases.

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

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

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

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

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[5] AR 569 Confidentiality of Inmate Records (Exhibit G)

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

ARGUMENT OF THE PARTIES

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

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

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

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

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

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[6]However, the hearing officer notes that AR 569 (Exhibit G) was not mentioned in the Specificity of Charges and 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.

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

DISCUSSION

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

AR 339.07.14(L) and AR 339.07.15(SS) prohibit distribution or modification of information or records that is private and confidential or removing, copying, concealing, altering, falsifying, destroying, stealing or tampering with any report or official document. Ms. DeRosa copied the inmate release forms by sending them to Mr. Suwe for the purpose of his review to confirm that he could read the writing. There was no nefarious purpose as clearly contemplated by both AR 339.07.14(L) and AR 339.07.15(SS). Technically she violated the AR's when she copied the inmate forms, however the intent of both the Computer Usage violation and Neglect of Duty violation involve distribution of private confidential information or some form of destruction of or illicit modification of official records. Ms. DeRosa's actions do no rise to the level of a Class 5 dismissal violation. The information in the inmate release plans would have been available on the community notification website. The other 3 emails, dated March 2, 2917, April 18, 2017 and May 4, 2018 do not contain confidential or private information.

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

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

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

CONCLUSIONS OF LAW

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

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

The Employer has the burden of proof to present evidence and argument to prove the allegations presented in the specificity of charges. The "standard of proof is the 'degree or level of proof demanded' to prove a specific allegation." Nassiri and Johnson v. Chiropractic Physicians' Board of Nevada, 130 Nev.Ad.Op. 27 (April 3, 2014) at 5. The Supreme Court of Nevada further opined "that the preponderance-of-the-evidence standard is the minimum civil 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.

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

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

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

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

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

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

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

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

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

Ms. DeRosa technically violated AR 339.07.14(B) and AR 339.07.15(SS), 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.

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[7] 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.

DECISION

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

IT IS HEREBY 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 the Nevada Department of Corrections to terminate Ms. DeRosa is REVERSED.

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

IT IS SO ORDERED.

Lorna L Ward

Lorna L. Ward
HEARING OFFICER

NOTICE: Pursuant to NRS 233B.130 should any party desire to appeal this final decision of the Hearing Officer, a Petition for Judicial Review must be filed with the district court within thirty (30) days after service by mail of this decision.

[8] 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

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

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

Attorneys for Respondent PATRICIA DEROSA

REC'D & FILED
2018 JUN 27 AM 11:27
SUSAN MERRIWETHER
CLERK
BY
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA, *ex rel* its DEPARTMENT OF CORRECTIONS, Petitioner, vs. PATRICIA DEROSA, an individual, and STATE OF NEVADA, *ex rel* its DEPARTMENT OF ADMINISTRATION, PERSONNEL COMMISSION and DIVISION OF HEARINGS AND APPEALS, Respondents.	CASE NO.: 18 OC 00150 1B DEPT NO.: 1

RESPONDENT PATRICIA DEROSA'S NOTICE OF INTENT TO PARTICIPATE IN JUDICIAL REVIEW PROCEEDING

COMES NOW Respondent, PATRICIA DEROSA ("Employee"), by and through her legal counsel, Dyer Lawrence, LLP, and Thomas J. Donaldson, Esq., and pursuant to NRS 233B.130(3) and in accordance with the Court's Order for Briefing Schedule dated June 21, 2018, hereby notifies the above-entitled Court of her intent to participate in the above-captioned matter initiated by the filing of a Petition for Judicial Review ("Petition") on or about June 20, 2018. Employee hereby reserves all rights and privileges pursuant to NRS 233B.130 *et seq* and the Nevada Rules of Civil Procedure.

Based upon a variety of reasons asserted in the Petition, Petitioner is challenging the Findings of Fact, Conclusions of Law & Decision ("Decision") dated May 23, 2018, issued by Respondent

DIVISION OF HEARINGS AND APPEALS Hearing Officer Lorna L. Ward, Esq. Petition, Exhibit 1. The Decision properly "REVERSED" Petitioner's unlawful termination of Employee's "unblemished" 27-year State employment and reinstated Employee with "full back pay and benefits." *Id.* at p. 11.

The Hearing Officer's Decision shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the Court. NRS 233B.135(2). The burden of proof is on Petitioner to show that the Decision is invalid pursuant to NRS 233B.135(3). *Id.*

Contrary to Petitioner's contentions, substantial rights of Petitioner have **not** been prejudiced in this case, and Hearing Officer Ward's Decision is clearly **not** improper, unlawful, erroneous, arbitrary or capricious. In fact, once the Court reviews the Hearing Officer's thorough and well-reasoned Decision and the record of the underlying administrative proceeding, it will become abundantly clear that the Petition is nothing more than a monumental waste of time, public money and judicial resources initiated by a proverbial "sore loser."

Therefore, Employee hereby requests an Order from the Court summarily denying the Petition, affirming Hearing Officer Ward's Decision and awarding Employee reasonable attorney's fees and costs of suit in accordance with NRCP 11.

AFFIRMATION

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

DATED this 26th day of June, 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

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

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Dyer Lawrence, LLP, and that on the 27th day of June, 2018, I caused a true and correct copy of the within **RESPONDENT PATRICIA DEROSA'S NOTICE OF INTENT TO PARTICIPATE IN JUDICIAL REVIEW PROCEEDING**, 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

JUN 28 2018

Bureau of Litigation
Personnel Division

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

ADAM PAUL LAXALT
Attorney General
CAMERON P. VANDENBERG
Chief Deputy Attorney General
Nevada Bar No. 4356
Nevada Office of the Attorney General
Bureau of Business & State Services
Personnel Division
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Tel: 775-687-2132
Fax: 775-688-1822
cvandenberg@ag.nv.gov
Attorneys for Petitioner
State of Nevada Department of Corrections

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SUSAN MERRIWETHER
CLERK
BY
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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

Petitioner,

vs.

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

Respondents.

Case No. 18 OC 00150 1B

Dept. No. 1

STIPULATION AND ORDER FOR EXTENSION OF TIME FOR PETITIONER TO FILE OPENING BRIEF

Petitioner, State of Nevada *ex rel.* its Department of Corrections, by and through its counsel of record, Adam Paul Laxalt, Attorney General, and Cameron P. Vandenberg, Chief Deputy Attorney General, and Respondent, Patricia DeRosa, by and through her counsel of record, Thomas J. Donaldson, Esq., hereby stipulate to extend the current deadline for Petitioner to file and serve its Opening Brief by seventeen (17) days up to and including Friday, September 21, 2018. Petitioner's Opening Brief is currently due Tuesday, September 4, 2018[1] pursuant to NRS 233B.133(1) and this Court's Order dated June 21, 2018. Due to responsibilities in other cases and family obligations,

/ / /

[1] Petitioner received written notice by mail on July 25, 2018 that the record had been filed with the Court. The notice is dated July 20, 2018. Per NRS 233B.133(1) the Opening Brief is due within 40 days after the agency gives written notice to the parties. 40 days from July 20, 2018, plus three days for mailing, is Saturday, September 1, 2018. Monday, September 3, 2018 is a legal holiday.

Petitioner's counsel requires additional time to prepare its Opening Brief. This is Petitioner's first request for an extension of time to file said brief.

This Stipulation is entered into in good faith and not for purposes of delay.

DATED this 23rd day of August, 2018.

DYER LAWRENCE, LLP

By: _____
THOMAS J. DONALDSON, ESQ.
Nevada Bar No. 5283
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896
tdonaldson@dyerlawrence.com
Attorneys for Respondent DeRosa

DATED this 24th day of August, 2018.

ADAM PAUL LAXALT
Attorney General

By: _____ for
CAMERON P. VANDENBERG
Chief Deputy Attorney General
Nevada Bar No. 4356
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 687-2132
cvandenberg@ag.nv.gov
Attorneys for Petitioner
State of Nevada Department of Corrections

* * *

ORDER

IT IS SO ORDERED.

DATED this 29th day of August, 2018.

_____
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General and that on the 24th day of August, 2018, I served a copy of the foregoing **STIPULATION AND ORDER FOR EXTENSION OF TIME FOR PETITIONER TO FILE OPENING BRIEF** 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:

Thomas J. Donaldson, Esq.
Dyer Lawrence Law Firm
2805 Mountain Street
Carson City, Nevada 89703
tdonaldson@dyerlawrence.com

Rebecca M. Bateman
An Employee of the Office of the Attorney General

ADAM PAUL LAXALT
Attorney General
CAMERON P. VANDENBERG
Chief Deputy Attorney General
Nevada Bar No. 4356
Nevada Office of the Attorney General
Bureau of Business & State Services
Personnel Division
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Tel: 775-687-2132
Fax: 775-688-1822
cvandenberg@ag.nv.gov
Attorneys for Petitioner
State of Nevada Department of Corrections

REC'D & FILED
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SUSAN MERRIWETHER
CLERK
BY V. Alegria
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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

Petitioner,

vs.

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

Respondents.

Case No. 18 OC 00150 1B

Dept. No. 1

PETITIONER'S OPENING BRIEF

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

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

I.

STATEMENT OF JURISDICTION

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

II.

STATEMENT OF ISSUES

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

1. The hearing officer reversed DeRosa's dismissal when just cause clearly supports DeRosa's dismissal;

2. The hearing officer substituted her judgment for that of NDOC with respect to DeRosa's dismissal;

3. The hearing officer found that DeRosa did not violate AR 339.07.18(I) (Unbecoming Conduct - "unauthorized disclosure of confidential Department matters") based on a finding that none of the information contained in the unauthorized emails sent by 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

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

III.

STATEMENT OF THE CASE

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

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

[1] DeRosa was not charged with AR 339.07.14(B) ("unauthorized use or distribution of 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.

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

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

IV.

STATEMENT OF FACT

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

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

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

> **Nevada Administrative Code 284.646 Dismissals:**
>
> 2. An appointing authority may immediately dismiss an employee for the following causes, unless the conduct is authorized pursuant to a rule or policy adopted by the agency with which the employee is employed:
>
> . . .
>
> (b) Unauthorized release or use of confidential information.
>
> **Nevada Administrative Code 284.650 Causes for disciplinary action:**
>
> 1. Activity which is incompatible with an employee's conditions of employment established by law or which violates a provision of NAC 284.653 or 284.738 to 284.771, inclusive.
>
> 7. NAC 284.650 Inexcusable neglect of duty
>
> **NDOC Administrative Regulations:**
>
> AR 339.07.14 COMPUTER USAGE VIOLATIONS
> L. Unauthorized use to inappropriately seek, distribute, obtain copies of, modify, or distribute information, files or other data that is private, confidential or not open to public inspection. **CLASS 5**
>
> AR 339.07.15 NEGLECT OF DUTY
> SS. Removing, copying, concealing, altering, falsifying, destroying, stealing, or tampering with any record, report or other official document maintained by the State, Department or any other criminal justice agency. (Official Department reports may be removed and/or copied only as allowed by law and Department policy/procedure) **CLASS 5**
>
> AR 339.07.18 UNBECOMING CONDUCT
> I. Unauthorized disclosure of confidential Department matters. **CLASS 4.**

ROA 106-158.

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

///

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

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

> 1. Violation of NRS 284.387. I was not given notice of the recommended corrective/disciplinary action within the 90 day timeframe as required.[2]
> 2. Violation of DOC AR 339, lack of progressive disciplinary actions. I have had no prior disciplinary actions, I feel that this is an extreme corrective/disciplinary action.

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

V.

SUMMARY OF THE ARGUMENT

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

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

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[2] DeRosa abandoned this argument at her May 1, 2018 hearing.

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

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

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

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

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

VI.

LAW AND ARGUMENT

A. Standard of Review.

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

See NRS 233B.135(3).

Legal determinations made by an administrative hearing officer are subject to a *de novo* standard of 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)).

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

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

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

A court may set aside a final decision by a hearing officer where the final decision is clearly erroneous in view of the "reliable, probative and substantial evidence on the whole record." NRS 233B.135(3)(e). Moreover, a decision is arbitrary and capricious if not "supported by substantial evidence in the record" or where a decision is made in disregard of the facts and circumstances 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.

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

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

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

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

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

[3] NDOC did not charge DeRosa with violation of AR 339.07.14(B) (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, lines 21-24. Such a violation is a Class 3-5. ROA 150.

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

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

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

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

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NDOC had explicit authority to dismiss DeRosa for violating AR 339.07.15(SS).[4] The hearing officer's Decision clearly violated the authority granted to NDOC and exceeded the hearing officer's limited authority.

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

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

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[4] There are other charges set forth in the Specificity of Charges that also support dismissal; however, at this time NDOC is addressing the one Class 5 violation that was upheld by the hearing officer.

[5] 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.

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

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

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

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

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

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

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

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

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

NDOC AR 569 (Confidentiality of Inmate Records), which was admitted into evidence without objection at the hearing (ROA 18, lines 3-8), specifically states that "[t]he disclosure of inmate information, whether written or verbal, outside the realm of an employee's duties is prohibited." ROA 167-172. "Information pertaining to an inmate will be disclosed only when a defined need to know has been ascertained and the identity of the requester has been verified." *Id.* "Inmate information that is not specifically approved for disclosure within an NDOC Administrative Regulation is considered confidential for purposes of disclosure, does not constitute a matter of public record, and is not to be 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

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

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

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

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[6] According to NRS 179B.250, the offender information provided by the Central Repository upon receipt of a request for information is limited to:

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

(2) A complete physical description of the offender.

(3) A current photograph of the offender.

(4) The year of birth of the offender.

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

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

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

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

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

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

(I) The offense that was committed, including a citation to 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.

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

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

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

In reversing DeRosa's dismissal, the hearing officer arbitrarily found that, in DeRosa's copying of the inmate forms and sending them to Mr. Suwe, there was "no nefarious purpose as clearly contemplated by both AR 339.07.14(L) and AR 339.07.15(SS)". ROA 8, lines 11-14. Furthermore, the hearing officer erroneously, arbitrarily and capriciously injected her own opinion as to the intent of the policies or violations with which DeRosa was charged. ROA 8, lines 15-17 ("the intent of both the 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

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

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

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

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

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

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

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

[7] In the more recent cases involving computer violations or disclosure of confidential information,

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

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

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

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

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

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dismissal was recommended by NDOC. ROA 226. One of the cases was settled for unspecified 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.*

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

VII.

CONCLUSION

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

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 21st day of September, 2018.

ADAM PAUL LAXALT
Attorney General

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

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:

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

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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 Vandenberg
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 21st day of September, 2018, I served a copy of the foregoing **PETITIONER'S OPENING BRIEF** 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:

Thomas J. Donaldson, Esq.
Dyer Lawrence Law Firm
2805 Mountain Street
Carson City, Nevada 89703
tdonaldson@dyerlawrence.com

Department of Administration
State of Nevada Personnel Commission
Division of Hearings and Appeals
1050 E. William Street, Suite 450
Carson City, Nevada 89701

Lorna L. Ward
Appeals Officer
Department of Administration
State of Nevada Personnel Commission
1050 E. William Street, Suite 450
Carson City, Nevada 89701

An Employee of the Office of the Attorney General

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

Attorneys for Respondent PATRICIA DEROSA

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SUSAN MERRIWETHER
CLERK
BY C. TORRES
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA, *ex rel.* its DEPARTMENT OF CORRECTIONS, Petitioner, vs. PATRICIA DEROSA, an individual, and STATE OF NEVADA, *ex rel.* its DEPARTMENT OF ADMINISTRATION, PERSONNEL COMMISSION and DIVISION OF HEARINGS AND APPEALS, Respondents.	CASE NO.: 18 OC 00150 1B DEPT NO.: 1

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

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

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

Respectfully submitted this 17th day of October, 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

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

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

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

[1] The Hearing Office did not file a notice of intent to participate in the instant judicial review.

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

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.

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

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

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

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

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

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

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

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

Neither Employee nor any person residing at her home has ever received personal service of the Petition, the opening Memorandum of Points and Authorities, or any other document filed by 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.

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

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 (9th Cir. 2009) (quoting *Benny v. Pipes*, 799 F.2d 489 (9th 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).

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

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 (1st Jud. Dist. Ct. of Nev., 2015), this Court issued an Order Granting Motion to Dismiss dated September 21, 2018, under nearly identical circumstances.[2] Exhibit 1, hereto. In *Boice*, NDOT failed to serve its petition for

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[2] As with NDOC in the instant matter, NDOT was represented by the Nevada Attorney General's Office in *Boice*.

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

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

> The Court has determined that [NDOT] has failed to substantially comply with the technical requirements of NRS 233B.130(5), namely that [NDOT] failed to properly 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.

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

IV. CONCLUSION

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

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 17th day of October, 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

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Dyer Lawrence, LLP, and that on the 12th 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

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

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 17th day of October, 2018.

DEBORA M. MCEACHIN
NOTARY PUBLIC
STATE OF NEVADA
APPT. No. 93-3882-3
MY APPT. EXPIRES JANUARY 11, 2020

Notary Public

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

INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION	PAGE(S)
1	Order Granting Motion to Dismiss in Case No. 14 OC 00158 1B	4

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

EXHIBIT "1"

EXHIBIT "1"

Case No.: 14 OC 00158 1B

Dept. No.: 1

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SUSAN MERRIWETHER
CLERK

BY _____
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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

Petitioner,

v.

ROCKY BOICE,

Respondent.

ORDER GRANTING MOTION TO DISMISS

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

In his Motion to Dismiss Pursuant to NRCP 4 & 12, Respondent requested that the Court dismiss the Petition for Judicial Review on the grounds that Petitioner failed to personally serve Respondent in accordance with the requirements of NRCP 4(d)(6) within forty-five (45) days of filing the Petition as is required by NRS 233B.130(5). Further, Respondent argued that Petitioner cannot show good cause for its failure to serve Respondent.

In its Opposition, Petitioner asserted that Respondent's contention that service was ineffective in this matter is waived on two (2) separate grounds. First, Respondent's attorney has acknowledged receipt of the lawsuit. Second, Respondent had knowledge of the lawsuit.

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

Therefore, based on the foregoing and good cause appearing,

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

IT IS SO ORDERED.

Dated this 22 day of July, 2015.

JAMES T. RUSSELL
DISTRICT JUDGE

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, 8th 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

ADAM PAUL LAXALT
Attorney General
CAMERON P. VANDENBERG
Chief Deputy Attorney General
Nevada Bar No. 4356
Nevada Office of the Attorney General
Bureau of Business & State Services
Personnel Division
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Tel: 775-687-2132
Fax: 775-688-1822
cvandenberg@ag.nv.gov
Attorneys for Petitioner
State of Nevada Department of Corrections

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CLERK
BY C. TORRES
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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

Petitioner,

vs.

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

Respondents.

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

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

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

I.

INTRODUCTION

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

II.

FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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[1] DeRosa's demotion was upheld by the hearing officer on October 2, 2018.

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

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

III.

ARGUMENT

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

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

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

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

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

> NRS 233B.130(5) provides that petitioners must perfect service within forty-five days of filing the petition. Neither that statute, nor any other 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.
>
> Even assuming, for purposes of this appeal, that the rules of civil procedure generally apply to petitions for judicial review, a petitioner is not required to serve process in accordance with NRCP 4. NRCP 4(d) requires a plaintiff to ensure that personal service "of the summons and 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.

> As Metz points out, the rules governing service of a summons and complaint are intended to provide a defendant with notice of an action against him, and to require his presence in court to defend the action. Petitions for judicial review, however, involve on-going underlying proceedings, and only the agency and "parties of record" to the administrative action may be named as respondents. Thus, the agency and all parties are already aware of the matter. And unlike the purpose behind a summons, under NRS 233B.130(3), the agency and any party must file a notice of intent to participate within twenty days of service of the petition only if they "desire to participate" in the district court proceedings.
>
> **As a result, NRCP 4's service of process requirements do not apply to judicial review proceedings. . . . Instead, even assuming that the rules of civil procedure are relevant to judicial review proceedings, NRCP 5(b)(2)(B), which governs service of "pleadings and other papers" and *allows for service by mail*, is more appropriately applied here.**

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

Similarly, in *BAC Home Loans Servicing, LP v. Eighth Judicial District Court,* 126 Nev. 691 (2010), the Nevada Supreme Court concluded that personal service as set forth in NRCP 4 was not required for a petition for judicial review. "The rules governing service of a summons and complaint are intended to provide a defendant with notice of an action against it and to require its presence in court to defend the action. *Id.* (citing *Orme v. District Court,* 105 Nev. 212, 715, 782 P.2d 1325, 1327 (1989) ("The primary purpose underlying the rules regulating service of process is to insure that individuals are provided actual notice of suit and a reasonable opportunity to defend.")). "Petitions for judicial review . . . involve ongoing proceedings and only parties to those proceedings may be named as respondents." *Id.* (citing NRS 233B.130(2)(a) (stating that a petition for judicial review must "[n]ame as respondents the agency and all parties of record to the administrative proceeding.")). "Thus, the parties to a petition for judicial review . . . are already aware of the matter, and NRCP 4's 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

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

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

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

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

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

> [A] number of considerations may govern a district court's analysis of good cause . . ., and we emphasize that no single consideration is controlling. Appropriate considerations include: (1) difficulties in locating the defendant, (2) the defendant's efforts at evading service or concealment of improper service until after the 120–day period has lapsed, (3) the plaintiff's diligence in attempting to serve the defendant, (4) difficulties encountered by counsel, (5) the running of the applicable statute of limitations, (6) the parties' good faith attempts to settle the 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

[2] 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.

Scrimer 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[3] 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[4] 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.[5] 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.[6]

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[3] 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.

[4] 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).

[5] It is undisputed that DeRosa received NDOC's brief.

[6] 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 Vandenberg
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 State of Nevada, Office of the Attorney General and that on the 5th day of November, 2018, I served a copy of the foregoing **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** 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:

Thomas J. Donaldson, Esq.
Dyer Lawrence Law Firm
2805 Mountain Street
Carson City, Nevada 89703
tdonaldson@dyerlawrence.com

Patricia DeRosa
3309 Ponderosa Drive
Carson City, Nevada 89701

Department of Administration
State of Nevada Personnel Commission
Division of Hearings and Appeals
1050 E. William Street, Suite 450
Carson City, Nevada 89701

Lorna L. Ward
Appeals Officer
Department of Administration
State of Nevada Personnel Commission
1050 E. William Street, Suite 450
Carson City, Nevada 89701

Rebecca M. Fatara
An Employee of the Office of the Attorney General

DECLARATION OF CAMERON P. VANDENBERG

I, Cameron P. Vandenberg, hereby declare that:

1. I am an attorney duly licensed to practice law before all courts in the State of Nevada (Nevada State Bar Number 4356). I am a Chief Deputy Attorney General assigned to represent the Defendant in the case of *Nevada Department of Corrections v. Patricia DeRosa, et al.,* Case No. 18 OC 00150 IB.

2. I have personal knowledge of the matters stated below, and I could testify competently to them if called up to do so.

3. Attached to Petitioner's Response in Opposition to Respondent Patricia DeRosa's Motion to Dismiss as Exhibit 1 is a true and correct copy of Thomas J. Donaldson's March 20, 2018 email indicating representation of Patricia DeRosa.

4. Attached to Petitioner's Response in Opposition to Respondent Patricia DeRosa's Motion to Dismiss as Exhibit 2 is a true and correct copy of Respondent Patricia DeRosa's Appeal of Dismissal, Suspension, Demotion or Involuntary Transfer dated June 15, 2018.

5. Attached to Petitioner's Response in Opposition to Respondent Patricia DeRosa's Motion to Dismiss as Exhibit 3 behind the Certificate of Service is a true and correct copy of the Certified Mail Receipt and cover letter mailed to Patricia DeRosa with Petitioner's Petition for Judicial Review and Opening Brief on October 19, 2018 and Patricia DeRosa's signature for receipt of same.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 5th day of November, 2018.

By: Cameron Vandenberg
CAMERON P. VANDENBERG
Chief Deputy Attorney General

EXHIBIT 1

Rebecca M. Zatarain

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; 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

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EXHIBIT 2

Date Received:

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

Contact Phone: (775) 297-1338

Email: pattyderosa@att.net

Employee I.D. #: 10512

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: Patricia DeLong 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 10th 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

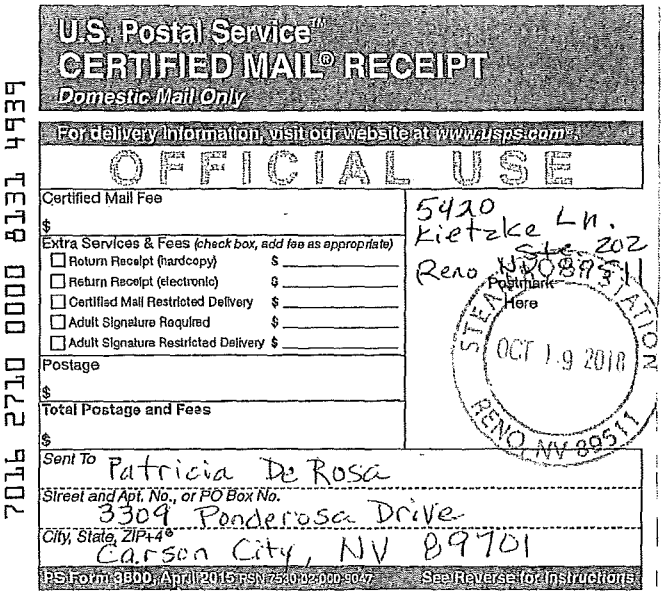
EXHIBIT 3

CERTIFICATE OF SERVICE

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

Patricia DeRosa
3309 Ponderosa Drive
Carson City, NV 89701

An Employee of the Office of the Attorney General



U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com®.

OFFICIAL USE

Certified Mail Fee
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Extra Services & Fees (check box, add fee as appropriate)
- ☐ Return Receipt (hardcopy) $
- ☐ Return Receipt (electronic) $
- ☐ Certified Mail Restricted Delivery $
- ☐ Adult Signature Required $
- ☐ Adult Signature Restricted Delivery $

Postage
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Total Postage and Fees
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5420 Kietzke Ln. Ste. 202
Reno NV 89511

Postmark Here

STEAMBOAT STATION
OCT 19 2018
RENO NV 89511

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 7530-02-000-9047 See Reverse for Instructions

7016 2710 0000 8131 4939

ADAM PAUL LAXALT
Attorney General

J. BRIN GIBSON
First Assistant Attorney General

NICHOLAS A. TRUTANICH
Chief of Staff

KETAN D. BHIRUD
General Counsel

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

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 #

9590 9402 2531 6306 8376 06

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

United States
Postal Service

• Sender: Please print your name, address, and ZIP+4® in this box•

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

RMZ

RECEIVED
NOV 01 2018
ATTORNEY GENERAL
RENO OFFICE

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Patricia DeRosa
3309 Ponderosa Drive
Carson City, NV 89701

9590 9402 2531 6306 8376 06

2. Article Number (Transfer from service label)
7016 2710 0000 8131 4939

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

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Patricia DeRosa ☐ Agent ☒ Addressee

B. Received by (Printed Name) Patricia DeRosa C. Date of Delivery 10/30/18

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☒ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

Domestic Return Receipt

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

Attorneys for Respondent PATRICIA DEROSA

REC'D & FILED
2018 NOV 16 PM 4:42
SUSAN MERRIWETHER
CLERK
BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA, *ex rel.* its DEPARTMENT OF CORRECTIONS, Petitioner, vs. PATRICIA DEROSA, an individual, and STATE OF NEVADA, *ex rel.* its DEPARTMENT OF ADMINISTRATION, PERSONNEL COMMISSION and DIVISION OF HEARINGS AND APPEALS, Respondents.	CASE NO.: 18 OC 00150 1B DEPT NO.: 1

RESPONDENT PATRICIA DEROSA'S REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS

COMES NOW Respondent PATRICIA DEROSA ("Employee"), by and through her legal counsel, Dyer Lawrence, LLP, and Thomas J. Donaldson, Esq., and hereby replies to "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" ("Opposition"). The instant Reply

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is made pursuant to FJDCR 15(4) and based upon the following points of authorities and the pleadings and papers on file herein.

DATED this 16th 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

MEMORANDUM OF POINTS AND AUTHORITIES

Contrary to Petitioner's claims in its Opposition, NDOC has completely failed to fulfill its basic obligation to properly serve Employee in a timely manner as required by the NRCP 4 and 12. Petitioner's reliance upon undersigned counsel's representation of Employee in the underlying administrative actions (without undersigned counsel's consent to accept service on behalf of Employee), Employee's Notice of Intent to Participate in Judicial Review Proceeding, which specifically "reserve[d] all rights and privileges pursuant to NRS 233B.130 *et seq.* and the Nevada Rules of Civil Procedure," Petitioner's untimely service of the Petition for Judicial Review("Petition") on Employee by mail on October 30, 2018, and various unpublished and foreign court opinions are all misplaced.

Initially, Petitioner blatantly misrepresents in its Opposition that "[w]ithout citing any relevant, supporting authority, [Employee] takes the position that NDOC was required to personally serve her with the Petition . . . in this matter in accordance with NRCP 4(d)(6) . . . ." Opposition, p. 3 at lines 10-12. Of course, nothing could be further from the truth. Employee's Motion is replete with relevant sections of NRS and NRCP and Nevada Supreme Court opinions.

Most importantly, Petitioner completely ignores NRCP 81(a), which states:

> The [Rules of Civil Procedure] do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute. Where the applicable statute provides

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

> for procedure under the former statutes governing civil actions, such procedure shall be in accordance with these rules. Appeals from a district court to the Supreme Court of Nevada, and applications for extraordinary writs in the Supreme Court are governed by the Nevada Rules of Appellate Procedure.

As conceded by Petitioner, NRS 233B.130 *et seq.*, does **not specify the manner of serving parties** named in a petition for judicial review. Therefore, in accordance with NRCP 81(a), both NRCP 4 and NRCP 12 clearly apply to petitions for judicial review since there are no conflicting provisions in NRS Chapter 233B, the Nevada Administrative Procedure Act.

Similarly, Petitioner completely neglects to explain, let alone excuse, NDOC's failure to comply with this Court's Order for Briefing Schedule ("Briefing Order") dated June 21, 2018. The Briefing Order reiterated the procedural requirements of NRS 233B.133, specifically noting that "Petitioner must serve the Petition for Judicial Review upon the agency and ***every party within 45 days after the filing of the Petition for Judicial Review***." (Emphasis supplied.) As confirmed in the Opposition, Petitioner has never personally served Employee, despite Employee continuing to be employed by NDOC, and did not serve Employee by mail until October 30, 2018, **one hundred and thirty-two days (132)** after the filing of the Petition on or about June 20, 2018. Opposition, Exhibit 3, p. 4.

Additionally, Petitioner does not even mention, let alone attempt to distinguish, this Court's Order Granting Motion to Dismiss ("Order") the petition for judicial review filed by the Nevada Department of Transportation ("NDOT") in *State of Nevada, ex. rel. its Department of Transportation v. Rocky Boice*, Case No. 14 OC 00158 1B (July 22, 2105), a case that nearly mirrors the instant matter. In *Boice*, this Court determined that NDOT failed to comply with NRCP 4(d)(6) and the technical requirements of NRS 233B.130(5) by not personally serving Mr. Boice and that there was no good cause shown by NDOT as to why service was not complied with and, hence, dismissed the case based on *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 190, 42 P.3d 268 (2002).[1] Order, p. 2 at lines 15-26. Certainly, the Attorney General's Office, which represents both

[1] NDOT also attempted to cure its jurisdictional filing requirement by mailing a copy of the petition for judicial review to Mr. Boice, which was also insufficient service. Order, p. 2 at lines 13-24.

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

NDOT and NDOC, was aware of the basis for the dismissal of NDOT's petition for judicial review and should have "learned its lesson."

Here, NDOC provides no good reason in its Opposition as to why it still has not personally served Employee, now **one hundred and four (104) days** since the 45-day deadline expired on August 6, 2018. This case is analogous to *Dallman v. Merrell*, 106 Nev. 929, 803 P.2d 232, 233 (1990), in which 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.[2] Thus, consistent with *Dallman* and *Boice*, this Court should dismiss the instant Petition.

Rather than admitting that NDOC failed to properly serve Employee and conceding that the Court lacks jurisdiction over the instant dispute, Petitioner unpersuasively attempts to distinguish the instant action from other civil actions relying upon distinguishable case law, unpublished opinions and decisions from foreign jurisdictions. Opposition, pp. 3-5. However, the Court should reject Petitioner's contention.

Further, Petitioner illogically claims that NRCP 5(b)(2)(B), rather than NRCP 4 applies in this case. Opposition, pp. 4-6. However, NRCP 5 concerns "Service and Filing of Pleadings and Other Papers," and specifically applies to "**every pleading subsequent to the original complaint.**" NRCP 5(a) (emphasis added). Thus, contrary to Petitioner's assertion, NRCP 5 is clearly **not applicable** to service of the Petition in this case.

Incredibly, Petitioner attempts to justify its failure to properly serve Employee by claiming that "[Employee's] presence in this judicial review proceeding is not required" because "there is no provision in NRS 233B providing that judgment by default will be rendered against her." Opposition, p. 6 at lines 22-27. Given that Respondent STATE OF NEVADA *ex rel.* its DEPARTMENT OF ADMINISTRATION, PERSONNEL COMMISSION, DIVISION OF HEARINGS AND APPEALS, did not file a notice of intent to participate in this judicial review,

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[2] The 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 that do not exist here.

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

consistent with its past practice, Employee is the only party who can oppose the Petition and seek an order from the Court affirming Hearing Officer Lorna L. Ward's Decision dated May 23, 2018, in accordance with NRS 233B.135(3). Petitioner's contention is laughable.[3]

Petitioner resorts to requesting an extension of time to serve Employee. Opposition, pp. 7-8. However, as in *Dallman, supra*, 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.

Finally, Petitioner unpersuasively contends that "[Employee] will suffer absolutely no prejudice by this Court's retroactive extension of time for service" and that she simply "does not desire to address the compelling arguments raised in NDOC's Opening Brief in favor of reversal of the hearing officer's decision." Opposition, p. 9 at lines 1-6. 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). Additionally, Employee is unnecessarily incurring attorney's fees in defending NDOC's defective Petition while Petitioner utilizes the Attorney General's Office, at taxpayers' expense. Although undersigned counsel cannot justify reviewing Petitioner's Opening Brief at this time, as usual, it is unlikely that Petitioner makes any "compelling arguments" given that, once again, NDOC had nothing to lose and is nothing more than the proverbial "sore loser." *See* Employee's Notice of Intent to Participate in Judicial Review Proceeding, p. 2.

CONCLUSION

It is undisputed that Petitioner failed to properly serve Employee with its Petition. Additionally, NDOC completely ignored the legal authorities in Employee's Motion, advanced no legitimate legal theories and has not shown good cause for its failure to comply with NRCP 4 in a

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[3] Similarly, Petitioner's attempted reliance upon NRAP 3(d)(1) is unquestionably misplaced in this case. Opposition, p. 7.

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Carson City, Nevada 89703
(775) 885-1896

timely matter or any reason to extend the service period at this late date. Therefore, Employee requests an order from the Court dismissing NDOC's Petition with prejudice pursuant to NRCP 4 and NRCP 12.

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 16th 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

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

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Dyer Lawrence, LLP, and that on the 16th day of November, 2018, I caused a true and correct copy of the within **RESPONDENT PATRICIA DEROSA'S REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS PURSUANT TO NRCP 4 &12 OR, IN THE ALTERNATIVE, MOTION TO EXTEND SERVICE PERIOD**, 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 19 2018

Bureau of Litigation
Personnel Division

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

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

RECD & FILED
2018 NOV 21 AM 8:44
SUSAN MERRIWETHER
CLERK
BY
DEPUTY

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

Petitioner,

vs.

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

Respondents.

CASE NO.: 18 OC 00150 1B

DEPT NO.: 1

ORDER GRANTING MOTION TO DISMISS

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

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

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

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

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

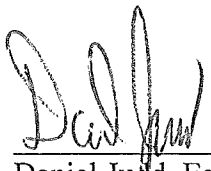
Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 21 day of November, 2018, I deposited for mailing, postage paid, at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

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
1050 E. Williams St., Ste. 450
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

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

Attorneys for Respondent PATRICIA DEROSA

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2018 NOV 27 PM 3:13
SUSAN MERRIWETHER
CLERK
BY
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA, *ex rel* its DEPARTMENT OF CORRECTIONS, Petitioner, vs. PATRICIA DEROSA, an individual, and STATE OF NEVADA, *ex rel.* its DEPARTMENT OF ADMINISTRATION, PERSONNEL COMMISSION and DIVISION OF HEARINGS AND APPEALS, Respondents.	CASE NO.: 18 OC 00150 1B DEPT NO.: 1

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on the 21st day of November, 2018, the Court entered its Order Granting Motion to Dismiss. A copy of the Order is attached and incorporated herein as Exhibit 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 27th 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

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Dyer Lawrence, LLP, and that on the 27th 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"

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

RECD & FILED
2018 NOV 21 AM 8:44
SUSAN MERRIWETHER
CLERK
BY _____ DEPUTY

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

Petitioner,

vs.

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

Respondents.

CASE NO.: 18 OC 00150 1B

DEPT NO.: 1

ORDER GRANTING MOTION TO DISMISS

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

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

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

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

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
1050 E. Williams St., Ste. 450
Carson City, NV 89710

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

Daniel Judd, Esq.
Law Clerk, Dept. 1

ADAM PAUL LAXALT
Attorney General
CAMERON P. VANDENBERG
Chief Deputy Attorney General
Nevada Bar No. 4356
Nevada Office of the Attorney General
Bureau of Business and State Services
Personnel Division
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Tel: 775-687-2132
Fax: 775-688-1822
cvandenberg@ag.nv.gov
Attorneys for Petitioner
State of Nevada Department of Corrections

REC'D & FILED
2018 DEC 14 PM 3:20
SUSAN MERRIWETHER
CLERK
BY_____
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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

Petitioner/Appellant,

vs.

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

Respondents.

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

NOTICE OF APPEAL

Notice is hereby given that the State of Nevada, *ex rel.* its Department of Corrections, Petitioner/Appellant above-named, hereby appeals to the Supreme Court of Nevada from the District

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Court's final Order Granting Motion to Dismiss entered in this action on the 21st day of November, 2018.

DATED this 17th day of December, 2018.

ADAM PAUL LAXALT
Attorney General

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

AFFIRMATION

The undersigned hereby affirms pursuant to NRS 239.030 that the preceding Notice of Appeal does not contain the personal information of any person.

DATED this 17th day of December, 2018.

ADAM PAUL LAXALT
Attorney General

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

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 17th day of December, 2018, in accordance with NRAP 3(d)(1), I served a copy of the foregoing **NOTICE OF APPEAL,** by causing said document to be placed in the United States Mail, first class postage prepaid, addressed to:

Thomas J. Donaldson, Esq.
Dyer Lawrence Flaherty Donaldson & Prunty
2805 Mountain St.
Carson City, Nevada 89703

Department of Administration
State of Nevada Personnel Commission
Division of Hearings and Appeals
1050 E. William Street, Suite 450
Carson City, Nevada 89701

Lorna L. Ward
Appeals Officer
Department of Administration
State of Nevada Personnel Commission
1050 E. William Street, Suite 450
Carson City, Nevada 89701

An Employee of the State of Nevada, Office of the Attorney General