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5 Nevada Bar No. 6835,  
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12 *Attorneys for Petitioner*

REC'D & FILED  
2019 SEP 20 AM 11:06

AUDREY ROWLAND  
CLERK  
BY  DEPUTY

Electronically Filed  
Sep 27 2019 09:33 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

9 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
10 IN AND FOR CARSON CITY

11 STATE OF NEVADA DEPARTMENT  
12 OF TRANSPORTATION,

Case No. 19 OC 000661B

Dept. No. 1

13 Petitioner,

14 vs.

15 STATE OF NEVADA, DEPARTMENT OF  
16 ADMINISTRATION, HEARINGS DIVISION,  
17 an agency of the State of Nevada, and  
18 JOHN BRONDER,

19 Respondents. \_\_\_\_\_/

20 NOTICE OF APPEAL

21 Notice is hereby given that State of Nevada, Department of Transportation,  
22 Petitioner above named, hereby appeals to the Supreme Court of Nevada from the  
23 Findings of Fact, Conclusions of Law and Decision Denying Petition for Judicial Review  
24 entered in this action on the 10<sup>th</sup> day of September, 2019.

25 DATED this 20<sup>th</sup> day of September, 2019.

26 AARON D. FORD  
27 Attorney General

28 By: 

LORI M. STORY  
Senior Deputy Attorney General  
State Bar No. 6835  
*Attorneys for Petitioner*

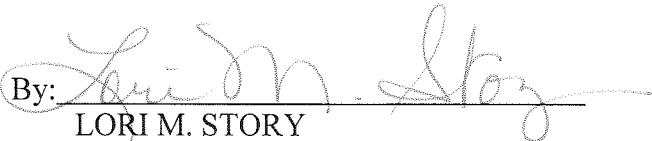
**AFFIRMATION**

**Pursuant to NRS 239B.030**

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

DATED: September 20, 2019.

AARON D. FORD  
Attorney General

By:   
LORI M. STORY  
Senior Deputy Attorney General  
State Bar No. 6835

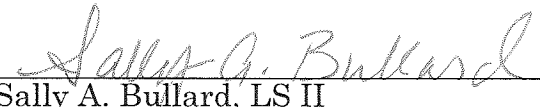
CERTIFICATE OF SERICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 20th day of September, 2019, service of the **NEVADA DEPARTMENT OF TRANSPORTATION'S NOTICE OF APPEAL** was made this date by depositing a true copy of the same for mailing, first class mail, at Carson City, Nevada, and or *via* e-mail, addressed as follows:

Paul H. Lamboley, Esq. (Via U.S. mail and E-mail): [phlamboley@aol.com](mailto:phlamboley@aol.com)  
Bank of America Plaza  
50 W. Liberty Street, Ste. 645  
Reno, NV 89501


Thomas J. Donaldson (Via U.S. Mail and E-mail): [tdonaldson@dyerlawrence.com](mailto:tdonaldson@dyerlawrence.com)  
Dyer Lawrence, LLP  
2805 Mountain Street  
Carson City, NV 89703  
(775) 885-1896 office  
(775) 885-8728 facsimile

Tasha Eaton, Judicial Assistant (Via U.S. Mail and E-mail): [teaton@admin.nv.gov](mailto:teaton@admin.nv.gov)  
For Paul Lamboley, Esq.  
Appeals Officer  
State of Nevada, Dept. of Administration / Hearings Division  
1050 E. Williams Street, Ste. 450  
Carson City, Nevada 89701

  
Sally A. Bullard, LS II  
An employee of the Office of Attorney General

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Nevada Attorney General  
LORI M. STORY,  
Senior Deputy Attorney General  
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*Attorneys for Petitioner*

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BY  DEPUTY

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

STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION,

Case No. 19 OC 000661B

Dept. No. 1

Petitioner,

vs.

STATE OF NEVADA, DEPARTMENT OF  
ADMINISTRATION, HEARINGS DIVISION,  
an agency of the State of Nevada, and  
JOHN BRONDER,

Respondents. \_\_\_\_\_/

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement: State of Nevada, Department of Transportation.

2. Identify the judge issuing the decision, judgment, or order appealed from: Honorable James T. Russell.

3. Identify each appellant and the name and address of counsel for each appellant:

State of Nevada, Department of Transportation, Appellant

///

///

1 Lori M. Story  
2 Senior Deputy Attorney General  
3 Office of the Attorney General  
4 1263 S. Stewart Street, Rm. 315  
5 Carson City, NV 89712  
6 775-888-7516  
7 [lstory@ag.nv.gov](mailto:lstory@ag.nv.gov)  
8 Attorney for Petitioner/Appellant

9 4. Identify each respondent and the name and address of appellate counsel, if known,  
10 for each respondent (if the name of a respondent's appellate counsel is unknown, indicate  
11 as much and provide the name and address of that respondent's trial counsel):

12 John Bronder, Respondent

13 Thomas J. Donaldson, Esq.  
14 Dyer Lawrence, LLP  
15 2805 Mountain Street  
16 Carson City, Nevada 89703  
17 (775) 885-1896 office  
18 [TDonaldson@dyerlawrence.com](mailto:TDonaldson@dyerlawrence.com)  
19 Attorney for Respondent

20 5. Indicate whether any attorney identified above in response to question 3 or 4 is  
21 not licensed to practice law in Nevada and, if so, whether the district court granted that  
22 attorney permission to appear under SCR 42 (attach a copy of any district court order  
23 granting such permission): Both are admitted to practice in Nevada.

24 6. Indicate whether appellant was represented by appointed or retained counsel in  
25 the district court: Retained.

26 7. Indicate whether appellant is represented by appointed or retained counsel on  
27 appeal: Retained.

28 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and  
the date of entry of the district court order granting such leave: No.

9. Indicate the date the proceedings commenced in the district court (e.g., date  
complaint, indictment, information, or petition was filed): April 8, 2019.

10. Provide a brief description of the nature of the action and result in the district  
court, including the type of judgment or order being appealed and the relief granted by the

1 district court: This was a petition for judicial review of an administrative hearing officer's  
2 decision in a state personnel action.


3 11. Indicate whether the case has previously been the subject of an appeal to or  
4 original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court  
5 docket number of the prior proceeding: No.

6 12. Indicate whether this appeal involves child custody or visitation: No.

7 13. If this is a civil case, indicate whether this appeal involves the possibility of  
8 settlement: Not likely.

9 DATED this 20<sup>th</sup> day of September, 2019.

10 AARON D. FORD  
11 Attorney General

12 By:   
13 LORI M. STORY  
14 Senior Deputy Attorney General  
15 State Bar No. 6835

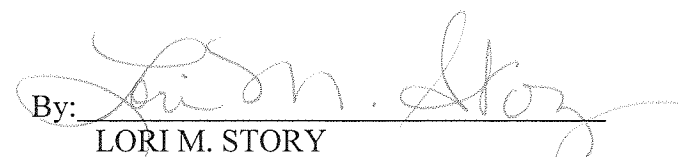
16  
17  
18 **AFFIRMATION**

19 **Pursuant to NRS 239B.030**

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

22 DATED: September 20, 2019.

23 AARON D. FORD  
24 Attorney General

25 By:   
26 LORI M. STORY  
27 Senior Deputy Attorney General  
28 State Bar No. 6835


CERTIFICATE OF SERICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 20th day of September, 2019, service of the NEVADA DEPARTMENT OF TRANSPORTATION'S CASE APPEAL STATEMENT was made this date by depositing a true copy of the same for mailing, first class mail, at Carson City, Nevada, and or via e-mail, addressed as follows:

Paul H. Lamboley, Esq. (Via U.S. mail and E-mail): [phlamboley@aol.com](mailto:phlamboley@aol.com)  
Bank of America Plaza  
50 W. Liberty Street, Ste. 645  
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Tasha Eaton, Judicial Assistant (Via U.S. Mail and E-mail): [teaton@admin.nv.gov](mailto:teaton@admin.nv.gov)  
For Paul Lamboley, Esq.  
Appeals Officer  
State of Nevada, Dept. of Administration / Hearings Division  
1050 E. Williams Street, Ste. 450  
Carson City, Nevada 89701

  
Sally A. Bullard, LS II  
An employee of the Office of Attorney General

Judge: RUSSELL, JUDGE JAMES  
TODD

Case No. 19 OC 00066 1B

Ticket No.  
CTN:STATE OF NEVADA DEPARTMENT OF  
TRANSPORTATION

By:

BRONDER, JOHN

DRSPND

-vs-

By: DONALDSON, THOMAS J  
2805 MOUNTAIN ST  
CARSON CITY, NV 89703Dob: Sex:  
Lic: Sid:  
DEPT. OF ADMINISTRATION, DRSPND  
HEARINGS DIVISION

By:

Dob: Sex:  
Lic: Sid:  
STATE OF NEVADA DRSPND

By:

Dob: Sex:  
Lic: Sid:Plate#:  
Make:  
Year: Accident:  
Type:  
Venue:  
Location:STATE OF NEVADA  
DEPARTMENT OF  
TRANSPORTATION

PLNTPET

Bond:  
Type:Set:  
Posted:

Charges:

Ct.

Offense Dt: Cvr:  
Arrest Dt:  
Comments:

Ct.

Offense Dt: Cvr:  
Arrest Dt:  
Comments:

Ct.

Offense Dt: Cvr:  
Arrest Dt:  
Comments:

Sentencing:

No.	Filed	Action	Operator	Fine/Cost	Due
1	09/20/19	MOTION FOR STAY PENIDNG APPEAL	1BCCOOPER	0.00	0.00
2	09/20/19	CASE APPEAL STATEMENT	1BCCOOPER	0.00	0.00
3	09/20/19	NOTICE OF APPEAL	1BCCOOPER	0.00	0.00
4	09/18/19	CERTIFICATE OF SERVIE	1BCCOOPER	0.00	0.00
5	09/12/19	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION DENYING PETITION FOR JUDICIAL REVIEW	1BJULIEH	0.00	0.00
6	09/10/19	SUMMARY JUDGMENT	1BJHIGGINS	0.00	0.00
7	09/10/19	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BJHIGGINS	0.00	0.00
8	09/10/19	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION DENYING PETITION FOR JUDICIAL REVIEW	1BJHIGGINS	0.00	0.00
9	08/14/19	REQUEST FOR SUBMISSION OF PETITION FOR JUDICIAL REVIEW AND RELATED BRIEFING	1BCCOOPER	0.00	0.00
10	08/14/19	DEPARTMENT OF TRANSPORTATINS REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS PETITION FOR JUDICIAL REVIEW	1BCCOOPER	0.00	0.00




NO.	FILED	ACTION	OPERATOR	FINE/COST	DUE
11	08/09/19	RESPONDENT JOHN BRONDER'S POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR JUDICIAL REVIEW	1BCTORRES	0.00	0.00
12	07/30/19	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BVANESSA	0.00	0.00
13	07/30/19	STIPULATION AND ORDER EXTENDING TIME TO FILE RESPONDENT'S ANSWERING BRIEF	1BVANESSA	0.00	0.00
14	06/25/19	DEPARTMENT OF TRANSPORTATION OPENING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS PETITION FOR JUDICIAL REVIEW	1BJULIEH	0.00	0.00
15	06/14/19	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BCCOOPER	0.00	0.00
16	06/14/19	ORDER GRANTING PETITIONERS REQUEST FOR EXTENSION OF TIME TO FILE OPENING BRIEF	1BCCOOPER	0.00	0.00
17	06/13/19	REQUEST FOR SUBMISSION OF PETITIONERS MOTION FOR EXTENSION OF TIME TO FILE OPENING BRIEF AND ATTACHED ORDER	1BCCOOPER	0.00	0.00
18	06/11/19	MOTION FOR EXTENSION OF TIME TO FILE OPENING BRIEF	1BCCOOPER	0.00	0.00
19	05/09/19	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BJULIEH	0.00	0.00
20	05/09/19	ORDER GRANTING MOTION FOR STAY PENDING JUDICIAL REVIEW	1BJULIEH	0.00	0.00
21	05/08/19	CERTIFICATE OF TRANSMITTAL	1BJULIEH	0.00	0.00
22	05/08/19	RECORD ON APPEAL	1BJULIEH	0.00	0.00
23	05/08/19	PLAINTIFF'S/PETITIONER'S INITIAL APPEARANCE AFFIRMATION PURSUANT TO NRS 239.030	1BJULIEH	0.00	0.00
24	05/08/19	TRANSMITTAL OF RECORD ON APPEAL	1BJULIEH	0.00	0.00
25	05/08/19	REQUEST FOR SUBMISSION OF MOTION FOR STAY PENDING JUDICIAL REVIEW AND ATTACHED ORDER	1BCCOOPER	0.00	0.00
26	04/30/19	SUMMONS	1BJULIEH	0.00	0.00
27	04/26/19	WAIVER OF SERVICE OF SUMMONS UNDER RUL 4.1 OF THE NEVADA RULES OF CIVIL PROCEDURE	1BJULIEH	0.00	0.00
28	04/25/19	RESPONDENT JOHN BRONDERS RESPONSE TO PETITIONERS MOTION FOR STAY PENDING JUDICIAL REVIEW	1BCCOOPER	0.00	0.00
29	04/25/19	RESPONDENT JOHN BRONDERS NOTICE OF INTENT TO PARTICIPATE IN JUDICIAL REVIEW PROCEEDING Receipt: 59978 Date: 04/25/2019	1BCCOOPER	218.00	0.00
30	04/25/19	ISSUING SUMMONS & ADD'L SUMMONS (2)	1BCCOOPER	0.00	0.00
31	04/09/19	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BVANESSA	0.00	0.00
32	04/09/19	ORDER GRANTING A TEMPORARY STAY AND RE: TIME TO FILE OPPOSITION TO MOTION FOR STAY	1BVANESSA	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
33	04/09/19	ORDER FOR BRIEFING SCHEDULE	1BVANESSA	0.00	0.00
34	04/08/19	MOTION FOR STAY PENDING JUDICIAL REVIEW	1BVANESSA	0.00	0.00
35	04/08/19	PETITION FOR JUDICIAL REVIEW	1BVANESSA	265.00	0.00
Total:				483.00	0.00
Totals By: COST				483.00	0.00
INFORMATION				0.00	0.00
*** End of Report ***					

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5 *Attorneys for Respondent JOHN BRONDER*

REC'D & FILED  
2019 SEP 10 AM 8:20  
AUBREY ROWLATT  
CLERK  
BY  DEPUTY

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

10  
11 STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION, )

12 )  
13 Petitioner, )

14 vs. )

15 STATE OF NEVADA, DEPARTMENT  
OF ADMINISTRATION, HEARINGS DIVISION, )  
16 an agency of the State of Nevada, and )  
JOHN BRONDER, )

17 Respondents. )  
18 )

CASE NO.: 19 OC 00066 1B

DEPT NO.: 1

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND DECISION DENYING  
PETITION FOR JUDICIAL REVIEW**

19 PETITIONER STATE OF NEVADA DEPARTMENT OF TRANSPORTATION ("NDOT") having  
20 filed herein a Petition for Judicial Review ("Petition") on or about April 8, 2019, pursuant to NRS 281.641  
21 and NRS 233B.010 *et seq.*, challenging the Decision and Order on Whistleblower Appeal ("Decision")  
22 issued by RESPONDENT STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, HEARINGS  
23 DIVISION Hearing Officer Paul H. Lamboley, Esq., on or about March 7, 2019, with notice to all parties;  
24 this Court having considered the pleadings, legal authorities and supporting documents submitted by the  
25 parties; hereby makes the following findings of fact, conclusions of law and decision denying the Petition.

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Findings of Fact

The underlying administrative proceeding concerns a whistleblower appeal filed on or about January 16, 2018, by RESPONDENT JOHN BRONDER ("Employee") pursuant to NRS 281.611 *et seq.* Record on Appeal ("ROA") 605-634. Employee was hired as a Manager I (Grade 43, Step 8) by NDOT in Elko, Nevada, on June 6, 2016. ROA 040, 053:17-18, 430, 496. The position has a one (1) year probationary period. ROA 065:10-13. On or about February 13, 2017, Employee accepted a lateral transfer to the same position in Carson City. ROA 040, 430, 496. In addition to his regular job duties and responsibilities, Employee was directed immediately to assist with rewriting NDOT's Construction Manual and to learn the job duties of another Manager I, who was retiring in May, 2017. ROA 061-062, 430, 496-497.

On or about April 10, 2017, Employee viewed NDOT's Board of Directors' meeting and, based upon then Governor Brian Sandoval's question and comments about seemingly excessive compensation of contracted consultants, immediately expressed his concerns to NDOT Assistant Construction Engineer Stephen Lani. Mr. Lani dismissed Employee's concerns of a gross waste of public money. ROA 045-046, 430, 609, 615-621.

The next day, at a Nevada Board of Examiners meeting on April 11, 2017, when discussing consulting contracts with former NDOT employees, then Governor Sandoval stated:

This is something that will likely be taken up at the Board of Transportation, but the **total amount for consultants is \$186 million**. That's a really big number. I asked yesterday, **it's bigger than the entire payroll of NDOT for a year**. Today is not the day to do it but I'd like you to be thinking about it – we pay \$41.93 for an employee to do it and we're paying \$134.40 for a consultant to do the same work. I think a conversation needs to be had with the amount of money that is going out the door versus what is being done internally. As I said, I am very surprised that we have that amount of money. We approve these consulting contracts piecemeal but we've never had them aggregated and this is a massive number. I know your bandwidth is only so wide and we have a lot of projects going on out there, but again, I've got to get a better feel for what's going on because we see at least two or three of these every month for former employees working as consultants. (Emphasis added.)

ROA 046-046, 439.

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1 Two (2) weeks later, just before a planned family vacation, Employee received an overall “meets  
2 standards” 11-month performance evaluation on April 24, 2017, which was the first and only evaluation he  
3 received from NDOT.<sup>1</sup> ROA 047-049, 623-625. NDOT Chief Construction Engineer Sharon Foerschler  
4 reviewed, approved and signed the evaluation. ROA 215:4-15, 239-240, 623. Employee was never the  
5 subject of disciplinary action while employed by NDOT. ROA 048:23-25.

6 When Employee returned from vacation on Friday, May 5, 2017, NDOT rejected him from  
7 employment one (1) month prior to the completion of his twelve (12) month probationary period on  
8 June 6, 2017. ROA 049-050, 627. On July 14, 2017, Employee met with now former NDOT Director Rudy  
9 Malfabon and now former Assistant Director of Operations Reid Kaiser regarding the concerns he expressed  
10 to Mr. Lani and the termination of his NDOT employment.<sup>2</sup> ROA 051-052, 088:1-15, 092, 610. Mr. Kaiser  
11 told Employee that he was rejected because he was “not a good fit” in NDOT’s Construction Division, but  
12 offered to speak to other NDOT managers about rehiring him. ROA 051-052, 103-105, 113.

13 On September 8, 2017, Employee was hired as a Professional Engineer (Grade 40, Step 1) by the  
14 Nevada Department of Conservation and Natural Resources, Division of State Parks. ROA 053:7-16.

15 On October 10, 2017, NDOT posted a job vacancy notice for Resident Engineer (Grade 43) in Elko,  
16 Nevada. ROA 054-055, 610. On October 24, 2017, Employee applied for the Resident Engineer position  
17 and was ranked #1 on the list. ROA 055-056, 442. However, rather than interviewing (and hiring)  
18 Employee, NDOT withdrew the job posting on October 31, 2017. ROA 431, 610.

19 Three (3) days later, on November 3, 2017, NDOT re-posted the vacancy for Resident Engineer in  
20 Elko, Nevada. ROA 445. Employee applied for the position and was identified as eligible, but not  
21 interviewed (or hired) per NAC 284.374. ROA 056, 446.

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24  
25 <sup>1</sup> NRS 284.340(2) provides, “[e]ach appointing authority shall . . . [f]ile reports with the  
26 Administrator on the performance, during the probationary period, of each of the employees of the appointing  
27 authority who holds a position in the classified service. A report must be filed at the end of the 2nd and 5th  
months of employment if the probationary period is 6 months, or at the end of the 3rd, 7th and 11th months  
of employment if the probationary period is 12 months.”

28 <sup>2</sup> Former Director Malfabon was present throughout the underlying administrative hearing on  
January 17, 2019, but did not testify to rebut any of Employee’s claims or testimony. ROA 033, 036:1-8.

1 On January 16, 2018, Employee filed the underlying whistleblower appeal. ROA 605-606. On or  
2 about May 1, 2018, NDOT filed a Motion to Dismiss (“Motion”) the appeal, which was fully briefed. On  
3 July 13, 2018, Hearing Officer Lamboley conducted a hearing regarding the Motion based upon the parties’  
4 Stipulated Facts and subsequently issued his Decision and Order (“Order”) denying NDOT’s Motion dated  
5 October 6, 2018. ROA 470-501. The Order determined:

6 . . . to whom an employee makes a disclosure or statement, albeit to a party within or without  
7 the employee’s employment setting, is neither relevant nor material under NRS 281.641(3).

8 ROA 484:18-20. Further, the Hearing Officer concluded that Employee’s appeal was timely, that Employee  
9 alleged reprisal or retaliatory action as defined in NRS 281.611(5) and that the Hearing Officer could grant  
10 the relief requested by Employee. ROA 489-493.

11 On January 17, 2019, Hearing Officer Lamboley conducted an administrative hearing concerning  
12 Employee’s whistleblower appeal and subsequently issued his Decision dated March 7, 2019. ROA 001-  
13 030. In the Decision, the Hearing Officer first found:

14 There is no serious question that Bronder’s statements [to Assistant Construction  
15 Engineer Stephen Lani on April 10, 2017,] involved matters of public concern over what may  
16 be properly termed “gross waste of public money,” i.e., taxpayer money, regarding  
consultants and construction contract awards that include concern for excessive cost  
allowances and considered improper governmental action for which NDOT admittedly has  
an interest in, is responsible for, and is able to critically evaluate and remedy if need be.

17 ROA 010-011.

18 Hearing Officer Lamboley also properly determined:

19 Moreover, the criteria for whistleblower protected speech is *not* whether the content  
20 or action of expressed concern is *in fact or proven to be* true or correct, or *is* a violation of  
21 law, or is *not considered as such* by the employer, but rather the criteria *is* whether the  
22 employee disclosure *in good faith, reasonably believed* there may be improper governmental  
23 action. *Simonian v. Univ. and Cmt. Coll. Sys.*, 122 Nev. 187, 128 P.3d 1057 (Nev. 2006);  
also *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1323-24, 970 P.2d 1062, 1068 (Nev.  
1998) (tortious discharge); cf. *International Game Technology v. Dist. Court*, 124 Nev. 193,  
179 P.2d 556 (Nev. 2008) (false claims statutory protection) and *International Game Tech.*  
*v. Dist. Court*, 122 Nev. 132, 127 P.3d 1088 (Nev. 2006), J. Maupin dissenting.

24 ROA 011-012 (emphasis in original).

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1 Additionally, the Hearing Officer appropriately established:

2 The absence of coherent, cogent and credible reasons for NDOT's action and the  
3 negative statements NDOT made post-action regarding Bronder's re-transfer provide  
4 legitimate nexus and causal relation between NDOT[s] action and Bronder's April 10  
5 expressed concerns over consultants and construction bid/contract award costs to his  
6 supervisors that were reported to the appointing authority, and support the conclusion that  
7 NDOT's rationale evidences reprisal or retaliatory action as the real predicate for NDOT's  
8 rejection of probation and termination of Bronder, if not his removal from the interview  
9 eligibility list "per NAC 284.374."

10 ROA 018:8-14.

11 Next, Hearing Officer Lamboley logically determined that Employee properly had standing to file  
12 the whistleblower complaint. ROA 021-022. Then, the Hearing Officer correctly determined that he had  
13 the authority under NRS 281.641(2) to reinstate Employee to NDOT employment as a remedy for NDOT's  
14 retaliatory action against Employee. ROA 022-024. Finally, Hearing Officer Lamboley appropriately  
15 rejected NDOT's misplaced attempt to rely upon the Nevada Supreme Court's recent opinion in *O'Keefe*  
16 *v. DMV*, 134 Nev. Adv. Op. 92 (December 6, 2018), which concerned the appeal of a disciplinary action  
17 pursuant to NRS 284.385, *not* a whistleblower appeal. ROA 024.

18 Ultimately, the Hearing Officer granted Employee's whistleblower appeal due to NDOT's reprisal  
19 or retaliatory actions, reversed NDOT's termination (rejection from probation) of Employee, reinstated  
20 Employee to his former probationary status and employment with NDOT as a Manager I, Grade 43, Step 8,  
21 and restored Employee's accrued benefits previously earned. ROA 028.

22 NDOT filed its Petition on or about April 8, 2019. NDOT is seeking to have the Court overturn the  
23 Hearing Officer's Decision granting Employee's whistleblower appeal. ROA 28. NDOT filed a motion for  
24 a temporary stay of the Decision pending appeal, which was not opposed by Employee and, thus, granted  
25 by the Court in its Order dated April 9, 2019.

26 Any Finding of Fact hereinafter construed to constitute a Conclusion of Law shall be, and hereby is,  
27 incorporated as such to the same extent as if originally so designated.

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In essence, NDOT contends in its Opening Brief that the Hearing Officer’s Decision is “arbitrary and capricious,” “clearly erroneous” and “in excess of [the Hearing Officer’s] statutory authority” because the Hearing Officer granted Employee’s whistleblower appeal under the circumstances. Opening Brief, p. 13. However, NDOT’s arguments are not persuasive.

NDOT first claims that “[t]he Hearing Officer erred when he ignored the specific limitations period imposed by statute and regulation on State personnel who appeal an employment action on the basis of alleged reprisal.” Opening Brief, p. 15. However, the Hearing Officer properly applied the applicable statutes.

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1 The procedures and requirements for a whistleblower appeal are set forth in NRS 281.641, which  
2 provides:

3 1. If any reprisal or retaliatory action is taken against a state officer or employee who  
4 discloses information concerning improper governmental action within 2 years after the  
5 information is disclosed, the state officer or employee may file a written appeal with a  
6 hearing officer of the Personnel Commission for a determination of whether the action taken  
7 was a reprisal or retaliatory action. The written appeal must be accompanied by a statement  
8 that sets forth with particularity:

9 (a) The facts and circumstances under which the disclosure of improper governmental  
10 action was made; and

11 (b) The reprisal or retaliatory action that is alleged to have been taken against the state  
12 officer or employee.

13 The hearing must be conducted in accordance with the procedures set forth in NRS 284.390  
14 to 284.405, inclusive, and the procedures adopted by the Personnel Commission pursuant to  
15 subsection 4.

16 2. If the hearing officer determines that the action taken was a reprisal or retaliatory  
17 action, the hearing officer may issue an order directing the proper person to desist and refrain  
18 from engaging in such action. The hearing officer shall file a copy of the decision with the  
19 Governor or any other elected state officer who is responsible for the actions of that person.

20 3. The hearing officer may not rule against the state officer or employee based on the  
21 person or persons to whom the improper governmental action was disclosed.

22 4. The Personnel Commission may adopt rules of procedure for conducting a hearing  
23 pursuant to this section that are not inconsistent with the procedures set forth in  
24 NRS 284.390 to 284.405, inclusive.<sup>4</sup>

25 5. As used in this section, "Personnel Commission" means the Personnel  
26 Commission created by NRS 284.030.

27 "Improper governmental action" means any action taken by a state officer or employee or local  
28 governmental officer or employee in the performance of the officer's or employee's official duties, whether  
or not the action is within the scope of employment of the officer or employee, which is among other things,  
a gross waste of public money. NRS 281.611(1)(e).

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<sup>4</sup> NRS 284.390 to NRS 284.405 concern a hearing to determine the reasonableness of a dismissal,  
demotion or suspension of a State employee.

1 “Reprisal or retaliatory action” includes:

- 2 (a) The denial of adequate personnel to perform duties;
- 3 (b) Frequent replacement of members of the staff;
- 4 (c) Frequent and undesirable changes in the location of an office;
- 5 (d) The refusal to assign meaningful work;
- 6 (e) The issuance of letters of reprimand or evaluations of poor performance;
- 7 (f) A demotion;
- 8 (g) A reduction in pay;
- 9 (h) The denial of a promotion;
- 10 (i) A suspension;
- 11 (j) A dismissal;
- 12 (k) A transfer;
- 13 (l) Frequent changes in working hours or workdays; or
- 14 (m) If the employee is licensed or certified by an occupational licensing board, the
- 15 filing with that board, by or on behalf of the NDOT, of a complaint concerning the employee,
- 16 if such action is taken, in whole or in part, because the state officer or employee or local
- 17 governmental officer or employee disclosed information concerning improper governmental
- 18 action.

11 NRS 281.611(5). With respect to an NRS 281.641(1) reprisal/retaliation claim, the Hearing Officer must  
12 only determine whether a State employee has engaged in protected activity, *i.e.*, has disclosed information  
13 concerning alleged conduct that might constitute “improper governmental action.” *Simonian v. Univ. &*  
14 *Cnty. Coll. Sys.*, 122 Nev. 187, 198, 128 P.3d 1057 (2006). As a result, the Hearing Officer need not  
15 determine whether the employee’s allegations are correct. *Id.* at 198-199.

16 Here, Employee disclosed improper governmental action to Mr. Lani on April 10, 2017. ROA 045-  
17 046, 430, 609, 615-621. Two (2) weeks later on April 24, 2017, Employee received his first and only  
18 performance evaluation with an overall rating of “meets standards,” which his “appointing authority,”  
19 NDOT Chief Construction Engineer Sharon Foerschler reviewed, “agree[d]” with and signed. ROA 047-  
20 049, 215:4-15, 239-240, 623-625. NDOT rejected Employee from probation, *i.e.*, terminated his  
21 employment, two (2) weeks later on May 5, 2017, one (1) month before he would have completed his twelve  
22 (12) month probationary period on June 6, 2017. ROA 049-050, 627. Employee subsequently learned on  
23 January 5, 2018, that NDOT unlawfully removed his name from the interview eligibility list “per  
24 NAC 284.374.” ROA 056, 446. Employee filed his whistleblower appeal on or about January 16, 2018.  
25 ROA 605-606.

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1 After thorough legal analysis, the Hearing Officer properly determined:

2 The 2-year time [period] in NRS 281.641(1) is a specific statutory time applicable to  
3 whistleblower protection on appeal of a state NDOT's alleged reprisal or retaliatory action,  
4 and is jurisdictional, not procedural. By contrast the 10-day time [period] in NAC  
5 281.305(1)(a) is regulatory time applicable to appeal hearing procedures to determine [the]  
6 reasonableness of NDOT's disciplinary dismissal, demotion, or suspension under NRS  
7 284.390-390-.405, and is not consistent with [the] authority grant[ed] under NRS 281.641(4)  
8 for whistleblower free speech protection.

9 ROA 020:17-19 (footnote omitted). Hearing Officer Lamboley states in his Decision, "[w]hat is factually  
10 clear is that NDOT's reprisal or retaliatory action occurred within a 2-year period after Bronder's disclosures  
11 at issue." ROA 020:10-11. Thus, the Hearing Officer correctly concluded that "Bronder's appeal is timely  
12 for the relief requested." ROA 021:4-5.

13 Administrative regulations cannot contradict or conflict with the statute they are intended to  
14 implement. *Roberts v. State Univ. of Nevada Sys.*, 104 Nev. 33, 752 P.2d 221 (1988), *cited*, *Hager v.*  
15 *Nevada Medical Legal Screening Panel*, 105 Nev. 1, at 3, 767 P.2d 1346 (1989), *Clark County Social Servs.*  
16 *Dep't v. Newkirk*, 106 Nev. 177, at 179, 789 P.2d 227 (1990), AGO 93-23 (9-29-1993), AGO 94-01  
17 (2-16-1994), *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, at 293, 995 P.2d 482  
18 (2000), *see also Meridian Gold Co. v. State*, 119 Nev. 630, at 635, 81 P.3d 516 (2003), *NAIW v. Nevada*  
19 *Self-Insurers Association*, 126 Nev. 74, at 83, 225 P.3d 1265 (2010), AGO 2010-14 (5-13-2010), *Public*  
20 *Agency Compensation Trust v. Blake*, 127 Nev. 863, at 869, 265 P.3d 694 (2011). Conflict between a statute  
21 and a regulation renders the regulation invalid. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, *id.* at  
22 295, 995 P.2d 482, 486.

23 NDOT concedes that the "Plain Text of [the] Statute Applies." Opening Brief, pp. 18-19. Applying  
24 this standard, NRS 281.641(1) plainly states, "[t]he hearing must be conducted in accordance with the  
25 procedures set forth in NRS 284.390 to 284.405, inclusive, and the procedures adopted by the Personnel  
26 Commission pursuant to [NRS 281.641] subsection 4." Further, NRS 281.641(4) plainly provides, "[t]he  
27 Personnel Commission may adopt rules of procedure for conducting a hearing pursuant to this section . . . ."  
28 Thus, the regulations adopted by the Personnel Commission can only concern the whistleblower hearing  
procedures, not the timeline for filing a whistleblower appeal. Since NRS 281.641 does not require a  
whistleblower appeal to be filed "within 10 working days," NAC 281.305(a) is invalid since it is contrary  
to NRS 281.641. Clearly, the Hearing Officer did not err when he found that Employee's whistleblower

1 appeal was timely.

2 2. Employee was not required to report improper governmental action outside NDOT.

3 Next, based solely upon the Nevada Supreme Court's holding in a single private (not under NRS  
4 Chapter 281) whistleblower case, NDOT contends that "[o]nly reports made for a public purpose obtain  
5 whistleblower protection." Opening Brief, p. 22. However, this is not true in whistleblower cases involving  
6 State employees under NRS Chapter 281.

7 The hearing officer may not rule against the state officer or employee based on the person or persons  
8 to whom the improper governmental action was disclosed. NRS 281.641(3).

9 Hearing Officer Lamboley addressed this issue in his Order dated October 6, 2018. ROA 482-484.  
10 Based upon current language of NRS 281.641(3) and its legislative history (Senate Bill 357, 1995), the  
11 Hearing Officer determined:

12 A fair, impartial and critical reading of that legislative history on whistleblower  
13 protection makes clear the specific language in NRS 281.641(3) was chosen to clarify a  
14 jurisdictional issue, and specifically intended to legislatively correct a problem created by a  
15 prior decision of a hearing officer which denied whistleblower relief to an employee  
"because the employee did not render his whistle-blowing to the proper level or jurisdiction,  
it did not fall within this law."

16 ROA 482-483. The Hearing Officer then concluded, "[t]hus, to whom an employee makes a disclosure or  
17 statement, albeit to a party within or without the employee's employment setting, is neither relevant nor  
18 material under NRS 281.641(3)." ROA 484:18-20. Clearly, the Hearing Officer did not err when deciding  
19 this legal issue.

20 3. The relief requested by Employee and granted by the Hearing Officer is appropriate.

21 Next, NDOT summarily contends that the Hearing Officer lacked authority to reinstate Employee  
22 after determining that NDOT's termination of Employee constituted reprisal or retaliatory action. Opening  
23 Brief, pp. 22-23. However, such a reading and application of NRS 281.641(2) would make the Legislature's  
24 policy declaration and NRS 281.611 *et seq.* utterly meaningless. *See Hobbs v. State*, 127 Nev. 234, 237, 251  
25 P.3d 177 (2011).

26 If the Hearing Officer determines that the action taken was a reprisal or retaliatory action, the Hearing  
27 Officer may issue an order directing the proper person to desist and refrain from engaging in such action.  
28 NRS 281.641(2).

1 Here, Hearing Officer Lamboley spent over a page of his Decision explaining how reinstating  
2 Employee to NDOT employment with accrued benefits is the only meaningful way to cure NDOT's reprisal  
3 or retaliatory action of rejecting Employee from probation, *i.e.*, terminating him, after he reported improper  
4 governmental action. ROA 022-024. A probationary employee may be rejected for any lawful reason.  
5 NAC 284.458(1). Logically, if the employee's rejection constitutes reprisal or retaliatory action in violation  
6 of NRS 281.611 *et seq.*, the rejection is unlawful and must be invalidated.

7 Reinstatement of Employee is consistent with Hearing Officer Lansford W. Levitt's reinstatement  
8 of Rocky Boice in *Boice v. NDOT*, Case No. CC-07-13-LWL (June 26, 2014).<sup>5</sup> ROA 448-458. Pursuant  
9 to NRS 47.130 the Court may take judicial notice that NDOT appealed Hearing Officer Levitt's decision  
10 to this Court in Case No. 14 OC 00158 1B, the Court dismissed NDOT's appeal by Order dated  
11 July 22, 2015, NDOT then appealed the matter to the Nevada Supreme Court in Case No. 68696, but  
12 subsequently voluntarily dismissed the appeal on November 28, 2017. Clearly, Hearing Officer Lamboley's  
13 conclusion that "the desist and refrain remedy [of NRS 281.641(2)] requires reinstatement of Bronder's  
14 probation and his employment with acquired benefits" is proper.

15 4. NDOT's rejection of Employee from probation was unlawful.

16 Finally, NDOT claims that the Hearing Officer's finding that NDOT's reasons for rejecting  
17 Employee from probation two (2) weeks after issuing him a "meets standards" performance evaluation and  
18 just one (1) month prior to completing his twelve (12) month probationary period were pretextual was  
19 arbitrary and capricious. Opening Brief, pp. 23-27. However, the evidence proves otherwise.

20 The Court shall not substitute its judgment for that of the agency as to the weight of evidence on a  
21 question of fact. NRS 233B.135(3). The hearing officer's conclusions of law, which are necessarily closely  
22 related to the hearing officer's view of facts, are entitled to deference and will not be disturbed if they are  
23 supported by substantial evidence. *Frangul, supra*, 110 Nev. 46, 51, 867 P.2d 397 (1994). "Substantial  
24 evidence" is that which a reasonable mind might accept as adequate to support a conclusion. *Barsy, supra*,  
25 113 Nev. 712, 719, 941 P.2d 971 (1997).

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27 <sup>5</sup> The Court may take judicial notice of administrative proceedings. *Mack v. Estate of Mack*, 125 Nev.  
28 80, 92, 206 P.3d 98, 106 (2009).

1 Hearing Officer Lamboley spent seven (7) pages of his Decision setting forth the facts related to  
2 NDOT's rejection of Employee from probation on May 5, 2017, just two (2) weeks after issuing him a  
3 "meets standards" performance evaluation on April 27, 2017, and one (1) month before Employee would  
4 have completed his twelve (12) month probationary period on June 6, 2017. ROA 012-018. The Hearing  
5 Officer found:

6 In this case, the sequence of events coupled with staff testimony and [the] evidence overall,  
7 and the inconsistent and contradictory testimony of Ms. Foerschler in particular, regarding  
8 Bronder's job performance as Manager I in Carson City, do not provide a smoking gun of  
reprisal or retaliatory action, but the reasons for NDOT's action appear to be pretextual and  
an *ex post facto* rationale offered by the action-responsible appointing authority.

9 ROA 018:3-7. Hearing Officer Lamboley then concluded:

10 The absence of coherent, cogent and credible reasons for NDOT's action and the  
11 negative statements NDOT made post-action regarding Bronder's re-transfer provide [the]  
12 legitimate nexus and causal relation between NDOT's action and Bronder's April 10  
13 expressed concerns over consultants and construction bid/contract award costs to his  
supervisors that were reported to the appointing authority, and support the conclusion that  
NDOT's rationale evidences reprisal or retaliatory action as the real predicate for NDOT's  
rejection of probation and termination of Bronder, if not his removal from the interview  
eligible list "per NAC 284.374."

14 ROA 018:8-14.

15 Ms. Foerschler, who was the "appointing authority" in this case, claimed that she came up with a list  
16 of reasons why she was rejecting Employee from probation, including an after-the-fact timeline of events.  
17 ROA 200-206, 359-362 (ER 048-051). However, it is clear from the Hearing Officer's questioning of Ms.  
18 Foerschler, that he did not believe her. ROA 223-242, 359-362. Ms. Foerschler had no credible evidence  
19 that Employee was not interacting with his subordinates, that Employee had not "sought out additional work  
20 assignments," that Employee did not work forty (40) hours the "week of [the] Partnering Conference" in  
21 Reno, that he "did not partake in [the] Construction Manual rewrite project as assigned," or that he did not  
22 learn the Consultant program, which was another (retiring) manager's responsibility. *Id.*

23 Additionally, it is undisputed that Mr. Lani told Ms. Foerschler about Employee's concerns about  
24 the exorbitant costs of the consulting contracts, *i.e.*, gross waste of money or improper governmental action,  
25 and that Ms. Foerschler tainted Employee's former supervisor in Elko, Boyd Ratliff, when she called  
26 Mr. Ratliff regarding her decision to reject Employee from probation. ROA 195, 206:20-25, 248-251.

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1 Finally, despite Ms. Foerschler's contention that she involved Employee's supervisor, Jeff Freeman,  
2 and Mr. Lani in her decision to reject Employee from probation, Mr. Freeman had no significant issues with  
3 Employee based upon the performance evaluation that he prepared, and Mr. Lani was not even aware of the  
4 "meets standards" evaluation. ROA 174, 185-188, 623-625. Thus, the Hearing Officer's finding that "the  
5 reasons for NDOT's action appear to be pretextual and an *ex post facto* rationale" for Employee's  
6 termination are clearly supported by substantial evidence in the record. ROA 018:3-7.

7 Any Conclusion of Law hereinafter construed to constitute a Finding of Fact shall be, and hereby is,  
8 incorporated as such to the same extent as if originally so designated.

9 Order and Decision

10 IT IS HEREBY ORDERED that NDOT's Petition for Judicial Review dated April 8, 2019, is hereby  
11 DENIED.

12 IT IS FURTHER ORDERED that Hearing Officer Lamboley's Decision dated March 7, 2019, in  
13 Hearings Division Appeal No. 1802330-PHL is hereby AFFIRMED.

14 IT IS FURTHER ORDERED that within ten (10) days of the date of this Order, NDOT shall comply  
15 with and implement Hearing Officer Lamboley's Decision in Hearings Division Appeal No. 1802330-PHL  
16 by reinstating Employee to his former probationary status and employment with NDOT as a Manager I,  
17 Grade 43, Step 8, and restoring Employee's accrued benefits previously earned retroactive to May 5, 2017,  
18 and serving a copy of the Decision on the Governor of Nevada and any other appointed State officer(s) or  
19 person(s) responsible for the personnel actions of NDOT.

20 DATED this 10<sup>th</sup> day of September, 2019.

21  
22   
DISTRICT COURT JUDGE

23 Submitted by:

24 DYER LAWRENCE, LLP

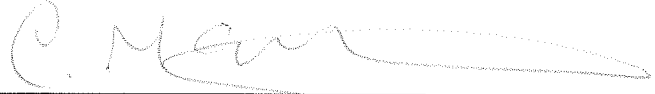
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26 By: \_\_\_\_\_  
27 Thomas J. Donaldson  
28 Nevada Bar No. 5283  
Attorneys for Respondent  
John Bronder

**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 10 day of September, 2019, I deposited for mailing, postage paid, at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

Thomas J. Donaldson, Esq.  
2805 Mountain Street  
Carson City, NV 89703

Lori M. Story, Esq.  
Office of the Nevada Attorney General  
100 S. Carson Street  
Carson City, NV 89701

  
C. McClintick  
Law Clerk, Dept. 1



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5 *Attorneys for Respondent JOHN BRONDER*

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

10  
11 STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION, )

12 Petitioner, )

13 vs. )

14 STATE OF NEVADA, DEPARTMENT )  
15 OF ADMINISTRATION, HEARINGS DIVISION, )  
16 an agency of the State of Nevada, and )  
JOHN BRONDER, )

17 Respondents. )  
18

CASE NO.: 19 OC 00066 1B

DEPT NO.: 1

19 **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**  
20 **DENYING PETITION FOR JUDICIAL REVIEW**

21 **PLEASE TAKE NOTICE THAT** on September 10, 2019, the above-entitled Court entered the  
22 Findings of Fact, Conclusions of Law and Decision Denying Petition for Judicial Review, in the above-  
23 captioned matter, a copy of which is attached hereto as **Exhibit "1."**

24 DATED this 12<sup>th</sup> day of September, 2019.

25 DYER LAWRENCE, LLP

26  
27 By: 

28 Thomas J. Donaldson  
Nevada Bar No. 5283  
Attorneys for Respondent  
John Bronder

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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Dyer Lawrence, LLP, and that on the 12<sup>th</sup> day of September, 2019, I caused a true and correct copy of the within **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION DENYING PETITION FOR JUDICIAL REVIEW**, to be delivered via U.S. Mail, first-class postage prepaid and electronic mail to the following persons:

Lori M. Story, Esq.  
Senior Deputy Attorney General  
Personnel Division  
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Carson City, NV 89701  
[lstory@ag.nv.gov](mailto:lstory@ag.nv.gov)

Paul H. Lambole, Esq.  
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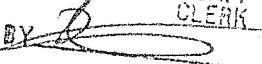
  
Debora McEachin

**EXHIBIT "1"**

**EXHIBIT "1"**

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5 *Attorneys for Respondent JOHN BRONDER*

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

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11 STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION,

12  
13 Petitioner,

14 vs.

15 STATE OF NEVADA, DEPARTMENT  
OF ADMINISTRATION, HEARINGS DIVISION,  
16 an agency of the State of Nevada, and  
JOHN BRONDER,

17 Respondents.  
18

CASE NO.: 19 OC 00066 1B

DEPT NO.: 1

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND DECISION DENYING  
PETITION FOR JUDICIAL REVIEW**

19 PETITIONER STATE OF NEVADA DEPARTMENT OF TRANSPORTATION ("NDOT") having  
20 filed herein a Petition for Judicial Review ("Petition") on or about April 8, 2019, pursuant to NRS 281.641  
21 and NRS 233B.010 *et seq.*, challenging the Decision and Order on Whistleblower Appeal ("Decision")  
22 issued by RESPONDENT STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, HEARINGS  
23 DIVISION Hearing Officer Paul H. Lamboley, Esq., on or about March 7, 2019, with notice to all parties;  
24 this Court having considered the pleadings, legal authorities and supporting documents submitted by the  
25 parties; hereby makes the following findings of fact, conclusions of law and decision denying the Petition.

26 ///

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Findings of Fact

The underlying administrative proceeding concerns a whistleblower appeal filed on or about January 16, 2018, by RESPONDENT JOHN BRONDER ("Employee") pursuant to NRS 281.611 *et seq.* Record on Appeal ("ROA") 605-634. Employee was hired as a Manager I (Grade 43, Step 8) by NDOT in Elko, Nevada, on June 6, 2016. ROA 040, 053:17-18, 430, 496. The position has a one (1) year probationary period. ROA 065:10-13. On or about February 13, 2017, Employee accepted a lateral transfer to the same position in Carson City. ROA 040, 430, 496. In addition to his regular job duties and responsibilities, Employee was directed immediately to assist with rewriting NDOT's Construction Manual and to learn the job duties of another Manager I, who was retiring in May, 2017. ROA 061-062, 430, 496-497.

On or about April 10, 2017, Employee viewed NDOT's Board of Directors' meeting and, based upon then Governor Brian Sandoval's question and comments about seemingly excessive compensation of contracted consultants, immediately expressed his concerns to NDOT Assistant Construction Engineer Stephen Lani. Mr. Lani dismissed Employee's concerns of a gross waste of public money. ROA 045-046, 430, 609, 615-621.

The next day, at a Nevada Board of Examiners meeting on April 11, 2017, when discussing consulting contracts with former NDOT employees, then Governor Sandoval stated:

This is something that will likely be taken up at the Board of Transportation, but the **total amount for consultants is \$186 million**. That's a really big number. I asked yesterday, **it's bigger than the entire payroll of NDOT for a year**. Today is not the day to do it but I'd like you to be thinking about it – we pay \$41.93 for an employee to do it and we're paying \$134.40 for a consultant to do the same work. I think a conversation needs to be had with the amount of money that is going out the door versus what is being done internally. As I said, I am very surprised that we have that amount of money. We approve these consulting contracts piecemeal but we've never had them aggregated and this is a massive number. I know your bandwidth is only so wide and we have a lot of projects going on out there, but again, I've got to get a better feel for what's going on because we see at least two or three of these every month for former employees working as consultants. (Emphasis added.)

ROA 046-046, 439.

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1 Two (2) weeks later, just before a planned family vacation, Employee received an overall “meets  
2 standards” 11-month performance evaluation on April 24, 2017, which was the first and only evaluation he  
3 received from NDOT.<sup>1</sup> ROA 047-049, 623-625. NDOT Chief Construction Engineer Sharon Foerschler  
4 reviewed, approved and signed the evaluation. ROA 215:4-15, 239-240, 623. Employee was never the  
5 subject of disciplinary action while employed by NDOT. ROA 048:23-25.

6 When Employee returned from vacation on Friday, May 5, 2017, NDOT rejected him from  
7 employment one (1) month prior to the completion of his twelve (12) month probationary period on  
8 June 6, 2017. ROA 049-050, 627. On July 14, 2017, Employee met with now former NDOT Director Rudy  
9 Malfabon and now former Assistant Director of Operations Reid Kaiser regarding the concerns he expressed  
10 to Mr. Lani and the termination of his NDOT employment.<sup>2</sup> ROA 051-052, 088:1-15, 092, 610. Mr. Kaiser  
11 told Employee that he was rejected because he was “not a good fit” in NDOT’s Construction Division, but  
12 offered to speak to other NDOT managers about rehiring him. ROA 051-052, 103-105, 113.

13 On September 8, 2017, Employee was hired as a Professional Engineer (Grade 40, Step 1) by the  
14 Nevada Department of Conservation and Natural Resources, Division of State Parks. ROA 053:7-16.

15 On October 10, 2017, NDOT posted a job vacancy notice for Resident Engineer (Grade 43) in Elko,  
16 Nevada. ROA 054-055, 610. On October 24, 2017, Employee applied for the Resident Engineer position  
17 and was ranked #1 on the list. ROA 055-056, 442. However, rather than interviewing (and hiring)  
18 Employee, NDOT withdrew the job posting on October 31, 2017. ROA 431, 610.

19 Three (3) days later, on November 3, 2017, NDOT re-posted the vacancy for Resident Engineer in  
20 Elko, Nevada. ROA 445. Employee applied for the position and was identified as eligible, but not  
21 interviewed (or hired) per NAC 284.374. ROA 056, 446.

22 ///

23 ///

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24  
25 <sup>1</sup> NRS 284.340(2) provides, “[e]ach appointing authority shall . . . [f]ile reports with the  
26 Administrator on the performance, during the probationary period, of each of the employees of the appointing  
27 authority who holds a position in the classified service. A report must be filed at the end of the 2nd and 5th  
months of employment if the probationary period is 6 months, or at the end of the 3rd, 7th and 11th months  
of employment if the probationary period is 12 months.”

28 <sup>2</sup> Former Director Malfabon was present throughout the underlying administrative hearing on  
January 17, 2019, but did not testify to rebut any of Employee’s claims or testimony. ROA 033, 036:1-8.

1 On January 16, 2018, Employee filed the underlying whistleblower appeal. ROA 605-606. On or  
2 about May 1, 2018, NDOT filed a Motion to Dismiss ("Motion") the appeal, which was fully briefed. On  
3 July 13, 2018, Hearing Officer Lamboley conducted a hearing regarding the Motion based upon the parties'  
4 Stipulated Facts and subsequently issued his Decision and Order ("Order") denying NDOT's Motion dated  
5 October 6, 2018. ROA 470-501. The Order determined:

6 ... to whom an employee makes a disclosure or statement, albeit to a party within or without  
7 the employee's employment setting, is neither relevant nor material under NRS 281.641(3).  
8 ROA 484:18-20. Further, the Hearing Officer concluded that Employee's appeal was timely, that Employee  
9 alleged reprisal or retaliatory action as defined in NRS 281.611(5) and that the Hearing Officer could grant  
10 the relief requested by Employee. ROA 489-493.

11 On January 17, 2019, Hearing Officer Lamboley conducted an administrative hearing concerning  
12 Employee's whistleblower appeal and subsequently issued his Decision dated March 7, 2019. ROA 001-  
13 030. In the Decision, the Hearing Officer first found:

14 There is no serious question that Bronder's statements [to Assistant Construction  
15 Engineer Stephen Lani on April 10, 2017,] involved matters of public concern over what may  
16 be properly termed "gross waste of public money," i.e., taxpayer money, regarding  
consultants and construction contract awards that include concern for excessive cost  
allowances and considered improper governmental action for which NDOT admittedly has  
an interest in, is responsible for, and is able to critically evaluate and remedy if need be.

17 ROA 010-011.

18 Hearing Officer Lamboley also properly determined:

19 Moreover, the criteria for whistleblower protected speech is *not* whether the content  
20 or action of expressed concern is *in fact or proven to be* true or correct, or *is* a violation of  
21 law, or is *not considered as such* by the employer, but rather the criteria *is* whether the  
22 employee disclosure *in good faith, reasonably believed* there may be improper governmental  
23 action. *Simonian v. Univ. and Cmt. Coll. Sys.*, 122 Nev. 187, 128 P.3d 1057 (Nev. 2006);  
also *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1323-24, 970 P.2d 1062, 1068 (Nev.  
1998) (tortious discharge); cf. *International Game Technology v. Dist. Court*, 124 Nev. 193,  
179 P.2d 556 (Nev. 2008) (false claims statutory protection) and *International Game Tech.*  
*v. Dist. Court*, 122 Nev. 132, 127 P.3d 1088 (Nev. 2006), J. Maupin dissenting.

24 ROA 011-012 (emphasis in original).

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1 Additionally, the Hearing Officer appropriately established:

2 The absence of coherent, cogent and credible reasons for NDOT's action and the  
3 negative statements NDOT made post-action regarding Bronder's re-transfer provide  
4 legitimate nexus and causal relation between NDOT['s] action and Bronder's April 10  
5 expressed concerns over consultants and construction bid/contract award costs to his  
6 supervisors that were reported to the appointing authority, and support the conclusion that  
7 NDOT's rationale evidences reprisal or retaliatory action as the real predicate for NDOT's  
8 rejection of probation and termination of Bronder, if not his removal from the interview  
9 eligibility list "per NAC 284.374."

10 ROA 018:8-14.

11 Next, Hearing Officer Lamboley logically determined that Employee properly had standing to file  
12 the whistleblower complaint. ROA 021-022. Then, the Hearing Officer correctly determined that he had  
13 the authority under NRS 281.641(2) to reinstate Employee to NDOT employment as a remedy for NDOT's  
14 retaliatory action against Employee. ROA 022-024. Finally, Hearing Officer Lamboley appropriately  
15 rejected NDOT's misplaced attempt to rely upon the Nevada Supreme Court's recent opinion in *O'Keefe*  
16 *v. DMV*, 134 Nev. Adv. Op. 92 (December 6, 2018), which concerned the appeal of a disciplinary action  
17 pursuant to NRS 284.385, *not* a whistleblower appeal. ROA 024.

18 Ultimately, the Hearing Officer granted Employee's whistleblower appeal due to NDOT's reprisal  
19 or retaliatory actions, reversed NDOT's termination (rejection from probation) of Employee, reinstated  
20 Employee to his former probationary status and employment with NDOT as a Manager I, Grade 43, Step 8,  
21 and restored Employee's accrued benefits previously earned. ROA 028.

22 NDOT filed its Petition on or about April 8, 2019. NDOT is seeking to have the Court overturn the  
23 Hearing Officer's Decision granting Employee's whistleblower appeal. ROA 28. NDOT filed a motion for  
24 a temporary stay of the Decision pending appeal, which was not opposed by Employee and, thus, granted  
25 by the Court in its Order dated April 9, 2019.

26 Any Finding of Fact hereinafter construed to constitute a Conclusion of Law shall be, and hereby is,  
27 incorporated as such to the same extent as if originally so designated.  
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1  
2 Conclusions of Law

3 The Court has jurisdiction over the Petition, which was filed on or about April 8, 2019, in the above-  
4 entitled Court, which is the same county where the underlying agency proceeding occurred. Petition;  
5 ROA 031. Additionally, the Decision is a final decision of the agency, which is the Hearings Division, and  
6 this matter is properly before the Court pursuant to NRS 233B.130 *et seq.*<sup>3</sup>

7 In essence, NDOT contends in its Opening Brief that the Hearing Officer's Decision is "arbitrary and  
8 capricious," "clearly erroneous" and "in excess of [the Hearing Officer's] statutory authority" because the  
9 Hearing Officer granted Employee's whistleblower appeal under the circumstances. Opening Brief, p. 13.  
10 However, NDOT's arguments are not persuasive.

11 1. Employee's whistleblower appeal was timely filed.

12 NDOT first claims that "[t]he Hearing Officer erred when he ignored the specific limitations period  
13 imposed by statute and regulation on State personnel who appeal an employment action on the basis of  
14 alleged reprisal." Opening Brief, p. 15. However, the Hearing Officer properly applied the applicable  
15 statutes.

16 Initially, the Nevada Legislature specifically declared that it is the public policy of this State that  
17 State officers and employees are encouraged to disclose, to the extent not expressly prohibited by law,  
18 improper governmental action, and it is the intent of the Legislature to protect the rights of a State officer  
19 or employee who makes such a disclosure. NRS 281.621. Additionally, a State officer or employee shall  
20 not directly or indirectly use or attempt to use the official authority or influence of the officer or employee  
21 to intimidate, threaten, coerce, command, influence or attempt to intimidate, threaten, coerce, command or  
22 influence another State officer or employee in an effort to interfere with or prevent the disclosure of  
23 information concerning improper governmental action. NRS 281.631(1). The use of "official authority or  
24 influence" includes taking, directing others to take, recommending, processing or approving any personnel  
25 action such as an appointment, promotion, transfer, assignment, reassignment, reinstatement, restoration,  
26 reemployment, evaluation or other disciplinary action. NRS 281.631(2).

27 ///

28 <sup>3</sup> Respondent Hearings Division (and Hearing Officer Lambole) did not file a timely notice of intent  
to participate in the instant judicial review proceeding pursuant to NRS 233B.130(3).

1 The procedures and requirements for a whistleblower appeal are set forth in NRS 281.641, which  
2 provides:

3 1. If any reprisal or retaliatory action is taken against a state officer or employee who  
4 discloses information concerning improper governmental action within 2 years after the  
5 information is disclosed, the state officer or employee may file a written appeal with a  
6 hearing officer of the Personnel Commission for a determination of whether the action taken  
7 was a reprisal or retaliatory action. The written appeal must be accompanied by a statement  
8 that sets forth with particularity:

9 (a) The facts and circumstances under which the disclosure of improper governmental  
10 action was made; and

11 (b) The reprisal or retaliatory action that is alleged to have been taken against the state  
12 officer or employee.

13 The hearing must be conducted in accordance with the procedures set forth in NRS 284.390  
14 to 284.405, inclusive, and the procedures adopted by the Personnel Commission pursuant to  
15 subsection 4.

16 2. If the hearing officer determines that the action taken was a reprisal or retaliatory  
17 action, the hearing officer may issue an order directing the proper person to desist and refrain  
18 from engaging in such action. The hearing officer shall file a copy of the decision with the  
19 Governor or any other elected state officer who is responsible for the actions of that person.

20 3. The hearing officer may not rule against the state officer or employee based on the  
21 person or persons to whom the improper governmental action was disclosed.

22 4. The Personnel Commission may adopt rules of procedure for conducting a hearing  
23 pursuant to this section that are not inconsistent with the procedures set forth in  
24 NRS 284.390 to 284.405, inclusive.<sup>4</sup>

25 5. As used in this section, "Personnel Commission" means the Personnel  
26 Commission created by NRS 284.030.

27 "Improper governmental action" means any action taken by a state officer or employee or local  
28 governmental officer or employee in the performance of the officer's or employee's official duties, whether  
or not the action is within the scope of employment of the officer or employee, which is among other things,  
a gross waste of public money. NRS 281.611(1)(e).

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<sup>4</sup> NRS 284.390 to NRS 284.405 concern a hearing to determine the reasonableness of a dismissal,  
demotion or suspension of a State employee.

1 "Reprisal or retaliatory action" includes:

- 2 (a) The denial of adequate personnel to perform duties;  
3 (b) Frequent replacement of members of the staff;  
4 (c) Frequent and undesirable changes in the location of an office;  
5 (d) The refusal to assign meaningful work;  
6 (e) The issuance of letters of reprimand or evaluations of poor performance;  
7 (f) A demotion;  
8 (g) A reduction in pay;  
9 (h) The denial of a promotion;  
10 (i) A suspension;  
11 (j) A dismissal;  
12 (k) A transfer;  
13 (l) Frequent changes in working hours or workdays; or  
14 (m) If the employee is licensed or certified by an occupational licensing board, the  
15 filing with that board, by or on behalf of the NDOT, of a complaint concerning the employee,  
16 if such action is taken, in whole or in part, because the state officer or employee or local  
17 governmental officer or employee disclosed information concerning improper governmental  
18 action.

11 NRS 281.611(5). With respect to an NRS 281.641(1) reprisal/retaliation claim, the Hearing Officer must  
12 only determine whether a State employee has engaged in protected activity, *i.e.*, has disclosed information  
13 concerning alleged conduct that might constitute "improper governmental action." *Simonian v. Univ. &*  
14 *Cnty. Coll. Sys.*, 122 Nev. 187, 198, 128 P.3d 1057 (2006). As a result, the Hearing Officer need not  
15 determine whether the employee's allegations are correct. *Id.* at 198-199.

16 Here, Employee disclosed improper governmental action to Mr. Lani on April 10, 2017. ROA 045-  
17 046, 430, 609, 615-621. Two (2) weeks later on April 24, 2017, Employee received his first and only  
18 performance evaluation with an overall rating of "meets standards," which his "appointing authority,"  
19 NDOT Chief Construction Engineer Sharon Foerschler reviewed, "agree[d]" with and signed. ROA 047-  
20 049, 215:4-15, 239-240, 623-625. NDOT rejected Employee from probation, *i.e.*, terminated his  
21 employment, two (2) weeks later on May 5, 2017, one (1) month before he would have completed his twelve  
22 (12) month probationary period on June 6, 2017. ROA 049-050, 627. Employee subsequently learned on  
23 January 5, 2018, that NDOT unlawfully removed his name from the interview eligibility list "per  
24 NAC 284.374." ROA 056, 446. Employee filed his whistleblower appeal on or about January 16, 2018.  
25 ROA 605-606.

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1 After thorough legal analysis, the Hearing Officer properly determined:

2 The 2-year time [period] in NRS 281.641(1) is a specific statutory time applicable to  
3 whistleblower protection on appeal of a state NDOT's alleged reprisal or retaliatory action,  
4 and is jurisdictional, not procedural. By contrast the 10-day time [period] in NAC  
5 281.305(1)(a) is regulatory time applicable to appeal hearing procedures to determine [the]  
reasonableness of NDOT's disciplinary dismissal, demotion, or suspension under NRS  
284.390.390-.405, and is not consistent with [the] authority grant[ed] under NRS 281.641(4)  
for whistleblower fee speech protection.

6 ROA 020:17-19 (footnote omitted). Hearing Officer Lamboley states in his Decision, "[w]hat is factually  
7 clear is that NDOT's reprisal or retaliatory action occurred within a 2-year period after Bronder's disclosures  
8 at issue." ROA 020:10-11. Thus, the Hearing Officer correctly concluded that "Bronder's appeal is timely  
9 for the relief requested." ROA 021:4-5.

10 Administrative regulations cannot contradict or conflict with the statute they are intended to  
11 implement. *Roberts v. State Univ. of Nevada Sys.*, 104 Nev. 33, 752 P.2d 221 (1988), *cited*, *Hager v.*  
12 *Nevada Medical Legal Screening Panel*, 105 Nev. 1, at 3, 767 P.2d 1346 (1989), *Clark County Social Servs.*  
13 *Dep't v. Newkirk*, 106 Nev. 177, at 179, 789 P.2d 227 (1990), AGO 93-23 (9-29-1993), AGO 94-01  
14 (2-16-1994), *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, at 293, 995 P.2d 482  
15 (2000), *see also Meridian Gold Co. v. State*, 119 Nev. 630, at 635, 81 P.3d 516 (2003), *NAIW v. Nevada*  
16 *Self-Insurers Association*, 126 Nev. 74, at 83, 225 P.3d 1265 (2010), AGO 2010-14 (5-13-2010), *Public*  
17 *Agency Compensation Trust v. Blake*, 127 Nev. 863, at 869, 265 P.3d 694 (2011). Conflict between a statute  
18 and a regulation renders the regulation invalid. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, *id.* at  
19 295, 995 P.2d 482, 486.

20 NDOT concedes that the "Plain Text of [the] Statute Applies." Opening Brief, pp. 18-19. Applying  
21 this standard, NRS 281.641(1) plainly states, "[t]he hearing must be conducted in accordance with the  
22 procedures set forth in NRS 284.390 to 284.405, inclusive, and the procedures adopted by the Personnel  
23 Commission pursuant to [NRS 281.641] subsection 4." Further, NRS 281.641(4) plainly provides, "[t]he  
24 Personnel Commission may adopt rules of procedure for conducting a hearing pursuant to this section . . . ."  
25 Thus, the regulations adopted by the Personnel Commission can only concern the whistleblower hearing  
26 procedures, not the timeline for filing a whistleblower appeal. Since NRS 281.641 does not require a  
27 whistleblower appeal to be filed "within 10 working days," NAC 281.305(a) is invalid since it is contrary  
28 to NRS 281.641. Clearly, the Hearing Officer did not err when he found that Employee's whistleblower

1 appeal was timely.

2 2. Employee was not required to report improper governmental action outside NDOT.

3 Next, based solely upon the Nevada Supreme Court's holding in a single private (not under NRS  
4 Chapter 281) whistleblower case, NDOT contends that "[o]nly reports made for a public purpose obtain  
5 whistleblower protection." Opening Brief, p. 22. However, this is not true in whistleblower cases involving  
6 State employees under NRS Chapter 281.

7 The hearing officer may not rule against the state officer or employee based on the person or persons  
8 to whom the improper governmental action was disclosed. NRS 281.641(3).

9 Hearing Officer Lamboley addressed this issue in his Order dated October 6, 2018. ROA 482-484.  
10 Based upon current language of NRS 281.641(3) and its legislative history (Senate Bill 357, 1995), the  
11 Hearing Officer determined:

12 A fair, impartial and critical reading of that legislative history on whistleblower  
13 protection makes clear the specific language in NRS 281.641(3) was chosen to clarify a  
14 jurisdictional issue, and specifically intended to legislatively correct a problem created by a  
15 prior decision of a hearing officer which denied whistleblower relief to an employee  
"because the employee did not render his whistle-blowing to the proper level or jurisdiction,  
it did not fall within this law."

16 ROA 482-483. The Hearing Officer then concluded, "[t]hus, to whom an employee makes a disclosure or  
17 statement, albeit to a party within or without the employee's employment setting, is neither relevant nor  
18 material under NRS 281.641(3)." ROA 484:18-20. Clearly, the Hearing Officer did not err when deciding  
19 this legal issue.

20 3. The relief requested by Employee and granted by the Hearing Officer is appropriate.

21 Next, NDOT summarily contends that the Hearing Officer lacked authority to reinstate Employee  
22 after determining that NDOT's termination of Employee constituted reprisal or retaliatory action. Opening  
23 Brief, pp. 22-23. However, such a reading and application of NRS 281.641(2) would make the Legislature's  
24 policy declaration and NRS 281.611 *et seq.* utterly meaningless. *See Hobbs v. State*, 127 Nev. 234, 237, 251  
25 P.3d 177 (2011).

26 If the Hearing Officer determines that the action taken was a reprisal or retaliatory action, the Hearing  
27 Officer may issue an order directing the proper person to desist and refrain from engaging in such action.  
28 NRS 281.641(2).

1 Here, Hearing Officer Lamboley spent over a page of his Decision explaining how reinstating  
2 Employee to NDOT employment with accrued benefits is the only meaningful way to cure NDOT's reprisal  
3 or retaliatory action of rejecting Employee from probation, *i.e.*, terminating him, after he reported improper  
4 governmental action. ROA 022-024. A probationary employee may be rejected for any lawful reason.  
5 NAC 284.458(1). Logically, if the employee's rejection constitutes reprisal or retaliatory action in violation  
6 of NRS 281.611 *et seq.*, the rejection is unlawful and must be invalidated.

7 Reinstatement of Employee is consistent with Hearing Officer Lansford W. Levitt's reinstatement  
8 of Rocky Boice in *Boice v. NDOT*, Case No. CC-07-13-LWL (June 26, 2014).<sup>5</sup> ROA 448-458. Pursuant  
9 to NRS 47.130 the Court may take judicial notice that NDOT appealed Hearing Officer Levitt's decision  
10 to this Court in Case No. 14 OC 00158 1B, the Court dismissed NDOT's appeal by Order dated  
11 July 22, 2015, NDOT then appealed the matter to the Nevada Supreme Court in Case No. 68696, but  
12 subsequently voluntarily dismissed the appeal on November 28, 2017. Clearly, Hearing Officer Lamboley's  
13 conclusion that "the desist and refrain remedy [of NRS 281.641(2)] requires reinstatement of Bronder's  
14 probation and his employment with acquired benefits" is proper.

15 4. NDOT's rejection of Employee from probation was unlawful.

16 Finally, NDOT claims that the Hearing Officer's finding that NDOT's reasons for rejecting  
17 Employee from probation two (2) weeks after issuing him a "meets standards" performance evaluation and  
18 just one (1) month prior to completing his twelve (12) month probationary period were pretextual was  
19 arbitrary and capricious. Opening Brief, pp. 23-27. However, the evidence proves otherwise.

20 The Court shall not substitute its judgment for that of the agency as to the weight of evidence on a  
21 question of fact. NRS 233B.135(3). The hearing officer's conclusions of law, which are necessarily closely  
22 related to the hearing officer's view of facts, are entitled to deference and will not be disturbed if they are  
23 supported by substantial evidence. *Frangul, supra*, 110 Nev. 46, 51, 867 P.2d 397 (1994). "Substantial  
24 evidence" is that which a reasonable mind might accept as adequate to support a conclusion. *Barsy, supra*,  
25 113 Nev. 712, 719, 941 P.2d 971 (1997).

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27  
28 <sup>5</sup> The Court may take judicial notice of administrative proceedings. *Mack v. Estate of Mack*, 125 Nev.  
80, 92, 206 P.3d 98, 106 (2009).

1 Hearing Officer Lamboley spent seven (7) pages of his Decision setting forth the facts related to  
2 NDOT's rejection of Employee from probation on May 5, 2017, just two (2) weeks after issuing him a  
3 "meets standards" performance evaluation on April 27, 2017, and one (1) month before Employee would  
4 have completed his twelve (12) month probationary period on June 6, 2017. ROA 012-018. The Hearing  
5 Officer found:

6 In this case, the sequence of events coupled with staff testimony and [the] evidence overall,  
7 and the inconsistent and contradictory testimony of Ms. Foerschler in particular, regarding  
8 Bronder's job performance as Manager I in Carson City, do not provide a smoking gun of  
reprisal or retaliatory action, but the reasons for NDOT's action appear to be pretextual and  
an *ex post facto* rationale offered by the action-responsible appointing authority.

9 ROA 018:3-7. Hearing Officer Lamboley then concluded:

10 The absence of coherent, cogent and credible reasons for NDOT's action and the  
11 negative statements NDOT made post-action regarding Bronder's re-transfer provide [the]  
12 legitimate nexus and causal relation between NDOT['s] action and Bronder's April 10  
13 expressed concerns over consultants and construction bid/contract award costs to his  
supervisors that were reported to the appointing authority, and support the conclusion that  
14 NDOT's rationale evidences reprisal or retaliatory action as the real predicate for NDOT's  
rejection of probation and termination of Bronder, if not his removal from the interview  
eligible list "per NAC 284.374."

15 ROA 018:8-14.

16 Ms. Foerschler, who was the "appointing authority" in this case, claimed that she came up with a list  
17 of reasons why she was rejecting Employee from probation, including an after-the-fact timeline of events.  
18 ROA 200-206, 359-362 (ER 048-051). However, it is clear from the Hearing Officer's questioning of Ms.  
19 Foerschler, that he did not believe her. ROA 223-242, 359-362. Ms. Foerschler had no credible evidence  
20 that Employee was not interacting with his subordinates, that Employee had not "sought out additional work  
21 assignments," that Employee did not work forty (40) hours the "week of [the] Partnering Conference" in  
22 Reno, that he "did not partake in [the] Construction Manual rewrite project as assigned," or that he did not  
23 learn the Consultant program, which was another (retiring) manager's responsibility. *Id.*

24 Additionally, it is undisputed that Mr. Lani told Ms. Foerschler about Employee's concerns about  
25 the exorbitant costs of the consulting contracts, *i.e.*, gross waste of money or improper governmental action,  
26 and that Ms. Foerschler tainted Employee's former supervisor in Elko, Boyd Ratliff, when she called  
27 Mr. Ratliff regarding her decision to reject Employee from probation. ROA 195, 206:20-25, 248-251.

28 ///

1 Finally, despite Ms. Foerschler's contention that she involved Employee's supervisor, Jeff Freeman,  
2 and Mr. Lani in her decision to reject Employee from probation, Mr. Freeman had no significant issues with  
3 Employee based upon the performance evaluation that he prepared, and Mr. Lani was not even aware of the  
4 "meets standards" evaluation. ROA 174, 185-188, 623-625. Thus, the Hearing Officer's finding that "the  
5 reasons for NDOT's action appear to be pretextual and an *ex post facto* rationale" for Employee's  
6 termination are clearly supported by substantial evidence in the record. ROA 018:3-7.

7 Any Conclusion of Law hereinafter construed to constitute a Finding of Fact shall be, and hereby is,  
8 incorporated as such to the same extent as if originally so designated.

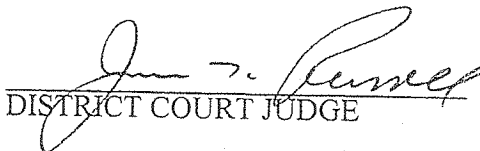
9 Order and Decision

10 IT IS HEREBY ORDERED that NDOT's Petition for Judicial Review dated April 8, 2019, is hereby  
11 DENIED.

12 IT IS FURTHER ORDERED that Hearing Officer Lamboley's Decision dated March 7, 2019, in  
13 Hearings Division Appeal No. 1802330-PHL is hereby AFFIRMED.

14 IT IS FURTHER ORDERED that within ten (10) days of the date of this Order, NDOT shall comply  
15 with and implement Hearing Officer Lamboley's Decision in Hearings Division Appeal No. 1802330-PHL  
16 by reinstating Employee to his former probationary status and employment with NDOT as a Manager I,  
17 Grade 43, Step 8, and restoring Employee's accrued benefits previously earned retroactive to May 5, 2017,  
18 and serving a copy of the Decision on the Governor of Nevada and any other appointed State officer(s) or  
19 person(s) responsible for the personnel actions of NDOT.

20 DATED this 10<sup>th</sup> day of September, 2019.

21  
22   
23 DISTRICT COURT JUDGE

24 Submitted by:

25 DYER LAWRENCE, LLP

26 By: \_\_\_\_\_

27 Thomas J. Donaldson  
28 Nevada Bar No. 5283  
Attorneys for Respondent  
John Bronder

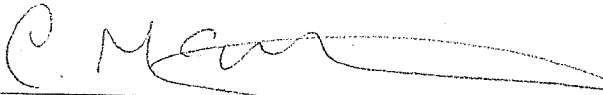


CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 10 day of September, 2019, I deposited for mailing, postage paid, at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

Thomas J. Donaldson, Esq.  
2805 Mountain Street  
Carson City, NV 89703

Lori M. Story, Esq.  
Office of the Nevada Attorney General  
100 S. Carson Street  
Carson City, NV 89701

  
C. McClintick  
Law Clerk, Dept. 1

## DISTRICT COURT CIVIL COVER SHEET

Carson City

County, Nevada

Case No.

190C 00066 1B

(Assigned by Clerk's Office)

REC'D &amp; FILED

2019 APR 8 PM 3:07

**I. Party Information** (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

STATE of Nevada Dept of  
Transportation

Defendant(s) (name/address/phone):

STATE Nevada Dept of  
Admin. & Hearing Div. BY AUBREY NEWLATT  
Clerk  
John Brandon, Respondent DEPUTY

Attorney (name/address/phone):

Lori M. Story, Sr. Attorney  
General Office of Attorney General  
100 N. Carson St. Carson City, NV  
89701

Attorney (name/address/phone):

Thomas Donaldson Esq.  
Dyes Law Firm, Plaintiff  
2805 Mountain St.  
Carson City, NV 89702**II. Nature of Controversy** (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property	Negligence	Torts
<b>Landlord/Tenant</b> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant <b>Title to Property</b> <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Foreclosure Mediation Assistance <input type="checkbox"/> Other Title to Property <b>Other Real Property</b> <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	<input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence <b>Malpractice</b> <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	<b>Other Torts</b> <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate	Construction Defect & Contract	Judicial Review/Appeal
<b>Probate</b> (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Surviving Spouse <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate <b>Estate Value</b> <input type="checkbox"/> Greater than \$300,000 <input type="checkbox"/> \$200,000-\$300,000 <input type="checkbox"/> \$100,001-\$199,999 <input type="checkbox"/> \$25,001-\$100,000 <input type="checkbox"/> \$20,001-\$25,000 <input type="checkbox"/> \$2,501-\$20,000 <input type="checkbox"/> \$2,500 or less	<b>Construction Defect</b> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect <b>Contract Case</b> <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	<b>Judicial Review</b> <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency <b>Nevada State Agency Appeal</b> <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency <b>Appeal Other</b> <input type="checkbox"/> Appeal from Lower Court <input checked="" type="checkbox"/> Other Judicial Review/Appeal
Civil Writ		Other Civil Filing
<b>Civil Writ</b> <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		<b>Other Civil Filing</b> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

April 8, 2019  
Date

Signature of initiating party or representative  
 Sr. Deputy Atty General

See other side for family-related case filings.