

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION,

Appellant,

vs.

JOHN BRONDER,

Respondent.

No. 79695

Electronically Filed  
Oct 18 2019 10:45 a.m.

DOCKETING  
STATEMENT  
CIVIL APPEALS

1. Judicial District First Department No. I

County Carson City Judge Honorable James Todd Russell

District Ct. Case No. 19 OC 00066 1B

**2. Attorney filing this docketing statement**

Attorney Lori M. Story Telephone: (775) 888-7516

Firm: Office of the Attorney General, Transportation Division

Address 1293 So. Stewart Street, Room 315

Carson City, NV 89712

Client(s) Department of Transportation, State of Nevada

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

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

Attorney Thomas Donaldson, Esq. Telephone (775) 885-1896

Firm: Dyer Lawrence, LLP

Address: 2805 Mountain Street  
Carson City, NV 89703

Client(s) John Bronder

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

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

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

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

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

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

None

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

None.

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

Administrative Appeal; State employee

Whistleblower appeal under NRS 281.641.

Employee released from probationary position after having conversation with division engineer about high cost of road construction contracts.

Employee did not appeal action until almost 8 months after release. Administrative hearing officer found NRS 281.641 gives employee two years to appeal an act of reprisal.

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

Hearing Officer misinterpreted limitation period on state employee bringing whistle blower appeal. Upheld by district court;

Hearing officer ignored substantial evidence of no motive to retaliate; and ignored case law requiring a whistle blower to report misdeeds outside organization. Upheld by district court.

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

None

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

☒ N/A

☐ Yes

☐ No

If not, explain:

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

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

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

☒ A substantial issue of first impression

☒ An issue of public policy

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

☐ A ballot question

If so, explain:

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

This matter is presumptively assigned to Court of Appeals under NRAP 17(b)(9). However, the proper interpretation of the Statute of Limitations for State employee whistleblower administrative appeals is of major significance to the State as an employer and to the state employees to whom it applies.



All other State employee administrative appeals are due to be filed within 10-workdays of the complained of events. The Hearing Officer and Court's interpretation of NRS 281.641 provides State employees who wish to claim whistleblower protections a full two years after the event complained of to file an appeal.

NRS 281.641 provides a two-year window of protection against reprisal, not a two-year statute of limitations to file the administrative appeal *after* the alleged reprisal.

To find otherwise, particularly where 281.641 directs the appeal to be conducted in conformity with NRS 284.390 with its ten days to appeal, puts employer at a great disadvantage in developing the facts, gathering witnesses, etc. for administrative proceeding that is intended to be efficient, cost effective and fair.

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

Administrative hearing (2) days. 1<sup>st</sup> day Motion to Dismiss; 2<sup>nd</sup> day Merits of Appeal.

Was it a bench or jury trial?  
Administrative hearing before hearing officer.

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

No.

## TIMELINESS OF NOTICE OF APPEAL

**16. Date of entry of written judgment or order appealed from**  
09/10/2019

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

**17. Date written notice of entry of judgment or order was served**  
09/12/2019

was service by:

- ☐ Delivery  
☒ Mail/electronic/fax

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

n/a

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

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

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

☐ NRCP 59 Date of filing \_\_\_\_\_

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

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

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

Was service by:

- ☐ Delivery  
☐ Mail

**19. Date notice of appeal filed** 9/20/2019

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

n/a

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

NRAP 4(a); NRS 233B.150

### **SUBSTANTIVE APPEALABILITY**

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

(a)

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

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

The underlying action was an administrative appeal filed by a classified state employee. The appeal was conducted pursuant to NRS 281.641; NAC 281.305; NRS 284.390 et seq.

The petition for judicial review of the administrative decision is permitted under NRS 233B.130 and this appeal is permitted under NRS 233B.150.

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

(a) Parties:

State of Nevada, Department of Transportation, Petitioner  
John Bronder (employee), Respondent.

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

All parties are included.

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

John Bronder, (employee) Respondent, claims he was released from probation (and denied a later opportunity to interview) as reprisal for whistleblowing.

Department of Transportation claims appeal untimely under NRS 281.641 and NRS 284.390; no evidence of motive or reprisal; no whistleblower report outside agency.

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

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:  
(a) Specify the claims remaining pending below:

n/a

(b) Specify the parties remaining below:

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

☐ Yes

☒ No

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

The Order is independently appealable and NRAP 3A(b) as the Order determines all issues as to all parties.

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

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

### VERIFICATION

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

State of Nevada Department of  
Transportation

Name of appellant

October 18, 2019

Date

Lori M. Story, Senior Deputy  
Deputy Attorney General

Name of counsel of record

Lori M. Story

Signature of counsel of record

Carson City, Nevada

State and county where signed

### CERTIFICATE OF SERVICE

I certify that on the 18 day of October, 2019,  
I served a copy of this docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Thomas J. Donaldson  
Dyer Lawrence, LLP  
2805 Mountain Street  
Carson City, NV 89703

Dated this 18<sup>th</sup> day of October, 2019

Sally A. Burkard  
Signature

# EXHIBIT A

# EXHIBIT A



IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION,

Appellant,

vs.

JOHN BRONDER,

Respondent.

No. 79695

INDEX TO  
DOCKETING  
STATEMENT

| Exhibit    | Document   | Date     |
|------------|--|----------|
| A          | Index to Docketing Statement   |          |
| B          | Petition for Judicial Review   | 04/08/19 |
| Ex. 1 to B | Decision and Order on Nevada Department<br>of Transportation's Motion to Dismiss   | 10/10/18 |
| C          | Motion for Stay Pending Judicial Review  | 04/08/19 |
| D          | Order Granting Motion for Stay Pending<br>Judicial Review  | 05/09/19 |
| E          | Department of Transportation's Opening<br>Memorandum of Points and Authorities<br>in Support of Its Petition for Judicial Review | 06/25/19 |
| F          | Notice of Entry of Findings of Facts,<br>Conclusions of Law and Decision Denying<br>Petition for Judicial Review                 | 09/13/19 |
| G          | Motion for Stay Pending Appeal   | 09/20/19 |
| H          | Order Denying Motion for Stay Pending Appeal   | 10/14/19 |

# EXHIBIT B

# EXHIBIT B

1 AARON D. FORD  
2 Attorney General  
3 LORI M. STORY  
4 Senior Deputy Attorney General  
5 Nevada Bar No. 6835  
6 State of Nevada  
7 Office of the Nevada Attorney General  
8 Personnel Division  
9 100 S. Carson Street  
10 Carson City, NV 89701  
11 Tel: 775-684-1114  
12 lstory@ag.nv.gov  
13 *Attorneys for Petitioner*

REC'D & FILED  
2019 APR -8 PM 3:07  
AUGREY ROWLATT  
CLERK  
BY V. Alonzo  
DEPUTY

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

12 STATE OF NEVADA DEPARTMENT  
13 OF TRANSPORTATION,

Case No. 190C000661B

Dept. No. I

14 Petitioner,

15 vs.

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

20 Respondents,  
21 \_\_\_\_\_

21 PETITION FOR JUDICIAL REVIEW

22 Petitioner STATE OF NEVADA, DEPARTMENT OF TRANSPORTATION (DOT), by  
23 and through its counsel, AARON D. FORD, Attorney General for the State of Nevada, and  
24 LORI M. STORY, Senior Deputy Attorney General, and pursuant to NRS 281.641(1) and  
25 NRS 281.641(4), and NRS 233B.010 et seq., petitions the Court as follows:

26 1. Petitioner requests judicial review of the final decision of the Nevada State  
27 Personnel Administrative Hearing Officer dated March 7, 2019, in Case No. 1802330-PHL.

28 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 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 of the Nevada State Personnel Administrative Hearing Officer pursuant to NRS 233B.135 and enter an Order reversing or setting aside in whole or part the decision; and

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

3. A Motion for Stay Pending Appeal is filed concurrently herewith pursuant to NRS 233B.140.

DATED this 8th day of April, 2019.


ADAM PAUL LAXALT  
Attorney General

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

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

AARON D. FORD  
Attorney General

  
 LORIN M. STORY

Senior Deputy Attorney General

*Attorneys for Petitioner*

**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this 8<sup>th</sup> day of April, 2019, I served a copy of the foregoing **PETITION FOR JUDICIAL REVIEW**, by causing said document to be placed in the United States Mail, first class postage prepaid, addressed to:

Paul H. Lamboley (Via U.S. mail and E-mail): [phlamboley@aol.com](mailto:phlamboley@aol.com)  
Appeals Officer  
State of Nevada  
Department of Administration / Hearings Division  
1050 E. Williams Street, Ste. 450  
Carson City, Nevada 89701

Thomas Donaldson, Esq. (Via U.S. mail and E-mail): [tdonaldson@dverlawrence.com](mailto:tdonaldson@dverlawrence.com)  
Dyer Lawrence Flaherty Donaldson & Prunty  
2805 Mountain St.  
Carson City, NV 89703

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

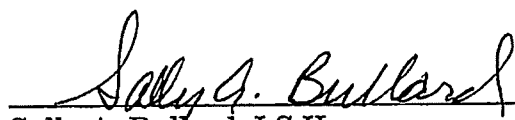
  
Sally A. Bullard, LS II  
an Employee of the Office of the Attorney General

EXHIBIT 1

EXHIBIT 1

1 NDOA-ORDR  
2 Paul H. Lambolely  
3 SBN 2149  
4 575 Forest Street, Ste. 200  
5 Reno, NV 89509  
6 Tel. 775.786.8333  
7 Fax 775.786.8334  
8 Email: phlambolely@aol.com  
9 Hearing Officer

**FILED**  
**OCT 10 2018**  
DEPT. OF ADMINISTRATION  
APPEALS OFFICER

7 STATE OF NEVADA  
8 DEPARTMENT OF ADMINISTRATION  
9 HEARINGS DIVISION  
10 BEFORE THE HEARING OFFICER

10 In the Matter of )  
11 )  
11 JOIN BRONDER )  
12 Employee - Appellant, )  
13 and )  
14 NEVADA DEPARTMENT OF )  
15 TRANSPORTATION )  
16 Employer - Respondent. )  
17 )  
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APPEAL NO. 1802330-PHI.

17 DECISION AND ORDER ON NEVADA DEPARTMENT  
18 OF TRANSPORTATION'S MOTION TO DISMISS

19 **A. Background.**

20 This case was initiated by Employee JOHN BRONDER (Bronder), under NRS 281.611 et seq.,  
21 specifically NRS 281.641(1), as an appeal of whistleblower retaliation conduct by Employer  
22 NEVADA DEPARTMENT OF TRANSPORTATION (NDOT).

23 On May 5, 2017, NDOT informed Bronder, who at the time was a probationary employee, that  
24 he was terminated.

25 In October 2017, an employment recruitment position was posted by NDOT, for which Bronder  
26  
27  
28



1 applied and ranked No. 1. This posting was later cancelled.

2 In November 2017, an employment recruitment position was posted by NDOT for which  
3 Bronder again applied. In response to this application, Bronder learned on January 5, 2018 that he  
4 was "removed per NRS 284.374" from the active eligible list for employment by NDOT.  
5

6 On January 16, 2018, Bronder timely filed appeal of his removal from eligible listing under  
7 NRS 284.374 based on whistleblower retaliation provisions of NRS 281.641(1).

8 On January 31, 2018 Nevada Department of Administration, Hearings Division (NDOA)  
9 appointed the undersigned to act as hearing officer (HO), who after conflict review accepted the  
10 assignment.

11 **B. Pre-Hearing Conference.**

12 On February 13, 2018 the HO proposed a pre-hearing conference with the Parties to review  
13 procedures, discovery/exchange of information, exhibits, witnesses, confidentiality, and  
14 date/time/location of hearing.  
15

16 Thereafter, the Parties decided a pre-hearing conference was not necessary, but did agree to  
17 hold a hearing on the merits of the appeal on May 31, 2018 starting at 9:00 AM at the offices of  
18 NDOA, 1050 E. Williams Street, Ste. 450, Carson City, NV.

19 **C. Pre-Hearing and Hearing Procedures/ Motion Activity.**

20 1. Consistent with the NDOA's March 15, 2018 Notice of Appeal and Order to Appear, the HIO  
21 issued an Order on pre-hearing and hearing procedures which noted that motions were disfavored,  
22 but included provision for pre-hearing discovery and non-discovery motions.  
23

24 2. On May 1, 2018 NDOT filed Motion to Dismiss (MTD), to which on May 2 Bronder filed  
25 Opposition, to which NDOT on May 4 filed Reply to Opposition.

26 3. On May 9, 2018 NDOT filed an email Motion to Continue Hearing previously set for May  
27  
28

1 31, 2018, to which on May 9 Bronder indicated no opposition, and on which the HO granted  
2 continuance of hearing to be reset.

3 4. The Parties agreed to a continue and reset the hearing on the MTD to Friday, July 13, 2018.

4 5. Based on granting the Motion to Continue, the HO issued an Order setting new Hearing  
5 Date, Time, Schedule and Procedures for hearing on NDOT's MTD under provisions of NRS  
6 281.641, and related provisions of NAC 281.315, both of which also incorporate provisions of  
7 NRS Chapter 284, and related provisions of NAC Chapter 284, specifically NRS 284.300-.405 and  
8 NAC 284.774-.818. Hearing was scheduled for July 12, 2018, later for July 13.

9 6. NDOT filed a Supplement to its MTD, dated July 3, 2018 to which filing Bronder objected.

10 7. Decision on the MTD was deferred until July 13 hearing.

11 **D. Hearing.**

12 On Friday, July 13, 2018 hearing was held on NDOT's MTD. Appearing were  
13 Employee/Appellant John Bronder and his counsel Thomas J. Donaldson, Esq., and  
14 Employer/Respondent NDOT by Deputy Attorney General Lori M. Story, Esq., and NDOT-HR  
15 representative Allison Wall.

16 As witness testimony was not anticipated on MTD issues, the exclusionary rule was  
17 unnecessary. However, to confirm under oath that facts stated in his initial written "Appeal of  
18 'Whistleblower' Retaliation" form and attached exhibits, dated January 16, 2018, submitted to  
19 Division of Human Resource Management were true, Bronder was sworn and did confirm the facts  
20 therein were true. Bronder's pre-hearing appeal forms and attached exhibits were accepted into the  
21 record as Exhibits NDOA-1 to NDOA-9.

22 At the request of the HO during hearing for the legislative history of the provision in NRS  
23 281.641(3). A link to the legislative history of S.B. 357 (1995), was provided post-hearing July 13  
24

1 by DAG Story. Post-hearing Comments on that history by the Parties were allowed to be received  
2 by July 20, 2018, and were received by emails on July 23 and 24, and are included in the record.

3 **1. Evidentiary Record and Employment History.**

4 **a. Evidentiary Record.**

5 For purposes of the MTD record, the Parties' Stipulation of Facts, dated July 11, 2018, was  
6 offered and accepted into the record at the hearing as Joint Exhibit 1, (JE-1)

7 Without objection, legislative history of NRS 641.641(3) was accepted and admitted as Joint  
8 Exhibit 2, (JE-2), on July 17. The Nevada Legislative Counsel Bureau's research library link  
9 regarding the 1995 legislative history for S.B.357 provided is:

10 [www.leg.state.nv.us/Division/Research/Library/LogHistory/LHs/1995/SB357\\_1995.pdf](http://www.leg.state.nv.us/Division/Research/Library/LogHistory/LHs/1995/SB357_1995.pdf)

11 The evidentiary record includes all documents transmitted in the administrative packet  
12 accompanying the NDOA's June 20 letter of assignment of appeal, identified as NDOA-:

13 NDOA-1 Assignment – January 31, 2018  
14 NDOA-2 Appeal from (NPD-53) – January 16, 2018  
15 NDOA-3 Bronder Summary Attached – January 16, 2018  
16 NDOA-4 Bronder Rejection of Employment letter – May 5, 2017  
17 NDOA-5 Memorandum – March 13, 2017  
18 NDOA-6 Transportation Board Minutes - April 10, 2017  
19 NDOA-7 Employee Appraisal & Development Report (NPD-15) – April 24 -27, 2017  
20 NDOA-8 Transportation Board Minutes – June 12, 2017  
21 NDOA-9 Transportation Board Minutes – August 11, 2017

22 In addition, the record includes the exhibits attached to Employer NDOT's Motion to Dismiss,  
23 Reply in Support and Supplement, identified as ER- :

24 ER-1. NDOT's Motion to Dismiss (MTD)  
25 ER-2 NDOT's MTD Exh A - Bronder Appeal Form NPD-53 with attachments Exh. A-D.  
26 ER-3 NDOT's Reply to Opposition to MTD  
27 ER-4 NDOT's Reply Exh. A - Appeal No.1809587 *Cannon v. NDIHHS* (04.10.18)  
28 ER-5 NDOT's Supplement to MTD  
ER-6 NDOT's Supplement to MTD Exh. A - Appeal No.1813758 *Cannon v. NDHHS*  
(06.15.18)

1 Also included are the exhibits attached to Employee Bronder's Pre-Hearing Statement,  
2 identified as EE-:

3 EE-1 Bronder's Opposition to NDOT's MTD

4 EE-2 Bronder's Opposition Exh. 1 – No. CC-07-13 *Boice v. NDOT* (06.27.14)

5 **b. Employment History.**

6 Bronder's employment history in JE-1 shows he was employed by NDOT June 6, 2016 as a  
7 Manager I P.E. position in Elko, NV at a Grade 43 which requires a 12-month probationary period.  
8 and on February 13, 2017, laterally transferred to a Manager 1 position in Carson City, NV, also a  
9 Grade 43 position. Bronder's first and only employee appraisal was done during the 10<sup>th</sup> month of  
10 his probationary period on April 25, 2017, 2-hours prior to his leave on a planned vacation leave.  
11 The Employee Appraisal & Development Report, NDOA-7, concluded that Bronder "meets  
12 standards" in overall rating for the listed 12 Job Elements evaluated, although 2-elements, #2 and  
13 #6, needed improvement. Returning to work from vacation leave on May 5, 2017, Bronder was  
14 informed that his employment was terminated effective at end of his shift that day.  
15

16 There is no evidence of any disciplinary action in Bronder's employment history.

17 Bronder did not appeal his termination.  
18

19 **III. Issues and Positions of the Parties.**

20 **A. Issues.**

21 In whistleblower appeals, there may primary issues and secondary issues raised by an MTD.

22 In its Motion to Dismiss (MTD), NDOT asserts the primary issue to be *whether Bronder*  
23 *conduct in this case qualifies for whistleblower protections and is eligible to utilize appeal*  
24 *procedures under applicable provisions of Nevada Revised Statutes (NRS) and Nevada*  
25 *Administrative Code (NAC).*  
26

1 NDOT also suggests a secondary issue that Bronder as a *probationary* employee may be  
2 dismissed at any time during probation without cause if NDOT complies with applicable  
3 regulations.

4 For Bronder, the primary issue is *whether he is entitled to whistleblower protection and appeal*  
5 *procedures available under applicable provisions of NRS and NAC, notwithstanding termination of*  
6 *probationary NDOT employment status and now former NDOT employee status.*

8 Both Parties raise issue on the *scope of remedy* as relief requesting restoration of employment.

9 **B. Positions of the Parties.**

10 **1. Employer NDOT**

11 Relying on statute and regulation NDOT initially urges 4 points as reasons for dismissal:

- 12 1. Bronder's appeal is untimely.
- 13 2. Bronder misuses process to appeal rejection from probation.
- 14 3. Bronder fails to allege he reported any improper governmental action outside of the  
NDOT.
- 15 4. Bronder seeks relief beyond the authority of Hearing Officer.

16 And concludes by urging:

- 17 1. Mr. Bronder's report to people in his supervisory chain does not qualify as whistleblowing.
- 18 2. Declining to re-interview him for a position where he has already proven himself ineffective  
cannot be seen as an act of reprisal and it is not listed in NRS 281.641.
- 19 3. The question of whether the appeal process applies to probationary employees remains  
unanswered, but if such an appeal was allowed, his appeal is untimely by several months and  
20 there was no other retaliatory or reprisal act listed in NRS 281.641 that Bronder claims as  
21 having been taken against him which would make his appeal timely or appropriate.
- 22 4. Mr. Bronder cannot obtain his requested relief through this appeal because the hearing  
officer cannot restore his pay grade, sick leave or lost time in PERS.

23 NDOT relies on various statutory and regulatory provisions cited in its Motion to Dismiss, ER-  
24 1, for termination of employment and dismissal of appeal proceedings based on statutory  
25 provisions regarding Disclosure of Improper Governmental Action in NRS 281.611-.661 and NAC  
26 281.305-.315.

1 Cited statutory provisions of the Nevada Revised Statutes provide:

2 **NRS 281.611 Definitions.** *As used in NRS 281.611 to 281.671, inclusive, unless the context*  
3 *otherwise requires:*

4 1. "Improper governmental action" means any action taken by a state officer or employee or  
5 local 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:

6 (a) In violation of any state law or regulation;

7 (b) If the officer or employee is a local governmental officer or employee, in violation of an  
ordinance of the local government;

8 (c) An abuse of authority;

9 (d) Of substantial and specific danger to the public health or safety; or

10 (e) A gross waste of public money.

11 2. "Local government" means a county in this State, an incorporated city in this State and  
Carson City.

12 3. "Local governmental employee" means any person who performs public duties under the  
13 direction and control of a local governmental officer for compensation paid by or through a local  
government.

14 4. "Local governmental officer" means a person elected or appointed to a position with a  
local government that involves the exercise of a local governmental power, trust or duty, including:

15 (a) Actions taken in an official capacity which involve a substantial and material exercise of  
administrative discretion in the formulation of local governmental policy;

16 (b) The expenditure of money of a local government; and

17 (c) The enforcement of laws and regulations of the State or a local government.

18 5. "Reprisal or retaliatory action" includes:

19 (a) The denial of adequate personnel to perform duties;

20 (b) Frequent replacement of members of the staff;

21 (c) Frequent and undesirable changes in the location of an office;

22 (d) The refusal to assign meaningful work;

23 (e) The issuance of letters of reprimand or evaluations of poor performance;

24 (f) A demotion;

25 (g) A reduction in pay;

26 (h) The denial of a promotion;

27 (i) A suspension;

28 (j) A dismissal;

(k) A transfer;

(l) Frequent changes in working hours or workdays; or

(m) If the employee is licensed or certified by an occupational licensing board, the filing with  
that board, by or on behalf of the employer, of a complaint concerning the employee.

29 5. If such action is taken, in whole or in part, because the state officer or employee or local  
governmental officer or employee disclosed information concerning improper governmental  
action.

30 6. "State employee" means any person who performs public duties under the direction and  
control of a state officer for compensation paid by or through the State.

1 7. "State officer" means a person elected or appointed to a position with the State which  
2 involves the exercise of a state power, trust or duty, including:

3 (a) Actions taken in an official capacity which involve a substantial and material exercise of  
4 administrative discretion in the formulation of state policy;

5 (b) The expenditure of state money; and

6 (c) The enforcement of laws and regulations of the State.

7 (Added to NRS by 1991, 1992: A 2001, 3049)

8 **NRS 281.641 Reprisal or retaliatory action against state officer or employee who discloses**  
9 **improper governmental action: Written appeal; hearing; order; negative ruling may not be**  
10 **based on identity of persons to whom disclosure was made; rules of procedure.**

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

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

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

21 The hearing must be conducted in accordance with the procedures set forth in NRS  
22 284.390 to 284.405, inclusive, and the procedures adopted by the Personnel Commission pursuant  
23 to subsection 4.

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

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

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

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

Cited regulatory provisions of the Nevada Administrative Code provide:

**NAC 281.305 Written appeal by officer or employee who claims retaliatory action was**  
**taken against him or her. (NRS 281.641)**

1. A state officer or employee who claims a reprisal or retaliatory action was taken against  
him or her for disclosing information concerning improper governmental action may file a written  
appeal pursuant to NRS 281.641 with a hearing officer of the Personnel Commission. The appeal  
must be:

(a) Filed within 10 workdays after the date the alleged reprisal or retaliatory action took place.

1 (b) Submitted on a form provided by the Division of Human Resource Management of the  
2 Department of Administration.

3 2. The hearing officer may reject a form that is incomplete or otherwise deficient as  
4 insufficient to commence the appeal.

(Added to NAC by Dep't of Personnel, eff. 3-1-96)

5 **NAC 281.315 Procedures for conduct of hearing on written appeal. (NRS 281.641)**

6 1. The provisions of this section and NAC 284.774 to 284.806, inclusive, and 284.818 govern  
7 the procedure for conducting a hearing for a written appeal filed pursuant to NRS 281.641.

8 2. A party may appear in person and may be represented by an attorney or another person of  
9 his or her choice, if the party chooses not to represent himself or herself.

10 3. All testimony must be under oath administered by the hearing officer.

11 4. The appeal must be heard in the following manner:

12 (a) The opening statement for the state officer or employee.

13 (b) The opening statement for the employer, unless reserved.

14 (c) Presentation of the state officer's or employee's case, followed by cross-examination. The  
15 state officer or employee must establish that:

16 (1) He or she was a state officer or employee on the date of the alleged reprisal or  
17 retaliatory action;

18 (2) He or she disclosed information concerning improper governmental action; and

19 (3) The alleged reprisal or retaliatory action was taken against the state officer or employee  
20 within 2 years after the date he or she disclosed the information concerning improper  
21 governmental action.

22 (d) If the state officer or employee establishes the facts set forth in paragraph (c), presentation  
23 of the employer's case, followed by cross-examination, to establish that the employer did not  
24 engage in the alleged reprisal or retaliatory action or that the action was taken for a legitimate  
25 business purpose and was not the result of the disclosure of information concerning improper  
26 governmental action by the state officer or employee.

27 (e) If the employer establishes a legitimate business purpose for the alleged reprisal or  
28 retaliatory action, the state officer or employee may introduce evidence, followed by cross-  
examination, to demonstrate that the stated business purpose is a pretext for the reprisal or  
retaliatory action.

(f) The parties may respectively offer rebutting testimony only, unless the hearing officer  
permits additional evidence upon the original cause.

(g) The argument for the state officer or employee.

(h) The argument for the employer.

(i) The closing argument for the state officer or employee.

(j) Submission of the appeal for a decision.

**b. Employee Bronder.**

In opposing dismissal, Bronder urges 5 points for denial of motion:

1. Hearing rules do not provide for NDOT's motion to dismiss,

2. Bronder's appeal is timely under governing statute.



3. Bronder can use appeal process to challenge rejection from probation as scope of relief is not so limited.
4. NDOT's reliance on decisions concerning private sector employment are not controlling under applicable statute.
5. Bronder's request for relief is within the authority of Hearing Officer.

Bronder relies on applicable provisions within the same statutes and regulations as NDOT cities, and additionally, NAC 274.374 which provides:

***NAC 284.374 Active lists: Removal and reactivation of names; no requirement or refusal to consider certain persons. (NRS 284.065, 284.155, 284.250, 284.295)***

1. The names of eligible persons will be removed from the active lists for any of the following causes:

(a) Appointment after certification to fill a full-time permanent position in the class for which the examination was given.

(b) Expiration of the term of eligibility.

(c) Separation of a person who is eligible for promotion from the state service.

(d) Failure by an eligible person to respond within the required time to an inquiry of availability.

(e) A statement by the eligible person that he or she is not willing to accept any type of appointment from the eligible list.

(f) Any of the causes listed in NRS 284.240 pursuant to which the Administrator may refuse to examine or certify an eligible person or, if the employee has been laid off, reemployment pursuant to subsection 7 of NAC 284.630.

2. An appointing authority need not consider an eligible person more than one time from a recruitment. Consideration of an applicant for other than full-time permanent positions must not be counted for the purposes of this subsection.

3. An appointing authority need not consider an otherwise eligible person who cannot perform the essential functions of the position with or without reasonable accommodation.

4. An appointing authority may refuse to consider an eligible person who has been subject to a suspension, demotion or termination as a result of an upheld or uncontested disciplinary action in the preceding 12 months. The 12-month period begins on the effective date of the uncontested action or, if it is contested, on the date the hearing officer issues a final decision upholding a suspension, demotion or termination. If an employee is removed from consideration pursuant to this subsection, the appointing authority must notify the employee of that fact in writing before interviewing the next candidate or making its selection. The employee has 3 working days after being notified that he or she has been removed from consideration pursuant to this subsection to notify the appointing authority of any discrepancy in the information in his or her personnel file which led to the removal of the employee from consideration. The appointing authority may not make its selection:

(a) If the employee does not notify the appointing authority of a discrepancy, until after the end of the period pursuant to which the employee may notify the appointing authority of a discrepancy; or

1 (b) If the employee notifies the appointing authority of a discrepancy, until after the appointing  
2 authority determines whether the removal of the employee from consideration pursuant to this  
subsubsection was appropriate.

3 5. An appointing authority shall refuse to consider an eligible person whose appointment to a  
4 position will violate NRS 281.210, NAC 284.375 or a policy approved by the Commission pursuant  
to NAC 284.375.

5 6. An eligible person whose name has been removed from an active list may request that his  
6 or her name be reactivated by stating his or her reasons for the request. If the Division of Human  
Resource Management determines that the reasons are justified, and the person's term of eligibility  
has not otherwise expired, his or her name may be reactivated.

7 Bronder contends the termination of his probationary employment on May 5, 2017, and the  
8 subsequent denials of employment opportunity based on job notices for Resident Engineer posted  
9 October 10, 2017 for which he applied and was ranked No. 1, but which posting was withdrawn on  
10 October 31, 2017, and the new posting for same position in November 2017, for which he again  
11 applied and identified as eligible but was not interviewed due to a notice that he was "removed per  
12 NRS 284.374" from active eligible list for employment by NDOT, were all done in retaliation for  
13 his disclosures on NDOT's alleged "gross waste of public money" based on award of excessive  
14 labor costs to contractors he made to NDOT's Assistant Construction Engineer Steve Lani on  
15 March 6, 2017 and to NDOT Director Rudy Malfaban and Assistant Director of Operations Reid,  
16 Kaiser on July 14, 2017.

17 As remedy, Bronder requests reinstatement of NDOT employment with restoration of "11  
18 months of probation served as Manager I, sick leave forfeited upon termination, and compensation  
19 level to Grade 43, step 8."

#### 20 IV. Discussion.

##### 21 A. Jurisdiction, Procedures and Criteria.

22 This case presents issues underlying protections available to employees alleging retaliation for  
23 whistleblowing in the public sector workplace. The protections for public employee  
24  
25  
26  
27  
28

1 whistleblowers are both statutory and constitutional. As a consequence, whistleblower protection in  
2 public sector employment is to be distinguished from and contrasted with that of at-will private  
3 sector employment without statutory or constitutional protections. Accordingly, case-law from at-  
4 will private sector employment on which NDOT relies is inapposite in analysis of whistleblower  
5 protections in public sector employment.  
6

### 7 **1. Nevada Statutory Protections.**

8 The statutory policy for whistleblower protection in Nevada is NRS 281.621, which provides:

9  
10 *Declaration of public policy. It is hereby declared to be the public policy of this state that a*  
11 *state officer or employee and a local governmental officer or employee are encouraged to disclose,*  
12 *to the extent not expressly prohibited by law, improper governmental action, and it is the intent of*  
*the Legislature to protect the rights of a state officer or employee and a local governmental officer*  
*or employee who makes such a disclosure.*

13 Additionally, NRS 281.631 states:

14 *State or local governmental officer or employee is prohibited from using authority or influence*  
15 *to prevent disclosure of improper governmental action by another state or local governmental*  
*officer or employee as follows:*

16 *1. A state officer or employee and a local governmental officer or employee shall not directly or*  
17 *indirectly use or attempt to use the official authority or influence of the officer or employee to*  
18 *intimidate, threaten, coerce, command, influence or attempt to intimidate, threaten, coerce,*  
*command or influence another state officer or employee or another local governmental officer or*  
*employee, as applicable, in an effort to interfere with or prevent the disclosure of information*  
*concerning improper governmental action.*

19 *2. For the purposes of this section, use of "official authority or influence" includes taking, directing*  
20 *others to take, recommending, processing or approving any personnel action such as an*  
21 *appointment, promotion, transfer, assignment, reassignment, reinstatement, restoration,*  
*reemployment, evaluation or other disciplinary action.*

22 Procedures for whistleblower protection are found in NRS 281.641 which provides:

23 *Reprisal or retaliatory action against state officer or employee who discloses improper*  
24 *governmental action: Written appeal; hearing; order; negative ruling may not be based on identity*  
*of persons to whom disclosure was made; rules of procedure.*

25 *1. If any reprisal or retaliatory action is taken against a state officer or employee who*  
26 *discloses information concerning improper governmental action within 2 years after the*  
27 *information is disclosed, the state officer or employee may file a written appeal with a hearing*  
*officer of the Personnel Commission for a determination of whether the action taken was a reprisal*

1 or retaliatory action. The written appeal must be accompanied by a statement that sets forth with  
2 particularity:

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

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

7 → The hearing must be conducted in accordance with the procedures set forth in NRS  
8 284.390 to 284.405, inclusive, and the procedures adopted by the Personnel Commission pursuant  
9 to subsection 4.

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

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

16 4. The Personnel Commission may adopt rules of procedure for conducting a hearing  
17 pursuant to this section that are not inconsistent with the procedures set forth in NRS  
18 284.390 to 284.405, inclusive.

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

21 NDOT relies on the fact that Bronder's failed to make his disclosures outside of the workplace  
22 chain of command which is necessary for whistleblower speech protection, citing case-law from at-  
23 will private sector employment, *Wiltie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432 (1989).

24 Bronder relies on the statutory protection in general, and specifically on the language of  
25 provision above in NRS 281.641(3) that prohibits a hearing officer from ruling against the public  
26 employee based on the person or persons to whom the improper governmental action was disclosed  
27 and the legislative history underlying that provision in S.B. 357 (1995). JF-2.

28 The legislative history for NRS 281.641(3) found in the Nevada Legislative Counsel Bureau's  
research library provides the Minutes of the Senate Committee on Government Affairs, Sixty-  
cighth Session, April 17, 1995 considering Senate Bill 357 (S.B.357).

A fair, impartial and critical reading of that legislative history on whistleblower protection  
makes clear the specific language in NRS 281.641(3) was chosen to clarify a jurisdictional issue,

1 and specifically intended to legislatively correct a problem created by a prior decision of a hearing  
2 officer which denied whistleblower relief to an employee *"because the employee did not render his*  
3 *whistle-blowing to the proper level or jurisdiction, it did not fall within this law."*

4  
5 In the case then at issue, the hearing officer's decision evidently decided that *"because the*  
6 *employee had not told the person in authority:"* it did not count as whistleblowing. JE-2. pp.6-7  
7 (Bates).

8 Chairperson Senator O'Connell, when asking why the language was needed, observed:

9 *Who is it that is going to determine ... if you just simply say they have the right to disclose*  
10 *this information and it does not make any difference who...and I recall this is initially what you were*  
11 *saying...you should be able to go to the press, the legislature, whomever...But the inappropriate*  
12 *person or entity...I would think whoever they chose to tell would be appropriate.*

13 *I was just thinking that there would not be a better way of putting it, because then are we*  
14 *not going to leave the ability of making the decision as to who is appropriate or inappropriate to*  
15 *the hearing officer?*

16 *I do not know, maybe I am misreading this, but it seems like we have now given them the*  
17 *ability to make that decision. That certainly was not the intent, have sat on the committee*  
18 *originally, the intent was ...it was an opportunity to give them a vehicle where they could go out*  
19 *and they could talk to somebody about something they thought was improper that was going on*  
20 *within the agency.*

21 JE-2, p. 8 (Bates).

22 Senator Raggio's descriptive remarks also confirm of legislative intent:

23 *I think it is clear. In other words, you are saying that you take your grievance to the*  
24 *hearing officer and the employer cannot come in and say, "This does not come under the law*  
25 *because the employee did not disclose it to the right person." In other words, I think it covers the*  
26 *situation where however or whomever the employee disclosed is not the point. It is the point that*  
27 *the employer, for whatever reasons, takes retaliatory action. I think it is clear.*

28 JE-2, p. 9 (Bates).

Senator O'Connell asked Senator Raggio:

*You do not think it gives the hearing office the ability to decide who the inappropriate*  
*person is?*

1 Replying, Senator Raggio stated:

2 *No, it is just the opposite. It says that the hearing officer, if he finds there is retaliatory*  
3 *which is his responsibility, cannot say 'Well it does not matter because the was not supposed to*  
4 *report to that person.' I mean there 's not an appropriate government entity.... I think it reads*  
5 *clearly.'*

5 JF-2, p. 9 (Bates).

6 Senator Porter asked:

7 *Why not be more specific on who they report to, not who they do not report to? Who is*  
8 *specifically allowed to be reported to? A supervisor, or management, or something like that instead*  
9 *of who they do not report to? Or who the appropriate person is? Maybe we need to be more*  
10 *specific on who the appropriate person should be.*

10 Public employee representative Gagnier responded:

11 *Senator, that was our original problem...was we did not want to say who, and so it does*  
12 *not. It is blank in that regard. It is silent. The intent we that the employee could report it to*  
13 *whoever they wished, whether it be to the media, a legislative committee or a legislator, or*  
14 *whoever.*

14 JF-2, p.9 (Bates).

15 The proposed Amendment as stated was approved and passed into law by the Nevada  
16 Legislature. Thus, by legislative amendment, S.B. 357 specifically corrected and cured a  
17 jurisdictional error and policy. Thus, to whom an employee makes a disclosure or statement, albeit  
18 to a party within or without the employee's employment setting, is neither relevant nor material  
19 under NRS 281.641(3). Whether retaliation occurred is the primary issue.

21 **2. Constitutional Protections.**

22 Since 1968 it has been evident that state public employees also have whistleblower protection  
23 under the 1<sup>st</sup> and 14<sup>th</sup> Amendments of US Constitution from employer retaliation. *Pickering v.*  
24 *Board of Education*, 391 U.S. 563 (1968) recognized the public employees protection is speech  
25 related to matters of public concern in balancing the interests of the employee as a citizen and the  
26

1 interest of the state in promoting the efficiency of public services it performs through its  
2 employees. i.e. the "Pickering test".

3 In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court held that an employee's lack of  
4 contract or tenured right to re-employment is immaterial to a free speech claim under the 1<sup>st</sup> and  
5 14<sup>th</sup> Amendments. In short, employment status is immaterial in retaliation for protected speech.  
6

7 In *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977), the Court considered 3 issues: whether there was  
8 federal-question jurisdiction, if 11<sup>th</sup> Amendment immunity existed, and if 1<sup>st</sup> and 14<sup>th</sup> Amendments  
9 prevented the governmental entity from adverse employment action for constitutionally protected  
10 speech on a matter of public concern. The Court found that although the employer was created by  
11 the state it was a local entity beyond the 11<sup>th</sup> Amendment, and held on remand the employer must  
12 show by a preponderance of evidence that the employee would have been fired regardless of  
13 protected speech, establishing the "Mt. Healthy test." Here, there is not an 11<sup>th</sup> Amendment issue.  
14

15 In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), the Court  
16 concluded that a teacher's 1<sup>st</sup> Amendment right of speech in private meetings with a principal in  
17 which she critically complained that employment policies sustained segregation, a matter of public  
18 concern, was protected when expressed privately just as when expressed publicly. The Court held  
19 non-renewal of a contract could be substantial adverse employment conduct, but remanded for  
20 application of the "Mt. Healthy test".  
21

22 In *Connick v. Meyers*, 461 U.S. 138 (1983), the Court held that claimed protected speech  
23 should be evaluated by its content, form and context of the statement based on the whole record,  
24 not a common standardized rule, and which is a question of law for the Courts under a 4-step test

25 In recognizing protected speech, the Court in *Garcetti v. Ceballos*, 547 U.S. 410 (2006),  
26 adopted and applied a distinction between speech of a public employee's as a *citizen* and that of an  
27

1 employee whose speech is part of their official job duties, and held the former is protected and the  
2 latter is not protected. This has forced courts to determine the nature of the employee's job  
3 description and duties with no little analytical framework as guidance and not without significant  
4 criticism. Though purporting to do otherwise, the decision undercuts *Givhan*, and seemingly fails  
5 to promote and protect speech based on public employee's informed knowledge made either  
6 privately in the workplace or publicly outside of the workplace.  
7

8 More recently in *Lane v Franks*, 573 U.S. \_\_\_, 134 S. Ct. 236 (2014), the Court recognized the  
9 decades-old constitutional protection for public employees' 1<sup>st</sup> Amendment rights which depend on  
10 careful balance between the interest of the employee and the employer. The Court examined its  
11 prior decisions in *Pickering*, *Connick and Garcetti*, and its analytical conclusions in the case  
12 provided an example of when *Garcetti* should not apply to limit that protection against retaliatory  
13 adverse employment actions.  
14

15 There is no serious question that Bronder's statements involved matters of public concern over  
16 what may be properly termed "gross waste of public money", i.e. taxpayer money, in construction  
17 contract awards that may include excessive labor cost allowances, which the employer agency has  
18 an interest in and responsible for being able to critically evaluate based the information disclosed in  
19 Bronder's statements. These statements were not within Bronder's ordinary job description,  
20 responsibilities or duties, and he clearly had overlapping concerns; (1) that of an employee's  
21 ordinary citizenry concern for the agency approach to awarding construction contracts, and (2) that  
22 as well of an employee's knowledgeable, best-shared legitimate and loyalty concern with and for  
23 his employer's mission, integrity and performance as a state agency in expending public money in  
24 the award of construction contracts.  
25

26 Bronder's stated concerns as citizen and employee are complementary, and not inconsistent.  
27  
28



1 Under Supreme Court decisional guidelines, Bronder's statements here at issue are entitled to 1<sup>st</sup>  
2 and 14<sup>th</sup> Amendment constitutional protection of public employment speech.

3 The primary issue in this case as framed by the NDOT's MTD is whether Bronder is entitled  
4 to whistleblower protection, which NDOT denies. However, the primary underlying factual and  
5 legal issues in this whistleblower case should necessarily focus on whether NDOT engaged in  
6 retaliatory adverse employment actions. The retaliatory issues are, however, not within the scope  
7 of issues presented in hearing on NDOT's MTD and thus not decided here.  
8

9 **V. Findings of Fact.**

10 Based on the Parties' Stipulated Facts as to NDOT's MTD (JE-1), as to matters of fact the HO  
11 finds as follows:  
12

- 13 1. On June 6, 2016, Bronder was hired to fill a permanent Manager I position in Elko with  
14 the Department of Transportation.
- 15 2. Bronder's Manager I position was classified as a grade 43.
- 16 3. A grade 43 classified position requires a one-year probationary period.
- 17 4. Bronder transferred from the Elko position to a Manager I position in Carson City on  
18 February 13, 2017, a lateral transfer.
- 19 5. The Carson City position is also a grade 43 position.
- 20 6. Bronder was directed to participate in the Construction Manual rewrite work sessions  
21 by Steve Lani on February 24, 2017 which lasted all-day on most Fridays including  
22 additional review and editing responsibilities.
- 23 7. Bronder was directed to learn the job duties of another Manager I in the division by Jeff  
24 Freeman in the week beginning February 27, 2017 to assume those duties upon their  
25 retirement on May 5, 2017.
- 26 8. Bronder viewed an April 10, 2017 Transportation Board Meeting online from his office  
27 and then reported Governor Sandoval's questions and concerns raised at that meeting to  
28 Stephen Lani, Assistant Construction Engineer, in his office on April 10, 2017.
9. Bronder received his employee evaluation on April 25th, 2017, just prior to leaving for  
his planned vacation.
10. The evaluation contained two areas of "does not meet standards," but was overall  
"meets standard."
11. Bronder was terminated from his employment on May 5, 2017, prior to the completion  
of his one-year probationary period.
12. Bronder applied for a position at the Department of Conservation and Natural Resource  
and interviewed on July 14, 2017.

- 1 13. Bronder met with Director of NDOT Rudy Malfabon and Assistant Director of
- 2 Operations, Reid Kaiser on July 14, 2017 and reported the same concerns and questions.
- 3 14. A position for Resident Engineer in District III was posted on October 10, 2017.
- 4 15. Bronder was hired by the Department of Conservation and Natural Resources on
- 5 October 23, 2017.
- 6 16. Bronder applied for the position in Elko on October 24, 2017, was determined eligible
- 7 and was ranked #1 on the list.
- 8 17. On October 31, 2017, the posting was withdrawn.
- 9 18. A new recruitment was posted for the same position.
- 10 19. Bronder applied for the position and was identified as eligible, but did not obtain an
- 11 interview.
- 12 20. Mr. Bronder was not interviewed for that posting. "per NAC 284.374."
- 13 21. Bronder seeks restoration of his 11 months of probation, restoration of sick leave
- 14 forfeited upon termination and restoration of a compensation level to grade 48, step 8.

15 Also based on substantial, credible and probative evidence of record, additional facts are  
16 found as follows:

- 17 22. In the July 14, 2017 meeting, Bronder stated his belief that his prior statements were the
- 18 reason he was dismissed during probation, in response Reid Kaiser stated he was told
- 19 that Bronder "wasn't a good fit".
- 20 23. Bronder's statements concerning excessive waste in expenditure of public money for
- 21 administrative fees NDOT allowed in the award of construction contracts are not within
- 22 his ordinary job description, responsibilities or duties.
- 23 24. Bronder's speech was protected by statute and constitution, consequently the alleged
- 24 substantive NDOT retaliatory conduct may be considered as adverse employment action
- 25 impacting Bronder's state employment and state employment opportunities in
- 26 determining whether further hearing is appropriate.
- 27 25. Bronder timely appealed NDOT's October 17 2017 action denying Bronder employment
- 28 opportunity "per NAC 284.374".

#### 29 VI. Conclusions of Law.

30 Based on the above Findings of Fact and substantial, credible and probative evidence of  
31 record, as conclusions of law the HO concludes as follows:

- 32 1. Bronder was a public employee when he made statements of concern on April 10, 2017
- 33 to Assistant Construction Engineer Steve Lani regarding what Bronder believed to be
- 34 excessive labor costs allowed in NDOT's award of construction contracts.
- 35 2. Bronder's statements on April 10, 2017 were statements of improper governmental
- 36 action alleging gross waste of public money as defined in NRS 281.611(1)(c).
- 37 3. Bronder's public employee statements made April 10, 2017 is speech entitled to
- 38 statutory protection under NRS 281.621 as improper government action.

4. Bronder's public employee statements made April 10, 2017 is speech entitled to constitutional protection under the 1<sup>st</sup> and 14<sup>th</sup> Amendment of the US Constitution as matters of general public concern and US Supreme Court decisional tests.
5. Under NRS 281.641(3) Bronder's statements do not lose statutory protection because they were to a supervisor or in the chain of command.

#### **VII. Decision and Order.**

While the fact that Bronder's speech may be considered protected by statute and constitution in the analysis for decision on NDOT's MTD, it is not sufficient to decide the appeal of Bronder's substantive claim that alleged retaliatory conduct by NDOT had adverse employment action impacting his state employment and state employment opportunities, all of which cannot be determined on the developed record to date.

NDOT's Motion to Dismiss raise several issues to support of dismissal of appeal:

##### **1. Appeal Not Timely.**

NDOT contends Bronder's appeal is not timely. NDOT's apparently raises the procedural issue of timeliness of Bronder's January 16, 2018 appeal on the assumption that Bronder's appeal is based on revocation of his probation May 5, 2017, and not the appeal as based denial of interview or eligibility for an employment opportunity in January 5, 2018 based on NDOT's action of "removed per NRS 284.374", for which appeal was in fact timely under NAC 281.305.

Understandably perhaps: NDOT makes this assumption based on the reinstatement relief Bronder requests, which NDOT correctly points out is contrary to stated statutory remedy in NRS 281.641(2). Bronder's remedy request does not foreclose whistleblower speech protection and is not determinative on MTD issues. It is significant if reprisal or retaliation action is later found.

The timeliness issue requires reconciling statutory time limit in NRS 281.641(1) that allows an appeal if any reprisal or retaliatory action based on a disclosure is taken with a 2-year period from the date of the disclosure and the regulatory time limit in NAC 281.305 that an appeal be filed

1 within 10 days of the alleged reprisal or retaliatory action. In review of conflicts between statute  
2 and regulation, the plain statutory language controls and regulation must be consistent with statute.

3 NRS 281.641(4) provides that the *Personnel Commission may adopt rules of procedure for*  
4 *conducting a hearing pursuant to this section that are not inconsistent with the procedures set forth*  
5 *in NRS 284.390 to 284.405, inclusive.* On its face, the statute appears to authorize only hearing  
6 procedures not regulation of a substantive time period limitation. But the incorporated hearing  
7 procedures include a 10-day appeal requirement. Thus, the 10-day provision in NAC 281.305 may  
8 not be consistent with the 2-year period in NRS 281.641(1) but may be consistent with the hearing  
9 provisions incorporated in NRS 281.641(4) but without reasonable clarity of notice.<sup>1</sup>

10 Arguments on this issue have not been supported by legislative or regulatory history or case-  
11 law to aid decision. What is factually clear is that Bronder's disclosures at issue all occurred within  
12 a 2-year period prior to his January 16, 2018 appeal, the reach of appeal will necessarily be open  
13 and revisited in a subsequent merits hearing on whether reprisal or retaliation action occurred.

## 14 **2. No Appeal of Rejection from Probation or Withdrawal of Recruitment.**

15 Form NPD-53 expressly states a former employee is eligible to file an appeal.

16 NDOT contends appeal is not available from rejection of probation, citing NAC 284.458(2), or  
17 withdrawal of employment recruitment notice or employment interview opportunity as the reprisal  
18 or retaliatory action as defined in NRS 281.611(5).

19 Although NAC 284.458(1) and (2) may preclude appeal of rejection of probation, it is not clear  
20 that such prohibition applies in the context of retaliatory action for a whistleblower's protected  
21

22 Apart from administrative appeal here at issue, a 2-year statute of limitation under NRS 11.190(4)(e) would  
23 apply to a judicial action on a whistleblower's claim for reprisal or retaliation. Actions under NRS Chapter 357,  
24 Nevada's False Claim Act, have other longer limitations depending on who initiates the action. See NRS 357.170.  
25 Other administrative whistleblower protection is also available within 30-day timeline under NRS Chapter 618,  
26 Nevada OSHA office.

1 speech and remedy under NRS 281.611 or 1st and 14th Amendments. NAC 284.458(1) allows  
2 rejection for any lawful reason. Logically, retaliation would not qualify as lawful reason.

3 On Bronder's claims related to NDOT's removal of employment posting, failure to interview,  
4 and eligibility "removed per NRS 284.374", NDOT contends that activity is not included in items  
5 listed as reprisal and retaliatory action in NRS281.611(5)(a)-(m). NDOT views that statutory  
6 listing as all-inclusive to the exclusion of any other conduct. The statute employs the broad term  
7 "includes" which logically implies that there is more than what is listed. The listed acts in NRS  
8 281.611(5) does not foreclose other conduct as qualifying for being reprisal or retaliatory action.<sup>2</sup>

9  
10 There is only a scintilla of evidence in Mr. Kaiser's July 14 statement that Bronder just "wasn't  
11 a good fit" to question whether Bronder's performance evaluation was the only issue for May  
12 rejection of his probation and/or October denial of an interview or November removal from  
13 eligibility list "per NRS 284.374". Prior to rejection of probation Bronder's only reported overall  
14 performance evaluation was "meets standards", while noting that 2 of 12 the Job Elements need  
15 improvement. Rejection from probation in May provided no reason.

16  
17 However, whether NDOT's action in January 2018 was retaliation for prior speech in April 10  
18 and/or July 14 meetings is a substantive issue without sufficient evidence because retaliation was  
19 not the evidentiary focus for the Parties in developing the limited record in hearing on NDOT's  
20 MTD, which upon denial obviously will require further hearing for record development on the  
21 issue of adverse employment action as reprisal or retaliation for a whistleblower's protected  
22 speech.  
23

24  
25 NRS 281.631(2) prohibits the use of official authority or influence in taking, directing others to take,  
26 recommending, processing or approving any personnel action such as an appointment, promotion, transfer, assignment,  
27 reassignment, reinstatement, restoration, reemployment, evaluation or other disciplinary action. This suggests there is  
28 range of adverse employment actions of legislative concern in protecting employee whistleblowers.

1       **3. Failure to Report Misconduct Outside NDOT.**

2       NDOT takes the position that because Bronder's April 2017 statements to Mr. Lani were not  
3       made outside the agency it does not qualify as whistleblowing protected speech under NRS  
4       281.621 or the 1<sup>st</sup> and 14<sup>th</sup> Amendments. Citing *Wiltzie v. Baby Grand Corp.*, 105 Nev. 291, 774  
5       P.2d 432 (1989). NDOT erroneously relies on at-will private sector employment precedent  
6       inapposite to the issue of public employment protected speech and is contrary to statutory and  
7       constitutional protections.  
8

9       NDOT also relies on an NDOA Hearing Division decision granting the State's Motion to  
10      Dismiss in Appeal No. 1813758 entitled *Anthony Cannon v. State of Nevada ex rel. its Department*  
11      *of Health and Humans Services, Division of Welfare and Supportive Services*, June 15, 2018.  
12

13      In that case, the hearing officer found the employee's petition "legally and factually deficient"  
14      when "under Nevada law a disclosure to one's 'chain of command' is legally insufficient to  
15      constitute a disclosure under the statutory scheme", citing *Wiltzie v Baby Grand Corp* as authority.

16      That decision is not only contrary to NRS 281.641(3) as amended by S.B. 357 (1995) but also  
17      the 1<sup>st</sup> and 14<sup>th</sup> Amendments' protection of employee speech in the workplace.

18      **4. Hearing Officer Cannot Grant Relief Requested.**

19      NDOT contends the relief Bronder requests cannot be granted by the hearing officer under  
20      NRS.641(2), and therefore Bronder's claim should be deemed moot and dismissed. NDOT correctly  
21      points out the statutory limitation for relief:  
22

23      *If the hearing officer determines that the action taken was a reprisal or retaliatory action,*  
24      *the hearing officer may issue an order directing the proper person to desist and refrain from*  
25      *engaging in such action. The hearing officer shall file a copy of the decision with the Governor or*  
26      *any other elected state officer who is responsible for the actions of that person.*  
27  
28

1 However, there is no similar limitation on relief from adverse employment action taken as  
2 reprisal or retaliation for protected employee speech in public sector employment. But here again,  
3 the inability to determine in a necessary material issue, i.e. whether reprisal or retaliation occurred  
4 on the record as developed.

5  
6 NDOT also argues the conduct of Bronder's concern was in fact publicly approved by the  
7 Transportation Board. Whether the conduct complained of was approved or not is *a non sequitur*  
8 in defense of claimed reprisal or retaliation conduct.

9 Any Finding of Fact hereinafter construed to constitute a Conclusion of Law, or any  
10 Conclusion of Law hereinafter construed to constitute a Finding of Fact, is hereby incorporated as  
11 such to the same extent as if originally so designated.

12  
13 Based on the forgoing reasoned review, the Findings of Fact, and the Conclusions of Law, and  
14 good cause appearing therefore,


15 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss  
16 (MTD) made by the Nevada Department of Transportation (NDOT) to dismiss the appeal of John  
17 Bronder filed January 16, 2018 should be, and hereby is, DENIED.

18 AND IT IS ORDERED that this case be re-set for hearing on the merits of Bronder's appeal on  
19 the issue of reprisal or retaliatory conduct by NDOT, and that the Parties provide available dates.

20  
21 AND IT IS FURTHER RECOMMENDED that a copy of this Decision and Order should be  
22 served on the Governor or any other appointed state officer(s) or person(s) responsible for the  
23 personnel actions of or at the Nevada Department of Transportation (NDOT).

24 Each Party shall bear their own costs and attorney's fees.

25 Dated the 6<sup>th</sup> day of October 2018 by \_\_\_\_\_

26   
27 Paul H. Lamboley  
28 Hearing Officer

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b) and N.E.F.C.R. 9, I HEREBY CERTIFY that on the 8<sup>th</sup> day of October 2018 true copies of the foregoing document were served as follows:

- \_\_\_\_\_ by placing a true and correct copy of the document in the U. S. Mail first class postage fully prepaid to named parties at the addressees shown below, and/or  
\_\_\_\_\_ by transmitting a true and correct copy of the document via facsimile transmission to the named parties at the fax numbers shown below, and/or  
\_\_\_\_\_ by serving a true and correct copy of the document via the Court's electronic service system, and/or  
  X   by serving a true and correct copy of the document via electronic means to the named parties at the email addresses shown below as expressly agreed, and/or  
\_\_\_\_\_ by hand delivery to and acceptance by the named parties shown below.

Thomas J. Donaldson, Esq.  
Dyer Lawrence Flaherty  
Donaldson & Prunty  
2805 Mountain Street  
Carson City, NV 89703  
[tjdonaldson@dyerlawrence.com](mailto:tjdonaldson@dyerlawrence.com)  
*Attorney for Employee-Appellant*

Lori M. Story, Esq.  
Senior Deputy Attorney General  
Office of the Attorney General  
5420 Kietzke Lane, Ste. 202  
Reno, NV 89511  
[lstory@ag.nv.gov](mailto:lstory@ag.nv.gov)  
*Attorney for Employer-Respondent*

And with copy to NDOA as follows:

Tasha Eaton  
Supervising Legal Secretary, Appeals Office  
Nevada Department of Administration, Hearings Division  
1050 E William Street Ste 450  
Carson City NV 89701  
[teaton@admin.nv.gov](mailto:teaton@admin.nv.gov)

  
Paul H. Lamboley



## 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 and Order 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:

JOHN BRONDER  
45 DESERT WILLOW WAY  
RENO, NV 89511

THOMAS DONALDSON ESQ  
2805 MOUNTAIN ST  
CARSON CITY NV 89703

DEPARTMENT OF TRANSPORTATION  
1263 S STEWART ST  
CARSON CITY, NV 89701

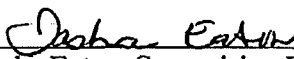
LORI STORY  
BUREAU OF BUSINESS AND STATE SERVICES PERSONNEL DIVISION  
100 N CARSON ST  
CARSON CITY NV 89701

HUMAN RESOURCE MANAGEMENT  
100 N STEWART ST STE 200  
CARSON CITY, NV 89701

ALLISON WALL  
DEPARTMENT OF TRANSPORTATION  
1263 S STEWART ST ROOM 115  
CARSON CITY NV 89701

RODOLFO Malfabon  
DEPARTMENT OF TRANSPORTATION  
1263 S STEWART ST ROOM 201  
CARSON CITY NV 89701

Dated this 10 day of October, 2018.

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

# EXHIBIT C

# EXHIBIT C

1 AARON D. FORD  
2 Nevada Attorney General  
3 LORI M. STORY  
4 Senior Deputy Attorney General  
5 Nevada Bar No. 6835  
6 State of Nevada  
7 Office of the Nevada Attorney General  
8 Personnel Division  
9 100 S. Carson Street  
10 Carson City, NV 89701  
11 Tel: 775-684-1114  
12 [lstory@ag.nv.gov](mailto:lstory@ag.nv.gov)  
13 *Attorneys for Petitioner*

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BY V. Algoria  
DEPUTY

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

12 STATE OF NEVADA DEPARTMENT  
13 OF TRANSPORTATION,

Case No. 190C000661B  
Dept. No. I

14 Petitioner,

15 vs.

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

20 Respondents,  
21 \_\_\_\_\_/

22 MOTION FOR STAY PENDING JUDICIAL REVIEW

23 Petitioner, STATE OF NEVADA ex rel. DEPARTMENT OF TRANSPORTATION  
24 (NDOT), by and through counsel, AARON D. FORD, Attorney General for the State of  
25 Nevada, and LORI M. STORY, Senior Deputy Attorney General, hereby submits its  
26 MOTION FOR STAY (Motion) requesting a stay of the enforcement of the final decision of  
27 the Nevada State Personnel Commission Hearing Officer dated March 7, 2019, pending  
28 decision on the merits of NDOT's Petition for Judicial Review.

1 This Motion is made and based on the following memorandum of points and  
2 authorities, the pleadings and papers on file herein, and any oral argument to be presented  
3 by counsel at any hearing in this matter.

4  
5 MEMORANDUM OF POINTS AND AUTHORITIES

6 I. INTRODUCTION

7 On May 5, 2017, Petitioner, Nevada Department of Transportation (NDOT),  
8 released Respondent John Bronder from his probationary status as a Manager I, one  
9 month before he would have attained permanent employee status. Employers within the  
10 State system can release a probationary employee for any lawful reason. In October,  
11 Bronder was hired by the Nevada Department of Conservation and Natural Resources as  
12 a resident engineer. He then submitted an application for another NDOT Manager I  
13 position District III. That job posting was withdrawn. He applied for the same position  
14 when it was reposted in November, 2017. When, on January 5, 2018, he learned that his  
15 name had been removed from the list of eligible applicants pursuant to NRS 284.374, he  
16 filed a whistleblower appeal pursuant to NRS 281.641(1) on January 16, 2018. Exhibit  
17 (Exh.) 1.

18 NDOT moved to dismiss the appeal as untimely, as seeking review of a non-  
19 appealable probationary release, not establishing a whistleblower report was made, and  
20 as seeking relief beyond the authority of the hearing officer to grant. Exh. 2. After the  
21 hearing officer denied the motion to dismiss (Exh.3), a hearing on the merits of Bronder's  
22 whistleblower appeal was conducted on January 17, 2019, by Hearing Officer Paul H.  
23 Lamboley. Lamboley entered his Decision and Order on Whistleblower Appeal on March  
24 7, 2019, finding that Bronder's release from probation, appealed more than six months  
25 after its occurrence, was reprisal or a retaliatory action and ordering that Bronder be  
26 "reinstated by NDOT to his former probationary status and employment with NDOT as  
27 Manager 1, Grade 43, Step 8, with restoration of accrued benefits previously earned.  
28 *See Id.*

1 NDOT has, concurrently with this Motion, filed a Petition for Judicial Review  
2 pursuant to NRS 233B.010, *et seq.* and herein respectfully requests that this Court enter  
3 an order staying the reinstatement of Bronder to NDOT employ and the reimbursement  
4 of back pay and benefits.

## 5 II. STATEMENT OF FACTS

6 On June 6, 2016, Bronder was hired to fill a Manager I engineering position in the  
7 Department of Transportation, District III in Elko, Nevada. Exh. 4, p. 9. As a new State  
8 employee, Bronder was required to complete a one-year probationary period before  
9 becoming a permanent classified employee. *Id.*, p. 34. NRS 284.290. A probationary  
10 employee may be dismissed at any time during the probationary period, so long as the  
11 dismissal complies with regulations. *Id.*, NAC 284.458. Regulations require that the  
12 dismissal be for a lawful reason and that notice be provided to the employee and the  
13 Division of Human Resource Management before the expiration of the probationary  
14 period. *Id.*

15 On February 13, 2017, eight months into his probationary period, Bronder laterally  
16 transferred to another Manager I position in the Carson City Construction Division within  
17 NDOT. Exh. 4, p. 9. The new position came with different job responsibilities than the  
18 Manager I position he started in Elko. *Id.* at pp. 10, 49-52. As part of his responsibility, he  
19 was asked to sit in on the Construction Manual edit meetings and begin to familiarize  
20 himself with another related management position to assist with coverage until a  
21 replacement could be hired once that individual retired. *Id.*, pp. 52, 165. <sup>1</sup> This transfer  
22  
23

---

24 <sup>1</sup> Bronder claims in his appeal that he was as to help rewrite the Construction  
25 Manual, the editing of which took hours of his time beyond the Friday meetings, as well  
26 as being required to "learn another employee's job to take it over upon their retirement."  
27 Exhibit 1, p. ER005. He claimed to be left with only 16 hours of a 40-hour week "to do his  
28 job." *Id.* This statement is misleading. First, he was not required to do more than attend  
the Friday Construction Manual meetings with no request that he work to edit the manual  
or do other work in that regard (Exh. 4, pp. 165-166), and it was the intention for him to  
cover the soon-to-be vacant position temporarily until a replacement could be hired, not to  
double his workload. Ex. 4, pp. 198. As the Chief Construction Engineer noted, Bronder  
did not step up to that request or make efforts toward learning the position. *Id.*

1 did not change his probationary status (NAC 284.106), a fact that was specifically  
2 discussed with him during his interview for the transfer Exh. 4, pp. 157-158; 163.

3 During the 4 month period remaining on his probation, Bronder attended a meeting  
4 for negotiations of a Construction Engineering Service contract. Exh. 4, pp. 10-11, 90. At  
5 the negotiation meeting, various issues in the contract were reviewed and terms  
6 negotiated. Exh. 4, pp. 90-95. Those negotiations were memorialized in a memorandum  
7 and included discussions of adjustments to the augmentation staffing durations and  
8 levels, estimated overtime for field staff, a reduction in overtime pay rates, an adjustment  
9 to pay rates for cultural resources, including a field monitor and an professional  
10 archaeologist, a reduction in vehicle rates and cell phone rates for field staff, and a  
11 reduction to the contractor's fee proposal for technology equipment. Exh.1, pp. ER 008-  
12 009.

13 In his hearing testimony, Bronder misrepresents the extent of negotiated changes  
14 that occurred during the meeting he attended, stating that only the vehicle rates and cell  
15 phone rates were addressed. Exh. 1, p. ER004; Exh. 4, p. 11. This is in an obvious effort  
16 to minimize the amount of negotiations that that actually occurred in this contract  
17 transaction so as to give his report of high costs more weight – as though the agreement  
18 was a “done deal” as proposed with no questions asked and no concerns for costs or rates  
19 of pay. Exh. 1, p ER 004. Bronder's false testimony was contradicted by Stephan Lani  
20 (supra.) and by Bronder's own statement on cross-examination. Exh. 4, pp. 39, lines 21-  
21 24; 54-55.

22 Following the Nevada Transportation Board meeting to consider this same contract,  
23 at which the Governor expressed concerns regarding the contract's costs, Bronder met  
24 with Assistant Construction Engineer Stephen Lani (Lani) and expressed the Governor's  
25 concerns about the costs of the contract. Exh. 4, pp. 14; 96-98. Because Lani knew that  
26 was an exceptional contract for a condensed schedule project, that the rates included  
27 allowances for company overhead and profit, and that they were within the rates allowed  
28 by federal law, he was not concerned about Bronder's report except to use it as a learning

1 opportunity for Bronder to understand the process and the regulatory constraints of the  
2 costs. *Id.*, pp. 40, 94-109. According to Lani, issues such as Bronder raised were commonly  
3 discussed in the publicly-held Nevada Transportation Board meetings and in other fora.  
4 *Id.* pp. 103-104, lines 13-4. Lani did not identify Bronder's questions to be a  
5 whistleblowing event which could cause trouble for NDOT. *Id.*, p. 103

6 By April, 2017, the Construction Division leadership, including Stephan Lani,  
7 Jeffrey Freeman, Bronder's direct supervisor, and Sharon Foerschler, met to discuss  
8 Bronder's progress and probation. Exh. 4, pp. 115-116. According to Lani, leadership  
9 "needed to make sure [they] were comfortable with his overall performance and that he  
10 was living up to the expectations." *Id.* The discussions included the pros and cons of  
11 Bronder's performance and the responsibilities of the position. *Id.* The consensus was the  
12 Bronder "probably wasn't the best fit for the position at the end of the day." *Id.* According  
13 to Lani, Bronder's meeting to discuss the contract concerns was not a factor and played no  
14 role in the decision. *Id.* According to Lani, the concerns were also not about Bronder's  
15 willingness to take on the other manager duties, but rather his management of his team  
16 and his overall fit within the dynamic of the Construction office "to be able to keep the  
17 program moving in the correct direction. *Id.* p. 117.

18 Chief Construction Engineer Sharon Foerschler, who had the ultimate decision-  
19 making authority (Exh. 4, p. 162), determined that Bronder was not demonstrating the  
20 necessary aptitude to meet the requirements of the Construction Manager position, based  
21 upon his performance during his time in the Construction Division. Exh. 5, p. ER 048;  
22 Exh. 4, pp. 164, 168-173. Foerschler had conveyed to Bronder when he was hired what  
23 her expectations were; that he should interact with staff as well as the duties he was to  
24 perform. *Id.* pp. 164, 170. It became apparent to her that Bronder was not actively  
25 engaged in those duties and that he was not a good fit for the agency. *Id.* pp. 171-172. She  
26 determined to release him from probation before he obtained permanent status. *Id.* pp.  
27 174-175.

28 ///

1 Despite Foerschler's misgivings about his performance and without affording  
2 Foerschler an opportunity to review it in advance, Bronder's immediate supervisor, Jeffrey  
3 Freeman, gave Bronder an overall "meets standards" review at eleven months, only three  
4 months of which were in the Construction Division. Exh. 4, pp. 167-168; Exh. 5, p. ER 019-  
5 021. However, the review indicated at least two areas that were not meeting standards.  
6 *Id.* This review was not in line with Ms. Foerschler's view of his performance. Exh. 5, p.  
7 ER 047, 51A-51B. However, the evaluation was issued to Bronder before Ms. Foerschler  
8 had an opportunity to discuss it with Bronder's supervisor. *Id.* Ms. Foerschler ultimately  
9 signed the meets-standards evaluation, after making comments on areas of concern. *Id.* p.  
10 ER 019-021. Foerschler explained her concerns with Bronder's performance to include: 1)  
11 Failure to interact with employees he is responsible for; 2) Inability to follow instructions;  
12 3) At Manager level expect above standard performance, more effective integration in to  
13 Construction Office. Exh. 4, p. 170-172; Exh. 5, p. ER 048.

14 Dismissal or demotions may be made at any time during the probationary period in  
15 accordance with regulations adopted by the Commission. NRS 284.290. Before Foerschler  
16 released Bronder from probation, she called Bronder's former NDOT supervisor to see if  
17 that division would accept Bronder back. Exh. 4, p. 175; lines 8-14; p. 219.<sup>2</sup> This was a  
18 courtesy call, as generally probationary employees have no right to revert to a previous  
19 position. *See* NAC 284.458; cf. NAC 284.462. The former supervisor was not willing to  
20 simply take Bronder back to District III. Exh. 4, p. 175, lines 13-14.

21 Bronder was released from probation on May 5, 2017, prior to the end of his  
22 probationary period, and did not become a permanent classified employee for NDOT. NAC  
23 284.458(5). At the meeting to notify him of his release, Bronder was advised that if he  
24 wanted to try to return to the Elko position he should call his former supervisor to ask if  
25 it was a possibility. When Bronder called the Elko supervisor, Boyd Ratliff, he was told he  
26 would be considered for a return to the Manager I position in District III through the  
27

28 <sup>2</sup> Bronder's testimony indicated that "Sharon" would not consider allowing him to  
return to Elko. Exh. 4, p. 23. Both Foerschler and Ratliff, Bronder's former supervisor in  
Elko contradict this version of events.



1 application process. Exh. 4, p. 222. Ratliff testified that he was unwilling to accept Bronder  
2 back because of the performance issues he had, including issues with candor and follow-  
3 through he had coached Bronder on during his time in District III. *Id.* pp. 220-222.  
4 Probationary employees have no right to appeal their release. NRS 284.458(1).

5 Bronder did not file a whistleblower appeal at that time he was released from  
6 probation. In fact, Bronder testified that it was only around his July 14<sup>th</sup> meeting with  
7 NDOT Director Rudy Malfabon and Deputy Director Reid Kaiser, referenced below, that  
8 "it started to occur to [him], maybe the real reason" for his termination was his discussions  
9 of the consultant costs. Exh. 4, p. 20, lines 4-12. Bronder also testified that he considered  
10 filing such an appeal within a month but when he did think of an appeal, he realized it  
11 was too late. Exh. 4,, pp. 43-44, lines 16-2.

12 After being released from probation by NDOT, Bronder interviewed for several  
13 other state positions, including for his current position with the Division of State Parks in  
14 the Nevada Department of Conservation and Natural Resources. Exh. 4, pp. 45-46; Exh.  
15 5, pp. ER 052-053. He interviewed for several positions with NDOT after his probationary  
16 release, but was selected for none of them. Exh. 4, pp. 45-46. Bronder later met with  
17 Director Malfabon and Deputy Director Kaiser of NDOT in July, 2017 to again raise his  
18 concerns about contract costs and to express his frustration with being released from  
19 probation. Exh. 1, pp ER 006.

20 In that meeting Bronder again expressed his concerns about the high costs of  
21 contracting personnel for highway construction projects. Exh. 4, p. 61. Here too, the  
22 seasoned employees of NDOT realized that, while Bronder's concerns were rational from  
23 a lay person's perspective, the process and costs were in line with state and federal  
24 regulations and accounted not only for the salaries of the contracted employees, but for  
25 the overhead and profit allowed to the contract employee's regular employer. Thus,  
26 neither the Deputy Director nor the Director considered Bronder's report to be a  
27 whistleblower report and had no reason to retaliate against him for expressing his  
28 concerns. Exh. 4, pp. 64-66. At the meeting, Bronder also stated his dissatisfaction with

1 being released from probation. In response to this, Deputy Director Kaiser agreed to call  
2 some of the department heads where Bronder had applied to ensure his release from  
3 NDOT was not considered in a negative way because he had been told Bronder was simply  
4 not a good fit in Construction. Exh. 4, pp. 73-74.

5 Bronder secured the position with the Division of State Parks, Department of  
6 Conservation and Natural Resources and commenced work there on October 23, 2017.  
7 Exh. 4, p. 22. On October 24, 2017, Bronder applied for another engineering position with  
8 NDOT. *Id.* The position posting was recalled and no interviews were conducted.  
9 Approximately one month later, the same position was posted, Bronder applied and was  
10 listed as eligible to interview. Exh. 6., attachment #3. Later, when the interviewing  
11 supervisor called Human Resources (HR) for NDOT to confirm Bronder's eligibility, the  
12 HR office advised him that Bronder should not be considered eligible pursuant to NRS  
13 284.240 because he had been "terminated." Exh. 4, pp. 234-235. This advice was in error,  
14 because release from probation is not considered to be termination for misconduct.<sup>3</sup> *Id.*  
15 pp. 235-237.

16 Bronder alleges that he received notice that he had been removed from the  
17 interview list on January 5, 2018. Exh.1, p. ER 006. He filed his whistleblower appeal  
18 within 10 workdays of that date, on January 16, 2018, claiming he had reported a "gross  
19 waste of government funds" to his supervisors and to the NDOT director and that he was  
20 released from probation in reprisal for his original report and improperly denied an  
21 interview in reprisal for his report to the NDOT director. *Id.* NDOT moved to dismiss the  
22 appeal on the following basis: 1) untimely as to the release from probation; 2) as seeking  
23 relief beyond the authority of the hearing officer to provide, and; 3) arguing that reporting  
24

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25  
26 <sup>3</sup> The circumstances surrounding the erroneous removal from the interview  
27 eligibility list was not discovered until after a motion to dismiss the administrative appeal  
28 as untimely had been litigated. The motion relied on stipulated facts, mostly as alleged  
by Bronder in his appeal, because there had been no opportunity to investigate this HR  
decision before the motion was filed. Subsequent investigation uncovered the erroneous,  
but innocent advice. Despite the intended narrow application of the stipulated facts, it  
appears the hearing officer relied on them to support his decision.

1 the alleged "gross waste of public money" to persons within the organization did not  
2 constitute protected speech entitling him to whistleblower protections. Exh.2.

3 The hearing officer required stipulated facts in order to address the motion to  
4 dismiss and in response, the parties entered into stipulation that was identified as only  
5 for use in determining the motion to dismiss. Exh. 7. After an extensive hearing on the  
6 motion to dismiss,<sup>4</sup> the hearing officer entered his decision in favor of Employee. Exh.3.  
7 The hearing officer's decision was erroneous in that it ignored or misapplied specific  
8 statutory and regulatory provisions applicable to State officers and employees that set out  
9 the parameters of the coverage of the whistleblower protections within state employment  
10 and provides the procedural requirements to obtain those protections.

11 A hearing on the merits followed sometime thereafter. On March 9, 2019, the  
12 hearing officer entered his decision and order finding that, "[t]here was no rational or  
13 legitimate basis for rejection of Bronder's probation ... based on the testimony of NDOT  
14 witness Sharon Foerschler, the appointing authority for the Construction Division in  
15 Carson City." Exh. 8, p. 13. He further found that the NDOT's proffered reasons for  
16 releasing Bronder from probation were pretext and that his dismissal from probation was  
17 in reprisal for his reports of waste. *Id.*, p. 26, line 12-15.

18 In his decisional fact-finding, the hearing officer relied on constitutional protections  
19 under the First and Fourteenth Amendments "of public employment speech" to find that  
20 Bronder's reports to Lani and then to Director Malfabon and Deputy Director Kaiser were  
21 "protected by statute and constitution" and thus NDOT's conduct may be considered as  
22 adverse employment action..." Exh. 8, pp. 18-19. The hearing officer also specifically found  
23 that "Bronder timely appealed NDOT's October 17, 2017 action denying Bronder  
24 employment opportunity 'per NAC 284.374'." *Id.* at p. 19.

25 In his legal analysis, the hearing officer went further. He erroneously determined  
26 that NRS 281.641(1) provided a 2-year period from the date of the disclosure of improper

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27 <sup>4</sup> The hearing on the motion to dismiss was not successfully recorded for  
28 transcription because the hearing officer was unable to properly operate the recorder, This  
caused prejudice to the employer because there is now no evidence as to the conduct of  
that hearing.

1 governmental action within which an appeal may be filed. The NDOT has filed a petition  
2 for judicial review concurrently with this Motion for Stay Pending Judicial Review,  
3 contending that the hearing officer's decision was erroneous.

### 4 III. LEGAL STANDARD

5 NRS 233B.140 governs the procedure for seeking a stay of a final administrative agency  
6 decision in Nevada. It provides as follows:

- 7 1. A petitioner who applies for a stay of the final decision in  
8 a contested case shall file and serve a written motion for  
9 the stay on the agency and all parties of record to the  
10 proceeding at the time of filing the petition for judicial  
11 review.
- 12 2. In determining whether to grant a stay, the court shall  
13 consider the same factors as are considered for a  
14 preliminary injunction under Rule 65 of the Nevada  
15 Rules of Civil Procedure.
- 16 3. In making a ruling, the court shall:
  - 17 (a) Give deference to the trier of fact; and
  - 18 (b) Consider the risk to the public, if any, of staying the  
19 administrative decision.

20 Generally, pursuant to NRS 233B.140, "the petitioner must provide security before  
21 the court may issue a stay." However, the state or an agency of the state is not required to  
22 post security as a condition for filing such a motion. *See* NRCP 65(2)(c).

23 The Nevada Supreme Court has adopted specific factors to consider in determining  
24 whether a preliminary injunction (or in this case, a stay) should issue:

25 A party seeking the issuance of a preliminary injunction bears  
26 the burden of establishing (1) a likelihood of success on the  
27 merits; and (2) a reasonable probability that the non-moving  
28 party's conduct, if allowed to continue, will cause irreparable  
harm for which compensatory damage is an inadequate remedy.

*S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 408, 23 P.2d 243, 246 (2001).

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1       **IV.    LEGAL ARGUMENT**

2       **A.    **LIKELIHOOD OF SUCCESS ON THE MERITS****

3       In order for a stay to issue, NDOT will have to demonstrate a likelihood of success on  
4 the merits. NRS 233B.135 provides the grounds for granting a Petition for Judicial Review  
5 and states:

6           The court shall not substitute its judgment for that of the agency  
7 as to the weight of evidence on a question of fact. The court may  
8 remand or affirm the final decision or set it aside in whole or in  
part if substantial rights of the petitioner have been prejudiced  
because the final decision of the agency is:

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

17 NRS 233B.135 (3).

18       The authority granted the Hearing Officer under NRS 281.641(2) is to determine  
19 whether the action complained of by a State Officer or Employee was reprisal or retaliatory  
20 action taken because of whistleblowing activity by the employee and, if so, to issue an  
21 order "directing the proper person to desist and refrain from engaging in such action." *Id.*  
22 Under Nevada law governing the disclosure of improper governmental action, reprisal or  
23 retaliatory action "*includes:*"

- 24           (a) The denial of adequate personnel to perform duties;  
25           (b) Frequent replacement of members of the staff;  
26           (c) Frequent and undesirable changes in the location of an office;  
27           (d) The refusal to assign meaningful work;  
28           (e) The issuance of letters of reprimand or evaluations  
of poor performance;  
          (f) A demotion;  
          (g) A reduction in pay;  
          (h) The denial of a promotion;

- (i) A suspension;
- (j) A dismissal;
- (k) A transfer;
- (l) Frequent changes in working hours or workdays; or
- (m) If the employee is licensed or certified by an occupational licensing board, the filing with that board, by or on behalf of the employer, of a complaint concerning the employee,
  - if such action is taken, in whole or in part, because the state officer or employee or local governmental officer or employee disclosed information concerning improper governmental action.

NRS 281.611(5).

Finally, improper governmental action is defined as:

[A]ny action taken by a state officer or employee or local 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:

- (a) In violation of any state law or regulation;
- (b) If the officer or employee is a local governmental officer or employee, in violation of an ordinance of the local government;
- (c) An abuse of authority;
- (d) Of substantial and specific danger to the public health or safety; or
- (e) A gross waste of public money.

NRS 281.611(1).

Bronder alleges that he disclosed to his NDOT superiors that NDOT engages in contract agreements for construction project management services which allow payments to those contractors which far exceed the rate of pay that a State employee in a similar capacity would receive for the same work. He alleges that this amounts to a gross waste of public money. Exh.1, pp. ER 004. He further alleges that because he made this report he was released from probation before he could obtain permanent employee status and, then eight months later he was improperly removed from an interview eligibility list. Bronder seeks reinstatement of his pay grade and employment start date as well as a return of any lost sick leave he had accrued prior to his release from probation. *Id.*, p. ER 006.

In order to appeal an alleged act of reprisal in State employment, NRS 281.641 provides that a hearing on the appeal must proceed in accordance with the procedures set

1 out in NRS 284.390-284.405. NRS 284.390 specifically provides that in order to obtain a  
2 hearing on an appeal for a disciplinary action, the appeal must be filed with the Personnel  
3 Commission within 10 working days of the date of the alleged improper action. Thus, to  
4 be in compliance with NRS 281.641, and obtain a hearing, a whistleblower appeal must  
5 be filed within that same 10 working day period. Regulations adopted in conformance  
6 with NRS 281.641, which were formulated by the Personnel Commission, which are found  
7 in NAC 281.305-315.

8 NDOT submits that the Hearing Officer's Decision regarding the timeliness of the  
9 appeal substantially violated its rights because: (1) the decision to allow the untimely  
10 appeal of the release from probation to proceed on the merits violates of NRS 281.641; (2)  
11 the decision to reinstate the employee's probationary status and his pay grade and lost  
12 sick leave is in excess of statutory authority granted under NRS 281.641, which allows a  
13 hearing officer to "enter an order directing the proper person to desist and refrain from  
14 engaging in such action"; (3) the decision is affected by other errors of law, including the  
15 hearing officer's determination that general statutory or constitutional protections apply  
16 to Bronder's appeal when more specific statutory and regulatory provisions are in place  
17 and applicable to this specific situation; and (4) because the decision is clearly erroneous  
18 in view of the reliable, probative and substantial evidence of the entire record. NDOT  
19 further submits that is likely to succeed on the merits of its appeal and that it will suffer  
20 irreparable harm if the stay is not granted, thereby justifying the grant of a stay of the  
21 hearing officer's decision pending the outcome of the appeal.

22 **1. The Hearing Officer's Decision to Deny NDOT's Motion to Dismiss Was in**  
23 **Violation of Laws Governing Whistleblower Appeals.**

24 This matter improperly proceeded to a hearing on the merits of Bronder's  
25 whistleblower appeal because the hearing officer misinterpreted and misapplied the  
26 statutes authorizing such appeals and the applicable statute of limitations in this matter.  
27 In both his decision on the NDOT's motion to dismiss and on the merits, Hearing Officer  
28 Lamboley misinterpreted the provisions of NRS 281.641 in order to give a State employee  
a two-year period for filing an appeal of a negative employment action allegedly resulting

1 from reprisal or retaliation by the State employer, when in fact, the period to file an appeal  
2 of such an alleged act of reprisal is set forth in NAC 281.305, as the legislature directed in  
3 NRS 281.641. The 10 workday period to file an appeal under NAC 281.305 conforms to  
4 procedures set out in NRS 284.390(1).

5 According to his decision on the motion to dismiss, the hearing officer found a  
6 conflict between the statute and regulation, stating,

7  
8 the timeliness issue requires reconciling [the] statutory time limit in NRS  
9 281.641(1) that allows an appeal if any reprisal or retaliatory action based on  
10 a disclosure is taken with[in] a 2-year period from the date of the disclosure  
and the regulatory time limit in NAC 281.305 that an appeal be filed within  
10 days of the alleged reprisal or retaliatory action.

11 Exh.3, p. 20.

12 **2. Rules of Statutory Interpretation Do Not Support Hearing Officer's**  
13 **Decisions, Rendering the Decisions In Excess of the Statutory**  
**Authority of the Agency and Allowing the Matter to Go Forward Upon**  
14 **Unlawful Procedure.**

15 **a. Plain Text of Statute Applies.**

16 The hearing officer improperly interpreted the statute granting state employees an  
17 administrative appeal right to include a 2-year statute of limitations. Rather than read  
18 the plain text of NRS 281.641 as imposing harmony between NRS 284.390 and NAC  
19 281.305, and creating the 10 workday filing deadline, the hearing officer misinterpreted  
20 NRS 281.641 to create a conflict with NRS 284.390. A proper reading of the plain text of  
21 the statute shows that it actually provides a 2-year window of protection against  
22 retaliatory actions, but imposes procedural requirements, "in accordance with the  
23 procedures set forth in NRS 284.390-284.490, inclusive, and the procedures adopted by  
24 the Personnel Commission pursuant to subsection 4." In fact, there is no conflict between  
25 the statutes and regulations as both NRS 281.641 and NAC 281.305 impose procedural  
26 requirements governing the hearing of the appeal, including a 10 workday period to  
27 actually submit the appeal requesting a hearing. NRS 281.641 directly and explicitly  
28 refers to NRS 284.390, which sets out the 10 workday filing period for disciplinary appeals  
for state employees, as the procedural basis for state employee whistleblower appeals.



1       “Statutory interpretation is a question of law subject to de novo review.” *State*  
2 *v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). The goal  
3 of statutory interpretation “is to give effect to the Legislature’s intent.” *Hobbs v. State*,  
4 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). To ascertain the Legislature’s intent, we look  
5 to the statute’s plain language. *Id.* “[W]hen a statute’s language is clear and unambiguous,  
6 the apparent intent must be given effect, as there is no room for construction.” *Edgington*  
7 *v. Edgington*, 119 Nev. 577, 582–83, 80 P.3d 1282, 1286 (2003).

8       NDOT contends that the statutory language set out in NRS 281.641 is unambiguous  
9 and clearly directs that the Personnel Commission draft regulations setting forth  
10 procedures which are in accordance with the procedures governing employee disciplinary  
11 appeals, as they are codified in NRS 284.390-284.405. Those disciplinary provisions  
12 clearly and unambiguously set out the 10 workday appeal period. NRS 284.390(1). NRS  
13 281.641 requires the imposition of the same or principally similar procedures for  
14 conducting the administrative hearing of a whistleblower appeal. Having done as the  
15 Legislature directed, and having had those procedural rules reviewed and approved by the  
16 Legislature, the rules of procedure adopted by the Personnel Commission have the same  
17 force and effect as other statutory provisions imposing statutes of limitation on causes of  
18 action. NRS 233B.040(1) should carry greater weight in the hearing officer’s review,  
19 because they are specific to the administrative appeal authorized by the statute.

20           **b. Do not render words meaningless**

21       Another cannon of statutory interpretation also supports NDOT’s position. The  
22 court “avoid[s] statutory interpretation that renders language meaningless or  
23 superfluous,” *Hobbs*, 127 Nev. at 237, 251 P.3d at 179, and “whenever possible ... will  
24 interpret a rule or statute in harmony with other rules or statutes,” *Watson Rounds*  
25 *v. Eighth Judicial Dist. Court*, 131 Nev. —, 358 P.3d 228, 232 (2015) (quotation marks  
26 omitted). In this instance, the hearing officer’s interpretation of NRS 281.641 rendered  
27 language within that provision meaningless. The hearing officer completely ignores  
28 legislature’s mandate to the hearing in “accordance with the procedures set forth in NRS  
284.390 to 284.405, inclusive,” as well as “the procedures adopted by the Personnel

Commission pursuant to subsection 4.” NRS 281.641(1). NRS 284.390 specifically identify the 10 workday appeal period. The procedures adopted by the Personnel Commission pursuant to NRS 281.641(14) also specifically identify the 10 workday appeal period. Thus, the hearing officer improperly ignored the language in the statute directing such procedural requirements, rendering those words meaningless. Doing so allowed him to apply a longer appeal period under generalized statutes of limitations for actions under Title VII or the Civil Rights Act or under Chapter 11 of Nevada’s Revised Statutes, which sets out the statutes of limitations for civil actions in this state. <sup>5</sup>

**c. The Hearing Officer’s Decision on the Motion to Dismiss Relied on General Constitutional Provisions In Disregard of More Specific Provisions of Law Applicable to Administrative Hearings.**

The hearing officer ignored specific applicable statutory and regulatory provisions in denying NDOT’s motion to dismiss in order to allow Bronder’s appeal to proceed despite its untimely filing. NRS 281.641 and NAC 281.305, passed and approved by the State Legislature branch, apply specifically to State officer and employee’s claims of reprisal in whistle blowing situations. NRS 281.641 addresses reprisal against state officers or employees and provides in pertinent part:

**NRS 281.641 Reprisal or retaliatory action against state officer or employee who discloses improper governmental action: Written appeal; hearing; order; negative ruling may not be based on identity of persons to whom disclosure was made; rules of procedure.**

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

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<sup>5</sup> It is not clear in his decision which SOL the hearing officer actually applied. What is clear is that he misapplied the law.

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

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

5 □ The hearing must be conducted in accordance with the  
6 procedures set forth in NRS 284.390 to 284.405, inclusive, and the  
7 procedures adopted by the Personnel Commission pursuant to  
8 subsection 4.

9 \*\*\*

10 4. The Personnel Commission may adopt rules of procedure  
11 for conducting a hearing pursuant to this section that are not  
12 inconsistent with the procedures set forth in NRS 284.390 to  
13 284.405, inclusive.

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

16 Chapter 284 of the Nevada Revised Statutes specifically governs the state  
17 personnel system. NRS 284.390 to 284.405 govern hearing procedures in State employee  
18 disciplinary challenges and provide for an appeal filing deadline, the format and form of  
19 the appeal, as well as other related procedural concerns for conducting an appeal.<sup>6</sup> The  
20 plain language in NRS 281.641 referencing personnel system disciplinary appeal  
21 procedures specifically identified the guiding principles to be used in drafting and adopting  
22 procedures for the whistleblower protection of State employees. NRS 284.390, of the  
23 provisions referenced in 281.641 as defining the procedures for such an appeal, requires  
24 that an appeal be filed "within 10 working days after the effective date of the disciplinary  
25 action being appealed.

26 Relatedly, NAC 281.305, one of the regulations adopted by the Personnel  
27 Commission in response to the passage of NRS 281.641 states:

28 **NAC 281.305 Written appeal by officer or employee who claims  
retaliatory action was taken against him or her. (NRS 281.641)**

1. A state officer or employee who claims a reprisal or  
retaliatory action was taken against him or her for disclosing

<sup>6</sup> In fact, the form for a whistleblower appeal also contains the language of NAC 281.305, as well as instructions noting that the appeal must be filed within 10 workdays of the occurrence, providing the employee clear notice of the 10 working-day filing limitation. Exh.1, pp. ER 002-003.

1 information concerning improper governmental action may file a  
2 written appeal pursuant to NRS 281.641 with a hearing officer of  
3 the Personnel Commission. The appeal must be:

4 (a) Filed within 10 workdays after the date the alleged  
5 reprisal or retaliatory action took place.

6 (b) Submitted on a form provided by the Division of Human  
7 Resource Management of the Department of Administration.

8 2. The hearing officer may reject a form that is incomplete or  
9 otherwise deficient as insufficient to commence the appeal.

10 Regulations reviewed and approved by the Legislature have the force and effect of law.

11 NRS 233B.040;<sup>7</sup>

12 Under the general versus specific canon of statutory interpretation, the more  
13 specific statute will take precedence, *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167  
14 (2005), and will be construed as an exception to the more general statute, *see* Antonin Scalia &  
15 Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012). This allows the two  
16 statutes to be read together without conflict. *Id.* at 185. *See also Piroozi v. Eighth Judicial Dist.*  
17 *Court*, 131 Nev. —, 363 P.3d 1168, 1172 (2015) ("Where a general and a special statute, each  
18 relating to the same subject, are in conflict and they cannot be read together, the special statute  
19 controls." (internal quotation marks omitted)). *Williams v. State Dep't of Corr.*, 402 P.3d 1260,  
20 1265 (Nev. 2017)

21 In reviewing the NDOT's motion to dismiss the appeal, the hearing officer  
22 improperly expanded his statutory review to include protections afforded to non-state  
23 employee citizens through a court action, by relying on statutory limitations applicable to  
24 a civil action in a court of law, but not applicable to this specific administrative process.  
25 Exh.3, pp. 12-15. *Williams*, 402 P. 3d 1265.

26 The hearing officer improperly relied on First Amendment free speech and  
27 Fourteenth Amendment due process protections and the general limitations and  
28 procedural requirements applicable to civil court cases, rather than the specific statutes  
applicable to State employees or officers in an administrative proceeding. The hearing  
officer erroneously found that the employee is entitled to constitutional protections for his

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<sup>7</sup> These Regulations were confirmed by Legislation Committee and filed with  
Secretary of State on March 1, 1996.

1 speech and application of other wide ranging statutes such as Chapter 11 of the Nevada  
2 Revised Statutes, statutes of limitation under the Nevada False Claim Act, as well as a  
3 30-day limitation he found under NRS Chapter 618, applicable to workplace safety  
4 protections under Nevada OSHA provisions (Exh.3, pp., 15-18), even though the context  
5 of the administrative proceedings requires application of the more specific protections  
6 afforded in NRS 281.641. *Lader*, 121 Nev. at 687.

7 In denying the motion to dismiss, the hearing officer appears to find that the 10  
8 workday limitation period does not apply to this State administrative appeal because there  
9 are other statutes that provide greater limitation periods. He also failed to name exactly  
10 what period of limitations he believes does apply.<sup>8</sup> The hearing officer erroneously finds  
11 the employee is generally entitled to protection of his speech and allows him to proceed  
12 with his appeal. *Id.*

13 Reliance on the general limitation periods for court actions is inappropriate, where  
14 the appeal is provided in an administrative setting through an expedited process designed  
15 solely to address State employment concerns. Administrative proceedings such as these  
16 are entitled to specific application of the rules designed for those proceedings, not to rules  
17 applicable to civil court actions. *Piroozi*, 131 Nev. \_\_\_, 363 P.3d at 1178. As a result, the  
18 hearing officer improperly expanded the scope of review for these administrative  
19 proceedings and enlarged the employee's rights. Doing so violates the law and regulations  
20 governing these special proceedings and operates to the detriment of NDOT.

21 As a result, the decision on the motion to dismiss, particularly as to the timeliness  
22 of Bronder's appeal, violates state laws and regulation governing the appeal. Failing to  
23 timely file an appeal fails to vest jurisdiction in the reviewing court tribunal. *Fitzpatrick*  
24 *v. State, Dep't of Commerce, Ins. Div.*, 107 Nev. 486, 488, 813 P.2d 1004, 1005 (1991)  
25 (providing that the time allotted by statute for taking an administrative appeal is  
26 jurisdictional.) Additionally, because the hearing officer found that the removal from an  
27 interview eligibility list was a clerical error not an act of reprisal (Exh. 8, p. 11), there was

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<sup>8</sup> Candidly, the undersigned had some challenge in following the analysis and  
rational set out by the hearing officer.

1 no continuing violation that might warrant a review of the untimely-appealed  
2 probationary release which occurred six months previous. Thus, the hearing officer acted  
3 without jurisdiction in allowing the appeal to proceed and in reviewing and deciding the  
4 merits of the appeal.<sup>9</sup>

5  
6 **2. The Hearing Officer's Finding of Pretext is Clearly Erroneous In**  
7 **View of the Reliable, Probative, and Substantial Evidence in the Record.**

8 **i. Substantial Probative Evidence Supports NDOT's Argument that NDOT**  
9 **Had No Motive to Retaliate.**

10 The hearing officer ignored the consistent and reliable testimony of all NDOT  
11 witnesses who unequivocally testified that Bronder's reports either to Lani, prior to his  
12 release from probation, or to Director Malfabon, after his release, provided no motive to  
13 retaliate because the information Bronder shared was already in the public arena and  
14 discourse, as is evidenced by the public discussions of the same held during hearings  
15 conducted by the Nevada Transportation Board. The NDOT witnesses testified  
16 consistently that no person at NDOT who was aware of Bronder's reported concerns  
17 considered the subject matter to be secret, or to reflect negatively on the department to  
18 warrant a cover-up of the circumstances or removal of Bronder from employ by NDOT.  
19 Neither did the evidence suggest that NDOT feared discovery of the facts, since they were  
20 already a matter of public discussion. Exh. 4, pp. 40, 64-66, 94-109; 175-177. In fact, the  
21 Construction Division took Bronder's comments to heart, tried to explain the parameters  
22 governing the negotiations and the rates paid, and took steps to review the status of those  
23 parameters. *Id.* Thus, there was no motive for NDOT to shut Bronder down from  
24 commenting on the contracts or to shut him out of NDOT. The evidence does not support  
25 the hearing officer's findings that the reasons for Bronder's dismissal were pretext, when  
26 there was no motive or desire to cause Bronder harm.

27  
28 <sup>9</sup> Even the employee admitted at the hearing that he knew it was too late when he  
initially considered filing an appeal of his probationary release. Exh. 4, p. 43, lines 16-  
24.

1        Rather than weigh the totality of the evidence presented by all the NDOT witnesses,  
2 the hearing officer also improperly injected himself into the witness examinations to such  
3 a degree as to hinder their representative's presentation of the case and to cause the  
4 witnesses confusion about the questions asked and the statements made by the hearing  
5 officer, impacting their testimony. *See* Exh. 4, pp. 75-82, 186-212. Thus, the procedures  
6 the hearing officer employed were beyond those generally held to be acceptable for the  
7 finder-of-fact in a hearing.

8        Bronder's stated concerns for the cost of contracting project management services  
9 on highway construction projects were common to persons who reviewed the contracts,  
10 including the Nevada Transportation Board, as well as to staff and leadership of the  
11 NDOT. However, the concerns did not represent any improper actions by NDOT staff or  
12 leadership because the costs of the contracts are governed by State and Federal  
13 regulations and are closely and independently reviewed by various review teams within  
14 the State. Exh. 4, pp. 89-114. Deputy Construction Engineer Stephen Lani testified that  
15 the hourly rates paid for the consulting contractors included not only the generally higher  
16 hourly rates paid to construction workers in the private sector, due to competition or  
17 prevailing wage requirements, but also accounted for federally audited and established  
18 overhead rates for the consultants' employer's as well as an allowance for the profit of  
19 those employing companies. *Id.* Lani's testimony was fully supported by the testimony of  
20 Reid Kaiser (Exh. 4, p. 58-70), and Sharon Foerschler (Exh. 4, pp.177-178 ), as well as by  
21 documentary evidence showing the negotiations of the consulting contract and audits of  
22 the outcome of the contract, post-performance. Exh.5, pp. ER 008-010; ER 032. Moreover,  
23 Bronder testified that he was personally aware that private rates of pay were higher than  
24 state rates of pay based on his own experiences in the private sector where he testified he  
25 was paid approximately \$60,000 more annually than the rate of pay for equivalent state  
26 engineers. Exh. 4, p. 41, ll. 12-21.

27 ///

28 ///

1 Bronder also alleged concerns that the high contract rates are protected by NDOT  
2 to ensure that when NDOT employees retire from state service they can obtain these high-  
3 paid contracting positions and continue to earn large sums of money at the state's expense.  
4 Exh.1, p.ER 004-006. He did not present any evidence at the hearing to support this  
5 assertion. However, the uncontroverted evidence presented by NDOT clearly showed that  
6 there is a statutory cooling-off period prohibiting an immediate return to contract work  
7 for the state and there is no preference in NDOT contract proposals for NDOT experienced  
8 employees. Exh. 4, pp. 120-124.

9  
10 **ii. A Lawful Release From Probation With or Without Stated Cause Is Not**  
11 **Evidence Of Pretext.**

12 In finding that NDOT's proffered reasons for releasing Bronder from probation were  
13 pretext, the hearing officer ignored the sworn and uncontroverted testimony of NDOT  
14 witnesses and relied almost exclusively on his unfounded belief that the unexplained  
15 release from probation when a month of probationary time remained was an act of reprisal,  
16 despite clear statutory authority that probationary employees can be dismissed at any  
17 time during the probationary period, so long as it is done in compliance with regulations.  
18 NRS 284.290. There is no requirement in the regulations that the employee be given a  
19 reason for his or her release, nor is there any requirement that the full period of probation  
20 be expended. *See generally* NAC 284.442-284.458.

21 Moreover, a thorough review of Sharon Foerschler's testimony rebuts the hearing  
22 officer's finding that it was contradictory and inconsistent. Exh. 8, p. 18. While the  
23 hearing officer found that "there was no substantive discussion with Bronder of reasons  
24 for actions taken by Ms. Foerschler," (*id.* at p. 15), Foerschler consistently testified that  
25 she outlined her reasons for letting Bronder go before she met with him and that she  
26 discussed those reasons with him during the meeting on May 5, 2017. Stephan Lani, who  
27 sat in on the meeting also testified that Bronder was offered various reasons for his  
28 release, consistent with Foerschler's list. Exh. 4, pp. 117-119. Furthermore, the hearing



1 officer seems to be more concerned that Foerschler told Kaiser and Ratliff that Bronder  
2 was not a "good fit," when she did not tell Bronder the same thing. "Not a good fit" is a  
3 euphemism similar to "did not work out" or "did not cut it" rather than stating the  
4 employee failed to demonstrate his abilities to do the job without going into specifics. Even  
5 Bronder admitted that he could be released from probation if he was unable to show he  
6 could do the job. Exh. 4, pp. 34-35

7 As testified by Lani and the HR employee, it is usually advised that appointing  
8 authorities releasing employees from probation should not give them a reason for the  
9 dismissal. Exh. 4, pp. 160, 239-240.

10 **iii. Bronder's Report to Lani and to Director Malfabon Did Not Disclose Improper**  
11 **Governmental Action or Gross Waste of Public Money.**

12 The hearing officer's determination that Broder's report of the high costs of contract  
13 employees was whistleblower activity was incorrect and was error. As noted above, the  
14 concerns raised by Bronder of alleged gross waste of public funds was not information that  
15 was new or accurate or secret, either at NDOT or within State government generally. The  
16 contract rates, while appearing to be high in a snapshot, were and are controlled by federal  
17 regulations (Exh. 4, pp. 94, 96, 99-101; *see* Exh. 9, Supplemental Authorities); include the  
18 generally higher prevailing wages within the region of construction required by the Davis-  
19 Bacon Act of 1931 (Pub. L. 71-798) and are monitored and negotiated prior to award of the  
20 contract. Moreover, Bronder testified that he was paid significantly more as a private  
21 engineer than the state wages in effect, estimating a figure of \$60,000 more annually.  
22 Exh. 4, p. 41. Importantly, as Lani testified, the contractors are chosen based on their  
23 qualifications to meet the needs of the contract before the costs are considered. Exh. 4,  
24 pp. 99-101. And, if the chosen contractor is unable to bring the contract costs to within  
25 the budgeted amounts, negotiations are closed and another contractor is considered. *Id.*  
26 at 158.

27 As outlined above, Bronder's reports to Stephan Lani and to Director Malfabon did  
28 not reveal anything untoward or nefarious and raised no internal concerns for the

1 department. Thus, NDOT had no motive to retaliate against Bronder at the time of his  
2 release from probation. As Lani testified, he considered Bronder's report of concerns to be  
3 the result of a lack of his understanding the process and its parameters. *See e.g.* Exh. 4,  
4 pp. 97,148-150. Lani considered and treated the conversation as a learning opportunity  
5 for Bronder and nothing more.

6 Where there is no motive for reprisal and no concern for public disclosure of the  
7 information presented in a purported whistleblower report, the characterization of normal  
8 business decisions as reprisal is improper and unsupportable. Moreover expenditure of  
9 public money through an open and public process does not qualify as improper government  
10 action." As the testimony unequivocally shows, none of the individuals who were aware  
11 of Bronder's report considered it to be any type of threat to their positions or their  
12 processes. They simply had no reason and no motive to retaliate for Bronder's lack of  
13 knowledge or understanding. The hearing officer's determination to the contrary is  
14 without support in the evidence and plainly wrong.

#### 15 **B. Irreparable Harm**

16 In addition to showing a likelihood of success on the merits of its appeal, to obtain  
17 a stay of the hearing officer's order to reinstate Bronder, NDOT must demonstrate  
18 irreparable harm will flow to the agency for which compensatory damages in inadequate.  
19 *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 408, 23 P.2d 243, 246 (2001). The hearing  
20 officer ordered that Bronder be "reinstated by NDOT to his former probationary status and  
21 employment with NDOT as Manager I, Grade 43, Step 8, with restoration of accrued benefits  
22 previously earned." Exh. 8, p. 28.<sup>10</sup> Bronder is currently employed with the Division of State  
23

---

24 <sup>10</sup> The Order for relief issued by the hearing officer is not clear as to its intended  
25 meaning. Bronder requested that the hearing officer "restore credit for 11 months of  
26 probation served as a Manager I (06.224), restore sick leave forfeited upon termination,  
27 restore compensation level to grade 43, step 8." Exh.1, p. ER001. The language in the  
28 order may be subject to interpretation, as the hearing officer does not specify what he  
means by "accrued benefits previously earned." It is also a possible subject of  
interpretation what is meant by restoring Bronder to his "former probationary status and  
employment." However, for purposes of this discussion, it is assumed that the hearing  
officer intended that Bronder would receive back pay for the differential between the  
Grade 40 Bronder currently occupies with DCNR and the Grade 43, step 8 he would have

1 Parks (Parks) as a professional engineer in a Grade 40 position. Exh. 4, p. 22. To reinstate  
2 him to his probationary status and employment with NDOT, Bronder will have to leave his  
3 current position with Parks and that agency would be entitled to refill his position. This will  
4 cost time and energy to Parks and the State and will leave any projects Bronder is involved  
5 in in that position pending and incomplete. More damaging, however, is that the order will  
6 require that NDOT and the State Personnel Offices pay to Bronder any "accrued benefits  
7 previously earned." In addition, if the appeal outcome is favorable to NDOT, but Bronder  
8 has already been reassigned to an NDOT position, he will have lost his Parks position and  
9 be without employment.

10 In the case of *State of Nevada Office of the Military v. William Simpson*, 18-908153,  
11 dated December 11, 2018, the Nevada Supreme Court determined that because there is no  
12 provision in Nevada law that would allow an employer to recoup "unwarranted back pay," a  
13 state agency is not entitled seek restitution of paid out back pay even if the court concludes  
14 the dismissal was proper. *Simpson*, at 5, citing *Ransier v. State Indus. Ins. Sys.*, 104 Nev.  
15 742, 746-47, 766 P.2d 274, 276-77 (1988). Thus, if the court denies the motion for stay  
16 pending this appeal and Bronder is immediately reinstated to employment with NDOT and  
17 paid his accrued benefits, should the appeal be decided in favor of NDOT, the State will be  
18 unable to recoup those back pay dollars and will suffer irreparable harms as a result.

19 As noted above, it is not only NDOT that risks irreparable harm. The employee will  
20 also be at risk of losing his current employment in pursuit of a wrongfully restored  
21 probationary position with NDOT.

## 22 V. CONCLUSION

23 The decisions made during the course of this State employee whistleblower appeal  
24 were erroneous and in violation of statutory provisions specifically applicable to these  
25 administrative proceedings. In allowing the appeal to go forward despite its untimely filing,  
26

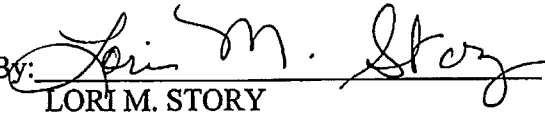
27  
28 occupied had he successfully completed his probationary period with NDOT, as well as  
reinstatement of any lost sick leave and credit for his previous eleven months of  
employment through payments to PERS and other such obligations. In any event, the  
order will require payment to Bronder of certain back pay.

1 the hearing officer acted without jurisdiction and in excess of his statutory authority.  
2 Additionally, the hearing officer disregarded the reliable, probative and substantial evidence  
3 in the record showing that Bronder's report gave his employers no motive to retaliation  
4 because it was not considered to be a whistleblower report and never caused his employer  
5 concerns about public awareness of the costs of outside contracting or the legality of the  
6 process employed in negotiating those contracts. In disregarding the credible and consistent  
7 evidence provided by NDOT witnesses, the hearing officer acted in a capricious and arbitrary  
8 manner.

9 NDOT requests that this tribunal issue a stay of the hearing officer's erroneous and  
10 illegal decisions and decree so as to allow a full and fair review of the record and to prevent  
11 the parties from suffering irreparable harm in carrying out an unlawful or incorrect decision.

12 DATED this 8<sup>th</sup> day of April, 2019.

13 ARRON D. FORD  
14 Attorney General

15  
16 By:   
17 LORI M. STORY  
18 Senior Deputy Attorney General  
19 State Bar No. 6835  
20 *Attorneys for Petitioner*  
21  
22  
23  
24  
25  
26  
27  
28

**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: April 8, 2019.

AARON D. FORD  
Attorney General

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

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 8th day of April, 2019, service of the NEVADA DEPARTMENT OF TRANSPORTATION'S MOTION TO STAY PENDING JUDICIAL REVIEW was made this date by depositing a true copy of the same for mailing, first class mail, at Las Vegas, Nevada, or via e-mail, addressed as follows:

Paul H. Lamboley (Via U.S. mail and E-mail): phlamboley@aol.com  
Appeals Officer  
State of Nevada  
Department of Administration / Hearings Division  
1050 E. Williams Street, Ste. 450  
Carson City, Nevada 89701

Thomas J. Donaldson (Via U.S. Mail and E-mail): 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  
For Paul Lamboley, Esq.  
Appeals Officer  
State of Nevada, Dept. of Administration / Hearings Division  
1050 E. Williams Street, Ste. 450  
Carson City, Nevada 89701

  
An employee of the Office of Attorney General

# EXHIBIT D

# EXHIBIT D

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2019 MAY -9 PM 2:12

AUDREY ROWLAND

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 00066 1B

Petitioner,

Dept. No. I

vs.

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

Respondents,

ORDER GRANTING MOTION FOR STAY PENDING JUDICIAL REVIEW

This matter comes before the Court on Petitioner STATE OF NEVADA ex rel. DEPARTMENT OF TRANSPORTATION'S (NDOT) Motion for Stay (Motion) pending resolution of a Petition for Judicial Review. Petitioner seeks a stay of the Administrative Appeal Officer's Decision and Order on Whistleblower Appeal. Respondent employee John Bronder has filed his Response to Petitioner's Motion for Stay Pending Appeal voicing no opposition to the motion and Petitioner has filed no reply. The motion has now been submitted for decision.

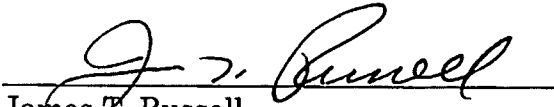


1 A stay of an Administrative Appeal Officer's decision may be granted pursuant to  
2 NRS 233B.140 where the Court considers the factors outlined in NRCP 65 and finds that  
3 there is a likelihood of success on the merits of the appeal and that there is a risk of  
4 irreparable harm to the movant should the stay not be granted. *S.O.C., Inc. v. Mirage*  
5 *Casino-Hotel*, 117 Nev. 403, 408, 23 P.2d 243, 246 (2001). However, in this case, the  
6 Respondent has stated that he has no opposition to a stay being granted, without  
7 conceding that NDOT has any likelihood of success on the merits of the Petition.

8 For the foregoing reasons, the unopposed Motion for Stay Pending Judicial Review  
9 filed by Petitioner is hereby GRANTED.

10 IT IS SO ORDERED.

11 Dated: May 9, 2019  
12

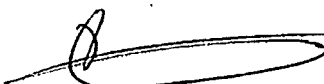
13  
14   
15 James T. Russell  
16 District Judge  
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 9<sup>th</sup> day of May, 2019, I deposited for mailing, postage paid, at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

Lori M. Story  
Senior Deputy Attorney General  
100 S. Carson Street  
Carson City, NV 89701

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



Angela Jeffries  
Judicial Assistant, Dept. 1

**EXHIBIT E**

**EXHIBIT E**

1 AARON D. FORD  
2 Nevada Attorney General  
3 LORI M. STORY  
4 Senior Deputy Attorney General  
5 Nevada Bar No. 6835  
6 State of Nevada  
7 Office of the Nevada Attorney General  
8 Personnel Division  
9 100 S. Carson Street  
10 Carson City, NV 89701  
11 Tel: 775-684-1114  
12 lstory@ag.nv.gov  
13 *Attorneys for Petitioner*

REC'D & FILED  
2019 JUN 25 AM 11:26  
AUBREY ROWLATT  
CLERK  
BY C. TORRES  
DEPUTY

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

12 STATE OF NEVADA DEPARTMENT  
13 OF TRANSPORTATION,

Case No. 19 OC 00066 1B

Dept. No. I

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15 vs.

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18 an agency of the State of Nevada, and  
19 JOHN BRONDER,

20 Respondents,  
21 \_\_\_\_\_

22 DEPARTMENT OF TRANSPORTATION OPENING MEMORANDUM OF  
23 POINTS AND AUTHORITIES IN SUPPORT OF ITS PETITION FOR JUDICIAL  
24 REVIEW  
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1 AARON D. FORD  
2 Nevada Attorney General  
3 LORI M. STORY  
4 Senior Deputy Attorney General  
5 Nevada Bar No. 6835  
6 State of Nevada  
7 Office of the Nevada Attorney General  
8 Personnel Division  
9 100 S. Carson Street  
10 Carson City, NV 89701  
11 Tel: 775-684-1114  
12 lstory@ag.nv.gov  
13 *Attorneys for Petitioner*

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25 \_\_\_\_\_/

26 **DEPARTMENT OF TRANSPORTATION OPENING MEMORANDUM OF**  
27 **POINTS AND AUTHORITIES IN SUPPORT OF ITS PETITION FOR JUDICIAL**  
28 **REVIEW**

I.

**STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to NRS 233B.130(2)(b). Petitioner, State of Nevada ex. rel. Department of Transportation (NDOT), timely filed the Petition for Judicial Review on April 8, 2019, within 30 days of the Nevada State Personnel Administrative Hearing Officer's final decision issued March 8, 2019. *See* NRS 233B.130(2)(d).

II.

**STATEMENT OF ISSUES**

1. Did the hearing officer clearly err and exceeded his statutory authority when he found the appeal timely, failed to apply the specific statutory and regulatory provisions governing state employee whistleblower appeals in favor of more generalized limitation periods applicable to state tort or constitutional claims, and allowed the untimely appeal to proceed to a hearing on the merits when he had no jurisdiction to do so?

2. Did the hearing officer clearly err when he found that a report made inside the organization could be whistleblowing, and when he found that the requested relief was within his authority under NRS 281.641?

3. Was the hearing officer's finding of pretext in NDOT's decision to release Bronder from probation clearly erroneous and arbitrary and capricious in view of the reliable, probative, and substantial evidence in the record?

III.

**STATEMENT OF THE CASE**

Respondent John Bronder was hired as a probationary employee in a Manager I, grade 43 step 8 position with the Department of Transportation on June 6, 2016. ROA 40.<sup>1</sup> He transferred to a position with the same grade and step in the Construction Division on February 13, 2017 with less than 4 months remaining on his one-year probationary period. *Id.* He was rejected from probation on May 5, 2017, one month prior to achieving

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<sup>1</sup> The Record on Appeal filed in this action on May 8, 2019, will be cited as "ROA" followed by the appropriate page number within the ROA.

1 permanent employee status. A probationary employee may be released from his or her  
2 position for any lawful reason if the release is done in compliance with the regulations  
3 governing such release. NRS 284.290; NAC 284.458. Bronder was advised of his release  
4 by letter hand-delivered to him at a meeting with Chief Construction Engineer Sharon  
5 Foerschler and Assistant Construction Engineer Stephan Lani. ROA 330; 49. On October  
6 23, 2017, Bronder commenced employment as a resident engineer with the Nevada  
7 Department of Conservation and Natural Resources. ROA 53. In November 2017, Bronder  
8 applied for an open Manager I position with NDOT. ROA 446. His name was erroneously  
9 removed from the interview eligibility list for that position based on a Human Resources  
10 Analyst's misconception of the applicability of NAC 284.374(4) to a release from  
11 probation.<sup>2</sup> ROA 265-268; 372. Bronder filed a whistleblower appeal pursuant to NRS  
12 281.614 on January 16, 2018. He alleged that he had reported a gross waste of public  
13 money through construction contract costs to the Assistant Construction Engineer,  
14 Stephan Lani in April, 2017 and again to the Director and Deputy Director of NDOT in  
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17 <sup>2</sup> NAC 284.374(4) reads:

18 An appointing authority may refuse to consider an eligible person who has  
19 been subject to a suspension, demotion or termination as a result of an upheld  
20 or uncontested disciplinary action in the preceding 12 months. The 12-month  
21 period begins on the effective date of the uncontested action or, if it is  
22 contested, on the date the hearing officer issues a final decision upholding a  
23 suspension, demotion or termination. If an employee is removed from  
24 consideration pursuant to this subsection, the appointing authority must  
25 notify the employee of that fact in writing before interviewing the next  
26 candidate or making its selection. The employee has 3 working days after being  
27 notified that he or she has been removed from consideration pursuant to this  
28 subsection to notify the appointing authority of any discrepancy in the  
information in his or her personnel file which led to the removal of the  
employee from consideration. The appointing authority may not make its  
selection:

(a) If the employee does not notify the appointing authority of a  
discrepancy, until after the end of the period pursuant to which the employee  
may notify the appointing authority of a discrepancy; or

(b) If the employee notifies the appointing authority of a discrepancy, until  
after the appointing authority determines whether the removal of the  
employee from consideration pursuant to this subsection was appropriate.

1 July, 2017. He claimed he was released from probation because of his report to Lani and  
2 denied the interview as continuing reprisal. ROA 605-634.

3 NDOT filed a motion to dismiss the appeal as untimely, because there is no right to  
4 appeal a lawful release from probation, because the report was not made outside Bronder's  
5 own organization, and because the requested relief was beyond the authority granted to  
6 the Hearing Officer in NRS 281.614. ROA 558-596. A statement of stipulated facts was  
7 submitted on the request of the Hearing Officer, which the parties agreed was to be used  
8 only for purposes of the motion to dismiss. ROA 496-501. Oral arguments were  
9 entertained (but apparently not recorded) and the Hearing Officer denied the motion to  
10 dismiss after misapplying and misinterpreting the specific statutory and regulatory  
11 provisions in Nevada law. The decision was entered on October 10, 2018. ROA 470-495.  
12 A hearing on the merits followed on January 17, 2019. ROA 31-291.

13 The evidence at the hearing clearly demonstrated that NDOT did not consider  
14 Bronder's reports about the contract costs to be a threat to their system or practices, nor  
15 did they consider it to be exposing any agency secrets or illegal behaviors. ROA 147-148.  
16 This topic was frequently discussed in public meetings of the Nevada Transportation  
17 Board and NDOT. (*see e.g.*, ROA 312-313; 318-324; 439), and those costs were constrained  
18 by both state and federal regulation and state policies. ROA 151; 379-409. In fact, the  
19 evidence suggests that the only reason Bronder had a concern about the costs was because  
20 the Governor had asked questions about of the contract when it was up for review by the  
21 Nevada Transportation Board in April, 2017. ROA 46, 609-611.<sup>3</sup>

22 The evidence also clearly indicates that Bonder's release from probation was due to  
23 concerns about his ability to step up to the responsibilities of the position in the  
24 Construction Division and was in no way the result of concerns about his raising questions  
25 about the contract costs. ROA 150 ll. 3-6. Finally, there was substantial, reliable  
26 evidence that showed the erroneous removal of Bronder's name from the interview list was  
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28 <sup>3</sup> This is apparent because Bronder sat in on negotiations of this particular contract  
and, according to his own testimony, he said nothing during those negotiations about the  
high costs or other terms of the contract which were being negotiated. ROA 55.

1 a clerical error on the part of the Human Resources clerk and was not done at the request  
2 of any NDOT supervisor or official. ROA 271. Where there is no evidence of a motive to  
3 retaliate against Bronder, a finding that a legitimate and rational business decision was  
4 an act of reprisal is an abuse of discretion and error on the part of the Hearing Officer.

5 NDOT seeks review of the decision of the Hearing Officer in denying the motion to  
6 dismiss because of his erroneous interpretation of NRS 281.641 and his application of more  
7 generalized statutes of limitation when specific statutory and regulatory provisions apply  
8 directly to a whistleblower appeal by a state employee. NDOT also appeals the Hearing  
9 Officer's consideration of the merits of the case, when the appeal was clearly untimely,  
10 depriving him of jurisdiction. NDOT also contends that under State and federal case law,  
11 a report of operational or employee malfeasance made within the organization, is not  
12 considered to be whistleblower activity that is entitled to protection under *Wiltsie v. Baby*  
13 *Grand Corp.*, 105 Nev. 291, 293 (1989) and *Biesler v. Professional Systems Corp.*, 321  
14 F.Supp.2d 1165 (D.Nev. 2011). NDOT asserts in this appeal that the relief granted by the  
15 Hearing Officer is beyond the authority granted to him by NRS 281.641(2). NDOT further  
16 appeals the Hearing Officer's final decision to grant Bronder relief upon a finding that the  
17 reasons offered by Chief Construction Engineer Sharon Foerschler to explain Bronder's  
18 rejection from probation were pretextual and developed after the fact. The decision  
19 ignores substantial or probative evidence to the contrary, and is arbitrary and capricious  
20 in light of that evidence.

21 NDOT seeks reversal of the hearing officer's denial of its motion to dismiss and a  
22 determination by this Court that the finding of reprisal by NDOT against Bronder was an  
23 abuse of discretion, founded on errors of law and fact, and providing relief that exceeds the  
24 authority permitted to the hearing officer under NRS 281.641 and NAC 281.305- 284.315.

#### 25 IV.

#### 26 STATEMENT OF THE FACTS

27 On June 6, 2016, Bronder was hired to fill a Manager I engineering position in the  
28 Department of Transportation, District III in Elko, Nevada. ROA 40. As a new State

1 employee, Bronder was required to complete a one-year probationary period before  
2 becoming a permanent classified employee. ROA 65. NRS 284.290. A probationary  
3 employee may be dismissed at any time during the probationary period, so long as the  
4 dismissal complies with regulations. *Id.*, NAC 284.458. Regulations require that the  
5 dismissal be for a lawful reason and that notice be provided to the employee and the  
6 Division of Human Resource Management before the expiration of the probationary  
7 period. *Id.*

8 On February 13, 2017, eight months into his probationary period, Bronder laterally  
9 transferred to another Manager I position in the Carson City Construction Division within  
10 NDOT. ROA 40. The new position came with different job responsibilities than the  
11 Manager I position he started in Elko. ROA 42, 80-83. As part of his responsibility, he  
12 was asked to sit in on the Construction Manual edit meetings and begin to familiarize  
13 himself with another related management position to assist with coverage until a  
14 replacement could be hired once that individual retired. ROA 83, 196.<sup>4</sup> This transfer did  
15 not change his probationary status, a fact that was specifically discussed with him during  
16 his interview for the transfer. NAC 284.106; ROA 188-189; 194.

17 During the 4 month period remaining on his probation, Bronder attended a  
18 negotiations meeting for a Construction Engineering Service contract. ROA 41-41; 121. At  
19 the meeting, various provisions in the contract were reviewed and terms negotiated. ROA  
20 121-126; *cf.* 41-43. Those negotiations were memorialized in a memorandum and included  
21 adjustments to the augmentation staffing durations and levels, estimated overtime for

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22  
23 <sup>4</sup> In his appeal, Bronder claims that he was asked to help rewrite the Construction  
24 Manual, the editing of which took hours of his time beyond the Friday meetings, as well  
25 as being required to "learn another employee's job to take it over upon their retirement."  
26 ROA 610. He claimed to be left with only 16 hours of a 40-hour week "to do his job." *Id.*  
27 This statement is false. According to sworn testimony at the hearing, Bronder was not  
28 required to do more than attend the Friday Construction Manual meetings with no request  
that he work to edit the manual or do other work in that regard. ROA 196-197. Moreover,  
it was the Chief Engineer's intention for him to cover the soon-to-be vacant position  
temporarily until a replacement could be hired, not to double his workload for an extended  
period. ROA 203-205; 229. As the Chief Construction Engineer noted, Bronder did not  
step up to that request or make efforts toward learning the position even though  
specifically directed to do so. *Id.*

1 field staff, a reduction in overtime pay rates, an adjustment to pay rates for cultural  
2 resources, including a field monitor and an professional archaeologist, a reduction in  
3 vehicle rates and cell phone rates for field staff, and a reduction to the contractor's fee  
4 proposal for technology equipment. ROA 613-614.

5 All of which contradicts Bronder's hearing testimony. ROA 41-43. In his hearing  
6 testimony, Bronder misrepresented the extent of negotiated changes that occurred during  
7 the meeting he attended, claiming that only the vehicle rates and cell phone rates were  
8 addressed. ROA 609; 42. This is in an obvious effort to minimize the negotiations that  
9 that actually occurred in this contract transaction so as to give his report of high contracts  
10 costs and preferential treatment more substance. ROA 609. Bronder's misleading  
11 testimony was contradicted by Stephan Lani and by Bronder's own statement on cross-  
12 examination. ROA 70, ll. 21-24; 85-86. Yet, the Hearing Officer ignored this conflicting  
13 testimony.

14 Following the Nevada Transportation Board meeting to consider this same contract,  
15 a meeting at which the Governor, a member of the Transportation Board, expressed  
16 concerns regarding the contract's costs, Bronder met with Assistant Construction  
17 Engineer Stephen Lani (Lani) and relayed the Governor's concerns about the costs of the  
18 contract. ROA 45; 127-129. Because Lani knew it was an exceptional contract for a  
19 condensed-schedule project and that the rates included allowances for company overhead  
20 and profit that were within the rates allowed by federal law and he was confident about  
21 the terms of the contract. ROA 71, 125-140. Lani tried to use Bronder's questions as a  
22 learning opportunity for him to understand the process of negotiating such contracts and  
23 the regulatory constraints imposed on them. *Id.* According to Lani, cost issues such as  
24 Bronder raised were commonly discussed in the publicly-held Nevada Transportation  
25 Board meetings and in other fora. ROA 134-135, ll. 13-4. Lani did not consider Bronder's  
26 questions to be a whistleblowing event which could cause trouble for NDOT. ROA 134, ll.  
27 6-20.

28 ///

1 In April, 2017, near the end of Bronder's one-year probationary period, the  
2 Construction Division leadership, including Bronder's direct supervisor, Jeffrey Freeman,  
3 Lani, and Chief Construction Engineer Sharon Foerschler, met to discuss  
4 Bronder's progress and probation status. ROA 146-147. According to Lani, leadership  
5 "needed to make sure [they] were comfortable with his overall performance and that he  
6 was living up to the expectations." *Id.* The discussions included the pros and cons of  
7 Bronder's performance and the responsibilities of the position. *Id.* The consensus was  
8 that Bronder "probably wasn't the best fit for the position at the end of the day." *Id.*  
9 According to Lani, Bronder's meeting to discuss the contract concerns was not a factor and  
10 played no role in the decision. *Id.* According to Lani, the concerns were related to  
11 Bronder's management and interaction with his team and his overall fit within the  
12 Construction office "to be able to keep the program moving in the correct direction." ROA  
13 148.

14 Chief Construction Engineer Sharon Foerschler, who had the ultimate decision-  
15 making authority (ROA 193), determined that Bronder was not demonstrating the  
16 necessary aptitude to meet the requirements of the Construction Manager position, based  
17 upon his performance during his time in the Construction Division. ROA 359, 195, 199-  
18 204. Foerschler had conveyed to Bronder when he was hired what her expectations were;  
19 that he should interact with staff as well as the duties he was to perform. ROA 195, 201.  
20 It became apparent to her that Bronder was not actively engaged in those duties and that  
21 he was not a good fit for the agency. ROA 202-203. She determined to release him from  
22 probation. ROA 205-206.

23 Despite Foerschler's expressed misgivings about his performance and without  
24 affording Foerschler an opportunity to review it in advance, Bronder's supervisor gave  
25 Bronder an overall "meets standards" performance review at eleven months, only three  
26 months of which were in the Construction Division. ROA 198-199, 326-328. The review  
27 indicated at least two areas where Bronder was not meeting standards. *Id.* This review  
28 was not in line with Ms. Foerschler's view of his performance. ROA 358, 363-364.



1 However, Freeman issued the evaluation to Bronder before Ms. Foerschler had an  
2 opportunity to discuss it with him. *Id.* Ms. Foerschler ultimately signed the meets-  
3 standards evaluation, after making comments on areas of concern. ROA 326-328.  
4 Foerschler explained her concerns with Bronder's performance to include: Failure to  
5 interact with employees he is responsible for; Inability to follow instructions; Not meet  
6 level of performance expected for individual in Manager I position, Failure to effectively  
7 integrate into Construction Office milieu. ROA 201-203, 359.

8 Dismissals or demotions may be made at any time during the probationary period  
9 in accordance with regulations adopted by the Commission. NRS 284.290. Before  
10 Foerschler released Bronder from probation, she called Bronder's former NDOT supervisor  
11 to see if that division would accept Bronder back. ROA 206, ll. 8-14; 250.<sup>5</sup> This was a  
12 courtesy call, as probationary employees have no right to revert to a previous position. *See*  
13 NAC 284.458; cf. NAC 284.462. The former supervisor was not willing to simply take  
14 Bronder back to District III. ROA 206, ll. 13-14.

15 Bronder was released from probation on May 5, 2017, prior to the end of his  
16 probationary period, and did not become a permanent classified employee for NDOT. NAC  
17 284.458(5). At the meeting to notify him of his release, Bronder was advised that if he  
18 wanted to try to return to the Elko position he should call his former supervisor to ask if  
19 it was a possibility. When Bronder called the Elko supervisor, Boyd Ratliff, he was told he  
20 would be considered for a return to the Manager I position in District III through the  
21 application process. ROA 253. Ratliff testified that he was unwilling to accept Bronder  
22 back because of the performance issues he had while working in District III, including  
23 issues with candor and follow-through he had coached Bronder on during his time in  
24 District III. ROA 251-252.

25 Probationary employees have no right to appeal their release from probation. NRS  
26 284.458(1). Bronder did not file a whistleblower appeal at that time he was released from  
27

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28 <sup>5</sup> Bronder's testimony indicated that "Sharon" would not consider allowing him to  
return to Elko. ROA 54. Both Foerschler and Ratliff, Bronder's former supervisor in Elko  
contradict this version of events. ROA 206.

1 probation. In fact, Bronder testified that at some point he considered filing an appeal of  
2 his release, but when he did think of an appeal, he realized it was too late. ROA 74-75,  
3 lines 16-2 (emphasis added).

4 After being released from probation by NDOT, Bronder interviewed for several  
5 other state positions, including for his current position with the Division of State Parks in  
6 the Nevada Department of Conservation and Natural Resources. ROA 76-77, 363-364. He  
7 interviewed for several positions with NDOT after his probationary release, but was not  
8 selected. ROA 76-77. Perhaps in an effort to raise his visibility within the Department,  
9 Bronder met with Director Malfabon and Deputy Director Kaiser of NDOT in July, 2017.  
10 In that meeting, Bronder expressed his concerns about the high costs of contracting  
11 personnel for highway construction projects. ROA 92.

12 Here too, the NDOT leadership realized that, while Bronder's concerns were  
13 rational from a lay-person's perspective, the process and costs of the contract were in-line  
14 with state and federal regulations and accounted not only for the salaries of the contracted  
15 employees, but for the overhead and profit allowed to the contract employee's employer.  
16 ROA 95-96. Thus, neither the Director nor the Deputy Director considered Bronder's  
17 report to be a whistleblower event. As a result, there was no reason to retaliate against  
18 him for expressing his concerns. In fact, since Bronder no longer worked for NDOT, they  
19 had no opportunity or authority to impact the conditions of his State employment at that  
20 point.

21 At the meeting, Bronder also stated his dissatisfaction with being released from  
22 probation. In response to this, Deputy Director Kaiser agreed to call some of the  
23 department heads where Bronder had applied to ensure his release from NDOT was not  
24 considered in a negative way. ROA 104-105.

25 Bronder secured his position with the Division of State Parks, Nevada Department  
26 of Conservation and Natural Resources and commenced work there on October 23, 2017.  
27 ROA 53. Bronder then immediately applied for another engineering position with NDOT.  
28 *Id.* The position posting was recalled and no interviews were conducted. Approximately

1 one month later, the same position was posted, Bronder applied and was listed as eligible  
2 to interview. ROA 445-446. Later, when Mr. Ratliff, the interviewing engineer called  
3 Human Resources (HR) for NDOT to confirm Bronder's eligibility, the HR office advised  
4 him that Bronder should not be considered eligible pursuant to NRS 284.240 because he  
5 had been "terminated." ROA 265-266. This advice was in error, because release from  
6 probation is not considered to be termination for misconduct.<sup>6</sup> ROA 266-268.

7 Bronder filed his whistleblower appeal on January 16, 2018, claiming he had  
8 reported a "gross waste of government funds" to his supervisors and to the NDOT director  
9 and that he was released from probation in reprisal for his original report and improperly  
10 denied an interview in reprisal for his second report to the NDOT director. *Id.*

11 NDOT moved to dismiss the appeal on the following bases: 1) the appeal was  
12 untimely as to the release from probation; 2) the appeal sought relief beyond the authority  
13 of the hearing officer to provide; and 3), reporting the alleged "gross waste of public money"  
14 to persons within the organization did not constitute protected speech entitling him to  
15 whistleblower protections under *Ainsworth v. Newmont Mining Corp.*, 128 Nev. 878, 381  
16 P.3d 588 (2012) (whistleblower protection limited to employees who reported activity to  
17 governmental agency outside of the company); *Biesler v. Professional Systems Corp.*, 321  
18 F. Supp. 2d 1165 (D. Nev. 2011) (employee's exposure of allegedly fraudulent and illegal  
19 conduct to individuals within company was insufficient under Nevada law for  
20 whistleblower protection); *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432 (1989)  
21 (internal reporting of improper activity to employer rather than appropriate authorities  
22 not sufficient to support tortious discharge); *see also Reuber v. Reno Dodge Sales, Inc.*,  
23 2013 WL 7158571 (Nev., Nov. 1, 2013) (unpublished decision) (reporting within company  
24

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25 <sup>6</sup> The circumstances surrounding the erroneous removal from the interview  
26 eligibility list were not discovered until after a motion to dismiss the administrative appeal  
27 had been litigated. The motion relied on stipulated facts, mostly as alleged by Bronder in  
28 his appeal, because there had been no opportunity to uncover this HR decision before the  
motion was filed. *See* ROA 496-501. Subsequent investigation uncovered the erroneous,  
but innocent advice. Despite the intended narrow application of the stipulated facts, it  
appears the hearing officer relied on them to support his decision in favor of Bronder,  
despite testimony to the contrary at the merits hearing.

not eligible for whistleblower protections). ROA 558-596. The motion was denied. ROA 470-495.

A hearing on the merits of Bronder's appeal followed in January 2019. On March 9, 2019, the hearing officer entered his decision and order finding that, "[t]here was no rational or legitimate basis for rejection of Bronder's probation ... based on the testimony of NDOT witness Sharon Foerschler, the appointing authority for the Construction Division in Carson City." ROA 13. He further found that the NDOT's proffered reasons for releasing Bronder from probation were pretext and that his dismissal from probation was in reprisal for his reports of waste, all the while ignoring evidence in contemporaneous emails outlining Foerschler's concerns regarding Bronder's job performance. ROA 26, ll. 12-15; 363-366.

In his decisional fact-finding, the hearing officer relied on constitutional protections under the First and Fourteenth Amendments "of public employment speech" to find that Bronder's reports to Lani and then to Director Malfabon and Deputy Director Kaiser were "protected by statute and constitution" and thus NDOT's conduct may be considered as adverse employment action . . . ." ROA 18-19. The hearing officer also specifically found that "Bronder timely appealed NDOT's October 17, 2017 action denying Bronder employment opportunity 'per NAC 284.374'." ROA 19. The appeal was not filed until January 16, 2018.

The Hearing Officer went on to find that "no evidence suggests HR engaged in reprisal or retaliatory action" in removing Bronder from the eligibility list in October of 2017." ROA 13. In his legal analysis, the hearing officer went further. He erroneously determined that NRS 281.641(1) provided a 2-year period from the date of the disclosure of improper governmental action within which an appeal may be filed, when, in fact, a plain reading of the statute reveals a 2-year window of protection against reprisal, with procedural requirements for filing an appeal within 10 work-days of the alleged act of reprisal, as set forth in regulations NAC 281.305 and NAC 281.315.

///

1 The NDOT filed its petition for judicial review of the Hearing Officer's decisions,  
2 contending that they are erroneous and an abuse of discretion.

3 V.

4 SUMMARY OF THE ARGUMENT

5 The Hearing Officer's decision on the motion to dismiss is contrary to law as it  
6 ignores the specific directives and plain meaning of the Nevada statutes and regulations  
7 governing the procedures for a state employee to file a whistleblower appeal and instead  
8 relies on a more general statute imposing a two-year limitation period for tort and civil  
9 rights cases. Further, that decision ignores long-standing case law which withholds  
10 protection for reporting made only within the employee's organization, as occurred here.  
11 This erroneous decision resulted in the Hearing Officer exercising jurisdiction over the  
12 appeal when such jurisdiction was never vested. The Hearing Officer's decision on the  
13 motion to dismiss should be reversed.

14 Additionally, the Hearing Officer's decision on the merits of the case ignores the  
15 reliable, probative, and substantial evidence in the record that NDOT did not consider  
16 Bronder's questions and concerns about contract costs to present any threat of exposure  
17 of improper activities within the agency and, therefore, had no motive to retaliate against  
18 Bronder. The decision ignores the reliable probative and substantial evidence that  
19 Bronder was released from probation for good and legal cause and also ignores  
20 documentary evidence demonstrating that those reasons were not "after-the-fact" excuses,  
21 but had been outlined and discussed by the appointing authority with her deputy  
22 engineers well before the issuance of the 11-month evaluation and the subsequent release  
23 from probation. Ignoring this substantial and reliable evidence to find that the release  
24 from probation was reprisal is an abuse of discretion by the Hearing Officer and warrants  
25 reversal of the decision.

26 The HO exceeded the statutory authority under NRS 281.641 in his decision to issue  
27 a cease and desist order of reinstating the probationary employment status of the  
28 employee and in ordering back pay and restoration of leave and work credit.

1 VI.

2 ARGUMENT

3 A. Standard of Review

4 The standard of review for evaluating a hearing officer's decision is governed by the  
5 Administrative Procedure Act, NRS 233B. *See Dredge v. State, ex rel., Dep't of Prisons,*  
6 *105 Nev. 39, 43, 769 P.2d 56, 58 (1989).* NRS 233B.135(3) provides, in pertinent part, as  
7 follows:

8 ... The court may remand or affirm the final decision or set it aside  
9 in whole or in part if substantial rights of the Petitioner have been  
prejudiced because the final decision of the agency is:

- 10 (a) In violation of constitutional or statutory provisions;  
11 (b) In excess of the statutory authority of the agency;  
12 (c) Made upon unlawful procedure;  
13 (d) Affected by other error of law;  
14 (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.

15 Accordingly, a court may reverse a hearing officer's decision "if the aggrieved party has been  
16 prejudiced by administrative findings, inferences, conclusions or decisions that are, *inter*  
17 *alia*, affected by error of law, clear error in view of the reliable, probative, and substantial  
18 evidence of record or an abuse or clearly unwarranted exercise of discretion." *Dredge*, 105  
19 Nev. at 43, 769 P.2d at 58-59. *See Meadow v. The Civil Serv. Bd. of LVMPD*, 105 Nev. 624,  
20 627, 781 P.2d 772, 774 (1989) (explaining an administrative agency acts arbitrarily and  
21 capriciously when it acts in disregard of the facts and circumstances involved). The burden  
22 of the proof is on the party attacking the decision to show the final decision is invalid. NRS  
23 233B.135(2).

24 The construction of a statute is a question of law subject to review de novo. *Diamond*  
25 *v. Swick*, 117 Nev. 671, 674, 28 P.3d 1087, 1089 (2001). However, the reviewing court  
26 defers to an agency's interpretation of its governing statutes or regulations if the  
27 interpretation is within the language of the statute. *Dutchess Business Svc, Inc. v. Nev.*  
28 *State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

Purely legal questions are reviewed *de novo*. *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, in reviewing questions of fact, the court is prohibited from substituting its judgment for that of the agency. NRS 233B.135(2); *Garcia*, 200 P.3d at 520, 125 Nev. at 56. Therefore, on factual issues, the court is limited to determining whether there is substantial evidence in the record to support the agency's decision. *Id.* "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Garcia*, 200 P. 2d at 520, 125 Nev. at 56 (citing *Grover C. Dils Med. Ctr. V. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005)).

**B. The Hearing Officer Clearly Erred and Exceeded His Statutory Authority When He Found the Appeal Timely, Failed to Apply the Specific Statutory and Regulatory Provisions Governing State Employee Whistleblower Appeals In Favor of More Generalized Limitation Periods Applicable to State Tort or Constitutional Claims, and Allowed the Untimely Appeal to Proceed to a Hearing on the Merits When He Had No Jurisdiction to do so.**

**i. Timeliness**

The 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. Instead, he applied more generalized limitations periods applicable to civil tort or civil rights actions. *Williams v. State Department of Corrections*, 2017 WL 4456980, 402 P.3d 1260, 1265 (Nev. 2017); *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Adv. Op. 100, 363 P.3d 1168 (Nev. 2015) ("Where a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls.") quoting *Laird v. State Publ Emps. Ret. Bd.*, 98 Nev. 42, 45 639 P.2d 1171, 1173 (1982).

NRS 281.641 provides for protection of state officers or employees who report improper governmental action and sets out the parameters of the procedures to be applied in such cases. The statute reads:

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

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

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

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

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

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

26           4. The Personnel Commission may adopt rules of procedure  
27 for conducting a hearing pursuant to this section that are not  
28 inconsistent with the procedures set forth in NRS 284.390 to  
29 284.405, inclusive.

30           5. As used in this section, "Personnel Commission" means  
31 the Personnel Commission created by NRS 284.030.  
32 (Emphasis added.)

33           NRS 284.390(1), one of the statutes referenced in NRS 281.461, provides the  
34 procedure and timelines for state personnel to appeal a disciplinary matter. It states:

35           1. Within 10 working days after the effective date of an  
36 employee's dismissal, demotion or suspension pursuant to NRS  
37 284.385, the employee who has been dismissed, demoted or  
38 suspended may request in writing a hearing before the hearing



1 officer of the Commission to determine the reasonableness of the  
2 action. The request may be made by mail and shall be deemed  
3 timely if it is postmarked within 10 working days after the  
4 effective date of the employee's dismissal, demotion or  
5 suspension.

6 In conformance with the directive of NRS 281.641 and the procedures set out in  
7 NRS 284.390, the Personnel Commission imposed a 10 work-day limitations period on the  
8 filing of an appeal based on reprisal or retaliation against a state employee. NAC 281.305.

9 NAC 281.305, one of the regulations adopted by the Personnel Commission in  
10 response to the passage of NRS 281.641 states:

11 **NAC 281.305 Written appeal by officer or employee who claims  
12 retaliatory action was taken against him or her. (NRS 281.641.)**

13 1. A state officer or employee who claims a reprisal or  
14 retaliatory action was taken against him or her for disclosing  
15 information concerning improper governmental action may file a  
16 written appeal pursuant to NRS 281.641 with a hearing officer of  
17 the Personnel Commission. The appeal must be:

18 (a) Filed within 10 workdays after the date the alleged reprisal  
19 or retaliatory action took place.

20 (b) Submitted on a form provided by the Division of Human  
21 Resource Management of the Department of Administration.

22 2. The hearing officer may reject a form that is incomplete or  
23 otherwise deficient as insufficient to commence the appeal.<sup>7</sup>

24 The 10 work-day limitation period established in this regulation is prominently printed in  
25 two places on the form that the Personnel Commission created for this purpose. ROA 605-  
26 607. Bronder used the exact form to draft and submit his whistleblower appeal. *Id.*  
27 However, he filed the appeal some six months after the alleged act of reprisal which gained  
28 him relief in the Administrative proceeding.

According to his decision on the motion to dismiss, the Hearing Officer found a  
conflict between the statute and regulation, stating,

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<sup>7</sup> Regulations reviewed and approved by the Legislature have the force and effect of  
law. NRS 233B.040; These Regulations were confirmed by Legislation Committee and  
filed with Secretary of State on March 1, 1996.

1 the timeliness issue requires reconciling [the] statutory time limit  
2 in NRS 281.641(1) that allows an appeal if any reprisal or  
3 retaliatory action based on a disclosure is taken with[in] a 2-year  
4 period from the date of the disclosure and the regulatory time  
limit in NAC 281.305 that an appeal be filed within 10 days of the  
alleged reprisal or retaliatory action.

5 ROA 489-490, ll. 24-2. This reconciliation is not necessary given that the 2-year period is  
6 a period of protection from retaliation, not a procedural requirement setting out the period  
7 of time within which the appeal must be filed after an act of reprisal. The Hearing Officer  
8 simply misread and misinterpreted the applicable statutes. This error of law requires  
9 reversal.

10 ii. Rules of Statutory Interpretation Do Not Support Hearing Officer's  
11 Analysis, Rendering the Decisions In Excess of the Statutory Authority of  
12 the Agency and Allowing the Matter to Go Forward Upon Unlawful  
Procedure.

13 a. Plain Text of Statute Applies.

14 "Statutory interpretation is a question of law subject to de novo review." *State*  
15 *v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). The goal  
16 of statutory interpretation "is to give effect to the Legislature's intent." *Hobbs v. State*,  
17 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). To ascertain the Legislature's intent, we look  
18 to the statute's plain language. *Id.* "[W]hen a statute's language is clear and unambiguous,  
19 the apparent intent must be given effect, as there is no room for construction." *Edgington*  
20 *v. Edgington*, 119 Nev. 577, 582-83, 80 P.3d 1282, 1286 (2003).

21 The statutory language set out in NRS 281.641 is unambiguous and clearly directs  
22 that the Personnel Commission draft regulations setting forth procedures which are in  
23 accordance with the procedures governing employee disciplinary appeals, as they are  
24 codified in NRS 284.390-284.405. Those disciplinary provisions clearly and  
25 unambiguously set out the 10 work-day appeal period. NRS 284.390(1). NRS 281.641  
26 requires the imposition of procedures for conducting the administrative hearing of a  
27 whistleblower appeal that are in conformity with the disciplinary appeal procedures.  
28 Having done as the Legislature directed, and having had those procedural rules reviewed

1 and approved by the Legislature, the rules of procedure adopted by the Personnel  
2 Commission in Chapter 281 of the Nevada Administrative Code have the same force and  
3 effect as other statutory provisions imposing statutes of limitation on causes of action.  
4 NRS 233B.040; *Turk v. Nevada State Prison*, 94 Nev. 101, 104, 575 P.2d 599, 601 (1978)  
5 (“Those rules, mandated by the legislature and adopted in accordance with statutory  
6 procedures, have the force and effect of law.”) NRS 284.155.”); *Oliver v. Spitz*, 76 Nev. 5,  
7 348 P. 2d 158 (1960).

8       The hearing officer erroneously interpreted the statute granting state employees an  
9 administrative appeal right to include a 2-year statute of limitations. Rather than read  
10 the plain text of NRS 281.641 to impose harmony between NRS 284.390 and NAC 281.305,  
11 by creating the 10 work-day filing deadline for whistleblower appeals, the hearing officer  
12 misinterpreted NRS 281.641 to create a conflict with NRS 284.390. A plain reading of the  
13 statute provides a 2-year window of protection against retaliatory actions, but imposes  
14 procedural requirements, “in accordance with the procedures set forth in NRS 284.390-  
15 284.490, inclusive, and the procedures adopted by the Personnel Commission pursuant to  
16 subsection 4.” In fact, there is no conflict between the statutes and regulations as both  
17 NRS 281.641 and NAC 281.305 impose procedural requirements governing the hearing of  
18 the appeal, including a 10 work-day period to actually submit the appeal requesting a  
19 hearing. NRS 281.641 directly and explicitly refers to NRS 284.390, which sets out the 10  
20 work-day filing period for disciplinary appeals for state employees, as the procedural basis  
21 for state employee whistleblower appeals.

22           **b. Do Not Render Words Meaningless.**

23       Another cannon of statutory interpretation also supports NDOT’s position. The  
24 court must “avoid statutory interpretation that renders language meaningless or  
25 superfluous,” *Hobbs*, 127 Nev. at 237, 251 P.3d at 179, and “whenever possible ... will  
26 interpret a rule or statute in harmony with other rules or statutes,” *Watson Rounds*  
27 *v. Eighth Judicial Dist. Court*, 131 Nev. —, 358 P.3d 228, 232 (2015) (quotation marks  
28 omitted). In this instance, the hearing officer’s interpretation of NRS 281.641 rendered

1 language within that provision meaningless. The hearing officer completely ignores the  
2 Legislature's mandate to conduct the hearing in "accordance with the procedures set forth  
3 in NRS 284.390 to 284.405, inclusive," as well as "the procedures adopted by the Personnel  
4 Commission pursuant to subsection 4." NRS 281.641(1). NRS 284.390 specifically  
5 identifies the 10 work-day appeal period. The procedures adopted by the Personnel  
6 Commission pursuant to NRS 281.641(14) also specifically identify the 10 work-day appeal  
7 period. Thus, the hearing officer improperly ignored the language in the statute directing  
8 such procedural requirements, rendering those words meaningless. Doing so allowed him  
9 to apply a longer appeal period under generalized statutes of limitations for actions under  
10 Title VII or the Civil Rights Act or under Chapter 11 of Nevada's Revised Statutes, which  
11 sets out the statutes of limitations for civil actions in this state.<sup>8</sup>

12 **c. The Hearing Officer Disregarded Specific Provisions of Law Applicable to**  
13 **Administrative Hearings In Favor of More General Limitations Rules.**

14 The hearing officer ignored specific applicable statutory and regulatory provisions  
15 in denying NDOT's motion to dismiss in order to allow Bronder's appeal to proceed despite  
16 its untimely filing. NRS 281.641 and NAC 281.305, passed and approved by the State  
17 Legislature branch, apply specifically to State officer and employee's claims of reprisal in  
18 whistle blowing situations. Thus, the Hearing Officer's decision to interpret this statute  
19 to allow for a two-year limitation period, rather than a two-year period of protection is  
20 erroneous. His determination that the 10 work-day limitation period was not imposed by  
21 statute or that some other statute carries more weight than the specific statutes and  
22 regulations governing this specific scenario, is clearly wrong. *Williams v. State*  
23 *Department of Corrections*, 2017 WL 4456980, 402 P.3d 1260, 1265 (Nev. 2017); *Piroozi v.*  
24 *Eighth Jud. Dist. Ct.*, 131 Adv. Op. 100, 363 P.3d 1168 (Nev. 2015).

25 To be sure, Bronder's appeal alleged two separate acts of reprisal based, apparently,  
26 on two separate purported whistleblowing reports. ROA 605-634. In reviewing the merits  
27

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28 <sup>8</sup> It is not clear in his decision which statute of limitations the hearing officer actually applied. What is clear is that he either misinterpreted or disregarded the laws specifically governing state employee appeals in whistleblower actions.

1 of Bronder's allegations, the Hearing Officer found fault, but no act of reprisal, in the  
2 clerical error that resulted in Bronder's removal from an interview eligibility list in  
3 November, 2017, while granting relief on an alleged act of reprisal which was appealed  
4 some six months after it occurred. ROA 13, ll. 8-10; There was no evidence to suggest that  
5 NDOT had any influence over Bronder once he was released from probation in May of  
6 2017, no mention in the appeal of other continuing actions by NDOT that could tie the two  
7 separate events together for a "continuing violation," and no finding by the Hearing Officer  
8 that there was such a continuing violation which might bring the May 2017 act within the  
9 appeal filed in January 2018. Moreover, Bronder knew of the 10 work-day appeal period  
10 and admitted he knew an appeal of the probationary release would be untimely once he  
11 concluded the release was retaliatory. ROA 74-75; ll. 16-2.

12 The Hearing Officer erred in denying the motion to dismiss, where it was clear that  
13 the alleged retaliatory release from probation occurred more than six months before the  
14 appeal was filed. The Hearing Officer could have and should have dismissed the untimely  
15 allegations, as he had no jurisdiction to review them. The decision on the motion to  
16 dismiss, particularly as to the imeliness of Bronder's appeal, violates state laws and  
17 regulation governing the appeal. Failing to timely file an appeal fails to vest jurisdiction  
18 in the reviewing court tribunal. *Fitzpatrick v. State, Dep't of Commerce, Ins. Div.*, 107  
19 Nev. 486, 488, 813 P.2d 1004, 1005 (1991) (providing that the time allotted by statute for  
20 taking an administrative appeal is jurisdictional.) Additionally, because the hearing  
21 officer found that the removal from an interview eligibility list was a clerical error not an  
22 act of reprisal (Exh. 8, p. 11), there was no continuing violation that might warrant a  
23 review of the untimely-appealed probationary release which occurred six months previous.  
24 Thus, the hearing officer acted without jurisdiction in allowing the appeal to proceed and  
25 in reviewing and deciding the merits of the appeal.<sup>9</sup> The Hearing Officer made a clear  
26 error of law and his finding of reprisal and order for reinstatement should be reversed.

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<sup>9</sup> Even the employee admitted at the hearing that he knew it was too late when he initially considered filing an appeal of his probationary release. ROA 74, ll.16-24.

1 C. The Hearing Officer Clearly Erred When He Found That A Report Inside the  
2 Organization Could Be Whistleblowing And When He Found That The Requested  
3 Relief Was Within His Authority Under NRS 281.641.

4 i. Report Made Within Organization

5 NRS 281.641 defines "improper governmental action" as an action which violates  
6 state law, or violates an ordinance, or is an abuse of authority, or gross waste of public  
7 money." Only reports made for a public purpose obtain whistleblower protections. *Wiltsie*  
8 *v. Baby Grand Corp.*, 105 Nev. 291, 293 (1989), 774 P.2d 432, 433 (1989). As a result, the  
9 report of the improper governmental action must be made outside the organization – to  
10 the appropriate authorities. Otherwise, the report is not one made for a public purpose,  
11 but rather, for a private or proprietary purpose. *Id.* Because this type of reporting does  
12 not promote the public interest by publicly disclosing wrongful government action, it is not  
13 provided the same protections as a public disclosure.

14 Bronder's reports were both made within the organization where the purported  
15 improper governmental action occurred – in April, 2017 to the Deputy Construction  
16 Engineer and in July, 2017 to the Director and Deputy Director of NDOT. While the  
17 statute, which has been in effect since 1995, provides that the Hearing Officer cannot rule  
18 against the employee based upon who they report to, some of the above-cited decisions  
19 were decided after that time and have been relied upon in other personnel administrative  
20 appeals as grounds for dismissal. ROA 553-557. Moreover, there are many persons and  
21 places outside the organization where Bronder could have reported this improper  
22 governmental action, if he truly intended to report improper governmental action and have  
23 some impact. Bronder did not intend his questions to his supervisor or to the NDOT  
24 Director to be actual whistleblowing events. It is much more likely that he was simply  
25 trying to impress these individuals with his knowledge and his concern for the operations  
26 of NDOT to enhance his own professional standing and his chances for rehire.

27 ii. Relief Granted Outside Hearing Officer's Authority.

28 The authority granted the Hearing Officer under NRS 281.641(2) is to determine  
whether the action complained of by a State Officer or Employee was reprisal or retaliatory

1 action taken because of whistleblowing activity by the employee and, if so, to issue an  
2 order "directing the proper person to desist and refrain from engaging in such action." *Id.*  
3 Bronder seeks reinstatement of his pay grade and employment start date as well as a  
4 return of any lost sick leave he had accrued prior to his release from probation. ROA 605.

5 The requested relief is beyond the cease and desist authority granted to hearing  
6 officers under NRS 281.641 (2). Relying on another decision by an administrative hearing  
7 officer, Bronder argued such relief was allowed. However, decisions of administrative  
8 hearing officers have no precedential weight and this reliance is misplaced.

9 **D. The Hearing Officer's Finding of Pretext In NDOT's Decision To Release Bronder From**  
10 **Probation is Clearly Erroneous, And Is Arbitrary and Capricious In View of the**  
11 **Reliable, Probative, and Substantial Evidence in the Record.**

12 **i. Substantial Probative Evidence Supports NDOT's Argument that NDOT Had No**  
13 **Motive to Retaliate.**

14 The hearing officer ignored the consistent and reliable testimony of all NDOT  
15 witnesses who unequivocally testified that Bronder's reports either to Lani, prior to his  
16 release from probation, or to Director Malfabon, after his release, provided no motive to  
17 retaliate because the information Bronder shared was already in the public arena and  
18 discourse, as is evidenced by the public discussions of the same held during hearings  
19 conducted by the Nevada Transportation Board. ROA 332-338, *see also* 344-345. The  
20 NDOT witnesses testified consistently that no person at NDOT who was aware of  
21 Bronder's reported concerns considered the subject matter to be secret, or to reflect  
22 negatively on the department such as to warrant a cover-up of the circumstances or  
23 removal of Bronder from employ by NDOT. Neither did the evidence suggest that NDOT  
24 feared discovery of the facts, since they were already a matter of public discussion. *Id.*  
25 ROA 71; 94-109; 125-140; 177; 206-208.

26 In fact, the Construction Division took Bronder's comments to heart, tried to explain  
27 the parameters governing the negotiations and the rates paid, and took steps to review  
28 the status of those parameters. *Id.* Thus, there was no motive for NDOT to shut Bronder

1 down from commenting on the contracts or to shut him out of NDOT. The evidence does  
2 not support the hearing officer's findings that the reasons for Bronder's dismissal were  
3 pretext, when there was no motive or desire to cause Bronder harm.

4 Bronder's stated concerns for the cost of contracting project management services  
5 on highway construction projects were common to persons who reviewed the contracts,  
6 including the Nevada Transportation Board, as well as to staff and leadership of the  
7 NDOT. However, the concerns did not represent any improper actions by NDOT staff or  
8 leadership because the costs of the contracts are governed by State and Federal  
9 regulations and are closely and independently reviewed by various review teams within  
10 the State. ROA 120-145. Deputy Construction Engineer Stephen Lani testified that the  
11 hourly rates paid for the consulting contractors included not only the generally higher  
12 hourly rates paid to construction workers in the private sector, due to competition or  
13 prevailing wage requirements, but also accounted for federally audited and established  
14 overhead rates for the consultants' employer's as well as an allowance for the reasonable  
15 profit of those employing companies. *Id.* Lani's testimony was fully supported by the  
16 testimony of Reid Kaiser, ROA 89-101, and Sharon Foerschler, ROA 207-209, as well as  
17 by documentary evidence showing the negotiations of the consulting contract and audits  
18 of the outcome of the contract, post-performance. ROA 008-010; 032; 315-317; 340-342.  
19 Moreover, Bronder testified that he was personally aware that private rates of pay were  
20 higher than state rates of pay based on his own experiences in the private sector where he  
21 testified he was paid approximately \$60,000 more annually than the rate of pay for  
22 equivalent state engineers. ROA 72, ll. 12-21.

23 Bronder also alleged concerns that the high contract rates are protected by NDOT  
24 to ensure that when NDOT employees retire from state service they can obtain these high-  
25 paid contracting positions and continue to earn large sums of money at the state's expense.  
26 ROA 609-611. He did not present any evidence at the hearing to support this assertion.  
27 However, the uncontroverted evidence presented by NDOT clearly showed that there is a  
28 statutory cooling-off period prohibiting an immediate return to contract work for the state



1 and there is no preference in NDOT contract proposals for NDOT experienced employees.  
2 ROA 151-156.

3 **ii. A Lawful Release From Probation With or Without Stated Cause Is Not Evidence**  
4 **of Pretext.**

5 In finding that NDOT's proffered reasons for releasing Bronder from probation were  
6 pretext, the Hearing Officer ignored the sworn and uncontroverted testimony of NDOT  
7 witnesses and relied almost exclusively on his own unfounded belief that the unexplained  
8 release from probation, when a month of probationary time remained, was an act of  
9 reprisal, despite clear statutory authority that probationary employees can be dismissed  
10 at any time during the probationary period, so long as it is done in compliance with  
11 regulations. NRS 284.290. There is no requirement in the regulations that the employee  
12 be given a reason for his or her release, nor is there any requirement that the full period  
13 of probation be expended. *See generally* NAC 284.442-284.458.

14 Moreover, a thorough review of Sharon Foerschler's testimony rebuts the Hearing  
15 Officer's finding that it was contradictory and inconsistent. ROA 18. While the hearing  
16 officer found that "there was no substantive discussion with Bronder of reasons for actions  
17 taken by Ms. Foerschler," (ROA 15), Foerschler testified that she outlined her reasons for  
18 letting Bronder go before she met with him and that she discussed those reasons with him  
19 during the meeting on May 5, 2017. ROA 200-203; 359, Stephan Lani, who sat in on the  
20 meeting also testified that Bronder was offered various reasons for his release, consistent  
21 with Foerschler's list. ROA 148-150. Furthermore, the Hearing Officer seems to be more  
22 concerned that Foerschler told Kaiser and Ratliff that Bronder wasnot a "good fit," when  
23 she did not tell Bronder the same thing. "Not a good fit" is a euphemism similar to "did  
24 not work out" or "did not cut it" rather than stating the employee failed to demonstrate  
25 his abilities to do the job without going into specifics. Even Bronder admitted that he  
26 could be released from probation if he was unable to show he could do the job. ROA 65-  
27 66. As testified by Lani and the HR employee, it is usually advised that appointing

28 ///

1 authorities releasing employees from probation should not give them a reason for the  
2 dismissal. ROA 191; 239-240; 270-271.

3 **iii. Bronder's Report to Lani and to Director Malfabon Did Not Disclose Improper**  
4 **Governmental Action or Gross Waste of Public Money.**

5 The hearing erred in determining that Broder's report of the high costs of contract  
6 employees was whistleblower activity. As noted above, the concerns raised by Bronder of  
7 alleged gross waste of public funds was not information that was new or accurate or secret,  
8 either at NDOT or within State government generally. The contract rates, while  
9 appearing to be high in a snapshot, were and are controlled by federal regulations (ROA  
10 125; 127-132; 379-409), include the generally higher prevailing wages within the region of  
11 construction required by the Davis-Bacon Act of 1931 (Pub. L. 71-798) and are monitored  
12 and negotiated prior to award of the contract. Moreover, Bronder himself testified that he  
13 was paid significantly more as a private engineer than the state wages he was earning as  
14 a Manager 1, estimating a figure of \$60,000 more annually than his state salary. ROA 72.  
15 Importantly, as Lani testified, the contractors are chosen based on their qualifications to  
16 meet the needs of the contract before the costs are considered. ROA 130-132. And, if the  
17 chosen contractor is unable to bring the contract costs to within the budgeted amounts,  
18 negotiations are closed and another contractor is considered. ROA 189.

19 Bronder's reports to Stephan Lani and to Director Malfabon did not reveal anything  
20 untoward or nefarious and raised no internal concerns for the department. Thus, NDOT  
21 had no motive to retaliate against Bronder at the time of his release from probation. As  
22 Lani testified, he considered Bronder's report to arise from his lack of his understanding  
23 the contracting process and its parameters. ROA 97; 128; 179-181. NDOT considered and  
24 treated the conversation as a learning opportunity for Bronder and nothing more.

25 There is no motive for reprisal and no concern for public disclosure of the  
26 information presented in the purported whistleblower report. The Hearing Officer's  
27 characterization of normal business decisions as reprisal is unfair and unsupported by the  
28 substantial, probative evidence presented at the hearing. Moreover, "expenditure of public

1 money through an open and public process does not qualify as improper government  
2 action." As the testimony unequivocally shows, none of the individuals who were aware  
3 of Bronder's report considered it to be any type of threat to their positions or their  
4 processes. They simply had no reason and no motive to retaliate for Bronder's lack of  
5 knowledge or understanding. The hearing officer's determination to the contrary is  
6 without support in the evidence and plainly wrong.


7 CONCLUSION

8 The decisions made during the course of this State employee whistleblower appeal  
9 were erroneous and in violation of statutory provisions specifically applicable to these  
10 administrative proceedings. In allowing the appeal to go forward despite its untimely filing,  
11 the Hearing Officer acted without jurisdiction and in excess of his statutory authority.  
12 Additionally, the Hearing Officer disregarded the reliable, probative and substantial  
13 evidence in the record showing that Bronder's report gave his employers no motive to  
14 retaliate. The report was not considered to be a whistleblower report and never caused  
15 NDOT concerns about public awareness of the costs of outside contracting or the legality of  
16 the process employed in negotiating those contracts. In disregarding the credible, consistent,  
17 and substantial evidence provided by NDOT witnesses, the hearing officer acted in a  
18 capricious and arbitrary manner.

19 NDOT requests that this Court reverse the Hearing Officer's erroneous and  
20 unsupported decisions.

21 DATED this 25<sup>th</sup> day of June, 2019.

22 ARRON D. FORD  
23 Attorney General

24 By:   
25 LOREI M. STORY  
26 Senior Deputy Attorney General  
27 State Bar No. 6835  
28 *Attorneys for Petitioner*

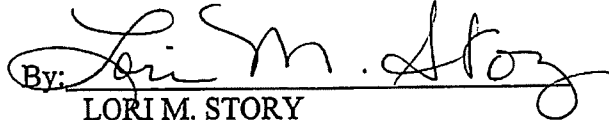
**AFFIRMATION**

**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 this 25<sup>th</sup> day of June, 2019.


AARON D. FORD  
Attorney General

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

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 25<sup>th</sup> day of June, 2019, service of the NEVADA DEPARTMENT OF TRANSPORTATION'S OPENING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS PETITION FOR JUDICIAL REVIEW was made this date by depositing a true copy of the same for mailing, first class mail, at Carson City, Nevada, addressed as follows:

Thomas J. Donaldson  
Dyer Lawrence, LLP  
2805 Mountain Street  
Carson City, NV 89703  
(775) 885-1896 office  
(775) 885-8728 facsimile

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

# EXHIBIT F

# EXHIBIT F

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

5 *Attorneys for Respondent JOHN BRONDER*

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

10  
11 STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION,

12 Petitioner,

13 vs.

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

**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  
100 S. Carson Street  
Carson City, NV 89701  
[lstory@ag.nv.gov](mailto:lstory@ag.nv.gov)

Paul H. Lamboley, Esq.  
Hearing Officer  
State of Nevada Dept. of Admin. Appeals  
1050 E Williams St Ste 450  
Carson City, NV 89710  
[lw11@sbcglobal.net](mailto:lw11@sbcglobal.net)

Tasha Eaton  
Supervising Legal Secretary  
State of Nevada Dept. of Admin. Appeals  
1050 E Williams St Ste 450  
Carson City, NV 89710  
[teaton@admin.nv.gov](mailto:teaton@admin.nv.gov)

  
Debora McEachin



**EXHIBIT "1"**

**EXHIBIT "1"**

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

5 *Attorneys for Respondent JOHN BRONDER*

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CLERK  
BY [Signature]  
DEPUTY

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

10  
11 STATE OF NEVADA 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

**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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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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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  
28 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."

<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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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).

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28 <sup>3</sup> Respondent Hearings Division (and Hearing Officer Lamboley) 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]  
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 fee 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  
16 "because the employee did not render his whistle-blowing to the proper level or jurisdiction,  
17 it did not fall within this law."

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

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

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

28 If the Hearing Officer determines that the action taken was a reprisal or retaliatory action, the Hearing  
Officer may issue an order directing the proper person to desist and refrain from engaging in such action.  
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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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  
14 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."

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.

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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.

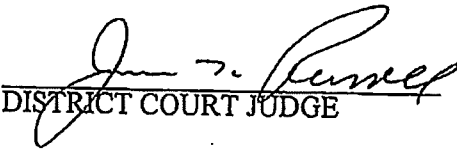
9 Order and Decision

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

25  
26 By: \_\_\_\_\_

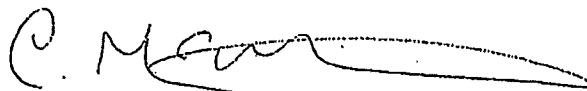
27 Thomas J. Donaldson  
28 Nevada Bar No. 5283  
Attorneys for Respondent  
John Bronder

**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

# EXHIBIT G

# EXHIBIT G



1 AARON D. FORD  
2 Nevada Attorney General  
3 LORI M. STORY  
4 Senior Deputy Attorney General  
5 Nevada Bar No. 6835  
6 State of Nevada  
7 Office of the Nevada Attorney General  
8 Nevada Department of Transportation  
9 1263 S. Stewart Street  
10 Carson City, NV 89712  
11 Tel: 775-888-7516  
12 [lstory@ag.nv.gov](mailto:lstory@ag.nv.gov)  
13 *Attorneys for Petitioner*

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

12 STATE OF NEVADA DEPARTMENT  
13 OF TRANSPORTATION,

Case No. 19 OC 000661B

Dept. No. 1

14 Petitioner,

15 vs.

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

20 Respondents.  
21 \_\_\_\_\_/

22 MOTION FOR STAY PENDING APPEAL

23 Petitioner, STATE OF NEVADA ex rel. DEPARTMENT OF TRANSPORTATION  
24 (NDOT), by and through counsel, AARON D. FORD, Attorney General for the State of  
25 Nevada, and LORI M. STORY, Senior Deputy Attorney General, hereby submits its  
26 MOTION FOR STAY (Motion) requesting a stay of the enforcement of the final decision of  
27 the Court dated September 10, 2019, pending decision on the merits of NDOT's Appeal of  
28 that decision to the Nevada Supreme Court.

1 This Motion is made pursuant to Nevada Rules of Appellate Procedure Rule 8 and  
2 based on the following memorandum of points and authorities, the pleadings and papers  
3 on file herein, and any oral argument to be presented by counsel at any hearing in this  
4 matter.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 On May 5, 2017, Petitioner, Nevada Department of Transportation (NDOT),  
8 released Respondent John Bronder from his probationary status as a Manager I, one  
9 month before he would have attained permanent employee status. Employers within the  
10 State system can release a probationary employee for any lawful reason. In October,  
11 Bronder was hired by the Nevada Department of Conservation and Natural Resources as  
12 a resident engineer. He then submitted an application for another NDOT Manager I  
13 position District III. That job posting was withdrawn. He applied for the same position  
14 when it was reposted in November, 2017. When, on January 5, 2018, he learned that his  
15 name had been removed from the list of eligible applicants pursuant to NRS 284.374, he  
16 filed a whistleblower appeal pursuant to NRS 281.641(1) on January 16, 2018. Record On  
17 Appeal (ROA) 605-634.<sup>1</sup>

18 NDOT moved to dismiss the appeal as untimely, as seeking review of a non-  
19 appealable probationary release, not establishing a whistleblower report was made, and  
20 as seeking relief beyond the authority of the hearing officer to grant. ROA 558-596. After  
21 the hearing officer denied the motion to dismiss (ROA 470-495), a hearing on the merits  
22 of Bronder's whistleblower appeal was conducted on January 17, 2019, by Hearing Officer  
23 Paul H. Lamboley. ROA 031-291. Lamboley entered his Decision and Order on  
24 Whistleblower Appeal on March 7, 2019, finding that Bronder's release from probation,  
25 appealed more than six months after its occurrence, was reprisal or a retaliatory action  
26 and ordering that Bronder be "reinstated by NDOT to his former probationary status and  
27

28  

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<sup>1</sup> The Record on Appeal is cited, but is not provided, as it is voluminous and has  
already been provided to the Court.

1 employment with NDOT as Manager 1, Grade 43, Step 8, with restoration of accrued  
2 benefits previously earned. ROA 001-030.

3 On September 10, 2019, this Honorable Court entered its Findings of Fact,  
4 Conclusions of Law and Decision Denying Petition for Judicial Review upholding the  
5 Hearing Officer's decision. The Court specifically found that Bronder's appeal, filed more  
6 than six months after the occurrence of his release from probation and well beyond the 10  
7 work-day period set out in NRS 284.390, was timely. This decision, if allowed to stand,  
8 can and will be interpreted to mean that all State employees, permanent or probationary,  
9 have two years *from the act of reprisal* within which to file an administrative appeal  
10 challenging the action. This determination will result in inconsistency within employee  
11 appeal processes and will negatively impact the State's ability to address and correct  
12 improper personnel actions in a timely and efficient manner.

13 Other employee appeals within the State classified employment system,  
14 including appeals of discipline in the form of suspensions, demotions or dismissal under  
15 NRS 284.390, grievances appealed to the Employee Management Committee under  
16 NRS 284.384 and NAC 284.682, 284.686, 284.690, 284.695, as well as involuntary  
17 transfers under NRS 284.376, must be filed with the Personnel Commission within 10  
18 work-days of the occurrence, while this Court's decision allows a full two years within  
19 which a classified state employee may file such an appeal of an alleged act of reprisal for  
20 whistleblowing. The decision circumvents the legislative directive in NRS 281.641 that the  
21 "*hearing must be conducted in accordance with the procedures set forth in NRS 284.390*  
22 *to 284.405, inclusive,*" where NRS 284.390 is the statute that imposes the 10 work-day  
23 period for filing the appeal.

## 24 II. STATEMENT OF FACTS <sup>2</sup>

25 On June 6, 2016, Bronder was hired to fill a Manager I engineering position in the  
26 Department of Transportation, District III in Elko, Nevada. ROA 40. As a new State  
27 employee, Bronder was required to complete a one-year probationary period before  
28

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<sup>2</sup> The Undersigned recognizes that these facts may be well-known to the Court at this juncture, but provides the same for clarity and completeness.

1 becoming a permanent classified employee. NRS 284.290. A probationary employee may  
2 be dismissed at any time during the probationary period, so long as the dismissal complies  
3 with regulations. *Id.*, NAC 284.458. Regulations require that the dismissal be for a lawful  
4 reason and that notice be provided to the employee and the Division of Human Resource  
5 Management before the expiration of the probationary period. *Id.*

6 On February 13, 2017, eight months into his probationary period, Bronder laterally  
7 transferred to another Manager I position in the Carson City Construction Division within  
8 NDOT. ROA 40. The new position came with different job responsibilities than the  
9 Manager I position he started in Elko. ROA 40, 80-83. As part of his responsibility, he  
10 was asked to sit in on the Construction Manual edit meetings and begin to familiarize  
11 himself with another related management position to assist with coverage until a  
12 replacement could be hired once that individual retired. ROA 83, 196.<sup>3</sup> This transfer did  
13 not change his probationary status (NAC 284.106), a fact that was specifically discussed  
14 with him during his interview for the transfer. ROA 188-189; 194.

15 In his new position, Bronder attended a meeting for negotiations of a Construction  
16 Engineering Service contract. ROA 41-42, 121. At the negotiation meeting, various issues  
17 in the contract were reviewed and terms negotiated. ROA 121-126. Those negotiations  
18 were memorialized in a memorandum and included discussions of adjustments to the  
19 augmentation staffing durations and levels, estimated overtime for field staff, a reduction  
20 in overtime pay rates, an adjustment to pay rates for cultural resources, including a field  
21 monitor and a professional archaeologist, a reduction in vehicle rates and cell phone rates  
22 for field staff, and a reduction to the contractor's fee proposal for technology equipment.  
23 ROA 613-614.

24 Following the Nevada Transportation Board meeting to consider this same contract,  
25 at which the Governor expressed concerns regarding the contract's costs, Bronder met

---

26  
27 <sup>3</sup> Bronder's assertions as to his work assignments were contradicted by the District  
28 Engineer, Sharon Foerschler (ROA 196-197), and it was intended that he cover the soon-  
to-be vacant position temporarily until a replacement could be hired, not to double his  
workload. ROA 198. As the Chief Construction Engineer noted, Bronder did not step up  
to that request or make efforts toward learning the position. *Id.*

1 with Assistant Construction Engineer Stephen Lani (Lani) and expressed the Governor's  
2 concerns about the costs of the contract. ROA. 45; 127-129. According to Lani, issues such  
3 as Bronder raised were commonly discussed in the publicly-held Nevada Transportation  
4 Board meetings and in other fora. ROA 134-135, ll. 13-4. Lani did not identify Bronder's  
5 questions to be a whistleblowing event which could cause trouble for NDOT. ROA 134.

6 By April, 2017, the Construction Division leadership, met to discuss Bronder's  
7 progress and probation. ROA 146-147. "Leadership "needed to make sure [they] were  
8 comfortable with his overall performance and that he was living up to the expectations."  
9 *Id.* The consensus was that Bronder "probably wasn't the best fit for the position at the  
10 end of the day." *Id.* According to Lani, Bronder's meeting to discuss the contract concerns  
11 was not a factor and played no role in the decision. *Id.* According to Lani, the concerns  
12 were also not about Bronder's willingness to take on the other manager duties, but rather  
13 his management of his team and his overall fit within the dynamic of the Construction  
14 office "to be able to keep the program moving in the correct direction. ROA 148.

15 In the end, Chief Construction Engineer Sharon Foerschler determined that  
16 Bronder was not demonstrating the necessary aptitude to meet the requirements of the  
17 Construction Manager position, based upon his performance during his time in the  
18 Construction Division. ROA 359; ROA 226, 230-235. She determined to release him from  
19 probation before he obtained permanent status. ROA 205-206.

20 Dismissals or demotions may be made at any time during the probationary period  
21 in accordance with regulations adopted by the Commission. NRS 284.290. Before  
22 Foerschler released Bronder from probation, she called Bronder's former NDOT supervisor  
23 to see if that division would accept Bronder back. ROA 201; ll. 8-14; 250. This was a  
24 courtesy call; probationary employees have no right to revert to a previous position. *See*  
25 NAC 284.458; cf. NAC 284.462.

26 ///

27 ///

28 ///

1 Bronder was released from probation on May 5, 2017, prior to the end of his  
2 probationary period, and did not become a permanent classified employee for NDOT. NAC  
3 284.458(5). When asked why he did not file an appeal in May, he testified that by the time  
4 he thought of it, he was too late. ROA 74. In fact, when asked "how late is too late?" It  
5 was two weeks –beyond two weeks." ROA 75, line 1.<sup>4</sup> After being released from probation  
6 by NDOT, Bronder interviewed for several other state positions, including for his current  
7 position with the Division of State Parks in the Nevada Department of Conservation and  
8 Natural Resources. ROA 76-77; 371-372.

9 Two months later, Bronder met with Director Malfabon and Deputy Director Kaiser  
10 of NDOT to raise his concerns about contract costs and to express his frustration with  
11 being released from probation. ROA 611. Here too, the seasoned employees of NDOT  
12 realized that, while Bronder's concerns were rational from a lay person's perspective, the  
13 process and costs were in line with state and federal regulations and accounted not only  
14 for the salaries of the contracted employees, but for the overhead and profit allowed to the  
15 contract employee's regular employer. Thus, neither the Deputy Director nor the Director  
16 considered Bronder's report to be a whistleblower report and had no reason to retaliate  
17 against him for expressing his concerns. ROA. 95-97.

18 Bronder secured his current position with the Division of State Parks, Department  
19 of Conservation and Natural Resources and commenced work there on October 23, 2017.

20 <sup>4</sup> Even Bronder believed the appeal limitation period was two weeks (10 work-  
21 days), a time-frame consistent with NRS 284.390 and NAC 281.305(1) which states:

22 1. A state officer or employee who claims a reprisal or retaliatory  
23 action was taken against him or her for disclosing information  
24 concerning improper governmental action may file a written appeal  
25 pursuant to NRS 281.641 with a hearing officer of the Personnel  
26 Commission. The appeal must be:

27 (a) *Filed within 10 workdays after the date the alleged reprisal or*  
28 *retaliatory action took place.*

(b) Submitted on a form provided by the Division of Human  
Resource Management of the Department of Administration.

(Emphasis added.)

1 Exh. 4, p. 22. On October 24, 2017, Bronder applied for another engineering position with  
2 NDOT. *Id.* The position posting was recalled and no interviews were conducted.  
3 Approximately one month later, the same position was posted, Bronder applied and was  
4 listed as eligible to interview. Later, when the interviewing supervisor called Human  
5 Resources (HR) for NDOT to confirm Bronder's eligibility, the HR office advised him that  
6 Bronder should not be considered eligible pursuant to NRS 284.240 because he had been  
7 "terminated." ROA 265-266. This advice was in error, because release from probation is  
8 not considered to be termination for misconduct.<sup>5</sup> *Id.* pp. 265-268. Mr. Lamboley  
9 determined that there was no retaliatory intent related to this misconstruction of the  
10 disqualification regulation. ROA 13, ll. 9-10.

11 A hearing on the merits followed after denial of NDOT's motion to dismiss. On  
12 March 9, 2019, the hearing officer entered his decision and order finding that, "[t]here was  
13 no rational or legitimate basis for rejection of Bronder's probation ... based on the  
14 testimony of NDOT witness Sharon Foerschler, the appointing authority for the  
15 Construction Division in Carson City." ROA 13, ll. 13-14. He further found that the  
16 NDOT's proffered reasons for releasing Bronder from probation were pretext and that his  
17 dismissal from probation was in reprisal for his reports of waste. ROA 26, lines 12-15.

18 In his decisional fact-finding, the hearing officer relied on constitutional protections  
19 under the First and Fourteenth Amendments "of public employment speech" to find that  
20 Bronder's reports to Lani and then to Director Malfabon and Deputy Director Kaiser were  
21 "protected by statute and constitution" and thus NDOT's conduct may be considered as  
22 adverse employment action..." ROA 18-19. The hearing officer also specifically found that  
23 "Bronder timely appealed NDOT's October 17, 2017 action denying Bronder employment  
24 opportunity 'per NAC 284.374.'" ROA 19.

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25  
26 <sup>5</sup> The circumstances surrounding the erroneous removal from the interview  
27 eligibility list was not discovered until after a motion to dismiss the administrative appeal  
28 as untimely had been litigated. The motion relied on stipulated facts, mostly as alleged  
by Bronder in his appeal, because there had been no opportunity to investigate this HR  
decision before the motion was filed. Subsequent investigation uncovered the erroneous,  
but innocent advice. Despite the intended narrow application of the stipulated facts, it  
appears the hearing officer relied on them to support his decision.

1 In his legal analysis, the hearing officer went further. He erroneously determined  
2 that NRS 281.641(1) provided a 2-year period from the date of the disclosure of improper  
3 governmental action within which an appeal may be filed. The NDOT filed a petition for  
4 judicial review which was denied by this Court on September 10, 2019.

### 5 III. LEGAL STANDARD

6 NRS 233B.140 governs the procedure for seeking a stay of a final administrative agency  
7 decision in Nevada. It provides as follows:

- 8 1. A petitioner who applies for a stay of the final decision in  
9 a contested case shall file and serve a written motion for  
10 the stay on the agency and all parties of record to the  
11 proceeding at the time of filing the petition for judicial  
12 review.
- 13 2. In determining whether to grant a stay, the court shall  
14 consider the same factors as are considered for a  
15 preliminary injunction under Rule 65 of the Nevada  
16 Rules of Civil Procedure.
- 17 3. In making a ruling, the court shall:  
18 (a) Give deference to the trier of fact; and  
19 (b) Consider the risk to the public, if any, of staying the  
20 administrative decision.

21 Generally, pursuant to NRS 233B.140, "the petitioner must provide security before  
22 the court may issue a stay." However, the state or an agency of the state is not required to  
23 post security as a condition for filing such a motion. *See* NRCP 65(2)(c).

24 The Nevada Supreme Court has adopted specific factors to consider in determining  
25 whether a preliminary injunction (or in this case, a stay) should issue:

26 A party seeking the issuance of a preliminary injunction bears  
27 the burden of establishing (1) a likelihood of success on the  
28 merits; and (2) a reasonable probability that the non-moving  
party's conduct, if allowed to continue, will cause irreparable  
harm for which compensatory damage is an inadequate remedy.

*S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 408, 23 P.2d 243, 246 (2001).

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1 IV. LEGAL ARGUMENT

2 A. LIKELIHOOD OF SUCCESS ON THE MERITS

3 B. In order for a stay to issue, NDOT will have to demonstrate a likelihood of success  
4 on the merits. NRS 233B.135 provides the grounds for granting a Petition for  
5 Judicial Review and states:

6 The court shall not substitute its judgment for that of the agency  
7 as to the weight of evidence on a question of fact. The court may  
8 remand or affirm the final decision or set it aside in whole or in  
part if substantial rights of the petitioner have been prejudiced  
because the final decision of the agency is:

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

17 NRS 233B.135 (3).

18 The authority granted the Hearing Officer under NRS 281.641(2) is to determine  
19 whether the action complained of by a State Officer or Employee was reprisal or retaliatory  
20 action taken because of whistleblowing activity by the employee and, if so, to issue an  
21 order "directing the proper person to desist and refrain from engaging in such action." *Id.*  
22 Under Nevada law governing the disclosure of improper governmental action, reprisal or  
23 retaliatory action "includes:"

- 24 (a) The denial of adequate personnel to perform duties;  
25 (b) Frequent replacement of members of the staff;  
26 (c) Frequent and undesirable changes in the location of an office;  
27 (d) The refusal to assign meaningful work;  
28 (e) The issuance of letters of reprimand or evaluations of poor  
performance;  
(f) A demotion;  
(g) A reduction in pay;  
(h) The denial of a promotion;

- (i) A suspension;
- (j) A dismissal;
- (k) A transfer;
- (l) Frequent changes in working hours or workdays; or
- (m) If the employee is licensed or certified by an occupational licensing board, the filing with that board, by or on behalf of the employer, of a complaint concerning the employee, - if such action is taken, in whole or in part, because the state officer or employee or local governmental officer or employee disclosed information concerning improper governmental action.

NRS 281.611(5).

Finally, improper governmental action is defined as:

[A]ny action taken by a state officer or employee or local 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:

- (a) In violation of any state law or regulation;
- (b) If the officer or employee is a local governmental officer or employee, in violation of an ordinance of the local government;
- (c) An abuse of authority;
- (d) Of substantial and specific danger to the public health or safety;

or

- (e) A gross waste of public money.

NRS 281.611(1).

Bronder alleged that he disclosed to his NDOT superiors that NDOT engages in contract agreements for construction project management services which allow payments to those contractors which far exceed the rate of pay that a State employee in a similar capacity would receive for the same work. He alleged that this amounts to a gross waste of public money. ROA 609. He further alleged that because he made this report he was released from probation before he could obtain permanent employee status and, then eight months later he was improperly removed from an interview eligibility list. Bronder seeks reinstatement of his pay grade and employment start date as well as a return of any lost sick leave he had accrued prior to his release from probation. ROA 605

In order to appeal an alleged act of reprisal in State employment, NRS 281.641 provides that a hearing on the appeal must proceed in accordance with the procedures set out in NRS 284.390-284.405. NRS 284.390 specifically provides that in order to obtain a

1 hearing on an appeal for a disciplinary action, the appeal must be filed with the Personnel  
2 Commission within 10 working days of the date of the alleged improper action. The  
3 reference to an appeal "for a disciplinary action" should be disregarded in this matter, as  
4 the whistleblower statute invokes this statute for its procedural requirements.

5 To be in compliance with NRS 281.641, and obtain a hearing, a whistleblower  
6 appeal must be filed within that same 10 working day period identified in NRS 284.350  
7 and in the regulations adopted in conformance with NRS 281.641, which were formulated  
8 by the Personnel Commission and found at NAC 281.305-315.

9 NDOT submits that the Court's determination to uphold Hearing Officer's Decision  
10 regarding the timeliness of the appeal substantially violated NDOT's rights because:  
11 (1) the decision to allow the untimely appeal of the release from probation to proceed on  
12 the merits violates of NRS 281.641; (2) the decision is affected by other errors of law,  
13 including the hearing officer's determination that general statutory or constitutional  
14 protections apply to Bronder's appeal when more specific statutory and regulatory  
15 provisions are in place and applicable to this specific situation; and (3) because the decision  
16 is clearly erroneous in view of the reliable, probative and substantial evidence of the entire  
17 record. NDOT further submits that is likely to succeed on the merits of its appeal and  
18 that it will suffer irreparable harm if the stay is not granted, thereby justifying the grant  
19 of a stay of the hearing officer's decision pending the outcome of the appeal.

20 **1. The Hearing Officer's Decision to Deny NDOT's Motion to Dismiss Was in**  
21 **Violation of Laws Governing Whistleblower Appeals.**

22 This matter improperly proceeded to a hearing on the merits of Bronder's  
23 whistleblower appeal because the hearing officer misinterpreted and misapplied the  
24 statutes authorizing such appeals and the applicable statute of limitations in this matter.  
25 In both his decision on the NDOT's motion to dismiss and on the merits, Hearing Officer  
26 Lamboley misinterpreted the provisions of NRS 281.641. He did so in order to give  
27 Bronder a two-year period to appeal an allegedly retaliatory employment action by his  
28 State employer, when in fact, the period to file this type of appeal is set forth in

1 NRS 284.390. The 10 workday period to file an appeal under NAC 281.305 conforms to  
2 procedures set out in statute NRS 284.390(1).

3 According to his decision on the motion to dismiss, the hearing officer found a  
4 conflict between the statute and regulation, stating,

5 the timeliness issue requires reconciling [the] statutory time limit  
6 in NRS 281.641(1) that allows an appeal if any reprisal or  
7 retaliatory action based on a disclosure is taken with[in] a 2-year  
8 period from the date of the disclosure and the regulatory time  
limit in NAC 281.305 that an appeal be filed within 10 days of the  
alleged reprisal or retaliatory action.

9 Exh. 3, p. 20. However, this is a misinterpretation of the law because it is NRS 284.350  
10 (specifically cited in NRS 281.641) that imposes the 10 workday period.

11 **2. Rules of Statutory Interpretation Do Not Support Hearing Officer's**  
12 **Decisions, Rendering the Decisions in Excess of the Statutory**  
13 **Authority of the Agency and Allowing the Matter to Go Forward Upon**  
**Unlawful Procedure.**

14 **a. Plain Text of Statute Applies.**

15 The Court and hearing officer improperly interpreted the statute granting state  
16 employees an administrative appeal right to include a 2-year statute of limitations.  
17 Rather than read the plain text of NRS 281.641, in its entirety, to find harmony between  
18 the statutes and the regulations, the hearing officer misinterpreted NRS 281.641 to create  
19 a conflict with NRS 284.390.

20 A proper reading of the plain text of the statute shows that it actually provides a 2-  
21 year window of protection against retaliatory actions, but imposes procedural  
22 requirements, "in accordance with the procedures set forth in NRS 284.390-284.490,  
23 inclusive, and the procedures adopted by the Personnel Commission pursuant to  
24 subsection 4." In fact, there is no conflict between the statutes and regulations as both  
25 NRS 281.641, by its reference to NRS 284.350, and NAC 281.305 impose a 10 work-day  
26 period to submit the appeal. NRS 281.641 directly and explicitly refers to NRS 284.390,  
27 which sets out the 10 workday filing period for disciplinary appeals for state employees,  
28 as the procedural basis for state employee whistleblower appeals.

1       “Statutory interpretation is a question of law subject to de novo review.”  
2 *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). The goal  
3 of statutory interpretation “is to give effect to the Legislature’s intent.” *Hobbs v. State*,  
4 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). To ascertain the Legislature’s intent, we look  
5 to the statute’s plain language. *Id.* “[W]hen a statute’s language is clear and unambiguous,  
6 the apparent intent must be given effect, as there is no room for construction.” *Edgington*  
7 *v. Edgington*, 119 Nev. 577, 582–83, 80 P.3d 1282, 1286 (2003).

8       NDOT contends that the statutory language set out in NRS 281.641 is unambiguous  
9 and clearly directs that “the hearing must be conducted in accordance with the procedures  
10 set out in NRS 284.350 to 284.405, inclusive, ...” These are statutory rules and they do  
11 not conflict with the 2-year window of protection also provided in NRS 281.641. Those  
12 disciplinary appeal provisions, referenced in NRS 284.641 as setting out the required  
13 procedures for a whistleblower appeal, clearly and unambiguously set out the 10 work-day  
14 appeal period. NRS 284.390(1). NRS 281.641 requires the imposition of the same  
15 procedures for conducting the administrative hearing of a whistleblower appeal.

16       Having done as the Legislature directed, and having had those procedural rules  
17 reviewed and approved by the Legislature, the rules of procedure adopted by the Personnel  
18 Commission have the same force and effect as other statutory provisions imposing statutes  
19 of limitation on causes of action. NRS 233B.040(1); *Turk v. Nevada State Prison*, 94 Nev. 101,  
20 575 P.2d 599 (1978) (holding that the regulations prescribed by the Department of Personnel have the  
21 “force and effect of law”). Thus, these statutory procedures should carry greater weight in  
22 the hearing officer’s review, because they are specific to the administrative appeal  
23 authorized by the statute.

24               **b. Do not render words meaningless**

25       Another canon of statutory interpretation also supports NDOT’s position. The  
26 court “avoid[s] statutory interpretation that renders language meaningless or  
27 superfluous,” *Hobbs*, 127 Nev. at 237, 251 P.3d at 179, and “whenever possible ... will

28       ///

1 interpret a rule or statute in harmony with other rules or statutes," *Watson Rounds*  
2 *v. Eighth Judicial Dist. Court*, 131 Nev. —, 358 P.3d 228, 232 (2015) (quotation marks  
3 omitted). In this instance, the hearing officer's interpretation of NRS 281.641 rendered  
4 language within that provision meaningless. The hearing officer completely ignores  
5 legislature's mandate to conduct the hearing in "accordance with the procedures set  
6 forth in NRS 284.390 to 284.405, inclusive," as well as "the procedures adopted by the  
7 Personnel Commission pursuant to subsection 4." NRS 281.641(1). NRS 284.390  
8 specifically identify the 10 workday appeal period. The procedures adopted by the  
9 Personnel Commission pursuant to NRS 281.641(14) also specifically identify the 10  
10 workday appeal period. Thus, the hearing officer improperly ignored the language in the  
11 statute directing such procedural requirements, rendering those words meaningless.  
12 Doing so allowed him to apply a longer appeal period under generalized statutes of  
13 limitations for actions under Title VII or the Civil Rights Act or under Chapter 11 of  
14 Nevada's Revised Statutes, which sets out the statutes of limitations for civil actions in  
15 this state.

16 **c. The Court Erred in Affirming Hearing Officer's Decision on the Motion to**  
17 **Dismiss Which Relied on General Constitutional Provisions in Disregard of**  
**More Specific Provisions of Law Applicable to Administrative Hearings.**

18 This Court as well as the hearing officer ignored specific applicable statutory and  
19 regulatory provisions in denying NDOT's motion to dismiss in order to allow Bronder's  
20 appeal to proceed despite its untimely filing. NRS 281.641 and NAC 281.305, passed and  
21 approved by the State Legislature branch, apply specifically to State officer and employee's  
22 claims of reprisal in whistle blowing situations. NRS 281.641 addresses reprisal against  
23 state officers or employees and provides in pertinent part:

24 **NRS 281.641 Reprisal or retaliatory action against state officer**  
25 **or employee who discloses improper governmental action:**  
26 **Written appeal; hearing; order; negative ruling may not be based**  
27 **on identity of persons to whom disclosure was made; rules of**  
**procedure.**

28 1. If any reprisal or retaliatory action is taken against a  
state officer or employee who discloses information concerning  
improper governmental action within 2 years after the

1 information is disclosed, the state officer or employee may file a  
2 written appeal with a hearing officer of the Personnel  
3 Commission for a determination of whether the action taken was  
4 a reprisal or retaliatory action. The written appeal must be  
5 accompanied by a statement that sets forth with particularity:

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

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

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

14 \*\*\*

15 4. The Personnel Commission may adopt rules of procedure  
16 for conducting a hearing pursuant to this section that are not  
17 inconsistent with the procedures set forth in NRS 284.390 to  
18 284.405, inclusive.

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

21 Chapter 284 of the Nevada Revised Statutes specifically governs the state  
22 personnel system. NRS 284.390 to 284.405 govern hearing procedures in State employee  
23 disciplinary challenges and provide for an appeal filing deadline, the format and form of  
24 the appeal, as well as other related procedural concerns for conducting an appeal.<sup>6</sup> The  
25 plain language in NRS 281.641 referencing personnel system disciplinary appeal  
26 procedures and NRS 284.390 specifically identified the guiding principles to be used in  
27 drafting and adopting procedures for the whistleblower protection of State employees,  
28 including the 10 work-day appeal period set out in NRS 284.390.

Relatedly, NAC 281.305, one of the regulations adopted by the Personnel  
Commission in response to the passage of NRS 281.641 states:

**NAC 281.305 Written appeal by officer or employee who claims  
retaliatory action was taken against him or her. (NRS 281.641)**

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<sup>6</sup> In fact, the form for a whistleblower appeal also contains the language of  
NAC 281.305, as well as instructions noting that the appeal must be filed within  
10 workdays of the occurrence, providing the employee clear notice of the 10 working-day  
filing limitation. Exh.1, pp. ER 002-003.

1           1. A state officer or employee who claims a reprisal or  
2 retaliatory action was taken against him or her for disclosing  
3 information concerning improper governmental action may file a  
4 written appeal pursuant to NRS 281.641 with a hearing officer of  
5 the Personnel Commission. The appeal must be:

6           (a) Filed within 10 workdays after the date the alleged  
7 reprisal or retaliatory action took place.

8           (b) Submitted on a form provided by the Division of Human  
9 Resource Management of the Department of Administration.

10          2. The hearing officer may reject a form that is incomplete or  
11 otherwise deficient as insufficient to commence the appeal.

12 Regulations reviewed and approved by the Legislature have the force and effect of law.  
13 NRS 233B.040;<sup>7</sup>

14          Under the general versus specific canon of statutory interpretation, the more  
15 specific statute will take precedence, *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167  
16 (2005), and will be construed as an exception to the more general statute, *see* Antonin Scalia &  
17 Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012). This allows the two  
18 statutes to be read together without conflict. *Id.* at 185. *See also Piroozi v. Eighth Judicial Dist.*  
19 *Court*, 131 Nev. —, 363 P.3d 1168, 1172 (2015) ("Where a general and a special statute, each  
20 relating to the same subject, are in conflict and they cannot be read together, the special statute  
21 controls." (internal quotation marks omitted)). *Williams v. State Dep't of Corr.*, 402 P.3d 1260,  
22 1265 (Nev. 2017)

23          In reviewing the NDOT's motion to dismiss the appeal, the hearing officer and this  
24 Court improperly included protections afforded to non-state employee citizens through a  
25 court action, by relying on statutory limitations applicable to a civil action in a court of  
26 law, but not applicable to this specific administrative process. Exh. 3, pp. 12-15. *Williams*,  
27 402 P. 3d 1265. The purpose of the administrative appeal in the state classified personnel  
28 system is to provide a speedy resolution to contested employment actions while ensuring  
that the employee receives due process.

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<sup>7</sup> These Regulations were confirmed by Legislation Committee and filed with Secretary of State on March 1, 1996.



1 The Court improperly adopted the hearing officer's reliance on the general  
2 limitations and procedural requirements applicable to civil court cases, rather than the  
3 specific statutes applicable to State employees or officers in an administrative proceeding.  
4 As a result, the decision on this Petition for Judicial Review, particularly as to the  
5 timeliness of Bronder's appeal, violates state laws and regulation governing the appeal.  
6 Failing to timely file an appeal fails to vest jurisdiction in the reviewing court tribunal.  
7 *Fitzpatrick v. State, Dep't of Commerce, Ins. Div.*, 107 Nev. 486, 488, 813 P.2d 1004, 1005  
8 (1991) (providing that the time allotted by statute for taking an administrative appeal is  
9 jurisdictional.) Additionally, because the hearing officer found that the removal from an  
10 interview eligibility list was a clerical error not an act of reprisal (ROA 13), there was no  
11 continuing violation or justification that might warrant a review of the untimely-appealed  
12 probationary release which occurred six months previous. Thus, the hearing officer acted  
13 without jurisdiction in allowing the appeal to proceed and in reviewing and deciding the  
14 merits of the appeal.<sup>8</sup> This Court's affirmance of that decision was in error.

15  
16 **2. The Hearing Officer's Finding of Pretext is Clearly Erroneous In  
View of the Reliable, Probative, and Substantial Evidence in the Record.**

17 **i. A Lawful Release From Probation With or Without Stated Cause Is Not  
18 Evidence of Pretext.**

19 In finding that NDOT's proffered reasons for releasing Bronder from probation were  
20 pretext, the hearing officer and this Court ignored the sworn and uncontroverted  
21 testimony of NDOT witnesses and relied almost exclusively on his unfounded belief that  
22 the unexplained release from probation when a month of probationary time remained was  
23 an act of reprisal, despite clear statutory authority that probationary employees can be  
24 dismissed at any time during the probationary period, so long as it is done in compliance  
25 with regulations. NRS 284.290. There is no requirement in the regulations that the  
26 employee be given a reason for his or her release, nor is there any requirement that the  
27 full period of probation be expended. *See generally* NAC 284.442-284.458.

28  

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<sup>8</sup> Even the employee admitted at the hearing that he knew it was too late when he initially considered filing an appeal of his probationary release. ROA 74, ll. 16-24.

Moreover, a thorough review of Sharon Foerschler's testimony rebuts the hearing officer's finding that it was contradictory and inconsistent. While the hearing officer found that "there was no substantive discussion with Bronder of reasons for actions taken by Ms. Foerschler," (ROA 15), Foerschler consistently testified that she outlined her reasons for letting Bronder go before she met with him and that she discussed those reasons with him during the meeting on May 5, 2017. Stephan Lani, who sat in on the meeting also testified that Bronder was offered various reasons for his release, consistent with Foerschler's list. ROA 148-150. Even Bronder admitted that he could be released from probation if he was unable to show he could do the job. ROA. 65-66. As testified by Lani and the HR employee, it is usually advised that appointing authorities releasing employees from probation should not give them a reason for the dismissal. ROA. 191, 270-271.

**ii. Where There Is No Motive to Retaliate, Proper Employment Decision Are Not Pretext for Retaliation.**

The hearing officer's determination that Broder's report of the high costs of contract employees was whistleblower activity was incorrect and was error. The concerns raised by Bronder of alleged gross waste of public funds was not information that was new or accurate or secret, either at NDOT or within State government generally. The contract rates, while appearing to be high in a snapshot view, are controlled by federal regulations (ROA 125, 127, 130-132; *see* ROA 329-428); include the generally higher prevailing wages within the region of construction required by the Davis-Bacon Act of 1931 (Pub. L. 71-798) and are monitored and negotiated prior to award of the contract. Moreover, Bronder testified that he was paid significantly more as a private engineer than the state wages in effect, estimating he earned about \$60,000 more annually. ROA 72. Importantly, as Lani testified, the contractors are chosen based on their qualifications to meet the needs of the contract before the costs are considered. ROA 130-132. And, if the chosen contractor is unable to bring the contract costs to within the budgeted amounts, negotiations are closed and another contractor is considered. ROA 189.

1 Bronder's reports to Stephan Lani and to Director Malfabon did not reveal anything  
2 untoward or nefarious and raised no internal concerns for the department. Thus, NDOT  
3 had no motive to retaliate against Bronder at the time of his release from probation. As  
4 Lani testified, he considered Bronder's report of concerns to be the result of a lack of his  
5 understanding the process and its parameters. ROA. 128,179-181. Lani considered and  
6 treated the conversation as a learning opportunity for Bronder and nothing more.

7 Where there is no motive for reprisal and no concern for public disclosure of the  
8 information presented in a purported whistleblower report, the characterizing normal  
9 business decisions as reprisal is improper and unsupportable. Moreover, expenditure of  
10 public money through an open and public process does not qualify as "improper  
11 government action." As the testimony unequivocally shows, none of the individuals who  
12 was aware of Bronder's report considered it to be any type of threat to their positions or  
13 their processes. They simply had no reason and no motive to retaliate for Bronder's lack  
14 of knowledge or understanding. The Court's affirmance of the hearing officer's  
15 determination to the contrary is without support in the evidence and plainly wrong.

### 16 **C. Irreparable Harm**

17 In addition to showing a likelihood of success on the merits of its appeal, to obtain  
18 a stay of the hearing officer's order to reinstate Bronder, NDOT must demonstrate  
19 irreparable harm will flow to the agency for which compensatory damages in inadequate.  
20 *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 408, 23 P.2d 243, 246 (2001). The hearing  
21 officer ordered that Bronder be "reinstated by NDOT to his former probationary status and  
22 employment with NDOT as Manager I, Grade 43, Step 8, with restoration of accrued benefits  
23 previously earned." ROA 28. Bronder is currently employed with the Division of State Parks  
24 (Parks) as a professional engineer in a Grade 40 position. ROA 53. To reinstate him to his  
25 probationary status and employment with NDOT, Bronder will have to leave his current  
26 position with Parks and that agency would be entitled to refill his position. This will cost  
27 time and energy to Parks and the State and will leave any projects Bronder is involved in in  
28 that position pending and incomplete. In addition, if the appeal outcome is favorable to

1 NDOT, but Bronder has already been reassigned to an NDOT position, he will have lost his  
2 Parks position and be without employment.

3 In the case of *State of Nevada Office of the Military v. William Simpson*, 18-908153,  
4 dated December 11, 2018, the Nevada Supreme Court determined that because there is no  
5 provision in Nevada law that would allow an employer to recoup "unwarranted back pay," a  
6 state agency is not entitled seek restitution of paid out back pay even if the court concludes  
7 the dismissal was proper. *Simpson*, at 5, citing *Ransier v. State Indus. Ins. Sys.*, 104 Nev.  
8 742, 746-47, 766 P.2d 274, 276-77 (1988). Thus, if the court denies the motion for stay  
9 pending this appeal and Bronder is immediately reinstated to employment with NDOT and  
10 paid his accrued benefits, should the appeal be decided in favor of NDOT, the State will be  
11 unable to recoup those back pay dollars and will suffer irreparable harms as a result.

12 As noted above, it is not only NDOT that risks irreparable harm. The employee will  
13 also be at risk of losing his current employment in pursuit of a wrongfully restored  
14 probationary position with NDOT.

15 V. CONCLUSION

16 The decisions made during the course of this State employee whistleblower appeal  
17 and the judicial review of same were erroneous and in violation of statutory provisions  
18 specifically applicable to these administrative proceedings. In allowing the appeal to go  
19 forward despite its untimely filing, the hearing officer acted without jurisdiction and in  
20 excess of his statutory authority. Additionally, the hearing officer disregarded the reliable,  
21 probative and substantial evidence in the record showing that Bronder's report gave his  
22 employers no motive to retaliation because it was not considered to be a whistleblower report  
23 and never caused his employer concerns about public awareness of the costs of outside  
24 contracting or the legality of the process employed in negotiating those contracts. In  
25 disregarding the credible and consistent evidence provided by NDOT witnesses, the hearing  
26 officer acted in a capricious and arbitrary manner.

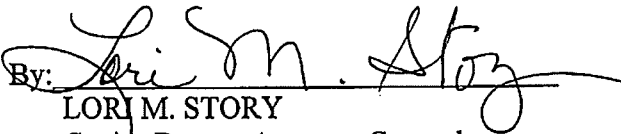
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1 NDOT requests that this Court issue a stay of the Court's decision pending appeal to  
2 the Nevada Supreme Court so as to allow a full and fair review of the record and to prevent  
3 the parties from suffering irreparable harm in carrying out an unlawful or incorrect decision.

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

5 AARON D. FORD  
6 Attorney General

7  
8 By:   
9 LORI M. STORY  
10 Senior Deputy Attorney General  
11 State Bar No. 6835  
12 *Attorneys for Petitioner*  
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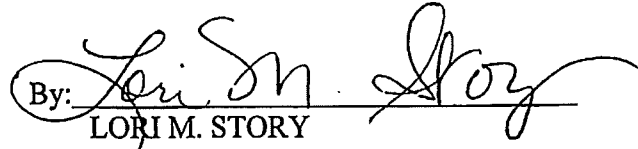
**AFFIRMATION**

**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

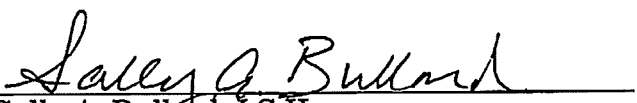
CERTIFICATE OF SERVICE

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 MOTION TO STAY PENDING 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@dverlawrence.com](mailto:tdonaldson@dverlawrence.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

# EXHIBIT H

# EXHIBIT H



1 Case No.: 19 OC 00066 1B

2 Dept. No.: 1

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

9 STATE OF NEVADA DEPARTMENT OF  
TRANSPORTATION,

10 Petitioner,

11 vs.

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

15 Respondents.

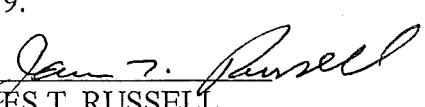
**ORDER DENYING MOTION  
FOR STAY PENDING APPEAL**

16 PETITIONER STATE OF NEVADA DEPARTMENT OF TRANSPORTATION  
17 ("NDOT") having filed herein a Motion for Stay Pending Appeal ("Motion") of this Court's  
18 Findings of Fact, Conclusions of Law and Decision Denying Petition for Judicial Review  
19 ("District Court Decision") dated September 10, 2019, and the Court having considered the  
20 Motion and all responsive pleadings thereto hereby concludes that NDOT has no likelihood of  
21 success on the merits of its appeal of the District Court Decision and that complying with said  
22 Decision will not cause any irreparable harm to NDOT. Therefore,

23 IT IS HEREBY ORDERED that NDOT's Motion for Stay Pending Appeal is DENIED.;

24 IT IS FURTHER ORDERED that NDOT shall comply with this Court's Decision dated  
25 September 10, 2019, in this matter within ten (10) days of the date of this Order.

26 DATED this 14th day of October, 2019.

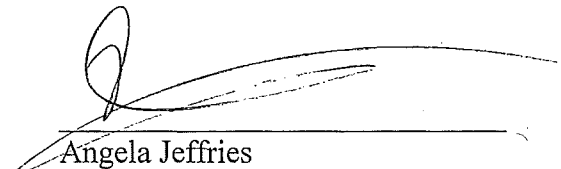
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28   
JAMES T. RUSSELL  
District Judge

**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 14<sup>th</sup> day of October, 2019, I deposited for mailing, postage paid, at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

Lori M. Story  
Senior Deputy Attorney General  
1263 S. Stewart Street  
Carson City, NV 89712

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



Angela Jeffries  
Judicial Assistant, Dept. 1