

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
DEPARTMENT OF  
TRANSPORTATION,

Appellant,

vs.

JOHN BRONDER,

Respondent.

Electronically Filed  
Jan 28 2020 08:31 a.m.  
Supreme Court Case No. 79695  
Elizabeth A. Brown  
Clerk of Supreme Court

*On Appeal from the First Judicial District Court, Carson City, Nevada*

**APPELLANT'S APPENDIX**

**VOLUME 4 OF 5**

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## **CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General and that on this 28th day of January, 2020, I electronically filed the foregoing APPELLANT’S APPENDIX – VOLUME 4, with the Nevada Supreme Court by using the e-filing system for the Nevada Supreme Court. The following participant in the case who is a registered user will be served by the e-filing system.

Thomas J. Donaldson, Esq.  
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tdonaldson@dyerlawrence.com

/s/ Kahra Stenberg  
An Employee of the  
Office of the Attorney General

U.S. DEPARTMENT OF AGRICULTURE  
BUREAU OF AGRICULTURAL ECONOMICS  
WASHINGTON, D. C.

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COLLECT  
AND  
FILE

CASE NO. 1802330-PHL

NEVADA DEPARTMENT OF  
TRANSPORTATION'S  
MOTION TO CONTINUE  
HEARING DATE

NEVADA DEPARTMENT OF  
TRANSPORTATION'S  
MOTION TO CONTINUE  
HEARING DATE

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NEVADA DEPARTMENT OF  
TRANSPORTATION'S  
MOTION TO CONTINUE  
HEARING DATE

## MEMORANDUM OF POINTS AND AUTHORITIES

The case was assigned to the undersigned in mid-April, after the hearing date in this matter had been set, based upon the urgent needs of previous counsel. Affidavit of Lori M. Story, Senior Deputy Attorney General, ¶3. Deputy Attorney General Dominika Batten, the original counsel, has suffered a family loss and is expected to be out of the office for an extended leave. *Id.* ¶ 4. The undersigned has a pre-existing conflict with the hearing date that has been set and, in fact, must travel to Ely, Nevada for the second half of that week in service of another client. *Id.* ¶¶ 6-8.

1 The scheduling conflict involves several parties, most of which are traveling from  
2 Carson City to Ely for a site visit and meeting in an attempt to resolve a dispute over a parcel  
3 of land owned by the State of Nevada and serving the East Ely Railroad Museum. In addition,  
4 this meeting was coordinated with the date for the quarterly meeting of the State Land Use  
5 Planning Advisory Committee (SLUPAC), which is meeting in Ely on June 1, 2018, in order  
6 to conserve travel costs and time use. *Id.* I am counsel for SLUPAC and must attend the  
7 meeting to ensure compliance with the Open Meeting Law and to advise Committee  
8 members on issues before the. SLUPAC members are representatives from all Nevada  
9 Counties and the quarterly meetings are held in varied locations throughout the state to  
10 equalize the travel obligations on the members. *Id.*

11 There are no other attorneys in the Personnel Division available to assist with this  
12 hearing and it would be inefficient to require another attorney to prepare for and present  
13 evidence at the appeal hearing after the undersigned has already become familiar with the  
14 case. *Id.* at ¶ 8.

15 NDOT, through the undersigned, emailed Bronder's representative and asked him  
16 to stipulate to a continuance of the hearing. Although it has been only a short time since  
17 the request was made and no response has been received, it seems expedient to bring the  
18 matter to the hearing officer's attention at the earliest opportunity. *Id.* ¶ 10.

19 Employer has also filed a Motion to Dismiss the matter, which motion is fully briefed  
20 and submitted for decision. *Id.* ¶ 9. Employer does not wish to expend efforts at this time  
21 to respond to document requests and to prepare for the hearing, if the matter will be  
22 dismissed or the hearing continued to a later date. To alleviate this need, the instant  
23 motion is being presented. *Id.*

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1 CONCLUSION

2 For the foregoing reasons, if the appeal is not dismissed based upon NDOT's motion  
3 for such relief, NDOT requests a continuance of the appeal hearing set for May 31, 2018, to  
4 a future date convenient to all parties and the hearing officer.

5 DATED: May 9th, 2018.

6 ADAM PAUL LAXALT  
7 ATTORNEY GENERAL

8 By: 

9 LORI M. STORY (Nevada Bar No. 6835)  
10 Senior Deputy Attorney General  
11 100 N. Carson Street  
12 Carson City, NV 89701  
13 (775) 684-1114 (phone)  
14 (775) 684-1145 (fax)  
15 Lstory@ag.nv.gov

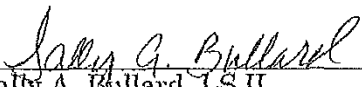
16 Attorneys for Nevada Department  
17 of Transportation  
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**CERTIFICATE OF SERVICE**

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 9th day of May, 2018, service of the **NEVADA DEPARTMENT OF TRANSPORTATIONS MOTION TO CONTINUE HEARING** 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 (Via E-mail): teaton@admin.uv.gov  
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

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





1 counsel for SLUPAC and must attend the meeting to ensure compliance with the Open  
2 Meeting Law and to advise Committee members on issues before the. SLUPAC members  
3 are representatives from all Nevada Counties and the quarterly meetings are held in  
4 varied locations throughout the state to equalize the travel obligations on the members.

5 7. In addition to the SLUPAC meeting and in an effort to coordinate travel and  
6 conserve state resources, it was also decided that a site-visit to the East Ely Railroad  
7 Museum was necessary in ongoing efforts to resolve a cloud in the title of State owned  
8 property in the museum complex. This site visit and meeting is scheduled to occur on  
9 May 30 and 31, 2018.

10 8. There are numerous individuals who will be traveling to Ely from Carson  
11 City for both the site visit and the SLUPAC meeting, so rescheduling of those are not  
12 reasonably possible. In addition, all attorneys in the Personnel Division are working  
13 under heavy caseloads and reassignment of this matter is not reasonably feasible.

14 9. Affiant, on behalf of NDOT, filed a motion to dismiss the appeal on May 2,  
15 2018. The motion is fully briefed and has been submitted for decision.

16 10. On May 7, 2018, Affiant received a document request from Bronder's  
17 representative. Affiant agreed to attempt to locate the requested document and in a  
18 responding email, asked Bronder's representative to stipulate to a continuance of the  
19 hearing date. Although only a couple of days has elapsed since the request to Mr.  
20 Donaldson, Affiant does not wish to advance significant preparation for the hearing at  
21 this time, if it will be dismissed or if the date for the hearing will be continued.

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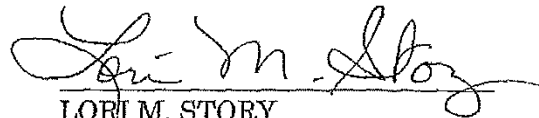
27 ///

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1 11. In an abundance of caution, Affiant has prepared this motion for  
2 continuance to ensure adequate time is available for consideration of the Motion to  
3 Dismiss and the Motion for Continuance.

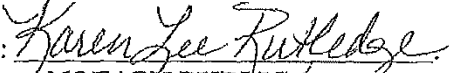
4 Further, your affiant says naught.

5 DATED this 8<sup>th</sup> day of May, 2018.

6  
7   
8 LORI M. STORY  
Senior Deputy Attorney General

9 SIGNED AND SWORN to before

10 me on this 8<sup>th</sup> day of May, 2018.

11 By:   
12 NOTARY PUBLIC



(Las Vegas)  
STATE OF NEVADA  
DEPARTMENT OF TRANSPORTATION  
REPLY TO OPPOSITION

JUN 14 - 7 PM 2:18

RECEIVED  
AND  
FILED

JOHN BRONDER,

Employee,

vs.

STATE OF NEVADA DEPARTMENT OF  
TRANSPORTATION,

Employer.

STATE OF NEVADA

PERSONNEL COMMISSION

HEARING OFFICER

STATE OF NEVADA  
DEPARTMENT OF TRANSPORTATION  
HEARING DIVISION  
OFFICE

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RECEIVED  
AND  
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CASE NO. 1802330-PHL

NEVADA DEPARTMENT OF  
TRANSPORTATION'S  
REPLY TO OPPOSITION TO  
MOTION TO DISMISS

The Employer, Nevada Department of Transportation (Employer or NDOT) by and through its counsel, Adam Paul Laxalt, Attorney General for the State of Nevada, and Lori M. Story, Senior Deputy Attorney General, hereby submits this Reply to Employee's Opposition to the Motion to Dismiss in the above-entitled matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Authority to Make Motion

In his Opposition, Bronder contends that the motion to dismiss is unauthorized. However, NRS 281.641 governs the procedure for such an appeal and specifically requires the matter be conducted in accordance with the "procedures set forth in NRS 284.390 to 284.405, inclusive, and the procedures adopted by the Personnel Commission pursuant to subsection 4." NRS 281.641(1). Nevada Revised Statutes and Nevada Administrative Code provisions contemplate motions before the hearing officer. *See e.g.* NRS 284.391(2) (motion regarding discovery) and NAC 284.786(2) (motion for continuance). Motions are also contemplated under Nevada Personnel Commission Hearing Officer Rules of Procedure ("Rules"). These Rules, which are specifically referenced in NRS 284.641(1), outline the timeline for briefing of motions. Ex. B, Rule 5.<sup>1</sup> Bronder cites no authority stating that a

<sup>1</sup> The NDOT starts this Reply with Ex. B to avoid confusion, where the Motion to Dismiss had one exhibit identified as Exhibit A. As noted on the Rules, these rules were adopted and approved by

1 motion to dismiss would not fall within the parameters of the motions contemplated by the  
2 Rules, and logic dictates that the filing and review of a motion to dismiss would be  
3 warranted where the appeal fails to meet the procedural or substantive requirements to  
4 proceed. In fact, such motions have been entertained and even granted in similar appeals  
5 before the hearing officer. Ex. C.

## 6 **II. Appeal Filing Deadline**

7 Bronder also argues that there is no requirement that a whistleblower appeal be  
8 filed within 10 workdays of the alleged retaliatory action. This disingenious argument is  
9 without any basis in fact. NDOT noted in its motion to dismiss the requirements of NAC  
10 281.305, which specifically requires the appeal to be filed within ten workdays of the  
11 retaliatory act.

### 12 **NAC 281.305 Written appeal by officer or employee who claims retaliatory 13 action was taken against him or her. (NRS 281.641)**

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

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

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

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

24 NAC 281.305 (emphasis added). This requirement is also noted on the appeal form provided by the  
25 Personnel Commission and filed by Bronder (Motion to Dismiss, Ex. A, p. 3), and in Bronder's own  
26 Exhibit 1, wherein the hearing officer in that case acknowledges the filing deadline. Opposition to  
27 Motion to Dismiss, Exhibit 1, p. 8. Thus, the appeal is untimely and must be dismissed on that basis.

## 28 **III. No Right to Appeal Probation Rejection**

Bronder further argues that an employee may appeal his rejection from probation as  
an act of reprisal. This assertion is specifically belied by Nevada law, which states that a  
probationary employee has no right to appeal a lawful release from probation, NAC

the Nevada Personnel Commission on July 11, 2014, qualifying them as official procedural  
authority.

284.458, and by the specific list of actions constituting reprisal as set forth in NRS 281.611(5), which is, in fact, an exhaustive list. This is so because where the Legislature has intended a list to not be exhaustive, it has used the phrase, "including, but not limited to..." See, e.g. NRS 244.366, NRS 278.8115, NRS 548.355; NRS 449.500, NRS 694C.215.<sup>2</sup> In the absence of this broadening language, the statutory wordings must be narrowly construed and the definition of the word "reprisal" set forth in NRS 281.611(5) must be given its plain and specific meaning as identified within that statute. Notably, release from probation is not on the list.

Here, Bronder was released from probation because he failed to meet standards on at least two measures of his work performance standards and was found by management to be unable to perform the Management I position adequately to assure his success going forward. His release was lawful and is not appealable. Neither is it an act or reprisal as defined by NRS 281.611(5).

#### IV. Report Must Be Outside Organization

Bronder argues that he is not required to report the improper governmental action to someone outside the agency. This argument has been presented to Nevada courts on numerous occasions, as set out in the motion to dismiss, and in every one the court have held that such reports must be made outside the agency to warrant whistleblower protections. See e.g. *Ainsworth v. Newmont Mining Corp.*, 128 Nev. 878, 381P.3d 588 (2012) (whistleblower protection limited to employees who reported activity to governmental agency outside of the company); *Biesler v. Professional Systems Corp.*, 321 F.Supp.2d 1165 (D. Nev. 2011) (employee's exposure of allegedly fraudulent and illegal conduct to individuals within company was insufficient under Nevada law for whistleblower protection); *Wiltzie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432 (1989) (internal reporting of improper activity to employer rather than appropriate authorities not sufficient to support tortious discharge); see also *Reuber v. Reno Dodge Sales, Inc.*, 2013

<sup>2</sup> This list is not exhaustive. The undersigned's Westlaw search for the phrase in Nevada law revealed in excess of 400 examples of this phrase being used in the Nevada Statutes.

1 WL 7158571 (Nev., Nov. 1, 2013) (unpublished decision) (reporting within company not  
2 eligible for whistleblower protections).

3 The provision cited by Bronder to support this argument has been in place in statute  
4 since 1995, long before most of the decisions cited above and still the courts have ruled that  
5 the report must be made outside the agency. The decisions cited above and others that may  
6 be available, including the decision attached as Exhibit C, do not require that the report be  
7 made to any specific person or persons, just that they be authorities outside the agency or  
8 corporation. Because Bronder did not report the alleged wrongdoing outside the agency,  
9 he is not entitled to whistleblower protections.

10 **V. Hearing Officer Cannot Grant Requested Relief**

11 Finally, Bronder misdirects this hearing officer to more general statutes and  
12 regulations, when the specific whistleblower statute clearly limits the hearing officer's  
13 authority in this instance. *Williams v. State Department of Corrections*, 2017 WL 4456980,  
14 402 P.3d 1260, 1265 (Nev. 2017); *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Adv. Op. 100, 363  
15 P.3d 1168 (Nev. 2015) ("Where a general and a special statute, each relating to the same  
16 subject, are in conflict and they cannot be read together, the special statute controls.")  
17 quoting *Laird v. State Publ Emps. Ret. Bd.*, 98 Nev. 42, 45 639 P.2d 1171, 1173 (1982).  
18 NRS 281.641(2), the whistleblower appeal statute, specifically states that if a hearing  
19 officer determines that an action was retaliatory, the officer "may issue an order directing  
20 the proper person to desist and refrain from engaging in such action." Here, Bronder  
21 requests that the hearing officer "restore credit for 11 months of probation served as a  
22 Manager (06.224)[, r]estore sick leave forfeited upon termination [, r]estore compensation  
23 level to grade 43.step 8." Motion to Dismiss Ex. A, p. 1.

24 Bronder's appeal must be dismissed because the relief requested is not within the  
25 authority granted the hearing officer by the whistleblower statute, which applies to this  
26 appeal.

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1 **VI. CONCLUSION**

2 Bronder's appeal is untimely and no appeal is available to challenge a lawful release  
3 from probation. In addition, Bronder did not report any improper governmental action  
4 outside the Department of Transportation. Finally, the relief Bronder requests is outside  
5 the Hearing Officer's authority to grant. Accordingly, the Hearing Officer should dismiss  
6 this appeal.

7 DATED: May 4<sup>th</sup>, 2018.

8 ADAM PAUL LAXALT  
9 ATTORNEY GENERAL

10 By: 

11 LORI M. STORY (Nevada Bar No. 6835)  
12 Senior Deputy Attorney General  
13 100 N. Carson Street  
14 Carson City, NV 89701  
15 (775) 684-1114 (phone)  
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17 Lstory@ag.nv.gov

18 Attorneys for Nevada Department  
19 of Transportation  
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CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 4th day of May, 2018, service of the NEVADA DEPARTMENT OF TRANSPORTATION'S REPLY TO OPPOSITION TO MOTION TO DISMISS 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 (Via E-mail): teaton@admin.nv.gov  
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@dverlawrence.com  
Dyer Lawrence, LLP  
2805 Mountain Street  
Carson City, NV 89703  
(775) 885-1896 office  
(775) 885-8728 facsimile

Sally G. Bullard  
An employee of the Office of Attorney General

# EXHIBIT B

000538

000553

**NEVADA PERSONNEL COMMISSION  
HEARING OFFICER RULES OF PROCEDURE**

**1. GENERAL PROVISIONS**

**1.1. Applicability**

- a) These rules shall be known and may be cited as Hearing Officer Rules of Procedure.
- b) Scope: Hearings related to dismissals, suspensions, demotions and involuntary transfers
  - 1. NAC 284.774 to 284.818, inclusive, govern hearings in all cases relating to dismissals, suspensions, demotions, and involuntary transfers before the hearing officer and hearings for a written appeal filed pursuant to NRS 281.641.
  - 2. Except as otherwise provided in this document, the hearing officer shall use the hearings procedures established in NAC 284.774 to 284.818, inclusive and any hearings procedures provided by the Division of Human Resource Management if interested parties have proper notice of any procedural changes or are not prejudiced thereby. A copy of the hearings procedures is available by contacting the Division of Human Resource Management at 100 N. Stewart St., Suite 200, Carson City, Nevada 89701 or on the Division's website at:  
<http://hr.nv.gov/uploadedFiles/hrnvgov/Content/Resources/Publications/Hearing%20Officer%20Rules.pdf>
  - 3. Each hearing officer may adopt supplementary rules governing practice before him or her to the extent they are not inconsistent with these rules, NRS 281 and 284, and NAC 284. The supplementary rules must be made available, in writing, to all parties not less than five business days before a hearing.
- c) Scope: Hearings related to claim of reprisal or retaliatory action for disclosing improper governmental action ("Whistleblower")
  - 1. NAC 281.305 to 281.315 and NAC 284.774 to 284.806, inclusive, NAC 284.818 govern the procedure for conducting a hearing for a written appeal filed pursuant to NRS 281.641.
  - 2. NRS 281.641 (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.

**1.2. Organization of Personnel Hearing Officer System**

- a) Hearing officers for personnel appeals are appointed by the Personnel Commission pursuant to NRS 284.091.

### 1.3. Governing Statutes and Regulations

- a) All hearings conducted before the hearing officer shall be held in accordance with the applicable provisions of NRS 281 and 284, NAC 284, and 233B, Nevada Administrative Procedures Act, to the extent referenced in NRS 284.

## 2. FILING AND SETTING OF CASES

### 2.1. Filing an Appeal

- a) Within 10 working days after the effective date of the challenged involuntary transfer, suspension, demotion, dismissal, a permanent classified employee may request a hearing before the hearing officer to determine the reasonableness of the action.
- b) Within 10 working days after the date of an alleged reprisal or retaliation, a State officer or employee who claims such action was taken against him or her for disclosing information concerning improper governmental action may request a hearing before the hearing officer.
- c) A request for a hearing before a hearing officer shall be made in writing and addressed to the Administrator of the Division of Human Resource Management, 100 N. Stewart St., Suite 200, Carson City, Nevada 89701. Requests will also be accepted by fax. Appeals must be filed on an Appeal of "Whistleblower" Retaliation Under the Provisions of NRS 281.641 (NPD-53) or Request for Hearing Regarding Dismissal, Suspension, Demotion, or Involuntary Transfer (NPD-54) form and must be signed by the employee. These forms can be found on the Division of Human Resource Management website at <http://hr.nv.gov/Resources/Forms/Hearings/Hearings/>.

### 2.2. Assignment of Hearing Officers

- a) Method of selection
  1. For each hearing requested in a claim relating to a dismissal, suspension, demotion, involuntary transfer, or reprisal or retaliatory action, the Senior Appeals Officer of the Hearings Division shall provide to each party to the claim a list of three qualified Hearings Division Appeals Officers (referred to herein as hearing officers).
  2. Each party may strike one name from the list and shall return the list with the remaining names to the Senior Appeals Officer of the Hearings Division not later than seven working days after receipt of the list.
  3. Except as otherwise provided in subsection paragraph 5, each person whose name is struck from the list pursuant to paragraph 2 is ineligible to serve as a hearing officer in that claim.
  4. Except as otherwise provided in paragraph 5, the Senior Appeals Officer of the Hearings Division shall select a hearing officer for the hearing from among the persons whose names were not struck from the list pursuant to paragraph 2.

5. If a strike list is not returned from either party within seven working days the Senior Appeals Officer of the Hearings Division may assign a hearing officer based on the information available.

6. If for any reason all of the hearing officers whose names were not struck from the list pursuant to paragraph 2 are unqualified or otherwise unavailable to serve as a hearing officer for the hearing, the Senior Appeals Officer of the Hearings Division will provide a new list of hearing officers to the parties in the manner provided in this section.

- a) The Senior Appeals Officer of the Hearings Division will notify the selected hearing officer and provide case materials as soon as the determination of assignment is made.
- b) If a hearing officer finds it necessary to recuse himself or herself from hearing an appeal, the basis for said recusal shall be documented in writing and addressed to the Senior Appeals Officer of the Hearings Division, who will then provide a new list of hearing officers to the parties in accordance with the provisions of 2.2(a).

### 2.3. Setting of cases

- a) Pursuant to NRS 284.390, the hearing officer shall schedule an employee's hearing within 20 working days after receipt of the employee's written request by the Division of Human Resource Management unless this time period is waived in writing by the employee or there is a conflict with the hearing calendar of the hearing officer. The hearing must be scheduled for the earliest possible date.
- b) Hearings may be scheduled by telephone and thereafter shall be confirmed in writing.
- c) In the interest of convenient, expeditious and complete determination of matters, the Senior Appeals Officer of the Hearings Division may consolidate hearing proceedings involving any number of issues.

## 3. COMMUNICATION WITH THE HEARING OFFICER

### 3.1 Communication with the Hearing Officer

- a) Any communication with the hearing officer or the clerk to the hearing officer that is by email, letter or facsimile must demonstrate that all concerned parties have been copied on the communication.
- b) When responding to an email from counsel or the hearing officer, use the "Reply to All" feature, so that all parties, counsel and the hearing officer know that everyone has received the communication.

### 3.2 Filing of Documents

- a) Filing of a document occurs when the original is received by and is in the actual physical custody of the hearing officer.
- b) A document over five pages in length may not be filed by facsimile unless so ordered or approved in advance by the Hearings Division. If a document which is five pages or less in length is received by facsimile, the document will be accepted and the date of receipt stamped on the document. If a document is received by facsimile and the original of the document is received within 3 business days after it is received by facsimile, the original will be stamped with the date it is received, but shall be deemed filed on the date the facsimile was received.
- c) A document may be filed by electronic mail upon prior written approval of the Hearings Division. A document filed by electronic mail must be:
  - i. Accompanied by an acknowledgment of receipt.
  - ii. Sent to the clerk for the hearing officer and to each party to the proceeding.

## 4. SUBPOENAS, PLEADINGS AND DOCUMENTS, DISCOVERY

### 4.1 Subpoenas

- a) The hearing officer, upon application of any party to a hearing, may issue subpoenas requiring the attendance and testimony of witnesses at the proceeding. Subpoenas must be served a minimum of five days prior to the hearing date.
- b) A request for subpoena shall be either in writing or on the record identifying the witness and stating how the witness' testimony is material and necessary to the proceedings before the hearing officer.
- c) Per diem and travel expenses must be paid by the party at whose request the witness is subpoenaed. The hearing officer may award as costs the amount of all such expenses to the prevailing party.

### 4.2. Pleadings and documents

- a) All pleadings, written motions and documents prepared for submission to the hearing officer shall be:
  - 1. In legible type on clean, white paper, 8 1/2 by 11 inches in size, and lined and numbered in the left margin.
  - 2. Free of any personal identifying information or such information redacted, in particular any Social Security Numbers. All documents must be reviewed and signed certification required by NRS 239B.030 must be submitted. Evidence packets or documents containing personal identifying information may be rejected by the hearing officer.

3. Two-hole punched at the top and if the submission is over 25 pages, it must be secured with "ACCO"-type fasteners.

b) Evidence packets:

i. Must contain a comprehensive index and separately numbered pages.

ii. Must not contain any double-sided documents.

b) Parties to an action shall furnish copies of any pleadings, documents or written motions to one another.

c) The hearing officer shall refuse to file any document or pleading which is not properly signed by all persons, or which does not comply with these rules.

d) A document or piece of physical evidence sought to be introduced during the hearing must first be identified for the record and the hearing officer may request the production of such records and the appearance of such persons as he or she requires.

#### 4.3. Discovery

a) The extent to which discovery is allowed, if at all, is at the discretion of the hearing officer who must make every effort to ensure that the discovery, if any, is neither costly nor burdensome.

b) Discovery methods allowed by the hearing officer shall be utilized to assist parties in preparing to meet their responsibilities and protect their rights without unduly delaying, burdening or complicating the hearing process and with due regard to the rights and responsibilities of other parties and persons affected.

c) If a party from whom discovery is sought objects to the discovery, the party seeking the discovery may file a motion with the hearing officer to obtain an order compelling discovery. In the disposition of the motion, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues in controversy are significant enough to warrant the discovery. Discovery motions shall include certification by moving counsel that after consultation with opposing counsel they have been unable to resolve the matter.

#### 5. MOTIONS: POINTS AND AUTHORITIES AND DECISIONS, EXTENSION OF TIME

##### 5.1. Motions: Points and authorities and decisions

- a) All motions shall be accompanied by points and authorities and any exhibits or affidavits relied upon.
- b) The responding party shall file and serve upon all parties, within 10 days after service of a motion, answering points and authorities and counter-affidavits.
- c) The moving party may serve and file reply points and authorities within five days after service of the answering points and authorities.
- d) The hearing officer may hold a telephone conference with parties on any motion.
- e) The hearing officer shall render a decision on the motion within 10 days of the moving party's final reply. Notice of the decision shall be provided to all parties at least five days prior to the scheduled hearing.

#### 5.2. Motions: Extension of time

- a) A request to extend the deadline for filing any motion shall be made at least five days prior to the deadline, with notice to all counsel and the hearing officer.
- b) No ex parte application for extension of time will be granted unless a satisfactory showing is made to the hearing officer that a good faith effort has been made to notify opposing counsel of the motion. If the hearing officer finds good cause therefore, he or she may order a temporary extension pending a determination of the motion.

### 6. PREHEARING CONFERENCES

6.1. The hearing officer may require a prehearing conference upon his or her own motion or upon motion of a party at which both parties and their counsel shall meet with the hearing officer to consider:

- a) Simplification of the issues;
- b) Necessity or desirability of amending documents for the purposes of clarification, simplification or limitation;
- c) Stipulations as to undisputed facts or contents and authenticity of documents;
- d) Limitation of the number of witnesses;
- e) Such other matters as may tend to expedite the disposition of the proceedings and to ensure a just conclusion.



6.2. Statements of counsel made at a prehearing conference are not admissible in evidence unless so provided by a prehearing order.

## 7. HEARING STATEMENTS

7.1. Five calendar days before the hearing, each party may serve and file a hearing statement which shall set forth the following matters in the following order:

- a) A concise statement of the claimed facts supporting the party's claims or defenses.
- b) A statement of admitted or undisputed facts.
- c) A statement of issues of law supported by a memorandum of authorities.
- d) Summaries or schedules referring to exhibits, and reasons which clearly reflect the claims, defenses, or evidence of the party, together with references to the records or other sources upon which such summaries or schedules are based
- e) The names and addresses of all witnesses, except impeaching witnesses.
- f) Any other appropriate comment, suggestion, or information for the assistance of the hearing officer in the hearing of the case.
- g) Certification by counsel that discovery has been completed, unless late discovery has been allowed by order of the hearing officer.

## 8. CONTINUANCES

8.1. No continuance of a hearing shall be granted except for good cause shown. Continuances shall be denied or granted as determined by the hearing officer and the hearing officer shall put in the file a record of continuances by party. Request for continuance shall be made in the following manner:

- a) A party may request a continuance not later than five business days before the date of the scheduled hearing by filing a written motion or stipulation with the hearing officer. Notice of the motion or stipulation and a copy of the motion or stipulation must be sent to each party to the hearing and to the clerk to the hearing officer.
- b) A party may contest a request for continuance submitted by another party by filing a written motion with the hearing officer not later than two business days after receiving the notice of the request for a continuance. Notice of the motion and a copy of the motion must be sent to each party to the hearing and to the clerk to the hearing officer.

- c) The hearing officer shall not grant a continuance requested on the day of a scheduled hearing unless 1) the hearing officer, any party, the legal counsel for a party or a primary witness cannot attend because of an emergency, 2) the hearing exceeds the time allotted for the day; or 3) the hearing officer recesses the hearing until a future date.
- d) If the hearing officer recesses a hearing pursuant to a request for a continuance which is filed on the day of the scheduled hearing, the hearing must be held not later than 20 business days after the date of request for a continuance, unless there is a conflict with the schedule of the hearing officer.

8.2. Any and all cases shall have a disposition within a six month period from the date the appeal is filed unless good cause exists.

## 9. CONDUCT OF HEARINGS

### 9.1. Authority of Hearing Officer

A hearing officer presiding over a hearing shall have all powers necessary and appropriate to conduct a full, fair and impartial hearing, including the following:

- a) To administer oaths and affirmations;
- b) To rule upon offers of proof and receive relevant evidence;
- c) To regulate the course of the hearing and the conduct of the parties and their counsel;
- d) To consider and rule upon procedural requests;
- e) To examine witnesses and direct witnesses to testify, limit repetitive or cumulative testimony and set reasonable limits on the amount of time each witness may testify;
- f) To conclude the hearing at such time as all relevant testimony has been presented; and
- g) To issue findings and recommendations and render decisions.

### 9.2. Sanctions for Noncompliance

If a party or attorney/representative fails or refuses to comply with the rules, the hearing officer may make such orders and impose such sanctions as are just, including, but not limited to the following:

- a) Continue any hearing until the disobedient party or attorney/representative has complied with the requirement imposed.

- b) Require the disobedient party to pay the other party his or her expenses, including a reasonable attorney's fee incurred in preparing for and attending such hearing.
- c) Dismiss the case.

#### 9.3. Communications with the Hearing Officer

- a) A party shall not communicate with the hearing officer regarding the merits of a case 1) except in the presence of all parties to the hearing; or 2) unless all parties to the hearing are notified of the communication in advance.
- b) The hearing officer shall not initiate ex parte communications with any interested person or party, directly or indirectly, regarding any matter in connection with a substantive issue.
- c) Nothing shall prevent the hearing officer from communicating about routine matters such as requests for continuances or opportunities to inspect the file, as long as all parties are informed of the substance of the communication. The date and type of communication, the persons involved and the results of such routine communications shall be part of the record.

#### 9.4. Settlement Agreements

- a) When a case is settled prior to the hearing, the parties or their attorney/representative must notify the hearing officer no later than 24 business hours prior to the scheduled hearing; this includes cancellations for hearings scheduled on a Monday.
- b) Unless specifically requested by the parties, the hearing officer may not initiate settlement negotiations on the date scheduled for the hearing.
- c) Unless otherwise agreed upon in writing by all parties, an offer or demand of settlement made by a party must not be disclosed to or proposed by the hearing officer before the issuance of a final decision by the hearing officer.
- d) The hearing officer has no authority to change, amend or modify any settlement agreement of the parties to the proceeding

#### 9.5. Hearings

- a) All hearings must be open to the public except on motion of either party for good cause shown. On the motion of either party, the hearing officer shall exclude witnesses not at the time under examination from the hearing room, except the parties to the proceeding.

- b) The employee may represent himself or herself at the hearing or be represented by an attorney or other person of the employee's own choosing.

9.6. The following shall be the order of proceeding of a hearing related to dismissals, suspensions, demotions and involuntary transfers:

- a) Presentation, argument and disposition of motions preliminary to the hearing.
- b) Opening statement for the employer.
- c) Opening statement for the employee, unless reserved.
- d) Presentation of the employer's case, followed by cross-examination.
- e) Presentation of the employee's case, followed by cross-examination.
- f) The parties may respectively offer rebutting testimony only, unless the hearing officer permits additional evidence upon the original cause.
- g) Argument for the employer.
- h) Argument for the employee.
- i) Closing argument for the employer.

9.7. The following shall be the order of proceeding of a hearing related to a claim of reprisal or retaliatory action for disclosing information concerning improper governmental action:

- a) Presentation, argument and disposition of motions preliminary to the hearing.
- b) The opening statement for the State officer or employee.
- c) The opening statement for the employer, unless reserved.
- d) Presentation of the State officer's or employee's case, followed by cross-examination. The State officer or employee must establish that:
  - 1. He or she was a State officer or employee on the date of the alleged reprisal or retaliatory action;
  - 2. He or she disclosed information concerning improper governmental action, and
  - 3. The alleged reprisal or retaliatory action was taken against him or her within two years after the date he or she disclosed the information concerning improper governmental action.
- e) If these facts are established, presentation of the employer's case, followed by cross-examination, to establish that the employer did not engage in reprisal or

retaliatory action or that the action was taken for a legitimate business purpose.

- f) If the employer establishes a legitimate business purpose for the 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 action.
- g) The parties may respectively offer rebutting testimony only, unless the hearing officer permits additional evidence upon the original cause.
- h) The argument for the State officer or employee.
- i) The argument for the employer.
- j) The closing argument for the State officer or employee.

#### 10. TESTIMONY AND EVIDENCE

10.1. All testimony and exhibits offered at the hearing must be relevant and bear upon the matter in contention. Any testimony or exhibits which are considered by the hearing officer as not meeting this criterion may properly be excluded.

##### 10.2. Testimony

- a) All testimony must be under oath administered by the hearing officer, except that the hearing officer may, for good cause shown, accept the sworn affidavit of a witness in lieu of the witness's appearance.
- b) At the beginning of his or her testimony, each witness who has not previously testified in the hearing shall state his or her name, business address and business/department, and job title or position.
- c) Testimony may be presented in the form of a statement or questions and answers.
- d) The hearing officer may allow testimony by telephone or videoconference in consideration of the cost or feasibility of the witness being present at the hearing, the nature and duration of the expected testimony, or whether there is a good reason the witness is unavailable to testify in person.
- e) Testimony is recorded and may be transcribed when necessary.

##### 10.3. Evidence

- a) The hearing officer shall determine the evidence based upon the charges and specifications set forth by the appointing authority in the appropriate

documents. Additional evidence beyond the scope of the charges shall not be considered.

- b) An employer or employee's past performance by way of an act or a failure to act may be shown by competent evidence.
- c) Reports, evaluations, and other written evidence may be considered only upon a showing that the parties were made aware of the contents of the material.
- d) The hearing officer shall consider the objection of either side to the introduction of evidence. Competence and relevance must be the primary test in ruling on objections
- e) All documents and exhibits offered into evidence at the hearing must be marked before submission in the following manner: employee/petitioner shall use numbers, employer/respondent shall use letters. Each party to the hearing must bring four complete copies of materials to the hearing.
- f) Any item offered into evidence must be properly authenticated and, if received, must be marked by the hearing officer or clerk with a distinguishing number or letter. The representative for the opposing party is entitled to examine the exhibit when it is offered.
- g) Technical rules of evidence do not apply at the hearing.
- h) The hearing officer shall return all documents and materials related to a case to the clerk within seven business days from the date of the decision.

## 11. FINDINGS AND DECISION

- 11.1. The hearing officer shall make no assumptions of innocence or guilt but shall be guided in his or her decision by the weight of the evidence as it appears to him or her at the hearing.
- 11.2. At the conclusion of the hearing the hearing officer shall take the case under submission and shall render his or her decision in writing, including findings of fact and conclusions of law and opinions.
- 11.3. If the hearing officer determines that the dismissal, demotion or suspension was without just cause as provided in NRS 284.385, the action must be set aside and the employee reinstated with full pay for the period of dismissal, demotion or suspension. The hearing officer may determine the reasonableness of the disciplinary actions and recommend appropriate levels of discipline, but only the appointing authority has the power to prescribe the actual discipline imposed on a permanent classified employee.

- 11.4. In a case regarding alleged reprisal or retaliatory action for reporting improper governmental action if the hearing officer determines that the action taken was a reprisal or retaliatory action, he or she may issue an order directing the proper person to desist and refrain from engaging in such action. The hearing officer shall file a copy of his or her decision with the Governor or any other elected State officer who is responsible for the actions of that person.
- 11.5. The hearing officer shall notify the parties in writing of his or her decision, findings and recommendations within 30 days from the date of the hearing.
- 11.6. The decision of the hearing officer is binding on the parties.
- 11.7. A petition for rehearing or reconsideration must be filed with the hearing officer within 15 days after the date of service of the hearing officer's decision. An order granting or denying the petition must be served on all parties at least five days before the expiration of the time for filing the petition for judicial review. If the petition is granted, the subsequent order shall be deemed the final order for the purpose of judicial review.
- 11.8. Any petition for judicial review of the decision of the hearing officer must be filed in accordance with the provisions of chapter 233B of NRS.

# EXHIBIT C

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RECEIVED

APR 10 2018

BEFORE THE NEVADA DEPARTMENT OF ADMINISTRATION

FILED

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

HEARINGS DIVISION

APR 10 2018

HEARINGS DIVISION

ANTHONY CANNON,

Petitioner,

Appeal No. 1809587-MG

v.

STATE OF NEVADA, ex rel. its  
DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, DIVISION OF  
WELFARE AND SUPPORTIVE  
SERVICES,

Respondent.

**ORDER DISMISSING WHISTLEBLOWER APPEAL**

Petitioner-Employee, Anthony Cannon is proceeding in proper person in this action. Respondent-Employer, Department of Health and Human Services, Division of Welfare and Supportive Services is represented by and through counsel, Adam Paul Laxalt, Esq., Attorney General for the State of Nevada, and Linda C. Anderson, Esq., Chief Deputy Attorney General.

This case involves an appeal of whistleblower retaliation under the provisions of NRS 281.641. The appeal is dated January 9, 2018.

The Department of Health and Human Services ("Employer") had moved to dismiss the whistleblower appeal filed by Anthony Cannon for failing to state a cause of action. On March 22, 2018, I issued an Order allowing Mr. Cannon additional time to file an Amended Petition alleging sufficient facts to overcome a motion to dismiss for failing to state a claim upon which relief may be granted.

Mr. Cannon thereupon served an Amended Petition.

The amendment consists of a three (3) page narrative. It also includes copies of e-mails and communications between Mr. Cannon and persons in his chain of command at the Nevada Department of Health and Human Services which reflect the genesis of this underlying dispute.

Mr. Cannon is claiming retaliation and differential treatment due to his race.

The dispute initially began because Mr. Cannon objected to his seven (7) month performance appraisal. Mr. Cannon filed a grievance, which was initially rejected. He went to the next step in

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1 the grievance process and it was, again, rejected. He is claiming that following that grievance  
2 process, he has been subject to differential treatment by his employer, including being placed on  
3 administrative leave and being the subject of an internal investigation.

4 Mr. Cannon's retaliation claim is brought under the Nevada whistleblower protection statute  
5 codified in NRS 281.611, et seq. The declared public policy of NRS Chapter 281's disclosure  
6 provisions is to encourage state and local officers and employees "to disclose to the extent not  
7 expressly prohibited by law, improper governmental action, and it is the intent of the legislature to  
8 protect the rights of the person to make such a disclosure."

9 NRS 281.641(1) allows a state officer or employee, who believes that she or he has  
10 experienced retaliation for having disclosed information concerning improper governmental action,  
11 to apply to a hearing officer for determination of the retaliation allegations. The hearing officer must  
12 determine whether the action taken was a reprisal or retaliatory action and may issue an order  
13 directing the proper person to desist and refrain from engaging in such action. Simonin v. University  
14 and Community College System of Nevada, 122 Nev. 187, 128 P.3d 1057 (2006).

15 There are certain prima facie elements that a person claiming whistleblower status and  
16 inappropriate retaliation must advance. The first element is that the person claiming such status must  
17 be an actual 'whistleblower' as defined by Nevada law. The essence of this is that a person must  
18 have disclosed information concerning improper governmental action.

19 The second element is that within two years of making such disclosure, that person is  
20 victimized by a reprisal or retaliatory action done as a consequence of the disclosure. In order to be  
21 an actionable claim under Nevada law, the retaliation has to be an act accomplished within two years  
22 of the original disclosure of improper governmental action.

23 There are standards set forth in the statutory scheme which dictate the proper contents of the  
24 written appeal. NRS 281.641 reflects that "(T)he written appeal must be accompanied by a  
25 statement that sets forth, with particularity: (a) *The facts and circumstances under which the*  
26 *disclosure of improper governmental action was made; and (b) The reprisal or retaliatory action*  
27 *that is alleged to have been taken against the estate officer of employee .*

28 Mr. Cannon's Amended Petition does set forth, with particularity, the factual basis of his

1 allegations of reprisals and retaliatory actions by his employer. Without a doubt, the allegations are  
2 sufficient to satisfy the second element of NRS 281.641.

3       However, once again, in describing the whistleblowing activity, his Amended Petition  
4 remains legally and factually deficient. I would, again, note that under Nevada law, a disclosure to  
5 one's "chain of command" is legally insufficient to constitute a disclosure under the statutory  
6 scheme. Under Wiltsie v. Baby Grand Corp, 105 Nev. 291, 774 P. 2d 432 (1989), the Nevada  
7 Supreme Court required that a disclosure of improprieties to be actionable under the whistleblower  
8 statutes must be made to an outside authority. There is not even an allegation of fact anywhere in  
9 the Amended Petition which would suggest that any outside authority was ever involved in any of  
10 the alleged employer's acts of misconduct. The grievance was handled completely within the chain  
11 of command. The alleged retaliations are all internal to the employer.

12       The Wiltsie case was discussed and amplified in Biesler v. Professional Systems, 321 F  
13 Supp.2d 1165 (D. Nev. 2004). In Biesler, the disclosure occurred when plaintiff "pointed out  
14 fraudulent and potentially illegal activities to management and to her CEO . . ." The court held that  
15 such conduct did not constitute a protected disclosure, as it was not made to someone outside of the  
16 organizational hierarchy.

17       As set forth in Schlang v. Key Airlines, Inc., 794 F. Supp 1493 (D. Nev 1992): "Wiltsie  
18 clearly holds that a complaint registered with the employer is a private or proprietary action that is  
19 not entitled to public policy protection." Id. at 1504.


20       I realize that Mr. Cannon is proceeding in proper person. I have reviewed the Amended  
21 Petition as favorably to him as possible to determine if under any view of the alleged facts, a valid  
22 whistleblower claim could be made. In fact, if every fact alleged in his Amended Petition were  
23 completely true, it would still not establish a valid whistleblower claim under NRS 281.641.

24       Neither the original Petition nor the Amended Petition reflect any facts with respect to a  
25 disclosure of improper governmental action to an outside authority. I would note that other  
26 jurisdictions seem to take a more expansive view of what actually constitutes a disclosure.  
27 However, the Nevada Supreme Court has spoken quite clearly on the issue and, as a Hearing Officer,  
28 I am bound by precedent. As such, I find that the Amended Charge does not set forth a colorable

1 claim that a protected disclosure was made by Mr. Cannon to an outside authority entitling him to  
2 whistleblower protection. Pursuant to Nevada law, as set forth herein, the Amended Petition is  
3 legally and factually deficient and fails to state a claim upon which relief may be granted.

4 As such, this action is dismissed with prejudice.

5 DATED this 9 day of April, 2018.

6  
7   
8 MARK L. GENTILE  
Hearing Officer

9 **NOTICE:** Pursuant to NRS 233B.130, should any party desire to appeal this final  
10 determination of the Appeals Officer, a Petition for Judicial Review must be filed with the  
11 District Court within 30 days after service by mail of this decision.  
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1 **CERTIFICATE OF SERVICE**

2 The undersigned, an employee of the State of Nevada, Department of Administration,  
3 Appeals Division, does hereby certify that on the date shown below, a true and correct copy of the  
4 foregoing **ORDER DISMISSING WHISTLEBLOWER APPEAL**, was duly mailed, postage  
5 prepaid, OR transmitted via interoffice mail to the following:

6 ANTHONY CANNON  
7 227 RECOLLECTION CT  
8 N LAS VEGAS NV 89032

9 DEPARTMENT OF HEALTH AND HUMAN SERVICES  
10 RICHARD WHITLEY, DIRECTOR  
11 4150 TECHNOLOGY WAY  
12 CARSON CITY NV 89706

13 MELODY DULEY, PERSONNEL OFFICER III  
14 DEPARTMENT OF HEALTH & HUMAN SERVICES  
15 1470 E COLLEGE PKWY  
16 CARSON CITY NV 89706

17 LINDA ANDERSON, CHIEF DEPUTY ATTORNEY GENERAL  
18 555 E WASHINGTON AVE, SUITE 3900  
19 LAS VEGAS NV 89101

20 Dated this 10<sup>th</sup> day of April, 2018.

21   
22 D Gambelluca, Legal Secretary II  
23 Employee of the State of Nevada  
24  
25  
26  
27  
28

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STATE OF NEVADA  
DEPT OF ADMINISTRATION  
HEARINGS DIVISION  
APPEAL OFFICE

2018 MAY -2 AM 11:15

NEVADA DEPARTMENT OF  
TRANSPORTATION'S  
MOTION TO DISMISS

/ / /

1 **II. STATEMENT OF FACTS**

2 On June 6, 2016, Bronder was hired to fill a Manager I position in the Department  
3 of Transportation. As a new employee, Bronder was required to complete a one-year  
4 probationary period before becoming a permanent classified employee. NRS 284.290. A  
5 probationary employee may be dismissed at any time during the probationary period, so  
6 long as the dismissal complies with regulations. *Id.*, NAC 284.458. On February 13, 2017,  
7 while still a probationary employee, Bronder laterally transferred to another Manager I  
8 position within NDOT. This transfer did not change his probationary status. Bronder was  
9 ultimately rejected from probation on May 5, 2017, and did not become a permanent  
10 classified employee for NDOT. Probationary employees do not have appeal rights to  
11 challenge a rejection from probation. NAC 284.458.

12 Bronder also alleges that the withdrawal of an October, 2017 NDOT recruitment  
13 notice for a significant management position in the Elko district without filling the position  
14 was an indication of continuing reprisal by NDOT "for [his] exposure and knowledge of the  
15 improper governmental action...." Exhibit A, Employee Whistleblower Appeal. Although  
16 probationary employees do not have appeal rights to challenge their rejection, and the  
17 withdrawal of a recruitment listing before any interviews were conducted is not improper,  
18 Bronder filed a whistleblower appeal on January 16, 2018, in hopes of regaining his NDOT  
19 position permanently. According to his appeal document, Bronder seeks restoration of his  
20 11 months of probation, restoration of sick leave forfeited upon termination and restoration  
21 of a compensation level to grade 43, step 8. Exhibit A.

22 **III. LEGAL ARGUMENT**

23 NRS 281.641(1) states that a state officer or employee may file a written appeal "if  
24 any reprisal or retaliatory action is taken against a state officer or employee who discloses  
25 information concerning improper governmental action[.]" NRS 281.611 defines "improper  
26 governmental action" as an action which violates state law, or violates an ordinance, or is  
27 an abuse of authority, or gross waste of public money." Only reports made for a public  
28 purpose obtain whistleblower protections. *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 293

1 (1989), 774 P.2d 432, 433 (1989). As a result, the report of the improper governmental  
2 action must be made outside the organization – to the appropriate authorities. Otherwise,  
3 the report is not one made for a public purpose, but rather, for a private or proprietary  
4 purpose. *Id.*

5 Procedurally, whistleblowers are required to file their appeal within 10 workdays of  
6 the act of reprisal and it must be submitted on a form provided by the Division of Human  
7 Resource Management with an attached summary which identifies the improper  
8 governmental action, the date of the disclosure, and to whom disclosure was made. NAC  
9 281.305. The Hearing Officer should dismiss this appeal because Bronder's appeal was  
10 untimely and unauthorized as to his release from probation<sup>1</sup> and he has not stated facts  
11 showing that he is, in fact, a whistleblower as defined by law. Finally, the relief sought is  
12 not within the hearing officer's authority granted by NRS 281.641(2).

13 A. Bronder's Appeal of the Release From Probation is Untimely

14 As noted above, Bronder was released from his probationary employment with  
15 NDOT on May 5, 2017. Ten workdays after May 5, 2017 was May 19, 2017. He did not file  
16 this whistleblower appeal until January 16, 2018, approximately eight months late. Thus,  
17 Bronder's appeal of any claimed reprisal by means of the release from probation is untimely  
18 and must be dismissed.

19 B. Bronder Cannot Appeal His Rejection From Probation Or The Withdrawal Of An  
20 Unfilled Recruitment Notice

21 Bronder is misusing the whistleblower appeal to attack his rejection from probation  
22 and the withdrawal of a job posting for which he applied. Exhibit A NAC 284.458(1) states  
23 that an appointing authority may reject a probationary employee for any lawful reason.  
24 Bronder's narrative makes clear that he was dismissed from probation on the basis of his  
25 inability to meet critical performance standards in his new job. As he admits, his eleven  
26 month performance evaluation was due near the time he was leaving for vacation and the

27  
28 <sup>1</sup> Probationary employees cannot appeal their rejection from probation. *See* NAC  
284.458(2) stating that a probationary employee cannot appeal the appointing authority's  
decision to reject him or her from probation.



1 evaluation noted at least two areas where Bronder failed to meet performance standards.  
2 It is also clear that Bronder did not agree with the evaluation, offering excuses for why  
3 these performance areas were deficient. Exhibit A.

4 Because it had become apparent that Bronder could not do the job successfully,  
5 Bronder's supervisor wished to complete the eleven month evaluation before Bronder left  
6 on vacation to allow NDOT adequate time to review the evaluation and make a final  
7 determination about his future employment before the final day of his probationary period  
8 – a completely reasonable course of action. Bronder seeks to use this appeal to avoid NAC  
9 284.458(2) and appeal his rejection from probation.

10 As for the pulled recruitment posting, Bronder states that he "expected that [his]  
11 experience and success in this position would ensure me an interview..." for the position in  
12 Elko.<sup>2</sup> While Bronder may have had such an expectation, the very fact that he had recently  
13 been dismissed by NDOT from probation in a similar position, signifies he was not  
14 successful and further indicates that he would likely not be considered a good candidate for  
15 similar positions with the department. Pulling a job announcement before interviews are  
16 conducted due to an inadequate pool of candidates is a perfectly reasonable business  
17 decision and is not one of the acts of reprisal identified in NRS 281.620(5). Neither is an  
18 applicant's disappointment in expectations for an interview covered by NRS 281.620(5).  
19 Accordingly, the Hearing Officer should dismiss this appeal.

20 C. Bronder Did Not Report Misconduct Outside NDOT

21 Bronder does not allege sufficient facts to show he qualifies for whistleblower  
22 protections. He does not state that he previously reported an improper governmental action  
23 outside the department where he was employed. Exhibit A. Rather, the reports he identifies  
24 were to supervisory personnel within the Nevada Department of Transportation: the Chief  
25 Construction Engineer, the Assistant Director of Operations and the Director of NDOT.  
26 Under well-established legal precedent, an employee is only a whistleblower if he or she

27  
28 <sup>2</sup> It is not clear from Bronder's appeal statement what "position" he is referring to in  
this final paragraph of his appeal statement, or what "experience and success" he had  
obtained from that "position," given his rejection from probation in his position with NDOT.

1 reports the governmental wrongdoing to the appropriate authorities, outside their own  
2 organization. *Ainsworth v. Newmont Mining Corp.*, 128 Nev. 878, 381P.3d 588 (2012)  
3 (whistleblower protection limited to employees who reported activity to governmental  
4 agency outside of the company); *Biesler v. Professional Systems Corp.*, 321 F.Supp.2d 1165  
5 (D. Nev. 2011) (employee's exposure of allegedly fraudulent and illegal conduct to  
6 individuals within company was insufficient under Nevada law for whistleblower  
7 protection); *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432 (1989) (internal  
8 reporting of improper activity to employer rather than appropriate authorities not  
9 sufficient to support tortious discharge); *see also Reuber v. Reno Dodge Sales, Inc.*, 2013  
10 WL 7158571 (Nev., Nov. 1, 2013) (unpublished decision) (reporting within company not  
11 eligible for whistleblower protections).

12 Also of note is that one of the reports of the alleged malfeasance was made to the  
13 NDOT Director on July 14, 2017, more than two months after Bronder had been released  
14 from probation. Exhibit A. Thus, not only is the appeal untimely as to the release from  
15 probation, the alleged report of improper action was made after the purported retaliatory  
16 dismissal.

#### 17 D. Hearing Officer Cannot Grant Requested Relief

18 A hearing officer cannot grant Bronder his requested relief. A claim is moot if a court,  
19 or hearing officer, cannot grant the requested relief. *See Personhood Nev. v. Bristol*, 126  
20 Nev. 599, 602, 245 P.3d 572, 574 (2010). NRS 281.641(2) states that if a hearing officer  
21 determines that an action was retaliatory, the officer "may issue an order directing the  
22 proper person to desist and refrain from engaging in such action." Here, Bronder requests  
23 that the hearing officer "restore credit for 11 months of probation served as a Manager  
24 (06.224)[, r]estore sick leave forfeited upon termination [, r]estore compensation level to  
25 grade 43.step 8." Ex. A, p. 1.

26 The hearing officer should reject Bronder's appeal because he cannot grant Bronder  
27 his requested relief. Bronder does not seek an order prohibiting the retaliatory conduct.  
28 Instead, Bronder is requesting the hearing officer to manipulate his hire date, his pay

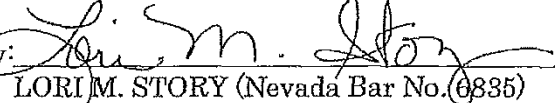
1 grade, and his leave totals. Clearly, NRS 281.641(2) does not authorize these actions.  
2 Accordingly, Bronder's appeal is moot and should be rejected.

3 **IV. CONCLUSION**

4 Bronder's appeal is untimely as to the release from probation. In addition, Bronder  
5 did not report any improper governmental action outside the Department of  
6 Transportation. Bronder is seeking to use this appeal to challenge his rejection from  
7 probation, an action expressly forbidden by NAC 284.458(2). Moreover, the withdrawal of  
8 a job posting for which he had applied and had "expected" an interview, does not meet the  
9 definition of reprisal in Nevada law. Accordingly, the Hearing Officer should dismiss this  
10 appeal.

11 DATED: May 1, 2018.

12 ADAM PAUL LAXALT  
13 ATTORNEY GENERAL

14 By:   
15 LORI M. STORY (Nevada Bar No. 6835)

16 Senior Deputy Attorney General

17 100 N. Carson Street

18 Carson City, NV 89701

19 (775) 684-1114 (phone)

20 (775) 684-1145 (fax)

21 Lstory@ag.nv.gov

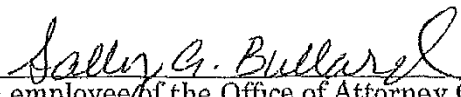
22 Attorneys for Nevada Department  
23 of Transportation  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 15  
day of May, 2018, service of the **NEVADA DEPARTMENT OF TRANSPORTATION'S**  
**MOTION TO DISMISS** 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 (Via E-mail): dgiambelluca@admin.nv.gov  
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@dverlawrence.com  
Dyer Lawrence, LLP  
2805 Mountain Street  
Carson City, NV 89703  
(775) 885-1896 office  
(775) 885-8728 facsimile

  
An employee of the Office of Attorney General

# EXHIBIT A

000565

000580

Date Received:

**APPEAL OF  
"WHISTLEBLOWER" RETALIATION  
UNDER THE PROVISIONS OF NRS 281.641**

This form is required for a state officer or employee or former state officer or employee to request a hearing to appeal action which he or she believes was reprisal or retaliation due to his or her disclosure of improper governmental action. This form is not to be used to report improper governmental action.

**I. Appellant Information (required section)**

Name: John Bronder

Mailing Address: 45 Desert Willow Way  
Reno, Nevada 89511

**RECEIVED**  
JAN 16 2018

Contact Phone: 775-772-8968

Email: jbronder@sbcglobal.net

Employee I.D. #: 60088

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

Department/Agency at time of Action: Department of Transportation

**II. Whistleblowing Activity (required section)**

Please attach a summary which identifies or describes the improper governmental action, as described in NRS.281.611, that you allege was carried out by a state officer or employee, including the date of the disclosure, to whom the disclosure was made, and any state laws or regulations that you believe were violated.

**III. Appealed Action (required section)**

What was the alleged reprisal or retaliatory action you are appealing and the date or effective date of the action?  
Dismissal from NDOT and ongoing reprisal evidenced by removal from the second active list for Manager I in District III after ranking #1 on first recruitment. Result appeared in my NEATS profile the morning of January 5, 2018.

Please attach a summary which explains why you believe the action you are appealing was reprisal or retaliation for your disclosure of improper governmental action. Please include:

- a) A chronology of events and facts which support your allegation that the action you are appealing was based on reprisal or retaliation for your disclosure of improper governmental action.
- b) Documentary evidence which supports your statements.

Is the date of the alleged reprisal or retaliatory action you are appealing within two years of the date you disclosed information concerning improper governmental action? ☒ Yes ☐ No

*Note: The appealed action must be within two years of the date of disclosure of improper governmental action.*

The remedy I seek is:

☐ To have an order issued directing the proper person to desist and refrain from engaging in the reprisal or retaliatory action.

☒ Other: Restore credit for 11 months of probation served as a Manager I (06.224). Restore sick leave forfeited upon termination. Restore compensation level to grade 43, step 8.

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

**IV. Appellant Representation (required section)**

You may represent yourself or be represented by an attorney or other person of your choosing. A representative may be designated at a later date. I choose to:

☐ Represent myself

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

Name: To be named at a later date.

Phone:

Address:

Fax:

Email:

**V. Signature (required section)**

I hereby request a hearing to determine whether the action described was reprisal or retaliation for disclosing information of improper governmental action, and I affirm that the information provided is true and correct.

Appellant Signature: John A. Brander

Date: January 16, 2018

**Appeal Instructions**

**General:** A state officer or employee or former state officer or employee is eligible to file an appeal. Attachments to this form may be provided however, all evidence and back-up documents need not be provided at this time; prior to the hearing, you will receive a request for any supporting material. If you have received a Specificity of Charges or written notice of involuntary transfer, please attach it to this request. Notification of a hearing will be sent to you or your designated representative by regular mail. The appeal procedures and statements made on this form do not include all of the rights available to an appellant. It is advisable to review NRS 281 and NAC 281 prior to filing an appeal. Appeal hearings are open to the public and decisions by a hearing officer are public information.

**When to File an Appeal:** Nevada law NRS 281.641 states, "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."

Your appeal must be filed within 10 working days after the date the alleged reprisal or retaliatory action took place. If your appeal is filed late, the hearing officer may dismiss it as untimely. The date of filing will be the date the appeal is postmarked, or the date of the fax, email, or date of receipt, if you personally deliver it to the Division of Human Resource Management.

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

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

**NRS 281.641 states, "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:

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

(b) The reprisal or retaliatory action that is alleged to have been taken against the state officer or employee. The hearing must be conducted in accordance with the procedures set forth in NRS 284.390 to 284.405, inclusive, and the procedures adopted by the Personnel Commission pursuant to subsection 4.

2. 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. The hearing officer shall file a copy of the decision with the Governor or any other elected state officer who is responsible for the actions of that person.

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."

**NAC 281.305 states, "Written appeal by officer or employee who claims retaliatory action was taken against him or her.**

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.

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

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

**NRS 281.611 states in part, "Definitions. As used in NRS 281.611 to 281.671, inclusive, unless the context otherwise requires:**

1. "Improper governmental action" means any 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."



## APPEAL OF "WHISTLEBLOWER" RETALIATION UNDER THE PROVISIONS OF NRS 281.641

### II. Whistleblowing Activity

Please attach a summary which identifies or describes the improper governmental action, as described in NRS 281.611, that you allege was carried out by a state officer or employee, including the date of the disclosure, to whom the disclosure was made, and any state laws or regulations that you believe were violated.

The improper governmental action was in violation of NRS 281.611.1(e) "A gross waste of public money" and NRS 281.611.5(j) "Dismissal." The action occurred on March 6, 2017 at the negotiation meeting with the consultant for Contract 3660. Both NDOT's Assistant District Engineer Rich Bosch and Assistant Construction Engineer Steve Lani approved extremely high labor rates that would result in excessive compensation to the consultant of approximately \$500,000 to \$700,000 on the \$2.1 million contract. I disclosed this to Assistant Construction Engineer Steve Lani on April 10, 2017 after hearing Governor Sandoval voice his concern with the high cost of this contract at the Transportation Board Meeting. On May 5, 2017, I was abruptly dismissed from employment with NDOT without warning or reason. Other state laws that I believe were violated are NAC 625.510 Fundamental principles. (NRS 625.140) A licensee shall uphold and advance the honor and dignity of the profession by maintaining high standards of ethical conduct. In particular, a licensee shall 1. Be honest and impartial, and serve his or her employer, clients and the public with devotion; and NAC 625.530 Relations with employers and clients. (NRS 625.140) In a professional engineer's or land surveyor's relations with his or her employers and clients, he or she shall: 1. Act in professional matters as a faithful agent or trustee for each employer or client; 2. Act fairly and justly toward vendors and contractors, and not accept from vendors or contractors any commission or allowances, directly or indirectly.

### III. Appealed Action

Please attach a summary which explains why you believe the action you are appealing was reprisal or retaliation for your disclosure of improper governmental action. Please include:

- a) A chronology of events and facts which support your allegation that the action you are appealing was based on reprisal or retaliation for your disclosure of improper governmental action.
- b) Documentary evidence which supports your statements.

The action occurred on March 6, 2017 at the negotiation meeting with the consultant for Contract 3660. See Exhibit A for the Memo summarizing the negotiation meeting. The negotiations were conducted by Assistant District Engineer Rick Bosch and Assistant Construction Engineer Steve Lani with the consultant (CA Group). An excel spreadsheet was provided by CA Group showing the build-up of labor and equipment rates. NDOT's practice is to pay the actual employee rate plus the federally audited company overhead rate. For CA Group, they showed their overhead to be 150.00%. Therefore, NDOT compensates the consultant 250% of the employee base labor rate for each billable hour. A negotiation of labor rates did not occur at this meeting and blanket acceptance was given by the two NDOT employees. The CA Group personnel in attendance included the proposed Assistant Resident Engineer, Peter Booth. This individual retired from NDOT as the Assistant District Engineer whose successor, Rich Bosch, was involved in this negotiation. He also directly supervised all District II Resident Engineers at which time Steve Lani worked for him. The close working relationship of these 3 individuals brings into question their ability to remain unbiased and act fairly on behalf of the State. The NDOT employees are well positioned to follow in the former supervisor's footsteps upon their retirement from NDOT. They will, however, require their successors at NDOT to perpetuate the inflated labor rates.

The consultant was contracting with NDOT to provide construction crew augmentation for Crew 910 including one Assistant Resident Engineer (Grade 40) and 8 Inspectors and Testers (Grades 30 and 33). The consultant's base labor rates were markedly higher than the comparable State positions and higher than the local industry standards. In the case of CA Group's proposed Assistant RE, his base labor rate was approximately 86% higher. He was over-qualified and over-compensated for the position of Assistant RE being that he retired as Assistant District Engineer (Grade 45). Given that he was expected to support the Resident Engineer (Grade 43) with little oversight, the labor rate would still be 63% higher than the NDOT Resident Engineer on Crew 910. In broad perspective, his labor rate is even 24% higher than the Director of NDOT. The Inspectors and Testers labor rates ranged from 25% to 60% higher than comparable NDOT positions.

Labor made up approximately 90% to 95% of the overall contract cost. Of the total contract cost of \$2,085,151, labor was approximately \$1.9 million. Based on the higher labor rates identified above, a gross overpayment was approved to CA Group of approximately \$500,000 to \$700,000. An independent audit of this contract will prove this. An audit of other contracts will prove that this has been occurring on most contracts, especially those that are staffed or owned by NDOT retirees.

During the April 10, 2017 Transportation Board Meeting, the Governor specifically questioned the high cost of this contract. See Exhibit B for pages from the minutes of that meeting. I viewed this meeting from my office in the Construction Division. I heard the concern of the Governor and listened to his questions and the responses from the NDOT Director and District Engineer. I felt that the responses to the Governor's questions were incomplete and misleading. I promptly went to the office of Assistant Construction Engineer Steve Lani and expressed my concern that NDOT was approving excessive labor rates for the consultant's employees. He dismissed that notion and said that these rates were lower than they have seen in the past.

Two weeks later, on the afternoon of April 25th, I was told by my supervisor, Jeff Freeman, that my performance evaluation needed to be done. I was about 2 hours away from leaving on vacation and felt this was hurried. The result of the evaluation was "meets standard." See Exhibit C for the NPD-15. There were two items that were identified that did not meet standard. Of the 10 weeks that I worked in the Construction Division, I spent 3 weeks in required conferences and training. I was also tasked with helping write the Construction Manual which involved an 8-hour working meeting almost every Friday with review and editing time during the week. I was also asked on my third week to learn another employee's job to take it over upon their retirement on May 5th. I worked very hard to fulfill these other assignments but was only left about 16 hours a week for 7 weeks to do my job.

Upon the day I returned from vacation, May 5th, I was called in to Chief Construction Engineer Sharon Foerschler's office along with Steve Lani as witness and abruptly dismissed from probation without any forewarning. See Exhibit D for the letter. In that meeting, I asked if I could transfer back to District III to the position I held for my first 8-1/2 months with NDOT since it was still unfilled. The Chief Construction Engineer said that that was not an option that they had considered. Having me removed from employment with NDOT was severe retaliation considering that all they said was that they were disappointed. I believe that my knowledge of their actions jeopardized their future plan and it was necessary to remove me completely from NDOT.

The Transportation Board Meeting on June 12, 2017 had more discussion on the high cost of consultants. See Exhibit E for pages from the meeting minutes. Member Almberg is the owner of a private engineering consulting firm and is experienced with setting labor rates. He was concerned that the overhead rates of the different consultants ranged from 110% to 190% and that choosing the consultant with a high overhead rate would cost

the state more. Governor Sandoval also questioned why NDOT would chose the high-overhead company. NDOT did not have a good answer for that.

I scheduled a meeting with the Director of NDOT which occurred on July 14, 2017. The subject was to discuss the concern that I had from the April 10<sup>th</sup> Transportation Board Meeting. The Director, Rudy Malfabon, asked the Assistant Director of Operations, Reid Kaiser, to sit in on the meeting since he oversees the Construction Division. I discussed in detail why I was concerned about the high consulting fees and specifically asked him if he thought that a base salary of \$168,000 seemed high for an Assistant Resident Engineer. He agreed but said that NDOT had looked into this several years ago. I also explained to them that this incident was why I believed I was dismissed. Reid Kaiser said he was told that I wasn't a good fit. He also offered to speak with other District and Division Chiefs so that my applications for rehire would not be rejected due to my recent dismissal from the Construction Division.

The Transportation Board Meeting on August 14, 2017 had discussion on the exclusive list of consultants that always seem to be selected. See Exhibit F for pages from the meeting minutes. Member Skancke has been on the board for several years. He was very upset that the same firms seem to get all the NDOT contracts. NDOT hands out a lot of money and it should be spread around to all qualified firms and not just a handful. What I have seen time and time again is that only those firms that are owned or staffed to a large degree with retired NDOT employees will be selected for contracts with NDOT. These firms, knowing that they have the inside track to NDOT contracts, sets their rates a minimum of 25% higher than industry standards.

A position for Resident Engineer in District III was posted on Oct. 10, 2017 and I applied for it on Oct. 24<sup>th</sup>. I was determined eligible and was ranked #1 on the list. On Oct. 31<sup>st</sup>, I learned that the recruitment was cancelled and a new recruitment was posted. I again applied for this position on Nov. 3<sup>rd</sup>. The 2 week period was extended for an additional 2 weeks and closed on Nov. 28<sup>th</sup>. I was again determined eligible but this time the list was unranked. I expected that my experience and success in this position would ensure me an interview since the number of applicants is rarely at least 5 in Elko. It was on January 5, 2018 that the result was shown as "Removed per NAC 284.374." This further indicates that reprisal by NDOT is continuing against me for my exposure and knowledge of the improper governmental action of a gross waste of public money.

000571

000586

EXHIBIT A  
MEMORANDUM  
NEGOTIATION SUMMARY OF MARCH 6, 2017

STATE OF NEVADA  
DEPARTMENT OF TRANSPORTATION

**MEMORANDUM**

March 13, 2017

**TO:** Reid Kaiser, Assistant Director

**FROM:** Lisa Schettler, Project Manager

**SUBJECT:** Negotiation Summary for RFP 617-16-040 Construction Engineering Services for Augmentation of Crew 910 to oversee the construction of Contract 3660, Project No. SPSR-0648(009) located on SR 648, Glendale Avenue, from Kietzke Lane to McCarran Boulevard in Washoe County.

A negotiation meeting was held at the NDOT District 2 Office in Reno on March 6, 2017, with Chad Anson and Peter Booth from CA Group, Inc. and Lisa Schettler, Stephen Lani, Rick Bosch, John Bronder and Pamela Kennedy of the Nevada Department of Transportation (DEPARTMENT or NDOT) in attendance.

The DBE goal for this agreement has been established at one and one-half percent (1.5%).

The scope of services that are to be provided by the SERVICE PROVIDER was reaffirmed by both parties at the outset.

The SERVICE PROVIDER shall provide one (1) Assistant Resident Engineer, one (1) part-time Public Information Officer (PIO), two (2) Inspectors level IV, two (2) Inspectors level III, four (4) Testers, and two (2) nuclear gauges. The SERVICE PROVIDER shall also provide one (1) Registered Professional Archeologist and may provide a Cultural Resource Field Monitor as required.

CA Group, Inc. is the prime consultant and has teamed up with the following subconsultants:

- Construction Materials Engineers, Inc. (Inspection and Testing Services)
- WCRM (Cultural Resource Management)
- Taylor Made Solutions (PIO)- Certified DBE

The DEPARTMENT's estimate was \$2,097,541.88 including labor and direct expenses.

The SERVICE PROVIDER's original estimate was \$1,810,538.15

The negotiations yielded the following:

1. Adjusted the augmentation staffing durations and levels based upon current estimated project construction and close out schedule.
2. Agreed estimated overtime for the field staff should be increased to 35% to align with the currently submitted contractor's construction schedule.

3. Reiterated that hours worked by the Service Provider are as needed to provide sufficient project oversight and are at the direction of the Resident Engineer.
4. We determined the original straight-time hourly billing rates for staff proposed by CA Group were reasonable, however, the original proposed overtime hourly billing rates appeared to be high and calculated inaccurately. CA Group lowered the overtime billing rates on average by \$27.63 per hour.
5. The original fee proposal submitted by CA Group included only one rate for cultural resource monitoring staff, although their proposal included both a field monitor approved as a Crew Chief by the BLM to work in the field and a Registered Professional Archaeologist to be available for oversight responsibilities and to provide expertise when cultural resources are identified in the field by the Crew Chief. CA Group provided two separate rates for the two positions in their subsequent fee proposal with the field monitor position billable rate decreased by \$42.31 per hour.
6. CA Group agreed to reduce the monthly vehicle rate for field staff from \$1,850 to \$1,700 per vehicle.
7. CA Group agreed to reduce the monthly cell phone rate for field staff from \$100 to \$50 per phone.
8. We reiterated the need for iPads to allow the field inspectors to access the Mobile Inspector™ program and a computer for the Assistant Resident Engineer access to the Field Manager™ Program currently used by NDOT. We advised CA Group that the use of the Mobile Inspector™ program by field inspectors did not require a monthly data plan. CA Group altered their fee proposal to provide technology equipment at a one-time lump sum rate rather than a monthly fee.
9. The final total negotiated cost for this agreement, including labor and direct expenses is \$2,085,151.00.

Reviewed and Approved:

DocuSigned by:



Assistant Director

EXHIBIT B  
TRANSPORTATION BOARD MEETING MINUTES  
PAGES 39-45 OF APRIL 10, 2017

000575

000590

Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
April 10, 2017

on the motion. Hearing none, all those in favor please say aye. [ayes around]  
Those opposed say nay. That motion passes unanimously. Again,  
congratulations to all those involved. We look forward to the successful  
completion of those projects.

Let's move to Agenda Item No. 6, Mr. Nellis, approval of agreements over  
\$300,000.

Nellis: Thank you Governor. There are three agreements under Agenda Item No. 6 that  
can be found on Page 3 of 38 in your packet. Line Item No. 1 is with Granite  
Construction in the amount of \$684,900. This is for reconstructing and widening  
Charleston Boulevard in the City of Las Vegas, at the existing I-15 Interchange.

Item No. 2 is with Diversified Consulting Services. This is in the amount of  
\$1,795,644.05; to provide full construction administration services including  
professional and technical engineering services for Contract 3665 located on I-80  
in Lyon County.

Lastly, Item No. 3, with CA Group is in the amount of \$2,085,151 to perform  
professional and technical engineering services for Contract 3660, located on SR-  
648 in Washoe County.

With that Governor, that concludes Agenda Item No. 6. We'd be happy to take  
any questions on these three agreements.

Sandoval: Thank you Mr. Nellis. I guess just a little more detail on Contract No. 3.

Malfabon: Oh, I'll take that. Reid Kaiser is over at the Legislature still. This is for  
construction management augmentation. In some cases, we still have a resident  
engineer but their staff are spread thin through several projects in the region.  
They need construction augmentation. The recommendation from the selection  
committee is for and negotiation of the contract with CA Group to augment our  
construction staff for those engineering technicians that do the testing, the  
inspection services and administration on the contract.

Sandoval: Is this typical, \$2 million for 13-months?

Malfabon: We only pay what we actually use Governor, but it's usually a negotiated rate,  
which we—the Construction Division, when they negotiate those contracts looks  
at the salaries of the individuals. They look at the overhead rates, which kind of  
rolls up into the actual cost. We only pay for the hours of service used by those



Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
April 10, 2017

folks, for the efforts that they provide to manage the project. It could be that the estimate might be high but we only pay for what we actually use.

Sandoval: Yeah, that's a lot of hours to—

Malfabon: Yes.

Sandoval: --to get to \$2 million.

Malfabon: Typically, what we see on construction engineering, it can be anywhere from 10% to 20% depending on whether we do it in-house and what type of work it is and whether it's augmented or full administration.

Dyson: Governor, Thor Dyson. On this particular job with the Glendale job, just so you're aware, it's a 24-hour a day job. For 24-hours a day, six or seven days a week, we're going to need staff, nighttime and day time. Granite has every intention of knocking out this job as quickly as possible. We're going to be staffing it and trying to knock it out this year. And we can't do it with the resources we have. So that's what you're seeing.

Sandoval: Questions from other Board Members? Member Savage.

Savage: Thank you Governor. A question on Agreement No. 1. It has to do with the funding and the timing. I know this is the preconstruction phase. The overall timeline and the funding—the funding notes say 2017, 2018, 2019, 2020, completing in 2020. Are there actually four or three years of actual preconstruction? And, what is the overall construction budget?

Malfabon: I'll do my best to respond to that but I might need some assistance from staff. John Terry is heading a AASHTO Committee on technical training this week. The timeframe for the preconstruction services is less than that. We anticipate that most of the work will be done in the first couple of years, to design the interchange in Southern Nevada. The construction might need some help from Rick, our Project Manager, on the construction estimate.

Splawinski: Rick Splawinski, Project Management Division. That number is being developed now when the project is in the environmental phase. The best number we're sitting on right now is probably \$31 million. Again, early or midway in the environmental phase for that project. As far as time goes, this agreement extending through 2020 is set up to be—to allow overlapping, multiple GMPs, so the preconstruction services could be going on maybe for the last GMP while

Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
April 10, 2017

construction had already started. Maybe even more so than what you saw on the SR-28 Bike Path Project, where there was a small GMP while final design continued. There may be even more than two GMPs where the preconstruction services covered by this agreement would carry on until the very last GMP went out.

Savage: That answers my question, because of the timing. So, the objective to start construction is what year?

Splawinski: 2019.

Savage: 2019.

Splawinski: So, at a minimum, the preconstruction services will go through 2019, 2020 might be an overlap year where the preconstruction services were still addressing the final GMPs and then 2020 is with any good fortune, wouldn't be needed for preconstruction. The agreement would extend that long if needed.

Savage: Okay. That satisfies my questions, thank you Rick. Thank you Governor.

Sandoval: Mr. Controller.

Knecht: Thank you Governor. I think part of the problem we're all having here is if you look at Page 3 of 38, Attachment A, you look at the amounts over here on the left and the notes on the right, you see that there's \$685,000 for Item 1, \$1.8 million for Item 2 and \$2.085 for Item 3. Then you go read the notes and the first note for Item 1 seems to say, well it says, the project consists of reconstructing and widening Charleston Boulevard, etc. You read the note for No. 2, it says, provide full construction administration services and as we heard, No. 3 is for augmentation. What it looks like, before you check the details in back, is like, we're going to pay \$685,000 for the real work and we're going to pay \$1.8 million and \$2.1 million for administration and augmentation. Then when you check the real work under No. 1, it says CMAR Preconstruction Services. So, it begins to make a little sense to me, but the way the notes versus the amounts were, it looked like the tail was wagging the dog in that we seem to be, according to those notes paying a lot for administration and augmentation and not so much for actual real field work.

Once I got through the whole thing, I was satisfied and I was satisfied especially with the answer that Thor Dyson gave and the other people here. The presentation was a touch confusing. Thank you.

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- Malfabon: Mr. Controller, we'll try to do better on those notes because we get that point that we could've been more clear in the notes so that it's more descriptive of what the actual contract is for. It was more of a—for instance, in the first one, it's more a description of the construction phase which is not before you for approval. It's the preconstruction services phase and that was not that clear unless you read the back-up materials. We'll take that in to consideration and do a better job in the future on reviewing those notes to make sure that they're applicable to what's before you so that you'll still have the back-up information but the notes are more explicit about what's before you today.
- Knecht: I thought you were just giving us a test.
- Sandoval: Other questions or comments. Any questions from Southern Nevada, Tom?
- Skamcke: None here Governor.
- Sandoval: And just a follow-up Rudy, on No. 3, when you say that's a maximum price, I understand that. So, is Thor or somebody else scrutinizing those contracts to make sure that the billings are good?
- Malfabon: Yes, Governor. What I noticed is that, they have some additional staff in there if needed. So, as construction activities occur on all of the district crews, Thor and his Assistant District Engineer for Construction, Rick Bosch, would determine whether they can move staff around to save some costs on the construction management of the project. We still want to just meet all the obligations for oversight of the project to make sure it's done correctly and paid correctly. Definitely, Thor and his staff would manage that part of it and make sure that they're aware of any costs. They need the back-up from the consultant, if needed. There's about four positions that are 'if needed'. There's a core work group of about six individuals with those four if needed. They manage that, Governor, on a day-to-day basis and stay in touch with the NDOT staff that are assigned to the project that are going to be augmented with the consultant.
- Sandoval: I don't mean to be nit-picky, but there's 80 hours in there for a PIO, outsourcing a PIO.
- Malfabon: Yes, and I'm sure Thor is going to say, there's so many businesses along there that we want to have more direct outreach with them. We've really stretched our PIO staff in the North, thin with some of the duplicate responsibilities during the legislative session. Obviously, Sean will be back after the session, he's roaming

Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
April 10, 2017

the halls all the time at the Legislature. Thor if you want to kind of address that, I know that it has to do with the extensive amount of public impact that we're going to have to traffic and business owners along this stretch.

Dyson: Thor Dyson. Governor, we've got a lot of businesses along Glendale there, a lot of very important businesses and we want to have very timely and fluid coordination and communication with the subcontractors, the business owners, emergency management, fire/police, that kind of group there. We also have some other projects in the area. RTC has their Fourth Street job, it's a \$38 million project to really completely redo Fourth Street. We've got our other project with Kietzke, the safety project you had seen earlier. There's a lot of things happening in that area and an upcoming Kietzke project, safety project for the next year. We've got one now. We've got one coming up. We've got the Fourth Street, we've got Glendale.

This is a pretty serious project involving a lot of business owners and we have found that we can eliminate a lot of complaints, hiccups or whatever you want to call it on weekends, nights because it's a complicated project. It's a very—it's a massive overhaul. We're going deep. We're going down a couple of feet. I know business owners have come in and talked to me already, Maverick wants to start doing some development. There's other potential development going on. They're coordinating as well, with our project managers right now and we need to have this coordination.

We also spent a lot of time, PIO hours on the I-80 design-build when we were shutting and closing interstate ramps and affecting businesses owners throughout Reno. It's money worthwhile. It really has value and it can really reduce a lot of headaches.

Sandoval: I understand that. As I said, I don't want to micromanage this. Also, Taylor Made Solutions is the subcontractor, which we have no real control over and they speak for us. They're going to be representing the Nevada Department of Transportation in the State. I just want to make sure that they're familiar with all of that and make sure that they're conveying the correct message. I'm not being critical of the expenditure, it's more that we have our PIOs in house that know the drill. When you start to outsource that, I wonder if they're as familiar with the processes and procedures of this Department.

Dyson: So, this particular subcontractor, Kathleen Taylor, they have done this before for us. Many years ago she was a former employee for the State of Nevada, for

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NDOT. When they go to attend, or when they go to do a press release or talk with business owners, they're involved, they're in all the contractor meetings, the coordination meetings. They are acutely familiar with every step of the contractor's operations. Then they put that together. Our PIO as well as our construction people, the district administration, we will review what's being kicked out to make sure we have quality control and that the message being worked on, presented and then submitted and distributed out to all those affected is the accurate one. We take that very seriously. I hate to cry wolf and the wolf never shows up.

This is a tough project. We're prepared to go to hell and come back for a good purpose. We'll do it.

Sandoval: I appreciate your being blunt. I mean, as you appreciate and you've said, Kietzke Lane may have the highest concentration of small businesses in Northern Nevada or pretty close. This is going to affect a lot of folks' livelihoods. This has to be done right and just while I'm on that, I say amen to what Member Savage said in terms of this road being a Cadillac now. It is time to turn it over and to relinquish it and for the County to take that. It will be, not in as good of shape, the best shape that it's ever been.

Dyson: So, it's the City of Sparks and we've talked to them in the past over the last 10-12 years, there was a lot of interest in relinquishing the road and them accepting it. Then the recession hit and things kind of got difficult for everyone involved. The road is still in NDOT's purview and responsibility. There are a lot of big, major businesses, Caterpillar, Cashman, Granite Construction happens to be on that road as well.

Sandoval: Why aren't they doing it for free then... [laughter]

Dyson: There's a lot of businesses, not just along Glendale, but the side streets, including some of my resident engineer offices we rented. It may not seem like a lot of small businesses on Kietzke, but we want to be very careful and very clear on how we're doing things. We want to be very communicative. If we're not communicating enough, if we're sick and tired of communicating, then we need to start communicating more. We'll do that through our PIO Group and we'll monitor it closely with our personal PIOs with NDOT overseeing the consultant PIO.

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Sandoval: I have complete confidence in you all. I mean, you do a great job. My point was more akin to what Member Savage said is, you know, obviously, historically, these were state highways and time has moved on. Now, essentially we are subsidizing the local governments in terms of improving and maintaining these roads. That was part of the conversation that we had before in terms of putting them up to pristine condition and then relinquishing them because they are local roads. Again, that's probably more of a political statement than anything else, but I just want to make sure that this goes smoothly. You mentioned some of the biggest businesses in Washoe County are going to be affected by this. I appreciate your hard work.

Dyson: Thank you.

Sandoval: All right, other questions or comments with regard to Agenda Item No. 6? Mr. Nellis, do you have anything else?

Nellis: No, Governor, that concludes Agenda Item No. 6.

Sandoval: If there are no further questions or comments, the Chair will accept a motion for approval of the agreements over \$300,000, as presented in Agenda Item No. 6.

Savage: So moved.

Knecht: Second.

Sandoval: Member Savage has moved for approval. The Controller has seconded the motion. Any questions or discussion on the motion? Hearing none, all those in favor, please say aye. [ayes around] Those opposed say no. That motion passes unanimously. Let's move on to Agenda Item No. 7, Mr. Nellis.

Nellis: Thank you Governor. There are two attachments that can be found under Agenda Item No. 7 for the Board's information. Beginning with Attachment A, there are four contracts and five emergency contracts on Pages 4 and 5 of 17 in your packet.

The first project is located on US-93 in Elko and White Pine Counties, for chip seal and seal coat. There were two bids and the Director awarded the contract to Sierra Nevada Construction in the amount of \$883,007.

The second project is located on SR-445, Pyramid Highway in Washoe County to construct acceleration and deceleration lanes. There were four bids and the Director awarded the contract to A&K Earthmovers in the amount of \$694,000.

EXHIBIT C  
NPD-15 FROM APRIL 24, 2017

000583

000598

Agency Use Only

**RECEIVED**

APR 27 2017

HUMAN RESOURCES DIVISION  
DEPT. OF TRANSPORTATION

STATE OF NEVADA

**EMPLOYEE APPRAISAL & DEVELOPMENT REPORT**

\*The contents of this report on performance must be discussed between the employee and his or her supervisor as described in NRS 284.337 and NAC 284.470

Central Records Use Only

**RECEIVED**

MAY 15 2017

DEPT. OF ADMIN  
DHHR - RECORDS

1. Employee Name: Last <b>Bronder</b> First <b>John</b> Initial <b>N</b>	
2. Class Title: <b>Manager I, P.E.</b>	3. Employee ID #: <b>60088</b>
4. Dept/Div/Section: <b>NDOT C040 Construction</b>	5. Date Evaluation Due: <b>5/6/17</b>
6. Agency # (3 digits): <b>800</b> Home Org # (4 digits): <b>C040</b> Position Control #: <b>040004</b>	7. Date Next Evaluation Due: <b>6/6/18</b>
8. Probationary/Trial Period (check one): 6 month Probation/Trial: <input type="checkbox"/> 2 <sup>nd</sup> month <input type="checkbox"/> 5 <sup>th</sup> month <input type="checkbox"/> Other 12 month Probation/Trial: <input type="checkbox"/> 3 <sup>rd</sup> month <input type="checkbox"/> 7 <sup>th</sup> month <input checked="" type="checkbox"/> 11 <sup>th</sup> month <input type="checkbox"/> Other	
OR Permanent (check one): <input type="checkbox"/> Annual <input type="checkbox"/> Other	
9. Work Performance Standards: <input checked="" type="checkbox"/> are an accurate reflection of the position <input type="checkbox"/> will be revised to reflect changes	
10. Overall Rating from Page 2, Number 14 (check one): <input type="checkbox"/> Does Not Meet Standards (DMS)* <input checked="" type="checkbox"/> Meets Standards (MS) <input type="checkbox"/> Exceeds Standards (ES) * If a rating of "Does Not Meet Standards" is given, another evaluation must be completed within 90 days. The rating may affect adjustments in salary based on merit (NAC 284.194).	
Rater's Printed Name: <b>Jeffrey Freeman</b>	
Rater's Signature & Title: <i>[Signature]</i> <b>Assistant Const Eng</b> Date: <b>4/24/17</b> (mm/dd/yy)	
11. Additional Supervisory Review (optional): <input type="checkbox"/> Agree <input type="checkbox"/> Disagree (Comment Required)	
Printed Name:	
Signature and Title: Date: (mm/dd/yy)	
12a. Date employee received evaluation document: <b>4/24/17</b> Employee's Initials: <b>JNB</b> (Does not indicate agreement or disagreement)	
b. Employee Response: NAC 284.470 requires that you complete the section below and sign the report on performance within 10 working days after discussion with your supervisor. <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree <input type="checkbox"/> Request Review* (If you disagree with the report and request a review, you must specify the points of disagreement below or attached.)	
c. Employee Signature: <i>[Signature]</i> Date evaluation returned to supervisor: <b>4/24/17</b>	
13. Appointing Authority Review: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree (Comment Required) <i>John needs to work on integrating with Const with Sub and Mark Coffman. Need to see improvements of Post Construction Reviews.</i>	
Appointing Authority's Printed Name: <b>JARON FOERSCHLER, P.E.</b>	
Appointing Authority Signature & Title: <i>[Signature]</i> <b>CHIEF CONSTRUCTION ENGINEER</b> Date: <b>4/27/17</b> (mm/dd/yy)	

\* Note - Reviewing Officer uses form NPD-15R to respond to employee's request for review as outlined in NAC 284.470

 04/23/17  
 000584

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Employee Evaluation & Development Report – Page 2

Employee Name: (Last)	(First)	(Initial)
Winkler	John	JW
Employee ID #: 60088		

14. Job Elements (Transfer from Employee Work Performance Standards form and provide a numerical rating of 1 = DMS; 2 = MS; or 3 = ES for each job element in column (A). Please note that whole number ratings are used, not fractions, to rate individual job elements.	(A) Rating	(B) Weighted Value	(C) Weighted Rating
Job Element #1: Supervise and train the Constructability and Project Scheduling Staff and assign tasks to accomplish Division responsibilities and Department goals.	2	15%	.3
Job Element #2: Review plans, specifications and special provisions for accuracy, completeness and constructability providing recommendations as needed. Calculate Liquidated Damages, Construction Engineering Budget and User Costs for all construction projects. Actively assist the Project Coordinators in answering contractor questions submitted during the bidding period.	1	10%	.1
Job Element #3: Manage the Division's scheduling program. Generate Time Determination Schedules (TDS) to determine working days. Manage the scheduling training for the Resident and Assistant Resident Engineers on the Department's latest version of scheduling software. Analyze contractor schedules for compliance with contract documents and assist with resolving contractor scheduling issues in a timely manner.	2	10%	.2
Job Element #4: Attend various meetings including Project Status, Design/Construction, Cost Risk Analysis and Value Engineering. Utilize information and decisions made in these meetings to prioritize workload and implement changes to programs and contract documents as recommended.	2	10%	.2
Job Element #5: Serve as an active member of the Bid Review Analysis Team (BRAT). Analyze contractor bids for compliance with Department requirements for responsive bidders and provide recommendations for award of all construction contracts. Inform the Resident Engineer of potential contractual issues discussed at the BRAT meeting.	2	5%	.1
Job Element #6: Manage Post Construction Review Meetings and ensure reports are generated with findings and recommendations. Generate Semi-Annual reports summarizing findings and recommendations for implementation on future projects.	1	5%	.05
Job Element #7: Manage the tracking of contract modifications to identify field issues and resolutions for future construction contracts.	2	5%	.1
Job Element #8: Generate and manage the travel budget for staff. Assist the Chief with budgetary tasks including Construction Engineering cost estimation for projects to meet the Department's Performance Measure target.	2	5%	.1
Job Element #9: Assist the Chief and Assistant Construction Engineers on special projects as assigned.	2	5%	.1

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**Employee Evaluation & Development Report – Page 3**

Employee Name: (Last)	(First)	(Initial)
Dooley	John	J
Employee ID #: 60088		

14. Job Elements (Transfer from Employee Work Performance Standards form and provide a numerical rating of 1 = DMS; 2 = MS; or 3 = ES for each job element in column (A). Please note that whole number ratings are used, not fractions, to rate individual job elements.	(A) Rating	(B) Weighted Value	(C) Weighted Rating
Job Element #10: Communication	2	10%	.2
Job Element #11: Teamwork	2	10%	.2
Job Element #12: Responsiveness	2	10%	.2
Overall Rating (Scale: 1 to 1.50 = DMS; 1.51 to 2.50 = MS; 2.51 to 3 = ES) (A "does not meet standards" rating may affect adjustments based on merit (NAC 284.194). Another evaluation must be completed within 90 days (NRS 284.340).)			1.85

**15. Rater's Comments:** (A "does not meet standards" rating for any job element must include a detailed explanation of the deficiencies.)  
John, You have been in our office for a couple of months and I appreciate your help, and thank you for volunteering to step up for the consultant side. I have given you a below standard in a couple of critical areas. First one was the plan reviews. Your section while self-sufficient could use the help to lighten their load and you will not be able to fully understand what they do until you do it as well. The second area is in the post construction reviews, it was agreed upon to allow you and Mark some time prior to looking into the review process, that time has passed and we need to have you focus on this. I have not seen much interaction and if you do not initiate the interaction it will not happen.

**16. Development Plan & Suggestions:** (The supervisor will address how the employee can enhance performance and achieve standards; indicates recommendation for further development and training. This section shall be discussed with the employee.)

Please work on the following areas. We need to develop a method for the post construction reviews to become a useful tool, the information is not being captured in the review and then transferred back to Design. Management is here to support change to the post construction process and will help you if you would like, but we feel that you can create the change. Please schedule time with Mark to begin looking at the process and together develop a plan for improvement, please report back to management on your plan once you have developed it. Also please integrate into the constructability section, take a project or two from the beginning and learn the entire process, sit down with the section on a regular basis to find out what they are working on and what help they need from you, jump into the round table discussions when you see they are working with a designer on a project. As the Constructability manager you should have a couple of project that are yours at any one time, and you should be familiar with all projects, know the teams, know the dates, and have an idea of the major issue on any project.

**17. Merit Award Program:** (Provide information to employee relating to the Merit Award Program established in NRS 285.020.) Please check method(s) used:

☐ Employee Handbook ☒ State Human Resource website: <http://hr.ny.gov/> ☐ Other (List details) \_\_\_\_\_

**Distribution:** Original to Division of Human Resource Management; Copy to Agency; Copy to Employee

NPD-15  
Rev. [11/15]

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EXHIBIT D  
DISMISSAL LETTER DATED MAY 5, 2017

000587

000602



BRIAN SANDOVAL  
Governor

STATE OF NEVADA  
DEPARTMENT OF TRANSPORTATION  
1263 S. Stewart Street  
Carson City, Nevada 89712

RUDY MALFABON PE Director

In Reply Refer to

May 5, 2017

John Bronder  
Manager I  
45 Desert Willow Way  
Reno, NV 89511

Rejection of Probationary Employee

Dear Mr. Bronder

This letter constitutes notice that you have been rejected from probationary status in the position of Manager I at end of shift, today, May 5, 2017. This notice is provided in accordance with Nevada Administrative Code 284.458.

  
Sharon Foerschler  
Chief Construction Engineer

EXHIBIT E  
TRANSPORTATION BOARD MEETING MINUTES  
PAGES 18-20 OF JUNE 12, 2017

000589

000604

Transcript of Nevada Department of Transportation  
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June 12, 2017

Martin: Mr. Terry, on these job order contracts for this type of a situation with Stantec that we're talking about on Item No. 3, CA Group, Horack, and Kimley-Horn, aren't the job orders put out as a small RFP to the three firms and a proposal on each one of those job orders individually?

Terry: Yes. Again, John Terry, Assistant Director Engineering. Yes, that is correct, although we could group a few of them. These are relatively small projects, but yes, they would be for individual projects, but we may choose to group a couple of them together and put one out for, like, three—one out that has three small projects with our estimated, you know, \$200,000 fee, and we'd put it out that way and then negotiate with the selected firm on the group of projects. So, yes, it could be individual projects or we could group a few small ones together.

Martin: But my point is, is that no single job order contract is just simply handed to one of these vendors without a RFP being issued.

Terry: Right, it's a relatively quick and short competition between the three for each of the task orders.

Martin: Okay, thank you. I just wanted to clarify that. The second point is, is that on Item No. 2, we have a \$600,000—basically, the same thing, a job order contract on an on-call basis for biological and support services. I want to go back to the agenda for—in May, we just issued a \$1 million contract to HDR for a very similar wording, very similar scope of work. Why is it that we need to have HDR at \$1 million and each one of these firms at \$600,000 or \$200,000 each, however you want to put it?

Terry: Again, John Terry, Assistant Director Engineering. There is some overlap, but really not much. The contract with HDR that was in last month's, which was an update to add another year to their contract that's been going for a while is for our major projects, mostly our major projects in Southern Nevada to do almost daily biological support for those construction contracts. Again, the big ones, and have a biologist almost on-site every day that major construction activity is going on. This on-call one is to assist our staff with both the design phase, the pre-construction phase, and just an audit during the construction phase of our medium and smaller projects, as well as our encroachment permits and other things that are happening across the state.

So, while there is some overlap, they are different roles. These are much smaller localized projects that are done on just an on-call and an audit basis. So, there is

Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
June 12, 2017

similarities in that we want a biologist, but that's kind of where the similarities end, and the other one is our major project, everyday activities, and these are more our spot activities across the state.

Martin: Okay, thank you. I just noticed that the wording was very, very similar in the description. So, that's why I was asking the question.

Sandoval: Thank you. Any other questions with regard to Agenda Item No. 4? Mr. Almberg.

Almberg: Thank you, Governor. Actually, a lot of the questions were identical questions that have already been asked, so I think we're on a lot of the same page here. So, the question that brings up now is, which has been discussed, is in—on Page 16 of Item No. 2, 16 of 50, No. 2 there says confirmed that they were competing for two other firms for each request for action—or approach. So, what makes that selection? We've narrowed it down to the three based on qualifications. Now we come back in, and the three compete for each individual job, and what becomes a selection on that job? Who's awarded that?

Terry: I may need some help with the answer to the question, a very simple, almost one-page proposal, who do you have available to work on this job, maybe a little bit about the scope, and a small selection committee makes that selection, and we execute the contract. So, it's very much, a very shortened version of our bigger selection process.

Almberg: Well, I mean, I think that's a good answer. It comes back, in a sense, who's available and who has the people currently that can assist us in here. I was just trying to verify if it was something that came in now and that we're putting a cost proposal to that says, hey, what's your cost to do this, and I'm going to select a low bidder. But that's not the case. You're just coming back in as who's available and who functions there.

And so, the one last question, going back to what the Controller started about, I had that same concern when we had overhead rates going from 110% all the way to 190%. Your response to him, come back and eluded that their pricing comes back fairly similar. It's just showing up as in potentially how their wages are to their employees is making a big difference in their overhead rate. And so, my question is can we, as the Board, see their hourly rates, because this is a situation where they should be providing us strictly their hourly rates. We have no specific

Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
June 12, 2017

scope to it. So, all at this point in time that we can compare, it's an identical scope of work from all three things.

Terry: Again, John Terry, Assistant Director for Engineering. You probably—if you want those, we can get them to you. Because these are going to be small procurements, probably very few of them would be over \$300,000. It would just be in the informational items, but, you know, we could provide that information if the Board desires. But we will have that when we negotiate the contract, you know, the rates for each of these firms. But in our normal business, unless they were large contracts, which these aren't anticipated to be, they would just show as informational, but we certainly have that.

Almberg: Yeah, I personally would like to see it just to come back in here, because, you know, the first thing that pops out is this big discrepancy of 190% to 110%. You know, are we getting the same value, you know, for the company that's working at 190% overhead. Are we only—get 1,000 hours out of them, and the company working at 110% overhead, are we going to get 1,500 hours out of them. And so, the overhead doesn't help me relate to potentially how much work we'll be getting out of them.

Terry: And maybe if I could just clarify one thing. There's no way differences in salaries are going to make up the difference between 192% and 110%. That is a huge discrepancy in overhead rates. Usually, it's between a few—they're all around 140% to 150%, and, you know, it sort of evens out. That is a big discrepancy, and I just want to clarify I don't see any way that that's going to be accommodated. The one with the higher overhead, we're going to pay more money.

Almberg: Well, I mean, I've had this conversation in the past with Mr. Hoffman, and, you know, I keep trying to grasp the concept of what this overhead rate is and how it relates to the work that we're getting out of them, and what I expressed to Bill in the past and what my thought is, if all things being equal, all things being the same quality of people, same quality of equipment, everything else, but we have an engineering company that chooses to lease their office space at the bottom floor, and we choose to have a company that leases space at the top floor. One will have a very high overhead rate compared to the other. And so, I'm not interested in coming in here and spending state monies for somebody that has a nice view from their office, and I just want it to be something that's controlled, that we're aware of this.



Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
June 12, 2017

- Terry: And we can make you aware of it. I would say often times, the higher overhead rate firms typically tend to be more specialty firms, especially geotech and specialty traffic firms, and the more general firms tend to have the lower overhead rates, not just where their offices are located, but I just wanted to make clear that I wasn't saying that we're going to get the same rates between a firm with 192% and 110%. That's not going to happen. So, we need to negotiate those fairly.
- Almberg: All right. Thank you.
- Sandoval: Mr. Terry, I just want to make sure I'm clear. So, you know, I know you can't commit now, but are you saying it's unlikely the 192% will get the work?
- Terry: No, sir, I did not say that. In my opinion, we found them to be qualified. They will compete fairly with the other firms for the work. Will we pay a little bit more should we hire them, I believe we would.
- Sandoval: That begs the question is if it's the same work, why would we pay someone 192% versus 110%?
- Terry: Yeah, their people, their proposal, yeah. I don't have a good answer for that.
- Sandoval: Okay. All right, any other questions, Board Members, with regard to Agenda Item No. 4? Mr. Nellis, anything else you want to present on that agenda item?
- Nellis: No, sir, that concludes this agenda item.
- Sandoval: If there are no further questions, the Chair will accept a motion to approve the four agreements included in Agenda Item No. 4.
- Knecht: Move.
- Sandoval: Controller has moved for approval for those agreements. Is there a second?
- Almberg: Second.
- Sandoval: Second by Mr. Almberg. Any questions or discussion? And again, Ms. Munoz, very well done, really enjoyed your presentation. All those in favor, say aye. [ayes around] Opposed, say no. Motion passes unanimously. Let's move to Agenda Item No. 5, Contracts, Agreements, and Settlements. Mr. Nellis.
- Nellis: Thank you, Governor, and again for the record, Robert Nellis, Assistant Director for Administration. There are two attachments under Agenda Item No. 5 for the

EXHIBIT F  
TRANSPORTATION BOARD MEETING MINUTES  
PAGES 16-17 OF AUGUST 11, 2017  
(MEETING ACTUALLY OCCURRED ON AUGUST 14, 2017)

000594

000609

Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
August 11, 2017

Malfabon: Sahara BRT.

Skancke: And the reason why I ask is that the Tiger Program has been very successful across the country, and I think the more that we can support the Senate's version of the Tiger appropriations than the House or the Administration, that bodes well really for—bodes really well for small states like Nevada. We can compete.

Malfabon: Member Skancke, I think also RTC Washoe won one for—is that the fourth [inaudible] yeah, so, another Bus Rapid Transit project. So, I think that whenever you see the MPOs win one of those awards, it's helpful for the entire state, as you pointed out.

Skancke: Yeah, the Tiger Program has been very successful for smaller states like Nevada. So, if we can suggest to our delegation in both houses to try and keep the Senate version of this when they go to conference, that would be very helpful to our state. The second thing that I—as you can imagine, you know what I'm going to bring up next, is a couple of these contracts. The one is the I-15/215, and then the other one is the I-15 Tropicana Interchange. And just so that you all know, I'm not letting up on this anytime soon. I'm here another five months, and I'll stay on it five more months unless the Governor has the willingness to appoint me to another term. I'll keep my fingers crossed. But I have a [laughter] I try to, publicly. Anyway, I just have a—I'm trying to keep it together here. I'm sorry. I just have real difficulty with how this whole thing is awarded, and so what I'd like to see is—I'm going to try to ask for this information a different way, because I'm getting my fingers and my hands around the Shell game, and the Shell game goes like this. This month, I am the prime. Next month, you're the prime. Next month, they're the prime. Next month, they're the prime, and then we're the subs; they're the subs; this is the sub, and that's got to stop, Rudy. It just has to stop. This is—to me, this just is not right. It is not right, and I don't know how we fix it, but I think we have to fix it. There are the same companies that are getting the same contracts, and it has to change. And so, the fact that you're trying to do it, I'm going to tell you that's great, but I'd like to see a whole new list of names next month and the month after that, and the month after that. We're cherry-picking the same firms, and you're all going to disagree with me in the Department, and that's fine. I've been around this for 31 years. This is not my first rodeo. I've represented a lot of these companies. I know how this deal is done, but if we don't start getting some new names at the top—my phone rang off the hook all weekend. I took eight calls, and I didn't want phone calls on a Saturday and a Sunday, but we've got to change it or there is going to be mutiny. I'm just telling you. The engineering firms that are not even being considered are not happy, and

Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
August 11, 2017

we—I went through the minutes from last month, and I'm going to say it again. We hand out a lot of dough, and we've got to spread this money out across the board. You cannot tell me that on these contracts, that the same firms are chosen every month. So, I appreciate what you've said today, but it has to change. So, actions speak louder than words, and I'm talking to everyone that deals with this issue. And if I see the same names again next month and the month after that, I'm going to put you all on notice, I'm going to call it out. I have a fiduciary and moral obligation to change this issue, and if my colleagues on the Board disagree with me, then I will be happy to step down, and I will take this issue in a different way. But if we have the same names next month and in October and November and December, I'm going to bring it up. I'm just letting you know. I don't know who's on these selection committees. I don't know how these things are picked and these companies are picked, but you cannot tell me—I'll repeat what I said last month. You cannot tell me that there are other firms that are not qualified for these jobs. You cannot. So, I want to know what the solution is going to be, and I'm going to look to my colleagues. If I'm out of line, tell me publicly today, and then I'll shut up, but this is month after month, after month, and I don't think it's your fault. I don't care who's to blame. I'm not into blame. I want responsibility. So, next month, I'm going to make a request that there are some new names at the top of these lists, and if they're the same names, I will be in this chair, and I'm going to tell you I'm going to bring it up. Is that fair? If it's unfair, then tell me, or you can pull me aside after the meeting and say, "I think you're out of line." But I will bring it up month after month. So, I'm just giving you all predictability, okay, so you know where this one Member stands. I can't speak for the other six Members of the Board. So, if you want to call me and tell me what the solution is, I'm happy to have that conversation privately, but it's got to change. We have to fix it, because I don't want any more phone calls on weekends. Happy to take phone calls. That's not the point, but it's happening more and more frequently, and these firms are afraid to bring it up because they're afraid they're never going to get another contract again. So, let's change the way we do it. Let's make sure that we are doing the necessary things that have to be done, and let's open up the door to some other firms to compete for these projects and get, across the board, access to the amount of money that we produce and we invest in the state. Thank you, Governor.

Sandoval: Thank you, Tom. Any other questions or comments from Board Members with regard to the Director's Report. All right. So, I would suggest, Rudy, that you take some time to sit with Member Skancke and perhaps go through some of those issues.

1 ORDR  
2 Paul H. Lamboley  
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: phlamboley@aol.com  
9 Hearing Officer

STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
HEARINGS DIVISION  
BEFORE THE HEARING OFFICER

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

ORDER ON PRE-HEARING PROCEDURES AND HEARING DATE

A. Background.

This case was initiated by Employee JOHN BRONDER (Bronder), as an appeal of whistleblower retaliation conduct by Employer NEVADA DEPARTMENT OF TRANSPORTATION (DOT).

On May 5, 2017, DOT informed Bronder that he was terminated

In October 2017, an employment recruitment position was posted by DOT, for which Bronder applied. The posting was later cancelled.

In November 2017, an employment recruitment position was posted by DOT for which Bronder applied. In response to his application, Bronder learned on January 5, 2018 that he was "removed per NRS 284.374" from active eligible list for employment.

ORDER ON PRE-HEARING PROCEDURES AND HEARING DATE

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

3 On January 31, 2018 NDOA appointed the undersigned to act as hearing officer (HO), who  
4 after conflict review accepted the assignment

5 **B. Pre-Hearing Conference.**

6 On February 13, 2018 the HO proposed a pre-hearing conference with the Parties to review  
7 procedures, discovery/exchange of information, exhibits, witnesses, confidentiality, and  
8 date/time/location of hearing.  
9

10 Thereafter, the Parties decided a pre-hearing conference was not desired, but did on March  
11 12, agree to hold a hearing on the merits of the appeal on May 31, 2018 starting at 9:00 AM at the  
12 offices of NDOA Hearing Division, 1050 E. Williams Street, Ste. 450, Carson City, NV.  
13

14 **C. Pre-Hearing and Hearing Procedures.**

15 Consistent with the NDOA's March 15, 2018 Notice of Appeal and Order to Appear, the  
16 following pre-hearing and hearing procedures are adopted and ordered as follows:

17 **1. Discovery/Exchange of Evidentiary Materials.**

18 It is anticipated that all discovery/exchange of evidentiary materials deemed relevant,  
19 material and necessary by the Parties for the protection of rights and responsibilities, preparation  
20 and/or presentation of their respective interests at hearing should, and shall, be completed on or  
21 before **Friday May 11, 2018.**  
22

23 **2. Motions – Generally Disfavored and Limited.**

24 **a. Discovery-related Motions:** Discovery motions shall be promptly filed and served, and  
25 opposed within five (5) calendar days after service date, to permit timely consideration and  
26 resolution before close of discovery on **Friday, May 11, 2018.** Discovery-related motions shall  
27 include certification that parties in good faith conferred to resolve issues. Such motions may be  
28 decided on the pleadings, or upon conference with counsel, by the HO.

ORDER ON PRE HEARING PROCEDURES AND HEARING DATE.

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1       **b. Non-discovery Motions** shall be filed and served on or before **Friday, May 18, 2018**,  
2 and promptly opposed within seven (7) calendar days after service date, to permit timely  
3 consideration and resolution before or at hearing on **Thursday, May 31, 2018**. Motions in Limine  
4 shall include certification that parties have in good faith conferred to resolve issues. Non-  
5 discovery-related motions may be decided on the pleadings, or upon conference with counsel, by  
6 the HIO.

8       **3. Hearing Schedule and Procedures:**

9       **a. Hearing** on the merits under NRS Chapter 284 and NAC Chapter 284 will be begin on  
10 **Thursday, May 31, 2018, at 9:00 AM (PDT)**, and may be continued if needed, at the Nevada  
11 **Department of Administration, Hearing Division, 1050 E. Williams Street, Ste. 450, Carson**  
12 **City, NV**, unless another location is set by the Parties and HIO.

13       **b. Conduct** of the hearing will be informal but not without procedural or evidentiary  
14 structure. Testimony by Parties and/or witnesses at the time of hearing shall be given under oath in  
15 person, unless otherwise agreed or allowed for cause to be given by telephone. Witness  
16 exclusionary rules will apply. Request that hearing be reported, will be at requesting Party's  
17 expense or may be shared expense of the Parties.

18       **c. Order** of hearing proceedings will be (1) consideration of preliminary matters, (2)  
19 opening statements by (a) employer and (b) employee (may reserve), (3) employer case in chief,  
20 with cross-examination, (4) employee case in chief, with cross-examination, (5) parties' rebuttal  
21 evidence, and (6) closing arguments by (a) employer and (b) employee, with (c) final closing by  
22 employer.

23       **d. Pre-Hearing Statements**, including lists of witness and exhibits, shall be exchanged by  
24 the parties and provided to the HIO on or before **Thursday, May 24, 2018**. Copies of any  
25 pleadings, orders, documents, exhibits, transcripts, governing statutes or applicable legal authorities  
26 relied upon must be included. Clear statements of (1) jurisdiction/applicable law, (2) claims or  
27  
28  
ORDER ON PRE-HEARING PROCEDURES AND HEARING DATE 3

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1 causes for action, (3) defenses, (4) statement of issues, and (5) specific relief requested must be  
2 included.

3 e. Lists of witnesses, except for rebuttal witnesses, should include a brief summary of  
4 anticipated testimony. For expert testimony, a Party shall file and serve documents establishing  
5 the qualifications to testify as an expert on a given subject.

6 f. Scheduling of witnesses for purposes of accommodation and hearing time management  
7 should be jointly reviewed and determined by the Parties prior to hearing if possible

8 g. Copies of exhibits to be introduced at hearing and included with Pre-Hearing statements,  
9 should be pre-marked for identification, e.g. Employee, EE -1 or Employer, ER-1

10 h. If agreed, the Parties may provide a Stipulation for Admitted or Uncontested Facts  
11 and/or Copies of Joint Exhibits with the Pre-Hearing Statements, pre-marked as Jt -1 etc.

12 i. Subpoenas to secure the attendance of a witness may be issued by the HO upon timely  
13 request and consideration of any opposition to issuance.

14 j. Continuance or postponement of scheduled hearing dates/times ordinarily will not be  
15 granted except upon good cause shown and/or stipulation by the Parties.

16 k. Decision and Report on the merits of dispute(s) will be based on the evidentiary record,  
17 and any decision thereon, pursuant to and as required by NRS Chapters 281 and 233B, and NAC  
18 Chapters 281 and should be timely rendered and served after the hearing, unless delayed by post-  
19 hearing briefs or other good cause.

20 **D. Miscellaneous.**

21 Communications may be made by email, facsimile or by US mail with copies to other counsel  
22 Customary rules and restrictions on *ex parte* communications with HO shall apply.

23 Should any issues arise that cannot be resolved between the parties and require, or are believed  
24 appropriate for, pre-hearing consideration with the HO, the same will be scheduled for a telephonic  
25 conference promptly upon request of any Party.

26 ORDER ON PRE-HEARING PROCEDURES AND HEARING DATE

27 4

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1 Dated this 20<sup>th</sup> day of March 2018 by

Paul H. Lamboley, Hearing Officer

3 CERTIFICATE OF SERVICE

4 Pursuant to N.R.C.P. 5(b) and N.E.F.C.R. 9, I HEREBY CERTIFY that on the 20<sup>th</sup> day of March 2018  
5 true copies of the foregoing document were served as follows:

- 6 \_\_\_\_\_ by placing a true and correct copy of the document in the U. S. Mail first class postage  
7 \_\_\_\_\_ by transmitting a true and correct copy of the document via facsimile transmission to  
8 \_\_\_\_\_ by serving a true and correct copy of the document via the Court's electronic service  
9 X \_\_\_\_\_ by serving a true and correct copy of the document via electronic means to the named  
10 \_\_\_\_\_ by hand delivery to and acceptance by the named parties shown below.

11 Thomas J. Donaldson, Esq.  
12 Dyer Lawrence Flaherty  
13 Donaldson & Prunty  
14 2805 Mountain Street  
15 Carson City, NV 89703  
16 [tdonaldson@dyerlawrence.com](mailto:tdonaldson@dyerlawrence.com)  
17 *Attorney for Employee-Appellant*

Dominika J. Batten, Esq.  
Deputy Attorney General  
Office of the Attorney General  
5420 Kietzke Lane, Ste. 202  
Reno, NV 89511  
[dbatten@ag.nv.gov](mailto:dbatten@ag.nv.gov)  
*Attorney for Employer-Respondent*

15 And with copy to NDOA as follows:

16 Tasha Eaton  
17 Supervising Legal Secretary, Appeals Office  
18 Nevada Department of Administration, Hearings Division  
19 1050 E William Street Ste 450  
20 Carson City NV 89701  
21 [teaton@admin.nv.gov](mailto:teaton@admin.nv.gov)

Paul H. Lamboley

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1  
2 STATE OF NEVADA  
3 DEPARTMENT OF ADMINISTRATION  
4 HEARINGS DIVISION  
5 BEFORE THE APPEALS OFFICER

FILED  
MAR 15 2018  
DEPT. OF ADMINISTRATION  
APPEALS OFFICER

6 In the Matter of: ) APPEAL NO. 1802330-PHL  
7 )  
8 JOHN BRONDER )  
9 )

10 NOTICE OF APPEAL AND ORDER TO APPEAR

11 YOU AND EACH OF YOU ARE HEREBY NOTIFIED that the above  
12 entitled matter has been scheduled to be heard before the Hearing Officer on:

13 DATE: Thursday, May 31, 2018

14 TIME: 9:00 AM – 4:30 PM

15 PLACE: STATE OF NEVADA  
16 DEPARTMENT OF ADMINISTRATION / HEARINGS DIVISION  
17 1050 E. WILLIAMS STREET, SUITE 450  
18 CARSON CITY, NV 89701  
19 Phone (775) 687-8420 Fax (775) 687-8421

20 1. All parties shall exchange and file with the Hearing Officer, prior to the  
21 hearing:

- 22 a. All documents they propose to introduce at the hearing;  
23 b. A statement of the issues being appealed from the Respondent; and  
24 c. A list of witnesses and a brief summary of their proposed testimony;

25 2. All parties shall comply with paragraph 1 of this Notice no later than **FIVE (5)**  
26 **DAYS PRIOR TO** the date and time for hearing as set forth above.

27 3. The parties may formulate a discovery plan, including types of discovery to be  
28 permitted and a time to accomplish discovery. The parties may request a telephone  
conference with the Hearing Officer regarding discovery disputes.

1 4. If any party fails to comply with this ORDER, the Hearing Officer may make  
2 such orders as are necessary to direct the course of the hearing, including but not  
3 limited to:

4 a. Restricting or prohibiting the introduction of evidence; or


5 b. Dismissing the appeal

6 5. Continuances may be granted after telephone conference call with the Hearing  
7 Officer or on written motion supported by affidavits.

8 6. This matter may be settled or otherwise resolved or dismissed by stipulation of  
9 the parties. Any party wishing to participate in decisions affecting this matter must  
10 appear at the above date and time.

11 7. Parties have stipulated to extend the hearing date beyond the 20 business day  
12 statutory requirement.

13 **IT IS SO ORDERED.**

14   
15 \_\_\_\_\_  
16 PAUL H LAMBOLEY  
17 APPEALS OFFICER  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Brian Sandoval  
Governor



Patrick Cates  
Director

Michelle L. Morgando, Esq.  
Acting Senior Appeals Officer

Northern Nevada:  
Hearing Office  
1050 E. Williams St Ste 400  
Carson City, Nevada 89701  
(775) 687-8440 | Fax (775) 687-8441

Appeals Office  
1050 E Williams St Ste 450  
Carson City, Nevada 89701  
(775) 687-8420 | Fax (775) 687-8421

STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION

Hearings Division

<http://hearings.state.nv.us/>

Southern Nevada:  
Hearing Office  
2200 S. Rancho Drive, Ste 210  
Las Vegas, Nevada 89102  
(702) 486-2525 | Fax (702) 486-2879

Appeals Office  
2200 S. Rancho Drive, Ste 220  
Las Vegas, Nevada 89102  
(702) 486-2527 | Fax (702) 486-2555

January 31, 2018

John Bronder  
45 Desert Willow Way  
Reno, Nevada 89511

Dominika J. Batten, Deputy Attorney General  
Bureau of Business & State Services – Personnel Division  
5420 Kietzke Lane, Suite 202  
Reno, Nevada 89511

Re: John BRONDER vs NDOT

Dear Mr. Bronder and Ms. Batten:

The State of Nevada Hearings Division has assigned this matter to Paul Lamboley to serve as the Hearing Officer.

The Hearing Officer will contact you to arrange a mutually convenient time for the hearing. Services for preparation of audio recording of the hearing will be provided. In addition, court reporters may be used in such proceedings, upon the request of either party and at the party's or parties' own expense.

Should you have any questions please contact Mr. Lamboly's assistant, Tasha Eaton, at 775-687-8420.

1802330-PHL

Sincerely,

D. Giambelluca, Judicial Assistant

cc: Rodolfo Malfabon, P.E., Director  
[rmalfabon@dot.state.nv.us](mailto:rmalfabon@dot.state.nv.us)  
Allison Wall, Personnel Officer III  
[awall@dot.state.nv.us](mailto:awall@dot.state.nv.us)

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Date Received.

**APPEAL OF  
"WHISTLEBLOWER" RETALIATION  
UNDER THE PROVISIONS OF NRS 281.641**

STATE OF NEVADA  
HEARING DIVISION  
JAN 16 2018

This form is required for a state officer or employee or former state officer or employee to request a hearing to appeal action which he or she believes was reprisal or retaliation due to his or her disclosure of improper governmental action. This form is not to be used to report improper governmental action.

**I. Appellant Information (required section)**

Name: John Bronder

Mailing Address: 45 Desert Willow Way  
Reno, Nevada 89511

**RECEIVED**  
JAN 16 2018

Contact Phone: 775-772-8968

Email: jbronder@sbcglobal.net

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

Employee I.D. #: 60088

Department/Agency at time of Action: Department of Transportation

**II. Whistleblowing Activity (required section)**

Please attach a summary which identifies or describes the improper governmental action, as described in NRS.281.611, that you allege was carried out by a state officer or employee, including the date of the disclosure, to whom the disclosure was made, and any state laws or regulations that you believe were violated.

**III. Appealed Action (required section)**

What was the alleged reprisal or retaliatory action you are appealing and the date or effective date of the action?  
Dismissal from NDOT and ongoing reprisal evidenced by removal from the second active list for Manager I in District III after ranking #1 on first recruitment. Result appeared in my NEATS profile the morning of January 5, 2018.

Please attach a summary which explains why you believe the action you are appealing was reprisal or retaliation for your disclosure of improper governmental action. Please include:

- a) A chronology of events and facts which support your allegation that the action you are appealing was based on reprisal or retaliation for your disclosure of improper governmental action.
- b) Documentary evidence which supports your statements.

Is the date of the alleged reprisal or retaliatory action you are appealing within two years of the date you disclosed information concerning improper governmental action? ☒ Yes ☐ No

*Note: The appealed action must be within two years of the date of disclosure of improper governmental action.*

The remedy I seek is:

☐ To have an order issued directing the proper person to desist and refrain from engaging in the reprisal or retaliatory action.

☒ Other: Restore credit for 11 months of probation served as a Manager I (06.224) Restore sick leave forfeited upon termination. Restore compensation level to grade 43, step 8.

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

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#### IV. Appellant Representation (required section)

You may represent yourself or be represented by an attorney or other person of your choosing. A representative may be designated at a later date. I choose to:

☐ Represent myself

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

Name: To be named at a later date

Phone:

Address:

Fax:

Email:

#### V. Signature (required section)

I hereby request a hearing to determine whether the action described was reprisal or retaliation for disclosing information of improper governmental action, and I affirm that the information provided is true and correct.

Appellant Signature:

*John A. Browder*

Date: January 16, 2018

#### Appeal Instructions

**General:** A state officer or employee or former state officer or employee is eligible to file an appeal. Attachments to this form may be provided however, all evidence and back-up documents need not be provided at this time; prior to the hearing, you will receive a request for any supporting material. If you have received a Specificity of Charges or written notice of involuntary transfer, please attach it to this request. Notification of a hearing will be sent to you or your designated representative by regular mail. The appeal procedures and statements made on this form do not include all of the rights available to an appellant. It is advisable to review NRS 281 and NAC 281 prior to filing an appeal. Appeal hearings are open to the public and decisions by a hearing officer are public information.

**When to File an Appeal:** Nevada law NRS 281.641 states, "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."

Your appeal must be filed within 10 working days after the date the alleged reprisal or retaliatory action took place. If your appeal is filed late, the hearing officer may dismiss it as untimely. The date of filing will be the date the appeal is postmarked, or the date of the fax, email, or date of receipt, if you personally deliver it to the Division of Human Resource Management.

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

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

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**NRS 281.641 states, "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:

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

(b) The reprisal or retaliatory action that is alleged to have been taken against the state officer or employee. The hearing must be conducted in accordance with the procedures set forth in NRS 284.390 to 284.405, inclusive, and the procedures adopted by the Personnel Commission pursuant to subsection 4.

2. 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. The hearing officer shall file a copy of the decision with the Governor or any other elected state officer who is responsible for the actions of that person.

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."

**NAC 281.305 states, "Written appeal by officer or employee who claims retaliatory action was taken against him or her.**

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.

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

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

**NRS 281.611 states in part, "Definitions.** As used in NRS 281.611 to 281.671, inclusive, unless the context otherwise requires:

1. "Improper governmental action" means any 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."

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**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 **NOTICE OF APPEAL AND ORDER TO APPEAR** was duly mailed, postage prepaid **OR** placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, 1050 E. Williams Street, Carson City, Nevada, 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

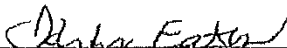
DOMINIKA BATTEN, ESQ  
DEPUTY ATTORNEY GENERAL  
5420 KIETZKE LN STE 202  
RENO NV 89511

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

VIRGINIA BROWNELL  
OFFICE OF THE ATTORNEY GENERAL  
5420 KIETZE LN STE 202  
RENO NV 89511

Dated this 15 day of March, 2018.

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



## APPEAL OF "WHISTLEBLOWER" RETALIATION UNDER THE PROVISIONS OF NRS 281.641

### II. Whistleblowing Activity

Please attach a summary which identifies or describes the improper governmental action, as described in NRS 281.611, that you allege was carried out by a state officer or employee, including the date of the disclosure, to whom the disclosure was made, and any state laws or regulations that you believe were violated.

The improper governmental action was in violation of NRS 281.611.1(e) "A gross waste of public money" and NRS 281.611.5(j) "Dismissal." The action occurred on March 6, 2017 at the negotiation meeting with the consultant for Contract 3660. Both NDOT's Assistant District Engineer Rich Bosch and Assistant Construction Engineer Steve Lani approved extremely high labor rates that would result in excessive compensation to the consultant of approximately \$500,000 to \$700,000 on the \$2.1 million contract. I disclosed this to Assistant Construction Engineer Steve Lani on April 10, 2017 after hearing Governor Sandoval voice his concern with the high cost of this contract at the Transportation Board Meeting. On May 5, 2017, I was abruptly dismissed from employment with NDOT without warning or reason. Other state laws that I believe were violated are NAC 625.510 Fundamental principles. (NRS 625.140) A licensee shall uphold and advance the honor and dignity of the profession by maintaining high standards of ethical conduct. In particular, a licensee shall 1. Be honest and impartial, and serve his or her employer, clients and the public with devotion; and NAC 625.530 Relations with employers and clients. (NRS 625.140) In a professional engineer's or land surveyor's relations with his or her employers and clients, he or she shall: 1. Act in professional matters as a faithful agent or trustee for each employer or client; 2. Act fairly and justly toward vendors and contractors, and not accept from vendors or contractors any commission or allowances, directly or indirectly.

### III. Appealed Action

Please attach a summary which explains why you believe the action you are appealing was reprisal or retaliation for your disclosure of improper governmental action. Please include:

- a) A chronology of events and facts which support your allegation that the action you are appealing was based on reprisal or retaliation for your disclosure of improper governmental action
- b) Documentary evidence which supports your statements.

The action occurred on March 6, 2017 at the negotiation meeting with the consultant for Contract 3660. See Exhibit A for the Memo summarizing the negotiation meeting. The negotiations were conducted by Assistant District Engineer Rick Bosch and Assistant Construction Engineer Steve Lani with the consultant (CA Group). An excel spreadsheet was provided by CA Group showing the build-up of labor and equipment rates. NDOT's practice is to pay the actual employee rate plus the federally audited company overhead rate. For CA Group, they showed their overhead to be 150.00%. Therefore, NDOT compensates the consultant 250% of the employee base labor rate for each billable hour. A negotiation of labor rates did not occur at this meeting and blanket acceptance was given by the two NDOT employees. The CA Group personnel in attendance included the proposed Assistant Resident Engineer, Peter Booth. This individual retired from NDOT as the Assistant District Engineer whose successor, Rich Bosch, was involved in this negotiation. He also directly supervised all District II Resident Engineers at which time Steve Lani worked for him. The close working relationship of these 3 individuals brings into question their ability to remain unbiased and act fairly on behalf of the State. The NDOT employees are well positioned to follow in the former supervisor's footsteps upon their retirement from NDOT. They will, however, require their successors at NDOT to perpetuate the inflated labor rates.

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The consultant was contracting with NDOT to provide construction crew augmentation for Crew 910 including one Assistant Resident Engineer (Grade 40) and 8 Inspectors and Testers (Grades 30 and 33). The consultant's base labor rates were markedly higher than the comparable State positions and higher than the local industry standards. In the case of CA Group's proposed Assistant RE, his base labor rate was approximately 86% higher. He was over-qualified and over-compensated for the position of Assistant RE being that he retired as Assistant District Engineer (Grade 45). Given that he was expected to support the Resident Engineer (Grade 43) with little oversight, the labor rate would still be 63% higher than the NDOT Resident Engineer on Crew 910. In broad perspective, his labor rate is even 24% higher than the Director of NDOT. The Inspectors and Testers labor rates ranged from 25% to 60% higher than comparable NDOT positions.

Labor made up approximately 90% to 95% of the overall contract cost. Of the total contract cost of \$2,085,151, labor was approximately \$1.9 million. Based on the higher labor rates identified above, a gross overpayment was approved to CA Group of approximately \$500,000 to \$700,000. An independent audit of this contract will prove this. An audit of other contracts will prove that this has been occurring on most contracts, especially those that are staffed or owned by NDOT retirees.

During the April 10, 2017 Transportation Board Meeting, the Governor specifically questioned the high cost of this contract. See Exhibit B for pages from the minutes of that meeting. I viewed this meeting from my office in the Construction Division. I heard the concern of the Governor and listened to his questions and the responses from the NDOT Director and District Engineer. I felt that the responses to the Governor's questions were incomplete and misleading. I promptly went to the office of Assistant Construction Engineer Steve Lanl and expressed my concern that NDOT was approving excessive labor rates for the consultant's employees. He dismissed that notion and said that these rates were lower than they have seen in the past.

Two weeks later, on the afternoon of April 25th, I was told by my supervisor, Jeff Freeman, that my performance evaluation needed to be done. I was about 2 hours away from leaving on vacation and felt this was hurried. The result of the evaluation was "meets standard." See Exhibit C for the NPD-15. There were two items that were identified that did not meet standard. Of the 10 weeks that I worked in the Construction Division, I spent 3 weeks in required conferences and training. I was also tasked with helping write the Construction Manual which involved an 8-hour working meeting almost every Friday with review and editing time during the week. I was also asked on my third week to learn another employee's job to take it over upon their retirement on May 5th. I worked very hard to fulfill these other assignments but was only left about 16 hours a week for 7 weeks to do my job.

Upon the day I returned from vacation, May 5th, I was called in to Chief Construction Engineer Sharon Foerschler's office along with Steve Lanl as witness and abruptly dismissed from probation without any forewarning. See Exhibit D for the letter. In that meeting, I asked if I could transfer back to District III to the position I held for my first 8-1/2 months with NDOT since it was still unfilled. The Chief Construction Engineer said that that was not an option that they had considered. Having me removed from employment with NDOT was severe retaliation considering that all they said was that they were disappointed. I believe that my knowledge of their actions jeopardized their future plan and it was necessary to remove me completely from NDOT.

The Transportation Board Meeting on June 12, 2017 had more discussion on the high cost of consultants. See Exhibit E for pages from the meeting minutes. Member Almberg is the owner of a private engineering consulting firm and is experienced with setting labor rates. He was concerned that the overhead rates of the different consultants ranged from 110% to 190% and that choosing the consultant with a high overhead rate would cost

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the state more. Governor Sandoval also questioned why NDOT would chose the high-overhead company. NDOT did not have a good answer for that.

I scheduled a meeting with the Director of NDOT which occurred on July 14, 2017. The subject was to discuss the concern that I had from the April 10<sup>th</sup> Transportation Board Meeting. The Director, Rudy Malfabon, asked the Assistant Director of Operations, Reid Kaiser, to sit in on the meeting since he oversees the Construction Division. I discussed in detail why I was concerned about the high consulting fees and specifically asked him if he thought that a base salary of \$168,000 seemed high for an Assistant Resident Engineer. He agreed but said that NDOT had looked into this several years ago. I also explained to them that this incident was why I believed I was dismissed. Reid Kaiser said he was told that I wasn't a good fit. He also offered to speak with other District and Division Chiefs so that my applications for rehire would not be rejected due to my recent dismissal from the Construction Division.

The Transportation Board Meeting on August 14, 2017 had discussion on the exclusive list of consultants that always seem to be selected. See Exhibit F for pages from the meeting minutes. Member Skancke has been on the board for several years. He was very upset that the same firms seem to get all the NDOT contracts. NDOT hands out a lot of money and it should be spread around to all qualified firms and not just a handful. What I have seen time and time again is that only those firms that are owned or staffed to a large degree with retired NDOT employees will be selected for contracts with NDOT. These firms, knowing that they have the inside track to NDOT contracts, sets their rates a minimum of 25% higher than industry standards.

A position for Resident Engineer in District III was posted on Oct. 10, 2017 and I applied for it on Oct. 24<sup>th</sup>. I was determined eligible and was ranked #1 on the list. On Oct. 31<sup>st</sup>, I learned that the recruitment was cancelled and a new recruitment was posted. I again applied for this position on Nov. 3<sup>rd</sup>. The 2 week period was extended for an additional 2 weeks and closed on Nov. 28<sup>th</sup>. I was again determined eligible but this time the list was unranked. I expected that my experience and success in this position would ensure me an interview since the number of applicants is rarely at least 5 in Elko. It was on January 5, 2018 that the result was shown as "Removed per NAC 284.374." This further indicates that reprisal by NDOT is continuing against me for my exposure and knowledge of the improper governmental action of a gross waste of public money.

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EXHIBIT A  
MEMORANDUM  
NEGOTIATION SUMMARY OF MARCH 6, 2017

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STATE OF NEVADA  
DEPARTMENT OF TRANSPORTATION

**MEMORANDUM**

March 13, 2017

**TO:** Reid Kaiser, Assistant Director  
**FROM:** Lisa Schettler, Project Manager  
**SUBJECT:** Negotiation Summary for RFP 617-16-040 Construction Engineering Services for Augmentation of Crew 910 to oversee the construction of Contract 3660, Project No. SPSR-0648(009) located on SR 648, Glendale Avenue, from Kietzke Lane to McCarran Boulevard in Washoe County.

A negotiation meeting was held at the NDOT District 2 Office in Reno on March 6, 2017, with Chad Anson and Peter Booth from CA Group, Inc. and Lisa Schettler, Stephen Lani, Rick Bosch, John Bronder and Pamela Kennedy of the Nevada Department of Transportation (DEPARTMENT or NDOT) in attendance.

The DBE goal for this agreement has been established at one and one-half percent (1.5%).

The scope of services that are to be provided by the SERVICE PROVIDER was reaffirmed by both parties at the outset.

The SERVICE PROVIDER shall provide one (1) Assistant Resident Engineer, one (1) part-time Public Information Officer (PIO), two (2) Inspectors level IV, two (2) Inspectors level III, four (4) Testers, and two (2) nuclear gauges. The SERVICE PROVIDER shall also provide one (1) Registered Professional Archeologist and may provide a Cultural Resource Field Monitor as required.

CA Group, Inc. is the prime consultant and has teamed up with the following subconsultants.

- Construction Materials Engineers, Inc. (Inspection and Testing Services)
- WCRM (Cultural Resource Management)
- Taylor Made Solutions (PIO)- Certified DBE

The DEPARTMENT's estimate was \$2,097,541.88 including labor and direct expenses.

The SERVICE PROVIDER's original estimate was \$1,810,538 15

The negotiations yielded the following:

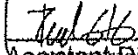
1. Adjusted the augmentation staffing durations and levels based upon current estimated project construction and close out schedule.
2. Agreed estimated overtime for the field staff should be increased to 35% to align with the currently submitted contractor's construction schedule.

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3. Reiterated that hours worked by the Service Provider are as needed to provide sufficient project oversight and are at the direction of the Resident Engineer.
4. We determined the original straight-time hourly billing rates for staff proposed by CA Group were reasonable, however, the original proposed overtime hourly billing rates appeared to be high and calculated inaccurately. CA Group lowered the overtime billing rates on average by \$27.63 per hour.
5. The original fee proposal submitted by CA Group included only one rate for cultural resource monitoring staff, although their proposal included both a field monitor approved as a Crew Chief by the BLM to work in the field and a Registered Professional Archaeologist to be available for oversight responsibilities and to provide expertise when cultural resources are identified in the field by the Crew Chief. CA Group provided two separate rates for the two positions in their subsequent fee proposal with the field monitor position billable rate decreased by \$42.31 per hour.
6. CA Group agreed to reduce the monthly vehicle rate for field staff from \$1,850 to \$1,700 per vehicle.
7. CA Group agreed to reduce the monthly cell phone rate for field staff from \$100 to \$50 per phone.
8. We reiterated the need for iPads to allow the field inspectors to access the Mobile Inspector™ program and a computer for the Assistant Resident Engineer access to the Field Manager™ Program currently used by NDOT. We advised CA Group that the use of the Mobile Inspector™ program by field inspectors did not require a monthly data plan. CA Group altered their fee proposal to provide technology equipment at a one-time lump sum rate rather than a monthly fee.
9. The final total negotiated cost for this agreement, including labor and direct expenses is \$2,085,151.00.

Reviewed and Approved:

DocuSigned by



Assistant Director

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EXHIBIT B  
TRANSPORTATION BOARD MEETING MINUTES  
PAGES 39-45 OF APRIL 10, 2017

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Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
April 10, 2017

on the motion. Hearing none, all those in favor please say aye. [ayes around]  
Those opposed say nay. That motion passes unanimously. Again,  
congratulations to all those involved. We look forward to the successful  
completion of those projects.

Let's move to Agenda Item No. 6, Mr. Nellis, approval of agreements over  
\$300,000.

Nellis: Thank you Governor. There are three agreements under Agenda Item No. 6 that  
can be found on Page 3 of 38 in your packet. Line Item No. 1 is with Granite  
Construction in the amount of \$684,900. This is for reconstructing and widening  
Charleston Boulevard in the City of Las Vegas, at the existing I-15 Interchange.

Item No. 2 is with Diversified Consulting Services. This is in the amount of  
\$1,795,644.05; to provide full construction administration services including  
professional and technical engineering services for Contract 3665 located on I-80  
in Lyon County.

Lastly, Item No. 3, with CA Group is in the amount of \$2,085,151 to perform  
professional and technical engineering services for Contract 3660, located on SR-  
648 in Washoe County.

With that Governor, that concludes Agenda Item No. 6. We'd be happy to take  
any questions on these three agreements.

Sandoval: Thank you Mr. Nellis. I guess just a little more detail on Contract No. 3.

Malfabon: Oh, I'll take that. Reid Kaiser is over at the Legislature still. This is for  
construction management augmentation. In some cases, we still have a resident  
engineer but their staff are spread thin through several projects in the region.  
They need construction augmentation. The recommendation from the selection  
committee is for and negotiation of the contract with CA Group to augment our  
construction staff for those engineering technicians that do the testing, the  
inspection services and administration on the contract.

Sandoval: Is this typical, \$2 million for 13-months?

Malfabon: We only pay what we actually use Governor, but it's usually a negotiated rate,  
which we—the Construction Division, when they negotiate those contracts looks  
at the salaries of the individuals. They look at the overhead rates, which kind of  
rolls up into the actual cost. We only pay for the hours of service used by those



Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
April 10, 2017

folks, for the efforts that they provide to manage the project. It could be that the estimate might be high but we only pay for what we actually use.

Sandoval: Yeah, that's a lot of hours to—

Malfabon: Yes.

Sandoval: --to get to \$2 million.

Malfabon: Typically, what we see on construction engineering, it can be anywhere from 10% to 20% depending on whether we do it in-house and what type of work it is and whether it's augmented or full administration.

Dyson: Governor, Thor Dyson. On this particular job with the Glendale job, just so you're aware, it's a 24-hour a day job. For 24-hours a day, six or seven days a week, we're going to need staff, nighttime and day time. Granite has every intention of knocking out this job as quickly as possible. We're going to be staffing it and trying to knock it out this year. And we can't do it with the resources we have. So that's what you're seeing.

Sandoval: Questions from other Board Members? Member Savage.

Savage: Thank you Governor. A question on Agreement No. 1. It has to do with the funding and the timing. I know this is the preconstruction phase. The overall timeline and the funding—the funding notes say 2017, 2018, 2019, 2020, completing in 2020. Are there actually four or three years of actual preconstruction? And, what is the overall construction budget?

Malfabon: I'll do my best to respond to that but I might need some assistance from staff. John Terry is heading a AASHTO Committee on technical training this week. The timeframe for the preconstruction services is less than that. We anticipate that most of the work will be done in the first couple of years, to design the interchange in Southern Nevada. The construction might need some help from Rick, our Project Manager, on the construction estimate.

Splawinski. Rick Splawinski, Project Management Division. That number is being developed now when the project is in the environmental phase. The best number we're sitting on right now is probably \$31 million. Again, early or midway in the environmental phase for that project. As far as time goes, this agreement extending through 2020 is set up to be—to allow overlapping, multiple GMPs, so the preconstruction services could be going on maybe for the last GMP while

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Board of Directors Meeting  
April 10, 2017

construction had already started. Maybe even more so than what you saw on the SR-28 Bike Path Project, where there was a small GMP while final design continued. There may be even more than two GMPs where the preconstruction services covered by this agreement would carry on until the very last GMP went out.

Savage: That answers my question, because of the timing. So, the objective to start construction is what year?

Splawinski: 2019.

Savage: 2019.

Splawinski: So, at a minimum, the preconstruction services will go through 2019, 2020 might be an overlap year where the preconstruction services were still addressing the final GMPs and then 2020 is with any good fortune, wouldn't be needed for preconstruction. The agreement would extend that long if needed.

Savage: Okay. That satisfies my questions, thank you Rick. Thank you Governor.

Sandoval: Mr. Controller.

Knecht: Thank you Governor. I think part of the problem we're all having here is if you look at Page 3 of 38, Attachment A, you look at the amounts over here on the left and the notes on the right, you see that there's \$685,000 for Item 1, \$1.8 million for Item 2 and \$2.085 for Item 3. Then you go read the notes and the first note for Item 1 seems to say, well it says, the project consists of reconstructing and widening Charleston Boulevard, etc. You read the note for No. 2, it says, provide full construction administration services and as we heard, No. 3 is for augmentation. What it looks like, before you check the details in back, is like, we're going to pay \$685,000 for the real work and we're going to pay \$1.8 million and \$2.1 million for administration and augmentation. Then when you check the real work under No. 1, it says CMAR Preconstruction Services. So, it begins to make a little sense to me, but the way the notes versus the amounts were, it looked like the tail was wagging the dog in that we seem to be, according to those notes paying a lot for administration and augmentation and not so much for actual real field work.

Once I got through the whole thing, I was satisfied and I was satisfied especially with the answer that Thor Dyson gave and the other people here. The presentation was a touch confusing. Thank you.

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April 10, 2017

- Malfabon: Mr. Controller, we'll try to do better on those notes because we get that point that we could've been more clear in the notes so that it's more descriptive of what the actual contract is for. It was more of a—for instance, in the first one, it's more a description of the construction phase which is not before you for approval. It's the preconstruction services phase and that was not that clear unless you read the back-up materials. We'll take that in to consideration and do a better job in the future on reviewing those notes to make sure that they're applicable to what's before you so that you'll still have the back-up information but the notes are more explicit about what's before you today.
- Knecht: I thought you were just giving us a test.
- Sandoval: Other questions or comments. Any questions from Southern Nevada, Tom?
- Skamcke: None here Governor.
- Sandoval: And just a follow-up Rudy, on No. 3, when you say that's a maximum price, I understand that. So, is Thor or somebody else scrutinizing those contracts to make sure that the billings are good?
- Malfabon: Yes, Governor. What I noticed is that, they have some additional staff in there if needed. So, as construction activities occur on all of the district crews, Thor and his Assistant District Engineer for Construction, Rick Bosch, would determine whether they can move staff around to save some costs on the construction management of the project. We still want to just meet all the obligations for oversight of the project to make sure it's done correctly and paid correctly. Definitely, Thor and his staff would manage that part of it and make sure that they're aware of any costs. They need the back-up from the consultant, if needed. There's about four positions that are 'if needed'. There's a core work group of about six individuals with those four if needed. They manage that, Governor, on a day-to-day basis and stay in touch with the NDOT staff that are assigned to the project that are going to be augmented with the consultant.
- Sandoval: I don't mean to be nit-picky, but there's 80 hours in there for a PIO, outsourcing a PIO.
- Malfabon: Yes, and I'm sure Thor is going to say, there's so many businesses along there that we want to have more direct outreach with them. We've really stretched our PIO staff in the North, thin with some of the duplicate responsibilities during the legislative session. Obviously, Sean will be back after the session, he's roaming

Transcript of Nevada Department of Transportation  
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the halls all the time at the Legislature. Thor if you want to kind of address that, I know that it has to do with the extensive amount of public impact that we're going to have to traffic and business owners along this stretch.

Dyson: Thor Dyson. Governor, we've got a lot of businesses along Glendale there, a lot of very important businesses and we want to have very timely and fluid coordination and communication with the subcontractors, the business owners, emergency management, fire/police, that kind of group there. We also have some other projects in the area. RTC has their Fourth Street job, it's a \$38 million project to really completely redo Fourth Street. We've got our other project with Kietzke, the safety project you had seen earlier. There's a lot of things happening in that area and an upcoming Kietzke project, safety project for the next year. We've got one now. We've got one coming up. We've got the Fourth Street, we've got Glendale.

This is a pretty serious project involving a lot of business owners and we have found that we can eliminate a lot of complaints, hiccups or whatever you want to call it on weekends, nights because it's a complicated project. It's a very—it's a massive overhaul. We're going deep. We're going down a couple of feet. I know business owners have come in and talked to me already, Maverick wants to start doing some development. There's other potential development going on. They're coordinating as well, with our project managers right now and we need to have this coordination.

We also spent a lot of time, PIO hours on the I-80 design-build when we were shutting and closing interstate ramps and affecting businesses owners throughout Reno. It's money worthwhile. It really has value and it can really reduce a lot of headaches.

Sandoval: I understand that. As I said, I don't want to micromanage this. Also, Taylor Made Solutions is the subcontractor, which we have no real control over and they speak for us. They're going to be representing the Nevada Department of Transportation in the State. I just want to make sure that they're familiar with all of that and make sure that they're conveying the correct message. I'm not being critical of the expenditure, it's more that we have our PIOs in house that know the drill. When you start to outsource that, I wonder if they're as familiar with the processes and procedures of this Department.

Dyson: So, this particular subcontractor, Kathleen Taylor, they have done this before for us. Many years ago she was a former employee for the State of Nevada, for

Transcript of Nevada Department of Transportation  
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NDOT. When they go to attend, or when they go to do a press release or talk with business owners, they're involved, they're in all the contractor meetings, the coordination meetings. They are acutely familiar with every step of the contractor's operations. Then they put that together. Our PIO as well as our construction people, the district administration, we will review what's being kicked out to make sure we have quality control and that the message being worked on, presented and then submitted and distributed out to all those affected is the accurate one. We take that very seriously. I hate to cry wolf and the wolf never shows up.

This is a tough project. We're prepared to go to hell and come back for a good purpose. We'll do it.

Sandoval: I appreciate your being blunt. I mean, as you appreciate and you've said, Kietzke Lane may have the highest concentration of small businesses in Northern Nevada or pretty close. This is going to affect a lot of folks' livelihoods. This has to be done right and just while I'm on that, I say amen to what Member Savage said in terms of this road being a Cadillac now. It is time to turn it over and to relinquish it and for the County to take that. It will be, not in as good of shape, the best shape that it's ever been.

Dyson: So, it's the City of Sparks and we've talked to them in the past over the last 10-12 years, there was a lot of interest in relinquishing the road and them accepting it. Then the recession hit and things kind of got difficult for everyone involved. The road is still in NDOT's purview and responsibility. There are a lot of big, major businesses, Caterpillar, Cashman, Granite Construction happens to be on that road as well.

Sandoval: Why aren't they doing it for free then... [laughter]

Dyson: There's a lot of businesses, not just along Glendale, but the side streets, including some of my resident engineer offices we rented. It may not seem like a lot of small businesses on Kietzke, but we want to be very careful and very clear on how we're doing things. We want to be very communicative. If we're not communicating enough, if we're sick and tired of communicating, then we need to start communicating more. We'll do that through our PIO Group and we'll monitor it closely with our personal PIOs with NDOT overseeing the consultant PIO.

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Sandoval: I have complete confidence in you all. I mean, you do a great job. My point was more akin to what Member Savage said is, you know, obviously, historically, these were state highways and time has moved on. Now, essentially we are subsidizing the local governments in terms of improving and maintaining these roads. That was part of the conversation that we had before in terms of putting them up to pristine condition and then relinquishing them because they are local roads. Again, that's probably more of a political statement than anything else, but I just want to make sure that this goes smoothly. You mentioned some of the biggest businesses in Washoe County are going to be affected by this. I appreciate your hard work.

Dyson: Thank you.

Sandoval: All right, other questions or comments with regard to Agenda Item No. 6? Mr. Nellis, do you have anything else?

Nellis: No, Governor, that concludes Agenda Item No. 6.

Sandoval: If there are no further questions or comments, the Chair will accept a motion for approval of the agreements over \$300,000, as presented in Agenda Item No. 6.

Savage: So moved.

Knecht: Second.

Sandoval: Member Savage has moved for approval. The Controller has seconded the motion. Any questions or discussion on the motion? Hearing none, all those in favor, please say aye. [ayes around] Those opposed say no. That motion passes unanimously. Let's move on to Agenda Item No. 7, Mr. Nellis.

Nellis: Thank you Governor. There are two attachments that can be found under Agenda Item No. 7 for the Board's information. Beginning with Attachment A, there are four contracts and five emergency contracts on Pages 4 and 5 of 17 in your packet.

The first project is located on US-93 in Elko and White Pine Counties, for chip seal and seal coat. There were two bids and the Director awarded the contract to Sierra Nevada Construction in the amount of \$883,007.

The second project is located on SR-445, Pyramid Highway in Washoe County to construct acceleration and deceleration lanes. There were four bids and the Director awarded the contract to A&K Earthmovers in the amount of \$694,000.

EXHIBIT C  
NPD-15 FROM APRIL 24, 2017

000623

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Agency Use Only

**RECEIVED**

APR 27 2017

HUMAN RESOURCES DIVISION  
DEPT. OF TRANSPORTATION

STATE OF NEVADA

**EMPLOYEE APPRAISAL & DEVELOPMENT REPORT**\* The contents of this report on performance must be discussed between the employee and his or her supervisor as described in NRS 284.337 and NAC 284.470

Central Records Use Only

**RECEIVED**

MAY 15 2017

DEPT. OF ADMIN  
DHRM - RECORDS

1. Employee Name: Last <b>Brondor</b> First <b>John</b> Initial <b>N</b>	
2. Class Title: <b>Manager I, P.E.</b>	3. Employee ID #: <b>60088</b>
4. Dept/Div/Section: <b>NDOT C040 Construction</b>	5. Date Evaluation Due: <b>5/6/17</b>
6. Agency # (3 digits): <b>800</b> Home Org # (4 digits): <b>C040</b> Position Control #: <b>040004</b>	7. Date Next Evaluation Due: <b>6/6/18</b>
8. Probationary/Trial Period (check one) OR Permanent (check one):	
6 month Probation/Trial: <input type="checkbox"/> 2 <sup>nd</sup> month <input type="checkbox"/> 5 <sup>th</sup> month <input type="checkbox"/> Other <input type="checkbox"/> 12 month Probation/Trial: <input type="checkbox"/> 3 <sup>rd</sup> month <input type="checkbox"/> 7 <sup>th</sup> month <input checked="" type="checkbox"/> 11 <sup>th</sup> month <input type="checkbox"/> Other <input type="checkbox"/> Annual <input type="checkbox"/> Other <input type="checkbox"/>	
9. Work Performance Standards: <input checked="" type="checkbox"/> are an accurate reflection of the position <input type="checkbox"/> will be revised to reflect changes	
10. Overall Rating from Page 2, Number 14 (check one):	
<input type="checkbox"/> Does Not Meet Standards (DMS)* <input checked="" type="checkbox"/> Meets Standards (MS) <input type="checkbox"/> Exceeds Standards (ES)	
* If a rating of "Does Not Meet Standards" is given, another evaluation must be completed within 90 days. The rating may affect adjustments in salary based on merit (NAC 284.194).	
Rater's Printed Name: <b>Jeffrey Freeman</b>	
Rater's Signature & Title: <i>[Signature]</i> <b>Assistant Const Eng</b> Date: <b>4/24/17</b> (mm/dd/yy)	
11. Additional Supervisory Review (optional): <input type="checkbox"/> Agree <input type="checkbox"/> Disagree (Comment Required)	
Printed Name:	
Signature and Title: Date: (mm/dd/yy)	
12a. Date employee received evaluation document: <b>4/24/17</b> Employee's Initials: <b>JB</b> (Does not indicate agreement or disagreement)	
b. Employee Response: NAC 284.470 requires that you complete the section below and sign the report on performance within 10 working days after discussion with your supervisor.	
<input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree <input type="checkbox"/> Request Review* (If you disagree with the report <u>and</u> request a review, you must specify the points of disagreement below or attached.)	
c. Employee Signature: <i>[Signature]</i> Date evaluation returned to supervisor: <b>4/24/17</b>	
13. Appointing Authority Review: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree (Comment Required)	
<i>John needs to work on integrating with Const. Notability and mark Cagimab. Need to see improvements of Post Construction Reviews.</i>	
Appointing Authority's Printed Name: <b>HARON FOERSCHLER, P.E.</b>	
Appointing Authority Signature & Title: <i>[Signature]</i> <b>CHIEF CONSTRUCTION ENGINEER</b> Date: <b>4/27/17</b> (mm/dd/yy)	

\* Note - Reviewing Officer uses form NPD-15R to respond to employee's request for review as outlined in NAC 284.470

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MC  
5/23/17

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Employee Evaluation & Development Report – Page 2

Employee Name: (Last)	(First)	(Initial)
Blanchard	John	J
Employee ID #: 60088		

14. Job Elements (Transfer from Employee Work Performance Standards form and provide a numerical rating of 1 = DMS; 2 = MS; or 3 = ES for each job element in column (A)) <i>Please note that whole number ratings are used, not fractions, to rate individual job elements.</i>	(A) Rating	(B) Weighted Value	(C) Weighted Rating
Job Element #1: Supervise and train the Constructability and Project Scheduling Staff and assign tasks to accomplish Division responsibilities and Department goals.	2	15%	.3
Job Element #2: Review plans, specifications and special provisions for accuracy, completeness and constructability providing recommendations as needed. Calculate Liquidated Damages, Construction Engineering Budget and User Costs for all construction projects. Actively assist the Project Coordinators in answering contractor questions submitted during the bidding period.	1	10%	.1
Job Element #3: Manage the Division's scheduling program. Generate Time Determination Schedules (TDS) to determine working days. Manage the scheduling training for the Resident and Assistant Resident Engineers on the Department's latest version of scheduling software. Analyze contractor schedules for compliance with contract documents and assist with resolving contractor scheduling issues in a timely manner.	2	10%	.2
Job Element #4: Attend various meetings including Project Status, Design/Construction, Cost Risk Analysis and Value Engineering. Utilize information and decisions made in these meetings to prioritize workload and implement changes to programs and contract documents as recommended.	2	10%	.2
Job Element #5: Serve as an active member of the Bid Review Analysis Team (BRAT). Analyze contractor bids for compliance with Department requirements for responsive bidders and provide recommendations for award of all construction contracts. Inform the Resident Engineer of potential contractual issues discussed at the BRAT meeting.	2	5%	.1
Job Element #6: Manage Post Construction Review Meetings and ensure reports are generated with findings and recommendations. Generate Semi-Annual reports summarizing findings and recommendations for implementation on future projects	1	5%	.05
Job Element #7: Manage the tracking of contract modifications to identify field issues and resolutions for future construction contracts.	2	5%	.1
Job Element #8: Generate and manage the travel budget for staff. Assist the Chief with budgetary tasks including Construction Engineering cost estimation for projects to meet the Department's Performance Measure target.	2	5%	.1
Job Element #9: Assist the Chief and Assistant Construction Engineers on special projects as assigned.	2	5%	.1

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Employee Evaluation & Development Report -- Page 3

Employee Name: (Last)	(First)	(Initial)
Decker	John	JV
Employee ID #: 60088		

14. Job Elements (Transfer from Employee Work Performance Standards form and provide a numerical rating of 1 = DMS; 2 = MS; or 3 = ES for each job element in column (A). Please note that whole number ratings are used, not fractions, to rate individual job elements.	(A) Rating	(B) Weighted Value	(C) Weighted Rating
Job Element #10: Communication	2	10%	.2
Job Element #11: Teamwork	2	10%	.2
Job Element #12: Responsivness	2	10%	.2
Overall Rating (Scale: 1 to 1.50 = DMS; 1.51 to 2.50 = MS; 2.51 to 3 = ES) (A "does not meet standards" rating may affect adjustments based on merit (NAC 284.19-4). Another evaluation must be completed within 90 days (NRS 284.340))			1.85

15. Rater's Comments: (A "does not meet standards" rating for any job element must include a detailed explanation of the deficiencies.)  
John, You have been in our office for a couple of months and I appreciate your help, and thank you for volunteering to step up for the consultant side. I have given you a below standard in a couple of critical areas. First one was the plan reviews. Your section while self-sufficient could use the help to lighten their load and you will not be able to fully understand what they do until you do it as well. The second area is in the post construction reviews, it was agreed upon to allow you and Mark some time prior to looking into the review process, that time has passed and we need to have you focus on this. I have not seen much interaction and if you do not initiate the interaction it will not happen

16. Development Plan & Suggestions: (The supervisor will address how the employee can enhance performance and achieve standards; indicates recommendation for further development and training. This section shall be discussed with the employee.)

Please work on the following areas, We need to develop a method for the post construction reviews to become a useful tool, the information is not being captured in the review and then transferred back to Design. Management is here to support change to the post construction process and will help you if you would like, but we feel that you can create the change. Please schedule time with Mark to begin looking at the process and together develop a plan for improvement, please report back to management on your plan once you have developed it. Also please integrate into the constructability section, take a project or two from the beginning and learn the entire process, sit down with the section on a regular basis to find out what they are working on and what help they need from you, jump into the round table discussions when you see they are working with a designer on a project. As the Constructability manager you should have a couple of project that are yours at any one time, and you should be familiar with all projects, know the teams, know the dates, and have an idea of the major issue on any project.

17. Merit Award Program: (Provide information to employee relating to the Merit Award Program established in NRS 285.020.) Please check method(s) used.

☐ Employee Handbook ☒ State Human Resource website: ☐ Other (List details) \_\_\_\_\_  
<http://hr.ny.gov>

Distribution: Original to Division of Human Resource Management; Copy to Agency; Copy to Employee

NPD-15  
Rev. 11/15

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EXHIBIT D  
DISMISSAL LETTER DATED MAY 5, 2017

000627

000642



BRIAN SANDOVAL  
Governor

STATE OF NEVADA  
DEPARTMENT OF TRANSPORTATION  
1263 S Stewart Street  
Carson City, Nevada 89712

RUDY MALFABON, PE Director

In Reply Refer to

May 5, 2017

John Bronder  
Manager I  
45 Desert Willow Way  
Reno, NV 89511

Rejection of Probationary Employee

Dear Mr. Bronder:

This letter constitutes notice that you have been rejected from probationary status in the position of Manager I at end of shift, today, May 5, 2017. This notice is provided in accordance with Nevada Administrative Code 284.458.

  
Sharon Foerschler  
Chief Construction Engineer

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EXHIBIT E  
TRANSPORTATION BOARD MEETING MINUTES  
PAGES 18-20 OF JUNE 12, 2017

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Transcript of Nevada Department of Transportation  
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June 12, 2017

similarities in that we want a biologist, but that's kind of where the similarities end, and the other one is our major project, everyday activities, and these are more our spot activities across the state.

Martin: Okay, thank you. I just noticed that the wording was very, very similar in the description. So, that's why I was asking the question.

Sandoval: Thank you. Any other questions with regard to Agenda Item No. 4? Mr. Almberg.

Almberg: Thank you, Governor. Actually, a lot of the questions were identical questions that have already been asked, so I think we're on a lot of the same page here. So, the question that brings up now is, which has been discussed, is in—on Page 16 of Item No. 2, 16 of 50, No. 2 there says confirmed that they were competing for two other firms for each request for action—or approach. So, what makes that selection? We've narrowed it down to the three based on qualifications. Now we come back in, and the three compete for each individual job, and what becomes a selection on that job? Who's awarded that?

Terry: I may need some help with the answer to the question, a very simple, almost one-page proposal, who do you have available to work on this job, maybe a little bit about the scope, and a small selection committee makes that selection, and we execute the contract. So, it's very much, a very shortened version of our bigger selection process.

Almberg: Well, I mean, I think that's a good answer. It comes back, in a sense, who's available and who has the people currently that can assist us in here. I was just trying to verify if it was something that came in now and that we're putting a cost proposal to that says, hey, what's your cost to do this, and I'm going to select a low bidder. But that's not the case. You're just coming back in as who's available and who functions there.

And so, the one last question, going back to what the Controller started about, I had that same concern when we had overhead rates going from 110% all the way to 190%. Your response to him, come back and eluded that their pricing comes back fairly similar. It's just showing up as in potentially how their wages are to their employees is making a big difference in their overhead rate. And so, my question is can we, as the Board, see their hourly rates, because this is a situation where they should be providing us strictly their hourly rates. We have no specific

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scope to it. So, all at this point in time that we can compare, it's an identical scope of work from all three things.

Terry: Again, John Terry, Assistant Director for Engineering. You probably—if you want those, we can get them to you. Because these are going to be small procurements, probably very few of them would be over \$300,000. It would just be in the informational items, but, you know, we could provide that information if the Board desires. But we will have that when we negotiate the contract, you know, the rates for each of these firms. But in our normal business, unless they were large contracts, which these aren't anticipated to be, they would just show as informational, but we certainly have that.

Almberg: Yeah, I personally would like to see it just to come back in here, because, you know, the first thing that pops out is this big discrepancy of 190% to 110%. You know, are we getting the same value, you know, for the company that's working at 190% overhead. Are we only—get 1,000 hours out of them, and the company working at 110% overhead, are we going to get 1,500 hours out of them. And so, the overhead doesn't help me relate to potentially how much work we'll be getting out of them.

Terry: And maybe if I could just clarify one thing. There's no way differences in salaries are going to make up the difference between 192% and 110%. That is a huge discrepancy in overhead rates. Usually, it's between a few—they're all around 140% to 150%, and, you know, it sort of evens out. That is a big discrepancy, and I just want to clarify I don't see any way that that's going to be accommodated. The one with the higher overhead, we're going to pay more money.

Almberg: Well, I mean, I've had this conversation in the past with Mr. Hoffman, and, you know, I keep trying to grasp the concept of what this overhead rate is and how it relates to the work that we're getting out of them, and what I expressed to Bill in the past and what my thought is, if all things being equal, all things being the same quality of people, same quality of equipment, everything else, but we have an engineering company that chooses to lease their office space at the bottom floor, and we choose to have a company that leases space at the top floor. One will have a very high overhead rate compared to the other. And so, I'm not interested in coming in here and spending state monies for somebody that has a nice view from their office, and I just want it to be something that's controlled, that we're aware of this.

EXHIBIT F  
TRANSPORTATION BOARD MEETING MINUTES  
PAGES 16-17 OF AUGUST 11, 2017  
(MEETING ACTUALLY OCCURRED ON AUGUST 14, 2017)

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Transcript of Nevada Department of Transportation  
Board of Directors Meeting  
August 11, 2017

Malfabon: Sahara BRT.

Skanske: And the reason why I ask is that the Tiger Program has been very successful across the country, and I think the more that we can support the Senate's version of the Tiger appropriations than the House or the Administration, that bodes well really for—bodes really well for small states like Nevada. We can compete.

Malfabon: Member Skanske, I think also RTC Washoe won one for—is that the fourth [inaudible] yeah, so, another Bus Rapid Transit project. So, I think that whenever you see the MPOs win one of those awards, it's helpful for the entire state, as you pointed out.

Skanske: Yeah, the Tiger Program has been very successful for smaller states like Nevada. So, if we can suggest to our delegation in both houses to try and keep the Senate version of this when they go to conference, that would be very helpful to our state. The second thing that I—as you can imagine, you know what I'm going to bring up next, is a couple of these contracts. The one is the I-15/215, and then the other one is the I-15 Tropicana Interchange. And just so that you all know, I'm not letting up on this anytime soon. I'm here another five months, and I'll stay on it five more months unless the Governor has the willingness to appoint me to another term. I'll keep my fingers crossed. But I have a [laughter] I try to, publicly. Anyway, I just have a—I'm trying to keep it together here. I'm sorry. I just have real difficulty with how this whole thing is awarded, and so what I'd like to see is—I'm going to try to ask for this information a different way, because I'm getting my fingers and my hands around the Shell game, and the Shell game goes like this. This month, I am the prime. Next month, you're the prime. Next month, they're the prime. Next month, they're the prime, and then we're the subs; they're the subs; this is the sub, and that's got to stop, Rudy. It just has to stop. This is—to me, this just is not right. It is not right, and I don't know how we fix it, but I think we have to fix it. There are the same companies that are getting the same contracts, and it has to change. And so, the fact that you're trying to do it, I'm going to tell you that's great, but I'd like to see a whole new list of names next month and the month after that, and the month after that. We're cherry-picking the same firms, and you're all going to disagree with me in the Department, and that's fine. I've been around this for 31 years. This is not my first rodeo. I've represented a lot of these companies. I know how this deal is done, but if we don't start getting some new names at the top—my phone rang off the hook all weekend. I took eight calls, and I didn't want phone calls on a Saturday and a Sunday, but we've got to change it or there is going to be mutiny. I'm just telling you. The engineering firms that are not even being considered are not happy, and

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August 11, 2017

we—I went through the minutes from last month, and I'm going to say it again. We hand out a lot of dough, and we've got to spread this money out across the board. You cannot tell me that on these contracts, that the same firms are chosen every month. So, I appreciate what you've said today, but it has to change. So, actions speak louder than words, and I'm talking to everyone that deals with this issue. And if I see the same names again next month and the month after that, I'm going to put you all on notice, I'm going to call it out. I have a fiduciary and moral obligation to change this issue, and if my colleagues on the Board disagree with me, then I will be happy to step down, and I will take this issue in a different way. But if we have the same names next month and in October and November and December, I'm going to bring it up. I'm just letting you know. I don't know who's on these selection committees. I don't know how these things are picked and these companies are picked, but you cannot tell me—I'll repeat what I said last month. You cannot tell me that there are other firms that are not qualified for these jobs. You cannot. So, I want to know what the solution is going to be, and I'm going to look to my colleagues. If I'm out of line, tell me publicly today, and then I'll shut up, but this is month after month, after month, and I don't think it's your fault. I don't care who's to blame. I'm not into blame. I want responsibility. So, next month, I'm going to make a request that there are some new names at the top of these lists, and if they're the same names, I will be in this chair, and I'm going to tell you I'm going to bring it up. Is that fair? If it's unfair, then tell me, or you can pull me aside after the meeting and say, "I think you're out of line." But I will bring it up month after month. So, I'm just giving you all predictability, okay, so you know where this one Member stands. I can't speak for the other six Members of the Board. So, if you want to call me and tell me what the solution is, I'm happy to have that conversation privately, but it's got to change. We have to fix it, because I don't want any more phone calls on weekends. Happy to take phone calls. That's not the point, but it's happening more and more frequently, and these firms are afraid to bring it up because they're afraid they're never going to get another contract again. So, let's change the way we do it. Let's make sure that we are doing the necessary things that have to be done, and let's open up the door to some other firms to compete for these projects and get, across the board, access to the amount of money that we produce and we invest in the state. Thank you, Governor.

Sandoval: Thank you, Tom. Any other questions or comments from Board Members with regard to the Director's Report. All right. So, I would suggest, Rudy, that you take some time to sit with Member Skancke and perhaps go through some of those issues.